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September 10, 2012

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Re: *Klein v. Penson Financial Services, Inc.*, Case No.
12-02546

Dear Ms. Collins:

We represent respondent Penson Financial Services, Inc. ("Penson") in the arbitration referenced above. Please direct all future correspondence to Penson relating to this arbitration to my attention.

Enclosed, please find an original and three copies of Penson's Answer to Claimant's Statement of Claim. Also enclosed, please find an original and three copies of Penson's FINRA submission agreement.

Please feel free to contact me with any questions. Thank you.

Sincerely,



Jeremy D. Schildcrout

Encl.

cc: David C. Castleberry, Esq. (by email only)

FINRA DISPUTE RESOLUTION
WEST REGION

R. WAYNE KLEIN, as Court Appointed Receiver
for FFCF INVESTORS, LLC, et al.,

Claimant,

- against -

PENSON FINANCIAL SERVICES, INC.,

Respondent.

FINRA No. 12-02546

**RESPONDENT PENSON FINANCIAL SERVICES, INC.'S ANSWER TO THE
STATEMENT OF CLAIM**

Respondent Penson Financial Services, Inc. ("Penson"), by and through its attorneys, Mayer Brown LLP, hereby submits its Answer to the Statement of Claim ("SOC"), filed on July 11, 2012 by R. Wayne Klein ("Claimant"), as Court Appointed Receiver for FFCF Investors, LLC ("FFCF"), Ascendus Capital Management, LLC ("Ascendus") and Smith Holdings, LLC (the "Receivership Entities").

PRELIMINARY STATEMENT

This case is Claimant's attempt to recoup the losses from any source, regardless of how tenuous the connection or the absence of culpability. Claimant purports to bring this arbitration on behalf of sixteen investors (the "Investors") who allegedly entrusted non-parties Roger Taylor and Richard Smith ("Taylor" and "Smith"), the purported managers of Ascendus and FFCF, with their investment funds. Claimant alleges that Ascendus and FFCF were merely fronts for a Ponzi scheme that Taylor and Smith orchestrated. Claimant alleges that, from 2003 to early 2006, Taylor persuaded the Investors to open brokerage accounts at Penson and to authorize Taylor to make trades in their accounts. Apparently the Investors followed his advice, giving Taylor and

his purported accomplices the authority to manage their Investments. According to the SOC, they are now facing criminal fraud charges relating to their roles in operating Ascendus and FFCF.

Apparently appreciating the difficulty, if not impossibility, of collecting damages from the purported wrongdoers, Claimant has attempted to put Penson at the center of the alleged scheme. Penson, however, had no role whatsoever in Smith and Taylor's solicitation of the Investors and had no role in the development of the trading strategy that Smith and Taylor implemented. As detailed below, at all times relevant to this arbitration, Penson merely performed its duties in accord with its contractual obligations as a clearing firm. Claimant fails to offer a credible theory as to how, let alone why, Penson could or should be liable for the alleged fraud of Taylor and Smith. It is for these reasons that the claims against Penson must be denied.

FACTS

Up until June of 2012, Penson was a securities clearing firm which provided clearing services for brokers and their clients. When a broker-dealer makes a securities trade, the trade must be "cleared," or processed, in order to become effective. The broker-dealers that contract for services from clearing firms are called "introducing brokers," and Great Eastern Securities ("Great Eastern") was one such broker dealer. Great Eastern retained Penson to provide clearing services on or about August 23, 2000. A copy of the Fully Disclosed Clearing Agreement between Great Eastern and Penson (the "Clearing Agreement") is attached as Exhibit A.

According to the Statement of Claim, the Investors opened accounts through Great Eastern at Penson at the direction of Taylor, who along with Smith and other individuals named in Claimant's lawsuits relating to the collapse of Ascendus and FFCF, were affiliated with Great

Eastern. In so doing, the Investors granted Taylor and Great Eastern representatives the authority to conduct trades on the Investors' behalf. It is presumably because Great Eastern used Penson to clear the trades of Great Eastern's account holders, that Great Eastern, through Taylor and Smith, allegedly introduced the Investors to Penson (hence the term "introducing broker") and directed the Investors to open accounts at Penson so Penson could provide the clearing services that Great Eastern required. The structure of this relationship is typical: Penson's customer was Great Eastern, while Great Eastern's customers were the Investors.

At all times relevant to this action Penson acted merely as a clearing broker for Great Eastern. The Clearing Agreement sets out the services that Penson provides and makes clear that Penson has no involvement whatsoever in the development of the investment strategies of Great Eastern's clients and customers such as the Investors. The Clearing Agreement provides:

- [Great Eastern] will be responsible for obtaining and verifying all required information and the identity of each potential Customer.¹
- [Great Eastern] shall be solely responsible for any issues regarding the suitability of any investments for its Customers.²
- [Great Eastern] will be responsible for the review and supervision of, and the suitability of, investments made by each and every one of its Customers and Penson shall have no responsibility.³
- [Great Eastern] shall advise each of its Customers that its relationship with Penson is solely that of an introducing broker to a clearing broker and that . . . [Great Eastern] bears all responsibility for the Customer's Account.⁴

Thus, the Clearing Agreement between Great Eastern and Penson underscores that Penson is not responsible for investment strategies and decisions relating to Great Eastern's customers.

¹ Exhibit A § 2(a).

² *Id.* § 2(b).

³ *Id.* § 2(d).

⁴ *Id.* § 7(a).

In addition, when each of the Investors opened an account at Penson, he/she entered into a Customer Agreement (a sample of which is attached as Exhibit B), which established the relationship and obligations between Penson and each of the Investors. Like the Clearing Agreement, the Customer Agreement specifically defines Penson's limited obligations and provides:

- [Penson] shall not be responsible or liable for any acts or omissions of the introducing broker or its representatives, employees or other agents.⁵
- [Customer] understands that [Penson] will not review [Customer's] accounts and will have no responsibility for trades made in [Customer's] accounts.⁶
- . . . [Penson] may accept and rely upon [Customer's] introducing broker for (a) orders for the purchase or sale in [Customer's] account of securities and other property, and (b) any other instructions concerning [Customer's] accounts.⁷
- [Customer] represents that [Customer] understands that [Penson] act[s] only to clear trades introduced by [Customer's] introducing broker and to effect other back office functions for [Customer's] introducing broker.⁸
- [Customer] confirms to [Penson] that [Customer] is relying for any advice concerning [Customer's] accounts solely on [Customer's] introducing broker. . . .⁹
- Reports of executions of orders and statements of accounts [Customer] shall be conclusive if not objected to in writing to [Penson], the former within five (5) days and the latter within ten (10) days, after forwarding by Penson.¹⁰

By entering into the Customer Agreements, the Investors acknowledged Penson's limited administrative functions.

The factual allegations in the Statement of Claim focus primarily on the conduct of Taylor and Smith. Claimant tacks on allegations in an attempt to link Penson to Taylor and

⁵ Exhibit B ¶ 6.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* ¶ 7.

Smith's scheme, but these contrived attempts to vilify Penson only serve to undermine the plausibility of Claimant's narrative.

For example, Claimant alleges that Taylor and Smith sent account statements to Investors, reporting false and substantial gains, and *concedes* that Penson sent contemporaneous monthly statements to the Investors showing *the actual results of the trading in their accounts*.¹¹ Claimant attempts to malign Penson for doing so, explaining that the reports were "lengthy, detailed, and complex[,] " which made the statements "more difficult to understand" than the bogus statements provided by Taylor and Smith.¹² What these allegations show, however, is that Penson sent the Investors truthful statements that complied with the regulatory requirements for such statements and, in so doing, provided them with the information necessary to expose the purported fraud of Smith and Taylor. It makes sense that Claimant would not highlight this fact – it undermines the theory that Penson was actively engaged in the purported fraud.

Claimant also alleges that the purported fraud "succeeded only because of Penson's affirmative acts in support of the scheme[,] " and explains that "[t]his support was given so Ascendus would continue its high volume trading at Penson."¹³ In other words, according to Claimant, Penson actively participated in the scheme so it could earn transaction fees for processing the trades in the Investors' accounts. Yet, according to Claimant, "[i]n early 2006, Penson withdrew millions of dollars of Investor money from the accounts at Penson" (i.e. where Penson could earn fees from trading activity) so Taylor and Smith could then pool these funds "and put [them] into FFCF, a new Ponzi scheme."¹⁴ Once these "millions of dollars" were

¹¹ Statement of Claim ("SOC") ¶ 17.

¹² *Id.* ¶ 17.

¹³ SOC ¶ 46.

¹⁴ *Id.* ¶ 7.

moved from the Investors' accounts to FFCF, the relationship between the Investors and Penson was severed. With no funds left in their accounts for trading purposes, Penson would cease to earn from processing their transactions. Claimant's position – that Penson was motivated to defraud the Investors by the promise of receiving transaction fees, so it transferred the funds to where Penson could make no money from them – is another self-contradictory position that undermines the plausibility of the claims against Penson.

Finally, Claimant states that "Ascendus could not have access to the accounts of [the Investors] without the consent of Penson."¹⁵ Tellingly, Claimant omits one critical fact: Ascendus could not have had access to the Investor's accounts at Penson *without the consent of the Investors*. As the Statement of Claim makes clear, it was the Investors who entrusted Taylor to manage their accounts. Penson merely followed the express instructions of the individuals managing the Investors' funds, which is exactly what the Investors authorized Penson to do.

Claimant does not allege, nor can he, that any of the Investors had any contact with Penson before putting their investment funds in the hands of Taylor and Smith. In fact, Claimant does not allege, nor can he, that Penson played any role whatsoever in the Investors' decision-making process. This is one of the many reasons why Penson does not belong in this arbitration. Claimant's decision to name Penson as a respondent should be recognized for what it is: a transparent effort to extract funds from the party with the perceived deep pockets. Penson is not liable to Claimant for his purported losses. The claims against Penson must be denied.

ABSENCE OF CLEARING FIRM LIABILITY

Claimant cannot state a legal claim against Penson because Penson's role in this matter was limited to that of a clearing firm. By definition, clearing firms provide administrative,

¹⁵ *Id.* ¶ 47.

“backroom” functions, and remain completely uninvolved in investment decisions.¹⁶ At all times relevant to this dispute, Penson served exclusively as a clearing broker that performed only back-office functions at the request of the introducing broker who handled the Investors’ Penson accounts. As indicated above, Penson had no involvement whatsoever in the development and execution of the Investors’ investment strategy, and had no relationship with the alleged individual wrongdoers.

The law is well established that a clearing firm performing only back-office, administrative functions, cannot be held liable for the fraudulent acts or failed investments made by introducing brokers or their agents.¹⁷ The connection between investors and clearing firms is too attenuated to blame clearing firms for the misconduct of an investment advisor or introducing broker, and it is for this reason that liability does not flow to a clearing firm simply discharging its contractual duties.

In the absence of any cognizable theory as to why Penson should be culpable for the Investors’ alleged losses, the claims against Penson must be denied.

ANSWER TO SPECIFIC ALLEGATIONS

¹⁶ See, e.g., *Dillon v. Militano*, 731 F.Supp. 634,637 (S.D.N.Y. 1990) (noting that clearing firms provide “mechanical, record-keeping functions related to the clearance and settlement of various transactions”); see also *Broadcast Capital Corp. v. Dutcher*, 859 F. Supp. 1517, 1518 n.1 (S.D.N.Y. 1994) (“Clearing firms generally perform recordkeeping and other mechanical functions related to stock transactions for stock brokers.”); *Katz v. Fin. Clearing & Servs. Corp.*, 794 F. Supp. 88, 90 (S.D.N.Y. 1992) (noting that a clearing firm “handles the mechanics of order entry, confirmation, clearance of trades, calculation of margin, and similar activities”); *Riggs v. Schnappell*, 939 F. Supp. 321, 324 (D.N.J. 1996) (“Clearing brokers . . . generally perform numerous backroom and record-keeping functions for the introducing broker.”); *Stander v. Fin. Clearing & Servs. Corp.*, 730 F. Supp. 1282, 1285 (S.D.N.Y. 1990) (stating that the duties of a clearing firm include providing “record-keeping functions for the accounts it handles, and, in some cases, to accomplish the actual settlement of trades for those accounts”).

¹⁷ See, e.g., *Fezzani v. Bear, Stearns & Co., Inc.*, 384 F. Supp. 2d 618 (S.D.N.Y. 2004); *Riggs v. Schappell*, 939 F. Supp. 321 (D.N.J. 1996) (granting motion to dismiss of clearing broker on theories of agency and negligence); *Katz v. Fin. Clearing & Servs. Corp.*, 794 F. Supp. 88, 93-94 (S.D.N.Y. 1992) (“A clearing broker performing merely its processing functions cannot be held liable for fraudulent misrepresentations made by an introducing broker to that introducing broker’s customers.”).

Penson has not completed its investigation of all facts related to this case and expressly reserves the right to change, modify or supplement the responses provided herein at any time prior to final hearing in this matter. Subject to the foregoing reservation, Penson responds to the specific allegations in the Statement of Claim as follows:

1. It denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 1, except admits that Ascendus and FFCF have been placed into receivership in the state of Utah and that Claimant purports to acts on behalf of the Receivership Entities.

2. It denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 2, but admits that Claimant purports to bring the claims against Penson in this arbitration on behalf of the Investors.

3. It denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 3.

4. It denies the allegations in Paragraph 4, except admits that Penson maintains an office in Dallas, Texas and, further, admits that prior to June 2012, Penson was a FINRA-registered broker dealer that provided clearing services to customers of its Introducing Brokers.

5. It denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 5, except admits that the Investors opened accounts at Penson and apparently authorized Taylor to manage said accounts.

6. It denies the allegations in Paragraph 6 and refers all questions of law to the Panel.

7. It denies that Penson “withdrew millions of dollars of Investor money” as alleged in Paragraph 7, and denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 7.

8. It denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 8 regarding the actions of Taylor and Smith and, further, denies the allegations regarding Penson’s purported “active assistance.”

9. It denies the allegations in Paragraph 9 and refers all questions of law to the Panel.

10. It denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 10, yet admits that Claimant has filed a lawsuit against Penson that is currently pending in the Third District Court of Utah.

11. It denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11, except admits that Claimant purports to bring this arbitration on behalf of sixteen individuals.

11(A). It denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11(A), except admits that Doug Anderson opened an Account at Penson through Great Eastern on or about August 12, 2003 and authorized Taylor and Great Eastern to make trades with the funds deposited in his account.

11(B). It denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11(B), except admits that Ned Bushnell opened an account through Great Eastern at Penson on or about June 14, 2004, and authorized Taylor and Great Eastern to make trades with the funds in his account.

11(C). It denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11(C), except admits that Kelly Cook opened an account through Great Eastern at Penson on or about September 23, 2003, and authorized Taylor and Great Eastern to make trades with the funds in her account.

11(D). It denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11(D) , except admits that Annette Donnell opened an account through Great Eastern at Penson on or about May 2, 2003, and authorized Taylor and Great Eastern to make trades with the funds in her account.

11(E). It denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11(E), except admits that Rodney Hulse opened an account through Great Eastern at Penson on or about October 30, 2003, and authorized Taylor and Great Eastern to make trades with the funds in his account.

11(F). It denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11(F), except admits that Stanley Hulse apparently opened a corporate account through Great Eastern at Penson on or about September 10, 2012 in the name of South Texas Value Legal Management, Inc., and authorized Taylor and Great Eastern to make trades with the funds in the account.

11(G). It denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11(G), except admits that Roy Molina opened an account through Great Eastern at Penson or about November 20, 2003, and authorized Taylor and Great Eastern to make trades with the funds in his account.

11(H). It denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11(H), except admits that Wayne Mortensen opened an account through

Great Eastern at Penson on or about September 30, 2003, and authorized Taylor and Great Eastern to make trades with the funds in his account.

11(I). It denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11(I), except admits that Rao Narra opened an account through Great Eastern at Penson on or about January 26, 2004, and authorized Taylor and Great Eastern to make trades with the funds in his account.

11(J). It denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11(J), except admits that Rodney Petersen opened an account through Great Eastern at Penson on or about January 22, 2004, and authorized Taylor and Great Eastern to make trades with the funds in his account.

11(K). It denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11(K), except admits that Steve Rogers opened an account through Great Eastern at Penson on or about November 21, 2003, and authorized Taylor and Great Eastern to make trades with the funds in his account. Further, Penson denies the allegations relating to the purported February 2004 transfer of funds from Steve Roger's Penson account to Ascendus.

11(L). It denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11(L), except admits that Kathryn Rowley opened an account through Great Eastern at Penson on or about July 23, 2003, and authorized Taylor and Great Eastern to make trades with the funds in her account.

11(M). It denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11(M), except admits that Sharon Wilcox opened an account

through Great Eastern at Penson on or about May 13, 2005, and authorized Taylor and Great Eastern to make trades with the funds in her account.

11(N). It denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11(N), except admits that Albert Wirth opened an account through Great Eastern at Penson on or about October 7, 2003, and authorized Taylor and Great Eastern to make trades with the funds in her account.

11(O). It denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11(O), except admits that David A. Young opened an account through Great Eastern at Penson on or about January 14, 2004, and authorized Taylor and Great Eastern to make trades with the funds in his account.

11(P). It denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11(P), except admits that Richard Young opened an account at Penson through Great Eastern in the name of RC Troy LTD on or about January 27, 2004, and authorized Taylor and Great Eastern to make trades with the funds in the account.

12. It denies the allegations in Paragraph 12, yet admits that Claimant brought this arbitration after Penson prevailed in moving to compel certain of the Investors' claims against Penson to FINRA arbitration. Penson further admits that Claimant's civil litigation is pending in Utah state court.

13. It denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13.

14. It denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 14.

15. It denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 15, except that it admits that the Investors authorized Taylor to manage the funds in their Penson accounts and refers the Panel to the LTAs for their contents.

16. It denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 16.

17. It denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 17, yet admits that Penson sent accurate account statements to the Investors. Further, Penson denies that these account statements were more difficult to understand than the allegedly phony account statements sent by Smith and Taylor.

18. It denies the allegations in Paragraph 18.

19. It denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 19.

20. It denies the allegations in Paragraph 20(A)-(E).

21. It denies the allegations of wrongdoing alleged against Penson in Paragraph 21 and denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 21.

22. It denies the allegations in Paragraph 22 and asserts that Claimant seeks recovery from Penson rather than Great Eastern simply because Great Eastern is no longer in business.

23. It admits that some of the transactions claimed of in the Statement of Claim are time-barred and denies the remaining allegations in Paragraph 23 and refers all questions of law to the Panel.

24. It admits that Paragraph 24 purports to set forth specific types of misconduct by Penson that caused injury to the Investors, but denies that misconduct by Penson caused injury to the Investors and refers all questions of law to the Panel.

25. It denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 25.

26. It denies the allegations of wrongdoing directed at Penson in Paragraph 26 and denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 26.

27. It denies the knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 27 and refers all questions of law to the Panel.

28. It denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 28 and refers the Panel to the referenced compliance manual for its contents.

29. It denies the allegations in Paragraph 29 and refers all questions of law to the Panel.

29(A). It denies the allegations in Paragraph 29(A), respectfully refers to the transfer requests referenced therein for their true and complete contents, and refers all questions of law to the Panel.

29(B). It denies the allegations in Paragraph 29(B) and respectfully refers to the “Fed Wire Request Form” referenced therein for its true and complete contents.

29(C). It denies the allegations in Paragraph 29(C) and respectfully refers to the “Fed Wire Request Form” referenced therein for its true and complete contents.

29(D). It denies the allegations in Paragraph 29(D) and respectfully refers to the “Fed Wire Request Form” referenced therein for its true and complete contents.

29(E). It denies the allegations in Paragraph 29(E) and respectfully refers to the “Fed Wire Request Form” referenced therein for its true and complete contents.

29(F). It denies the allegations in Paragraph 29(F) and respectfully refers to the “Fed Wire Request Form” referenced therein for its true and complete contents.

29(G). It denies the allegations in Paragraph 29(G) and respectfully refers to the “Fed Wire Request Form” referenced therein for its true and complete contents.

30. It denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 30.

31. It denies the allegations in Paragraph 31 and refers all questions of law to the Panel.

32. It denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 32, respectfully refers to the Customer Margin and Short Account Agreement referenced therein for its true and complete contents, and refers all questions of law to the Panel.

32(A)(1). It denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 32(A)(1).

32(A)(2). It denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 32(A)(2).

32(A)(3). It denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 32(A)(3).

32(A)(4). It denies the allegations in Paragraph 32(A)(4) and refers all questions of law to the Panel.

32(A)(5). It denies the allegations in Paragraph 32(A)(5) and refers all questions of law to the Panel.

32(B)(1). It denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 32(B)(1).

32(B)(2). It denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 32(B)(2).

32(B)(3). It denies the allegations in Paragraph 32(B)(3) and refers all questions of law to the Panel.

33. It denies the allegations in Paragraph 33 and refers all questions of law to the Panel.

33(A). It denies the allegations in Paragraph 33(A) and respectfully refers to the documents referenced therein for their true and complete contents.

33(B). It denies the allegations in Paragraph 33(B), respectfully refers to the documents referenced therein for their true and complete contents, and refers all questions of law to the Panel.

34. It denies the allegation in Paragraph 34.

35. It denies the allegations in Paragraph 35.

36. It denies the allegations in Paragraph 36.

37. It denies the allegations in Paragraph 37.

38. It denies knowledge or information sufficient to form a belief as to the truth of the allegations regarding what Taylor and Smith “were trying to persuade investors” to do beginning

in November 2005, as alleged in Paragraph 38, and denies the remaining allegations in that Paragraph.

38(A)-(H). It denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 38(A)-(H), except that it denies any wrongdoing on the part of Penson alleged therein, and, further, respectfully refers to the documents referenced therein for their true and complete contents.

39. It denies the allegations in Paragraph 39.

40. It denies the allegations in Paragraph 40, respectfully refers to the documents referenced therein for their true and complete contents, and refers all questions of law to the Panel.

41. It denies the allegations in Paragraph 41 and respectfully refers to the documents referenced therein for their true and complete contents.

42. It denies that Penson “assisted Ascendus” or “affirmatively assisted Ascendus in receiving prohibited performance-based fees,” as alleged in Paragraph 42, and refers all questions of law to the Panel.

42(A). It denies the allegations in Paragraph 42(A) and respectfully refers to the LTA referenced therein for its true and complete contents.

42(B). It denies the allegations in Paragraph 42(B).

42(C). It denies the allegations in Paragraph 42(C).

42(D). It denies the allegations in Paragraph 42(D).

43. It denies the allegations in Paragraph 43, respectfully refers to the LTAs referenced therein for their true and complete contents, and refers all questions of law to the Panel.

44. It denies the allegations in Paragraph 44 and refers all questions of law to the Panel.

44(A). It denies the allegations in Paragraph 44(A), respectfully refers to the LTAs referenced therein for their true and complete contents, and refers all questions of law to the Panel.

44(B). It denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 44(B).

44(C). It denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 44(C) and refers all questions of law to the Panel.

44(D). It denies the allegations in Paragraph 44(D).

45. It denies the allegations in Paragraph 45 and refers all questions of law to the Panel.

46. It denies the allegations in Paragraph 46 and refers all questions of law to the Panel.

47(A). It denies the allegations in Paragraph 47(A) except to note that Acendus could not have had access to the accounts of the Investors without the consent of the Investors.

47(B). It denies the allegations in Paragraph 47(B) and respectfully refers to the LTAs referenced therein for their true and complete contents.

47(C). It denies the allegations in Paragraph 47(C), respectfully refers to the compliance manual referenced therein for its true and complete contents, and refers all questions of law to the Panel.

47(D). It denies the allegations in Paragraph 47(D) and respectfully refers to the allegations in Paragraph 17, where Claimant alleges: "Penson also sent monthly account

statement to the Investors. These lengthy, detailed, and complex reports showed the actual results of trading.” That Plaintiff concedes that these account statements were accurate undermines his contention that “The Investors would not have consented to liquidating their Penson accounts and sending money to FFCF if they had realized their accounts had values tens or hundreds of thousands of dollars less than the amounts reported to them by Ascendus.” According to Claimant’s claims, Penson provided the Investors with the information sufficient to determine that the Ascendus account statements were fictitious.

48. It denies the allegations in Paragraph 48 and refers all questions of law to the Panel.

49. It denies the allegations in Paragraph 49, except that it admits that customers must complete a customer account agreement when opening a Penson account, and respectfully refers all questions of law to the Panel.

50. It denies the allegations in Paragraph 50 and refers all questions of law to the Panel.

51(A)-(C). It admits that Claimant purports to seek damages listed in Paragraphs 51(A)-(C), but denies that Claimant is entitled to recover these amounts from Penson and refers all questions of law to the Panel.

52. It admits that Claimant purports to seek damages listed in Paragraph 50, but denies that Claimant is entitled recover these damages from Penson and refers all questions of law to the Panel.

53. It admits that Claimant purports to seek damages listed in Paragraph 53, but denies that Claimant is entitled to recover these damages from Penson and refers all questions of law to the Panel.

54. It denies that Claimant is entitled to recover the damages outlined in Paragraph 54, respectfully refers to the text of Utah Code Ann. § 61-1-22 for its true and complete contents, and refers all questions of law to the Panel.

55. It denies the allegations in Paragraph 55, respectfully refers to the document reference therein for its true and complete contents, and refers all questions of law to the Panel.

56. It denies the allegations in Paragraph 56 and refers all questions of law to the Panel.

Any allegation not specifically addressed above is hereby denied.

AFFIRMATIVE DEFENSES

Claimant's claims are barred by the applicable statutes of limitations and or repose.

Claimant's claims are barred by laches.

Claimant's claims are barred, in whole or in part, because Penson had no knowledge of, or any reasonable grounds to believe, the existence of the alleged wrongdoing of Taylor, Smith or any other person or entity.

Claimant's claims are barred, in whole or in part, because any loss incurred by Claimant was caused, in whole or in part, by acts of third parties and/or by conditions and events outside of Penson's control.

Claimant's claims are barred, in whole or in part, by comparative and/or contributory negligence and assumption of the risk.

Claimant's claims are barred because Penson at all times acted in accord with its contractual obligations.

Claimant's claims are barred, in whole or in part, because Penson exercised reasonable care and diligence in performing its duties and contractual obligations as a clearing broker.

Claimant's claims are barred, in whole or in part, because Penson acted in good faith at all relevant times.

Claimant's claims are barred, in whole or in part, because Penson owed no duty that has been breached.

Claimant's claims are barred by the Investors' ratification of the disputed transactions and transfers.

Claimant's claims are barred by principles of assignment.

Claimant's claims are barred in whole or in part, for lack of standing.

Claimant fails to state a claim upon which relief may be granted.

CONCLUSION

Claimant has no viable claim against Penson. Penson performed purely administrative functions at all times and is not culpable for the purported conduct of third parties. Claimant fails to provide any cognizable theory as to how the alleged wrongdoing of Taylor, Smith or any of their cohorts should be attributed to Penson. This is a fundamental problem that strikes at the very core of Claimant's Statement of Claim. For these reasons, Penson not only requests that Claimant's claims against it be denied, but also that Claimant be forced to recompense Penson for all its attorneys' fees, costs, and expenses associated with this matter.

Dated: New York, New York
September 10, 2012

Respectfully submitted,

MAYER BROWN LLP

By: Jeremy D. Schildcrout / MCP
Mark G. Hanchet
Jeremy D. Schildcrout

1675 Broadway
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Attorneys for Respondent
Penson Financial Services, Inc.

EXHIBIT A

FULLY DISCLOSED CLEARING AGREEMENT

This Fully Disclosed Clearing Agreement (the "Agreement") is executed and entered into by and between Penson Financial Services, Inc. ("Penson"), a division of Service Asset Management Company, a North Carolina corporation, and Great Eastern Securities, Inc. ("Correspondent").

WHEREAS, Correspondent is in the process of registering or is registered with the Securities and Exchange Commission ("SEC") as a broker-dealer of securities in accordance with Section 15(b) of the Securities and Exchange Act of 1934 (the "Act") and is applying for membership or is a member of the National Association of Securities Dealers, Inc. ("NASD"), and desires for Penson to act as a clearing broker for Correspondent; and

WHEREAS, Penson meets all requirements of the SEC to function as a clearing broker, and desires to enter into an agreement to clear and maintain cash, margin, option or other accounts ("Accounts") for Correspondent or customers ("Customers") of Correspondent.

NOW, THEREFORE, in consideration of the mutual covenants contained herein, and of the guarantee of this Agreement by any guarantor(s), and for other good and valuable consideration the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. REPRESENTATIONS AND WARRANTIES

Correspondent represents and warrants to Penson that:

- (a) Correspondent is a corporation duly organized, validly existing and in good standing under the laws of the state of its incorporation.
- (b) Correspondent has all the requisite authority in conformity with all applicable laws and regulations to enter into this Agreement and to retain the services of Penson in accordance with the terms hereof.
- (c) Correspondent shall employ as a manager of its brokerage operation only a person who has all requisite licenses and experience in compliance with applicable securities laws and regulations.
- (d) Correspondent shall duly employ personnel ("Registered Representatives") who have the requisite licenses and experience in compliance with applicable securities laws and regulations.
- (e) Correspondent has advised Penson of any clearing arrangements that have been made or are expected to be made with any other clearing broker or dealer.

Penson represents and warrants to Correspondent that:

- (a) Penson is a corporation duly organized, validly existing and in good standing under the laws of the state of North Carolina.
- (b) Penson is registered as a broker-dealer with the SEC and is in compliance with the rules and regulations thereof.

- (c) Penson is a member corporation in good standing of the NASD and is in compliance with the rules and regulations thereof.
- (d) Penson is in compliance with the rules and regulations of each national securities exchange of which it is a member.

2. CUSTOMER AND CORRESPONDENT ACCOUNTS

Responsibility for compliance with the provisions of the NASD's Conduct Rules regarding opening, approving and monitoring Customer accounts shall be allocated between Penson and Correspondent as set forth in this Section 2.

- (a) **Account Documentation.** Correspondent will be responsible for obtaining and verifying all required information and the identity of each potential Customer. Correspondent will be responsible for obtaining all documents related to customer accounts, and for the transmission of all required documents to Penson on a timely basis. Penson may, in its discretion, receive documents directly from the Customer. Correspondent acknowledges the obligation to retain all documents in an easily accessible place in accordance with SEC rules and agrees to provide the original application by overnight delivery or a legible copy by facsimile transmission within 24 hours of a request from Penson. Correspondent will be responsible for complying with the requirement of SEC Rule 15g-9, if applicable.
- (b) **Knowledge of Customer and Customer's Investment Objectives.** Correspondent will be responsible for learning and documenting all the required information relating to each and every Customer in order to insure compliance by Correspondent with applicable rules and regulations. This required information includes, but is not limited to, all of the information and instructions submitted to Penson pursuant to Section 2(a), any additional facts relative to the Customer's investment objectives, and every person holding power of attorney over any Customer Account. It shall be the responsibility of Correspondent to ensure that those of its Customers who open Accounts hereunder shall not be minors. Correspondent shall be solely responsible for any issues regarding the suitability of any investments for its Customers.
- (c) **Acceptance of Accounts.** Prior to any Customer Account being opened with Penson, it must be approved by Correspondent. Penson reserves the right to withhold acceptance of, or to reject, for any reason, any Customer, Customer Account, Correspondent Account or any transaction for any Account and to terminate any Account previously accepted by Penson. Initial acceptance of each Account shall be conditioned upon Penson's receipt of completed forms as required by Section 2(a). Correspondent shall not submit such forms with respect to any Customer Account unless Correspondent has in its possession the documentation of all information required pursuant to Section 2(b). Penson shall be under no obligation to accept any Account as to which any documentation required to be submitted to Penson or maintained by Correspondent pursuant to Sections 2(a) and 2(b) is incomplete. Prior to acceptance of any Account, no action taken by Penson or any of its employees, including, without being limited to, executing or clearing a trade in any Account, shall be deemed to be or shall constitute acceptance of such Account.

- (d) **Supervision of Orders and Accounts.** Penson will execute orders for Correspondent's Customers after Correspondent's appropriate principals have accepted and approved said Accounts. Correspondent will be responsible for the review and supervision of, and the suitability of, investments made by each and every one of its Customers and Penson shall have no responsibility. Correspondent shall be responsible for insuring that all transactions in and activities related to all Accounts opened by it with Penson, including discretionary accounts, will be in compliance with all applicable laws, rules and regulations of the United States, the several states, governmental agencies, securities exchanges and the NASD, including any laws relating to Correspondent's fiduciary, responsibilities to Customers, either under the Employee Retirement Income Security Act of 1974 or otherwise. Correspondent shall diligently supervise the activities of its officers, employees and representatives with respect to all Accounts. Penson will perform the clearing services provided for in this Agreement for Accounts accepted by it in accordance with the terms of this Agreement, as it may be amended from time to time, and otherwise in accordance with its best business judgement. To the extent, if any, that Penson accepts from Correspondent orders for execution in accordance with Section 7(a), Correspondent shall be responsible for informing Penson of the location of the securities that are the subject of the order so that Penson may comply with the provisions of Rule 3110 of the NASD's Conduct Rules.
- (e) **Accounts of Associated Persons.** Correspondent will not accept Accounts for any persons that come within the express provisions of Rule 3050 of the NASD's Conduct Rules unless Correspondent has complied with the provisions of said Rule and, if applicable, provided evidence of employer approval as required by the Rule.
- (f) **Account Responsibility for Certain Purposes.** Notwithstanding anything herein to the contrary, for purposes of the Securities Investment Protection Act of 1970 and the Financial Responsibility Rules of the SEC, the Customer Accounts are the responsibility, of Penson. For all other purposes, the Customer Accounts shall be the full, total and sole responsibility of Correspondent.

3. EXTENSION OF CREDIT

Responsibility for compliance with the provisions of Regulation T issued by the Board of Governors of the Federal Reserve System pursuant to the Securities Exchange Act of 1934 ("Regulation T") and all other applicable rules, regulations and requirements of any exchange or regulatory agency affecting the extension of credit shall be allocated between Penson and Correspondent as set forth in this Section 3.

- (a) **Margin Agreements.** At the time of opening of each margin account, Correspondent will furnish Penson with a Penson Customer Margin and Short Account Agreement, executed by the Customer, on the form furnished to Correspondent by Penson. Correspondent may use a substitute form upon written approval by Penson.
- (b) **Margin and Margin Maintenance.** Correspondent is responsible for assuring Customer's payment of Customer's initial margin requirements and of all amounts necessary to meet subsequent maintenance calls in each Customer Account, in order to insure compliance with Regulation T and the house rules of Penson. Such

payment may be collected by Correspondent on Penson's behalf, or made directly to Penson at Correspondent's option. Correspondent is responsible for the payment of initial margin and of all amounts necessary to meet subsequent margin calls in each Correspondent Account. Penson shall have the unlimited right to buy in or sell out positions in Accounts whenever Penson, in its sole discretion, deems such action appropriate and despite whether, if the Account is a Margin Account, any such Account is then in compliance with applicable margin maintenance requirement or has requested an extension of time to make any payment required by Regulation T. Correspondent acknowledges that Penson has the right to demand payment on any debit balance and that Correspondent is responsible to Penson for any unsecured debit balance resulting from any failure of a Customer to make any such payments upon demand.

- (c) **Margin Requirements.** Initial margin and margin maintenance requirements applicable to any margin account shall be in accordance with the house rules of Penson, rather than in accordance with any lower requirement of any law, any exchange or any regulatory agency. Penson may change the margin requirements applicable to any Account or class of accounts, as described in its house rules; Correspondent shall be responsible for advising its Customer of the changed requirements and for the payment by the Customer of any additional margin necessary to insure compliance with such increased requirements.
- (d) **Losses.** In addition to, and not in limitation of, Correspondent's agreement to indemnify Penson pursuant to the provisions of Section 10, Correspondent indemnifies and holds harmless Penson from and against any and all loss, cost, expense and liability (including legal and accounting fees and expenses) sustained by Penson arising out of any of the following:
 - (i) any failure by any Customer to comply with the terms of its Customer Margin and Short Account Agreement with Penson;
 - (ii) The failure of Correspondent or any Customer to comply with Regulation T;
 - (iii) the failure of Correspondent to satisfy its obligations under this Section 3; or
 - (iv) The failure of delivery of securities sold or failure of payment for securities purchased in accordance with the provisions of Regulation T; the return to Penson unpaid of any check given to Penson by Correspondent or any Customer; or the payment for and/or delivery of all "when issued" transactions which Penson may accept or execute for the Accounts.

4. MAINTENANCE OF BOOKS AND RECORDS

Penson will maintain stock records and other records on a basis consistent with generally accepted practices in the securities industry and will maintain copies of such records in accordance with the NASD and SEC guidelines for record retention in effect from time to time. At the time this Agreement is executed and annually thereafter, Penson will provide Correspondent with a list or description of all exception or other reports that it offers to Correspondent. (See Attached Schedule B.) Annually, Penson will provide Correspondent with a list of those reports requested by or supplied to Correspondent and will provide a copy

of such notice to Correspondent's DEA. Penson and Correspondent shall each be responsible for preparing and filing the reports required by the governmental and regulatory agencies that have jurisdiction over each and Penson and Correspondent will provide the other with such information, if any, which is in the control of one party but is required by the other to prepare any such report.

5. RECEIPT, DELIVERY AND SAFEGUARDING OF FUNDS AND SECURITIES

- (a) **Receipt and Delivery in the Ordinary Course of Business.** Penson, acting on behalf of Correspondent, will receive and deliver all funds and securities in connection with transactions for Customer Accounts in accordance with the Customer's instructions to Correspondent. Correspondent shall be responsible for advising Customers of their obligations to deliver funds or securities in connection with each such transaction. Correspondent shall be responsible for any failure of any Customer to fulfill such obligation. Penson shall be responsible for the safeguarding of all funds and securities delivered to and accepted by it, subject to count and verification by Penson. However, Penson will not be responsible for any funds or securities delivered by a Customer or Correspondent, its agents or employees, until such funds or securities are physically delivered to Penson's premises and accepted by Penson or deposited in bank accounts maintained in Penson's name. It is expressly understood and agreed, however, that Correspondent is responsible for compliance with the Currency and Foreign Transactions Reporting Act (31 U.S.C. Section 5311 et seq.) and the rules and regulations promulgated thereunder (31 C.F.R. Section 103.11, as amended, et seq.).
- (b) **Custody Services.** Whenever Penson has been instructed to act as custodian of the securities in any Correspondent or Customer Account, or to hold such securities in "safekeeping," Penson may hold the securities in the Customer's name or may cause such securities to be registered in the name of Penson or its nominee or in the names of nominees of any depository used by Penson. Penson will perform the services required in connection with acting as custodian for securities in Correspondent and Customer Accounts, such as (i) collection and payment of dividends; (ii) transmittal and handling (through Correspondent) of tenders or exchanges pursuant to tender offers and exchange offers; (iii) transmittal of all proxy materials and other shareholder communications; and (iv) handling of exercises or expirations of rights and warrants, and of redemptions of securities.
- (c) **Receipt and Delivery Pursuant to Special Instruction.** Upon instruction from Correspondent or a Customer, Penson will make such transfers of securities or Accounts as may be requested. Correspondent shall be responsible for determining if any securities held in Correspondent or Customer Accounts are "restricted securities" or "control stock" as defined by the rules of the SEC and that orders executed for such securities are in compliance with applicable laws, rules and regulations.
- (d) **Draft-Issuing Authority.** At its discretion Penson may authorize certain of Correspondent's employees to sign drafts as drawer payable to Correspondent's Customers in amounts and pursuant to conditions as may be determined by Penson from time to time. Correspondent agrees that it will not request Penson to authorize someone to sign drafts who is not an employee of Correspondent. Correspondent further agrees that this authority shall not be granted by Penson until Correspondent

has notified Penson in writing that it has established and will maintain and enforce supervisory procedures with respect to the issuance of such instruments. Correspondent agrees to fully indemnify Penson from the negligence, fraud, or mistakes of Correspondent or Correspondent's employees in connection with any draft issuing authority granted to them and Correspondent authorizes Penson to charge any Correspondent Account or any other assets of Correspondent held by Penson with the amount of any such losses. Notwithstanding Section 5(a), Penson will not be repsonsible for the safeguarding of funds withdrawn by Correspondent or Correspondent's employees pursuant to such draft issuing authority. Penson may withdraw this draft issuing privilege without notice at any time during the term of this Agreement. Notwithstanding anything herein to the contrary, Penson may at any time, at its sole discretion, despite any prior authorization, refuse payment on any draft for which Correspondent is drawer and Penson is payee.

6. **CONFIRMATIONS AND STATEMENTS**

- (a) **Preparation and Transmission.** Penson will prepare and send to Customers monthly statements of account (or quarterly statements if no activity occurs in an account during any quarter covered by such statement), which statements shall meet Penson's requirements as to format and quality and will indicate that Correspondent is the introducing broker for the Account. Penson will be responsible for preparing and transmitting confirmations. Upon prior written approval from Penson, Correspondent may assume the responsibility of preparing and transmitting confirmations, including the responsibility for compliance with the provisions of Rule 2230 of the NASD's Conduct Rules. Copies of all monthly or quarterly statements sent by Penson to Customers will be send to Correspondent. Penson will also provide to Correspondent monthly statements of clearing services performed by Penson for Correspondent and Customer Accounts showing the fees charged for such services during the month, as provided in Section 8.
- (b) **Examination and Notification of Errors.** Correspondent shall examine promptly all monthly statements of account, monthly statements of clearing services and other reports provided to Correspondent by Penson. Correspondent shall notify Penson of any error claimed by Correspondent in any Account in connection with (i) any transaction prior to the settlement date of such transaction, (ii) information appearing on daily reports within seven days of such report, and (iii) information appearing on monthly statements or reports within 30 days of Correspondent's receipt of any monthly statement or report. Any notice of error shall be accompanied by such documentation as may be necessary to substantiate Correspondent's claim. Correspondent shall provide promptly upon Penson's request any additional documentation which Penson reasonably believes is necessary or desirable to determine and correct any such error.

7. **ACCEPTANCE OF ORDERS, EXECUTION OF TRANSACTIONS, OTHER SERVICES**

- (a) **Customers' Orders.** Orders received by Correspondent can be executed by Correspondent or forwarded to Penson for execution. The party executing the order shall be responsible for errors in execution. Acceptance of orders from Customers shall be the responsibility of Correspondent, and Correspondent shall be responsible

for the authenticity of all orders. Correspondent shall advise each of its Customers that its relationship with Penson is solely that of an introducing broker to a clearing broker and that, except as set forth in Section 2(f) above, Correspondent bears all responsibility for the Customer's Account. Penson is not obligated to accept for execution any orders placed directly with Penson by a Customer. In addition, Penson is not obligated to accept any orders from Correspondent if Penson determines in good faith that it should not. Correspondent assumes the risk of failure by an over-the-counter dealer with which Correspondent executes an order in the event such dealer fails to perform and will reimburse Penson for any, loss incurred by it in the transaction.

- (b) **Transactions Clearing.** During the term of this Agreement, Penson will clear transactions on a fully disclosed basis for Accounts of Correspondent and the Customers that Correspondent introduces and Penson accepts as provided in Section 2(b); provided, however, that Penson is not obligated to clear any transactions for Correspondent or Correspondent's Customers if Penson determines in good faith that it should not.
- (c) **Other Services.** Penson will perform such other services, upon such terms and at such prices, as Penson and Correspondent may from time to time agree.

8. FEES AND SETTLEMENTS FOR SECURITIES TRANSACTIONS

(a) **Commissions: Fees for Clearing Services.**

- (i) Correspondent has provided to Penson its basic commission schedule and Penson will charge each Customer the commission shown on such schedule or which Correspondent otherwise directs Penson to charge on each transaction. Correspondent's basic commission schedule may be amended from time to time by written instructions to Penson from Correspondent. Penson shall be required to implement such changes only to the extent that they are within the usual capabilities of Penson's data processing and operations systems and only over such reasonable time as Penson may deem necessary or desirable to avoid disruption of Penson's normal operational capabilities. Penson may charge Correspondent for changes in the basic commission schedule. Correspondent's basic commission schedule shall be within the format of Penson's computer system.
- (ii) Penson will charge Correspondent for clearing services according to the fee schedule set forth in Schedule A attached hereto and incorporated herein for all purposes. Clearing charges may be modified from time to time by Penson without re-execution of this Agreement. To implement new charges, Penson will mail or telecopy a new Schedule A to Correspondent. If Correspondent does not object to the new charges within ten (10) days of such mailing or telecopying, as provided below, the new charges shall become effective and the new Schedule A shall become a part of and modify this Agreement without any further action by the parties. Upon such event, Penson and Correspondent shall replace the previous Schedule A with the new Schedule A. Correspondent may object to new charges by giving notice canceling this Agreement as provided under Sections 12 and 20(m). During the pendency

of such notice period, the previous charges shall continue to be effective until termination.

- (b) **Settlements.** Penson will collect commissions from Customers on behalf of Correspondent and through Correspondent. Penson may make payments to Correspondent against such commissions in advance of the monthly settlement contemplated by this Section 8(b), the amount of such payments to be determined in Penson's sole discretion based upon Penson's experience with Correspondent.

As soon as practicable after the end of each month, Penson will forward to the Correspondent a statement showing the amount of commissions and other amounts collected by Penson on Correspondent's behalf, and all amounts due to Penson from Correspondent (including, without being limited to, clearing charges, other charges, other fees and Customer's unsecured debit items, however arising), together with the amount by which the total owed Correspondent exceeds the total owed Penson. If such statement indicates that Correspondent owes monies to Penson, Correspondent shall promptly pay Penson the amount by which the total owed Penson exceeds the total owed Correspondent. If Correspondent fails to make such payment on a timely basis, Penson shall have the right to charge any other Account maintained by Penson for Correspondent or any other assets of Correspondent held by Penson (including the deposit required pursuant to Section 9 and positions and balances in Correspondent Accounts) for the net amount due Penson. Any failure by Penson to charge any Account or assets of Correspondent held by Penson shall not act as a waiver of Penson's right to demand payment of, or to charge Correspondent's Accounts for, the full amount due at any time.

9. DEPOSIT

Contemporaneously with the signing of this Agreement, Correspondent will deliver cash or securities to Penson, as specified in Schedule A attached, for deposit in an account maintained by Penson (the "Deposit Account"). If at any subsequent time Penson, in its sole discretion, requires an additional deposit, Correspondent will deposit additional cash or securities in an amount specified by Penson. Instead of making such additional deposit, Correspondent may reduce Correspondent's business volume or modify the nature of the securities involved in the Correspondent's transactions ("business mix") as specified by Penson. Any failure by Penson to demand compliance with the requirement that Correspondent either deposit additional amounts or modify Correspondent's business mix shall not act as a waiver of Penson's right to demand compliance with such requirements at any time. If the deposit is not adequately funded as required by Penson, Penson may, in addition to all other rights under this Agreement, transfer cash or securities of Correspondent held by Penson to the Deposit Account. Correspondent agrees that if Penson, at its sole discretion, determines it to be necessary, Penson shall accept only liquidating transactions for Customer Accounts and that Correspondent will give notice of such fact to Customers. If such notice is not given to Customers by Correspondent, Correspondent agrees that Penson may give such notice to Customers. Penson shall be entitled to set-off against any deposit in addition to any and all other rights or remedies Penson may have under this Agreement or otherwise. Correspondent agrees that if this Agreement is terminated for any reason, Penson may liquidate securities deposited and deduct from such deposit any amounts Correspondent owes Penson because of failure to meet any of Correspondent's obligations under this Agreement.

10. INDEMNIFICATION

(a) Indemnity.

(i) Correspondent agrees to indemnify and hold harmless Penson, each person who controls Penson within the meaning of the Securities Exchange Act of 1934 and any directors, officers, employees, agents and attorneys of Penson ("Penson Indemnified Persons") from and against all claims, demands, proceedings, suits and actions and all liabilities, losses, expenses and costs (including any legal and accounting fees and expenses) relating to Penson's defense of any failure, for any reason, fraudulent or otherwise, by Correspondent, Correspondent's employees, independent agents or contractors, or Customers to comply with any obligation under this Agreement or any other agreement executed and delivered to Penson in connection with Penson's performance of services hereunder and any act or failure to act by Penson Indemnified Persons, except any act or failure to act which is the result of gross negligence or willful misconduct on the part of any such Penson Indemnified Person. Without limiting the generality of the foregoing, such failure is explicitly intended by the parties to include failure resulting from (i) suspension of trading or bankruptcy or insolvency of any company, securities of which are held in a Customer's Accounts; (ii) failure by any Customer to maintain adequate margin; or (iii) breach of any obligation existing between Correspondent and a Customer of Correspondent or any law, rule or regulation of the United States, a state or territory thereof, the SEC, the Federal Reserve Board or other authority, applicable to any transaction contemplated by this Agreement.

(ii) Penson shall indemnify and hold Correspondent harmless against any losses, claims, damages, liabilities or expenses including without limitation those asserted by Customers (which shall include, but not be limited to, all costs of defense and investigation and all attorney's fees) to which Correspondent may become subject, insofar as such losses, claims, damages, liabilities or expenses arise out of, or are based upon the gross negligence or willful misconduct of Penson or its employees in providing the services contemplated hereunder.

(iii) Upon receipt by any indemnified party under this Section of notice of the commencement of any action, and if a claim is to be made against the indemnifying party under this Section, the indemnified party will promptly notify the indemnifying party. The omission to notify the indemnifying party will not relieve it from any liability that it may have to any indemnified party otherwise than under this Section 10(a)(iii). In any such action brought against any indemnified party, the indemnifying party will be entitled to participate in and, to the extent that it may wish, to assume the defense thereof, subject to the provisions herein stated, with counsel satisfactory to such indemnified party. After notice from the indemnifying party to such indemnified party of its election to assume the defense thereof, the indemnifying party will not be liable to such indemnified party under this Section for any legal or other expense subsequently incurred by such indemnified party in connection with the defense thereof other than reasonable costs of investigation. The indemnified party shall have the right to employ separate counsel in any such action and to participate in the defense thereof, but the fees and expenses of such counsel shall not be at the expense of the indemnifying party if the indemnifying party has assumed the defense of the action with counsel satisfactory to the indemnified party.

- (b) **Security Interest and Authorization to Charge.** Correspondent grants to Penson a first lien and security interest in any Correspondent Account maintained by Penson and any other assets of Correspondent now or hereafter held by Penson and authorizes Penson to discharge such lien by charging such Account and assets with all amounts owing to Penson including, but not limited to, (i) any cost or expense resulting from failures to deliver or failures to receive, (ii) any losses resulting from unsecured debit balances in any Customer or Correspondent Account and (iii) any amounts to which Penson is otherwise entitled pursuant to the provisions of Section 10(a). Penson shall have discretion to liquidate or sell any securities without notice to Correspondent, and to determine which securities to sell. Such charge may be made against Correspondent Account or assets at any time and in such amount as Penson deems appropriate. No delay in charging any Correspondent Account or asset shall operate as a waiver of Penson's right to do so at any future time as and when Penson deems appropriate. Penson shall have the unlimited right to set-off any indebtedness or other obligations of Correspondent under this Agreement or otherwise (absolute or contingent, matured or unmatured) against any obligations of Penson to Correspondent, including from the Deposit Account (as described in Section 9 and/or any other money, securities, or other property of Correspondent in Penson's possession).
- (c) **Reserves.** In connection with any claim that does or could give rise to a claim for indemnification under this Section 10 for Penson or an Penson Indemnified Person, Penson may, in its discretion, in addition to any and all other rights and remedies under this Agreement, reserve and retain any money, securities or other property of Correspondent pending a determination of such claim. The money, securities or other property of Correspondent set aside in such a reserve shall be subject to Penson's standard lien and security interest described in Section 10(b) above.

11. UNDERTAKINGS OF CORRESPONDENT

- (a) **Financial Statements and Other Reports.** Correspondent will furnish to Penson as soon as possible a copy of Correspondent's balance sheet and statement of earnings for the current fiscal year and for each of Correspondent's subsequent fiscal years. Each such balance sheet and statement of earnings shall be certified by independent public accountants. Correspondent also shall furnish Penson with copies of its monthly and quarterly Focus filings promptly after filing.
- (b) **Other Clearing Services.** During the term of this Agreement, Correspondent will not sign a clearing agreement with another clearing broker or dealer without prior written approval by Penson.
- (c) **Suspension or Restriction.** In the event that Correspondent or any employee of Correspondent shall become subject to suspension or restriction by any regulatory body having jurisdiction over Correspondent and Correspondent's securities business, Correspondent will notify Penson immediately and Correspondent authorizes Penson to take such steps as may be necessary for Penson to maintain compliance with the rules and regulations to which Penson is subject. Correspondent further authorizes Penson, in any event, to comply with directives or demands made upon Penson by any exchange or regulatory body relative to Correspondent and Customers. In

connection with such directives or demands, Penson may seek advice or legal counsel and Correspondent will reimburse Penson for reasonable fees and expenses of such counsel.

- (d) **Fixed Price Offerings.** Correspondent agrees that in making sales of Securities, as a part of a fixed price offering, it will comply with all applicable rules of the NASD, including, without limitation, the NASD's Interpretations with respect to Free-Riding and Withholding under Rules 2110 and 2740 of the NASD's Conduct Rules.
- (e) **Customer Orders** Correspondent represents that all orders received by Penson will be in accordance with its Customers' instructions. The parties hereto expressly agree that Penson shall not be responsible for investigation into the facts surrounding any transaction that it may have with Correspondent, or that Correspondent may have with its Customers or other persons, nor shall Penson be under any responsibility for compliance by Correspondent with any laws or regulations which may be applicable to Correspondent.
- (f) **Inquiries on Certificates.** Penson agrees to act as Correspondent's direct inquirer under the Lost and Stolen Securities Program under Rule 17f-1 (17CFR 240.17f-1).

12. **TERMINATION OF AGREEMENT: TRANSFER OF ACCOUNTS**

- (a) **Effectiveness.** This Agreement shall remain in force for two (2) years from the date Correspondent first clears transactions at Penson. Subsequent to this initial term, either party may terminate this Agreement by giving forty-five (45) days prior written notice to the other party.
- (b) **Termination by Penson.** Notwithstanding Section 12(a), Penson may terminate this Agreement at any time on five (5) days written notice to Correspondent in the event that Correspondent:
 - (i) fails to comply with the terms of this Agreement and upon notification by Penson fails to begin compliance within 10 days from said notification; or
 - (ii) is enjoined, prohibited or suspended, as a result of an administrative or judicial proceeding, from engaging in securities business activities constituting all or portions of Correspondent's securities business, which injunction, prohibition or suspension in Penson's judgment makes impracticable the fully disclosed clearing relationship established in this Agreement.
- (c) **Automatic Termination.** In addition to any other provisions for termination herein, this Agreement shall terminate immediately in the event that either Correspondent or Penson ceases to conduct its business or that Penson:
 - (i) is no longer registered as a broker/dealer with the SEC; or
 - (ii) is no longer a member in good standing of the NASD; or

- (iii) is suspended by any national securities exchange of which Penson is a member for failure to comply with the rules and regulations thereof.
- (d) **Conversion of Accounts.** In the event that this Agreement is terminated for any reason, it shall be Correspondent's responsibility to arrange for the conversion of Correspondent and Customer Accounts to another clearing broker. Correspondent will give Penson notice (the "Conversion Notice") of:
 - (i) the name of the broker that will assume responsibility for clearing services for Customers and Correspondent;
 - (ii) the date on which such broker will commence providing such services;
 - (iii) Correspondent's undertaking, in form and substance satisfactory to Penson, that Correspondent's agreement with such broker provides that such broker will accept on conversion all Correspondent and Customer Accounts, then maintained by Penson; and
 - (iv) the name of an individual within that organization who Penson can contact to coordinate the conversion. The Conversion Notice shall accompany Correspondent's notice of termination given pursuant to Section 12(a) or within thirty (30) days of the occurrence of an event specified in Section 12(c).

If Correspondent fails to give the Conversion Notice to Penson, Penson may give to Customers such notice as Penson deems appropriate of the termination of this Agreement and may make such arrangements as Penson deems appropriate for transfer or delivery of Customer and Correspondent Accounts. Correspondent will pay to Penson \$3,000 in programming charges to process the conversion. In addition, Correspondent shall pay any costs incurred by Penson as billed by any third party vendors such as transfer agents, etc.

- (e) **Survival.** Termination of this Agreement shall not affect Penson's rights or liabilities relating to business transacted prior to the effective date of such termination. From the date of termination until transfer or delivery of all Customer and Correspondent Accounts, Penson's rights and liabilities relating to business transacted after such termination shall be governed by the same terms as those set forth in this Agreement.
- (f) **No Obligation to Release.** Penson shall not be required to release to Correspondent any securities or cash held by Penson for Correspondent in one or more Correspondent Accounts until any amounts owing to Penson pursuant to the provisions of this Agreement are paid; and Correspondent's outstanding obligations hereunder to Penson are determined, including determination of any disputed amounts, and satisfied; and any property of Penson in the possession of Correspondent is returned to Penson.

13. CONFIDENTIAL NATURE OF DOCUMENTS

All agreements, documents, papers, and data in any form, supplied by Correspondent concerning Correspondent's business or Customers shall be treated by Penson as confidential. To

the extent such documents or data are retained by Penson, they shall be kept in a safe place and shall be made available to third parties only as authorized by Correspondent in writing or pursuant to any order or request of a court or regulatory body having appropriate jurisdiction. Penson shall give Correspondent prompt notice of the receipt by Penson of any such order or subpoena, unless prohibited from doing so by the issuing authority which notice shall be given prior to Penson's compliance therewith. Such documents shall be made available by Penson for inspection and examination by Correspondent's auditors, by properly authorized agents or employees of any regulatory bodies or commissions or by such other persons as Correspondent may authorize in writing. Notwithstanding anything herein to the contrary, Correspondent expressly authorizes Penson to supply any information requested relating to Correspondent, its business, or its Customers to any regulatory body having appropriate authority.

14. NOTICE TO CUSTOMERS

Subject to the requirements of the NASD's Conduct Rules, Correspondent shall provide, or cause to be provided to every Customer upon the opening of a Customer Account, notice of the existence and general terms of this Agreement.

15. CUSTOMER COMPLAINT PROCEDURES

Correspondent will be responsible for the initial handling of all Customer complaints. Any customer who initiates a complaint with Penson will be referred by Penson to Correspondent. Penson will forward any complaints received to Correspondent's Designated Examining Authority ("DEA"). Penson will also notify the Customer in writing that the complaint was received and was forwarded to Correspondent and to Correspondent's DEA. If any such complaint is based upon an alleged act or failure to act by Penson, Correspondent will notify Penson promptly of such complaint and the basis therefor; and will consult with Penson; and the parties will cooperate in determining the validity of such complaint and the appropriate action to be taken.

16. REMEDIES CUMULATIVE

The enumeration herein of specific remedies shall not be exclusive of any other remedies. Any delay or failure by any party to this Agreement to exercise any right, power, remedy or privilege herein contained, or now or hereafter existing under any applicable statute or law, shall not be construed to be a waiver of such right, power, remedy or privilege, nor to limit the exercise of such right, power, remedy or privilege, nor shall it preclude the further exercise thereof or the exercise of any other right, power, remedy or privilege.

17. GUARANTEE

The corporation or individual(s) who guarantee the obligations of Correspondent under this Agreement by executing the signature lines designated for such purpose at the end of this Agreement (the "Guarantor(s)"), in consideration of Penson's entering into the Agreement, do(es) hereby personally guarantee(s) (jointly and severally, if more than one) the performance by Correspondent of the provisions of the Agreement (including without limitation the indemnification provisions of Section 10) and shall promptly pay any amount that is not paid by Correspondent to Penson under the Agreement. This is an absolute, unconditional and unlimited guarantee of payment and may be proceeded upon by Penson or a Penson Indemnified Person before filing any action against Correspondent or after any action against Correspondent has been commenced. Guarantor(s) grants to Penson a first lien and security interest on any and all money and securities of a Guarantor(s) held

by Pension. Pension shall have the unlimited right to set-off any amounts owed to it by Guarantor(s) against any obligation of Pension to Guarantor(s). Pension also shall have the unlimited right to set-off any amounts owed to it by Guarantor(s) against any obligation of Pension to Guarantor(s). Pension also shall have the absolute and unlimited right to sell, transfer, or liquidate any of the assets in any of Guarantor(s)' accounts with Pension for any amounts owed to it by Correspondent or Guarantor(s). The obligations of the Guarantor(s) shall not be discharged or impaired or otherwise affected by the failure of Pension or a Pension Indemnified Person to assert, claim, demand or enforce any remedy under this Agreement, nor by waiver, modification or amendment of this Agreement or any compromise, settlement or discharge of obligations of Correspondent under this Agreement, or any release or impairment of any collateral by Pension or a Pension Indemnified Person.

18. RESPONSIBILITY FOR ERRORS; LIMIT ON LIABILITY; NO CONSEQUENTIAL DAMAGES

In the general course of business, Pension and Correspondent shall each be responsible for correcting their own errors. In any action by Correspondent against Pension for any claim arising out of the relationship created by this Agreement, Pension shall only be liable to Correspondent in cases of gross negligence or willful misconduct, and in such cases Pension shall only be liable for the amount or actual monetary losses suffered by Correspondent. Correspondent shall not, in any such action or proceeding, or otherwise, assert any claim against Pension for consequential damages on account of any loss, cost, damage or expense which Correspondent may suffer or incur related to transactions in connection with this Agreement or otherwise, including, but not limited to, any lost opportunity claims.

19. PAIB PROVISION

- (a) **PAIB Reserve Calculation.** As the clearing broker for Correspondent, Pension agrees to perform the calculation for PAIB assets ("PAIB reserve computation") in accordance with the customer reserve computation ("customer reserve formula") set forth in SEC Rule 15c3-3 with the following modifications:
- (i) Any credit (including a credit applied to reduce a debit) that is included in the customer reserve formula will not be included as a credit in the PAIB reserve computation.
 - (ii) Note E(3) to Rule 15c3-3a which reduces debit balances by 1% under the basic method and subparagraph (a)(1)(ii)(A) of the net capital rule which reduces debit balances by 3% under the alternative method will not apply to the PAIB reserve computation
 - (iii) Neither Note E(1) to Rule 15c3-3a nor NYSE interpretation/04 to Item 10 of Rule 15c3-3a regarding securities concentration charges will be applied to the PAIB reserve computation
- (b) **Reserve Computation Time Frames.** The PAIB reserve computation will be prepared within the same time frames as those prescribed by Rule 15c3-3 for the customer reserve formula.
- (c) **PAIB Assets.** The PAIB reserve computation will include all of the proprietary accounts of Correspondent covered by this Agreement. All PAIB assets will be kept

separate and distinct from customer assets under the customer reserve formula in the Customer Protection Rule.

- (d) **PAIB Reserve Account.** Penson will maintain a separate "Special Reserve Account for the Exclusive Benefit of Customers" with a bank in conformity with the standards of paragraph (f) of Rule 15c3-3 ("PAIB Reserve Account"). Cash and/or qualified securities as defined in the customer reserve formula will be maintained in the PAIB Reserve Account in an amount equal to the PAIB reserve requirement.
- (e) **PAIB Credits**
 - (i) Credits included in the PAIB reserve computation that result from the use of PAIB securities pledged to meet intra-day margin calls in a cross margin account established between The Options Clearing Corporation and any regulated commodity exchange can be reduced to the extent that the excess margin held by the other clearing corporation in the cross margin relationship is used the following business day to replace the PAIB securities that were previously pledged. In addition, balances resulting from a cross margin account which are segregated pursuant to the Commodities Future Trading Commission regulations need not be included in the PAIB reserve computation.
 - (ii) Deposits received prior to a transaction pending settlement which are \$5 million or greater for any single transaction or \$10 million in aggregate can be excluded as credits from the PAIB reserve computation if such balances are placed and maintained in a separate PAIB Reserve Account by 12 noon eastern time (ET) on the following business day. Thereafter, the money representing any such deposits may be withdrawn to complete the related transactions without performing a new PAIB reserve computation.
- (f) **Deposit Requirements.** In the event the PAIB reserve computation results in a deposit requirement, the requirement can be satisfied to the extent of any excess debit in the customer reserve formula of the same date. However, a deposit requirement resulting from the customer reserve formula will not be satisfied with excess debits from the PAIB reserve computation.
- (g) **Credit Balances.** A credit balance resulting from a PAIB reserve computation can be reduced by the amount that items representing such credits are swept into money market funds or mutual funds of an investment company registered under the Investment Company Act of 1940 prior to 10 a.m. ET on the deposit date provided that the credits swept into any such fund are not subject to an right, charge, security interest, lien, or claim of any kind in favor of the investment company or Penson. Any credits which have been swept into money market funds or mutual funds must be maintained in the name of Correspondent or for the benefit of Correspondent. This treatment of credit balances applies only to the PAIB reserve computation.
- (h) **Exclusions from PAIB reserve computation**
 - (i) Commissions receivable and other receivables of Correspondent from Penson (excluding clearing deposits) that are otherwise allowable assets under the

Net Capital Rule will not be included in the PAIB reserve computation, provided the amounts have been clearly identified as receivables on the books and records of the Correspondent and as payables on the books of Penson.

- (ii) The proprietary account of Correspondent that is a guaranteed subsidiary of a clearing broker or who guarantees a clearing broker (i.e. guarantees all liabilities and obligations) will be excluded from the PAIB reserve computation.
- (i) **Clearing Deposits.** Clearing deposits required to be maintained at Penson may be included as debits in the PAIB reserve computation to the extent the percentage of the deposit which is based upon Penson's aggregate deposit requirements that relates to the proprietary business of the Correspondent can be identified.
- (j) **Notification Requirements**
 - (i) Within two business days of the execution of his Agreement, Correspondent will notify its designated examining authority ("DEA") in writing that it has entered into such agreement with Penson.
 - (ii) Upon discovery that any deposit made to the PAIB Reserve Account does not satisfy its deposit requirement, Penson shall by facsimile or telegram immediately notify its DEA and the Securities and Exchange Commission ("SEC"). Unless a corrective plan is found acceptable by the SEC and the DEA, Penson will provide written notification within 5 business days of the date of discovery to Correspondent that PAIB assets held by Penson will not be deemed allowable assets for net capital purposes. In the event Correspondent wishes to continue to count its PAIB assets as allowable, it will have until the last business day of the month following the month in which notification is made to transfer all PAIB assets to another clearing broker. However, if the deposit deficiency is remedied before the time at which Correspondent must transfer its PAIB assets to another clearing broker, Correspondent may choose to keep its assets at Penson.

20. MISCELLANEOUS

- (a) **Tax Reporting.** Penson shall be responsible for providing IRS Form 1099 (or any successor form) and other information required to be reported by federal, state or local tax laws, rules or regulations, to Accounts solely with respect to events subsequent to the effective date of this Agreement and for the mailing of same at Penson's expense.
- (b) **Scope of Services.** Penson shall limit its services pursuant to the terms of this Agreement to those services expressly set forth herein and related thereto.
- (c) **Modification.** This Agreement may be modified only by a writing signed by both parties to this Agreement. Such modification shall not be deemed as a cancellation of this Agreement. Subject to the NASD's Conduct Rules, this agreement and all modifications may be required to be submitted to the NASD for approval prior to

effectiveness. It is expressly understood that brokerage services cannot be provided by Correspondent under this Agreement until such approval, if required, is received.

- (d) **Assignment.** This Agreement shall be binding upon all successors, assigns or transferees of both parties hereto, irrespective of any change with regard to the name of or the personnel of Correspondent or Penson. Any assignment of this Agreement shall be subject to the requisite review and/or approval of any regulatory or self-regulatory agency or body whose review and/or approval must be obtained prior to the effectiveness and validity of such assignment. No assignment of this Agreement shall be valid unless the non-assigning party, in its sole discretion consents to such an assignment in writing. Neither this Agreement nor any operation hereunder is intended to be, shall not be deemed to be, and shall not be treated as a general or limited partnership, association or joint venture or agency relationship between Correspondent and Penson.
- (e) **Account Documentation.** Applicable laws and regulations require that Penson must have proper documentation and support for any Account opened on its books. If, after reasonable requests, the necessary documents to enable Penson to comply with such account documentation requirements of the laws and regulations have not been received by Penson, Correspondent shall receive notification that no further orders will be accepted for the Account involved.
- (f) **Construction.** The construction and effect of every provision of this Agreement, the rights of the parties hereunder and any questions arising out of the Agreement, shall be subject to the statutory and common law of the state of Texas.
- (g) **Arbitration.** In the event of a dispute between the parties, such dispute shall be settled by arbitration before arbitrators sitting in Dallas, Texas, in accordance with the rules of the Arbitration Committee of the NASD then in effect. The arbitrators may allocate attorneys' fees and arbitration costs between parties, and such award shall be final and binding between the parties and judgment thereon may be entered in any court of competent jurisdiction.
- (h) **Headings.** The headings preceding the text, articles and sections hereof have been inserted for convenience and reference only and shall not be construed to affect the meaning, construction or effect of this Agreement.
- (i) **Entire Agreement.** This Agreement shall cover only the types of services set forth herein and is in no way intended nor shall it be construed to bestow upon Correspondent or Penson any special treatment regarding any other arrangements, agreements or understandings that presently exist between Correspondent and Penson or that may hereinafter exist. Correspondent shall be under no obligation whatsoever to deal with Penson or any of its subsidiaries or any companies controlled directly or indirectly by or affiliated with Penson, in any capacity other than as set forth in this Agreement. Likewise, Penson shall be under no obligation whatsoever to deal with Correspondent or any of its affiliates in any capacity other than as set forth in this Agreement.
- (j) **Severability.** If any provision or condition of this Agreement shall be held to be invalid or unenforceable by any court, or regulatory or self-regulatory agency or

body, such invalidity or unenforceability shall attach only to such provision or condition. The validity of the remaining provisions and conditions shall not be affected thereby and this Agreement shall be carried out as if any such invalid or unenforceable provision or condition were not contained herein.

- (k) **Force Majeure.** In addition to any excuse provided by applicable law, all parties hereto shall be excused from liability for non-performance of this Agreement arising from any event beyond any party's control, whether or not foreseeable by either party, including but not limited to, labor disturbance, war, fire, accident, adverse weather, inability to secure transportation, governmental act or regulation, inability to obtain raw materials or other causes or events beyond either party's control, whether or not similar to those enumerated above.
- (l) **Interpleader.** If Penson receives conflicting claims from Correspondent, a Customer and/or other persons regarding money, securities or other property held by Penson, Penson may, in its sole discretion, tender such money, securities or other property to a court of competent jurisdiction and institute an action in interpleader or other appropriate legal proceeding to determine the rights of the respective claimants. Penson shall have no liability to Correspondent or Customers in connection with any such action, and shall be entitled to reimbursement for its costs and expenses in connection with such action from Correspondent.
- (m) **Notice.** For the purposes of any and all notices, consents, directions, approvals, restrictions, requests or other communications required or permitted to be delivered hereunder, Penson's address shall be:

Attention: Daniel P. Son
President
Penson Financial Services, Inc.
1700 Pacific Avenue, Suite 1400
Dallas, Texas 75201

and Correspondent's address shall be:

Mr. Alphonse Mekalainas
Great Eastern Securities, Inc.
2 Seaview Blvd., 2nd Floor
Port Washington, NY 11050

Either party may provide such notice or change its address for notice purposes by giving written notice pursuant to registered or certified mail, return receipt requested, of the new address to the other party.

- (n) **Counterparts: NASD Approval.** This Agreement may be executed in one or more counterparts, all of which taken together shall constitute a single agreement. When each party hereto has executed and delivered to the other a counterpart, this Agreement shall become binding on both parties, subject only to any required approval by the NASD. If required by the NASD, Penson will submit this Agreement to the NASD promptly following execution and will notify

Correspondent, or cause Correspondent to be notified promptly upon receipt of such approval.

MADE AND EXECUTED AT _____ THIS 23 DAY OF August, 2000.

PENSON:

PENSON FINANCIAL SERVICES, INC.
(A Division of Service Asset Management Company)

By:

Philip A. Pennington
Daniel P. Son, President Philip A. Pennington
1700 Pacific Avenue, Suite 1400
Dallas, Texas 75201
EVP

CORRESPONDENT:

INDIVIDUAL:

Alphonse Mekalain
[Signature]
Alphonse Mekalain
[Print name]
2 Seaview Blvd Suite 201
[Address]
Port Washington, NY 11050

ENTITY:

Great Eastern Securities, Inc
[Name]
Corporation
[Type of Entity, i.e., corporation,
partnership, etc.]

By:

Alphonse Mekalain / President
Its: 2 Seaview Blvd Suite 201
Port Washington, NY 11050
[Address]

GUARANTEE: The undersigned individual(s) or corporation hereby guarantee(s) the obligations of Correspondent under the Agreement as provided in Section 17 of the Agreement.

INDIVIDUAL GUARANTOR(S):

[Signature]

[Print name]

[Signature]

[Print name]

[Signature]

[Print name]

CORPORATE GUARANTOR:

[Name of Corporation]

By: _____

Its: _____

[Address]

EXHIBIT B

**PENSON FINANCIAL SERVICES, INC.
AND/OR BROKER DEALERS
FOR WHICH IT CLEARS**

CUSTOMER ACCOUNT AGREEMENT

Account Number: 	Full Name and Address on Account 	Social Security Number/Tax I.D.
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This must match the first named person on this account.

CERTIFICATION OF TAXPAYER ID NUMBER (SUBSTITUTE W-9)

Check appropriate box: ☐ Individual/Sole proprietor ☐ Corporation ☐ Partnership ☐ Other _____

Under penalty of perjury I certify that:

- (1) The number shown on this form is my correct taxpayer identification number (or I am waiting for a number to be issued to me) and
- (2) I am not subject to backup withholding because (a) I am exempt from backup withholding, or (b) I have not been notified by the Internal Revenue Service (IRS) that I am subject to backup withholding as a result of a failure to report all interest or dividends, or (c) the IRS has notified me that I am no longer subject to backup withholding (does not apply to real estate transactions, mortgage interest paid, the acquisition or abandonment of secured property, contributions to an individual retirement account (IRA), and payments other than interest and dividends).
- (3) I am a U.S. person (including a U.S. resident alien).

Certification Instructions—You must cross out item (2) above if you have been notified by the IRS that you are currently subject to backup withholding because of the under reporting of income.

DISCLOSURE OF NAME/ADDRESS ON SECURITIES YOU OWN

Under rule 14b-1(c) of the Securities Exchange Act, we are required to disclose to an issuer the name, address, and securities position of our customers who are beneficial owners of that issuer's securities unless the customer objects. Please check below if you do not want your ownership disclosed.

I object to the disclosure of such information _____

AUTHORIZATION TO EARN INTEREST ON FUNDS AWAITING INVESTMENT

This is to confirm my intention to reinvest cash credit balances held by you in my name, and I further confirm that this cash credit balance is being maintained with you solely for the purpose of reinvestment. I understand that cash balances of up to \$100,000 are protected by the Securities Investor Protection Corporation (SIPC), but that SIPC coverage is not available for funds maintained solely for the purpose of earning interest.

BY SIGNING BELOW, THE UNDERSIGNED AGREES TO ALL TERMS OF THE CUSTOMER AGREEMENT PRINTED ON THIS SIDE AND THE REVERSE OF THIS DOCUMENT. THE UNDERSIGNED ACKNOWLEDGES RECEIPT OF A COPY OF THIS AGREEMENT, THE INFORMATION BROCHURE PREPARED BY PENSON FINANCIAL SERVICES, INC., AND PENSON'S PRIVACY POLICY. THE UNDERSIGNED CERTIFIES THAT THE UNDERSIGNED HAS READ AND UNDERSTANDS ALL PROVISIONS OF THIS AGREEMENT. THIS AGREEMENT BENEFITS PENSON FINANCIAL SERVICES, INC., INTRODUCING BROKERS FOR WHICH IT CLEARS AND PERSONS RELATED TO EACH OF THE FOREGOING. THE REVERSE SIDE OF THIS AGREEMENT, PARAGRAPH 8, CONTAINS A PRE-DISPUTE ARBITRATION CLAUSE.

Date of Delivery of Privacy Policy: _____

For Use by Individuals, including joint accounts:

Signature: _____

Print Name: _____

Signature (Second Party, If Joint Account): _____

Print Name: _____

Date: _____

For use by entity accounts only (i.e. corporations, partnerships, trusts):

Is this account for a foreign bank? ☐ Yes ☐ No – If Yes, please list

Agent for service of process: _____

Is this account for a foreign shell bank? ☐ Yes ☐ No.

Does this firm offer services to a foreign shell bank? ☐ Yes ☐ No

If you answered yes to any of the above questions, Corporation will need to complete Certification Regarding Correspondent Accounts.

Signature: _____

Print Name: _____

Title: _____ Date: _____

1. Applicable Rules and Regulations. All transactions shall be subject to the constitution, rules, regulations, customs and usages of the exchange or market and its clearing house, if any, upon which such transactions are executed, except as otherwise specifically provided in this Agreement.

2. Definitions. "Introducing broker" means any brokerage firm which introduces securities transactions on behalf of the undersigned, which transactions are cleared through you, whether one or more. "Obligations" means all indebtedness, debit balances, liabilities or other obligations of any kind of the undersigned to you, whether now existing or hereafter arising. "Securities and other property" shall include, but shall not be limited to, money, securities, commodities or other property of every kind and nature and all contracts and options relating thereto, whether for present or future delivery. "You" or "your" refers to Penson Financial Services, Inc.

3. Breach; Security Interest. Whenever in your discretion you consider it necessary for your protection, or for the protection of the undersigned's introducing firm or in the event of, but not limited to; (i) any breach by the undersigned of this or any other agreement with you or (ii) the undersigned's failure to pay for securities and other property purchased or to deliver securities and other property sold, you may sell any or all securities and other property held in any of the undersigned's accounts (either individually or jointly with others), cancel or complete any open orders for the purchase or sale of any securities and other property, and/or borrow or buy-in any securities and other property required to make delivery against any sale, including a short sale, effected for the undersigned, all without demand for deposit of collateral, other notice of sale or purchase, or other notice or advertisement, each of which is expressly waived by the undersigned, and/or you may require the undersigned to deposit cash or adequate collateral to the undersigned's account prior to any settlement date in order to assure the performance or payment of any open contractual commitments and/or unsettled transactions. Any and all securities and other property belonging to the undersigned or in which the undersigned may have an interest held by you or carried in any of the undersigned's accounts with you (either individually or jointly with others) shall be subject to a first and prior security interest and lien for the discharge of the undersigned's obligations to you, wherever or however arising and without regard to whether or not you have made advances with respect to such securities and other property, and you are hereby authorized to sell and/or

purchase

any and all securities and other property in any of the undersigned's accounts, and/or to transfer any such securities and other property among any of the undersigned's accounts to the fullest extent of the law and without notice where allowed. The costs and expenses of collection of the debit balance and any unpaid deficiency in the accounts of the undersigned with you, including but not limited to reasonable attorneys' fees and expenses, incurred and payable or paid by you shall be payable to you by the undersigned.

4. Cancellation. You are authorized, in your discretion, should you for any reason whatsoever deem it necessary for your protection, without notice, to cancel any outstanding order, to close out the accounts of the undersigned, in whole or in part, or to close out any commitment made on behalf of the undersigned.

5. Payment of Indebtedness Upon Demand. The undersigned shall at all times be liable for the payment upon demand of any obligations owing from the undersigned to you, and the undersigned shall be liable to you for any deficiency remaining in any such accounts in the event of the liquidation thereof (as contemplated in Paragraph 3 of this Agreement or otherwise), in whole or in part, by you or by the undersigned; and the undersigned shall make payment of such obligations upon demand. If Customer also holds a futures account with Pension Financial Futures, Inc. ("PFFI"), Customer hereby authorizes Pension, without prior notice, to transfer from any account held with Pension to any account held with PFFI, any assets that PFFI represents to Pension are reasonably required to avoid the calling of margins for such PFFI account or the payment of any obligations owed Pension by Customer. Customer also authorizes Pension to request from PFFI assets held by PFFI that in Pension's judgment may be reasonably required to avoid the calling of margins for a Pension account or the payment of any obligations owed Pension by Customer.

6. Accounts Carried as Clearing Broker. The undersigned understands that you are carrying the accounts of the undersigned as clearing broker by arrangement with the undersigned's introducing broker through whose courtesy the account of the undersigned has been introduced to you. Until receipt from the undersigned of written notice to the contrary, you may accept from and rely upon the undersigned's introducing broker for (a) orders for the purchase or sale in said account of securities and other property, and (b) any other instructions concerning the undersigned's accounts. The undersigned represents that the undersigned understands that you act only to clear trades introduced by the undersigned's introducing broker and to effect other back office functions for the undersigned's introducing broker. The undersigned confirms to you that the undersigned is relying for any advice concerning the undersigned's accounts solely on the undersigned's introducing broker. The undersigned understands that all representatives, employees and other agents with whom the undersigned communicates concerning the undersigned's account are agents of the introducing broker, and not your representatives, employees or other agents. The undersigned understands that you are not a principal or partner with, and do not control in any way, the introducing broker or its representatives, employees or other agents. The undersigned understands that you will not review the undersigned's accounts and will have no responsibility for trades made in the undersigned's accounts. You shall not be responsible or liable for any acts or omissions of the introducing broker or its representatives, employees or other agents. Notwithstanding the foregoing, in the event that the undersigned initiates a claim against you in your capacity as clearing broker and does not prevail, the undersigned shall be responsible for the costs and expenses associated with your defense of such claim.

7. Communications. You may send communications to the undersigned at the undersigned's address or at such other address as the undersigned may hereafter give you in writing, and all communications so sent, whether by mail, telegraph, or otherwise, shall be deemed given to the undersigned personally, whether actually received or not. Reports of execution of orders and statements of accounts of the undersigned shall be conclusive if not objected to in writing to you, the former within five (5) days and the latter within ten (10) days, after forwarding by you.

THE FOLLOWING ARBITRATION AGREEMENT SHOULD BE READ IN CONJUNCTION WITH THESE DISCLOSURES:

(a) **ARBITRATION IS FINAL AND BINDING ON THE PARTIES;**

(b) **THE PARTIES ARE WAIVING THEIR RIGHT TO SEEK REMEDIES IN COURT, INCLUDING THE RIGHT TO JURY TRIAL;**

(c) **PRE-ARBITRATION DISCOVERY IS GENERALLY MORE LIMITED THAN AND DIFFERENT FROM COURT PROCEEDINGS;**

(d) **THE ARBITRATORS' AWARD IS NOT REQUIRED TO INCLUDE FACTUAL FINDINGS OR LEGAL REASONING AND ANY PARTY'S RIGHT TO APPEAL OR TO SEEK MODIFICATION OF RULINGS BY THE ARBITRATORS IS STRICTLY LIMITED; AND**

(e) **THE PANEL OF ARBITRATORS WILL TYPICALLY INCLUDE A MINORITY OF ARBITRATORS WHO WERE OR ARE AFFILIATED WITH THE SECURITIES INDUSTRY.**

8. ARBITRATION AGREEMENT. ANY AND ALL CONTROVERSIES, DISPUTES OR CLAIMS BETWEEN THE UNDERSIGNED AND YOU, OR THE INTRODUCING BROKER, OR THE AGENTS, REPRESENTATIVES, EMPLOYEES, DIRECTORS, OFFICERS OR CONTROL PERSONS OF YOU OR THE INTRODUCING BROKER, ARISING OUT OF, IN CONNECTION WITH, FROM OR WITH RESPECT TO (a) ANY PROVISIONS OF OR THE VALIDITY OF THIS AGREEMENT OR ANY RELATED AGREEMENTS, (b) THE RELATIONSHIP OF THE PARTIES HERETO, OR (c) ANY CONTROVERSY ARISING OUT OF YOUR BUSINESS, THE INTRODUCING BROKER'S BUSINESS OR THE UNDERSIGNED'S ACCOUNTS, SHALL BE CONDUCTED PURSUANT TO THE CODE OF ARBITRATION PROCEDURE OF THE NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC. ARBITRATION MUST BE COMMENCED BY SERVICE OF A WRITTEN DEMAND FOR ARBITRATION OR A WRITTEN NOTICE OF INTENTION TO ARBITRATE. THE DECISION AND AWARD OF THE ARBITRATOR(S) SHALL BE CONCLUSIVE AND BINDING UPON ALL PARTIES, AND ANY JUDGMENT UPON ANY AWARD RENDERED MAY BE ENTERED IN A COURT HAVING JURISDICTION THEREOF, AND NEITHER PARTY SHALL OPPOSE SUCH ENTRY.

No person shall bring a putative or certified class action to arbitration, nor seek to enforce any pre-dispute arbitration agreement against any person who has initiated in court a putative class action; or who is a member of a putative class who has not opted out of the class with respect to any claims encompassed by the putative class action until: (i) the class certification is denied; or (ii) the class is decertified; or (iii) the customer is excluded from the class by the court. Such forbearance to enforce an agreement to arbitrate shall not constitute a waiver of any rights under this agreement except to the extent stated herein.

9. Representations. The undersigned represents that the undersigned is of majority age, that the undersigned is not an employee of any exchange, or of any corporation of which any exchange owns a majority of the capital stock, or of a member of any exchange, or of a member firm or member corporation registered on any exchange or of a bank, trust company, insurance company or of any corporation, firm or individual engaged in the business dealing either as broker or as principal in securities, bills of exchange, acceptances or other forms of commercial paper. If the undersigned is a corporation, partnership, trust or other entity, the undersigned represents that its governing instruments permit this Agreement, that this Agreement has been authorized by all applicable persons and that the undersigned signatory is authorized to bind the undersigned. The undersigned represents that the undersigned shall comply with all applicable laws, rules and regulations in connection with the undersigned's account. The undersigned further represents that no one except the undersigned has an interest in the account or accounts of the undersigned with you.

10. Joint Accounts. If the undersigned shall consist of more than one person, the undersigned's obligations under this Agreement shall be joint and several. References to the "undersigned" shall include each of the undersigned. You may rely on transfer or other instructions from any one of the undersigned in a joint account, and such instructions shall be binding on each of the undersigned. You may deliver securities or other property to, and send confirmations; notices, statements and communications of every kind, to any one of the undersigned, and such action shall be binding on each of the undersigned.

11. Other Agreements. If the undersigned trades on margin or in short accounts, the undersigned agrees to be bound by the terms of your **Customer Margin and Short Account Agreement**. If the undersigned trades any options, the undersigned agrees to be bound by the terms of your **Customer Option Agreement**. The undersigned understands that copies of these agreements are available from you and, to the extent applicable, are incorporated by reference herein. The terms of these other agreements are in addition to the provisions of this Agreement and any other written agreements between you and the undersigned.

12. Data Not Guaranteed. The undersigned expressly agrees that any data or online reports is provided to the undersigned without warranties of any kind, express or implied, including but not limited to, the implied warranties of merchantability, fitness of a particular purpose or non-infringement. The undersigned acknowledges that the information contained in any reports provided by you is obtained from sources believed to be reliable but is not guaranteed as to its accuracy or completeness. Such information could include technical or other inaccuracies, errors or omissions. In no event shall you or any of your affiliates be liable to the undersigned or any third party for the accuracy, timeliness, or completeness of any information made available to the undersigned or for any decision made or taken by the undersigned in reliance upon such information. In no event shall you or your affiliated entities be liable for any special incidental, indirect or consequential damages whatsoever, including, without limitation, those resulting from loss of use, data or profits, whether or not advised of the possibility of damages, and on any theory of liability, arising out of or in connection with the use of any reports provided by you or with the delay or inability to use such reports.

13. Order Flow Disclosure. Depending on the security traded and absent specific direction from the undersigned, stock orders are routed via an electronic system to a listed, NASDAQ or over the counter broker or dealer. You or your correspondents may receive cash payments for routing such orders to specific brokers or dealers. Because these agents are market makers, they carry inventory in their specific securities, allowing for price improvement to the undersigned by trading through their inventories. Accordingly, the undersigned's orders will always be executed at the "best bid" or "best offer", or at a price superior to either, by virtue of the market maker's inventory positioning capabilities.

14. Credit Check. You are authorized, in your discretion, should you for any reason deem it necessary for your protection to request and obtain a consumer credit report for the undersigned.

15. Miscellaneous. If any provision of this Agreement is held to be unenforceable, it shall not affect any other provision of this Agreement. The headings of each section of this Agreement are descriptive only and do not modify or qualify any provision of this Agreement. This Agreement and its enforcement shall be governed by the laws of the state of Texas and shall cover individually and collectively all accounts which the undersigned has previously opened, now has open or may open or reopen with you, or any introducing broker, and any and all previous, current and future transactions in such accounts. Except as provided in this Agreement, no provision of this Agreement may be altered, modified or amended unless in writing signed by your authorized representative. This Agreement and all provisions shall inure to the benefit of you and your successors, whether by merger, consolidation or otherwise, your assigns, the undersigned's introducing broker, and all other persons specified in Paragraph 8. You shall not be liable for losses caused directly or indirectly by any events beyond your reasonable control, including without limitation, government restrictions, exchange or market rulings, suspension of trading or unusually heavy trading in securities, a general change in economic, political or financial conditions, war or strikes. You may transfer the accounts of the undersigned to your successors and assigns. This Agreement shall be binding upon the heirs, executors, administrators, successors and assigns of the undersigned.