

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:

PENSON WORLDWIDE, *et al.*,<sup>1</sup>

Debtors.

Chapter 11

Case No. 13-10061 (LSS)

(Jointly Administered)

PENSON TECHNOLOGIES LLC, (successor in  
interest to SAI HOLDINGS, INC. and PENSON  
FINANCIAL SERVICES, INC.),

Plaintiff,

Adv. Proc. No 16- (LSS)

– against –

SCHONFELD GROUP HOLDINGS LLC,

Defendant.

**COMPLAINT AND OBJECTION TO CLAIM**

Plaintiff Penson Technologies, LLC (“Plaintiff”), as successor in interest to Debtors SAI Holdings, Inc. (“SAI”) and Penson Financial Services, Inc. (“PFSI”), brings this action against Defendant Schonfeld Group Holdings LLC (“Schonfeld”), and alleges as follows:

**SUMMARY OF THE ACTION**

1. This is an action to recover millions of dollars in damages that directly resulted from breaches of contract by Schonfeld. Specifically, the dispute arises from a business transaction for the purchase of certain assets, between SAI, on the one hand, and Schonfeld

<sup>1</sup> The Debtors in these cases, along with the last four digits of each Debtor’s federal tax identification number, are: Penson Worldwide, Inc. (6356); SAI Holdings, Inc. (3657); Penson Financial Services, Inc. (3990); Penson Financial Futures, Inc. (6207); and Penson Futures (6207). The Debtors’ mailing address is 5960 W. Parker Rd. #278-198, Plano, Texas 75093.



Securities, LLC (“Schonfeld Securities”) and Schonfeld on the other. SAI performed all of its obligations under the governing asset purchase agreement, including the payment of over \$90 million dollars to Schonfeld, but defendant Schonfeld failed to perform its obligations, resulting in damages to SAI and PFSI in excess of \$20 million. By this action, Plaintiff seeks to recover these damages and seeks judgment that claim number 15 (the “Schonfeld Claim”) filed by Schonfeld against SAI is disallowed in full, or, alternatively, judgment that Plaintiff is entitled to offset, in their entirety, any amounts owed to Schonfeld on account of the Schonfeld Claim and that Plaintiff is entitled to recover damages in excess of the allowed amount, if any, of the Schonfeld Claim.

### **PARTIES**

2. Plaintiff is a Delaware limited liability company and the successor in interest to SAI and PFSI pursuant to the *Fifth Amended Joint Plan of Liquidation of Penson Worldwide, Inc., and its Affiliated Debtors* [Docket No. 774] (the “Plan”) and the order confirming the Plan [Docket No. 781].

3. Schonfeld is a Delaware limited liability company with its principal place of business in Jericho, New York.

### **JURISDICTION AND VENUE**

4. The Court has jurisdiction over this adversary proceeding pursuant to Rule 7001 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) and 28 U.S.C. §§ 1334(b) and 157(b)(2)(A), (B), (C) and (O), the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated as of February 29, 2012, and Article XVI of the Plan.

5. Venue is proper in this district pursuant to 28 U.S.C. § 1409 because this proceeding arises in a case commenced under chapter 11 of title 11 of the United States Code, 11

U.S.C. §§ 101-1532 (the “Bankruptcy Code”), and such case is presently pending before this Court. This is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2) (A), (B), (C), and (O). Accordingly, the Court may enter a final order or judgment consistent with Article III of the United States Constitution.

6. Plaintiff consents to the entry of final orders or judgment by this Court if it is determined that this Court, absent consent of the parties, cannot enter final orders or judgment consistent with Article III of the United States Constitution.

### **FACTUAL BACKGROUND**

7. In a transaction in November 2006, SAI purchased Schonfeld Securities’ entire clearing and back office operations (the “Transaction”). The Transaction included the purchase of the clearing relationships with seven Schonfeld affiliate entities and afforded PFSI the exclusive right to provide clearing, custody, margin and execution services for these Schonfeld “introducing firms” (also known as “correspondents”).

8. The Transaction was structured as an asset purchase under an Asset Purchase Agreement dated November 20, 2006 (“APA”) between SAI, as buyer, Schonfeld Securities, as seller, and Schonfeld, as parent and manager of Schonfeld Securities. Schonfeld Securities assigned its rights and obligations under the APA to Schonfeld. In addition to the APA, Schonfeld also entered into, among other agreements, an Unconditional Guaranty Agreement dated November 20, 2006.

9. Pursuant to the APA, SAI’s wholly-owned subsidiary, clearing firm PFSI, would obtain the exclusive right to provide clearing services for all seven of the Schonfeld correspondents for a fixed, ten year period of time, pursuant to a set of clearing agreements to be entered into as part of the Transaction.

10. Pursuant to the Unconditional Guaranty Agreement, Schonfeld absolutely, unconditionally and irrevocably guaranteed to PFSI and SAI, among other things, the full and complete performance by each of the Schonfeld correspondents under these clearing agreements.

11. Under the APA, SAI agreed to pay an amount projected to be approximately \$100 million for these assets. Payment was to be made via an initial payment at closing, and then four subsequent annual “earnout” payments, each to be determined based on Schonfeld’s correspondents’ trading activity over the first four years of the deal and the net revenues derived therefrom. Pursuant to this schedule, the purchase price was intended to be fully paid by SAI in February 2012.

12. Meanwhile, insofar as SAI was acquiring exclusive ten year clearing relationships with the Schonfeld correspondents, but SAI would be making payments for those relationships for the first five years of this arrangement, SAI expected to receive the overwhelming benefits of this Transaction in the time period from February 2012 through 2017, and likely beyond.

13. The most valuable of the Schonfeld correspondents being transferred in the Transaction was the Opus Trading Fund LLC (“Opus”) relationship. Opus was a wholly-owned subsidiary of Schonfeld. More than 35% of the purchase price paid by SAI in the Transaction was for the Opus relationship.

14. Like all the other Schonfeld correspondents, Opus signed a clearing agreement with PFSI at or near the time the Transaction closed. That clearing agreement contained an exclusivity provision (Section 11(b)) and was for a 10 year term (Section 12(a)). Towards the end of 2007, on or about December 28, 2007, Opus and PFSI entered into a series of customer agreements including a Portfolio Margining Account Side Agreement (collectively, the “PMA Side Agreement”) which contained similar provisions regarding exclusivity (Section 5) and 10

year term (Section 4). The PMA Side Agreement subsequently was extended for an additional two years in 2010.

15. From the period of time between the Transaction closing in 2006 until early 2012, SAI paid Schonfeld the total sum of approximately \$89.5 million pursuant to the terms of the APA, the payments made as a down payment and subsequent annual earn out payments.

16. PFSI, meanwhile, provided clearing, custody, margin and execution services to the legacy Schonfeld correspondents, including Opus.

17. In late January 2012, shortly before the very last earnout payment was due under the APA, Schonfeld caused Opus, without notice or justification, to terminate the PMA Side Agreement with PFSI.

18. Opus had earlier entered into a contractual relationship with JPMorgan in direct violation of the exclusivity provisions in the PMA Side Agreement.

19. PFSI objected by letter to Opus' purported termination of the PMA Side Agreement, but Schonfeld caused Opus to move its entire clearing, execution, margin and custody relationship to JPMorgan, in direct violation of the PMA Side Agreement.

20. The net effect of that improper termination was that SAI ended up paying Schonfeld approximately \$35 million for a ten year clearing relationship with Opus, but it received *less than half* of its intended and agreed upon term. Because of the improper and premature termination of the exclusive clearing agreement, SAI was able to generate net income of only \$15 million from the Opus relationship.

21. Shortly after Schonfeld caused Opus to breach the PMA Side Agreement, Schonfeld demanded that SAI make another earnout payment purportedly due under the APA. SAI refused to make such payment.

22. Thereafter, on or about February 13, 2013, Schonfeld filed the Schonfeld Claim against SAI, claim number 14 against Penson Worldwide, Inc., and claim number 45 against PFSI (collectively, the “SGH Claims”). Each of the SGH Claims asserts that the applicable debtor against which such claim was filed is liable for \$3,783,932 (inclusive of unpaid principal and interest) on account of the disputed earnout payment purportedly owed to SGH pursuant to the APA.

23. On April 21, 2016, Plaintiff, as successor in interest to PFSI, filed an objection [Docket No. 1344] to claim number 45 filed against PFSI on the grounds that PFSI is not a party to the APA and it therefore had no obligations or liabilities with respect to any earnout payments purportedly owed to SGH. SGH did not file a response in opposition to the claim objection and on May 16, 2016, the Court entered an order [Docket No. 1351] sustaining the claim objection and disallowing in full claim number 45.

24. In or about January 27, 2014, PFSI commenced a FINRA arbitration against Opus seeking to recover from Opus approximately \$2.4 million for unpaid fees (Count 1) and approximately \$21 million in damages for Opus’ unjustified breach of the PMA Side Agreement (Count 2).

25. With respect to Count 1, Opus did not dispute that monies were owing, only the amount in question.

26. With respect to Count 2, one of Opus’ principal defenses was that the suit was brought under the PMA Side Agreement and not under the APA. Opus asserted that because the APA was an agreement between SAI and Schonfeld, PFSI had no standing to sue Opus for the alleged losses – any claim for the breach of contract losses should have been brought by SAI against Schonfeld.

27. Following an evidentiary hearing, held in November and December 2015, the FINRA Panel awarded PFSI approximately \$1.1 million. The FINRA arbitration Panel did not provide an explanation for this award but this amount appears to be for the Count 1 claim.

28. Accordingly, Plaintiff, as successor in interest to SAI and PFSI pursuant to the Plan, brings this action to recover damages from Schonfeld for the losses suffered by SAI as a result of Schonfeld's conduct. Specifically, Plaintiff seeks to recover in excess of \$20 million, representing the difference between what SAI paid Schonfeld for the Opus relationship and what SAI received in return, plus consequential damages, in an amount to be proved at trial.

### **CLAIMS FOR RELIEF**

#### **COUNT I**

##### **(Breach of Contract)**

29. Plaintiff restates and incorporates every allegation set forth in paragraphs 1 through 28 above, as though fully set forth herein.

30. SAI, Schonfeld, and Schonfeld Securities entered into the APA.

31. SAI has performed all conditions precedent and all duties required for it under the terms of the APA.

32. Schonfeld breached the APA by causing its wholly owned subsidiary Opus to breach, inter alia, the exclusivity provisions of and unjustifiably terminate the PMA Side Agreement.

33. As a direct result of Schonfeld's breaches of the APA, SAI suffered damages, including incidental and consequential damages, in an amount to be determined at trial but presently believed to exceed \$20 million, plus consequential damages.

34. Plaintiff, as successor in interest to SAI pursuant to the Plan, is entitled to recover these damages for the benefit of SAI's estates and its creditors.

## **COUNT II**

### **(Breach of Guaranty)**

35. Plaintiff restates and incorporates every allegation set forth in paragraphs 1 through 28 above, as though fully set forth herein.

36. Schonfeld executed the Unconditional Guaranty Agreement.

37. Pursuant to the Unconditional Guaranty Agreement, Schonfeld absolutely, unconditionally and irrevocably guaranteed its subsidiaries' performance under various agreements, including Opus' performance under the PMA Side Agreement.

38. Opus breached the PMA Side Agreement by, among other things, terminating it without cause or justification.

39. To date, Schonfeld has failed to answer for Opus' obligations pursuant to the Unconditional Guaranty.

40. As a direct result of Opus' breach of the PMA Side Agreement and Schonfeld's failure to discharge its obligations under the Unconditional Guaranty, PFSI and SAI have suffered damages in an amount to be determined at trial, but presently believed to exceed \$20 million, plus consequential damages and interest and costs.

41. Plaintiff, as successor in interest to PFSI and SAI pursuant to the Plan, is entitled to recover these damages for the benefit of PFSI and SAI's estates and their creditors.

## **COUNT III**

### **(Breach of Obligation of Good Faith and Fair Dealing)**

42. Plaintiff restates and incorporates every allegation set forth in paragraphs 1 through 28 above, as though fully set forth herein.

43. Schonfeld had an implied obligation of good faith and fair dealing under the APA to ensure that its wholly owned subsidiary Opus discharge the obligations contained in the PMA Side Agreement and ensure that Opus did not breach the PMA Side Agreement.

44. Schonfeld breached this obligation by causing Opus to breach the PMA Side Agreement without cause or justification, thereby depriving SAI of a major part of the benefits of the APA.

45. As a direct result of Schonfeld's breaches, SAI suffered damages, including incidental and consequential damages, in an amount to be determined at trial but presently believed to exceed \$20 million.

46. Plaintiff, as successor in interest to SAI pursuant to the Plan, is entitled to recover these damages for the benefit of SAI's estates and its creditors.

**COUNT IV**  
**(Objection to Schonfeld Claim)**

47. Plaintiff restates and incorporates every allegation set forth in paragraphs 1 through 28 above, as though fully set forth herein.

48. SAI, Schonfeld, and Schonfeld Securities entered into the APA.

49. The Schonfeld Claim represents amounts relating to a disputed earnout payment that SAI allegedly owes to Schonfeld pursuant to the APA.

50. SAI has performed all conditions precedent and all duties required for it under the terms of the APA.

51. Schonfeld materially breached the APA by causing its wholly owned subsidiary Opus to breach, inter alia, the exclusivity provisions of and unjustifiably terminate the PMA Side Agreement.

52. To the extent that any earnout payment amounts may otherwise be owed to Schonfeld, pursuant to applicable New York state law, SAI's obligation to make such payment has been excused as a result of Schonfeld's material breach of the APA.

53. Plaintiff hereby objects to the Schonfeld Claim pursuant to section 502 of the Bankruptcy Code on the grounds that such claim should be disallowed in full on account of Schonfeld's material breach of the APA.

54. Plaintiff is entitled to judgment that the Schonfeld Claim is deemed disallowed in full.

55. Alternatively, to the extent that it is later determined at trial that amounts are owed by SAI to Schonfeld on account of the Schonfeld Claim, Plaintiff objects to the Schonfeld Claim pursuant to section 502 of the Bankruptcy Code on the grounds that the Schonfeld Claim should be deemed satisfied in full on account of the offset of the damages suffered by SAI due to Schonfeld's material breaches of the APA against the allowed amount of the Schonfeld Claim. In that event, Plaintiff is entitled to judgment that the Schonfeld Claim is deemed satisfied in full as a result of such offset.

## COUNT V

### **(Declaratory Judgment Regarding Plaintiff's Right to Setoff)**

56. Plaintiff restates and incorporates every allegation set forth in paragraphs 1 through 28 above, as though fully set forth herein.

57. SAI, Schonfeld, and Schonfeld Securities entered into the APA.

58. The Schonfeld Claim represents amounts relating to a disputed earnout payment that SAI allegedly owes to Schonfeld pursuant to the APA.

59. To the extent that it is later determined at trial that amounts are owed by SAI to Schonfeld on account of the Schonfeld Claim, pursuant to section 558 of the Bankruptcy Code,

and applicable New York state law, Plaintiff is entitled to offset the damages SAI suffered as result of Schonfeld's material breaches of the APA against SAI's liability on account of the Schonfeld Claim.

60. To the extent that SAI is found liable on account of the Schonfeld Claim, an actual controversy exists between the parties concerning Plaintiff's right to apply the damages incurred by SAI as a result of Schonfeld's material breaches of the APA to offset, in their entirety, any amounts owed to Schonfeld on account of the Schonfeld Claim.

61. There exists a substantial controversy between Plaintiff and Schonfeld of sufficient immediacy and reality to warrant the issuance of a declaratory judgment under 28 U.S.C. § 2201. A prompt judicial determination of the respective rights and duties of the parties in these respects is necessary and appropriate.

WHEREFORE, Plaintiff prays this Court enter judgment in its favor and judgment against Schonfeld as follows:

- a. For compensatory damages in an amount to be determined at the time of trial but not less than \$20 million including interest and costs;
- b. For consequential damages in an amount to be determined at trial;
- c. For a judgment that the Schonfeld Claim is disallowed in full due to Schonfeld's material breaches of the APA or, alternatively, judgment declaring that the Schonfeld Claim has been satisfied in full due to the offset of damages incurred by SAI against the allowed amount of the Schonfeld Claim;
- d. To the extent necessary, for a declaratory judgment that Plaintiff is entitled to offset the damages incurred by SAI as a result of Schonfeld's material breaches of the APA against the amount owed to Schonfeld on account of the Schonfeld Claim;
- e. An award of attorneys' fees and punitive damages in an amount to be determined by the Court; and
- f. For such other and further relief as the Court may deem reasonable, just and proper, in its discretion.

Dated: November 16, 2016  
Wilmington, Delaware

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Michael S. Neiburg

Pauline K. Morgan (No. 3650)

Kenneth J. Enos (No. 4544)

Ryan M. Bartley (No. 4985)

Michael S. Neiburg (No. 5275)

Ashley E. Jacobs (No. 5635)

Rodney Square

1000 North King Street

Wilmington, Delaware 19801

Telephone: (302) 571-6600

Facsimile: (302) 571-1253

-and-

MAYER BROWN LLP

Mark G. Hanchet

Christopher J. Houpt

1221 Avenue of the Americas

New York, New York 10020

Telephone: (212) 506-2500

Facsimile: (212) 262-1910

*Counsel to Plaintiff*