Docket #0058 Date Filed: 11/14/2018

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: PENSON WORLDWIDE, *et al.*,[1] 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, -against- SCHONFELD GROUP HOLDINGS LLC, Defendant.	Adv. Pro. No. 16-51522 (LSS)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT SCHONFELD GROUP HOLDINGS LLC'S MOTION FOR SUMMARY JUDGMENT

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[1] The Debtors in these jointly administered 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.

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Schonfeld Group Holdings LLC ("**Schonfeld**"), through its undersigned counsel, respectfully submits this reply memorandum of law in further support of its Motion for Summary Judgment (the "**Summary Judgment Motion**") seeking dismissal of all claims asserted by Penson Technologies LLC ("**Penson**"), as successor in interest to SAI Holdings Inc. ("**SAI**") and Penson Financial Services, Inc. ("**PFSI**").

PRELIMINARY STATEMENT[2]

Penson attempts to defeat the Summary Judgment Motion by claiming Schonfeld is confusing the parties and contracts at issue in this case with those at issue in the FINRA Arbitration. According to Penson, while "the FINRA Arbitration involved a dispute between PFSI and Opus; this action . . . is a dispute between SAI and Schonfeld." (Opposition Br., pp. 1-2.) Penson also argues that there are material issues of fact as to whether Schonfeld breached the APA and the Guaranty and whether those breaches, if any, have been remedied. Penson is wrong. As explained below, Schonfeld understands quite well the parties, contracts, and claims at issue here, and the inevitable conclusion is that Penson's claims under the APA and the Guaranty fail as a matter of law.

As an initial matter, although Penson's Complaint was brought on behalf of SAI and PFSI, Penson now clarifies that this action concerns SAI alone. (Opposition Br., pp. 2, 6 ("this action . . . is a dispute between SAI and Schonfeld . . . .")). Presumably Penson has modified the posture of its Complaint in an attempt to avoid *res judicata* and collateral estoppel effect of the FINRA Arbitration. This change, however, does not alter Schonfeld's entitlement to summary judgment. Schonfeld, therefore, accepts this change and the analysis below treats SAI as the sole plaintiff in this case.

[2] Capitalized terms used but not defined herein have the meanings ascribed to them in Schonfeld's moving brief.

With respect to SAI's Complaint, the First Count alleges 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." (Complaint, p. 32.) SAI's opposition brief concedes, however, that the "APA does not expressly require Schonfeld to ensure Opus' performance . . . ." (Opposition, p. 2.) SAI's concession is fatal to its First Count. There can be no breach of a contract term when, as SAI admits, no such contract term actually exists.

SAI's Second Count alleges Schonfeld breached the Guaranty by failing to answer for "Opus' obligations." (Complaint, p. 39.) That claim fails for two reasons. First, Schonfeld's guaranty of Opus' performance of the obligations in question was made to PFSI, not SAI. (A2.) Second, Opus' performance under the PMA was fully addressed and resolved in the FINRA Arbitration, resulting in an Award in PFSI's favor. Because Opus paid that Award in full, Schonfeld has no further obligations as Opus' guarantor.

SAI's Third Count seeks to use the implied covenant of good faith and fair dealing to inject a new term into the APA—one that obligates Schonfeld to guarantee Opus' performance under the PMA to SAI. New York law,[3] however, precludes the use of the implied covenant to rewrite an agreement's express terms. Moreover, even if such a term could be implied, the claim nevertheless would fail because Opus' obligations under the PMA were fully adjudicated and satisfied in the FINRA Arbitration.

SAI's Fourth and Fifth Counts, respectively, object to Schonfeld's Claim seeking its earnout payment under the APA and assert an alleged right to setoff. Those claims, however, are predicated on finding Schonfeld liable on any of the Complaint's first Three Counts. Because

[3] New York law applies to SAI's claims. See **Exhibit B**, APA, § 11.04 (A63), **Exhibit A**, Guaranty Agreement, § 8 (A5).

SAI's first Three Counts utterly fail as a matter of law, Schonfeld also is entitled to summary judgment on SAI's Fourth and Fifth Counts.

REPLY ARGUMENT

I. SAI CONCEDES THAT SCHONFELD DID NOT BREACH ANY EXPRESS PROVISION OF THE APA, WHICH IS FATAL TO SAI'S FIRST COUNT.

SAI's First Count alleges "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." (A1122). The APA, however, contains **no** term obligating Schonfeld to ensure Opus' performance under the APA. In fact, SAI's opposition concedes that "the APA does not expressly require Schonfeld to ensure Opus' performance . . . ." (Opposition Br., pp. 2, 6.) That concession is fatal to SAI's First Count, which fails as a matter of law. See In re Adelphia Commc'ns Corp., 2007 WL 2403553 (Bankr. S.D.N.Y. Aug. 17, 2007) (breach of contract claim failed because the plaintiff failed to identify "any terms of contracts that the [defendants] are alleged to have breached"); Caniglia v. Chi. Tribune-New York News Syndicate, Inc., 204 A.D.2d 233, 234 (N.Y. App. Div. 1994) (affirming dismissal of "a cause of action for breach of contract, as too indefinite, and therefore, unenforceable, for plaintiffs' failure to allege, in nonconclusory language, as required, the essential terms of the parties' purported personal services contract, **including those specific provisions of the contract upon which liability is predicated** . . . .") (emphasis added).

II. SAI'S SECOND COUNT, FOR BREACH OF THE GUARANTY, FAILS BECAUSE THE GUARANTEED OBLIGATIONS HAVE BEEN SATISFIED IN FULL.

A. Schonfeld Guaranteed Opus' Performance Under The PMA To PFSI, Not SAI.

SAI's Second Count alleges that Schonfeld breached its obligations under the Guaranty by not paying SAI for Opus' breach of the PMA. That claim fails for two reasons. First,

Schonfeld's guaranty of Opus' performance was made to PFSI, not SAI. Second, Opus' performance under the PMA was fully and finally adjudicated in the Arbitration and the resulting award was paid in full. Accordingly, the Second Count fails as a matter of law.

Although Schonfeld only guaranteed Opus' performance under the Clearing Agreements (including, for purposes of this motion, the PMA) to PFSI, (A2), SAI tries to salvage its claim by materially misquoting the terms of the Guaranty. Specifically, in its opposition brief, SAI quotes the Guaranteed Obligations, as defined in the recitals to the Guaranty (A2), but incredibly replaces a reference to PFSI with a bracketed reference to "[SAI]," thereby manufacturing a Guaranteed Obligation to SAI that does not exist. SAI claims:

> The Guaranty provided that Schonfeld "absolutely, unconditionally and irrevocably guarantees . . . to ***[SAI]*** . . . the full and complete performance by the Introducing Brokers[, including Opus,] of the obligations of the Introducing Brokers set forth in Sections 1(e), 11(b), [and] 17 . . . of the Clearing Agreements.

(Opposition Br., p. 12 (emphasis added).)[4]

Contrary to SAI's misrepresentation, Schonfeld's guaranty of Opus' performance under the Clearing Agreements, in this case the PMA, actually was made to PFSI only. (A2.) Specifically, and without modification, the Guaranty provides:

> Guarantor hereby absolutely, unconditionally and irrevocably guarantees (i) **to PFSI,** the full and complete payment and performance of the obligations of each of Tools and Schon-EX under the Services Agreement and the Execution Agreement, and the full and complete performance by the Introducing Brokers set forth in Section 1(e), 11(b), 17 and 20(d) of the Clearing Agreements; and (ii) **to SAI**, the full and complete payment and performance of the obligations of SSLLC under the Asset Purchase Agreement . . . .

[4] SAI did not, for example, replace a reference to the collective definition "Penson" with a reference to SAI out of convenience or to make the provision easier for the Court to read; instead, SAI changed a reference to PFSI to a reference to SAI. That blatant alteration of the substance of the Guaranty clearly was done in an attempt to fabricate a breach of contract claim where none exists.

((A2) (emphasis added).)

Needless to say, Schonfeld's Guaranty of Opus' obligations – the subject of SAI's Complaint – was not made to SAI.[5] As previously mentioned, SAI has now clarified (in an attempt to escape the *res judicata* and collateral estoppel effect of the Arbitration) that this case was brought by SAI, not PFSI. (See Opposition Br., pp. 2, 6.) For this reason alone, the Breach of Guaranty claim fails as a matter of law because the claim was not brought by the guaranteed party. See LaBarte v. Seneca Resources Corp., 728 N.Y.S.2d 618, 620 (N.Y. App. Div. 2001) ("Plaintiffs may not maintain a cause of action for breach of contract against those parties with whom they were not in privity"); CDJ Builders Corp. v. Hudson Grp. Const. Corp., 889 N.Y.S.2d 64, 65 (N.Y. App. Div. 2009) ("[l]iability for breach of contract does not lie absent proof of a contractual relationship or privity between the parties").

B. Opus' Obligations Under The PMA Were Fully Satisfied.

Regardless of whether SAI or PFSI is the party seeking to recover from Schonfeld, the Breach of Guaranty claim nevertheless fails because the Guaranteed Obligation—Opus' performance under the PMA—was fully satisfied by Opus. As to this point, SAI concedes that if a Guaranteed Obligation is fully satisfied, the guarantor is absolved of liability. (Opposition Br., pp. 25-26 (quoting PAF-PAR LLC v. Silverberg, 118 A.D.3d 446 (N.Y. App. Div. 2014) and Chi. Title Ins. Co. v. Mazula, 38 A.D.3d 1114, 1115 (N.Y. App. Div. 2007)). SAI argues, however, that this case cannot be resolved as a matter of law because "there is a dispute as to

[5] Pursuant to the APA, SAI acquired certain assets and operations of Schonfeld Securities, LLC ("SSLLC"), another Schonfeld affiliate. SSLLC made several representations and warranties to SAI in connection with that transaction. SSLLC further agreed to indemnify SAI if, for example, any of those representations and warranties proved inaccurate. Separate and apart from Schonfeld's guaranty of Opus' performance to PFSI, Schonfeld guaranteed SSLLC's obligations under the APA to SAI. Schonfeld's guaranty to SAI of those obligations owed by SSLLC, however, is not the subject of SAI's Complaint and has nothing to do with Opus' performance under the PMA (or its predecessor Clearing Agreement).

whether the FINRA panel actually concluded that Opus was liable for the damages sought . . . ." (Opposition Br., p. 25 (emphasis removed).) The undisputed factual record, however, belies SAI's argument.

First, SAI's fixation on the damages analysis is misplaced. The critical inquiry is not ***why*** the FINRA Panel decided the Early Termination Claim the way it did (e.g., lack of damages, lack of causation, etc.), but rather ***whether*** the claim was reached and decided. If the claim was adjudicated, Opus' obligation has been fixed and so too has any alleged liability of Schonfeld as a guarantor. A review of the Award eliminates any doubt that the FINRA Panel reached and decided the Early Termination Claim.

The Award notes that "Claimant asserted the following causes of action: breach of contract for failure to pay, and breach of contract of exclusivity [the Early Termination Claim]." (A1108.) The Award further notes that "At the conclusion of Claimant's Case in Chief Respondent requested dismissal of the Statement of Claim. After due deliberation the Panel denied the Motion on the grounds that the Claimant had established a prima facie case." (A1109.) Thus, contrary to SAI's speculative arguments that (i) the FINRA panel *may* have decided SAI lacked standing with respect to the Early Termination Claim and (ii) the Award was not sufficiently specific to allow this Court to determine whether or not the Early Termination Claim was adjudicated (Opposition Br., p. 22-24), the FINRA panel clearly reached and adjudicated both the Failure to Pay Claim and the Early Termination Claim.

After denying Respondent's motion to dismiss the Statement of Claim and finding that "Claimant had established a prima facie case," the FINRA Panel set forth in its Award its adjudication of all issues before it as follows:

> After considering the pleadings, the testimony and evidence presented at the hearing, the **Panel has decided in full and final resolution of the issues submitted for determination** as follows:
>
> 1. Respondent is liable for and shall pay to Claimant compensatory damages in the sum of $1,018,300.06 plus accrued interest of $101,830.00 calculated at the rate of 2.5% from January 31, 2012 to January 31, 2016.
>
> 2. **Any and all relief not specifically addressed herein, including attorneys' fees is denied.**

(A1109 (emphasis added).)

SAI correctly notes that the FINRA panel did not specifically allocate the Award to either (or both) of the two claims submitted for determination. That fact, however, is irrelevant to the issues before this Court because the FINRA panel expressly held that any and all relief not specifically addressed in the Award was denied. (Id.) Regardless of whether or not any portion of the monetary award the panel imposed was attributable to the Early Termination Claim, the clear and unambiguous language of the Award eliminates any doubt as to whether the FINRA panel adjudicated the Early Termination Claim. After the Award was issued, it was paid in full such that all of Opus' obligations (as well as Schonfeld's guaranty of those obligations to PFSI) were satisfied in full. (A1134-A1135.)

C. There Is No Legal Basis For Reading New Terms Into The Guaranty.

As set forth above, SAI concedes that the APA does not contain a guaranty of Opus' performance. (Opposition Br., pp. 2, 6.) Moreover, although the Guaranty does contain a guaranty of Opus' performance under the PMA, it was made to PFSI, not to SAI. (A2.) To try and avoid those inconvenient facts, SAI nevertheless urges that because the APA and Guaranty were executed contemporaneously, the Guaranty of Opus' performance under the PMA should be interpreted as a guaranty of all the provisions of the APA such that SAI can recover from

Schonfeld for Opus' alleged breach. (Opposition, Section III(B)). That nonsensical argument should be rejected.

As SAI notes, the Guaranty, the APA, and the other documents executed contemporaneously therewith "embody the entire agreement between the Companies and Guarantor with respect to the guaranty by Guarantor of the Guaranteed Obligations." Guaranty, at Section 14 (A6). See also APA, at Section 11.06 (A64). That said, the fact that the Guaranty and APA are integrated with one another does not mean that the express terms of those agreements can be disregarded or that the parties are entitled to additional rights, not expressly set forth in either agreement, by virtue of that integration. Indeed, it is well-settled that "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." Schron v. Troutman Sanders LLP, 20 N.Y.3d 430, 436 (N.Y. 2013). As a result, this Court must look to the terms of the APA and Guaranty to determine if any ambiguity exists. If no ambiguity exists, the express contractual terms must be enforced as written.

The Guaranty contains express "Guaranteed Obligations," some of which are made to SAI and some of which are made to PFSI. (A2-A3.) The fact that the Guaranty is fully integrated with the APA does not enlarge the nature or extent of the obligations the Guaranty imposes. Moreover, the APA does not contain any provision that would allow SAI to circumvent the express terms of the Guaranty. Rather, the reference to the APA allows the Court to consider that agreement in *interpreting* the Guaranty. If Schonfeld and SAI, two "sophisticated business entities, represented by counsel," intended to include a broader guaranty, "they easily could have included a provision to that effect." Schron, 20 N.Y.3d at 436. They did not. The APA must, accordingly, be enforced as written.

The cases SAI cites do not alter this result. For example, in Commander Oil Corp. v. Advance Food Serv. Equip., 991 F.2d 49, 52 (2d Cir. 1993), the Second Circuit found that extrinsic evidence of the parties' intent was necessary because the contractual language at issue was ambiguous. The court noted that the ambiguity existed whether the contract was read alone or in conjunction with another contemporaneously executed agreement. The other authorities upon which SAI relies are also inapposite. See BWA Corp. v. Alltrans Exp. U.S.A., Inc., 112 A.D.2d 850, 852 (N.Y. App. Div. 1985) (holding that instruments executed simultaneously must be read together, but not altering the general rule that the express terms of those agreements must be enforced); This Is Me, Inc. v. Taylor, 157 F.3d 139, 145 (2d Cir. 1998) (finding that reading contracts together created an ambiguity that could not be resolved on summary judgment).

Unlike in Commander Oil, BWA, and Taylor, the Guaranty and APA, whether read separately or together, are not ambiguous. Rather, the express obligations set forth in the Guaranty are beyond dispute. Stated simply, there is nothing in the Guaranty that provides SAI any right to recover from Schonfeld based on an obligation of Opus under the PMA. Because the express terms of the Guaranty are unambiguous and must be enforced as written, SAI's Second Count fails as a matter of law.

III. SAI'S THIRD COUNT FAILS BECAUSE IT IMPERMISSIBLY SEEKS TO ADD AN EXPRESS PROVISION TO THE APA.

SAI's Third Count alleges that "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." (A1124 ¶ 43). As set forth in Schonfeld's initial moving papers, this claim impermissibly seeks to add a new substantive term to the APA and, therefore, fails as a matter of law. (Moving Brief, p. 25.)

More specifically, SAI argues that if Schonfeld acted in bad faith by causing Opus to breach the PMA, then SAI would have a cause of action under the APA for breach of the implied covenant of good faith and fair dealing. That argument finds no support in the law. As set forth by New York's highest court in Dalton v. Educ. Testing Serv., 87 N.Y.2d 384, 392 (N.Y. 1995) (cited by SAI), the implied covenant includes a promise not to act in bad faith *when a contract contemplates an exercise of discretion*. Although an implied covenant need not be tied to a specific contractual term, "the parties' contractual rights and liabilities may not be varied, nor their terms eviscerated," by the implied covenant. Nat'l Westminster Bank, U.S.A. v. Ross, 130 B.R. 656, 680 (S.D.N.Y. 1991) (citation omitted). In that regard, if a party fails to state a viable claim for breach of an express contractual term, it "may not manufacture a breach through invoking the duty of good faith and fair dealing." Wurtsbaugh v. Banc of Am. Sec. LLC, 2006 WL 1683416, at *6 (S.D.N.Y. June 20, 2006).

Here, Schonfeld, SAI, and PFSI mutually and expressly contracted for a remedy if Opus was found to have breached the PMA. Specifically, in the Guaranty (which was signed by Schonfeld, SAI, and PFSI), Schonfeld agreed that it would guarantee Opus' performance as an Introducing Broker under the PMA to PFSI. (A2.) The APA expressly incorporates the Guaranty and, as SAI argues, the two contracts must be read together. (Opposition Br., pp. 31-35.) Thus, the implied covenant cannot be used to "transform an obligation" that already exists in the agreement—i.e., Schonfeld's promise to guarantee to PFSI certain of Opus' obligations—into a completely different affirmative obligation—i.e., an agreement to guarantee to a different contract party other obligations not enumerated in or otherwise contemplated by the Guaranty. Broder v. Cablevision Sys. Corp., 418 F.3d 187, 198–99 (2d Cir. 2005) (holding that the implied covenant can only be invoked in manner consistent with the agreed upon contractual terms; it

cannot be used to "add to the contract a substantive provision not included by the parties") (citations omitted).[6]

Here, it is unnecessary to resort to the implied covenant for the parties to receive the agreed-upon benefits under the APA and the Guaranty. To the contrary, the parties expressly contracted for specific remedies against Schonfeld if Opus breached the PMA. As a result, SAI's claim for breach of the implied covenant of good faith and fair dealing fails as a matter of law.

Lastly, although SAI did not plead willful misconduct in its Complaint, it now attempts to bootstrap its implied covenant claim to alleged willful misconduct by Schonfeld in order to overcome the exclusive remedy provision of the APA. (A61). This argument is of no moment, however, because, as set forth herein, SAI has no claim for breach of the implied covenant itself.

IV. *RES JUDICATA* AND COLLATERAL ESTOPPEL PRECLUDE SAI AND PFSI FROM RE-LITIGATING MATTERS DECIDED IN THE FINRA ARBITRATION.

SAI argues that *res judicata* does not apply to this case because it involves different parties and different contracts than those at issue in the FINRA Arbitration. Those distinctions, however, are not dispositive with respect to the application of *res judicata.* To the contrary, "[r]es judicata applies to the parties involved in litigation and those with whom they were in privity . . . , and it applies to arbitration awards . . . ." Spasiano v. Provident Mut. Life Ins. Co., 2 A.D.3d 1466, 1467 (N.Y. App. Div. 2003) (internal marks omitted). Furthermore, the facts at issue need not be identical for *res judicata* to apply. Rather, the subsequent litigation need only

[6] The case law upon which SAI relies is in accord with this principle but otherwise is irrelevant to the facts at issue here. See Dorset Indus., Inc. v. Unified Grocers, Inc., 893 F. Supp. 2d 395, 406 (E.D.N.Y. 2012) ("it is well-settled that the covenant can only impose an obligation consistent with other mutually agreed upon terms in the contract"); Wakefield v. N. Telecom, Inc., 769 F.2d 109, 112 (2d Cir. 1985) (addressing whether an implied covenant precludes termination of at will employee to avoid payment of commissions).

be "premised on the same series of transactions passed upon by the [arbitration panel]" for the doctrine to apply. Id.

PFSI (through its successor Penson) commenced the Arbitration against Opus. It cannot be legitimately disputed that SAI (also acting through Penson) is in privity with PFSI. Both entities act through the same successor entity and are represented by the same counsel. SAI's attempt to avoid the unfavorable result PFSI obtained in the FINRA Arbitration by playing a corporate shell game should not be countenanced. Moreover, notwithstanding SAI's misrepresentation of the Guaranty's terms, the relevant portions of that agreement are between PFSI and Schonfeld. Even under SAI's flawed recitation of the law, PFSI, as claimant in the arbitration, is unquestionably barred from re-litigating its claims predicated on Opus' performance under the PMA.[7]

Moreover, collateral estoppel also bars SAI's attempt to re-litigate the issues that were finally resolved in the FINRA Arbitration. Indeed, SAI does not dispute that collateral estoppel would bar SAI from re-litigating issues resolved in the FINRA Arbitration in this case. Instead, SAI argues that collateral estoppel does not apply because the Award is not "unambiguous as to the issues raised and addressed." (Opp. Br., p. 2.) As set forth above, however, the FINRA panel unquestionably reached and decided both of PFSI's claims, issued a monetary award, and

[7] SAI argues that *res judicata* cannot bar its claims because jurisdictional limitations precluded SAI from participating in the arbitration. That is not the standard for determining whether privity exists in the context of a claim of *res judicata*. Indeed, it is well-settled that *res judicata* can apply to an entity's affiliate notwithstanding that that entity did not participate in the arbitration. Spasiano, 2 A.D.3d at 1467. The cases SAI cites are not relevant to this issue. See, e.g., In re XO Commc'ns, Inc., 330 B.R. 394, 449 (Bankr. S.D.N.Y. 2005) (finding that a state court lacked subject matter jurisdiction over federal securities claims such that its resolution of related claims could not bar litigation of the federal claim in federal court). None of the cases cited by SAI stands for the proposition that a parent company can take a second bite at the apple after its subsidiary obtains an unfavorable result on the merits of a claim.

denied any and all other relief sought.[8] (A1108-A1109.) The FINRA panel clearly considered and resolved all issues with respect to the Early Termination Claim.

The Award is markedly different from those in the cases relied upon by SAI. SAI first cites In re Klein, Maus & Shire, Inc., 301 B.R. 408, 415 (Bankr. S.D.N.Y. 2003), for the proposition that if an arbitration panel does not specify the basis for its award, then the award will have no collateral estoppel effect. SAI neglects to disclose to the Court, however, that the award in that case was obtained by default—the respondent did not appear in the case. The complaint before the arbitrator in that case also contained multiple causes of action that all sought the same relief. Because the arbitration award was silent as to what issues were actually considered and decided, it was impossible to determine which claims had actually been resolved. Here, however, the FINRA Panel made clear it was considering and ruling upon both claims submitted to it. (A1108-A1109.)

Moreover, although the court in In re Hartmann found no collateral estoppel effect could be gleaned from an arbitration award similar to the Award here, the facts of that case distinguish it from the facts before this Court. 2011 WL 2118870 (Bankr. D. Colo. May 25, 2011). In Hartmann, the plaintiff (Frederick) alleged that she was defrauded by Hartmann into making certain investments. Frederick brought a FINRA arbitration against Hartmann alleging, among other things, breach of fiduciary duty, fraud, violations of securities laws, and negligent supervision. Plaintiff was awarded $240,000 in the arbitration, which was not satisfied.

Hartmann subsequently filed for bankruptcy and sought to discharge Frederick's $240,000 claim. Frederick filed a complaint objecting to Hartmann's discharge, alleging that her

[8] Although SAI argues that Schonfeld places too much weight on the FINRA panel's denial of Opus' motion to dismiss, Schonfeld's argument, as set forth herein and in its moving brief, is that the Award itself demonstrates that the FINRA panel considered and resolved both claims.

claims were based on Hartmann's fraud and therefore were non-dischargeable. Hartmann moved to dismiss, arguing that the FINRA award resolved the fraud issue in his favor such that collateral estoppel barred the new complaint. The court rejected that argument, finding that even though the FINRA panel recited the claims it was considering and noted that claims not specifically awarded were denied, it was impossible to determine whether the FINRA panel had or had not found fraud by Hartmann. 2011 WL 2118870, at *2-3.

In contrast, the critical inquiry in this case is not whether the FINRA Panel made a specific factual or legal determination like a finding of fraud, but rather whether the Early Termination Claim was reached and resolved at all. The record of the FINRA arbitration makes clear that it was. In contrast to the Hartmann case in which the plaintiff sought relief based on alternatively pled causes of action, PFSI prosecuted two distinct claims in the FINRA Arbitration. As set forth in the Award, both of PFSI's claims were considered by the FINRA Panel, which entered a monetary award and denied all other relief. In the end, regardless of whether (i) the entire Award was attributable to the Early Termination Claim, (ii) the entire Award was attributable to the Failure to Pay Claim, or (iii) the Award was attributable, in part, to both claims, either Opus was found liable for breach of the PMA or the Panel found no breach. Under any scenario, Opus' liability under the PMA was fully adjudicated and, to the extent Opus was found liable, fully satisfied. Thus, the predicate issue underlying the instant litigation—whether Opus breached the PMA—has been fully and finally resolved. Accordingly, the FINRA Award is dispositive of SAI's claims in this case, which fail as a matter of law.

CONCLUSION

For all the foregoing reasons and based on the facts and authorities cited herein, as well as in Schonfeld's initial moving papers, the Court should grant summary judgment in favor of

Schonfeld and against SAI, dismissing the Complaint and each count asserted therein with prejudice and granting such other or further relief as it deems just and proper.

Dated: November 14, 2018
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FOR THE DISTRICT OF DELAWARE

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CERTIFICATE OF SERVICE

I, Nicholas J. Brannick, hereby certify that on November 14, 2018, I caused a copy of the **Reply Memorandum of Law in Further Support of Defendant Schonfeld Group Holdings LLC's Motion for Summary Judgment** to be served via electronic mail, by consent, upon the parties listed below:

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