Docket #0050 Date Filed: 7/31/2018

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)

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

Nicholas J. Brannick, Esq. (No. 5721)
Cole Schotz P.C.
500 Delaware Avenue, Suite 1410
Wilmington, DE 19801
Tel: (302) 652-3131

Warren A. Usatine, Esq.
Wendy F. Klein, Esq.
Cole Schotz P.C.
25 Main Street
Hackensack, NJ 07601
Tel: (201) 489-3000
Counsel to Defendant,
Schonfeld Group Holdings LLC

[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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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

STATUTES

Schonfeld Group Holdings LLC ("Schonfeld"), through its undersigned counsel, respectfully submits this brief in support of its contemporaneously-filed Motion for Summary Judgment (the "**Motion for Summary Judgment**").

STATEMENT OF THE NATURE AND STAGE OF THE PROCEEDING

I. INTRODUCTION

Penson Technologies LLC ("**Penson**") improperly asserts claims against defendant Schonfeld stemming from an alleged breach of contract by Schonfeld's subsidiary, Opus Trading Fund LLC ("**Opus**"). It is undisputed, however, that Opus' liability for that alleged breach was fully and finally adjudicated and then satisfied in full. As a result, to the extent Schonfeld had any obligation to answer for Opus' breach, that obligation has been fully discharged. Moreover, the doctrines of *res judicata* and collateral estoppel serve as an absolute bar to Penson's attempt to re-litigate this matter. Thus, on multiple bases, Penson's claims fail as a matter of law and Schonfeld is entitled to summary judgment.

The undisputed facts demonstrate that, in 2014, Penson commenced a binding arbitration before the Financial Industry Regulatory Authority (the "**FINRA Arbitration**") against Opus, alleging that Opus had breached a December 28, 2007 Portfolio Margining Account Side Agreement (the "**PMA**"). Penson alleged, among other things, that it was entitled to $20 million in damages as a result of Opus' premature termination of the PMA. After a full hearing on the merits of Penson's claims, a three-member arbitration panel entered an award (the "**Award**") in "full and final resolution of the issues submitted for determination" and adjudicated Opus "liable" for compensatory damages in the "sum of $1,018,300.06 plus accrued interest of $101,830.00 . . . ." That Award, which subsequently was confirmed as a judgment, was paid in full.

Apparently dissatisfied with the Award in the FINRA Arbitration, Penson commenced this adversary proceeding, seeking the same $20 million in damages based on the same claim adjudicated in the course of the FINRA Arbitration, *i.e.*, Opus' alleged breach of the PMA due to its early termination of that agreement. The only difference between this action and the FINRA Arbitration is that Penson now sues Schonfeld rather than Opus, seeking to hold Schonfeld accountable for Opus' alleged breach. Specifically, Penson first alleges that Schonfeld breached a separate contract, a November 20, 2006 Asset Purchase Agreement (as amended, the "**APA**"), by causing Opus' breach of the PMA. Second, Penson alleges that Schonfeld breached a second contract, an Unconditional Guaranty Agreement (the "**Guaranty**"), by failing to answer for Opus' alleged breach of the PMA.

The undisputed facts demonstrate that Penson's claims cannot be maintained. First, the APA does not obligate Schonfeld to guarantee Opus' performance under the PMA. That fact alone is fatal to Penson's claims arising from any alleged breach of the APA (Counts One, Three, Four, and Five).

Second, although the Guaranty obligates Schonfeld to indemnify Penson for Opus' obligations under the PMA, Opus' liability under the PMA was finally adjudicated and satisfied in full in the FINRA Arbitration. Thus, Schonfeld has no responsibility as guarantor for Opus' conduct. These undisputed facts unequivocally establish Opus' right to summary judgment as to Count Two.

In addition, the doctrines of *res judicata* and collateral estoppel serve as an absolute bar to Penson's Complaint. Each of the five counts is nothing more than an attempt by Penson to re-litigate claims and issues that were heard in the FINRA Arbitration and finally resolved by the Award. Penson already had a full and fair opportunity to litigate the claims and issues set forth

in the Complaint. Thus, separate and apart from the substantive failings of Penson's claims, the doctrines of *res judicata* and collateral estoppel compel entry of summary judgment dismissing Penson's Complaint in its entirety.

II. PENSON'S BANKRUPTCY CASE

On January 11, 2013, SAI Holdings, Inc. ("**SAI**"), Penson Financial Services, Inc. ("**PFSI**," and, together with SAI and Penson, collectively "**Penson**"), and eight other related entities (collectively, the "**Debtors**"), filed voluntary petitions for relief in this Court under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq*. On January 15, 2013, this Court entered an Order directing the joint administration of the Debtors' chapter 11 cases for procedural purposes only and designating Case No. 13-10061 as the lead case. (D.I. 30).

On February 13, 2013, Schonfeld filed a proof of claim [Claim No. 15] (the "**Proof of Claim**") against SAI, asserting that $3,783,932 of the purchase price under the APA, dated November 20, 2006, by and between SAI (a Penson affiliate), as buyer, and Schonfeld, as assignee to Schonfeld Securities LLC, as seller, remained due and owing from SAI to Schonfeld. See **Exhibit J**, Proof of Claim (A168-A182).[2]

On July 31, 2013, the Court entered an order (D.I. 781) confirming the Fifth Amended Joint Liquidation Plan of Penson Worldwide, Inc. and its Affiliated Debtors (D.I. 781) (the "Plan"). The effective date of the Plan was August 15, 2013 (the "**Effective Date**")—nearly five years ago. Id. On the Effective Date, among other things, the assets of the Debtors' estates, including claims and causes of action (other than those specifically released under the Plan),

[2] All references to exhibits contained herein refer to exhibits to the contemporaneously-filed Declaration of Andrew Fishman in Support of Defendant Schonfeld Group Holdings LLC's Motion for Summary Judgment (the "**Fishman Declaration**").

were assigned to and vested in Penson, as liquidating trustee, in accordance with the terms of the Plan. (D.I. 781, § 9.02(a)). See **Exhibit K**, Plan (A183-A284).

III. THE FINRA ARBITRATION

On January 27, 2014, Penson commenced the binding FINRA Arbitration against Opus, a wholly-owned subsidiary of Schonfeld. Among other things, Penson alleged that Opus' early termination of the PMA was a material breach of the PMA, resulting in more than $20 million in damages to Penson. See **Exhibit L**, Statement of Claim (A285-A294). A panel of three arbitrators (the "**FINRA Panel**") heard the merits of Penson's claims over multiple hearing days. The Panel then entered an award dated February 26, 2016, which directed Opus to "pay to [Penson] compensatory damages in the sum of $1,018,300.06 plus accrued interest of $101,830.00 . . ." (the "**Arbitration Award**"). The Panel expressly stated that the Arbitration Award was entered " … in full and final resolution of the issues submitted for determination …" See **Exhibit W**, FINRA Dispute Resolution Award (A1107-A1114). In addition, the Arbitration Award expressly states that "[a]ny and all relief not specifically addressed herein, including attorneys' fees is denied." Id. (A1109).

The Arbitration Award subsequently was confirmed as a Judgment of the Supreme Court of the State of New York (the "**Judgment**"). **Exhibit Y**, Judgment (A1128-A1132). Opus paid the damages awarded to Penson in full, and the Judgment was marked satisfied. Fishman Declaration, ¶ 27; **Exhibit Z**, WestLaw Record Demonstrating Satisfaction of Judgment (A1133-A1135).

IV. THE ADVERSARY PROCEEDING

On November 16, 2016, Penson commenced this adversary proceeding. See Complaint and Objection to Claim (the "**Complaint**"). **Exhibit X**, Complaint (A1115-A1127). Although the Complaint names Schonfeld, and not Opus, as the defendant, each count of the Complaint is

predicated upon the same underlying claims and allegations that were adjudicated in the FINRA Arbitration and subsequently satisfied by Opus' payment in full of the Arbitration Award. Specifically, Penson once again seeks to recover $20 million in damages based on Opus' alleged breach of the PMA. This time, rather than pursuing Opus, Penson has sued Schonfeld, alleging that Schonfeld breached two different contracts, the APA and the Guaranty, by "causing" Opus to breach the PMA, id., Counts One, Three, Four, and Five (A1122-A1126), or by "fail[ing] to answer for Opus' obligations under the PMA. Id., Count Two (A1123).[3]

SUMMARY OF THE ARGUMENTS

1. Counts One, Four, and Five of Penson's Complaint are premised on the allegation that "Schonfeld breached the APA by causing . . . Opus to breach, *inter alia*, the exclusivity provisions of and unjustifiably terminate the [PMA]." Id. (A1122). These claims fail as a matter of law because nothing in the APA obligates Schonfeld to: (a) cause Opus to perform any obligations under the PMA; (b) guarantee Opus' performance under the PMA; and/or (c) otherwise indemnify Penson for Opus' conduct. The Court cannot impose a contractual obligation on Schonfeld beyond the explicit and unambiguous terms of the APA. Because the conduct allegedly undertaken by Schonfeld did not violate any term of the APA, Schonfeld is entitled to summary judgment on Counts One, Four, and Five of the Complaint.

2. Penson asserts in Count Three that Schonfeld breached the implied covenant of good faith and fair dealing 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." Id. (A1124).

[3] On January 17, 2017, Schonfeld filed a motion (I) to dismiss the complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1); or, alternatively, (II) to abstain pursuant to 28 U.S.C. § 1334(**c**)(1); or (III) to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) and/or the doctrine of *forum non conveniens* based on the parties' forum selection clause; or (IV) to transfer this action pursuant to the doctrine of *forum non conveniens* or 28 U.S.C. § 1412 (D.I. 9) (the "**Motion to Dismiss**"). On May 21, 2018, the Court entered an order denying the Motion to Dismiss. (D.I. 43). The issues raised in this Motion for Summary Judgment were not raised in the Motion to Dismiss, which focused on questions of jurisdiction.

Once again, Penson attempts to concoct a claim for which it has no right to recover. Under well-settled law, parties cannot rely on the implied covenant of good faith and fair dealing to create a substantive contractual right that was never bargained for. To reiterate, the APA does not require Schonfeld to cause, or otherwise guarantee, Opus' performance under the PMA and Penson cannot imply such a term as a matter of law. Because the implied covenant of good faith and fair dealing cannot be used to create a substantive right where none exists, Count Three of the Complaint also fails as a matter of law.

3. Lastly, Penson alleges in Count Two that Schonfeld breached the Guaranty by "failing to answer for Opus' obligations" thereunder. Id. (A1123). A guarantor, however, cannot be held liable for damages in excess of the damages awarded for breach of the underlying agreement. Moreover, a guarantor cannot be held liable for a primary obligor's breach when the primary obligor already has satisfied its obligation. Here, Opus' breach of the PMA was fully and finally adjudicated and Opus satisfied the ultimate Arbitration Award in full. Schonfeld's Guaranty obligations were, therefore, fully and finally discharged by virtue of Opus' satisfaction of the Arbitration Award. Accordingly, Schonfeld has no remaining Guaranty liability to Penson and is entitled to summary judgment on Count Two.

4. Separate and apart from the infirmities of Penson's claims, the doctrine of *res judicata* prevents Penson from re-litigating the claims asserted in the Complaint. Specifically, application of *res judicata* is appropriate because the claims alleged in this action, which arise from the same transaction that was fully litigated in the FINRA Arbitration, were fully and finally resolved by the FINRA Arbitration. As a result, Penson is precluded from re-litigating its claims in this action and Schonfeld is entitled to summary judgment dismissing the entire Complaint.

5. Similarly, the doctrine of collateral estoppel prevents Penson from re-litigating the issues raised in the Complaint because they were all raised and resolved in the course of the FINRA Arbitration. Specifically, the underlying premise of each count of the Complaint—whether Opus unjustifiably terminated, and thereby breached, the PMA—unquestionably was resolved by way of the Arbitration Award. Penson had a full and fair opportunity to litigate this issue during the course of the FINRA Arbitration. Notwithstanding Penson's apparent dissatisfaction with the result of the FINRA Arbitration, Penson cannot avoid the preclusive effect of the ultimate Arbitration Award. Thus, the doctrine of collateral estoppel also compels the entry of summary judgment dismissing all five counts of the Complaint.

STATEMENT OF UNDISPUTED FACTS

I. The APA And Guaranty.

In November 2006, Schonfeld[4] entered into the APA with Penson's affiliate, SAI. See **Exhibit B**, APA (A7-A67); **Exhibit X**, Complaint, ¶ 8 (A1118). Through the APA, SAI agreed, among other things, to purchase certain business operations from Schonfeld. **Exhibit B**, APA (A7-A67). Schonfeld, for its part, agreed to cause its affiliated proprietary trading firms, known as "correspondents," including Opus, to enter into agreements (like the PMA) with SAI's affiliates for the provision of clearing and financing services. Specifically, the APA provides, in relevant part:

> Section 2.01. Purchase and Sale of the Assets. Subject to the terms and conditions set forth herein, at the Closing (or at the applicable Conversion Date if otherwise expressly provided in this Section 2.01), [Schonfeld] shall sell, convey, assign, transfer and deliver to [SAI], and [SAI] shall accept and purchase, free and clear of any Liens, all of [Schonfeld's] right, title and interest in

[4] At closing, Schonfeld was not a party to the APA but signed the document as the parent and manager of Schonfeld Securities, LLC ("**Schonfeld Securities**"), the seller thereunder. Schonfeld Securities later assigned its rights and obligations under the APA to Schonfeld. See **Exhibit B**, APA (A7-A67); **Exhibit X**, Complaint (A1118 ¶ 8).

> and to all of [Schonfeld's] properties, assets, powers and rights of any type, kind or nature, whether tangible or intangible, and wherever located (other than the Retained Assets and collectively, the "Assets") used in connection with, arising out of, or otherwise related to the operation or conduct of [Schonfeld's] clearing and joint back office operations (collectively, the "Business") including, without limitation, the following:
>
> (a) the Clearing Agreements (for the purpose of clarity, it is understood that PFSI has entered into Fully Disclosed Clearing Agreements [like the PMA] and certain ancillary agreements in connection therewith with each of the Introducing Brokers [including Opus] simultaneously herewith that will become effective upon the applicable Conversion Date for each Introducing Broker [including Opus] whereupon the existing Clearing Agreement between the Company and the applicable Introducing Broker [including Opus] will terminate) . . . .

Id. (A21).

Schonfeld's indemnification obligations are expressly limited to those set forth in Section 10.02, as proscribed by Section 10.01, which imposes strict deadlines on the survival of the representations and warranties set forth in the APA. Id. (A57-A58). To be clear, however, neither Section 10.02, nor any other provision of the APA, requires Schonfeld to cause or to otherwise guaranty Opus' subsequent performance under the PMA, nor do those provisions impose an obligation on Schonfeld to indemnify any alleged breach by Opus. Id. (A7-A67). To the contrary, with respect to Opus, the APA requires nothing other than that Schonfeld cause Opus to enter into a Clearing Agreement, like the PMA,[5] with PFSI. Id. (A21 § 2.01(a)).

The APA also contains an Exclusive Remedy provision at Section 10.09, which provides:

> Section 10.09. Exclusive Remedy. After the Closing, and other than with respect to claims based upon breaches of Section 6.12 or Section 6.13 [both of which are intentionally omitted from the

[5] The PMA actually was the second iteration of the Penson/Opus relationship. The agreement that governed Penson and Opus' relationship between the November 2006 APA and the December 2007 PMA is not pertinent to this litigation, but is noted here to explain the lapse in time between the APA and the PMA. **Exhibit C**, Clearing Agreement (A68-A120); **Exhibit E**, PMA (A139-A151).

> APA], the remedies available pursuant to the provisions of this Article X [Indemnification] and Article IX [Tax Matters] **shall be the sole and exclusive remedy for monetary damages for any breach of representations, warranties, covenants or agreements herein**, provided, however, the foregoing shall not limit the right to seek recovery for fraud or willful misconduct or to seek specific performance, injunctive relief or other available equitable remedies.

Id. (A61). Nothing in Articles IX or X of the APA creates an obligation for Schonfeld to cause or otherwise guaranty Opus' performance under the PMA or to indemnify Penson for an alleged breach by Opus. Id.

That said, contemporaneous with the execution of the APA, Schonfeld executed the Guaranty Agreement, pursuant to which Schonfeld guaranteed, among other things, Opus' performance under the PMA. See **Exhibit A**, Guaranty Agreement (A1-A6). Specifically, the Guaranty provides that Schonfeld shall be liable for the payment and/or performance of the Guaranteed Obligations, which are defined to include Opus' obligations pursuant to Sections 1(e), 11(b), 17 and 20(d) of the Clearing Agreement.[6]

In accordance with the APA, beginning in December 2007, SAI's affiliate, PFSI, provided portfolio margining services to Opus pursuant to a clearing agreement, the PMA. See **Exhibit E**, PMA (A139-A151). Pursuant to the PMA, PFSI agreed to be Opus' exclusive provider of portfolio margining services[7] and committed, among other things, to fulfilling all of Opus' financing needs for a period of ten years. Id.

[6] By its express terms, the Guaranty only applies to Opus' performance under the Clearing Agreement. Opus' performance under the PMA, a separate and distinct contract, is not covered by the Guaranty. Nevertheless, because Opus' obligations under the PMA were fully satisfied, Penson's claim for breach of the Guaranty fails even if the Guaranty did apply to the PMA (a fact which Schonfeld disputes but concedes solely for the purposes of this motion).

[7] Portfolio margining is a Securities and Exchange Commission approved risk-based margining policy whereby a broker-dealer, like Penson, provides financing (*i.e.*, extends credit) to a customer, like Opus. That financing allows the customer to purchase securities on credit (otherwise known as purchasing "on margin") using

II. Opus' Termination Of The PMA.

The propriety of Opus' termination of the PMA was hotly contested by the parties and was, in fact, the principal issue addressed by the FINRA Arbitration. For purpose of this Motion for Summary Judgment, Opus is only presenting the undisputed facts concerning the PMA's termination, as documented in the letters exchanged by the parties.

Specifically, on January 26, 2012, Opus sent Penson a letter formally notifying Penson that Opus was terminating the PMA. **Exhibit F**, Opus Termination Letter (A152-A154). Opus' termination letter states, in relevant part, that certain restrictions imposed on Penson by FINRA rendered it "no longer possible or practicable for Penson to provide to Opus the services required under the [PMA]." Id. Accordingly, Opus advised that it was terminating the PMA, effective January 31, 2012. Id.

On January 30, 2012, Penson sent Opus a letter in response to Opus' termination letter. **Exhibit G**, January 30, 2012 Response to Opus Termination Letter (A155-A157). Penson's letter asserts, among other things, that Opus' premature termination of the PMA "cause[d] a breach of the [PMA and the APA], and we are hereby notifying Schonfeld that it has indemnification obligations in favor of Penson and its affiliates under Section 10.02 of the [PMA]." Id.

No further action was taken by Penson against Opus or Schonfeld until the commencement of the FINRA Arbitration, discussed below. Nevertheless, in the months that followed, Penson's inability to perform under the PMA was further confirmed. For example, in May 2012, Penson ceased operations and sold most of its U.S. securities accounts and contracts to Apex Clearing Corp. ("**Apex**"). See **Exhibit H**, Apex Purchase Term Sheet (A158-A165).

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leverage based on the risk of the customer's entire portfolio. Portfolio margining services typically include the extension of credit (financing services) and the provision of clearing services for the customer's trades.

Penson, however, did not assign its rights under the PMA to Apex as part of that transaction.[8] **Exhibit R**, Transcript of FINRA Arbitration (dated November 5, 2015) (A804, pp. 675-676). Furthermore, by October 2012, Penson filed a broker-dealer withdrawal form, following which it was not legally permitted to provide portfolio margining services. **Exhibit I**, Uniform Request for Withdrawal from Broker-Dealer Registration (A166-A167). Finally, on January 11, 2013, the Debtors filed for bankruptcy in the District of Delaware to liquidate their remaining assets. See In re Penson Worldwide, Inc., Case No. 13-10061 (LSS), D.I. 1 (Bankr. D. Del. Jan. 11, 2013).

III. THE FINRA ARBITRATION.

A. The Failure to Pay Claim.

On January 27, 2014, Penson commenced the FINRA Arbitration against Opus. **Exhibit L**, Statement of Claim (A285-294). Penson's Statement of Claim in the FINRA Arbitration asserted two counts. In the first count, Penson sought to recover approximately $1.8 million in compensatory damages arising from monies Penson claimed were due and owing from Opus for services rendered before the termination of the PMA (the "**Failure to Pay Claim**"). Id. (A293). In response to that claim, Opus conceded that it owed certain fees to Penson (and, indeed, had been trying to pay those fees for many months), but disagreed with the amount Penson claimed and asserted it was unable to obtain Penson's cooperation to reconcile the parties' differences. **Exhibit M**, Answer and Affirmative Defenses (A295-306).

As to the Failure to Pay Claim, at the hearing, Penson argued that it was entitled to $2,458,802.67. **Exhibit U**, Claimant Penson Technologies LLC's Post-Trial Memorandum (A1061-A1083). Opus put on evidence and argued that it owed only $906,363.24. **Exhibit V**,

[8] Notably, Penson could not assign the PMA to Apex without Opus' prior written consent. **Exhibit E**, PMA (A144-A145, ¶ 10).

Respondent Opus Trading Fund LLC's Post-Hearing Memorandum (A1084-A1106).

B. The Early Termination Claim.

Penson's second count in its FINRA Statement of Claim asserted that Opus' early termination of the PMA was a material breach of the PMA, resulting in more than $20 million in damages to Penson (the "**Early Termination Claim**"). **Exhibit L**, Statement of Claim (A285-A294). In the Statement of Claim, Penson urged that its $20 million damage claim was based on the "loss of revenue of the remaining [six year] term of [the PMA]. . . ." Id. (A294). Specifically, Penson alleged that "SAI paid approximately $35 million for the Opus clearing relationship," which Penson expected to have for a "ten year period." Id. (A283). Penson further alleged that as a result of Opus' termination of the PMA, Penson received net income of "approximately $15 million." Id. Thus, notwithstanding the fact that the APA did not guarantee any specific return for Penson's alleged $35 million purchase price, Penson sought to recover the balance of the purchase price. Id. (A288). Opus denied all liability on the Early Termination Claim. **Exhibit M**, Answer and Affirmative Defenses (A295-A306).

At the hearing, Penson made additional arguments with respect to its claim for damages concerning the Early Termination Claim, which are summarized in Penson's Post-Trial Memorandum. **Exhibit U**, Penson Post-Trial Memorandum (A1077, p. 15). As set forth therein, "[t]here were two damages models presented at final hearing [on this claim]." Id. The first model was based on a liquidated damages provision contained in an agreement that does not impose any obligations on Schonfeld and/or Opus concerning Opus' performance under the PMA. Id. (A1070, p. 8). Specifically, as stated by Penson:

> The first model is based on the formula contained in the "Termination Compensation Payment Agreement" (Ex. P-8) that [was] negotiated (and deployed) to compensate Penson for having overpaid where certain acquired Schonfeld correspondents (permissibly) departed Penson before completion of the exclusivity

> terms. Using that formula, Opus owes Penson either **$19,093,745** (based on the stock price of $17 as set forth in the APA) or **$21,264,169** (based on the actual value of the stock that Penson delivered and booked in its accounting records) on Penson's Second Cause of Action.

It is undisputed that the referenced Termination Compensation Payment Agreement did not apply to the PMA.[9] **Exhibit D**, Termination Compensation Payment Agreement (A121-A138).

The second damage model presented by Penson was "based on the amount that Penson paid Schonfeld for the Opus relationship, less the amount that it earned for the first four years of the relationship. Using this methodology, Penson [claimed it was] owed **$19,049,067** on [its] Second Cause of Action." Id., p. 17. As to that point, Opus noted that Penson sought to impose a money-back guaranty on the APA, notwithstanding that no such guaranty is found in the APA nor is Opus a party to the APA.

Notably, those were Opus' *only* arguments at the hearing that Penson was improperly relying on the APA. Although Opus asserted lack of standing as one of twenty-three affirmative defenses in its Answer and Affirmative Defenses, that argument was never raised at the hearing.[10] Thus, contrary to Penson's assertion in its Complaint that Penson's "standing" was Opus' "principal defense," the undisputed factual record demonstrates that defense was never pressed at the hearing and was not submitted for the panel's consideration. See generally id.

[9] Schonfeld notes, however, that Opus was a signatory to the Termination Compensation Payment Agreement in connection with certain clearing arrangements but that such arrangements were separate and apart from the PMA (as well as its predecessor, the Clearing Agreement) between Opus and Penson.

[10] This can be confirmed by review of the pre-hearing briefs, hearing transcripts, and post-hearing briefs. See generally **Exhibit N**, Claimant Penson Technologies LLC's Prehearing Memorandum (A307-A353), **Exhibit O**, Respondent Opus Trading Fund LLC's Pre-Hearing Memorandum (A354-A540), **Exhibit P**, Transcript of FINRA Arbitration (dated November 3, 2015) (A541-A658), **Exhibit Q**, Transcript of FINRA Arbitration (dated November 4, 2015) (A659-A772), **Exhibit R**, Transcript of FINRA Arbitration (dated November 5, 2015) (A773-A838), **Exhibit S**, Transcript of FINRA Arbitration (dated December 16, 2015) (A839-A970), **Exhibit T**, Transcript of FINRA Arbitration (dated December 17, 2015) (A971-A1060), **Exhibit U**, Penson Post-Trial Memorandum (A1061), **Exhibit V**, Opus Post -Hearing Brief (A1084).

At the close of Penson's case in chief, Opus orally moved to dismiss Penson's Early Termination Claim. Opus' motion made clear that although a breach of contract has four elements (a contract, breach, plaintiff's performance, and damages), Opus was moving to dismiss Penson's second count only "because Penson has failed to establish [one] essential element of a claim for breach of contract, namely damages." **Exhibit S**, Transcript of FINRA Arbitration (A888 p. 902). On oral motion to dismiss, Opus did not challenge any other element of Penson's Early Termination Claim, nor did it challenge Penson's standing to bring the claim.

Specifically, Opus argued:

> Penson only put forward two ways to calculate its damages . . . . [First,] they put forward a damage calculation based on a contractual termination provision that's not found in the actual contract at issue. They rely on that termination compensation agreement which witnesses have admitted is not applicable to Opus's ·performance under the [PMA, which] has no provision for any liquidated damages or early termination fee if it's terminated and that there was no other agreement that provides for that.
>
> [Second,] there was testimony about [a] damage calculation based on what [Penson's] parent company, SAI Holdings paid to Opus[']parent company Schonfeld to purchase the Opus business pursuant to an Asset Purchase Agreement, and specifically Penson was attempting to argue that pursuant to the [APA], because some amount of what SAI paid Schonfeld for its clearing business was attributable to the Opus business, [that] because [] SAI did not fully earn back that amount, that Penson is entitled to damages in this breach of contract arbitration for the difference between what SAI paid Schonfeld and what Penson earned from Opus . . . .
>
> [T]his damage calculation fails as a matter of law for several reasons. First, it's based on a contract to which Opus is not a party and which has not been sued on in this case . . . Penson is not su[ing] for breach of [the APA] . . . . And even if Opus were a party to the APA and even if the APA had been sued on in this case, that damage calculation would fail anyway because there's nothing in the APA that guarantees Penson [the right] to earn back all the money that it paid to acquire the Opus business.

Id. (A889, pp. 907-910).

After due deliberation, the FINRA Panel denied Opus' motion on the grounds that Penson had "**established a prima facie case**" on its Early Termination Claim. **Exhibit W**, Arbitration Award (A1109) (emphasis added). Thus, to the extent that Penson is trying to suggest that the FINRA Panel did not reach the merits of Penson's Early Termination Claim on any basis argued by Opus, including due to an alleged "standing" defense, that allegation is false. The FINRA Panel allowed both claims to be considered on their merits and expressly found Opus to be liable for breach of the PMA. See generally id. (A1107-A1114). Thus, even if Opus had pursued a standing defense (which it did not), that defense was overruled by the FINRA Panel, which directed Opus to present its case. Id. (A1109).

C. The Arbitration Award.

After five hearing days, including live testimony from five fact witnesses and two experts, the parties rested. Thereafter, the FINRA Panel issued the Arbitration Award in "**full and final"** resolution of the issues submitted for determination. Id. (emphasis added). The FINRA Panel awarded Penson the sum of $1,018,300.06, plus accrued interest of $101,830; an amount similar to the sum Opus conceded it owed Penson for services previously rendered. The FINRA Panel further held that "[a]ny and all relief not specifically addressed herein . . . is denied." Id. (A1109). Thus, Penson was denied any and all other relief sought, including further damages exceeding the amount of the Arbitration Award. Id. Opus paid the Arbitration Award in full.

Thereafter, Opus caused the Arbitration Award to be confirmed by the Supreme Court of the State of New York as a final Judgment. **Exhibit Y**, Judgment (A1128-A1132). Because Opus already had paid the Arbitration Award in full by the time it was confirmed, Opus also caused the Clerk of the Court to enter the satisfaction of the Judgment on the docket. **Exhibit Z**, WestLaw Satisfaction Record (A1133-A1135).

IV. THE ADVERSARY PROCEEDING

Penson's Complaint alleges that pursuant to the APA, PFSI obtained the exclusive right to provide clearing services to Schonfeld's correspondents, including Opus, for a period of ten years. **Exhibit X**, Complaint (A1118, ¶ 9). Just like in Penson's Statement of Claim in the FINRA Arbitration, the Complaint then alleges that Opus "unjustifiably" terminated the PMA. Id. (A1120, A1122, ¶¶ 17-18, 32). Although the Complaint asserts five counts against Schonfeld, each count relies on that same factual predicate—that Opus unjustifiably terminated, and thereby breached, the PMA. More specifically:

- Count One is for "Breach of Contract." In Count One, Penson alleges that Schonfeld breached the APA by causing its wholly-owned subsidiary Opus to breach the PMA. No other breach of the APA is alleged. Id. at ¶¶ 29-34.

- Count Two is for "Breach of Guaranty." In Count Two, Penson alleges that Schonfeld breached the Guaranty Agreement because it "absolutely, unconditionally and irrevocably guaranteed its subsidiaries' performance under various agreements, including Opus' performance under the PMA Side Agreement" but has failed to answer for Opus' purported breach of the PMA. Here again, no other breach of the Guaranty Agreement, other than Schonfeld's failure to answer for Opus' purported breach of the PMA, is alleged. Id. at ¶¶ 35-41.

- Count Three is for "Breach of Obligation of Good Faith and Fair Dealing." This entire count is based upon the allegation that "Schonfeld breached this obligation by causing Opus to breach the PMA [] without cause or justification, thereby depriving SAI of a major part of the benefits of the APA." Id. at ¶ 44. No other allegations are made in support of this Count. Id. at ¶¶ 42-46.

- Count Four is styled as "Objection to Schonfeld Claim." In this Count, Penson asserts that Opus' claim should be offset or rejected based upon Penson's claim that "Schonfeld materially breached the APA by causing its wholly-owned subsidiary Opus to breach . . . the PMA []." Id., ¶ 51. This claim is thus duplicative of Count One in that it relies solely upon the purported breach by Opus of the PMA and is contingent upon such a finding. Id. at ¶¶ 47-51.

- Count Five seeks a "Declaratory Judgment Regarding Plaintiff's Right to Setoff." Just like Count Four, this Count is entirely duplicative of Count One in that it relies solely upon the purported breach by Opus of the PMA and is contingent upon such a finding. Id. at ¶¶ 56-61.

Notably, the damages sought for these alleged causes of action are identical to the damages that Penson sought from Opus in the FINRA Arbitration. **Exhibit L**, Statement of Claim (A285-A294). In the FINRA Arbitration, Penson sought to recover $20 million, which it alleged consisted of "the amount that Penson paid Schonfeld for the Opus relationship, less the amount that it earned for the first four years of the relationship." **Exhibit U**, Penson Post-Trial Memorandum (A107). Likewise, in the Complaint, Penson seeks to recover "in excess of $20 million, representing the difference between what SAI paid Schonfeld for the Opus relationship and what SAl received in return, plus consequential damages, in an amount to be proved at trial." **Exhibit X**, Complaint (A1122). Moreover, just like at the FINRA hearing, Penson does not (and cannot) cite to any provision of the APA that sets forth its entitlement to recover the full value of its investment. See generally id. (A1115-A1127).

ARGUMENT

I. THIS MATTER IS RIPE FOR SUMMARY JUDGMENT PURSUANT TO FED. R. CIV. P. 56

Federal Rule of Civil Procedure 56(a), made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7056, provides that summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Id.; In re: IH 1, Inc. Miller v. Kirkland & Ellis LLP, 2016 WL 6394296, at *7 (Bankr. D. Del. Sept. 28, 2016) ("[S]ummary judgment is proper where the facts are undisputed and only one conclusion may reasonably be drawn from them.") (citing, *inter alia*, Gans v. Mundy, 762 F.2d 338, 341 (3d Cir. 1985)). A fact is "material" if it could "affect the outcome of the suit." In re Pillowtex Corp., 427 B.R. 301, 306 (Bankr. D. Del. 2010) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Horowitz v. Fed. Kemper Life Assurance Co., 57 F.3d 300, 302 n. 1 (3d Cir.1995)). When reviewing a motion for summary

judgment, "the Court is not limited to the complaint and documents referenced therein, but may appropriately consider the pleadings, admissible discovery, affidavits and disclosure materials on file." Id. (citing Fed. R. Civ. P. 56(c)).

The undisputed material facts here demonstrate that Opus is entitled to summary judgment. First, the APA does not impose an obligation on Schonfeld to guarantee Opus' performance under the PMA and/or to otherwise indemnify Penson for Opus' alleged breach of the PMA. As a result, Penson's First, Third, Fourth, and Fifth Counts, which are all predicated upon a breach of the APA, fail as a matter of law.

Moreover, although the Guaranty obligates Schonfeld to answer for Opus' breach of the PMA, Opus' liability was fixed by the Arbitration Award and then paid in full. As a result, Schonfeld has no further obligations as Opus' guarantor and Penson's Second Count must be dismissed.

Separate and apart from those dispositive issues, it also is undisputed that the claims and issues raised in the Complaint were fully and finally resolved in the FINRA Arbitration. As a result, Penson's claims are also barred by the legal doctrines of *res judicata* and collateral estoppel. Thus, as analyzed further below, there are no material facts in dispute to preclude the Court from granting Schonfeld summary judgment and dismissing Penson's Complaint in its entirety.

A. Penson's Claims Arising From An Alleged Breach Of The APA Fail As A Matter Of Law.

1. Penson's First, Fourth, And Fifth Counts Fail Because Schonfeld Did Not Breach Any Express Provision Of The APA.

Penson's First, Fourth, and Fifth Counts are entirely predicated on the allegation that "Schonfeld breached the APA by causing its wholly owned subsidiary Opus to breach, inter alia,

the exclusivity provisions of and unjustifiably terminate the [PMA]." **Exhibit X**, Complaint (A1122). Tellingly, however, the Complaint does not cite to a single provision in the APA that imposes an obligation on Schonfeld to cause or otherwise guaranty Opus' performance under the PMA. Id. (A1115-A1127). This omission is not an accident; in fact, the APA does not obligate Schonfeld to cause or otherwise guarantee Opus' performance under the PMA. **Exhibit B**, APA (A7-A67). Although speculative, that is likely why Schonfeld and Penson entered into the Guaranty, discussed in Section B, below. As to the APA, however, Penson's claims fail because under well-settled New York law,[11] Penson cannot recover for the breach of a term that does not exist in the APA.

Where, as in this case, a plaintiff sues for breach of contract, "provisions of the contract delineating the rights of the parties prevail over the allegations set forth in the complaint." Ark Bryant Park Corp. v. Bryant Park Restoration Corp., 285 A.D.2d 143, 150 (N.Y. App. Div. 2001). "The interpretation of an unambiguous contract is a question of law for the court . . . ." Id. Thus, "where factual allegations or legal conclusions are flatly contradicted by documentary evidence, they are not presumed to be true, or accorded every favorable inference . . . ." Id. (citations omitted); see also Biondi v. Beekman Hill House Apartment Corp., 257 A.D.2d 76, 81 (N.Y. App. Div. 1999), aff'd, 94 N.Y.2d 659 (N.Y. 2000) (same).

This is especially true when one party is seeking to impose a contractual indemnification obligation upon another. "When a [defendant] is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed." Hooper Assocs., Ltd. v. AGS Computers, Inc., 74 N.Y.2d 487, 491 (N.Y. 1989). Such "an indemnity obligation will be strictly construed, and additional

[11] New York law applies to Penson's claims. See **Exhibit B**, APA, § 11.04 (A63), **Exhibit A**, Guaranty Agreement, § 8 (A5), **Exhibit E**, PMA, § 11 (A145).

obligations may not be imposed beyond the explicit and unambiguous terms of the agreement." Millennium Holdings LLC v. Glidden Co., 146 A.D.3d 539, 545 (N.Y. App. Div. 2017) (citing Hooper, supra). In this case, Penson seeks to impose an obligation on Schonfeld under the APA to indemnify Penson for Opus' alleged breach. The APA, however, contains no such obligation. Thus, Penson's claims predicated on a breach of the APA fail as a matter of law.

Moreover, contrary to Penson's attempt to inject new terms into the APA, the contract expressly limits Schonfeld's obligations to Penson. **Exhibit B**, APA § 10.09 (A61). Not only must courts not add unwritten terms into a contract, but express contractual limitations on remedies must be strictly enforced. See, e.g., Mom's Bagels of N.Y., Inc. v. Sig Greenebaum, Inc., 164 A.D.2d 820, 822 (N.Y. App. Div. 1990) ("We have long held that parties to a commercial contract, absent any question of unconscionability, may agree to limit [a party's] liability for damages.") (citing Belden-Stark Brick Corp. v. Morris Rosen & Sons, 39 A.D.2d 534, 535 (N.Y. App. Div. 1972), aff'd, 31 N.Y.2d 884, (N.Y. 1972)). Section 10.09 of the APA, set forth in full above, contractually proscribes Penson from recovering for breach of contract claims, with certain limited exceptions not applicable here.[12] Thus, even if Penson had articulated an actual breach by Schonfeld (which it has not), the claim would nevertheless fail as it does not fall within the limits of APA's exclusive remedy provision.

Finally, and as addressed in Section B below with respect to Penson's breach of guaranty claim, even if the APA obligated Schonfeld to cause Opus' performance of the PMA (which it does not), Opus' alleged breach of the PMA was finally resolved by the Arbitration Award,

[12] Section 10.09 does not apply to fraud or willful misconduct. Under New York law, "willful misconduct" has been interpreted to constitute "conduct which is tortious in nature, i.e., wrongful conduct in which defendant willfully intends to inflict harm on plaintiff at least in part through the means of breaching the contract between the parties." Process Am., Inc. v. Cynergy Holdings, LLC, 839 F.3d 125, 138 (2d Cir. 2016) (citing Biotronik A.G. v. Conor Medsystems Ireland, Ltd., 22 N.Y.3d 799, 822 (N.Y. 2014)). Penson has not asserted a fraud or tort claim against Schonfeld (nor could it). Regardless, even if Penson could assert such a claim, the damages were finally adjudicated by the Arbitration Award and then paid in full.

which was fully satisfied. Thus, even if Penson's claims arising from a breach of the APA were otherwise viable, Opus' satisfaction of the Arbitration Award abrogated any right by Penson to recover anything further from Schonfeld.

2. Penson's Third Count For Breach Of An Implied Covenant Of Good Faith And Fair Dealing Fails Because It Impermissibly Seeks To Inject A New Term Into The APA.

Although New York law provides that "every contract . . . contains an implied covenant of good faith and fair dealing," the implied covenant "can only impose an obligation consistent with other mutually agreed upon terms in the contract." Geren v. Quantum Chem. Corp., 832 F. Supp. 728, 731-32 (S.D.N.Y. 1993) (citations omitted). Specifically, the implied covenant prevents a party from acting "in a manner that, although not expressly forbidden by any contractual provision, would deprive the other of the right to receive the benefits under their agreement." Id. at 732 (citations omitted). Stated differently, the implied covenant "ensures that parties to a contract perform the substantive bargained-for terms of their agreement." Id. (citations omitted). "[T]he implied covenant of good faith and fair dealing," however, cannot be used to "add[] a substantive provision not included by the parties." Id. (citations omitted); see also Fesseha v. TD Waterhouse Investor Servs., Inc., 305 A.D.2d 268, 268 (N.Y. App. Div. 2003) ("While the covenant of good faith and fair dealing is implicit in every contract, it cannot be construed so broadly as effectively to nullify other express terms of a contract, or to create independent contractual rights") (citations omitted).

Penson'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] and ensure that Opus did not breach the [PMA]." **Exhibit X**, Complaint (A1124 ¶ 43). Penson alleges that "Schonfeld breached this obligation by causing

Opus to breach the [PMA] without cause or justification, thereby depriving SAl of a major part of the benefits of the APA." Id. Penson's claim fails because it requires the Court to add an independent, substantive provision to the APA—an obligation for Schonfeld to "ensure that Opus did not breach the PMA"—notwithstanding Penson's failure to bargain for any such protection in the parties' agreements. Indeed, although the parties may have bargained for a similar provision under the Guaranty (see § (B), supra), the APA contains no such requirement. Because the Court cannot imply a term that goes beyond what the parties bargained for, the Court must grant summary judgment with respect to this claim.

Moreover, Penson's implied covenant claim is essentially just a reiteration of its breach of contract claim. That fact is also fatal to Penson's claim, as New York law prohibits a breach of the implied covenant claim from being asserted based on the same factual allegations as a breach of contract claim. Salomon v. Citigroup Inc., 123 A.D.3d 517, 518 (N.Y. App. Div. 2014) (dismissing claim for breach of covenant of good faith and fair dealing because it was "essentially duplicative of the allegations in [plaintiff's] breach of contract claim . . . particularly as it seeks the same damages as the breach of contract claim"); Sebastian Holdings, Inc. v. Deutsche Bank, AG., 108 A.D.3d 433, 434 (N.Y. App. Div. 2013) (same); N.Y.U. v. Continental Ins. Co., 87 N.Y.2d 308, 319-320 (N.Y. 1995) (same). Penson's implied covenant claim is wholly duplicative of its breach of contract claim, as both allege that Schonfeld breached the APA by causing Opus to breach the PMA, resulting in the same damage. The virtual identity of these two claims is a separate and independent basis for Schonfeld to obtain summary judgment as to this claim.

B. Penson's Second Count For Breach Of The Guaranty Fails Because The Guaranteed Obligations Were Satisfied In Full.

Schonfeld, as guarantor of Opus' obligations under the PMA, cannot be held liable for amounts in excess of Opus' liability or for amounts which Opus has already paid. See PAF-PAR LLC v. Silberberg, 118 A.D.3d 446, 446 (N.Y. App. Div. 2014), aff'd, 27 N.Y.3d 930 (N.Y. 2016). Because Opus' liability to Penson was fully and finally adjudicated and the Arbitration Award was satisfied in full, Schonfeld has no further obligations to Penson under the Guaranty.

In PAF-PAR, the plaintiff attempted to collect from a guarantor after the primary obligor satisfied its obligations under the terms of a modified promissory note. Id. The plaintiff argued that "despite the borrower's full payment of the modified loan amount, the guaranty for the original loan amount [was] still enforceable" because the guaranty indicated that it could not be "diminished, impaired, reduced or adversely affected by . . . modifications." Id. (internal marks omitted). The Appellate Division upheld the lower court's ruling that even contractual language prohibiting the diminishment, impairment, reduction, or adverse effect of a modification on a claim cannot render a "guarantor liable for more than what the primary obligor was obligated to pay and did pay." Id.; see also Chicago Title Ins. Co. v. Mazula, 38 A.D.3d 1114, 1115 (N.Y. App. Div. 2007) (reversing an order denying summary judgment where the movant submitted evidence that it had already paid the non-movant in full satisfaction of its claim).

Even if the Arbitration Award had not been satisfied, Penson could not recover damages in excess of what was awarded to Penson for Opus' underlying breach of the PMA. Id. Thus, at most, Penson would be entitled to the amount of the Arbitration Award, not the $20 million damages claim now sought. Regardless, the undisputed facts demonstrate that the Arbitration Award was satisfied in full, rending Penson's Breach of Guaranty claim entirely untenable.

C. ***Res Judicata* Precludes Penson From Re-litigating Matters Decided In The FINRA Arbitration.**

The doctrine of *res judicata* prevents Penson from relitigating the claims asserted in its Complaint. Under New York law,[13] the doctrine of *res judicata*, also called claim preclusion, provides that "as to the parties in a litigation and those in privity with them, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action." UBS Sec. LLC v. Highland Capital Mgmt., L.P., 86 A.D.3d 469, 473 (N.Y. App. Div. 2011). The undisputed facts establish that *res judicata* bars Penson's claims as a matter of law.

The Arbitration Award was a final adjudication on the merits between Penson and Opus. As a result, it constitutes "res judicata of all matters reasonably comprehended in the dispute submitted to the arbitrators." Springs Cotton Mills v. Buster Boy Suit Co., 275 A.D. 196, 199 (N.Y. App. Div. 1949), aff'd, 300 N.Y. 586 (N.Y. 1949); see also Matter of Am. Ins. Co. (Messinger—Aetna Cas. & Sur. Co.), 43 N.Y.2d 184, 189-90 (N.Y. 1977) (*res judicata* applies equally "to awards in arbitration as [it does] to adjudications in judicial proceedings"). Penson has not challenged the Arbitration Award, nor did it oppose the confirmation of the Arbitration Award as a Judgment. Thus, the Arbitration Award is *res judicata* as to all matters reasonably comprehended in the FINRA Arbitration, barring re-litigation of those matters by Penson and Opus, as well as those in privity with them, including Schonfeld. See Spasiano v. Provident Mut. Life Ins. Co., 2 A.D.3d 1466, 1467 (N.Y. App. Div. 2003) (allowing parent company to rely on *res judicata* effect of a prior arbitration award entered against its subsidiary). This is true

[13] Federal courts look to state law to determine the preclusive effect of a state court judgment concerning state court claims. See In re Raytrans Holding, Inc., 573 B.R. 121, 129 (Bankr. D. Del. 2017). New York law applies to Penson's claims. See **Exhibit B**, APA, § 11.04 (A63), **Exhibit A**, Guaranty Agreement, § 8 (A5), **Exhibit E**, PMA, § 11 (A145). Thus New York's *res judicata* and collateral estoppel standards apply. See U. S. Indus., Inc. v. Gregg, 58 F.R.D. 469, 474 (D. Del. 1973) (stating that "it is the source of a claim, rather than the basis of federal jurisdiction, which is relevant in determining the law applica[ble] to that claim") (citations omitted).

notwithstanding that Schonfeld was neither a party to the arbitration nor a party to the arbitration agreement. Id.

Critically, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." O'Brien v. City of Syracuse, 54 N.Y.2d 353 (N.Y. 1981). In fact, even "[w]hen alternative theories are available to recover what is essentially the same relief for harm arising out of the same or related facts such as would constitute a single 'factual grouping.' . . . the circumstance that the theories involve materially different elements of proof will not justify presenting the claim by two different actions." Id. at 357-358.

Although Penson now purports to pursue different legal theories than were asserted in the FINRA Arbitration, its claims are all explicitly predicated on whether Opus' early termination of the PMA constituted a breach thereof. As a result, Penson's claims in this case relate to the same underlying agreements and facts, and seek the same damages Penson previously pursued through its Early Termination Claim in the FINRA Arbitration. Because that claim was fully and finally adjudicated, *res judicata* precludes Penson from re-litigating that claim in this case, regardless of Penson's new legal theories.

Notwithstanding the clear application of *res judicata* based on the undisputed factual record, it is anticipated that Penson will argue, as it does in its Complaint, that the FINRA Panel did not reach the merits of its Early Termination Claim, insinuating that Opus somehow was successful in challenging Penson's standing to pursue the claim. That specious argument is contradicted by the plain terms of the Arbitration Award, which expressly states that Penson made out a *prima facie* case for breach of the PMA, an impossible result if Penson lacked standing to pursue its claim. The Arbitration Award also finds Opus liable for breach of the

PMA; also an impossible outcome if Penson lacked standing. Thus, contrary to Penson's self-serving and unsubstantiated assertion, the Arbitration Award was not premised on Penson's standing or lack thereof, but rather was a full and final award on the merits of Penson's claims. As a result, Penson's attempt to re-litigate the Early Termination Claim in this case clearly is barred by the doctrine of *res judicata.*

D. Penson Is Collaterally Estopped From Re-Litigating Matters Decided In The FINRA Arbitration

Separate and apart from *res judicata*, which bars Penson's claims as set forth above, the doctrine of collateral estoppel serves as an independent bar to this Court's consideration of issues resolved in the course of the FINRA Arbitration. Specifically, collateral estoppel "bars a litigant from disputing an issue in another proceeding when that issue was decided against the litigant in a proceeding in which he had a 'full and fair opportunity' to contest the matter." Feinberg v. Boros, 99 A.D.3d 219, 226 (N.Y. App. Div. 2012) (citing Schwartz v. Public Adm'r of County of Bronx, 24 N.Y.2d 65, 71 (N.Y. 1969)); Blythe Indus., Inc. v. Puerto Rico Aqueduct & Sewer Auth., 607 F. Supp. 1386, 1388 (S.D.N.Y. 1985)) ("Although the disposition . . . was by summary judgment based on affidavits, rather than a full trial, [the] decision nonetheless may have res judicata or collateral estoppel effect."). As a result, the doctrine "preserves party and judicial resources by preventing relitigation of matters that have already been resolved" and "prevents inconsistent results." Feinberg, 99 A.D.3d at 226 (citing Schwartz, 24 N.Y.2d at 74). Unlike *res judicata*, collateral estoppel may "be asserted in a new case by a **nonparty** to the original proceeding." Id. (emphasis added) (citing B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 147 (N.Y. 1967)). These principles "apply as well to awards in arbitration as they do to adjudications in judicial proceedings." Id. (citations omitted).

For many of the same reasons discussed above, Collateral Estoppel bars Penson's claims because the dispositive issues underlying each of Penson's claims in this action already were litigated to their conclusion in the FINRA Arbitration. The Arbitration Award makes clear that it fully and finally resolved Penson's claims, including the Early Termination Claim, whether through its award of monetary damages or its express denial of all other relief. **Exhibit W**, Arbitration Award (A1107-A1114). As a result, the FINRA Arbitration finally resolved two critical issues underlying Penson's claims in this case: (i) whether Opus breached the PMA by prematurely terminating the agreement; and (ii) the amount of damage caused by that breach. Thus, the FINRA Arbitration is dispositive of Penson's claims in this case, which fail as a matter of law.

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CONCLUSION

For all the foregoing reasons and based on the facts and authorities cited herein, the Court should grant summary judgment in favor of Schonfeld and against Penson, dismissing the Complaint and each count asserted therein with prejudice, and granting such other or further relief as it deems just and proper.

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Wilmington, Delaware

COLE SCHOTZ P.C.

By: */s/ Nicholas J. Brannick*
Nicholas J. Brannick (No. 5721)
500 Delaware Avenue, Suite 1410
Wilmington, DE 19801
Tel: (302) 652-3131

and

Warren A. Usatine
Wendy F. Klein
Cole Schotz P.C.
25 Main Street
Hackensack, NJ 07601
Tel: (201) 489-3000
Counsel to Defendant, Schonfeld Group Holdings LLC