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THIRD DISTRICT COURT
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SALT LAKE COUNTY
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Attorneys for Wayne Klein, Receiver for FFCF Investors, LLC,
Ascendus Capital Management, LCC, and Smith Holdings, LLC

IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY

STATE OF UTAH

THE LIGHTED CANDLE SOCIETY, a
nonprofit Washington, D.C. corporation,

Plaintiff,

vs.

ASCENDUS CAPITAL MANAGEMENT,
LLC, a Utah limited liability company;
RICHARD T. SMITH, ROGER E. TAYLOR,
ROBERT ALSOP, FFCF INVESTORS, LLC, a
Utah limited liability company, LBS
PARTNERS, John Does I through IX and Jane
Does I through IX,

Defendants.

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS**

Case No. 090906303

Judge Kate Toomey

R. Wayne Klein, court-appointed receiver (the "Receiver") for Ascendus Capital Management, LLC ("Ascendus") and FFCF Investors, LLC ("FFCF") (collectively the "Receivership Entities"), by and through his attorneys of record, hereby submits his Memorandum in Support of Motion to Dismiss.

STATEMENT OF FACTS

Ascendus and FFCF Operated as Ponzi Schemes

1. Beginning in approximately 2002, Ascendus collected millions of dollars from investors as part of a "Ponzi" scheme premised on trading in the options market.¹
2. In 2005, Ascendus, through its agents, reported that the options market no longer provided the profitable opportunities that had existed earlier and that Ascendus would be closed down.
3. At that time, investors were told that a new investment program was being created through another entity, FFCF, and that the investors would be able to continue to realize profits through investments with FFCF, an entity operated and controlled by the same individuals that operated and controlled Ascendus.
4. Many investors in Ascendus then invested their money with FFCF.
5. FFCF operated as another Ponzi scheme, and over the next two and one-half years, investors began to withdraw money until the investment scheme operated by FFCF collapsed.

Appointment of Receiver for Ascendus and FFCF

6. On October 15, 2008, A. David Barnes, M.D., P.C. ("Dr. Barnes"), one of the

¹ Utah case law has defined a Ponzi scheme as "a fraudulent investment scheme in which money contributed by later investors generates artificially high dividends for the original investors, whose example attracts even larger investments." *State v. Bolson*, 2007 UT App 268, ¶ 4, 167 P.3d 539 (citing Black's Law Dictionary 1180 (7th ed.1999)).

investors in the Ascendus and FFCF schemes, sued Ascendus, FFCF, and others in Third District Court alleging ten different causes of action, and sought, among other things, dissolution of Ascendus and FFCF, two limited liability companies, pursuant to the Utah Revised Limited Company Act (the "Dissolution Action").

7. In the Dissolution Action, Dr. Barnes also asked for the appointment of a receiver to handle the business and affairs of Ascendus and FFCF before and after dissolution.

8. The Dissolution Action was assigned to the Honorable Denise P. Lindberg, Third Judicial District Court of Salt Lake County, State of Utah.

9. The Receiver was appointed Receiver for the Receivership Entities by Judge Lindberg pursuant to an Order entered on March 18, 2009 (the "Order"). (*See generally* the Order, attached as Exhibit A.)

10. On April 16, 2009, the plaintiff filed this action.

11. Under the terms of the Order, the Receiver is authorized to investigate the affairs of the Receivership Entities, to marshal and safeguard their assets, and to institute legal proceedings for the benefit of the Receivership Entities and their investors and creditors against individuals or entities which the Receiver claims have wrongfully or improperly received funds or other proceeds from the Receivership Entities. (*Id* at 2-4.)

12. Recently, in the Dissolution Action, the Receiver moved for an Approval of Proof of Claim Form and Claim Review Process to create a process for distributing the assets of the Receivership Entities in a fair and equitable manner to those with legitimate claims against them,

(Receiver's Motion for Approval of Proof of Claim Form and Claim Review Process, attached as Exhibit B.) Approval of this claims process is now pending before Judge Lindberg.

13. Pursuant to the proposed Claim Review Process, those with possible claims against the Receivership Entities, such as the plaintiff, will receive a Proof of Claim form from the Receiver.

14. Once a valid Proof of Claim form is returned to the Receiver along with documents supporting the claim, the Receiver will classify the claim as allowed, reduced, or rejected.

15. Claimants will then be able submit additional documentation to support their claims, and will also be able to file objections with Judge Lindberg if they disagree with the Receiver's recommendations.

16. Upon the conclusion of the claim submission process and after resolving any objections to the Receiver's recommendation, the Receiver will begin to distribute on a pro-rata basis and in stages the assets he has recovered, depending on the pace at which the remaining funds are recovered and litigation is completed.

ARGUMENT

The Court should dismiss Ascendus and FFCF from this case. Exclusive jurisdiction over the property of these two companies rests with Judge Lindberg in an action where she appointed a receiver to manage their affairs. The statute under which the Receiver was appointed provides in part: "The court appointing a receiver or custodian has *exclusive jurisdiction* over the

company and all of its property wherever located." Utah Code Ann. § 48-2c-1212 (1) (emphasis added). Accordingly, Judge Lindberg's court is the only court with jurisdiction over the assets of the Receivership Entities. Wisdom supports this result. If parties with claims were allowed to go forward against the Receivership Entities in various forums, inconsistent judgments are a risk and the expense of needless litigation is a certainty. See *Wyndham Associates v. Bintliff*, 398 F.2d 614, 619 (2nd Cir. 1968) ("There is a strong policy favoring the litigation of related claims in the same tribunal in order that pretrial discovery can be conducted more efficiently, duplicitous litigation can be avoided, thereby saving time and expense for both parties and witnesses, and inconsistent results can be avoided."). In addition, Utah Code Ann. § 48-2c-1212 (1)'s approach preserves the assets for equitable distribution to all creditors, rather than to a few who may try to seize all of the assets for themselves.

Utah courts recognize the general rule that the "possession by the court of the res in a receivership proceeding gives the court the power to determine all questions concerning the ownership and disposition of the property." *Interlake Co. v. Von Hake*, 697 P.2d 238 (Utah 1985). See also *Jacobs v. DeShelter*, 465 F.2d 840, 843 (6th Cir. 1972) ("The settled rule which has risen on the foundation of this principle is that whichever court, state or federal, first obtains constructive possession of property in the exercise of its jurisdiction, is entitled to retain control of that property without interference from the other.").

For example, in *Klein v. Peter*, stockholders of a mining company, which was in receivership in Idaho state court, sued the company and its officer and managers in Utah federal

court "claiming they had been defrauded by the acts of [the] officers out of large sums of money . . ." 284 F. 797, 798 (8th Cir. 1922). The case was dismissed by the district court, and the stockholders appealed. *Id.* On appeal, the *Klein* court held that the district court properly dismissed the case because it lacked jurisdiction. *Id.* Citing the United States Supreme Court, the *Klein* court explained: "The whole property of the corporation within the jurisdiction of the court which appointed the receiver . . . remains in its custody, to be administrated and distributed by it." *Id.* at 799, 800 (citing *Porter v. Sabin*, 149 U.S. 473 (1893)). "Until the administration of the estate has been completed and the receivership terminated," other courts cannot "assume to deal with rights of property or of action, constituting part of the estate within the exclusive jurisdiction and control" of the court that has appointed the receiver. *Id.* at 800.

The *Klein* court also pointed out that even though that case was dismissed, the stockholders could still pursue their claims in Idaho state court. *Id.* "Appellants had and have a complete remedy for any wrongs inflicted, *in the court appointing the receiver.*" *Id.* (Emphasis added.) Similarly, the plaintiff in this case does not lose its claims against Ascendus and FFCF after they are no longer parties in this action. One of the purposes of appointing a receiver is to distribute assets to multiple parties in a fair and equitable manner, and trial courts are given broad authority to direct the procedures for the disposition of claims against a company in receivership. *In re Olympus Construction, L.C.*, 2009 UT 29, ¶ 21, 215 P.3d 129. In the Dissolution Action, the trial court will fashion a claim disposition procedure. *Id.* ¶ 23; *see also* Statement of Facts ("SOF") ¶ 12. Under the proposed procedure, those with possible claims

against the Receivership Entities, such as the plaintiff, may submit a Proof of Claim form to the Receiver, and the Receiver will classify the claim as allowed, reduced, or rejected. SOF ¶¶ 13, 14. Claimants may file objections with Judge Lindberg if they disagree with the Receiver's recommendations. *Id.* ¶ 15. Upon the conclusion of the claim submission process and after any objections to the Receiver's recommendation have been resolved, the Receiver will begin to distribute on a pro-rata basis and in stages the assets he has recovered, depending on the pace at which the remaining funds are recovered and litigation is completed. *Id.* ¶ 16. Therefore, the plaintiff will not lose any of its rights if the Court grants this motion to dismiss. Instead, the Receiver will be able to conserve the resources of the Receivership Entities by avoiding unnecessary litigation, judicial efficiency will be increased as the same court handles similar claims, the risk of inconsistent decisions concerning the property of the Receivership Entities will be eliminated and assets will be distributed in the most equitable manner.

Utah Code Ann. § 48-2c-1212 gives the court appointing a receiver the power to establish the authority of the Receiver. Utah Code Ann. § 48-2c-1212(3)(ii) provides that this authority may include the authority to sue and defend legal actions. Pursuant to this grant of authority, Judge Lindberg included the following paragraph in the Order:

The Receiver is authorized, empowered, and directed to investigate, prosecute, defend, intervene in, or otherwise participate in or compromise actions in any state, federal, or foreign court or proceeding of any kind as may be advisable, in his sole discretion, to recover or conserve assets and property of Company Defendants.

Exhibit A, ¶ 6. While this provision gives the Receiver the option to sue or defend in other

courts, it does not give other courts jurisdiction over the Receivership Entities or their assets. As set forth above, that jurisdiction, under Utah Code Ann. § 48-2c-1212 (1), is given exclusively to Judge Lindberg's court. Accordingly, the appropriate way to defend against such actions, in almost every instance, is by doing precisely what the Receiver is doing here: moving to dismiss so that the claims procedure can proceed undisturbed in the court with exclusive jurisdiction over the Receivership Entities and their assets.

CONCLUSION

For the foregoing reasons, the Receiver respectfully requests the Court to dismiss Ascendus and FFCF from this action.

DATED this 29th day of January, 2010.

**MANNING CURTIS BRADSHAW
& BEDNAR LLC**



L.R. Curtis, Jr.
David C. Castleberry
Attorneys for Wayne Klein, Receiver for FFCF
Investors, LLC, Ascendus Capital Management,
LCC, and Smith Holdings, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of January, 2010, I caused to be served in the manner indicated below a true and correct copy of the attached and foregoing **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** upon the following:

- VIA FACSIMILE
- VIA HAND DELIVERY
- VIA U.S. MAIL
- VIA FEDERAL EXPRESS
- VIA EMAIL

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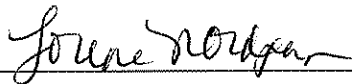


EXHIBIT A

FILED
MAR 18 2009
THIRD DISTRICT COURT
SALT LAKE DEPARTMENT

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Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

A. DAVID BARNES, M.D., P.C.,

Plaintiff,

vs.

FFCF INVESTORS, L.L.C., a Utah limited liability company; ASCENDUS CAPITAL MANAGEMENT, L.L.C., a Utah limited liability company; SMITH HOLDINGS, L.L.C., a Utah limited liability company; RICHARD T. SMITH, An individual; ROGER E. TAYLOR, an individual, and John Does I through X,

Defendants.

**ORDER APPOINTING A
RECEIVER FOR FFCF
INVESTORS, L.L.C., ASCENDUS
CAPITAL MANAGEMENT,
L.L.C., AND SMITH HOLDINGS,
L.L.C.**

Civil No. 080922273

Judge Lindberg

THIS CAUSE came to be heard before this Court on Plaintiff's Motion for Appointment of Receiver, and the Court having heard argument of counsel and having conducted a hearing, and being otherwise fully advised in the premises,

IT IS HEREBY ORDERED AND ADJUDGED that:

1. Plaintiff's Motion for Appointment of Receiver is granted.
2. Wayne Klein is appointed Receiver of and shall take immediate possession of all of the assets of the Defendants FFCF Investors, L.L.C. ("FFCF"), Ascendus Capital Management, L.L.C., ("Ascendus"), and Smith Holdings, L.L.C. ("Smith Holdings") (collectively "Company Defendants"), and all of the rents, revenues, income, profits, or other sums due the Company Defendants.
3. Company Defendants, their agents or employees, and other persons in possession of any of the foregoing assets shall forthwith deliver them to the Receiver and are restrained from interfering with the Receiver or with any of the property delivered to the Receiver.
4. The Receiver is authorized, empowered, and directed to:
 - a. Marshal and take control of all assets and property belonging to, or in the custody, control, or possession of any of the Company Defendants, with full power to take such steps as he deems necessary to secure such premises, assets and property;
 - b. Have control of, and to close, transfer, or otherwise take possession of all accounts, securities, funds, or other assets of, or in the name of any of the Company Defendants, at any bank, brokerage firm, or financial institution which has possession, custody, or control of any assets of and of the Company Defendants;

- c. Take such action as is necessary to preserve and take control of, and to prevent the dissipation, concealment, or disposition of any assets of Company Defendants;
- d. Make or authorize such payments and disbursements from the funds and assets under his/her control pursuant to this Order, and to incur, or authorize the incurrence of, such expenses and make, or authorize the making of, such agreements as may be reasonable, necessary, and advisable in discharging his/her duties as Receiver;
- e. Take possession, have access to, and to review all mail or any other communication, in any other form, of the Company Defendants or of its agents, officers, and directors;
- f. Execute all necessary corporate resolutions or directions necessary in carrying out the Receiver's responsibilities; and
- g. Make demand, file, or otherwise handle any claim under any insurance policy held by or issued on behalf of the Company Defendant or other persons affiliated with it.

5. The Receiver is authorized, empowered, and directed without further leave of the Court, to liquidate and convert into money all of the assets, property, and interests of every nature held in his/her possession and control pursuant to this Order, by selling, conveying, and

disposing of the property, either at public or private sale, on terms and in the manner the Receiver deems most beneficial to the persons or parties entitled to the proceeds and to deposit such proceeds into an account, pending further order of the Court.

6. The Receiver is authorized, empowered, and directed to investigate, prosecute, defend, intervene in, or otherwise participate in or compromise actions in any state, federal, or foreign court or proceeding of any kind as may be advisable, in his sole discretion, to recover or conserve assets and property of Company Defendants.

7. The Receiver shall have the authority to issue subpoenas for documents and testimony consistent with the Utah Rules of Civil Procedure.

8. Defendant and its officers, agents, servants, employees, attorneys-in-fact, consultants, accountants, advisers, and counsel shall cooperate with and assist the Receiver, including, if deemed necessary by the Receiver, by appearing for deposition testimony and producing documents.

9. The Receiver is authorized to employ agents, servants, or employees in his/her discretion to assist him/her in taking possession of the property and carrying out the terms of the Receivership and the orders of this Court, including accountants, attorneys, securities and real estate brokers, financial or business advisers, forensic experts, or liquidating agents.

10. The costs, fees, and expenses of the Receiver incurred in connection with the performance of his/her duties described herein, including the costs and expenses of those persons

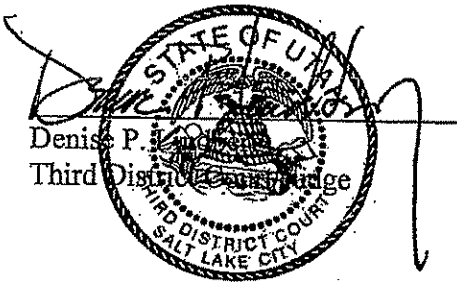
who may be engaged or employed by the Receiver to assist him/her in carrying out his/her duties hereunder, shall be paid out of the proceeds or other assets of Defendant and any other assets under the control of the Receiver pursuant to this Order. All applications for costs, fees, and expenses for services rendered in connection with the Receiver shall be made by application detailing the nature of the services and shall be heard by the Court.

11. Within ten (10) days of the date of this Order, the Receiver shall file with this Court an Oath and Acceptance of Receiver accepting the appointment and agreeing to faithfully discharge his/her duties.

12. The Receiver shall serve until further order of this Court.

DATED: 18 March 2008

BY THE COURT:


Denise P. [unclear]
Third District Court Judge
THIRD DISTRICT COURT
SALT LAKE CITY


CERTIFY THAT THIS IS A TRUE COPY
OF AN ORIGINAL DOCUMENT ON FILE
IN THE THIRD DISTRICT COURT, SALT
LAKE COUNTY, STATE OF UTAH.
DATE: March 18, 2008

DEPUTY CLERK
THIRD DISTRICT
SALT LAKE

EXHIBIT B

FILED
THIRD DISTRICT COURT
10 JAN 21 PM 3:48
SALT LAKE DEPARTMENT

MANNING CURTIS BRADSHAW
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Attorneys for Receiver for FFCF Investors, LLC,
Ascendus Capital Management, LLC,
and Smith Holdings, LLC

IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY

STATE OF UTAH

A. DAVID BARNES, M.D., P.C.,

Plaintiff,

vs.

FFCF INVESTORS, LLC, et al.

Defendants.

**RECEIVER'S MOTION FOR
APPROVAL OF PROOF OF CLAIM
FORM AND CLAIM REVIEW PROCESS**

Case No. 080922273

Judge: Denise P. Lindberg

FFCF INVESTORS, LLC,

Plaintiff,

vs.

RICHARD SMITH, et al.

Defendants.

R. Wayne Klein, the Court-Appointed Receiver (the "Receiver") of Ascendus Capital Management, LLC ("Ascendus"), FFCF Investors, LLC ("FFCF"), and Smith Holdings, LLC ("Smith Holdings"), (collectively, the "Receivership Entities"), hereby moves for Court approval of the form to be used for investors and others ("Claimants") to make claims ("Claims") against the assets of the Receivership Entities and for approval of the process to be used by the Receiver in evaluating the Claims.

Background

The Court appointed the Receiver on March 18, 2009, in connection with an investor lawsuit filed against the Receivership Entities. Under the order appointing a receiver, the Receiver was initially empowered to "marshal and take control of all assets and property" of the Receivership Estate (*Order Appointing a Receiver*, at 2). The Receiver was directed to "liquidate and convert into money all of the assets" of the Receivership Entities (*id.* at 3), "pending further order of the Court" (*id.*).

Since the date the Receiver was appointed, notable progress has been made in recovering funds for the Receivership Estate. This progress is described in the five reports to the Court by the Receiver dated April 13, May 29, July 10, September 25, and November 25, 2009. Much remains to be accomplished in the recovery of funds. Nevertheless, the Receiver believes it is appropriate at this time to identify those persons who will be asserting Claims against the property of the Receivership Estate and determine the amount of valid Claims.

Accordingly, the Receiver moves for Court approval of the following Claims Review Procedure and the attached Proof of Claim Form.

Proposed Claims Review Procedure

1. **Distribution of Proof of Claim Forms** The Receiver will distribute Proof of Claim Forms, in the form attached as Exhibit A (Instructions and Proof of Claim Form), to all investors known to the Receiver and to others who have informed the Receiver of an intent to make Claims against the Receivership Estate. The Proof of Claim Form will also be posted on the website of the Receiver, available for any person to access.
2. **Proof of Claim Deadline** Proof of Claim Forms must be submitted to the Receiver by April 30, 2010 to be accepted. Proof of Claim Forms mailed after that date will be deemed invalid, absent demonstration of compelling circumstances or Court order.
3. **Assignment of Claim Number** When Claims are submitted, the Receiver will assign a Claim number ("Claim Number") to each Claim. To maintain the confidentiality of Claimants, Claims will be referred to by Claim Number in public filings. Information as to the identity of Claimants will be provided to the Court for *in camera* review.
4. **Review for Completeness** Proof of Claim Forms will be reviewed for completeness when received. If required information is missing, the Claimant will be given an opportunity to submit the missing information within ten days after the Receiver mails notice to Claimant that information is missing.
5. **Documentation Required** Claimants will be expected to submit documents supporting the amount of their Claim. If Claimants fail to submit documents supporting the amount of their Claims, the Receiver will have discretion to make a recommendation to the Court of an allowable Claim amount, based on the records of the Receiver. The Receiver may

recommend that the Claim be allowed in full, allowed at a reduced Claim amount, or denied. (*Note: the amount allowed for the "Claim" does not mean there will be enough money to pay the full Claim.*)

6. **Signature and Waiver Required** For a Proof of Claim to be valid, the Claimant must sign the Proof of Claim Form under penalty of perjury and agree to make the Claims process the exclusive means of making a Claim against the Receivership Estate.
7. **Initial Classification of Claims** The Receiver will initially classify Claims as "allowed," "reduced," or "rejected." The Receiver's review will be premised upon the principles set forth in the attached Exhibit B.
 - a. "Allowed" Claims will be those where the amount of Claim is the same as shown on records of the Receiver or where the Claimant submits documentation demonstrating to the satisfaction of the Receiver that the claimed amount is accurate.
 - b. "Reduced" Claims will be those where the Receiver believes the Claimant is entitled to a portion, but not all, of the amount claimed. Reductions might be recommended based on i) inadequate evidence that the claimed amount was actually paid to the Receivership Entities making the Claim, ii) the Claimant failing to offset distributions paid by the Receivership Entities, iii) the Receiver's belief that the Claimant had business affiliations with Ascendus, FFCE, or Smith Holdings, assisted in promoting the investment program, or was on notice of problems with the companies, such that the claimed amount should be discounted,

or iv) the presence of other factors indicating that the Claim amount should be reduced.

- c. "Rejected" Claims will be those where i) the Receiver believes the Claim knowingly contains false information, ii) the Claimant is an investor who has already received a return of the full principal amount invested, iii) the Claim is by a person who assisted in the investment program that is the subject of the Receivership, iv) the Claim is for debts not related to the operation of the Receivership Entities, or v) other situations where it would not be proper to use the assets of the Receivership Estate to pay the Claim.

8. **Notice of Preliminary Allowable Claim Amount** When the Receiver has finished his review of the completed Proof of Claim Forms and documentation submitted by Claimants, the Receiver will notify each Claimant of the Receiver's determination of the "Preliminary Allowable Claim Amount." For Claims where the Receiver intends to recommend a reduced Claim amount or reject the Claim, a Notice similar to Exhibit C will be mailed to the Claimant. Claimants who disagree with the Receiver's determination of the Preliminary Allowable Claim Amount will be allowed thirty (30) days from the date of mailing to submit additional documentation to support the amount of their Claim or to seek to persuade the Receiver that his determination should be modified. Claimants will be able to indicate acceptance of the Receiver's recommendation.

9. **Review of Supplemental Information** The Receiver will review any documentation

and information submitted in response to his notice of the Preliminary Allowable Claim and compile a list of recommended Allowable Claim Amounts.

10. **Recommendation to the Court.** The Receiver will file with the Court his recommendation of the Allowable Claim Amounts and send a copy to all Claimants.
11. **Claimant Objections Filed with the Court** Claimants who disagree with the Receiver's recommendation to the Court of the Allowable Claim Amount will have thirty (30) days from the time the Receiver's recommendations are filed with the Court to file an objection to the Receiver's recommendation. Any Claimant who fails to file a timely objection with the Court will be deemed to have consented to the Allowable Claim Amount as determined by the Receiver.
12. **Court Resolution of Objections** When the Receiver submits to the Court his recommendations of the Allowable Claim Amounts, the Receiver will suggest a process the Court might use to resolve the objections, in light of the number and nature of objections expected. Possible options include a hearing at which Claimants can argue their objections, making rulings based on written submissions, or referral to a special master.
13. **Determination of Final Allowable Claim Amounts** When the Court has ruled on the objections, the Receiver will file a Final Claims Summary which will report, as to each Claim number, the final allowed amount. This Final Claims Summary will also be posted on the Receiver's website. The Final Claims Summary amounts will be used by the Receiver in making pro-rata distributions of assets he has recovered in the Receivership.

14. **Distribution of Funds** The Receiver can begin making payments to investors and other Claimants. It is expected that the Receiver will make distributions in stages, depending on the pace at which remaining funds are recovered and litigation is completed.

Proposed Timetable The Claims procedure outlined above involves a number of steps and time periods for each step. It is hoped the Claims procedure can be completed according to the following timetable:

- **April 30, 2010** Deadline for submission of Proof of Claim Forms.
- **May 14, 2010** Receiver will have notified Claimants of any deficiencies in their Proof of Claim Forms and give an opportunity to supply missing information.
- **May 24, 2010** Deadline for submission of information identified by Receiver as missing.
- **June 15, 2010** Completion of initial review of Proof of Claim Forms by the Receiver. Receiver will send notice of Preliminary Allowable Claim Amounts to each Claimant.
- **July 15, 2010** Deadline for Claimants to submit any additional documentation in response to notice by the Receiver that the Preliminary Allowable Claim Amount is reduced or rejected.
- **August 13, 2010** Receiver will file with the Court a report listing the Allowable Claim Amounts recommended by the Receiver.
- **September 13, 2010** Deadline for Claimants to file with the Court any objections to the

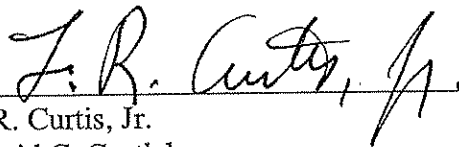
Receiver's list of Allowable Claim Amounts.

- **September 30, 2010** Receiver will file with the Court a proposed process for resolving the objections and a proposed distribution plan, to be implemented when the list of Allowable Claims is finalized.
- **November 15, 2010** Goal for completion of Court review of, and ruling on, objections and on the proposed distribution plan. This will result in a final list of Allowable Claims and permission for the Receiver to begin making distributions.

WHEREFORE, the Receiver Wayne Klein asks this Court to approve the foregoing claims procedure and enter the Order attached hereto as Exhibit D.

DATED this 21st day of January, 2010.

MANNING CURTIS BRADSHAW & BEDNAR LLC



L.R. Curtis, Jr.

David C. Castleberry

Attorneys for Receiver for FFCF Investors, LLC, Ascendus Capital Management, LLC and Smith Holdings, LLC

Plaintiff:

Wayne Klein
Court-Appointed Receiver for FFCF Investors, LLC,
Ascendus Capital Management, LLC,
and Smith Holdings, LLC
299 South Main, Suite 1300
Salt Lake City, UT 84111

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of January, 2010, I caused to be sent via first-class mail, postage prepaid, a true and correct copy of the foregoing Receiver's Motion for Approval of Proof of Claim Form and Claim Review Process to:

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Salt Lake City, UT 84111
Counsel for Albert Wirth

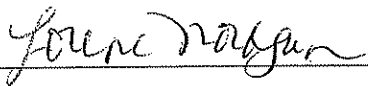


EXHIBIT A

EXHIBIT A

**THIRD DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH**

A. David Barnes, M.D.,

Case No. 080922273

vs.

FFCF Investors, LLC, Ascendus Capital Management, LLC, Smith Holdings, LLC, Richard T. Smith, and Roger E. Taylor.

PROOF OF CLAIM FORM

FFCF Investors, LLC ("FFCF") Ascendus Capital Management, LLC ("Ascendus") and Smith Holdings, LLC ("Smith Holdings")

Please review the attached "Instructions" for information on how to complete this form.

Deadline:

All Proof of Claim Forms must be returned to the Receiver (Wayne Klein) by April 30, 2010.

Mail to:

FFCF/Ascendus Claim Form

Wayne Klein, Receiver

299 South Main, Suite 1300

Salt Lake City, UT 84111

Note: Do not mail the claim form to the court.

A. CLAIMANT INFORMATION

Response

1. Contact Information

Claimant Name

Joint Holder/Investor

Address

City, State, Zip

Phone Number

Mobile Phone

E-Mail Address

Tax Identification Number

2. **Entities:** If any of the investments were made by an entity, list all persons who directly or indirectly hold beneficial interests in the entity and their share of ownership.

3. **Affiliation/Relationship:** Attach an explanation for any "yes" answers.

Are you related to Roger Taylor or Richard Smith?

	Have you been a business partner with Taylor or Smith, assisted in the creation of companies they managed, or been a signatory on any bank accounts they held?			
	Have you ever received financial support from Taylor or Smith, such as salary, loans, or gifts of money or property?			
4.	Sales Activity: Did you solicit others to invest with Ascendus or FFCF or did you receive compensation as a result of others investing with Ascendus or FFCF?			
5.	Type of Claim			
	<u>Ascendus Investor?</u> Did you pay money (or have others pay money for you) to Ascendus Capital Management? (<i>Note: do not include funds that you deposited into a brokerage account at Penson Financial Services or Great Eastern Securities .</i>)	Yes/No:		
	<u>Investor in FFCF?</u> Did you pay money to FFCF Investors, LLC?	Yes/No:		
	<u>Non-Investor Creditor?</u> Do you claim that Ascendus or FFCF owes you money for something other than an investment?	Yes/No:		
B. INVESTOR CLAIM INFORMATION				
1.	Funds Given to Ascendus. List the amount and date of each payment given to Ascendus by you, or by others for you, for investment purposes. (<i>Do not include monies given to FFCF, Penson, or Great Eastern.</i>)	Amount	Date	What documents are enclosed?
	First investment			
	Second investment			
	Third investment			
	Fourth investment			
	Fifth investment			
	<i>Are additional sheets enclosed with more investments?</i>			Yes/No:
	Total amount given to Ascendus			

2.	Monies Received from Ascendus. List the amount and date of each payment you received from Ascendus. This includes interest, withdrawals, and payments by Ascendus to others for you. It also includes payments to you by Roger Taylor, Richard Smith, or others in connection with your investment payments to Ascendus.	Amount	Date	What documents are enclosed?
	First payment			
	Second payment			
	Third payment			
	Fourth payment			
	Fifth payment			
	<i>Are additional sheets enclosed with more payments?</i>			Yes/No:
	Total amount received from Ascendus			
3.	Net Investment Results - Ascendus What is the net results of your investment with Ascendus? In most cases, this will consist of the total amount of investments minus the total amount you were paid.			
4.	Funds Given to FFCF. List the amount and date of each payment given to FFCF by you, or by others for you, for investment purposes.	Amount	Date	What documents are enclosed?
	First payment			
	Second payment			
	Third payment			
	Fourth payment			
	Fifth payment			
	<i>Are additional sheets enclosed with more investments?</i>			Yes/No:
	Total amount given to FFCF			
5.	Monies Received from FFCF. List the amount and date of each payment you received from FFCF. This includes interest, withdrawals, and payments by FFCF to others for you. It also includes payments to you by Roger Taylor, Richard Smith, or others in connection with your investment.	Amount	Date	What documents are enclosed?
	First payment			
	Second payment			
	Third payment			
	Fourth payment			
	Fifth payment			
	<i>Are additional sheets enclosed with more payments?</i>			Yes/No:

	Total amount received from FFCF			
6.	Net Investment Results - FFCF			
	What is the net results of your investment with FFCF? In most cases, this will consist of the total amount of investments minus the total amount you were paid.			
C.	CLAIMS FOR NON-INVESTOR DEBTS			
1.	Nature of Claim	Explanation		
	Explain the nature of the claim you have against Ascendus, FFCF, or Smith Holdings. <i>Attach additional pages as necessary.</i>			
	Explain the reasons you believe this claim should be paid by the Receivership Estate. <i>Attach additional pages as necessary.</i>			
2.	Claims Against Receivership Estate. List the amounts you claim are owed you by the Receivership Estate, along with the dates of each payment and the documentation supporting your claim.	Amount	Date	What documents are enclosed?
	First payment/amount claimed.			
	Second payment/amount claimed.			
	Third payment/amount claimed.			
	Fourth payment/amount claimed.			
	Fifth payment/amount claimed.			
	<i>Are additional sheets enclosed with more claims?</i>			Yes/No:
	Total amount claimed for non-investor debts.			
D.	TOTAL AMOUNT OF CLAIM (investors and creditors).			
E.	SIGNATURES OF CLAIMANT(S): <u>Important:</u> Filing this proof of claim shall constitute agreement that this claims process shall be the exclusive means of making a claim against the Receivership Entities and shall be a waiver of any other claims against the Receivership Entities or the Receiver. All Claimants must sign this Claim Form.			
	I/we do hereby declare under penalty of perjury that the above information is correct to the best of my/our knowledge and belief.			Date

[EXHIBIT A]
INSTRUCTIONS FOR PROOF OF CLAIM FORM

Ascendus Capital Management, LLC (“Ascendus”), FFCF Investors, LLC (“FFCF”), and
Smith Holdings, LLC (“Smith Holdings”)

Instructions

The attached “Proof of Claim” Form has been approved by the Third District Court of Utah. These instructions apply to that Proof of Claim Form. This process is the exclusive method for investors and others to assert claims against any of the monies or assets of Ascendus, FFCF, and Smith Holdings which have been or should be delivered to Wayne Klein, the Court-appointed Receiver (“Receiver”). Persons who invested in Ascendus or FFCF may complete the Proof of Claim Form and submit it to the Receiver. Persons who have other claims against the assets of Ascendus, FFCF, or Smith Holdings also may use this form to make claims.

The following guidelines apply to this Proof of Claim Form:

1. **Documents.** The Receiver will make an initial evaluation of the claim based on records deemed to be reliable. Investors are strongly encouraged to submit copies of documents establishing that funds were sent to Ascendus or FFCF in order to establish the amount invested. Copies of bank documents will be the most persuasive means of demonstrating how much money was invested. *Note: because investment account statements sent to investors did not reflect actual profits earned by the companies, copies of account statements received from Ascendus or FFCF will not be deemed reliable indications of monies invested.* In the event the documents submitted by investors show different results than bank records reconstructed by the Receiver, the Receiver will base his recommendation to the Court on the records deemed most reliable.
2. **Signed Under Oath.** The Proof of Claim Form must be signed under penalty of perjury. If the amount of a claim is based on false or misleading information, the Receiver may recommend that the entire claim be denied.
3. **Confidentiality.** The Receiver will endeavor to maintain the confidentiality of information submitted by claimants, by assigning a claim number to each claim. Public filings will refer to claims by claim number. The Receiver will provide to the Court information allowing it to identify each claimant.
4. **Types of Claims.** Persons whose claims are based on “investments” made with Ascendus or FFCF should list those investments in Section B of the Proof of Claim Form. Persons whose claims are based on other business dealings with Ascendus or FFCF should complete Section C of the Proof of Claim Form. Claimants may make claims under both sections if they had investment and non-investment dealings with the companies. Unsecured claims arising from non-investment dealings with these companies are less likely to be deemed valid claims against the assets of Ascendus,

FFCF, and Smith Holdings.

5. **Classes of Claims.** The Receiver may recommend to the Court that claims be divided into more than one class, with higher percentages of claims being paid to certain classes. Claims that may be assigned to classes receiving lower percentages of recovery might include claims for non-investment business dealings with the companies, claims by family members or business associates, claims by persons who may have had knowledge of the true financial condition of the companies or who otherwise may not have acted in complete good faith, claims based on goods or services, and claims containing false or misleading information.
6. **Allowable Claims will be Based on the Principal Amount of Investment.** The amount of valid claims determined by the Receiver will be based on the amount of funds actually paid to Ascendus or FFCF, not based on profits reported on account statements prepared by these companies. Because it is expected that there will only be enough money to pay a portion of valid claims, no one will be allowed to recover more than the amount of their actual investment unless all investors recover at least the amount of their investment.
7. **Submission Deadline.** The Proof of Claim Form must be sent to the Receiver and delivered or postmarked by **April 30, 2010**. Claims postmarked or delivered after that date may be denied. If you are aware of other claimants, please encourage them to submit claims before the deadline. Additional copies of this Proof of Claim Form are available on the Receiver's website at www.kleinutah.com. Proof of Claim Forms and documentation supporting the claim should be mailed, instead of being sent electronically. The Receiver cannot confirm the receipt of claim documents sent electronically. *Claim forms should NOT be sent to the court.*
8. **Keep a Copy!** Claimants should keep a copy of the Proof of Claim Form and supporting documentation. Claimants should keep their original copies of supporting documents and send photocopies to the Receiver. The Receiver will contact you if he needs the original documents for review.
9. **Steps in the Claim Review Process.**
 - a. Proof of Claim Forms will be reviewed for completeness when received. If required information (such as a signature) is missing, the claimant will be contacted and given an opportunity to submit the missing information within ten days.
 - b. The Receiver will determine the validity of the amount of the claim by reviewing the Proof of Claim Form and supporting documentation and by comparing the claim with the financial records reconstructed by the Receiver. If the records do not match, the Receiver will make his recommendations based on records he deems most accurate – whether from the claimant or from the Receiver's analysis.
 - c. The Receiver will make a determination of the Preliminary Allowable Claim Amount. *Note: This is the amount that the claimant can validly claim against the*

amount of assets recovered by the Receiver. It does not mean that that amount will be available for payment. The amount actually paid to claimants is expected to be a small percentage of the amount of allowable claims because we anticipate that there will be valid claims for more money than will be recovered.

- d. Claimants will be notified of the Receiver's determination of their Preliminary Allowable Claim Amount. Claimants who disagree with the Receiver's determination of the preliminary allowable claim amount will have thirty (30) days to provide additional documentation to support the amount of their claim or to persuade the Receiver that his preliminary determination should be modified.
- e. The Receiver will file with the Court his recommendations of the Allowable Claim Amount for each claimant.
- f. Claimants who disagree with the Receiver's recommendation will have thirty (30) days from the time the Receiver's recommendations are filed with the Court to file with the Court an objection to the Receiver's recommendation.
- g. The Court will establish a process for evaluating and ruling on the objections.
- h. When the Court has ruled on the objections, the list of allowable claim amounts will be deemed final.
- i. Distribution of funds recovered on behalf of Ascendus, FFCF, and Smith Holdings will be made on a pro-rata basis based on the final allowable claim amounts.

10. **Timetable.** The following is the expected timetable for determining allowable claims:

Date	Event
April 30, 2010	Deadline for submission of Proof of Claim Forms.
June 15, 2010	Receiver will complete his initial review of claim forms and will send notice of Preliminary Allowable Claim Amounts.
July 15, 2010	Deadline for submission of any additional information by claimants disagreeing with the Preliminary Allowable Claim determination and requesting additional review.
August 13, 2010	Receiver will file a report to the Court listing his recommendations for Allowable Claim Amounts. This report will also be mailed to all claimants.
September 13, 2010	Deadline for claimants to file with the Court any objections to the Receiver's recommendation of allowable claims.
November 15, 2010	Goal for completion of the Court's review of objections, creation of a final list of allowable claims, and Court approval of a distribution plan. Distributions of funds can begin.

The Proof of Claim Form must be mailed by **April 30, 2010** to the Receiver at:
Ascendus/FFCF Claim Form
Wayne Klein, Receiver
299 South Main, Suite 1300
Salt Lake City, UT 84111

EXHIBIT B

EXHIBIT B

[EXHIBIT B]

Guidelines for Claims Review, Reductions, and Rejections

1. **Claims should be supported by documentation.** Because the Receiver has determined that the records of Ascendus, FFCF, and Smith Holdings are incomplete and inaccurate, they will not be considered a reliable measure of amounts paid to these companies. Proof of Claim Forms should be accompanied by documents, such as bank records, providing evidence of the amounts paid to the companies and amounts received from them. If Proof of Claim Forms are submitted without supporting documentation, the Receiver will rely on documentation he believes best represents the actual financial transactions that occurred.
2. **Allowable claims should be based on "principal" amounts invested.** The "principal" amounts paid to Ascendus or FFCF will be used to calculate the amount of loss, not the amounts shown on account statements. Withdrawals or distributions will be deemed withdrawals of principal, not payment of profits.
3. **Allowable claims will be determined based on payments to Receivership Entities.** The allowable amount of claims will be based on amounts paid to Ascendus or FFCF for investment purposes. Payments investors may have made to Penson Financial Services, Taylor, Smith, or others will not be considered as components of a valid claim absent compelling justification.
4. **Grounds for disallowing claims.** Investors who received distributions in amounts greater than the amount of their principal investments will have their claims rejected. Claims that are not signed or are deemed to knowingly include false information will be rejected. Claims postmarked after the submission deadline will be rejected absent compelling justification for the delay.
5. **Claims by affiliated persons.** The Receiver may reject or reduce the recommended amount to be paid on claims submitted by persons who had a role in the operation of the businesses of Ascendus, FFCF, or Smith Holdings, solicited others to make investments, received compensation based on the investments of others, had close business relationships with the companies, Taylor, or Smith, or based on other appropriate factors.
6. **Receiver's use of business judgment.** The Receiver will use his business judgment in making recommendations to the Court regarding: a) whether claims by persons associated with other investors (such as investments by a claimant from personal and business accounts) should be treated separately or aggregated and b) whether claims should be reduced or rejected based on indications of lack of good faith by claimants in their dealings with the companies, or with the Receiver.

EXHIBIT C

EXHIBIT C

[EXHIBIT C]

**WAYNE KLEIN, RECEIVER FOR FFCF INVESTORS, LLC, ASCENDUS
CAPITAL MANAGEMENT, LLC, AND SMITH HOLDINGS, LLC
Third District Court Case No. 080922273**

Name
Address
City, State, Zip

NOTICE OF REDUCED OR REJECTED PROOF OF CLAIM

Dear _____:

Your Proof of Claim Form has been assigned Claim No. _____.

Wayne Klein, the Court-appointed Receiver for Ascendus, FFCF, and Smith Holdings has reviewed your Proof of Claim. The Receiver intends to recommend that your Claim be reduced or rejected for the reason(s) described below. Your Proof of Claim indicated a Claim amount of \$_____. The Receiver intends to recommend that the Court allow \$_____ of that Claim and reject any amounts in excess of the allowed amount.

The reason(s) for the Receiver's decision to recommend that your Claim be reduced or rejected are:

_____ The Claim form was not signed.

_____ The Claim form was not postmarked on or before April 30, 2010.

_____ The documentation you provided does not support the amount you claimed.

_____ Our records indicate that additional amounts should be deducted for distributions, withdrawals, or payments of profits to you.

_____ Our records do not show that your payments were made to the Receivership Entities or to others for the Receivership Entities.

_____ Other: _____

CALCULATIONS. The Receiver's records show the following payments relating to your dealings with Ascendus, FFCF, and Smith Holdings:

Amount actually paid by Claimant to or for the Receivership Entities:	
DEDUCTION: amounts previously paid to Claimant:	
Allowed amount:	
Claimed amount (on the Proof of Claim Form submitted by Claimant):	
Excess amount of Claim:	

What if I disagree with the Receiver's recommendation of a reduced or rejected Claim Amount?

You may submit additional documentation to the Receiver in response to this Notice by mailing it to the Receiver at the address below. **Note: Your response must be postmarked no later than _____ (30 days after mailing of Notice).**

What happens next?

Following receipt of your supplemental documentation, the Receiver will review the information you submit and determine whether or not the Receiver changes his recommendation. If the Receiver changes his recommendation, you will be notified by letter indicating the amount of the allowed Claim.

If the Receiver does not change his recommendation, the Receiver will submit a list to the Court of the Allowable Claim Amounts, including his recommendation for your Claim. You will be mailed a copy of the Receiver's recommendation to the Court. You will have thirty (30) days from the time of the Receiver's filing with the Court to file with the Court an objection to the Receiver's recommendation. If you fail to file an objection with the Court, you will be deemed to have consented to the Receiver's recommendation.

How do I accept the Receiver's recommendation of the amount of my allowable Claim?

Please sign this form in the space provided below and return it to the Receiver at the address listed below. Upon receipt of this signed form, the Receiver's recommendation will be deemed accepted and your Claim amount will be reduced to the amount recommended by the Receiver.

I AGREE WITH THE RECEIVER'S RECOMMENDATION AND ACCEPT THE ALLOWED AMOUNT OF THE CLAIM.

Signed: _____ Date: _____

How much will I be paid under the Receiver's calculations?

The "allowed amount" is **not** the amount that will actually be paid. At a future date, the Court will approve a distribution plan, which is expected to be based on the amount of money available and the total amount of allowed Claims. The Receiver expects there will only be sufficient funds to pay a portion of the total amount of each allowed Claim.

When will the allowed amount be paid?

The Receiver hopes to receive approval from the Court to begin paying allowable Claims in November 2010. Because the Receiver does not expect that all the funds will be recovered by that time and that not all the litigation will be completed, the Receiver expects that additional payments will be made in stages, as funds are recovered.

Address of the Receiver:

Wayne Klein, Receiver for Ascendus, FFCF, and Smith Holdings
299 South Main, Suite 1300
Salt Lake City, UT 84111
(801) 534-4455

EXHIBIT D

EXHIBIT D

MANNING CURTIS BRADSHAW
& BEDNAR LLC

L.R. Curtis, Jr. [0784]
David C. Castleberry [1151]
170 South Main, Suite 900
Salt Lake City, UT 84101-1655
Telephone (801) 363-5678
Facsimile (801) 364-5678

Attorneys for Receiver for FFCF Investors, LLC,
Ascendus Capital Management, LLC,
and Smith Holdings, LLC

IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY

STATE OF UTAH

A. DAVID BARNES, M.D., P.C.,

Plaintiff,

vs.

FFCF INVESTORS, LLC, et al.

Defendants.

[PROPOSED]

**ORDER APPROVING PROOF OF
CLAIM FORM AND CLAIM REVIEW
PROCESS**

Case No. 080922273

Judge: Denise P. Lindberg

FFCF INVESTORS, LLC,

Plaintiff,

vs.

RICHARD SMITH, et al.

Defendants.

The matter before the Court is the Receiver's Motion for Approval of Proof of Claim Form and Claim Review Process filed by R. Wayne Klein, the Court-Appointed Receiver of Ascendus Capital Management, LLC, FFCF Investors, LLC, and Smith Holdings, LLC. The Court has reviewed the Motion and the file and based thereon and for good cause shown,

IT IS HEREBY ORDERED that:

1. The Motion is GRANTED.
2. The Court approves the Proof of Claim Form and Instructions proposed by the Receiver attached as Exhibit A to the Receiver's motion.
3. The Court approves the Claim Review Process as set forth in the Motion, including the Guidelines for Claims Review, Reductions, and Rejections attached as Exhibit B and the form of the Receiver's Notice of Reduced or Rejected Proof of Claim, attached as Exhibit C to the Receiver's Motion.

Dated this ____ day of February, 2010.

BY THE COURT

Judge Denise P. Lindberg
District Court Judge