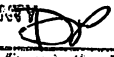


FILED DISTRICT COURT
Third Judicial District

NOV 13 2012

SALT LAKE COUNTY
By 
Deputy Clerk

**MANNING CURTIS BRADSHAW
& BEDNAR LLC**

David C. Castleberry [11531]

dcastleberry@mc2b.com

136 East South Temple, Suite 1300

Salt Lake City, UT 84111

Telephone (801) 363-5678

Facsimile (801) 364-5678

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

IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY
STATE OF UTAH

A. DAVID BARNES, MC, PC,

Plaintiff,

vs.

FFCF INVESTORS, LLC, et al.,

Defendants.

**[PROPOSED]
FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Case No. 080922273

Judge James T. Blanch

FFCF INVESTORS, LLC,

Plaintiff,

vs.

RICHARD SMITH, et al.,

Defendants.

The above-captioned case came on for a hearing on September 24, 2012. David C. Castleberry of the firm of Manning Curtis Bradshaw & Bednar LLC represented R. Wayne Klein, the court-appointed receiver for FFCF Investors, LLC ("FFCF"), Ascendus Capital Management, LCC ("Ascendus"), and Smith Holdings, LLC ("Smith Holdings"). No other party to this matter was present or represented by counsel at this hearing.

The Court, having heard the evidence offered by the parties and the arguments of counsel, hereby finds as follows:

FINDING OF FACTS

1. In February 2006, Richard Smith ("Smith") formed FFCF to pool investor funds to invest in a money management fund known as LBS.
2. As a manager of FFCF, Smith owed fiduciary duties to FFCF.
3. FFCF received approximately \$10,910,899.03 from its investors; however, Smith transferred only approximately \$8,027,550.00 to LBS.
4. From about February 2006 through about June 2008, Smith misrepresented the amounts held by FFCF and the amounts its investors were earning in their investments.
5. As investors began demanding payment of the amounts Smith represented they were due, he paid those false amounts, notwithstanding that he knew FFCF did not have sufficient funds to pay all of its investors the false amounts he had represented they earned.
6. In essence, FFCF operated as a Ponzi scheme.
7. Smith also made significant payments of FFCF investor funds to individuals who

never contributed to FFCF.

8. As a direct result of Smith's acts and omissions, investors in FFCF have claims against FFCF totaling \$3,208,491.86.

9. In addition, \$20,000 was transferred from FFCF to Smith or to others at his direction without FFCF receiving reasonably equivalent value for these transfers, *and proximately causing harm to FFCF in that amount.* *§ 11/7/12*

10. On October 15, 2008, Roger Taylor ("Taylor"), also a manager of FFCF, filed a lawsuit against his co-manager, Smith, and others involved in the Ponzi scheme, seeking damages against Smith and others.

11. On March 11, 2009, FFCF filed a First Amended Complaint, asserting four claims for relief against Smith: (1) intentional misrepresentation; (2) breach of fiduciary duty; (3) conversion; and (4) violation of the Utah Uniform Fraudulent Transfer Act.

12. On March 18, 2009, Judge Lindberg issued an order removing Taylor from control of FFCF, and appointed R. Wayne Klein (the "Receiver") as the receiver of FFCF.

13. The lawsuit filed originally by FFCF was consolidated with the case *Barnes v. FFCF Investors LLC et al.*, Case No. 080922273, Third District Court, Salt Lake County, State of Utah.

14. Smith was served with the First Amended Complaint and a Summons on May 3, 2010.

15. Smith has not answered or otherwise appeared in response to the First Amended Complaint. *The Court accordingly entered his default August 29, 2012.*

16. The Receiver has established a claims process under the direction of the Court, which allowed underpaid and unpaid investors in FFCF to assert claims against FFCF, which operated as a Ponzi scheme rather than as a legitimate business.

17. Through the claims process, the Receiver has made distributions to those who have made claims against FFCF; however, FFCF still remains liable to its investors in the amount of \$3,208,491.86.

18. The Court finds that the testimony of the Receiver has established, as a direct and proximate cause of Smith's breach of fiduciary duty, that FFCF has been damaged in the amount of *\$ 11/5/12* \$3,208,491.86, which represents the amounts that FFCF owes to its unpaid or underpaid investors, *and also in the amount of \$20,000, as described in paragraph 9 above.*

19. The Court finds that the Receiver has established the amount FFCF owes the investors through a summary spreadsheet entitled the "Net Losses of Investors in FFCF," which summarizes voluminous documents in control of the Receiver and which is admissible under Rule 1006 of the Utah Rules of Evidence.

20. The Court also finds that the Receiver's admission as receiver for FFCF that it is liable to the investors in FFCF for \$3,208,491.86 is an admission against interest by FFCF, which is an independent evidentiary reason for finding that Smith has caused FFCF damages in that amount.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Court enters the following conclusions of law:

1. The Court enjoys jurisdiction over the subject matter involved in this lawsuit and over the parties to the lawsuit, and venue is proper.

2. Under the authority of *Amica Mutual Ins. Co. v. Schettler*, 768 P.2d 950 (Utah 1989), a preponderance of the evidence shows that Smith is liable to FFCF for all of the claims asserted in the First Amended Complaint, and that he is, in particular, liable for breach of fiduciary duty and for ~~fraudulent~~ conversion. *11/7/12*

3. To the extent that it is necessary that the claims against Smith be proven by clear and convincing evidence, the Court concludes that Smith is liable under this standard as well. *11/7/12*

4. FFCF has been damaged in the amount of \$20,000, which represents the amounts that were transferred either directly to Smith or at his direction from FFCF for which FFCF did not receive reasonably equivalent value. *as a direct and proximate result of Smith's conduct, 11/7/12*

5. FFCF has also been damaged in the amount of \$3,208,491.86, which represents the amounts that FFCF owes to its unpaid or underpaid investors because of Smith's breaches of fiduciary duty. *as a direct and proximate result of Smith's conduct, 11/7/12*


6. In sum, Smith is liable to FFCF in the total amount of \$3,228,491.86, and judgment against him will be entered in that amount with interest accruing at the legal rate.

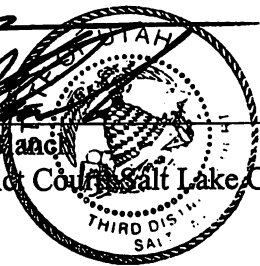
7. The Court finds that there is no just reason for delay, and that entry of final judgment against Smith is appropriate pursuant to Rule 54(b) of the Utah Rules of Civil Procedure.

WHEREFORE, JUDGMENT shall be entered in favor of Klein in accordance with the foregoing Findings of Fact and Conclusions of Law.

DATED this 7th day of November, 2012.

BY THE COURT:


Judge James T. Blance
Utah Third District Court Salt Lake County



CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of November, 2012, I served true and correct copies of the foregoing **FINDINGS OF FACT AND CONCLUSIONS OF LAW** upon the following counsel of record, in the manner indicated below:

- Hand Delivery
- U.S. Mail
- Overnight Mail
- Fax Transmission
- E-Mail Transmission

Richard T. Smith
443 North 750 East
Orem, UT 84097
Defendant

- Hand Delivery
- U.S. Mail
- Overnight Mail
- Fax Transmission
- E-Mail Transmission

A. David Barnes
4822 Holladay Blvd., #170
Salt Lake City, UT 84117-5469
Plaintiff

- Hand Delivery
- U.S. Mail
- Overnight Mail
- Fax Transmission
- E-Mail Transmission

Roger Taylor
2400 Vineyard Drive
Santa Clara, UT 84765
Defendant

