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Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

<p>R. WAYNE KLEIN,  Receiver,</p>	<p><b>PLAINTIFF DR. BARNES' MOTION FOR REIMBURSEMENT OF ATTORNEYS' FEES AND COSTS PROCURING RECEIVERSHIP</b></p>
<p>A. DAVID BARNES, M.D., P.C.,  Plaintiff,</p>	<p>Civil No. 080922273  Judge Lindberg</p>
<p>vs.</p> <p>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.</p>	

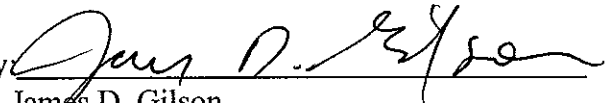
Plaintiff A. David Barnes, M.D., P.C. ("Plaintiff" or "Dr. Barnes"), through counsel, hereby moves the Court for an order authorizing the Receiver to pay Dr. Barnes for the attorneys'

fees and costs that he incurred in connection with getting a Receiver appointed in this matter, for the benefit of all similarly situated investors in defendants FFCF and Ascendus, which fees and costs total \$44,065.85. Dr. Barnes incurred these fees and costs without any financial assistance from any other investor creditors of FFCF and Ascendus. The details of that work and expenses are set forth in the Affidavit of Dr. Barnes' undersigned counsel, which is submitted herewith. The Receiver has filed a Petition for the Court to approve the settlement of some claims against certain overpaid investors and to pay certain administrative expenses. Expenses incurred by Dr. Barnes in getting the Receiver appointed is also an administrative expense that should also be paid. Reimbursement is not sought for fees and costs incurred by Dr. Barnes that were solely for his benefit and that are unique to his claims.

This Motion is supported by an accompanying memorandum of points and authorities, which includes the fee affidavit of Dr. Barnes' undersigned counsel that is attached to that Memorandum.

DATED: October 1, 2009.

CALLISTER NEBEKER & McCULLOUGH

By   
James D. Gilson  
Attorneys for Plaintiff A. David Barnes, MD

**CERTIFICATE OF SERVICE**

I hereby certify that on the 1<sup>st</sup> of October, 2009, a true copy of the foregoing

**PLAINTIFF DR. BARNES' MOTION FOR REIMBURSEMENT OF ATTORNEYS' AND COSTS PROCURING RECEIVERSHIP** was mailed to the following:

Sara J. Pfrommer  
2663 Little Kate Road  
P.O. Box 3915  
Park City, UT 84060

Gerald Millard  
Millard Living Trust  
4542 Cottage Grove Lane  
Murray, UT 84107

James J. Warner  
Frederick M. Reich  
3233 Third Ave.  
San Diego, CA 92103

Russell A. Cline  
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10 West 100 south, Suite 425  
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Richard T. Smith  
443 N. 750 E.  
Orem, UT 84097

Craig R. Madsen  
1112 North 700 East  
Springville, UT 84663

R. Wayne Klein, Receiver  
299 South Main, Suite 1300  
Salt Lake City, UT 84111

James Michael Usher  
8709 South Oakwood Park Circle  
Sandy, UT 84094

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Parr Brown Gee & Loveless  
185 South State Street, Suite 800  
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Orem, UT 84097

Erik Christiansen  
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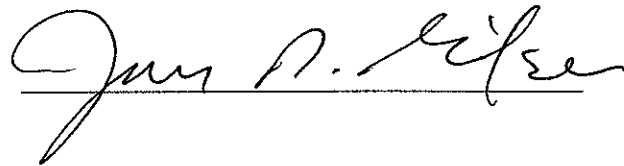
Bary Jones  
157 East 1700 North  
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2455 East Parleys Way, Suite 115  
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Mark W. Pugsley  
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Salt Lake City, UT 84111

Bruce L. Dobb  
Jensen, Duffin & Dobb, LLP  
311 South State Street, Suite 380  
Salt Lake City, UT 84111

  
A handwritten signature in cursive script, reading "Jay A. Pifer", is written over a horizontal line.

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Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

<p>R. WAYNE KLEIN,  Receiver,</p>	<p><b>MEMORANDUM IN SUPPORT OF DR. BARNES' MOTION FOR REIMBURSEMENT OF ATTORNEYS' FEES AND COSTS PROCURING RECEIVERSHIP</b></p>
<p>A. DAVID BARNES, M.D., P.C.,  Plaintiff,</p>	<p>Civil No. 080922273  Judge Lindberg</p>
<p>vs.</p> <p>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.</p>	

Plaintiff A. David Barnes, M.D., P.C. ("Plaintiff" or "Dr. Barnes"), submits this memorandum of points and authorities in support of his Motion for Reimbursement of

Attorneys' Fees Relating to Receivership. As set forth below, expenses incurred by Dr. Barnes in getting the Receiver appointed in this matter, and in connection with other Receivership related matters that benefitted all the creditors of defendants FFCF and Ascendus, are administrative expense to which Dr. Barnes should be reimbursed from funds collected by the Receiver.

#### Factual Background

1. In 2006 Dr. Barnes invested \$300,000 in FFCF/Ascendus. (Verified Complaint ¶¶ 11-13).
2. In July 2008, Dr. Barnes, along with the other victims of the FFCF/Ascendus multi-million dollar ponzi scheme, received a letter from Roger Taylor stating that defendant Richard Smith had engaged in "irregularities" in handling the funds of FFCF, that cash had been improperly distributed, that FFCF has very little money left, that Smith is under psychiatric care, and the Taylor is stepping forward to investigate and "reconcile all the accounts." (Verified Complaint ¶ 18 and Exh. C thereto).
3. Dr. Barnes' Complaint in this action was filed on October 14, 2008. The claims and remedies in that Complaint include the appointment of a Receiver for defendants FFCF, Ascendus, and Smith Holdings, and an injunction removing defendant Roger Taylor as the manager of FFCF and Ascendus, and an order requiring defendant Taylor to turn over all documents in his possession, or that of his attorneys, to the court-appointed receiver.

4. On December 4, 2008, Dr. Barnes filed a Motion for an Order Appointing a Receiver for defendants FFCF, Ascendus, and Smith Holdings, and a Motion for Disqualification of defendant's counsel, which motions were both opposed by defendants.

5. Following briefing and oral argument, by Order dated March 18, 2009, the Court granted Dr. Barnes' Motion for Appointment of Receiver, and by Order dated April 13, 2009, disqualified defendants' counsel from representing all defendants except for defendant Roger E. Taylor. The Court also ordered defendant Taylor's counsel to turn over the companies records to the Receiver as had been requested by Dr. Barnes.

6. On September 8, 2009, the Receiver filed a Request for approval of agreements that the Receiver has reached that will result in over \$400,000 being returned to the receivership entities, and requested approval to pay certain administration expenses.

7. Attached hereto as "Exhibit A" is the affidavit of Dr. Barnes' undersigned counsel itemizing the legal work, fees, and costs relating to the receivership and disqualification motions, that Dr. Barnes has incurred for the benefit of all FFCF/Ascendus victims and for which he seeks reimbursement by this Motion. That summary does not include legal fees and costs incurred solely for Dr. Barnes' benefit, and that was not for the mutual benefit of all creditors of FFCF and Ascendus.

8. Dr. Barnes has incurred costs and legal fees in connection with getting the Receiver appointed in this matter, and in connection with other Receivership related matters to the benefit of all the creditor/victims of FFCF and Ascendus. None of the other creditor/victims of FFCF and Ascendus have contributed towards Dr. Barnes' legal fees and costs in this regard.

While many of the victims of FFCF and Ascendus cooperated with Dr. Barnes and his counsel in sharing information that was used in documents that Dr. Barnes filed with the Court, they did not engage separate counsel themselves to assist in the preparation of those documents that Dr. Barnes' counsel filed. (See Affidavit, Exh. A).

### ARGUMENT

A receivership is an equitable matter in which the court has discretion to order that Dr. Barnes' be reimbursed for legal expenses that he reasonably incurred in connection with getting the Receiver appointed and for other costs and legal services performed for the mutual benefit of all the beneficiaries of the receivership.

Rule 66 of the Utah Rules of Civil Procedure provides that a Receiver has the power, "under the direction of the court...to collect, pay, and compromise debts" and "to make transfers and to take other action as the court may authorize." Similarly, Utah Code Ann. § 48-2c-1212(5) provides that during a receivership the court may order the payment of compensation and expense disbursements from the company's assets:

(5) the court from time to time during the receivership or custodianship may order compensation paid and expense disbursements or reimbursements made to the receiver or custodian and the custodian's or receiver's counsel from the assets of the company or proceeds from the sale of the assets.

Although this statute does not specifically address reimbursement of expenses incurred in connection with the appointment of a receiver, the Court is sitting in equity in a receivership, and thus has the power and discretion to order such reimbursement if the court determines that it



would be equitable to do so. See Shaw v. Robison, 537 P.2d 487, 490 (Utah 1975) (“A receivership is an equitable matter and is entirely within the control of the court.”); Interlake Co. v. Von Hake, 697 P.2d 238, 239 (same).

In Alexander Dawson, Inc. v Hydroponics, Inc., 535 P.2d 1251 (Utah 1975), the Utah Supreme Court affirmed the trial court’s award of fees “in a prior case involving the same parties,” explaining that those fees were “adjunct to the administration” of the receivership:

The fees awarded by the trial court here, were legitimate expenses of the receivership, -as much so as fees for filing, compensating the receiver, storage of assets, drayage charges, accountant’s fees or coffeebreak exhaustion time, - and the like, -all adjunct to the administration of a first or second class receivership.

Id. at 1251-52.

Similarly, court decisions from other jurisdictions support an award for fees incurred in connection with the appointment of the receiver. For instance, in Laudan v. ABC Travel System, Inc., 165 A.2d 568, 571 (N.J. Super. 1960), the court granted the fee application of plaintiff for legal services rendered that lead to the appointment of the receiver, explaining: “Counsel for plaintiffs did render a service to the various classes of claimants. The rationale which sanctions the imposition of a charge on the trust funds for the receiver’s compensation is equally applicable to the request for a counsel fee.”

This equitable rule of reimbursing plaintiff for legal fees and costs incurred in bringing the action and procuring the appointment of the receiver was explained in an early decision from the Supreme Court of South Carolina:

It is a rule of equity, universally recognized, that where one creditor institutes proceedings for the benefit of all creditors, those creditors who claim the benefit or fruit of the action

must contribute to the expenses, including counsel fees, and the court will direct the payment of such fees and expenses before the division of the property recovered. It was therefore quite proper that the fee of Mr. H. F. Buist, who was the attorney who filed the complaint against the bank, asking for the appointment of a receiver and the distribution of the assets among creditors, should be paid from the funds realized for the creditors before distribution among them.

Buist v. Williams, 62 S.E. 859, 860 (S.C. 1908).

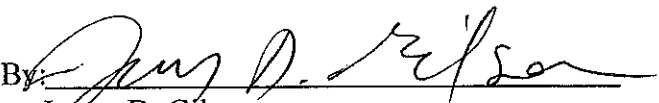
Dr. Barnes' incurred legal fees and costs in connection with filing this action and getting the Receiver appointed for defendants FFCF, Ascendus, and Smith Holdings, and in getting conflicted defendants' counsel removed from representing the receivership entities. All the creditors of those entities have benefitted from that work and from the appointment of the Receiver, who is now recouping funds for the benefit of all the creditors of FFCF and Ascendus. It is fair and equitable that Dr. Barnes be reimbursed for the legal fees and costs that he incurred in connection with the Receiver's appointment for the benefit of all the creditors.

### Conclusion

Based on the foregoing, Dr. Barnes' Motion for Reimbursement of Attorneys' Fees and Costs Procuring Receivership should be granted.

DATED: October <sup>15<sup>th</sup></sup>/<sub>1</sub>, 2009.

CALLISTER NEBEKER & McCULLOUGH

By:   
James D. Gilson  
Attorneys for Plaintiff

**CERTIFICATE OF SERVICE**

I hereby certify that on the 1<sup>st</sup> of October, 2009, a true copy of the foregoing

**MEMORANDUM IN SUPPORT OF DR. BARNES' MOTION FOR REIMBURSEMENT  
OF ATTORNEYS' FEES AND COSTS PROCURING RECEIVERSHIP** was mailed to the  
following:

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Gerald Millard  
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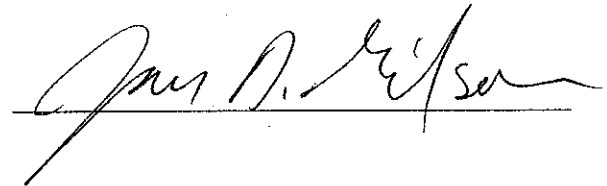
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Bruce L. Dibb  
Jensen, Duffin & Dibb, LLP  
311 South State Street, Suite 380  
Salt Lake City, UT 84111

A handwritten signature in cursive script, appearing to read "James D. Wilson", is written over a horizontal line.

# **EXHIBIT “A”**

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Attorneys for Plaintiff

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R. WAYNE KLEIN,

Receiver,

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.

**AFFIDAVIT OF JAMES D.  
GILSON OF ATTORNEYS' FEES  
AND COSTS RELATING TO  
RECEIVERSHIP**

Civil No. 080922273

Judge Lindberg

STATE OF UTAH            )  
  ):ss  
COUNTY OF SALT LAKE )

Affiant, James D. Gilson, being first duly sworn, deposes and states that:

1. I am a duly licensed attorney authorized to practice law within this jurisdiction and before this Court.

2. I am lead counsel for the plaintiff in this action, A. David Barnes, M.D.

3. During the period from August 15, 2008 through March 26, 2009, myself and other attorneys of the law firm of Callister Nebeker & McCullough, including Paul H. Shaphren, Zachary T. Shields, and Jacob D. Lyons, provided a total of 204.4 hours of legal services in the matter before this Court in connection with filing the Complaint in this action, getting the Receiver appointed, and getting defendants counsel disqualified from representing the receivership entities. This time, at the rate of \$150 - \$270 per hour, depending on the experience level of the attorneys involved as set forth below, results in total attorneys fees in the amount of \$43,250.00. Time spent performing legal services related solely for Dr. Barnes' benefit, and that was not for the mutual benefit of all creditors of FFCF and Ascendus, has not been included in this total.

4. I, James D. Gilson, received my law degree in 1989 from the University of Utah, and I provided 129 hours of work in this regard at the billing rate of \$250 per hour. Jacob D. Lyons, who received his law degree in 2008 from the University of Indiana, provided 70 hours of work in this regard at a billing rate of \$150 per hour. Paul H. Shaphren, who received his law degree in 1980 from the University of Pennsylvania, provided one hour of work in this regard at the billing rate of \$270 per hour. Zachary T. Shields, who received his law degree in 1990 from

Brigham Young University, provided one hour of work in this regard at the billing rate of \$230 per hour.

5. The rates and hours charged were the standard billing rates for all of the attorneys involved. The time incurred by myself on this matter as set forth above was recorded on each day that the time was incurred, and was for the actual amount of time spent. All other attorneys who worked on this matter with my firm similarly recorded their time. Monthly bills were sent to Dr. Barnes that itemized the time spent by each attorney. All of the amounts set forth in this affidavit have been billed to and incurred by Dr. Barnes, without reduction, offset or compromise. A written fee agreement was entered into between Callister Nebeker & McCullough and Dr. Barnes at the beginning of our representation, consistent with the fees charged in this matter.

6. None of the other creditor/victims of FFCF or Ascendus have contributed towards Dr. Barnes' legal fees and costs in this regard. While many of the victims of FFCF and Ascendus cooperated with Dr. Barnes' counsel in sharing information that was used in documents that Dr. Barnes' counsel filed with the Court, they did not engage separate counsel themselves to assist in the preparation of those documents that Dr. Barnes' counsel filed.

7. During the period from August 15, 2008 through March 26, 2009, the following actions have been taken by counsel for Dr. Barnes relating to the filing of this action and procuring the appointment of the Receiver:

- i. Initial meetings with client and telephone conferences with client regarding FFCF scheme and background information.



- ii. Review FFCF offering memoranda and documents from FFCF, Richard Smith, Robert Alsop, and Roger Taylor.
- iii. Office conference, telephone conferences with, and correspondence with FFCF transactional counsel Robert Alsop regarding FFCF and Ascendus and its principals.
- iv. Telephone conference and correspondence with Roger Taylor.
- v. Correspondence, e-mails, and office conference with witness Kent Norton.
- vi. Numerous e-mails and correspondence with James Warner and Sara Pfrommer, counsel for Roger Taylor, FFCF, and Ascendus, and multiple telephone conferences with same.
- vii. Legal research regarding remedies available, potential causes of action, receivership rules, and public information regarding FFCF and Ascendus.
- viii. Confer with Utah Division of Securities regarding defendants.
- ix. Numerous meetings, correspondence, and telephone conferences with other investors in FFCF and Ascendus, including but not limited to J. Harmer of Lighted Candle Society, R. Molina, A. Donnell, and J. Millard.
- x. Draft Verified Complaint and assemble all its exhibits.
- xi. Draft Summons for each defendant and arrange for service of process on each.
- xii. Draft motion and memorandum in support for inspection of entity defendants' records.
- xiii. Review Answers filed by Defendants to Verified Complaint.
- xiv. Investigate and numerous meetings, telephone conferences, and correspondence with potential receivers, including W. Klein.
- xv. Legal Research and draft Motion for an Order Appointing a Receiver for FFCF, Ascendus, and Smith Holdings, LLC, and supporting memorandum.

- xvi. Legal Research and draft Motion for Disqualification of defendants' counsel Sara Pfrommer and supporting memorandum, and Memorandum in Opposition to Motion for Pro Hac Vice Admission of James J. Warner and Frederick M. Reich
- xvii. Review defendants' memoranda in opposition to receivership and disqualifications motions.
- xviii. Legal research and draft reply memorandum in support of receivership and disqualification motions.
- xix. Prepare for argument and attend hearing re Motions for Receiver and for Disqualification of Counsel.
- xx. Draft Order Appointing Receiver and Order Re Defendants' Counsel.
- xxi. Meetings with Receiver to transfer information obtained from various investors in FFCF and Ascendus and review and copy documents re same.

8. During the period from August 15, 2008 through March 26, 2009, costs were incurred in conjunction with provision these legal services in the amount of \$796.85. Itemized as follows:

Postage	\$142.98
Runner Expenses	108.50
Photocopies	201.37
Filing Fee (Complaint)	230.00
Constable charges for Service of Summons	<u>114.00</u>
<b>Total</b>	<b>\$796.85</b>

9. The foregoing services and costs were reasonable and necessary in connection with the filing of the Complaint and the Motion for Appointment of Receiver and Motion to Disqualify Defendants' Counsel, for the mutual benefit of all creditors of FFCF and Ascendus.

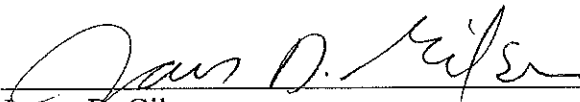
10. The rate billed per hour by each of the attorneys involved is well within the customary range charged by other attorneys in this area for similar services with similar experience.

11. In consideration of the time and labor required, the amount involved, the time necessary to work with the various parties, and the various issues that were litigated, and the results obtained, the amount requested relating to procuring the appointment of the Receiver in this matter is reasonable.

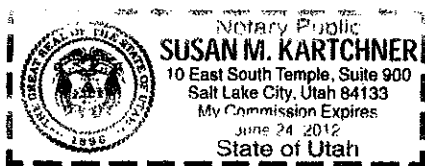
FURTHER AFFIANT SAYETH NOT.

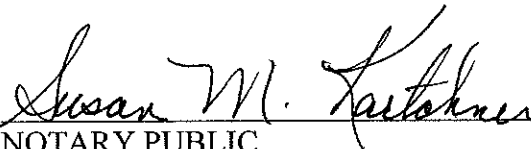
DATED this 1<sup>st</sup> day of October, 2009.

CALLISTER NEBEKER & McCULLOUGH

  
James D. Gilson  
Attorneys for Plaintiff

SUBSCRIBED AND SWORN to before me by James D. Gilson on this 1<sup>st</sup> day of October, 2009.



  
NOTARY PUBLIC