

FILED
THIRD DISTRICT COURT
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SALT LAKE DEPARTMENT

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IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY

STATE OF UTAH

<p>A. DAVID BARNES, M.D., P.C., Plaintiff, vs. FFCF INVESTORS, LLC, et al. Defendants.</p>	<p>RECEIVER'S REQUEST FOR APPROVAL OF WIRTH SETTLEMENT AND STIPULATED MOTION TO DISMISS WIRTH AND WIRTH'S COUNTERCLAIMS</p> <p>MEMORANDUM IN SUPPORT</p>
<p>FFCF INVESTORS, LLC, Plaintiff, vs. RICHARD SMITH, et al. Defendants.</p>	<p>Case No. 080922273 Judge: Denise P. Lindberg</p>

For the reasons described below, the Receiver: 1) requests the Court's approval of a proposed settlement with defendant Albert Wirth, and 2) moves dismissal, pursuant to stipulation, of defendant Wirth from this action.

SETTLEMENT AGREEMENT WITH DEFENDANT WIRTH

Background of Wirth's Investments

The financial transactions and relationships between Wirth and the Receivership Entities are complex. Wirth became an investor during the Ascendus period, when he deposited approximately \$3.5 million in a brokerage account at Penson Financial Services and granted Taylor access to his account for the purpose of trading options in Wirth's account. Wirth received monthly account statements from Ascendus reporting that he earned significant monthly profits. Wirth withdrew the reported profits each month and then paid a portion of those profits to Ascendus as commissions.

When the Ascendus program was concluded and the FFCE program was begun, Wirth agreed to move his investment to FFCE. Wirth did not recognize that his Penson account was worth only \$2.2 million at that point because of various representations about the value of his account that Wirth attributes to Ascendus. Wirth was told by Ascendus that his beginning investment account balance at FFCE was \$3.6 million. Account statements Wirth received from Ascendus and FFCE after this point also reported the \$3.6 million investment value. Once his funds were at FFCE, FFCE pooled the investment monies of Wirth with investment funds from other investors and placed the money with LBS Advisors for management. Wirth continued to withdraw the profits reported to him by FFCE.

Once his funds were at LBS, Wirth continued to withdraw profits that were reported to him by LBS. In April 2007, Wirth's portion of the pooled investment at LBS was separated from that of other FFCE investors. By August 2008, FFCE had withdrawn all of its funds

invested with LBS. Wirth's money, however, remained at LBS. Since the initiation of this litigation, it has been discovered that the monies still managed by LBS were invested with another entity – GJB Enterprises -- that is now in receivership and is itself suspected of being a *Ponzi* scheme.

This left Wirth in an odd position vis-à-vis the Receiver. On one hand, Wirth's investments are in an aggregate "net loss" position. However, since Wirth's investments at LBS had been separated from the FFCF pool, Wirth potentially might be considered to have theoretically withdrawn that amount and be deemed an overpaid investor – albeit an overpaid investor whose funds were lost by remaining in the pool into which he was placed by and at the recommendation of FFCF. Given Wirth's allegations that FFCF was legally responsible for placing his funds at LBS, issues of potential liability for Wirth's losses at LBS potentially might be litigated among the receivership entities and Wirth.

To avoid consuming time and expenses by continuing litigation between Wirth and the Receiver – and to seek to align their interests – Wirth and the Receiver have entered into a settlement agreement. The Receiver seeks Court approval of the settlement agreement described below.

Litigation Between the Parties

In December 2008, Ascendus and FFCF filed suit against Wirth and other investors who were accused of being overpaid. On March 30, Wirth filed an answer and a counterclaim against Ascendus and FFCF, among others. Separately, on March 11, 2009, Wirth filed a lawsuit in

federal court against two of the Receivership Entities, along with other defendants.¹

It is noteworthy that in his federal lawsuit, Wirth seeks to recover funds from defendants that have not been sued by the Receiver. In some of those instances, Wirth may have causes of action that the Receiver would not be able to assert successfully. In other words, Wirth may have claims that the Receiver might not have.

The Proposed Settlement Agreement

Based on information provided to the Receiver by Wirth, it appears to the Receiver that Wirth still has a net principal loss of approximately \$975,000 – after taking into account all of his withdrawals from his investment accounts.² The settlement agreement seeks to encourage Wirth to continue his litigation against other defendants in a way that will relieve the Receiver of any obligation in that litigation, while providing benefits to the Receivership Entities if Wirth succeeds.

The settlement agreement provides that in his federal court litigation (mostly against defendants the Receiver has not sued), Wirth will be entitled to keep the first \$975,908.57 he recovers. For monies he recovers over that amount, 70% of the proceeds will be paid to the Receivership. The Receiver will have oversight authority over all settlements and dismissal decisions made by Wirth in his litigation, to ensure cases are not settled for less than their true value. If Wirth decides not to pursue certain claims, those claims will be assigned to the Receiver.

¹ The actions described in this paragraph all occurred before the appointment of a Receiver, when the Receivership Entities were all controlled by Roger Taylor.

² As with all of the investors who received distributions, Wirth believed his distributions at Ascendus were profits. This settlement recognizes that those distributions are treated as withdrawals of principal.

STIPULATED MOTION TO DISMISS

Assuming Court approval of this settlement agreement, the Receiver hereby moves to dismiss Wirth as a defendant in this action with prejudice. Wirth moves that his counterclaim in this action be dismissed with prejudice. Separately, Wirth will stipulate and move that the Receiver be dismissed as a defendant in the federal court action with prejudice.

ARGUMENT IN SUPPORT OF MOTION

Approval of Settlement Agreement

The Order Appointing Receiver (“Order”) (dated March 18, 2009) directed the Receiver to: “Marshal and take control of all assets and property belonging to . . . any of the Company Defendants, with full power to take such steps as he deems necessary to secure such premises, assets, and property.” *Id.* at p. 2. The Order also authorizes the Receiver to make “such agreements as may be reasonable, necessary and advisable in discharging his/her duties as Receiver.” *Id.* at 3. Similarly, paragraph 5 of the Order empowers the Receiver to “liquidate and convert into money all of the assets, property, and interests” belonging to the Receivership. *Id.* It was pursuant to this authority that the Receiver engaged in negotiations with Wirth and entered into this settlement agreement.

The Receiver recognizes that the Order Appointing Receiver already authorizes the Receiver to finalize and implement the proposed settlement agreement, especially in light of this Court’s Order Approving Settlements, entered October 1, 2009. However, in light of the size of, and unique terms contained in, this settlement agreement, the Receiver determined to provide advance notice to other parties and the investors (via posting on the Receivership web site) and

to seek Court approval.

As the Utah Supreme Court emphasized in *Interlake Co. v. Von Hake*, 697 P.2d 238, 240 (Utah 1985), a Receiver has limited powers and should apply to the court for advice and directions. *Accord, Shaw v. Robinson*, 537 P.2d 487 (Utah 1975) (sales by receiver cannot be completed unless confirmed by the court and consistent with authority previously granted).

Dismissal of Defendants

Paragraph 6 of the Order empowers the Receiver to “prosecute, defend, . . . or compromise actions in any . . . court or proceeding of any kind as may be advisable in his sole discretion, to recover or conserve assets and property of Company Defendants.” *Id.* at 4.

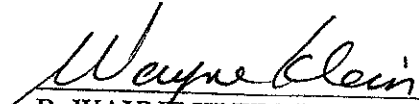
Advantages of this Settlement Agreement to the Receivership Entities

The Receiver believes that this settlement agreement has several advantages to the Receivership. First, the Receivership Estate avoids the burden, cost, expense and risk of protracted litigation with Wirth in this case and in the paralegal federal cases. Second, Wirth can assert claims that the Receivership might not be able to assert. Third, Wirth can seek recovery from defendants that the Receiver potentially might not have grounds to sue. Fourth, the Receiver will receive substantial benefits from litigation conducted by Wirth for which the Receiver will not bear any of the costs. Given that both the Receiver and Wirth are seeking the same goals and they have complementary tools that can be used to achieve those goals, it makes the most sense for the parties to be working together to recover funds, rather than litigating against each other.

Proposed Order

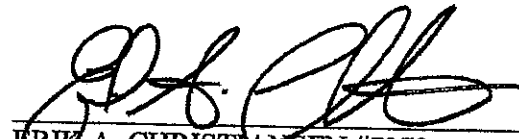
A proposed order is attached.

Respectfully submitted this 27th day of October, 2009.


R. WAYNE KLEIN #3819
Receiver for FFCF Investors, Ascendus
Capital Management, and Smith Holdings

Joinder in Motion to Dismiss by Defendant Wirth

I join the motion to dismiss Wirth as a defendant and to dismiss counterclaims asserted by Wirth in this action.


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Parsons Behle & Latimer
Counsel for Defendant Albert Wirth