

FILED
THIRD DISTRICT COURT
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SALT LAKE COUNTY
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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 REPLY TO OBJECTION BY JAMES J. WARNER AND SARA J. PFROMMER</p> <p>Case No. 080922273</p> <p>Judge: Denise P. Lindberg</p>
<p>FFCF INVESTORS, LLC, Plaintiff, vs. RICHARD SMITH, et al. Defendants.</p>	

At a hearing on October 1, 2009, the Court entered an oral order disqualifying James J. Warner and Sara J. Pfrommer from continuing any representation of defendant Roger Taylor. The Court asked the Receiver to prepare a proposed order for the Court.

On October 5, 2009, the Receiver sent a proposed order to Mr. Warner, Ms. Pfrommer, and Mr. Gilson. On October 12, Mr. Gilson provided comments and requested some changes to the proposed order. Those changes were made and a revised proposed order submitted to the Court on October 13. On October 15, James Warner called the Receiver indicating his belief the proposed order was too broad. The Receiver offered to consider a marked-up version of changes Warner was requesting to determine whether a substitute order could be submitted to the Court with the support of all parties. The Receiver received no proposal from Warner.

Warner filed an objection with the Court dated October 16, 2009.

ARGUMENT

The Receiver desires that the final order be consistent with the oral ruling by the Court and not broader than necessary to accomplish the remedial purposes of the Court's order. This is precisely the purpose of sending draft orders to other counsel before submission to the Court. However, after waiting a week and hearing no response from Warner or Pfrommer, the Receiver submitted his proposed draft to the Court.

The Receiver responds to Warner's objections as follows:

- Regarding paragraph 4, Mr. Warner objects to the language that Taylor "cannot now be heard to complain about the impact on his ability to select his own counsel in this action." Warner says: "There was nothing in the hearing transcript and oral order that made such a statement." At the time the Receiver prepared the proposed order, he did not have a copy of the transcript of the hearing, but now has a transcript. The proposed language was in response to the following finding by the Court: "Again, Mr. Taylor was warned that this

could be in an outcome. So this should not have come as a shock. He was given the benefit of the doubt.” (tr. p. 14).¹

- Regarding paragraph 8(d) [which was ¶7(d) in the initial version sent to Mr. Warner], Warner objects to the required delivery of billing records to the Receiver. The Receiver has no objection to Mr. Warner retaining copies of billing records, but believes the Receiver should obtain copies of billing records relating to Mr. Warner’s representation of Receivership Entities and for legal services his firm provided to any other parties, which were paid by any of the Receivership Entities or with funds from any of the Receivership Entities.
- Regarding paragraph 12 [which was ¶11 in the initial version], Mr. Warner objects to the use of the term “including,” preferring another word that would impose fewer limits on his ability to discuss this case with Taylor and new counsel for Taylor. The Receiver believes the language proposed by the Receiver is consistent with the Court’s language: “You are not to participate in any respect in this – on the future litigation.” “I don’t think it’s appropriate for you to be consulting with new counsel or providing any further involvement – involving yourself in any further, in any way, not just you, but I mean the firm totally. And the same thing for Ms. Pfrommer.” (tr. p. 14). Warner may be seeking this change to better position himself to be able to argue that he should remain as counsel for Mr. Taylor in the federal litigation brought against Taylor by certain investors.

The Receiver is sensitive to the Court’s time required to make any changes as a result of Mr. Warner’s objection. The Receiver is happy to make changes and submit a new proposed order if

¹ The Receiver will supply a copy of the transcript of the October 1, 2009 hearing to the Court if the Court wishes.

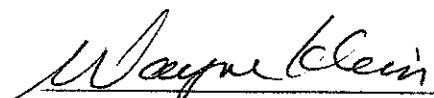
the Court gives instructions via a minute order or the Receiver can transmit an electronic copy of the proposed order to the Court's clerk for any revisions.

NOTICE TO THE COURT OF SUBSEQUENT ACTIVITIES

The Receiver reluctantly brings to the Court's attention subsequent activities of Mr. Warner, in the event the Court deems it appropriate to issue a clarification of the breadth or intent of its order of disqualification.

On October 16, 2009, Warner filed "Defendant Roger Taylor's Opposition to Motion to Disqualify Counsel" and "Declaration of James J. Warner in Support" in the federal court litigation involving FFCF, Ascendus, and investors. In his Declaration, Warner references the Receiver's request for approval of the Wirth settlement in the state-court action. A copy of the state-court filing was attached to his federal court Declaration. This Court's October 1 oral order indicated that Mr. Warner was disqualified immediately "from any further involvement in this case." The Receiver's request for approval of the Wirth settlement was *not* sent to Mr. Warner or Ms. Pfrommer. Mr. Warner may have received a copy from Mr. Taylor or from the court files, but it was not provided to him by the Receiver. In the event the Court intended Mr. Warner to no longer be reviewing files related to this state case or consulting with Mr. Taylor about developments in this case, the Court may wish to include a more specific instruction.

RESPECTFULLY SUBMITTED, this 28th day of October 2009.


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

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of October, 2009, copies of the foregoing Receiver's

Reply to Objection to Order of Disqualification were mailed to:

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