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THIRD DISTRICT COURT
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SALT LAKE COUNTY
BY _____
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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 REPLY TO TAYLOR'S
OBJECTION TO SETTLEMENT
AND ETHICAL ISSUES RAISED**

Case No. 080922273

Judge: Denise P. Lindberg

FFCF INVESTORS, LLC,

Plaintiff,

vs.

RICHARD SMITH, et al.

Defendants.

By filings dated October 22, 2009, defendant Roger Taylor objects to proposed settlements, objects to dismissal, and raises concerns of what he believes are ethical breaches by the Receiver. By this reply, the Receiver responds to those issues.¹

¹ Taylor also objects to any award of fees to Plaintiff Dr. Barnes. The Receiver is not responding to that argument.

TAYLOR'S OBJECTION TO SETTLEMENT AND DISMISSALS

Taylor expresses an objection "to the proposed settlements and the Motion to dismiss certain defendants." His use of plural "settlements" and "defendants" implies he opposes more than the recent settlement agreement involving investor Albert Wirth. On October 1, the Court previously approved the settlements involving Jones, Cook, Richard Young, and David Young and dismissed seven defendants from this action. Accordingly, his objection to those settlements is moot (as well as being untimely since notice was given to his counsel at the time the settlements were presented to the Court).

Taylor's objections to the pending request for approval of the Wirth settlement and dismissal motion are not well founded for several reasons. First, as Taylor was not an investor in Ascendus or FFCF and is not an intended beneficiary of the Receivership, he does not have standing to object to a settlement with, or dismissal of the suit against, an investor.

Second, Taylor bases his objection on his insistence that Ascendus and FFCF were entirely separate enterprises with no connections between them. The Receiver's investigation has reached a different conclusion, finding evidence that options trading was not limited to individual accounts held by the investors at Penson Financial Services, that Ascendus investors were given false information about the value of their investment accounts being managed by Ascendus, and that monies were transferred from investor accounts at Penson without their consent. False reports about the value of Ascendus investments were used to induce investors to participate in the FFCF investment program.

Third, Taylor's urging that the Receiver adopt his view that the conduct of the two entities was unrelated would limit the ability of the Receiver to recover funds from overpaid

investors. The Receiver has identified a large number of investors who decided not to participate in FFCF, but nonetheless were overpaid. If Taylor's view prevailed, the Receiver would be precluded from recovering funds from investors who were overpaid in the Ascendus program.² To the contrary, it is in the best interests of the injured investors that the Receiver be able to maximize the sources of recovery.³

The Receiver continues to believe the proposed settlement with Albert Wirth is in the best interests of the Receivership and the investors for whom the Receiver is seeking to recover monies.

TAYLOR'S ASSERTION OF ETHICAL BREACHES BY THE RECEIVER

Taylor appears to be asserting two ethical breaches by the Receiver: 1) that problems being faced by the Receiver's former firm make the Receiver incapable of carrying out his responsibilities to the Court, and 2) the Receiver is improperly sharing revenues with non-lawyers.

On the first point, steps taken recently and continuing to be taken should alleviate any legitimate concerns Taylor might have. As a result of disclosures that the Florida offices of Lewis B. Freeman & Partners, Inc. were under criminal investigation (for conduct that occurred before Klein's employment by the firm), the Receiver has terminated his affiliation with the firm. As of October 1, 2009, the Receiver is no longer affiliated with the Freeman firm and has formed

² Taylor attributes the Receiver's position to the Receiver's ignorance of the separate nature of the two investment programs. It is not ignorance, but a deliberate recognition of the realities of how the two programs were marketed and operated.

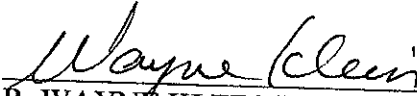
³ Taylor further argues that the Receiver's decision to consider the totality of investments is an example of a conflict of interest by the Receiver, appearing to argue that the Receiver is harming the interests of FFCF investors to the advantage of Ascendus investors. If there had been no nexus between Ascendus and FFCF, the appointment of different Receivers might have been appropriate. However, that is not what the evidence is showing and, in any event, there would be no need for a Receiver for Ascendus because the scheme did not collapse at that early stage.

his own firm, Klein & Associates, PLLC. The details of the separation are still being finalized, and the Receiver is in the process of establishing a web site under his control to serve as a repository of Receivership documents and to inform investors. The impending liquidation of the Freeman firm should not result in any adverse effects on the work of the Receivership.

Taylor asserts that the Receiver is engaging in ethical breaches by two supposed plans to share his fees.

1. Taylor cites an ethics opinion from the Texas Bar prohibiting a Receiver from paying a portion of his fees to the parties' lawyers. The Receiver does not dispute that such a practice would be unethical. The Receiver has no intention of sharing any of his fees with other parties to this or other cases – or to their counsel. The Receiver expressed a willingness to acquiesce in some of the Receivership funds being used to compensate Dr. Barnes for his work in getting a Receiver appointed. Such conduct is not proscribed.
2. Taylor asserts that Utah Rule of Professional Responsibility 5.4 (prohibiting sharing legal fees with non-lawyers) requires the disqualification of the Receiver because the Receiver cannot share his legal fees with his former firm, Lewis B. Freeman & Partners. The simple answer is that the Receiver has not been acting as the lawyer representing the Receivership Entities. While he has been performing some legal work on behalf of the Receivership Entities, it has been in his capacity as Receiver for the entities, not as the attorney for the entities. In other words, the Receiver does not represent the entities; he is the entities. As a result, the fees that the Receiver will be requesting (none have been paid), will not be considered legal fees. They are fees for services as a Receiver. Just because the Receiver is an attorney does not mean that fees he earns are "legal fees."

The Receiver believes the objections expressed by Taylor should be disregarded.
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

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