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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

A. DAVID BARNES, M.D., P.C.,

Plaintiff,

vs.

FFCF INVESTORS, LLC, et al.

Defendants.

FFCF INVESTORS, LLC,

Plaintiff,

vs.

RICHARD SMITH, et al.

Defendants.

**RECEIVER'S MOTION FOR
ORDER TO SHOW CAUSE WHY
RICHARD SMITH SHOULD NOT
BE HELD IN CONTEMPT**

Case No. 080922273

Judge: Denise P. Lindberg

R. WAYNE KLEIN, the Court-appointed Receiver in this matter, hereby moves, pursuant to Rules 7(b)(2) and 37(b), for an Order to Show Cause why defendant, Richard Smith should not be held in civil and/or criminal contempt of court. The Order to Show Cause should require Smith to then and there show cause, if any there be, why he should not be punished for

civil and/or criminal contempt of the October 1, 2009 Court order compelling his deposition.

This motion is supported by the following memorandum in support and the attached declaration of Wayne Klein.

MEMORANDUM IN SUPPORT

Factual Background

1. On August 5, 2009, the Receiver served on Smith a subpoena duces tecum. Because Smith is unrepresented, the Receiver opted to formally serve Smith with a subpoena rather than simply mail a notice of deposition. Smith signed a copy of the subpoena, acknowledging receipt.
2. The deposition was scheduled for August 27, 2009 in Provo, to be convenient for Smith. Smith did not appear at the deposition.
3. The day before the scheduled deposition, Smith delivered an objection to the subpoena.
4. On September 1, 2009, the Receiver filed with this Court a motion to compel the deposition of Smith. No party filed any response to that motion.
5. On October 1, 2009, the Court issued an order compelling the deposition of Smith and imposing sanctions for his non-compliance. Under that Order, the Receiver was permitted to set a time, date, and location for the deposition; Smith was required to attend and to use his best efforts to recover documents requested by the subpoena.
6. On October 6, 2009, the Receiver mailed a notice of deposition to Smith and parties in the case. The new deposition was set for November 4, 2009, to begin at 9:00 a.m. The Receiver also sent Smith a copy of the October 1 Court order compelling his deposition.

7. On November 4, 2009, the Receiver and other parties appeared at the designated place and time to take Smith's deposition. Smith did not appear. A record was made, with a certified court reporter, of the date and time and Smith's failure to appear. In addition to the Receiver, other parties present for the deposition were counsel for Albert Wirth, counsel for T. Courtney Smith, and plaintiff Dr. David Barnes.
8. Anthony Schofield, counsel for T. Courtney Smith noted on the record that his client (the father of Richard Smith) told Mr. Schofield that Richard Smith was aware of the scheduled deposition.
9. The Receiver was not contacted by Richard Smith or anyone else on his behalf indicating that Smith would not attend the deposition.

Argument

Sanctions for Failure to Comply with Order

Civil Procedure Rule 37(b) discusses a party's failure to comply with a court order:

(b)(1) *Sanctions by court in district where deposition is taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(b)(2) *Sanctions by court in which action is pending.* If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(b)(2)(D) . . . an order treating as a contempt of court the failure to obey any orders

Civil Procedure Rule 45(e) discusses failures to comply with subpoenas:

(e) *Contempt.* Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the

subpoena issued. . . .

Distinguishing Civil and Criminal Contempt

A contempt order is criminal if its purpose is to vindicate the court's authority, as by punishing an individual for disobeying an order, even if the order arises from civil proceedings. . . . A contempt order is civil if it has a remedial purpose, either to coerce an individual to comply with a court order given for the benefit of another party or to compensate an aggrieved party for injuries resulting from the failure to comply with an order. *Von Hake v. Thomas*, 759 P2d 1162, 1168 (Utah 1988) [citations omitted].

The conduct at issue here might be treated as both criminal and civil contempt. The Receiver's primary interest is a civil contempt finding: the Receiver needs the Court's remedial assistance in forcing Mr. Smith to provide information needed by the Receiver. A civil contempt order by the Court can be used to ensure Mr. Smith's attendance at a deposition, perhaps by having the deposition occur in custody.

The question of criminal contempt is an issue for the Court's own determination. Where a person subject to a court order has disobeyed that order, the Court can find that person in criminal contempt and impose punishment for disobeying the court order. The Receiver expresses no opinion whether Mr. Smith should be punished for criminal contempt; he brings it to the Court's attention so the Court can determine whether it wishes to impose punishment.

The *Von Hake* court noted: "Both fines and imprisonment may be used to coerce a party or remedy a failure to perform as well as to vindicate a court's authority." *Id.*

Requested Relief

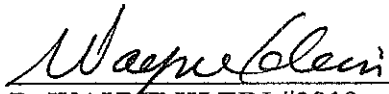
The Receiver asks the Court to issue an Order to Show Cause requiring Smith to appear at the next status hearing in this matter (December 2, 2009 at 9:00 a.m.) or at another time set by

the Court. The Receiver further prays that at that hearing, the Court:

1. Consider whether Smith should be held in criminal contempt for his failure to comply with the Court's October 1, 2009 order compelling his deposition;
2. Order that Smith be adjudged in civil contempt for his failure to appear at the deposition set by the Receiver's deposition notice dated October 6, 2009 and as ordered by this Court on October 1.
3. Order that Smith be incarcerated for civil contempt until his deposition can be held (in a correctional facility if needed), or alternatively that he be required to post a bond sufficient to ensure his attendance at a deposition scheduled by the Receiver.
4. Order that Smith be required to pay a civil contempt fine of \$1,000 to the Receiver for the fees and expenses incurred by the Receiver in preparing for the two depositions at which Smith failed to attend, the motion to compel his deposition, and this motion for an order to show cause. This fine should be in addition to any recoveries the Receiver might seek or make against Smith for his conduct while acting as an officer or manager of the Receivership Entities. This fine should be required to be paid before Smith is release from incarceration.

A proposed Order to Show Cause is attached.

Respectfully submitted this 6th day of November, 2009.



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

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of November, 2009, true copies of the foregoing Receiver's Motion for Order to Show Cause, Declaration of Wayne Klein, and Proposed Order to Show Cause, were mailed to:

Roger E. Taylor
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Richard T. Smith
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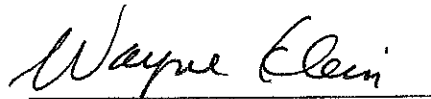
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**DECLARATION OF
R. WAYNE KLEIN, RECEIVER**

Case No. 080922273

Judge: Denise P. Lindberg

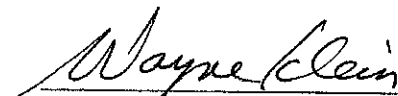
I, R. WAYNE KLEIN, the Receiver in this matter, hereby declare as follows:

1. I am the court-appointed Receiver in this matter and have personal knowledge of all facts set forth herein. I would and could competently testify to these facts in a court of law.

2. On October 6, 2009, I mailed to Richard Smith a copy of a Notice of Deposition, setting the date and time of his deposition for November 4, 2009 at 9:00 a.m. in Salt Lake City. I also mailed to Richard Smith a copy of this Court's October 1, 2009 Order Compelling Deposition of Richard Smith and Imposing Sanctions.
3. I received no communications from Smith indicating that he was unavailable on those dates or that he would not attend the deposition.
4. On the date and time set for the deposition, Richard Smith did not appear. I had the court reporter go on the record to note his failure to appear and to note the appearance of myself and three other parties: Dr. Barnes, Albert Wirth, and T. Courtney Smith.
5. In comments made on the record, Anthony Schofield, counsel for T. Courtney Smith, noted that his client (Courtney Smith) had told him (Mr. Schofield) that Richard Smith was aware that his deposition had been set and that he was expected to appear.
6. The Receiver has expended time valued at substantially in excess of \$1,000 in attending the two scheduled depositions and in preparing and filing motions to procure Smith's attendance at a deposition.

Pursuant to Utah Code Ann. §78B-5-705, I declare under criminal penalty of the State of Utah that the foregoing is true and correct.

Executed this 6th day of November, 2009.



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