


FILED DISTRICT COURT
Third Judicial District

MAR 18 2010

SALT LAKE COUNTY

By _____

Deputy Clerk 

MANNING CURTIS BRADSHAW
& BEDNAR LLC
L.R. Curtis, Jr. [0784]
David C. Castleberry [11531]
170 South Main Street, Suite 900
Salt Lake City, UT 84101-1655
Telephone: (801) 363-5678
Facsimile: (801) 364-5678

Attorneys for Receiver for FFCF Investors, LLC,
Ascendus Capital Management, LCC,
and Smith Holdings, LLC

IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY

STATE OF UTAH

R. WAYNE KLEIN, AS COURT-APPOINTED
RECEIVER FOR FFCF INVESTORS, LLC,
ASCENDUS CAPITAL MANAGEMENT,
LLC, AND SMITH HOLDINGS, LLC,

Plaintiff,

vs.

KAYS CREEK CAPITAL MANAGEMENT,
LLC,

Defendant.

COMPLAINT

Case No. 100904602

Judge Kennedy

Plaintiff R. Wayne Klein (the "Receiver"), as duly court-appointed Receiver for FFCF Investors, LLC ("FFCF"), Ascendus Capital Management, LLC ("Ascendus"), and Smith Holdings, LLC ("Smith Holdings") (collectively the "Receivership Entities"), by and through his counsel, Manning Curtis Bradshaw & Bednar LLC, hereby files this action against Defendant Kays Creek Capital Management, LLC ("Kays Creek"), and alleges as follows:

PARTIES, JURISDICTION, AND VENUE

1. The Receiver was appointed Receiver for the Receivership Entities by the Honorable Denise P. Lindberg, Third Judicial District Court of Salt Lake County, State of Utah, pursuant to an Order dated March 18, 2009 (the "Order"), entered in the action *A. David Barnes, M.D., P.C. v. FFCF Investors, LLC et al.*, Case No. 080922273.

2. Under the terms of the Order, the Receiver is authorized to investigate the affairs of the Receivership Entities, to marshal and safeguard their assets, and to institute legal proceedings for the benefit of the Receivership Entities and their investors and creditors against individuals or entities which the Receiver claims have wrongfully or improperly received funds or other proceeds from the Receivership Entities.

3. Jurisdiction and venue are properly vested with this Court pursuant to Utah Code § 78A-5-102 and Utah Code § 48-2c-1212.

4. Upon information and belief, Kays Creek is a Utah limited liability company with its principal place of business in Kaysville, Utah.

GENERAL ALLEGATIONS

The Ponzi Scheme

5. Through forensic accounting and investigation, the Receiver and his staff have been able to confirm that the Receivership Entities operated as a Ponzi scheme created by Roger E. Taylor ("Taylor") and Richard Smith ("Smith").

6. In January 2003, Taylor and Smith formed Ascendus.

7. In April 2003, Ascendus received a license as an investment adviser. Taylor was

the designated official of the investment adviser and referred to himself as the registered investment adviser.

8. Taylor and Smith solicited investors to engage Taylor and Ascendus to trade options, using the investors' funds. Investors were told that Taylor would utilize a proprietary trading strategy that was consistently profitable and that was designed to avoid losses. Investors were required to pay Ascendus based on a sliding-scale commission rate that increased as reported profits rose. If the investment returns were under 12% a year, Ascendus would earn 10% of the profits earned each month. Commissions of 20% were due if profits were between 12% and 24% a year. If the investment earned greater than 24% annual returns, investors owed Ascendus 30% of the profits reported to them by Ascendus.

9. In the majority of cases, investors were instructed to open brokerage accounts in their own name at Penson Financial Services, Inc. ("Penson"), a Dallas-based broker-dealer. Investors deposited their investment funds (and in some cases, stock) into their brokerage accounts at Penson. Investors signed forms granting Taylor authority to trade options, using funds in their Penson brokerage accounts. These forms were labeled Limited Trading Authorizations ("LTA").

10. Ascendus hired salespersons to find additional investors for the Ascendus options trading program. These salespersons were paid commissions based on the amount of funds they obtained. None of these other salespersons were licensed as investment adviser representatives for Ascendus, as required by the Utah Securities Act.

11. Each month, Ascendus prepared account statements for each investor, reporting

on how much profit had been earned from options trading in their accounts and how much commission was owed to Ascendus as a result. Smith and others delivered these account statements to investors monthly and collected from the investors checks payable to Ascendus for the commissions due on the reported profit. (In some cases, the investors authorized wire transfers directly from Penson to Ascendus for payment of the commissions.)

12. During the entire time that Ascendus operated, from early 2003 through January 2006, Ascendus reported profits every month to all investors. The reported profit varied each month, but the monthly statements always reported a profit.

13. Investors who opened accounts at Penson also received monthly account statements directly from Penson. These account statements listed the trades conducted in their account during the prior month and reported on the end-of-month value of the account. The Penson account statements were complex and difficult to understand, making it hard for investors to measure profits and losses. The Ascendus statements, by contrast, simply reported the total amount of profits earned and commissions due.

14. The account statements from Penson showed account values lower than the account values reported to investors by Ascendus. When some investors asked about the discrepancies, Taylor gave a variety of explanations such as: Penson's accounting is not well suited for the type of trading Ascendus does, or that the difference was due to the value of options positions still open at the end of the month – positions that were really unrealized profits. Most investors accepted these explanations.

15. In reality, Ascendus was not earning profits for investors every month. Some

months saw significant declines in the value of the investors' accounts. Despite these losses, Ascendus continued to report profits to investors and collect commissions based on these reports.

16. As Ascendus reported an unending stream of profits, at a time when account values were fluctuating and generally declining, the gap between the reality of account values and the perception – i.e., the amount reported in the Ascendus account statements – grew.

17. On information and belief, Ascendus had its first month of losses in July 2003. When Taylor decided to report profits for that month, perhaps hoping to make up the losses in future months, he started Ascendus on a downward spiral from which it never recovered. The losses were never made up and the monthly account statements issued by Ascendus (and later, FFCF) became increasingly fraudulent.

18. Some investors realized that the Ascendus statements could not be reconciled with the monthly reports being issued by Penson. Several investors challenged Taylor. When confronted, Taylor agreed to have Ascendus refund the commissions paid and compensate the investors for their trading losses. For example:

A. At the beginning of January 2004, investor VF had \$200,000 in his investment account at Penson. During January, the account value dropped by 13%, while Ascendus reported the account had increased in value 6.9% from December 19, 2003 to January 17, 2004. Ascendus charged VF a commission of \$3,048.52 as Ascendus' share of profits earned during the month of January. In February, the value of VF's account dropped another 10.8% (while Ascendus reported a 3.5% profit). In March, the account lost \$81,484.26 in value, a 51.6% drop. By the end of June 2005, the value of VF's account had dropped to \$47,492.32, a

76.2% decline – and this was despite Ascendus depositing an additional \$10,000 into VF's account at Penson in March 2005. Ascendus deposited an additional \$10,000 into VF's account in July 2005. Despite this additional cash infusion, VF's account value had dropped to \$39,405.39 by August 2005 when he withdrew this amount from Penson. VF filed a lawsuit in September. The suit was settled, resulting in Taylor and Ascendus paying an additional \$148,500.00 to investor VF.

B. EP, a Florida attorney, also threatened suit against Taylor and Ascendus for the losses in his investment account being managed by Taylor. Taylor, Smith, and Ascendus signed a settlement agreement with EP, pursuant to which Ascendus paid \$128,977.36 to EP. This represented the full amount of EP's investment losses and a portion of the profits that Ascendus had reported to him.

19. By sending false account statements to investors, Taylor caused Ascendus to become insolvent. This insolvency occurred because the false account statements caused Ascendus to owe more to investors than its net worth. The aggregate account value that Ascendus reported to investors in the monthly account statements exceeded the combined value of the brokerage accounts of the investors and the assets of Ascendus. In other words, Ascendus lacked the net worth to pay investors the amount by which the "reported" account values exceeded the "actual" account values.

20. Other factors causing Ascendus to be insolvent early in its operations were:

A. Expending company funds to pay investors who recognized the account statement discrepancies, thereby decreasing the company's capital and net worth;

B. By using falsely-claimed profits as justification for collecting high commissions, Ascendus became liable to investors for those improperly-collected commissions. In fact, in multiple instances, Ascendus used company funds to repay commissions to investors who complained that the commissions had been collected improperly. Ascendus lacked the financial capacity to repay all the commissions it had collected improperly; and

C. Taylor accepted investors into Ascendus who did not meet the net worth standards required as part of Ascendus' investment advisory license. This made Ascendus liable to repay any investor who did not have \$750,000 under management by Ascendus or who did not have a net worth of over \$1.5 million. Ascendus lacked sufficient funds to make those payments.

21. While a majority of investors opened separate brokerage accounts at Penson, some sent their money directly to Ascendus to be pooled and managed by Taylor. Investors were told that they needed to have at least \$100,000 in a Penson brokerage account to qualify for options trading by Taylor. Investors who had less than \$100,000 to invest could send their investment funds to Ascendus for management by Ascendus in the pooled "Ascendus Growth Fund" ("AGF"), even though Ascendus' investment advisory license did not allow it to take custody of client funds.

22. At least fifteen investors sent their money directly to Ascendus, expecting their funds would be managed by Taylor directly in an account he controlled. These investors also received monthly account statements from Ascendus, reporting on profits supposedly earned each month. Because these investors did not have separate accounts at Penson, they did not receive any account statements from Penson. The Penson account statements showing the actual

profits and losses were sent only to Ascendus.

23. These 15 AGF investors gave a total of \$1,016,683.96 to Ascendus. Of this amount, \$331,580.94 was placed by Ascendus in its AGF account at Penson for at least a period of time. The remaining \$685,103.02 was used to pay distributions to other investors or expenses of Ascendus.

24. Monthly account statements sent to AGF investors also reported consistent profits. In reality, at least a fourth of the months saw declines in the value of the AGF fund and AGF earned less than \$3,000 in cumulative net profits during its three years of existence. These factors, and the liabilities they created to investors, further exacerbated the insolvency of Ascendus.

25. Of the \$1,106,683.96 given by investors directly to Ascendus for investment in AGF, only \$525 was returned to a single AGF investor. The remaining amount was used to make payments to non-AGF investors, insiders, affiliated persons for commissions, and business expenses.

26. In addition to the use of AGF funds to pay non-AGF investors (described above), Ascendus used other funds paid to it by investors in order to make distribution payments to other investors. This is a practice typically found in Ponzi schemes, where funds from new investors are used to make payments to earlier investors, in order to retain the investors and attract even larger investments. This practice began at least by August 2003. For example:

A. On August 22, 2003, an investor gave \$20,000 to Ascendus. Before this deposit, the balance in the Ascendus bank account was \$1,037.84. The money from the investor

was used to make a \$20,000 payment to another investor 11 days later.

B. In November 2005, an investor paid \$275,000 to Ascendus. The bulk of those funds was used to make distribution payments to five other investors, including repaying the investor whose August 2003 investment was used to pay off another investor (described in the preceding paragraph). That 2003 investor was paid a 50% return on her investment.

27. In late 2005, Taylor decided to close the Ascendus options trading program. Taylor paired with his brother-in-law, Jeff Roylance, to raise investment funds for a California investment adviser – LBS Advisors ("LBS"). Roylance and his company, Summit Capital Advisors ("Summit"), had secured exclusive rights to raise funds for LBS. Taylor became a sub-advisor for Summit. Taylor was to earn commissions from Summit for investment funds he was able to deliver to LBS.

28. Pursuant to Taylor's sub-advisor agreement with Summit, Taylor would receive 66% of the management fees generated by Summit on funds Taylor raised from investors in the first year and 50% in subsequent years.

29. Taylor and Smith formed FFCF Investors, LLC in January 2006, as a vehicle for pooling investor funds to send to LBS. Taylor was again the managing member. The FFCF name was itself an indication that investor monies were to be sent to "Franklin Forbes Composite Fund," a fund operated by LBS.

30. Because Taylor and Ascendus would no longer receive commissions from options trading for investors after Ascendus closed, Taylor would receive no further income from Ascendus. In order to continue receiving compensation – this time from LBS Advisors – Taylor

needed to persuade investors to move their money to LBS.

31. In late 2005, Taylor, Roylance, and others began talking and meeting with Ascendus investors, telling them the options trading environment was not conducive to the continued string of "profits" they had received in the past. Taylor told investors about FFCF and the investment programs offered by LBS, encouraging investors to move their investments to FFCF. Most investors were told that LBS required a significant minimum investment, so investor funds would have to be pooled.

32. The process of having investors withdraw their funds from their Penson accounts created a problem for Taylor, as liquidating the Penson accounts would have made investors realize that their Penson accounts had lost money and that the accounts did not have the value as stated in the account statements from Ascendus. To solve this problem, Taylor and Smith had investors sign wire transfer forms, instructing Penson to wire the "total balance" of the investors' money directly to the newly-created FFCF entity.

33. When Taylor met with investors, he generally had them sign subscription agreements memorializing their decisions to invest in FFCF. These subscription agreements significantly overstated the amount of their beginning investment balance in FFCF. The amounts listed in the subscription agreements were consistent with the investment values that had been reported in the account statements sent out by Ascendus. For example:

A. Investor DA had a \$470,792.56 ending value in his investment account at Penson. This was wired from Penson to FFCF on February 15, 2006. During this time period, his Ascendus account statement said his investment balance was almost twice that amount –

\$912,000.

B. Investor AB had a \$179,237.88 balance in his Penson account, but his subscription agreement with FFCF showed a \$500,000 beginning investment balance.

C. Investor RH had a \$239,713.84 balance in his Penson account, but his FFCF subscription agreement showed a beginning investment balance of \$329,830.28.

34. In total, investors who joined FFCF at its inception delivered actual funds to FFCF totaling \$7,585,727.61 (between December 2005 and February 2006). These investors were told by Taylor and FFCF that their investment balances were at least \$12,819,451.19. This \$5,233,723.58 difference represented fictitious investment deposits.

35. Taylor employed various devices to persuade investors to move to FFCF, in addition to the expected profits. In at least one instance, Taylor caused Ascendus to deposit \$41,434.08 into an investor's account at Penson, to make it appear as if the individual account had over \$200,000, instead of the actual value of \$160,833.24. This investor was then persuaded to move his investment to FFCF. This investor learned in 2009 that the \$41,434.08 was removed from his Penson account before the transfer, so the investor had only \$160,833.24 actually transferred to FFCF from Penson. Nevertheless, this investor was told his beginning investment balance at FFCF was \$200,000.

36. Not all investors were given the choice of withdrawing their funds invested through Ascendus or moving to FFCF. Investors whose funds were pooled by Ascendus for participation in the Ascendus Growth Fund had their funds continue to be held in AGF until July 2006.

37. As a result of telling investors that they had at least \$12.8 million invested, when FFCF only had received \$7.6 million, FFCF was insolvent from the beginning.

38. The problem was exacerbated from there. As the investor funds were sent to LBS and FFCF began to receive account statements from LBS claiming profits were being earned, Taylor and FFCF had to report to investors profit on the \$12.8 million the investors thought they had, rather than the \$7.6 million actually invested. The monthly account statements sent to investors by FFCF reflected this illusion.

39. Taylor and FFCF may have hoped that the \$7.6 million would earn sufficiently high returns to repay the \$12.8 million promised to investors, but Taylor and FFCF were not able to keep up with disbursements and began to immediately redistribute new investment funds coming into FFCF, instead of forwarding those new investor funds to LBS.

40. Between March 2006 and July 2007, investors gave an additional \$3.6 million to FFCF, believing it would be combined with other investment funds already in the pool formed by FFCF. However, only \$430,000 of this \$3.6 million was ever sent to LBS. Despite having received a total of \$11.2 million from investors, only \$8.0 million was actually sent to LBS for investment.

41. During this time, the investors who had invested \$11.2 million were told their initial investment balances exceeded \$16.6 million.

42. LBS sent monthly account statements to FFCF reporting on the profits earned each month from the funds invested by FFCF.

43. During the time FFCF had pooled funds from investors and sent most of it to

LBS, Taylor continued in the role as the investing expert for FFCF. Newsletters, which Taylor authored, were sent to investors telling them about the progress of their investments and market trends affecting their investments.

44. As noted above, almost all of the investor funds in the Ascendus Growth Fund were used to pay other investors or for expenses of Taylor and Ascendus. After Ascendus ceased its options investment program in February 2006, AGF continued. Over the next four months, the \$39,237.81 remaining in this trading account were used to pay expenses unrelated to the investors whose funds were in the account, including \$37,775.69 paid out to other investors.

45. There were numerous instances in which new monies sent to FFCF by investors were used to make payments to other investors, instead of being sent to LBS for inclusion in the investment pool:

A. Out of \$300,000 deposited by an investor into FFCF in March 2006, more than \$250,000 was used to pay distributions to three other investors.

B. Out of \$500,000 given to FFCF in November 2006 by an investor, \$430,000 was sent to LBS for investment. Of the remaining funds, \$14,111.11 was used to make distribution payments to two other investors, \$30,000 was paid to Taylor, and the balance was used for the operations of FFCF.

C. An investor delivered \$332,309.26 to FFCF on March 16, 2007. \$276,662.36 of this amount was used to make distribution payments to three other investors.

D. A \$200,000 distribution payment to an investor on March 21, 2007 was funded from deposits by two other investors.

E. A \$50,000 payment by an investor on March 20, 2007 was transferred from one bank account to another and finally to FFCF where it was used to have sufficient funds to make a \$160,000 distribution to another investor.

F. On April 26, 2007, investor GDN wired \$200,000 to FFCF for investment. The next day, the \$200,000 was wired as a payment to another investor; none of the funds were sent to LBS.

G. Investor JG sent \$25,000 for investment on June 27, 2007. The next day, the \$25,000 was paid out to another investor, leaving the bank account with a zero balance.

46. Sometimes, investors requested distributions and FFCF lacked funds to pay the withdrawal. In some instances, Smith borrowed funds and used the proceeds from the loans to make distribution payments to investors, including a \$150,000 payment to an investor on August 20, 2007 and a \$750,000 payment to another investor on November 7, 2007.

47. Because FFCF owed investors over \$5 million more than FFCF had in its investment account at LBS or its own bank account, all funds in the control or possession of FFCF should have been used for the benefit of investors – either to increase the size of the investment pool or to return funds to investors. Instead, substantial funds from FFCF were used to pay expenses that were not only not for the benefit of investors but which were completely unrelated to the business of FFCF.

48. From early 2006 to July 2008, LBS was reporting to FFCF that FFCF was earning profits on its investment managed by LBS. Those reported profits were not high enough to cover the gap between the amount FFCF had sent to LBS and what was reported to investors.

49. Nevertheless, Taylor continued to withdraw funds from LBS. Between the inception of the investment and March 2007, Taylor withdrew \$2,016,594.75 from LBS, reducing FFCF's earning capacity. At least \$432,272.39 of the amount withdrawn from LBS was paid to persons and entities who were not investors.

50. In December 2007, Taylor withdrew \$1,500,000 from LBS, along with that month's \$14,206.10 in reported earnings. This money was sent to Taylor's own bank account, where most of it was later sent on to FFCF. This withdrawal left an account value of \$81,849.52 at LBS.

51. In the interim, investors were still receiving account statements showing high values for their portions of the FFCF investment pool.

52. In February 2008, Lighted Candle Society (an investor) ("LCS"), requested withdrawal of its \$100,000 investment. In mid-April, Taylor wrote LCS saying that because of a communication failure between Smith and Taylor, Taylor was not informed of the withdrawal request and, therefore, FFCF had missed the deadline to request the withdrawal during the current quarter. Taylor told LCS that its withdrawal request was submitted to LBS on April 11 and that LCS could expect payment by approximately July 11, 2008.

53. In reality, Taylor knew that the value of FFCF's investment with LBS was less than the amount needed to pay LCS.

54. On or around July 10, 2008, when LCS was told it would receive the return of its investment, Smith attempted suicide and was hospitalized. A letter was sent to investors, saying that the fund had collapsed and that the investments were lost. This letter acknowledges that

investor accounts were suffering losses as early as 2004 and that the account statements sent to investors did not reflect the amount actually in the investor accounts. The letter bears the purported signature of Smith, but was actually drafted by Taylor.

55. On August 1, Taylor withdrew the remaining \$81,849.52 of FFCF's funds from LBS, depositing those funds into his own bank account.

Transfers from the Receivership Entities to Kays Creek

56. From July 2003 to October 2004, the Receivership Entities transferred \$288,935.87 to Kays Creek.

57. On or about December 20, 2004, Kays Creek transferred \$83,236.50 to the Receivership Entities.

58. On or about December 22, 2004, Kays Creek transferred \$78,829.65.

59. Kays Creek Capital allegedly provided trade strategies to the Receivership Entities for a fee, which was based on a percentage of profits earned.

60. The amounts transferred from the Receivership Entities to Kays Creek should be returned to the Receiver because the Receivership Entities did not ultimately turn a profit with their trading but rather lost money.

61. The Receiver has demanded that Kays Creek pay to the Receiver money that it received from the Receivership Entities, but it has refused to do so.

FIRST CLAIM FOR RELIEF

(Fraudulent Transfer – Utah Code § 25-6-1 *et seq.*)

62. The Receiver incorporates each and every allegation contained in the foregoing

paragraphs.

63. The transfers of funds to Kays Creek from the Receivership Entities were inherently fraudulent because they were sent from a company engaged in a Ponzi scheme, and were made with the intent to hinder, delay, or defraud the creditors and/or investors of the Receivership Entities.

64. None of the Receivership Entities received a reasonably equivalent value from Kays Creek for goods or services in exchange for the transfers.

65. Accordingly, these transfers are avoidable under the Utah Uniform Fraudulent Transfer Act.

66. The Receivership Entities were insolvent at the time the transfers were made to Kays Creek.

67. Pursuant to Utah Code § 25-6-1 *et seq.*, the Receiver is entitled to avoid and recover the transfer of money from the Receivership Entities to Kays Creek as an actual or constructive fraudulent conveyance.

SECOND CLAIM FOR RELIEF

(Unjust Enrichment)

68. The Receiver incorporates each and every allegation contained in the foregoing paragraphs.

69. Kays Creek received at least \$126,869.72 from the Receivership Entities in excess of any money it deposited with them.

70. Notwithstanding a demand that it do so, the money Kays Creek received in excess

of any amounts it transferred to the Receivership Entities has not been paid to the Receiver, nor has it provided a reasonably equivalent value of goods or services to the Receivership Entities for the transfers of money to Kays Creek from the Receivership Entities.

71. Kays Creek knowingly and voluntarily accepted and retained a benefit when the funds of the Receivership Entities were transferred to it.

72. The money transferred to Kays Creek by the Receivership Entities continues to be wrongfully retained by it.

73. The Receiver is entitled to disgorgement of the funds transferred from the Receivership Entities to Kays Creek, and the circumstances present in this action render its retention of those benefits inequitable.

74. Kays Creek have been unjustly enriched at the expense of the Receivership Entities, and the Receiver is entitled to judgment in the amount of the money transferred to Kays Creek from the Receivership Entities in excess of the reasonable value of goods or services provided by Kays Creek to the Receivership Entities.

PRAYER FOR RELIEF

WHEREFORE, the Receiver prays for judgment against Kays Creek as follows:


1. For damages against Kays Creek in the amount of the money transferred to it from the Receivership Entities in excess of the reasonable value of goods or services provided by it to the Receivership Entities, believed to be at least \$126,869.72;
2. For an order requiring Kays Creek to disgorge the total amount of the transfers to it from the Receivership Entities in excess of the reasonable equivalent of any goods or services

provided to the Receivership Entities;

3. For pre-judgment and post-judgment interest to the fullest extent permitted;
4. For costs and attorneys' fees expended in recovering funds from Kays Creek; and
5. For such other and further relief as the Court may deem just and proper.

DATED this 18th day of March, 2010.

**MANNING CURTIS BRADSHAW
& BEDNAR LLC**



L.R. Curtis, Jr.
David C. Castleberry
Attorneys for Receiver for FFCF Investors, LLC,
Ascendus Capital Management, LCC, and Smith
Holdings, LLC

Plaintiff:
Wayne Klein
Court-Appointed Receiver for FFCF Investors, LLC,
Ascendus Capital Management, LCC,
and Smith Holdings, LLC
299 South Main, Suite 1300
Salt Lake City, UT 84111