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THIRD DISTRICT COURT
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WAYNE KLEIN
RECEIVER FOR FFCF, ASCENDUS, SMITH HOLDINGS
299 SOUTH MAIN, SUITE 1300
SALT LAKE CITY, UT 84111
Telephone (801) 534-4455
Facsimile (801) 961-4001
wklein@kleinutah.com

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 APPLICATION
SEEKING COURT APPROVAL OF
FEES AND EXPENSES**

Case No. 080922273

Judge: Denise P. Lindberg

FFCF INVESTORS, LLC,

Plaintiff,

vs.

RICHARD SMITH, et al.

Defendants.

R. Wayne Klein, the Court-Appointed Receiver (the "Receiver") of FFCF Investors, LLC, Ascendus Capital Management, LLC, and Smith Holdings, LLC (the "Receivership

Entities”), hereby submits his first Application Seeking Court Approval of Fees and Expenses for himself and the firm Lewis B. Freeman & Partners, Inc., for the period March 18, 2009 through September 30, 2009 (“Reporting Period”).¹

BACKGROUND

1. The Receivership portion of this litigation commenced on March 18, 2009 with this Court’s entry of an Order Appointing A Receiver.
2. As of September 30, 2009, the Receiver had filed four status reports with the Court. These were dated April 13, 2009, May 29, 2009, July 10, 2009, and September 25, 2009. The status reports describe the work performed by the Receiver and the progress made to date. These status reports were all submitted in advance of status hearings conducted by the Court. Copies of these reports are posted online at www.kleinutah.com.

SERVICES PERFORMED

3. Pursuant to the order appointing a Receiver, the Receiver, who himself is an attorney, and the Receiver’s professionals, have performed the following services during the Reporting Period:
 - a. Corporate Records: Business records of Ascendus and FFCF were obtained from Roger Taylor’s attorney, James Warner. These records proved to be incomplete; the Receiver has noted that few of the records expected to be maintained by these

¹ Effective September 30, 2009, the Receiver is no longer affiliated with Lewis B. Freeman & Partners, Inc. (“LBF”). This application is for fees due to LBF for work it performed through September 30, 2009, before the Receiver’s separation from LBF. Future fee requests will not include any requests for fees or expenses for LBF.

companies were delivered to him. No computer records have been delivered to the Receiver. The records that were delivered have been analyzed for clues into the operations of the Receivership Entities. As part of his efforts to obtain more records of these entities, the U.S. Postal Service has agreed to forward mail to the Receiver that is addressed to these entities.

- b. Bank Records: The Receiver obtained copies of bank records for nine accounts held at various times at Far West Bank and Zions Bank. These records were inputted into databases and sorted to create reconstructed financial records of the Receivership Entities. Some of the bank records were provided by Warner; others had to be obtained from the banks by the Receiver. The Receiver found payments to other financial institutions, where the Receivership Entities did not maintain bank accounts. The Receiver has issued subpoenas to these entities, seeking to learn the purposes for the bank payments. Recently, an additional bank account for Ascendus has been located at another bank; a subpoena has been issued for those records.
- c. Analysis of Investor Deposits and Withdrawals: The Receiver has substantially completed his analysis seeking to determine the amounts given to FFCF and Ascendus by investors and the amounts paid out to them as withdrawals or distributions of profit. This analysis started with an examination of investor account statements prepared by Ascendus and FFCF. The Receiver discovered

these were neither accurate nor complete. The Receiver then used the bank records in an effort to reconstruct transactions with investors.

- d. Analysis of Brokerage Records: Records showing the transactions with LBS Advisors were analyzed to determine the pattern and timing of deposits and withdrawals. Monthly statements of some of the investor accounts at Penson Financial have been analyzed to compare balances shown by Penson with account balances for the same period shown on account statements by Ascendus. Penson records were also compared to bank records of Receivership Entities to determine the purposes and destinations of certain payments by Ascendus and FFCF.
- e. Tax Issues: The Receiver filed required forms notifying the IRS of the appointment of the Receiver. Substantial additional efforts were expended in an effort to obtain prior years' tax returns for the Receivership Entities. The Receiver also has spoken with some investors and their accountants regarding information necessary to file tax returns and tax treatment of this loss.
- f. Tracing Payments: Reconstructing the financial records has permitted the Receiver to identify the names of persons and entities who received payments from the Receivership Entities. The Receiver has sought to determine the locations of these persons and the purposes for those payments. This has involved the review of bank records to identify and locate the recipients of funds, requesting information from the recipients, issuing subpoenas, taking depositions,

analyzing responses and documents provided, and negotiating for the return of payments.

- g. Gathering Information from Others: The Receiver has sought information from current investors, former investors, recipients of payments, public records and regulatory filings, and from other companies that conducted business with the Receivership Entities. The Receiver has encountered difficulty in obtaining information from many recipients. Since August, the Receiver has been granted authority to issue subpoenas and take depositions of persons knowledgeable about the operations of the companies. This authority is now being used.
- h. Interviews and Depositions: The Receiver and his assistants have interviewed multiple people to learn information about the business operations of FFCF and Ascendus, computer records created by the companies, operations of Superwire and Extream TV (entities affiliated with the Receivership Entities), and companies that assisted Ascendus in executing securities transactions. The deposition of one overpaid investor has been taken so far. An attempt to depose Richard Smith failed when he filed an objection and refused to appear. As a result of the Court's intervention, Smith has been ordered to appear at a deposition. His deposition has been rescheduled.
- i. Communications with Investors: The Receiver sent questionnaires to investors, requesting information regarding their investments and identification of

documents they received from the Receivership Entities. Substantial, valuable information was obtained from these questionnaires, documents, and interviews with investors. The Receiver has also had extensive communications with investors in personal meetings, on the telephone, and via e-mail. The Receiver created a web site to inform investors about the progress of the Receivership.

- j. Settlements with Overpaid Investors: Extensive discussions and negotiations have been held with a number of overpaid investors. Information was sent to these investors and their attorneys and information from the investors was analyzed in an effort to determine the size of the overpayment and to demonstrate that overpayment did, in fact, occur. During the Reporting Period, these efforts have culminated in four settlements with investors who were overpaid. These settlements have netted \$190,000 for the Receivership.
- k. Ongoing Discussions with Overpaid Investors: The Receiver continues to engage in extensive discussions with other overpaid investors. This has included providing significant information to the investors (and their attorneys), showing payments to them from FFCF and Ascendus and analyzing information they provided showing their payments to the Receivership Entities.
- l. Search for Prior Investors Who Withdrew Funds: The reconstruction of the financial records has revealed that there were other investors who withdrew from participation in the investment program before it collapsed. Many of these are

overpaid. The Receiver is attempting to locate them.

- m. Sending Demand Letters. When the Receiver has been able to determine that an investor has been overpaid or that payments were made without sufficient evidence that the transactions benefitted the companies, he has sent letters demanding repayment of those funds.
- n. Research: The Receiver has conducted significant research into the background of persons and entities that might be targets of lawsuits by the Receiver. This research seeks to determine whether the Receiver has grounds to seek payments from these persons. The Receiver has also researched records showing criminal convictions of several people affiliated with the Receivership Entities.
- o. Litigation in Federal Court: The Receivership entities are currently defendants in two cases that have been consolidated in federal court. The Receiver has been served with the lawsuit and other filings in that case and continues to monitor and participate in those litigation proceedings.
- p. Other Litigation in State Court: The Receivership Entities also are defendants in a lawsuit filed in state court by Lighted Candle Society, an investor. The Receiver has been served with that lawsuit and is monitoring litigation proceedings in the case.
- q. Court Filings and Motions: In addition to the status reports filed in this case, the Receiver has prepared and submitted to the Court the following litigation filings:

- i. Oath and Acceptance of Receiver;
 - ii. Motion to Consolidate Cases;
 - iii. Report to Court on Potential Conflicts of Interest (and reply);
 - iv. Motion to Approve Settlements, Dismiss Defendants;
 - v. Motion to Compel Deposition of Richard Smith; and
 - vi. Response to Barnes Application for Payment of Fees.
- r. Receiver Bank Account: A bank account has been opened to conduct Receivership business. Funds deposited into the operating account will be used to pay some of the expenses of the Receivership, such as the costs of depositions and obtaining bank records. This money will also be used to fund litigation against overpaid investors, recipients of improper payments, and company insiders.

REQUEST FOR COURT APPROVAL OF FEES AND EXPENSES

4. The Order Appointing A Receiver provides:

The costs, fees and expenses of the Receiver incurred in connection with the performance of his/her duties described herein, including the costs and expenses of those persons who may be engaged or employed by the Receiver to assist him/her in carrying out his/her duties and obligations hereunder shall be paid out of the proceeds or other assets of the Defendant and any other assets under the control of the Receiver pursuant to this Order. All applications for costs, fees and expenses for services rendered in connection with the Receiver shall be made by application detailing the nature of the services and shall be heard by the Court.

Appointment Order at ¶ 11, ppg. 4-5.

5. This Application is being submitted pursuant to this provision.

Application Summary and Billing Methodology

6. Through this Application, the Receiver, on behalf of himself and the firm Lewis B. Freeman & Partners, Inc. is requesting approval of compensation for services provided to, and reimbursement of expenses incurred on behalf of, the Receivership Estate in the amounts described below.
7. Summary invoices reflecting the services rendered by the Receiver and Lewis B. Freeman & Partners, Inc. and a detailed list of expenses incurred are attached as Exhibit A. Detailed invoices describing the work performed by the Receiver and by employees of Lewis B. Freeman & Partners, Inc., on a daily basis, as well as the detailed list of expenses incurred, have been lodged with the Court by means of a separate letter to the Court. The detailed fee invoices are not being made public because they include investment and personal information about investors, describe negotiating stances and legal theories being pursued, and identify persons providing assistance to the Receiver and the nature of information they have provided.
8. The Applicants' services are billed on an hourly-rate basis.
 - a. The Receiver's hourly rate is \$350.
 - b. The hourly rates of managers, analysts, and other employees of Lewis B. Freeman & Partners, Inc. who have worked on this case range from \$75 to \$120. No other employee of Lewis B. Freeman & Partners, Inc. has charged more than \$120 per hour for work on this case. The vast majority of those performing work on this

case – other than the Receiver – bill their rates substantially below this maximum rate. The professionals and who have billed time to this case, and their rates are:

Name	Profession	Hourly Rate Billed
Earl S. Maeser	Attorney	\$120
Dustin Gibb	Law Clerk	\$75
Keith J. Williams	Analyst	\$75

- c. In rendering services and incurring expenses, the Applicants have endeavored to use the most economical means and methods that are available and appropriate under the circumstances.

Specific Requests

The Receiver

9. From March 18, 2009 (the day he was appointed as Receiver) through September 30, 2009, the Receiver has rendered 299.6 hours of administrative, investigative, and legal services to the Receivership Estate, billed at \$104,860. Because it is virtually impossible to distinguish his services among administrative, investigative, or legal categories – and, in any event, it would be cumbersome and unproductive to take the time to record time in artificial categories – the services rendered by the Receiver are described in his invoice with regard to the tasks accomplished. The services rendered are summarized above and in Exhibit A, and are fully detailed in the invoices provided to the Court.

Lewis B. Freeman & Partners, Inc.

10. During this Reporting Period, three employees of Lewis B. Freeman & Partners, Inc.

have assisted with the case, spending 585.5 billable hours assisting the Receiver. The Receiver seeks compensation of \$46,833.00 for this time – time billed at an average rate of \$79.99 per hour. The services rendered by employees of Lewis B. Freeman & Partners, Inc. are summarized above and in Exhibit A, and are fully detailed in the invoices submitted to the Court and government plaintiffs.

Expenses

11. Lewis B. Freeman & Partners, Inc. (LBF&P) has advanced expenses for the operation of the Receivership totaling \$747.78.

Summary

12. Total fees and expenses requested are as follows:

	<u>Fees</u>	<u>Expenses</u>
a. Receiver and LBF&P (March 31, 2009 invoice)	\$9,520.00	\$89.25
b. Receiver and LBF&P (September 30, 2009 invoice)	<u>\$142,173.00</u>	<u>\$658.53</u>
c. <i>Total</i>	<i>\$151,693.00</i>	<i>\$747.78</i>

Proportional Reimbursement

13. To ensure that the Receiver's work does not absorb a disproportionate amount of funds recovered, the Receiver suggests that the Court direct that the Receiver's fees be paid in stages. The Receiver should be permitted to pay himself and others assisting him up to a maximum of 30% of amounts already recovered by the Receiver and 30% of future amounts recovered by the Receiver – up to the amount of fees and expenses approved

pursuant to this request.

CONCLUSION

The Receiver respectfully submits this Application Seeking Court Approval of Fees and Expenses related to FFCF, Ascendus, and Smith Holdings. Based on the description of work performed in this Application and in the Initial, Second, Third, and Fourth Reports to the Court, the Receiver requests that the Court enter the proposed Order attached hereto as Exhibit B, approving the fees and expenses incurred by the Receiver and his professionals as set forth herein, and authorizing the Receiver to pay such amounts as a cost of administering the Receivership Estate.

The Receiver verifies under penalty of perjury that the foregoing is true and correct.

DATED this 27th day of November, 2009.



WAYNE KLEIN, Receiver

CERTIFICATE OF SERVICE

I hereby certify that on this 21th day of November, 2009, I caused to be sent via first-class mail, postage prepaid, a true and correct copy of the foregoing Receiver's Application Seeking Court Approval of Fees and Expenses to:

Roger E. Taylor
1360 Summerwood Cir
Santa Clara UT 84765

James D. Gilson
Callister Nebeker & McCullough
10 East South Temple, Suite 900
Salt Lake City, UT 84133
Counsel for A. David Barnes

Richard T. Smith
443 North 750 East
Orem, UT 84097

Craig R. Madsen
1112 North 700 East
Springville, UT 84663
Counsel for Kathryn Rowley

Anthony W. Schofield
Kirton & McConkie
518 West 800 North, Suite 204
Orem, UT 84057
Counsel for T. Courtney Smith

Erik Christiansen
Parsons Behle & Latimer
201 South Main Street, Suite 1800
Salt Lake City, UT 84111
Counsel for Albert Wirth

David W. Scofield
Peters/Scofield
2455 East Parleys Way, Suite 115
Salt Lake City, UT 84109
Counsel for Robert Workman

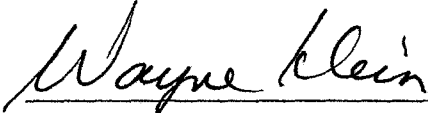


EXHIBIT A -- INVOICE SUMMARY

DATE: September 30, 2009

CLIENT: FFCF/Ascendus Receivership

Summary of Services:

<u>Professional</u>	<u>Hours</u>	<u>Hourly Rate</u>	<u>Amount</u>
Wayne Klein	299.6	\$350.00	\$104,860.00
Earl Maeser	64.9	\$120.00	\$7,788.00
Dustin D. Gibb	93.3	\$75.00	\$6,997.50
Keith J. Williams	<u>427.3</u>	\$75.00	<u>\$32,047.50</u>
Total of Services:	885.1		\$151,693.00

Expenses

Date	Amount	Expense
3/18/09	7.50	One copy of certified order appointing receiver
3/19/09	39.00	Fee for six additional copies of certified orders appointing receiver.
3/20/09	11.80	Outside copying expense for questionnaire for investors.
3/20/09	14.75	Postage costs to mail questionnaire to investors.
3/31/09	16.20	Research fee to Zions Bank for copies of bank account transactions.
4/6/09	2.00	Online access fee to corporate information of accountant.
4/8/09	16.00	Copies of court filings in separate lawsuit against investors.
4/16/09	111.80	Research fee to American West Bank for copies of bank documents.
7/10/09	2.00	Database access fee to obtain articles of incorporation for FFCF.
7/10/09	12.05	Postage to send third status report and special report to attorneys.
8/4/09	18.50	Money order for witness fee for subpoena to Richard Smith.
8/20/09	25.43	Photocopies of reply memorandum and exhibits to send to attorneys.
8/20/09	30.00	Postage to mail receiver's reply brief on conflicts of interest.
9/17/09	75.00	Fee for serving subpoena on Richard Smith.
9/24/09	365.75	Research fee to American West Bank for copies of bank documents.
	\$747.78	

Total Request: ***\$151,693.00 in fees, \$747.87 in expenses.***

EXHIBIT A

WAYNE KLEIN
RECEIVER FOR FFCF, ASCENDUS, SMITH HOLDINGS
299 SOUTH MAIN, SUITE 1300
SALT LAKE CITY, UT 84111
Telephone (801) 534-4455
Facsimile (801) 961-4001
wklein@kleinutah.com

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>[PROPOSED]</p> <p>ORDER APPROVING RECEIVER'S APPLICATION SEEKING COURT APPROVAL OF FEES AND EXPENSES</p> <p>Case No. 080922273</p> <p>Judge: Denise P. Lindberg</p>
<p>FFCF INVESTORS, LLC, Plaintiff, vs. RICHARD SMITH, et al. Defendants.</p>	

The matter before the Court is the Receiver's Application Seeking Court Approval of Fees and Expenses (Application) filed by R. Wayne Klein, the Court-Appointed Receiver of

FFCF Investors, Ascendus Capital Management, and Smith Holdings. The Court has reviewed the Application and the applicable law, and based thereon and for good cause shown,

IT IS HEREBY ORDERED that:

1. The Application is APPROVED.
2. The fees and expenses incurred by the Receiver and his professionals, as set forth in the Application, are reasonable and necessary, and may be paid as an expense of administering the receivership estate.
3. The Receiver is authorized to pay the Receiver, and Lewis B. Freeman & Partners, Inc., \$151,693.00 in fees for services rendered for the benefit of the Receivership Estate from March 18, 2009 through September 30, 2009, and \$747.78 as reimbursement of expenses paid on behalf of the receivership estate in the manner requested in the application.
4. The fees and expenses approved herein shall be paid in a manner that does not take more than 30% of the funds recovered by the Receiver. The Receiver may automatically pay himself up to 30% of future funds recovered, up to the amount approved by this Order.

Dated this _____ day of _____ 2009.

BY THE COURT:

Denise P. Lindberg
Third District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of _____, 2009, I caused to be sent via first-class mail, postage prepaid, a true and correct copy of the foregoing Order Approving Receiver's Application Seeking Court Approval of Fees and Expenses to:

Roger E. Taylor
1360 Summerwood Cir
Santa Clara UT 84765

James D. Gilson
Callister Nebeker & McCullough
10 East South Temple, Suite 900
Salt Lake City, UT 84133
Counsel for A. David Barnes

Richard T. Smith
443 North 750 East
Orem, UT 84097

Craig R. Madsen
1112 North 700 East
Springville, UT 84663
Counsel for Kathryn Rowley

Anthony W. Schofield
Kirton & McConkie
518 West 800 North, Suite 204
Orem, UT 84057
Counsel for T. Courtney Smith

Erik Christiansen
Parsons Behle & Latimer
201 South Main Street, Suite 1800
Salt Lake City, UT 84111
Counsel for Albert Wirth

David W. Scofield
Peters/Scofield
2455 East Parleys Way, Suite 115
Salt Lake City, UT 84109
Counsel for Robert Workman

Wayne Klein
299 South Main, Suite 1300
Salt Lake City, UT 84111
Receiver
