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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 THIRD
APPLICATION SEEKING COURT
APPROVAL OF FEES AND
EXPENSES**

Case No. 080922273

Judge: Denise P. Lindberg

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 Third Application Seeking Court Approval of Fees and Expenses for himself and his firm Klein & Associates, PLLC, for the period April 1, 2010 through September 30, 2010 (“Reporting Period”).

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. Since April 1, 2010, the Receiver has filed two status reports with the Court. These were dated June 21, 2010 and September 14, 2010. The status reports describe the work performed by the Receiver and the progress made to date. These status reports were submitted in advance of status hearings conducted by the Court. Copies of these reports are posted online at www.kleinutah.com.
3. Two status conferences have been held with the Court during this time period: June 28, 2010 and September 20, 2010.

SERVICES PERFORMED

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:

4. Additional Lawsuit Filed: One additional lawsuit has been filed during the Reporting Period. On June 1, 2010, a lawsuit was filed against Sara Pfrommer, seeking the return of legal fees paid to her by FFCF for services she performed for Superwire. As noted below, this lawsuit has now been settled.

5. Ongoing Litigation: The Receiver has been actively engaged in pursuing the lawsuits he has filed as well as the litigation that was outstanding at the time he was appointed. Some of these cases have resulted in settlements, defaults have been entered in others, and a few defendants have been dismissed. The remaining cases are still in litigation.
6. Settlements: During the Reporting Period, the Receiver has reached the following settlements:
- a. VF: On April 9, 2010, the Receiver agreed to a settlement with VF, a former investor in Ascendus who did not invest in FFCF. The Receiver alleged that VF was paid more than the amount of his principal investment. VF paid the Receiver \$48,056.00 in the settlement. This settlement was reached without the need to file a lawsuit.
 - b. Allied Telesis: The Receiver reached a settlement of his lawsuit against Allied Telesis on August 4, 2010, recovering \$60,000.00 that had been paid to Allied Telesis for work related to Superwire. The Receiver has dismissed the lawsuit against Allied Telesis, but is continuing to pursue related claims against another party. Those claims may require the filing of a lawsuit.
 - c. Sara Pfrommer: Pfrommer, an attorney who formerly represented Ascendus and FFCF, signed a settlement agreement on August 13, 2010. Under the settlement agreement, she repaid \$9,250.00 in legal fees paid to her by Ascendus and FFCF for work performed for Superwire. The Receiver has dismissed the lawsuit

against her.

- d. Utah Community Credit Union: On August 30, 2010, the Utah Community Credit Union paid \$6,000.00 to the Receiver to settle claims the credit union was paid funds from Receivership Entities on an automobile loan to T. Courtney Smith. The credit union also assigned to the Receiver its claims against Smith. As a result of the settlement, the lawsuit was dismissed.
- e. Robert Workman: The Receiver reached a settlement of his lawsuit against Workman on March 31, 2010. Workman paid the Receiver \$288,000.00 in settlement of claims that Workman was overpaid as an investor.
- f. Janalyn Memmott: On September 15, 2010, Janalyn Memmott paid \$3,000.00 to the Receiver in settlement of claims she was overpaid. This settlement amount reflected a demonstrated inability to pay the entire amount alleged to have been overpaid. As part of the settlement, the Receiver agreed not to file a lawsuit.
- g. Prior Settlements: As described in the status reports to the Court, the Receiver recovered additional funds during the reporting period as payments from prior settlements.

7. Default Judgments: During the Reporting Period, the Receiver has obtained default orders or judgments against those listed below. The Receiver expects to begin collection procedures to identify and recover assets from these defendants:

- a. Steven James: James is a brother-in-law of Richard Smith. The Receiver's

litigation alleged James was overpaid as an investor. A default order was obtained on June 7, 2010. The judgment is in the amount of \$37,415.60.

- b. Karl Stammen: Stammen is a Massachusetts attorney who was paid by FFCF and Ascendus for legal services he performed for Superwire. A default order was entered on June 25, 2010. The default order is for \$17,000.00.
- c. Bush & Sons: This company was paid by Receivership Entities for services it provided for Superwire. A default judgment was entered on July 28, 2010 in the amount of \$30,000.00.

8. Dismissals: Two parties have been dismissed from litigation:

- a. Heritage West Federal Credit Union: This credit union failed and was taken over by the National Credit Union Administration (“NCUA”). The Receiver has filed a claim with the NCUA, seeking repayment of the amounts that the Receiver were paid to the credit union improperly.
- b. Matthew White: Mr. White filed for bankruptcy after the Receiver filed suit against him. He received a discharge in bankruptcy and will be dismissed as a defendant in the lawsuit against him and others. The lawsuit remains pending against others.

9. Ongoing Litigation:

- a. Open Cases: Litigation remains open – and active – against Alex Murillo, Roger and Jennifer Taylor, Family First Credit Union, Kays Creek Capital, Logistics

Management and Scott Nauert, Robert Alsop, Sancuro Wound Care, Susan Smith, Richard Smith, T. Courtney Smith, Kathryn Rowley, TDI Energy, and Tripod Holdings.

- b. Litigation Efforts: In addition to the settlements and dismissals discussed above, the Receiver and his attorneys have been involved in substantial efforts relating to the litigation. This has included successfully defeating a motion for partial summary judgment by Alex Murillo, opposing Kathryn Rowley's motion to dismiss, making initial disclosures and establishing scheduling orders, receiving and seeking discovery, and participating in the related federal litigation.

10. Claims Process. The bulk of the Claims review has been conducted during the Reporting Period:

- a. Claims Reviewed: The deadline for filing claims was April 30, 2010. Twenty Claims were submitted and analyzed by the Receiver.
- b. Recommendations on Claims: On June 21, 2010, the Receiver filed with the Court a report summarizing the review of the submitted Claims and his recommendations as to which Claims should be approved and in what amounts. The Receiver also recommended a methodology for making an initial distribution to investors.
- c. Objections: A deadline of July 28, 2010 was established by the Court for the filing of any objections to the recommendation as to the allowable claims and the

proposed distribution methodology. Two objections were filed to the Receiver's recommendation on the allowable claims. Two objections were filed with the Court opposing the proposed distribution plan. On August 16, 2010, the Receiver filed his responses to the Objections. On September 10 and 20, 2010, the Court issued Minute Entries overruling the objections.

- d. Initial Distribution: On October 14, the Court approved payment of the initial distributions to investors. The Receiver sent these payments on October 19, 2010 (after the end of the Reporting Period). This included \$16,032.92 in an administrative claim and \$400,000.00 in investor distributions.

11. Analysis. The Receiver has continued conducting significant analysis of records including bank records, brokerage account statements, and documents provided to the Receiver by investors. This analysis has enabled the Receiver to:

- a. Compare account statements sent to investors by Person Financial Services to those produced by Ascendus, showing the differences between them and identifying which account statements issued by Ascendus and FFCF contained false information;
- b. Calculate the profits and losses incurred in individual brokerage accounts that were traded by Ascendus pursuant to trading authority from the investors;
- c. For certain accounts, calculate the extent to which options trading was profitable or resulted in losses;

- d. Identify the sources of funds paid to Taylor and other recipients of Receivership Funds. These analyses have been used in the existing litigation to establish that the funds paid to outside entities came from investors and should be repaid;
- e. Evaluate possible avenues of recovery and the estimated current values of assets held by defendants. These evaluations have been used in making settlement decisions;
- f. Compare records obtained from Taylor, regarding the results of trading, with the results reported to investors by Ascendus. This analysis facilitated a determination of the extent to which the results reported in Ascendus account statements can be attributed to Taylor;
- g. Analyze customer account opening documents obtained from Kays Creek Capital to determine what investment objectives were listed, what disclosures were given, and which documents were created by Penson;
- h. Determine the funds used by Ascendus to purchase cashier's checks that were then sent to Penson and deposited into selective customer accounts, to increase the account balances; and
- i. Determine the extent to which money was sent via wire transfer directly from customer accounts at Penson to Receivership Entities, rather than being sent to customers.

12. Other Activities The Receiver has engaged in a number of other activities and

accomplished other tasks, including:

- a. Information has been posted on the Receiver's website to inform investors.
- b. Assistance and information has been given to regulators and law enforcement agencies. On August 13, 2010, the Utah Attorney General filed criminal charges against Taylor and Smith, relating to their conduct with Ascendus and FFCE.

13. Financial Operations. Since April 1, 2010, the Receiver has recovered \$419,047.00. It is expected that more settlements and payments will be received, but the Receiver believes future recoveries will be much smaller and harder to achieve.

14. Prior Fee Payments. On May 10, the Court approved the Receiver's Second Application for Fees and Expenses, totaling \$106,820.36. This was withdrawn from the Receivership bank account in two parts, on June 2, 2010 and September 13, 2010. This was for work performed through March 31, 2010.

REQUEST FOR COURT APPROVAL OF FEES AND EXPENSES

15. 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.

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

Application Summary and Billing Methodology

17. Through this Application, the Receiver, on behalf of himself and his firm Klein & Associates, PLLC, 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.
18. A summary invoice reflecting the services rendered by the Receiver and Klein & Associates, PLLC is attached as Exhibit A. A detailed invoice describing the work performed by the Receiver and by employees of Klein & Associates, PLLC, on a daily basis, has been lodged with the Court by means of a separate letter to the Court. The detailed fee invoice is not being made public because it includes investment and personal information about investors, describes negotiating stances and legal theories being pursued, and identifies persons providing assistance to the Receiver and the nature of information they have provided.
19. The Applicants' services are billed on an hourly-rate basis.
- a. The Receiver's hourly rate is \$350.00.
 - b. The hourly rates of analysts and other employees of Klein & Associates, PLLC who have worked on this case range from \$75.00 to \$120.00. The professionals and who have billed time to this case, and their rates are:

Name	Profession	Hourly Rate Billed
Jake Hennessy	Analyst	\$120.00
Keith J. Williams	Analyst	\$75.00
Collin Snow	Analyst	\$75.00

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

Specific Requests

The Receiver

20. From April 1, 2010 through September 30, 2010, the Receiver has rendered 348.0 hours of administrative, investigative, and legal services to the Receivership Estate, billed at \$121,800.00.¹ The services rendered by the Receiver are summarized above and in Exhibit A, and are fully detailed in the invoices provided to the Court.

Klein & Associates, PLLC

21. During this Reporting Period, three employees of Klein & Associates, PLLC have assisted with the case, spending 681.1 billable hours assisting the Receiver.² The Receiver seeks compensation of \$73,978.50 for this time – time billed at an average rate

¹ This does not include 9.3 hours of time worked that is not being billed. This time is valued at \$3,255.00.

² This does not include 206.9 hours that have been spent on the case that are not being billed. The decision to not bill this time results from several factors, including research efforts that seemed promising, but ended up not being productive, time spent understanding the options trading program, indexing the contents of files, gathering and indexing account statements, assistance given to regulatory agencies, and time spent double-checking the analysis performed. This time not billed has a value of \$17,298.50.

of \$108.62 per hour. The services rendered by employees of Klein & Associates, PLLC are summarized above and in Exhibit A, and are fully detailed in the invoices submitted to the Court.

Expenses/Summary of Fees and Expenses

22. Klein & Associates, PLLC has advanced expenses for the operation of the Receivership totaling \$825.67. These are summarized in Exhibit A and described in detail in the invoices submitted to the Court.
23. Total billable fees and expenses incurred total \$196,604.17.

Voluntary Reduction in Fees

24. This is a complex case, where no assets were in the Receivership Estate at the time the Receiver was appointed. Few records were delivered to the Receiver and all the financial transactions have had to be reconstructed by the Receiver from bank records he has obtained relating to the sixteen bank accounts he has identified that held investor funds. Funds to repay investors are being sought from overpaid investors, insiders, providers of services to the entities, and entities that received funds from the Receivership Entities for providing services to persons other than the Receivership Entities.
25. This is proving to be a very time consuming effort. If the Receiver were to request and receive payment for all the time he has devoted to this case, it is likely most of the monies he has recovered to date would be consumed in payment of these fees. Indeed, in light of the amount of this current fee application, the Receiver might have asked the

court to allow him to reserve \$98,714.92 or even \$196,604.17 to pay his fees – out of the \$430,000.00 in the Receivership bank account. Instead, the Receiver asked the Court for approval to pay \$416,032.92 to investors, which constitutes almost the entirety of what has been recovered. Thus, the Receiver will be paid for the fees and expenses being sought through this application only from future recoveries.

26. Additionally, the Receiver is voluntarily waiving more than half of his fees. In addition to not billing 216.2 hours, valued at \$20,553.50, the Receiver is waiving half of the billable fees he has incurred in this case during the Reporting Period – \$97,889.25. This makes a total of \$118,442.75 in work that is being donated to this effort during this Reporting Period. The actual fees being requested, plus expenses, total \$98,714.92.

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 Eighth and Ninth 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 25th day of October, 2010.



WAYNE KLEIN, Receiver

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of October, 2010, I caused to be sent via first-class mail, postage prepaid, a true and correct copy of the foregoing Receiver's Third Application Seeking Court Approval of Fees and Expenses and Proposed Order to:

Jerome H. Mooney
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Callister Nebeker & McCullough
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Counsel for Kathryn Rowley

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Counsel for T. Courtney Smith

L.R. Curtis, Jr.
Manning, Curtis, Bradshaw & Bednar
170 South Main, Suite 900
Salt Lake City, UT 84101
Counsel for the Receiver



EXHIBIT A - INVOICE SUMMARY

DATE:	October 25, 2010		
CLIENT:	FFCF/ASCENDUS RECEIVERSHIP		
Summary of Services:			
Professional	Hours	Rate	Amount
Wayne Klein	348.00	350.00	121,800.00
Jake Hennessy	508.80	120.00	61,056.00
Keith Williams	111.10	75.00	8,332.50
Collin Snow	61.20	75.00	4,590.00
Total	1,029.10		195,778.50
Amount Waived			97,889.25
Total Fees Requested			97,889.25
Expenses			825.67
Total Fees and Expenses			98,714.92
Value of Non-Billed Time and Waived Fees			118,442.75

EXPENSES

4/1/2010	10.94	DocuMart	Copies	Copies of Murillo file for Securities Division
4/2/2010	231.40	United Airlines	Airfare	Travel to California for Taylor deposition
4/3/2010	122.10	Holiday Inn	Hotel	Hotel for deposition of Roger Taylor - Wayne
4/3/2010	122.10	Holiday Inn	Hotel	Hotel for depo. of Roger Taylor - Dave C.
4/20/2010	7.50	Holiday Inn	Parking	Parking at hotel.
4/19/2010	9.44	McDonald's	Breakfast	Breakfast for Wayne and D. Castleberry
4/19/2010	23.45	Rudy's Pub & Grill	Dinner	Dinner for Wayne and D. Castleberry
4/19/2010	9.21	Kinko's	Copies	Color copies of exhibits for deposition
4/20/2010	14.00	Salt Lake City Airport	Parking	Airport parking
4/20/2010	10.00	Macarthur Place	Parking	Parking at deposition
4/20/2010	30.75	Arco Gas	Gasoline	Gasoline for rental car
4/20/2010	81.54	Fox Car Rental	Rental Car	Rental car for deposition
5/3/2010	3.97	DocuMart	Copies	Copies of Ascendus PPM for Murillo stip.
6/1/2010	22.80	Avanti	Addressing	Type addresses of claimants for claim rept.
6/21/2010	7.69	DocuMart	Copies	Copies of 8th Report, Report on claims
6/22/2010	11.97	DocuMart	Copies	Copies of claims report for claimants
7/9/2010	34.06	DocuMart	Copies, CD	Copy, scan documents from Kays Creek Cap.
7/21/2010	17.31	DocuMart	Copies	Copy documents from Kathryn Rowley
8/16/2010	21.21	DocuMart	Copies	Copies of responses to objections.
8/23/2010	25.00	FINRA	Document Retrieval	Order copy of Penson AWC
9/14/2010	9.23	DocuMart	Copies	Copies of Ninth Report to Court
Total	825.67			

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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>[PROPOSED]</p> <p>ORDER APPROVING RECEIVER’S THIRD 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 Second 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 Klein & Associates, PLLC \$97,889.25 in fees for services rendered for the benefit of the Receivership Estate from April 1, 2010 through September 30, 2010, and \$825.67 as reimbursement of expenses paid on behalf of the receivership estate in the manner requested in the application.
4. The Receiver may automatically pay himself the amount approved by this Order out of funds currently in the Receivership bank account or from funds recovered in the future.

Dated this _____ day of November, 2010.

BY THE COURT:

Denise P. Lindberg
Third District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of November, 2010, I caused to be sent via first-class mail, postage prepaid, a true and correct copy of the foregoing Order Approving Receiver's

Third Application Seeking Court Approval of Fees and Expenses to:

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