

FILED DISTRICT COURT
Third Judicial District

APR 16 2010

SALT LAKE COUNTY

By _____
Deputy Clerk

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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 SECOND
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 second Application Seeking Court Approval of Fees and Expenses for himself and his firm Klein & Associates, PLLC, for the period October 1, 2009 through March 31, 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 October 1, 2009, the Receiver has filed three status reports with the Court. These were dated November 25, 2009, January 22, 2010, and March 1, 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. Four status conferences have been held with the Court during this time period: October 1, 2009, December 2, 2009, January 28, 2010, and March 5, 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. Lawsuits Filed: Sixteen lawsuit have been filed since October 1, 2009:
 - a. Alex Murillo: This suit, filed December 28, 2009, seeks recovery of \$58,512.90 paid to Mr. Murillo as commissions for soliciting money for Ascendus.
 - b. J S Geldt: On January 8, 2010, the Receiver filed suit against Idaho-based J S

Geldt, LLC, seeking repayment of over \$800,000 paid by FFCF in satisfaction of a loan made by JS Geldt to Richard Smith. The Receiver has reached a settlement in this case resulting in the payment of cash, release of claims, and a trust deed.

- c. Roger Taylor: The Receiver filed suit on March 1, 2010 against Taylor, his wife, and his company, Taylor Holdings. The suit seeks over \$2.5 million paid to Taylor from Receivership Entities or withdrawn from LBS Advisors by Taylor.
- d. Allied Telesis: The Receiver filed this lawsuit on March 18, 2010, seeking recovery of \$82,007.50 paid by Receivership Entities without any benefit going to the Receivership Entities.
- e. Bush & Sons Capital: In this lawsuit, filed March 18, 2010, the Receiver alleges this company was paid \$30,000.00 by Receivership Entities for services to other companies controlled by Taylor and Smith.
- f. Family First Credit Union: This March 18, 2010 lawsuit seeks recovery of \$21,933.64 paid to the credit union for Richard Smith's car payments.
- g. Heritage West Credit Union: The Receiver filed this suit on March 18, 2010 to recover \$23,361.10 in car payments made for Roger Taylor's wife by the Receivership Entities.
- h. Karl Stammen: This lawsuit, filed March 18, seeks recovery of \$17,000.00 in attorneys' fees paid by Receivership Entities to this attorney in Massachusetts for legal work conducted for another company controlled by Taylor and Smith.

- i. Kays Creek Capital: On March 18, 2010, the Receiver filed this suit seeking repayment of \$126,869.72 paid to Kays Creed by Ascendus for options trading.
- j. Logistics Management: This March 18 lawsuit seeks recovery of \$12,000.00 paid to this company and its president for services to another company.
- k. Robert Alsop: The Receiver filed suit on March 18 to recover \$164,256.80 paid in legal services without evidence of equivalent benefit to Receivership Entities.
- l. Sancuro Wound Care/National Hyperbaric: This lawsuit, filed March 18 against two companies and two officers, seeks recovery of more than \$400,000.00 paid to these defendants for services to other companies controlled by Taylor and Smith.
- m. Susan Smith: The Receiver sued the wife of Richard Smith on March 18 to recover \$382,881.48 she was paid by Receivership Entities, without any demonstrated benefit to the companies in receivership.
- n. TDI Energy: This March 18 lawsuit seeks to recover \$167,500.00 paid to this company for what appears to be an investment in oil wells.
- o. Tripod Holdings: A lawsuit against a group of related investors was filed March 18 alleging they received \$114,172 in excess payments.
- p. Utah Community Credit Union: On March 18, the Receiver sued this credit union seeking the return of \$13,407.14 in car payments the Receivership Entities paid for Richard Smith's father.

Related Litigation. The Receiver reached agreement to settle litigation in state and

federal court involving investor Albert Wirth. Another investor, The Lighted Candle Society, dismissed its lawsuit against the Receivership Entities after the Receiver filed a motion to dismiss.

6. Discovery. The Receiver has taken several depositions in the Receivership case and participated in multiple depositions in the federal litigation. The Receiver arranged to permit the parties in the federal litigation to copy his non-privileged records pursuant to a protective order.
7. Settlements. On October 1, 2009, the Court approved four settlement agreements that had been negotiated previously. The Receiver continues to receive payments pursuant to one of those previous settlements. Since that time, the Receiver has entered into ten additional settlement agreements:
 - a. Douglas Anderson released claims against the Receivership on October 15, 2009 in exchange for payments he received as part of another investor settlement.
 - b. Benjamin Card, an investor, agreed to a settlement on November 13, 2009 and paid \$22,398.00.
 - c. The Sutherland Institute repaid \$5,000.00 on December 2, 2009 that it received as a charitable contribution.
 - d. David Bush repaid \$8,731.25 on December 11, 2009 that he received as compensation for providing investment services to the Receivership Entities.
 - e. Grant Snarr repaid \$18,908.54 on December 16 that he received for soliciting

other investors.

- f. Rod Hulse agreed on January 8, 2010 to repay \$13,000.00 in settlement of overpayments he received as an investor.
 - g. Elliott Packer paid the Receivership \$25,000.00 on February 19, 2010 in settlement of overpayments he received.
 - h. FRT paid the Receivership \$40,000.00 on March 19 in settlement of overpayments it received from Receivership Entities.
 - i. Steven Rogers paid the Receivership \$8,000.00 on March 24 in settlement of overpayments he received.
 - j. J S Geldt agreed to pay the Receivership monies, deliver trust deeds, and release claims it might make as part of a settlement with the Receiver. On March 24, the first payment was received. Additional payments are required.
8. Claims Process. On February 17, the Court approved the claims procedure proposed by the Receiver. The next day, the Receiver mailed over 50 claim forms to investors and other prospective claimants. The Receiver has begun analyzing claims forms that have been submitted.
9. Analysis. The Receiver has conducted 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 identify:
- a. Instances in which payments made by the Receivership Entities were “Ponzi”

payments, using money from some investors to make payments to other investors.

- b. When the Receivership Entities became insolvent, allowing the Receiver to claim that certain payments were fraudulent transfers.
- c. The extent of payments to insiders.
- d. Payments made by Receivership Entities to other companies not related to the Receivership Entities, where investors were not benefitted.
- e. That most investor accounts managed by Ascendus were losing money, while investors were being told they were earning profits.
- f. Which commission payments Ascendus collected based on false reports of profits.
- g. Significant discrepancies between the account statements provided to investors by Penson Financial Services and the account statements from Ascendus.
- h. The results of funds pooled by investors in a common account controlled by Ascendus.
- i. The extent to which Ascendus and FFCE made settlement payments to investors.
- j. How funds withdrawn from LBS Advisors was spent.

10. 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. The Receiver hired counsel to represent him in litigation and bring suit against overpaid investors and other recipients of improper funds.

- c. The FFCF entity was dissolved.
- d. James Warner and Sara Pfrommer were disqualified from continuing to act as counsel for Taylor in the state court proceedings.
- e. Assistance and information has been given to regulators and law enforcement agencies.
- f. A procedure was requested to have all the Receiver's lawsuits heard before a single Judge (which was established).

11. Financial Operations. Since October 1, 2009, the Receiver has recovered \$225,580.99. More settlements and payments are expected. The Receiver paid \$75,000.00 to his former firm in January, pursuant to the Court's approval of the first fee application. The remaining \$77,386.78 in fees and expenses due to the Receiver for services up to September 30, 2009 was paid on April 14, 2010. An additional \$75,102.95 has been paid to counsel for the Receiver for services from November through February and \$12,000.00 was paid to plaintiff Dr. Barnes at the Court's instruction.

REQUEST FOR COURT APPROVAL OF FEES AND EXPENSES

12. 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.

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

Application Summary and Billing Methodology

14. 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.

15. Summary invoices reflecting the services rendered by the Receiver and Klein & Associates, PLLC are attached as Exhibit A. Detailed invoices describing the work performed by the Receiver and by employees of Klein & Associates, PLLC, 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.

16. The Applicants' services are billed on an hourly-rate basis.

a. The Receiver's hourly rate is \$350.00.

b. The hourly rates of managers, analysts, and other employees of Klein & Associates, PLLC who have worked on this case range from \$75.00 to \$120.00.

No other employee of Klein & Associates, PLLC has charged more than \$120.00 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	\$120.00
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

17. From October 1, 2009 through March 31, 2010, the Receiver has rendered 411.6 hours of administrative, investigative, and legal services to the Receivership Estate, billed at \$144,060.00.¹ The services rendered by the Receiver are summarized above and in Exhibit A, and are fully detailed in the invoices provided to the Court.

¹ This does not include 7.9 hours of time worked that is not being billed. This time is valued at \$2,765.00.

Klein & Associates, PLLC

18. During this Reporting Period, four employees of Klein & Associates, PLLC have assisted with the case, spending 727.4 billable hours assisting the Receiver.² The Receiver seeks compensation of \$68,613.00 for this time – time billed at an average rate of \$94.33 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

19. Klein & Associates, PLLC has advanced expenses for the operation of the Receivership totaling \$483.86. These are summarized in Exhibit A and described in detail in the invoices submitted to the Court.

20. Total billable fees and expenses incurred total \$213,156.86.

Voluntary Reduction in Fees

21. 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

² This does not include 367.8 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 of Ascendus, assistance given to regulatory agencies, and time spent double-checking the analysis performed. This time not billed has a value of \$42,286.50.

providing services to persons other than the Receivership Entities.

22. 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. To address this risk, the Receiver is deferring taking payments for his fees so he does not take more than 30% of the funds that have been recovered. In addition, the Receiver is endeavoring to ensure that his fees and fees for his outside counsel do not consume more than half of the funds recovered. While he would prefer that this percentage was lower, the circumstances of this case have combined to make the recoveries difficult and cause significant effort to be expended in that effort.

23. Accordingly, the Receiver is voluntarily waiving significant portions of his fees. This is possible because the Receiver is no longer affiliated with another company and has the ability to make this waiver. In addition to not billing 357.7 hours, valued at \$45,051.50, the Receiver is waiving half of the billable fees he has incurred in this case during the Reporting Period – \$106,336.50. This makes a total of \$151,387.50 in work that is being donated to this effort. The actual fees being requested, plus expenses, total 106,820.36.

Proportional Reimbursement

24. The Receiver again 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 Fifth, Sixth, and Seventh 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 16th day of April, 2010.



WAYNE KLEIN, Receiver

EXHIBIT A - INVOICE SUMMARY

DATE:	April 14, 2010		
CLIENT:	FFCF/ASCENDUS RECEIVERSHIP		
Summary of Services:			
Professional	Hours	Rate	Amount
Wayne Klein	411.60	350.00	144,060.00
Earl Maeser	1.30	120.00	156.00
Jake Hennessy	311.10	120.00	37,332.00
Keith Williams	283.80	75.00	21,285.00
Collin Snow	131.20	75.00	9,840.00
Total			212,673.00
Amount Waived			106,336.50
Total Fees Requested			106,336.50
Expenses			483.86
Total Fees and Expenses			106,820.36
Value of Non-Billed Time and Waived Fees			151,387.50

EXPENSES

10/22/2009	6.41	DocuMart	Copies	Notice of Wirth settlement, dismissal motion to parties.
10/28/2009	5.19	DocuMart	Copies	Copies of brief replying to Warner motion.
11/3/2009	66.35	DocuMart	Copies	Copies of exhibits to use in deposition.
11/6/2009	6.41	DocuMart	Copies	Motion for order to show cause for the parties
11/12/2009	8.25	DocuMart	Copies	Copies of court filings, reports for counsel.
11/17/2009	2.25	Third District Court	Copies	Copies of court orders issued in the case.
11/18/2009	26.07	DocuMart	Copies	Copies of documents needed by attorneys.
11/18/2009	57.57	Klein & Associates	Mileage	Reimburse car usage for deposition (114 miles)
11/25/2009	7.45	DocuMart	Copies	Copies of Fifth Report, to send to parties.
12/16/2009	3.25	Third District Court	Copies	Docket sheet.
1/21/2010	12.69	DocuMart	Copies	Copies of customer account statements/Penson
1/21/2010	4.49	DocuMart	Copies	Copy transcript of R. Smith deposition for Smith.
1/22/2010	6.41	DocuMart	Copies	Copy Sixth Report, to send to parties.
2/12/2010	144.40	Avanti Exec. Serv.	Analysis	Analysis of options traded in AGF account (at cost)
2/18/2010	25.64	DocuMart	Copies	Copy claim forms to mail
2/18/2010	33.39	U.S. Postal Service	Postage	Postage to mail claim forms.
2/19/2010	34.73	DocuMart	Copies	Copy files of litigation targets for attorneys.
3/1/2010	6.41	DocuMart	Copies	Copy seventh status report, to send to parties.
3/4/2010	19.36	DocuMart	Printing	Print documents on CD from investor.
3/5/2010	7.14	DocuMart	Copies	Copy account documents from investor.
TOTAL	483.86			

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RICHARD SMITH, et al.

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[PROPOSED]

**ORDER APPROVING
RECEIVER'S SECOND APPLICATION
SEEKING COURT APPROVAL OF
FEES AND EXPENSES**

Case No. 080922273

Judge: Denise P. Lindberg

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 \$106,336.50 in fees for services rendered for the benefit of the Receivership Estate from October 1, 2010 through March 31, 2010, and \$483.86 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 April, 2010.

BY THE COURT:

Denise P. Lindberg
Third District Court Judge