

NOV 25 2009

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.

**FIFTH REPORT OF
R. WAYNE KLEIN, RECEIVER
(FOR PERIOD ENDING NOV 25, 2009)**

Case No. 080922273

Judge: Denise P. Lindberg

FFCF INVESTORS, LLC,

Plaintiff,

vs.

RICHARD SMITH, et al.

Defendants.

R. Wayne Klein, the Court-Appointed Receiver of FFCF Investors, LLC, Ascendus Capital Management, LLC, and Smith Holdings, LLC (the "Receivership Entities") submits this Fifth Report of the Receivership, for the period September 25, 2009 through November 25, 2009.

DEVELOPMENTS SINCE THE LAST REPORT

A. Settlements with Overpaid Investors

1. On October 1, 2009, the Court approved four settlements entered into by the Receiver with Kelly Cook, Richard Young, David Young, and Bary Jones. Pursuant to those settlements, the Receiver recovered \$190,800. This money is being held in a Receivership bank account. One of those settlements calls for the receipt of an additional \$147,483 by September 2010.
2. As part of its order approving these settlements, the Court authorized the Receiver to enter into future settlement agreements without requiring prior Court approval of the settlements.
3. On November 13, 2009, the Receiver entered into a settlement agreement with Benjamin Card. Under this agreement, Mr. Card paid the Receiver \$22,398. This is the full amount the Receiver determined was overpaid to Mr. Card. Mr. Card had not been identified as an overpaid investor previous to the appointment of the Receiver.

B. Dismissals of Lawsuits Against Investors

4. As noted in earlier reports, a lawsuit had been filed in December 2008 (before the appointment of the Receiver) against 13 persons alleging they were overpaid investors. The Receiver has assumed control of this lawsuit (the "Recoupment Lawsuit") and it has been consolidated with the case under which the Receiver was appointed.
5. In connection with the Receiver's settlements with Richard Young, David Young, and Bary Jones, they were dismissed from this lawsuit.
6. When the Receiver completed his financial analysis, he determined that four of the

defendants accused of being overpaid were not, in fact, overpaid. On October 1, 2009, the Court granted the Receiver's motion to dismiss these defendants from the litigation.

7. Six defendants remain in that lawsuit. The Receiver is in negotiations with three of them, has proposed a settlement with one other, and expects extensive litigation will be necessary against the remaining two. The proposed settlement is discussed in more detail below.

C. Demands for Repayment

8. The Receiver has identified several categories of persons who received funds improperly from the Receivership Entities. The Receiver has begun making demands on these for repayments:

- a. Overpaid Investors The Receiver has identified more than a dozen investors who withdrew from participation in the Ascendus or FFCF investment programs with profits. These are not currently defendants in the Recoupment Lawsuit. The Receiver has made demand on those investors. Some of these demands have resulted in negotiations which are ongoing. Others have ignored the Receiver's demands and the Receiver expects to file lawsuits against them.
- b. Sales Agents The Receiver has identified a number of persons who were paid commissions or referral fees for introducing investors to the Ascendus investment program. It appears to the Receiver that none of these sales agents were licensed to sell securities or to give investment advice. Accordingly, the Receiver has made demand on these sales agents for a return of commissions they received.

- c. Automobile Purchases To date, the Receiver has identified three instances in which Receivership funds were used to make monthly payments for automobiles purchased by persons affiliated with the Receivership Entities. The Receiver has not found any documentation in the records of the Receivership Entities justifying these payments. Accordingly, the Receiver intends to seek repayment of these amounts from the financial institutions that accepted funds from the Receivership Entities for loans that were not owed by the Receivership Entities.
- d. Attorneys Fees The Receiver intends to challenge payments by Receivership Entities to several attorneys. The Receiver has sent a letter to James Warner, former counsel for Roger Taylor, requesting the return of \$80,000 paid to Warner by Taylor with funds withdrawn from LBS Advisors on August 1, 2008. Because this money was withdrawn after Richard Smith had acknowledged that FFCF was insolvent and because these funds belong to investors, not to Roger Taylor, the Receiver believes it was improper to pay this money to Warner and has asked him to return this payment. In at least two other cases, the Receiver has identified payments made to attorneys from FFCF funds, when the attorneys were not performing any legal work for FFCF. The Receiver expects to request a return of these funds.

D. Gathering Information

9. Information gathering continues to be slowed by the lack of cooperation of persons affiliated with the Receivership Entities and by others who appear to be overpaid. These include:

- a. Richard Smith The Receiver has been attempting to take the deposition of Richard Smith since August. Smith failed to attend a deposition scheduled on August 27, 2009. The Receiver requested the Court's assistance and on October 1, 2009, the Court signed an order compelling Smith to submit to a deposition. The deposition was set for November 4. Smith did not appear at that deposition. The Receiver filed a motion that Smith be held in contempt. On November 9, 2009, the Court issued an order to show cause, requiring Smith to appear before the Court on December 2 to explain why he has refused to submit to a deposition. This order has been served on Smith.
- b. Roger Taylor The Receiver found information indicating that Ascendus was a signatory to a written agreement settling a claim made by Vince Frates, a prior investor. More than \$68,000 in payments were made by FFCF to Mr. Frates pursuant to that settlement. The Receiver requested copies of the settlement documents from the Portland law firm that represented the investor. Citing a confidentiality provision in the settlement agreement, the law firm said it would provide the documents only if the Receiver obtained a subpoena from an Oregon court or if Roger Taylor consented to release of the agreement. The law firm told the Receiver that Taylor has refused to consent to the release of this information.
- c. Brett Bott Brett Bott received compensation from all three Receivership Entities. The Receiver sent a letter to Mr. Bott requesting information, but the request was

ignored. Bott also ignored a subpoena sent to him. It appears the Receiver will have to spend additional time to get a Court order compelling him to provide information. There are others who similarly have been issued subpoenas who have failed to provide responses.

10. The Receiver continues his efforts to identify the recipients of funds from the Receivership Entities and the purposes of those payments. As this information is obtained, the Receiver is making demands for repayment where it appears the money was paid improperly.
11. Records were obtained, via subpoena, of an FFCF account at Key Bank. Analysis of these bank records revealed no transactions of substance.
12. The Receiver has recently obtained records for several bank accounts held by entities affiliated with the Receivership Entities. The Receiver will be analyzing these accounts to determine the size, frequency, dates, and purposes of payments to and from Receivership Entities. These records include voluminous transactions. The inputting of these records has just been completed and the analysis of the transactions has begun.

E. Disqualification of Taylor's Attorney

13. On October 1, 2009, the Court issued an oral order disqualifying James Warner and Sara Pfrommer from continuing to represent Roger Taylor. This ruling was based on the Court's determination that conflicts of interest prevent their continuing to represent Taylor in light of previously representing two of the Receivership Entities and having acted as a quasi receiver. At the Court's request, the Receiver prepared a proposed order for the Court to sign. Warner

has filed an objection to the proposed order.

14. On October 13, 2009, the Receiver sent a notice to Taylor advising him of the need to retain an attorney or make an appearance in the litigation.

F. Developments Involving the Receiver, Hiring Counsel

15. Effective September 30, 2009, the Receiver terminated his affiliation with Lewis B. Freeman & Partners, Inc., the Miami-based company that had been providing administrative support. The Receiver has formed a new company, Klein & Associates, PLLC, to employ the analysts who have been assisting the Receiver in his work.
16. The Receiver has created a new Internet web page with information about the Receivership. The new website has been updated to contain copies of recent orders by the Court and other developments of the Receivership. The new website is www.kleinutah.com.
17. On November 16, 2009, the Receiver sent a letter to the investors who were still participants in FFCF at the time of its collapse, informing them of the new website.
18. In an order issued on October 1, 2009, the Court authorized the Receiver to use some of the funds recovered from the settlements as inducement to a law firm to agree to represent the Receiver. On November 20, 2009, Lee Curtis, of Manning, Curtis, Bradshaw and Bednar agreed to serve as counsel for the Receiver. The law firm has filed a notice of appearance in the Court proceedings and has begun sending demand letters to recipients of funds. It is expected that the attorneys will file suit against persons and entities who the Receiver believes received funds improperly and will represent the Receiver in legal proceedings.

G. Motion by Dr. Barnes Motion for Payment of Fees

19. On October 1, 2009, Plaintiff, Dr. Barnes, filed a motion asking the Court to have the Receivership reimburse him for \$44,065.85 in legal fees and costs he incurred in securing the appointment of a Receiver that would act for the benefit of all investors. The Receiver responded to the Court that he agreed that Dr. Barnes' efforts had resulted in a benefit for all of the investors, but suggested that the Court approve payment of only \$12,000 at this time, with a decision on payment of the remainder deferred to a later time – when the ultimate success of the Receivership can be evaluated. The Receiver is aware of two investors who objected to any payment to Dr. Barnes. On November 12, 2009, the Court signed an order approving payment of \$12,000 to Dr. Barnes. This payment has not yet been made.

H. Proposed Settlement with Investor Al Wirth

20. On October 22, 2009, the Receiver filed notice with the Court of a settlement agreement with investor Al Wirth. While the Court has previously granted the Receiver authority to decide which settlements to accept, the Receiver wanted to bring this agreement to the attention of the Court and the investors because of the unique circumstances and the significant nature of the settlement.

21. Investor Wirth's relationship with the Receivership Entities is a complex one. There is a legal theory under which Wirth could be deemed an overpaid investor (as alleged in the Recoupment lawsuit) and a legal theory under which he would be considered an underpaid investor. Which legal theory would prevail depends on whether a court would decide that

because a) Mr. Wirth had the capacity to withdraw his money from LBS Advisors (but did not) and b) his money was lost when the LBS investment was revealed to be fraudulent, Mr. Wirth could still be forced to pay the Receiver the amount of money shown in his account statement from the fraudulent enterprise.

22. The Receiver elected to reach a settlement agreement with Wirth instead of litigating with him to see which legal theory would prevail. This decision was based on several factors: a) the Receiver did not believe that the legal theory that would require Wirth to pay the Receivership was highly certain to prevail, b) in light of uncertainty about the success of the legal theory, the Receiver was reluctant to charge significant Receiver fees and attorneys fees to the Receivership, thereby substantially reducing the amount that would be available to pay investors if the Receiver's legal theory did not succeed, c) the litigation would be hard fought, d) even if the Receiver won, Mr. Wirth might not have the ability to pay the amount shown on his LBS account statement since that amount had been lost in that separate investment fraud, e) the Receiver did not want to spend the time and incur the expense of participating in not only the litigation against Wirth, but also being a defendant in federal court litigation by Wirth against the Receivership and many other defendants (necessitating extensive discovery and involvement in litigation between the other parties), and f) the Receiver believed it makes more practical sense to align the interests of the Receivership and Wirth.

23. Essentially, the proposed settlement agreement is structured around the fact that Wirth has

recovered \$975,000 less than he invested. He would be encouraged to pursue his lawsuits against other persons. After he has recovered the balance of the amount he has lost, he must pay to the Receiver 70% of any additional amounts he recovers and must permit the Receiver to approve his litigation efforts.

24. Roger Taylor and Dr. Barnes have filed notices with the Court, opposing this settlement.
25. The Receiver has not notified the Court that this issue is ready for decision, opting to let this issue be discussed at the December 2, 2009 status conference and discover whether the Court wants to give any direction on this matter.

I. Status of Other Litigation

26. The Receiver is a defendant in three other lawsuits:
 - a. Lighted Candle Society Lighted Candle Society (“LCS”) is an underpaid investor. It filed a separate lawsuit in state court seeking recovery for its losses. LCS recently notified the Receiver that it intends to move forward with its litigation against the Receivership Entities. The Receiver has asked its counsel to determine whether to file a motion seeking to be dismissed from this lawsuit, arguing that any recovery for LCS from the Receivership Entities must come through a claims process in the Receivership Court rather than separate litigation. In essence, the Receiver seeks to argue that no investor should be able to claim a priority in the assets recovered by the Receiver and that the Receiver should not be forced to participate in the LCS

litigation. The Receivership will incur legal fees in its participation in this lawsuit.¹

b. Albert Wirth As noted above, the Receiver has been sued in federal court by investor Al Wirth. If this Court determines that the settlement with Wirth is appropriate, the Receiver will be dismissed from Wirth's federal court lawsuit and will not have to incur legal expenses by participating in that litigation. If the Receiver is not dismissed from that litigation, the Receiver is likely to be obligated to incur significant legal fees and expend significant amounts of time participating in discovery, responding to motions, and court appearances.²

c. Annette Kay Donnell Ms. Donnell is an underpaid investor who has also filed a federal court lawsuit against two of the Receivership Entities (before they were placed in Receivership). This lawsuit has been consolidated with the Wirth lawsuit. The Receiver has requested that Donnell dismiss the Receivership Entities from the litigation – to avoid the need to incur expenses from participating in that litigation.

J. Financial Activities of the Receivership

27. To date, the Receiver has recovered \$213,198 as a result of the five settlements described above.

¹ The Receiver has been informed that Taylor's attorneys, Sara Pfrommer and James Warner, no longer represent Taylor in the LCS litigation.

² A motion is pending in federal court to have Mr. Warner disqualified from representing Taylor in the federal court action.

Date	Source	Amount
8/21/09	Bary Jones	\$20,000.00
8/26/09	Kelly Cook	\$20,800.00
9/9/09	Richard Young	\$100,000.00
9/16/09	David Young	\$50,000.00
11/13/09	Benjamin Card	\$22,398.00
Total		\$213,198.00

28. The Receiver has expended \$2,059.19 of this amount in the costs of the Receivership, paying for deposition transcripts, and bank records. These expenses are shown below.

Date	Amount	Recipient	Purpose
9/1/09	\$22.94	Harland-Clark	Purchase checks
9/9/09	\$10.00	Wells Fargo Bank	Wire transfer fee
10/1/09	\$83.00	Central Bank	Subpoena costs
10/2/09	\$56.60	Bank of American Fork	Subpoena costs
10/7/09	\$510.45	Tempest Reporting	Deposition transcript
10/15/09	\$38.95	Utah Community C.U.	Subpoena costs
10/21/09	\$37.50	Family First C.U.	Subpoena costs
11/2/09	\$615.00	American West Bank	Subpoena costs
11/11/09	\$19.75	Key Bank	Subpoena costs
11/11/09	\$165.00	Tempest Reporting	Deposition fee
Total	\$2,059.19		

29. The Receiver expects to file a fee application soon, requesting Court approval to pay a portion of the fees he has incurred for his work to date.

TOPICS FOR DECEMBER 2, 2009 STATUS HEARING

The Receiver will suggest that the Court consider the following matters at the hearing on

December 2, 2009:

1. Order to Show Cause to Richard Smith The Court has issued an Order to Show Cause to consider whether to hold Mr. Smith in contempt and whether to require him to submit to a deposition.
2. Proposed Wirth Settlement The Receiver will seek any direction from the Court on the proposed settlement with Wirth. It is not known whether other parties will appear to make arguments on this point.
3. Disqualification Order of Mr. Warner The Court can determine how to proceed in light of objections filed by Warner to the proposed order of disqualification.
4. Overcoming Hurdles in Obtaining Information The Receiver will seek any guidance from the Court in overcoming problems faced by Taylor's opposition to the Receiver obtaining copies of a settlement agreement involving the Receivership Entities and how to respond to situations where subpoenas are being ignored.
5. Setting the Date for Another Status Conference

CONCLUSION

The Receiver respectfully submits this Initial Report for the period from September 25, 2009 through November 25, 2009.

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

DATED this 25th day of November, 2009.



WAYNE KLEIN, Receiver

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of November, 2009, a true copy of the foregoing Fifth Report of Receiver was mailed to the following:

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