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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.

**SIXTH REPORT OF  
R. WAYNE KLEIN, RECEIVER  
(FOR PERIOD ENDING JAN. 22, 2010)**

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 Sixth Report of the Receivership, for the period November 26, 2009 through January 22, 2010.

## **DEVELOPMENTS SINCE THE LAST REPORT**

### **A. Settlements and Negotiations with Overpaid Investors**

1. Since the date of the last report, the Receiver has entered into five settlements:
  - a. On December 2, 2009, the Sutherland Institute returned \$5,000 that had been contributed to it by Ascendus Capital, following a demand by counsel for the Receiver for repayment of these funds.
  - b. David Bush, who had been paid \$8,731.25 for providing investment services to Ascendus, repaid that amount to the Receiver on December 11, 2009.
  - c. On December 16, Grant Snarr returned \$18,908.54 in commissions he had been paid as a result of investors he recommended to Ascendus.
  - d. Rodney Hulse, an overpaid investor, agreed on January 8, 2010 to repay \$13,000 to the Receiver. This represents approximately 93% of the amount that the Receiver contends he was overpaid. \$5,000 was paid at the time of the settlement, with the remaining \$8,000 to be paid over the next three months.
  - e. On January 19, the Court approved the settlement that the Receiver had proposed with investor Albert Wirth. This settlement was described in the Fifth Report of the Receiver.
2. The Receiver is negotiating with others for the return of overpaid investment amounts and other improper payments. It is hoped that these will result in agreements. If not, the Receiver expects to file lawsuits seeking a return of these funds.

## **B. Litigation Developments**

3. Existing Lawsuit Against Investors/Insiders. The lawsuit filed by counsel for Roger Taylor in December 2008 accusing some investors of being overpaid still is pending against five defendants. The Receiver is in discussions with two of the defendants about possible settlement. It appears that efforts at negotiation with the remaining defendants have not been productive and that active litigation will be required to resolve claims against them.
4. Lawsuit Against Alex Murillo. On December 28, 2009, the Receiver filed a lawsuit against Alex Murillo, seeking the return of \$58,512 he was paid in commissions for referring other investors to Ascendus.
5. Lawsuit Against JS Geldt. On January 8, 2010, the Receiver filed a lawsuit against JS Geldt Investments, of Idaho Falls. The lawsuit seeks the return of \$1,010,527.31 paid to JS Geldt from Receivership Entities – which the Receiver believes was paid improperly.
6. Lighted Candle Society. The Lighted Candle Society has filed a lawsuit against two of the Receivership Entities in a separate state court action. The Receiver intends to file a motion to have the Receivership Entities dismissed from that action so all claims against the Receivership Entities will be considered by this Court.
7. Federal Court Litigation.
  - a. As a result of the settlement with investor Al Wirth, attorneys for Mr. Wirth have filed a motion to dismiss the Receivership Entities from the litigation pending in federal court. The Receiver has asked the other plaintiff, investor Annette Kay

Donnell, to dismiss the Receivership Entities from that suit.

- b. The Receiver has signed a protective order relating to discovery in this litigation and has been participating in some litigation and discovery proceedings.
- c. The Receiver has provided access to documents gathered by the Receiver to parties in this litigation. The Receiver withheld confidential attorney-client and work product documents from this production.
- d. Attorneys involved in the federal court litigation have recently sent out subpoenas to many of the investors, seeking copies of documents related to their investments. The Receiver has no role or involvement in the issuance of these subpoenas.

8. Other Litigation-Related Developments. The Receiver has been asking certain investors to sign declarations that will assist him in litigation that has been filed. On December 15, 2009, the Court entered an amended disqualification order for counsel of Mr. Taylor.

### **C. Discovery and Asset Recovery Efforts**

9. Smith Deposition. In compliance with a Court order, Richard Smith appeared for a two-day deposition in December. He provided information that is expected to be of significant assistance to the Receiver.
10. Asset Recovery Efforts. The Receiver continues to seek information regarding payments made by the Receivership Entities. This includes:
  - a. Researching the identity and location of payees, then determining the purposes of the payments.

- b. Making demands for repayment of funds expended improperly. Demands have been made for the repayment of funds to three lawyers who were paid funds from FFCF for litigation not related to FFCF or which funds represented fraudulent conveyances. Counsel for the Receiver is also sending demand letters when recipients of funds have failed to respond to correspondence from the Receiver.
- c. Researching cases supporting our demands for repayment of funds.
- d. Meeting with overpaid investors and other recipients of funds to establish that funds were paid improperly and to discuss agreements to repay those funds.
- e. Meeting with attorneys for insiders, to discuss potential liability.
- f. Requesting information from Roger Taylor regarding the identity and purposes of questionable payments from FFCF and Ascendus bank accounts. Mr. Taylor has not responded to these requests.
- g. Creating a list of targets of recovery. This includes identifying the payments made, grounds for seeking repayment of those funds, and compiling evidence of misconduct.

11. Dissolution Papers Filed. In response to notification of the need to renew the corporate charter of FFCF Investors, LLC, the Receiver consulted with the State Division of Corporations and decided to file formal dissolution papers as part of the process of winding up affairs of the company. The charters of Ascendus and Smith Holdings had previously expired.

## **D. Analysis**

12. Analysis of financial transactions continues, in an effort to identify sources of recovery. This includes:

- a. Analyzing discrepancies between account statements issued by Penson Financial Services and Ascendus, to determine the extent to which the Ascendus account statements accurately reported profits earned on options trading and whether commissions were accurately charged to investors.
- b. Analyzing investments sent directly to Ascendus, where they were pooled and sent to Penson for an account in the name of Ascendus. This analysis is examining how much money was paid directly to Ascendus, by whom, how much of this money was sent to Penson, what happened to the money in the Penson account, and how funds were used by Ascendus that were for investment purposes, but not sent to Penson.
- c. Examining the sources and destinations of wires with Penson Financial Services, to identify whose funds related to each transaction and how the monies were spent.
- d. Finding the sources and uses of funds for non-investor financial transactions from the bank accounts of the Receivership Entities. These include other business ventures involving technology companies, oil investments, and the use of investor funds to pay for the services of others.
- e. Analyzing the money flows with LBS Advisors, to determine the sources of funds sent to LBS, how funds were used when withdrawn from LBS, and discrepancies

between the amount actually sent to LBS and what investors were told was in LBS.

### **E. Informing Investors**

13. The Receiver has continued to post information and court filings on its web site to keep investors informed of progress in this case.
14. The Receiver also has met or spoken with a number of investors who provided information to the Receiver about the case or who were seeking information from the Receiver about their particular investments.

### **F. Financial Developments**

15. Since November 25, the Receiver has recovered \$37,658.29 as a result of the five settlements described above and an \$18.50 uncashed check that was redeposited into the account.
16. The Receiver has expended \$14,376.95 of Receivership funds since the date of the last report. These expenses are shown below:

<b>Date</b>	<b>Amount</b>	<b>Recipient</b>	<b>Purpose</b>
11/23/09	\$75.00	Anderson Investigations	Service of court order
11/30/09	\$8.00	Wells Fargo Bank	Bank service fee
12/16/09	\$12,000.00	Dr. A. David Barnes	Partial fee payment
12/31/09	\$8.00	Wells Fargo Bank	Bank service fee
12/31/09	\$2,285.95	Tempest Reporting	Deposition transcript
<b>Total</b>	<b>\$14,376.95</b>		

17. After taking account of these deposits and expenditures, the current balance in the Receivership bank account is \$234,420.15.
18. The Receiver has not yet been paid any funds for his work. By order dated January 19, 2010, the court has approved the first fee request by the Receiver. The Receiver has indicated to the

Court that he will pay himself only up to 30% of the funds he has recovered to date. The Receiver expects to withdraw a partial payment of his fees in the near future.

### **G. Claims Process**

19. While much remains to be achieved, the Receiver believes it is appropriate at this time to begin the claims process. The claims process will identify those who will be asserting claims against the assets of the Receivership Estate and determine the amount of valid claims.
20. On January 21, 2010, the Receiver filed a motion with the Court asking for approval of the claims process proposed by the Receiver. The motion includes a copy of the proposed claim form, guidelines to be used in evaluating claims, and a timetable for implementing the claims process. If approved by the court, the claims process will begin in February with the mailing of claim forms to investors and other claimants. Copies of the motion and proposed claim forms are listed on the Receiver's website at [www.kleinutah.com](http://www.kleinutah.com).

### **TOPICS FOR JANUARY 28, 2010 STATUS HEARING**

The Receiver will suggest that the Court consider the following matters at the status hearing on January 28:

1. Claim Form. The Receiver will respond to any questions the Court may have regarding the proposed claims process and recommended claim form.
2. Consolidating Litigation. The Receiver will request guidance from the Court whether the lawsuits filed (and to be filed) by the Receiver to recover fraudulent conveyances and other improper payments should be brought before the Receivership Court or heard by the judges



to which the lawsuits have been assigned.

3. Counsel Fees. In its October 1, 2009 order, the Court approved the Receiver's request to use funds in the Receivership account to hire counsel to pursue litigation on behalf of the Receivership. As noted previously, the Receiver has hired Manning, Curtis, Bradshaw & Bednar as his counsel. The Receiver has received an invoice from the law firm for \$29,730.20 representing legal services provided in November and December. The Receiver intends to pay these expenses from the Receivership bank account, unless the Court indicates it would prefer that this expense be the subject of a formal fee request (as is done by the Receiver).
4. Set Date for Next Status Hearing.

### CONCLUSION

The Receiver respectfully submits this Initial Report for the period from November 26, 2009 through January 22, 2010.

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

DATED this 22<sup>nd</sup> day of January, 2010.

  
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WAYNE KLEIN, Receiver

**CERTIFICATE OF SERVICE**

I hereby certify that on the 22<sup>nd</sup> day of January, 2010, a true copy of the foregoing Sixth

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