

FILED DISTRICT COURT
Third Judicial District

APR 10 2009

By _____
SALT LAKE COUNTY
Deputy Clerk

R. WAYNE KLEIN #3819
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@lbfglobal.com

IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY

STATE OF UTAH

R. WAYNE KLEIN,

Receiver,

A. DAVID BARNES, M.D., P.C.,

Plaintiff,

vs.

FFCF INVESTORS, LLC, et al.

Defendants.

**RECEIVER'S MOTION TO
CONSOLIDATE CASES AND
MEMORANDUM IN SUPPORT**

Case No. 080922273

Judge: Denise P. Lindberg

Case No. 080925879

Judge: Leon A. Dever

R. WAYNE KLEIN, the court-appointed receiver in this matter, hereby moves, pursuant to Rule 42(a), for an order consolidating case Civ. No. 080925879 with case Civ. No. 080922273, both cases to be heard by Judge Lindberg, the Court that appointed the Receiver.

This motion is being filed in both Third District courts in which related actions are pending. This motion is supported by the following argument.

ARGUMENT

On March 18, 2009, this Court appointed the Receiver for three companies (FFCF Investors, LLC, Ascendus Capital Management, LLC, and Smith Holdings, LLC) named as defendants in case 080922273 (the “Receivership Action”). The complaint in this case was filed October 15, 2008. Two months later, one of the defendants in the Receivership Action, Roger E. Taylor, caused FFCF Investors, LLC to initiate a separate action, *FFCF Investors, LLC v. Richard Smith, et al.*, Civ. No. 080925879 (Third Dist. Ct., Utah) (the “FFCF Recoupment Action”). That action alleges that certain investors were overpaid and seeks repayment of the excess funds. The FFCF Recoupment Action is pending before Judge Dever.

Utah Rule of Civil Procedure 42(a) permits consolidation of cases when the “actions involve[e] a common question of law or fact.” Utah appellate courts have taught that this rule is designed “to avoid unnecessary delay,” *In re: Adoption of A.B., D.B., & S.S. v. State*, 1999 UT 315 at ¶14 and to promote “the interests of efficient judicial administration,” *Lignell v. Berg*, 593 P.2d 800, 805 (Utah 1979).

In most cases in which a receiver has been appointed, the receiver will determine the causes of action to pursue and will initiate those actions in the court which appointed the receiver – the receivership court. This consolidation motion is necessary because the FFCF Recoupment Action – the type of action a receiver would bring – has already been filed and is pending before another judge in the Third District.

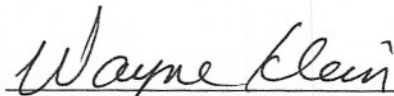
The cases should be consolidated because they involve common issues of fact and law and because efficient judicial administration will be promoted:

- Both cases will involve determination of many of the same factual issues.
- Consolidating both cases will avoid the risk that inconsistent rulings could be made in the separate cases on particular factual or legal issues common to both cases.
- Both cases require the participation of the Receiver. Because the work of the Receiver is subject to oversight by this Court (including approval of any fees to be paid), it is appropriate that this Court oversee the receiver's performance in connection with his efforts to recover funds that might have been improperly transferred by the Receivership Entities.
- Since the Receivership Court is already familiar with the factual background of this case and the legal issues that may arise, it would conserve judicial resources to avoid requiring another judge to learn the factual background and legal standards at issue.

Under Rule 42(a)(1), this motion should be heard by Judge Lindberg's court, "the judge assigned to the first case filed." As Judge Lindberg is the one who appointed the Receiver, this also makes her the one in the best position to determine whether there are common facts or law, evaluate whether judicial economy will result, and ensure the receivership is operated properly.

For the foregoing reasons, the Receiver asks the court to consolidate *FFCF Investors, LLC v. Richard Smith, et al.*, Civ. No. 080925879 into Civ. No. 080922273, currently pending before Judge Lindberg.

DATED this 10th day of April, 2009.



R. WAYNE KLEIN #3819

Receiver for FFCF Investors, Ascendus
Capital Management, and Smith Holdings

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of April, 2008, a true copy of the foregoing Motion to

Consolidate Cases and Memorandum in Support was mailed to the following:

Sara J. Pfrommer
P.O. Box 3915
Park City, UT 84060
Counsel for Roger Taylor

James J. Warner
Frederick M. Reich
3233 Third Avenue
San Diego, CA 92103
Counsel for Roger Taylor

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

Jonathan O. Hafen
Parr Brown Gee & Loveless
185 South State Street, Suite 800
Salt Lake City, UT 84111
Counsel for Annette Kay Donnell

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

Steven James
465 North 750 East
Orem, UT 84097

Barry Jones
PO Box 3159
Wendover, NV 89835

Gerald Millard
Millard Living Trust
4542 Cottage Grove Lane
Murray, UT 84107

Russell A. Cline
Crippen & Cline
10 West 100 South, Suite 425
Salt Lake City, UT 84101
Counsel for Stanford Petersen

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

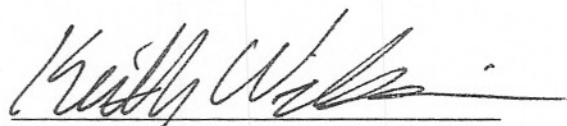
Michael Usher
1768 North 450 West, #211
Provo, UT 84604

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

Robert Workman
435 North Main
Heber City, UT 84032

Joseph M. Hepworth
Fillmore, Spencer LLC
3301 North University Avenue
Provo, UT 84604
Counsel for David and Richard Young

A handwritten signature in black ink, appearing to read "Keith Wilson", is written over a horizontal line.