

FILED DISTRICT COURT
Third Judicial District

JUL 10 2009

SALT LAKE COUNTY

By _____
Deputy Clerk

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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.

**THIRD REPORT OF
R. WAYNE KLEIN, RECEIVER
(FOR PERIOD ENDING JULY 10, 2009)**

Case No. 080922273

Judge: Denise P. Lindberg

R. Wayne Klein, the Court-Appointed Receiver of FFCF Investors, LLC, Ascendus Capital Management, LLC, and Smith Holdings, LLC (the "Receivership Entities") submits this Third Report of the Receivership, covering the period May 15, 2009 through July 10, 2009.

DEVELOPMENTS SINCE THE LAST REPORT

Analysis of Bank Records of the Receivership Entities

1. As noted in the Second Report to the Court, the Receiver received records of the Receivership Entities from James Warner, counsel for Roger Taylor, in April, including

many bank records. The bank records Mr. Warner had collected were incomplete; in some cases copies of checks and deposited items relating to several years of activity were missing.

2. The Receiver requested missing records from the banks involved and has recently received most of the records sought.
3. Those records indicate there were at least nine bank accounts maintained by the three entities placed into receivership by the Court. These accounts were held at four different banks. Records from these nine accounts are being analyzed to determine the sources of deposits into the accounts, transfers of funds between these accounts, and the recipients of payments from these accounts.
4. The Receiver's analysis of these bank records is at a very preliminary stage. It is premature to rely on the accuracy of the records because some of the additional documents requested from the banks have only recently been received and the Receiver's analysis is ongoing – particularly relating to determining the identity of recipients of funds and the purposes of those transfers. Nevertheless, the Receiver believes some preliminary conclusions can be drawn.
 - a. There were more than 3,300 transactions in these accounts, spanning a time period of more than five years.
 - b. Analysis of the bank records has revealed a significant number of investor financial transactions that were not listed in summaries that were prepared previously and provided to the Receiver.

- c. It appears that some investor funds were deposited into each of the nine bank accounts. Some investor funds appear to have been deposited directly into the accounts and some appear to have been deposited into the accounts on their behalf through checks or wire transfers from Penson Financial. There are at least 38 deposits by Penson into the bank accounts of the Receivership Entities (totaling \$4.3 million) and six checks to Penson from an Ascendus account (totaling \$258,000), suggesting that investors might not have had exclusive control over their funds at Penson.
- d. While each of the nine bank accounts appears to have held investor funds, each account also was used for transactions unrelated to the investments –often for personal uses. This increases the difficulty of tracing the flow of investor funds.
- e. A total of \$37,768,048.22 flowed through these accounts.
- f. There were numerous, sizable transfers of funds between the different bank accounts, making it difficult to identify the purposes of each bank account and complicating the effort to trace the flow of funds through each bank account.
- g. Approximately \$11 million of the total in the accounts represented transfers between accounts, leaving approximately \$26 million in funds being deposited from outside sources.
- h. Of the outside sources, \$13 million appears to have come from current investors; \$13 million came from other sources, which might include former investors.

5. The Receiver has identified the recipients of most of the funds paid from these accounts and is in the process of contacting the recipients of significant payments, to determine the purposes of these payments. The initial review of these transactions and the results of preliminary investigation, suggests the following:
- a. Payment of \$217,329.93 in credit card charges, including \$162,120.23 to American Express, \$34,699.11 to Capital One, \$7,065.96 to Provident Bank, \$877.71 to Washington Mutual, and \$12,566.92 to Household Bank (likely for credit card expenses). It is not known the extent to which these credit card charges were for business expenses.
 - b. \$2,596 was paid to a travel company. The Receiver is attempting to discover whether these payments were for legitimate business expenses.
 - c. A net of \$729,992 was paid to a company named Extream TV. According to the company, these payments were part of a plan to invest \$3 million in Extream TV through another company called Superwire. Separately, payments totaling \$710,000 were made to Superwire. It appears there was litigation and a settlement payment regarding these transactions. The Receiver is seeking more information about these payments.
6. The deposits from Penson were made between December 2003 and February 2007. The Receiver has asked Penson for more information regarding these payments.
7. Significant amounts seem to have been paid to insiders or persons affiliated with the

companies. The Receiver has begun seeking information regarding these transactions in an attempt to determine the purposes for, and legitimacy of, these payments. These payments include:

- a. \$161,998.99 paid to Robert Alsop, an attorney who served as legal counsel for one or more of the Receivership Entities;
- b. \$24,500 paid to Sara Pfrommer, who currently is counsel to Roger Taylor, and served as counsel to FFCF and Ascendus before the Receiver was appointed.
- c. Checks and wire transfers totaling \$278,146.45 were paid to Richard Smith and Smith Holdings, LLC.
- d. Checks and wire transfers totaling \$395,131.48 were paid to Susan Smith.
- e. At least \$1,612,521.06 was paid to Roger Taylor and his company, Taylor Holdings.
- f. \$14,327 was paid to Linda Taylor, the wife of Roger Taylor.
- g. \$3,784.64 was paid to Newton Taylor, the father of Roger Taylor. Newton Taylor was a signatory on one of the bank accounts into which investor monies were deposited. The vast majority of the transactions in this bank account appear to be for personal expenses of Newton Taylor.
- h. Other payments, which initially appear to have been for personal uses, include payments to Beaver Justice Court, Boy Scouts of America, BYU, Canyon View Junior High School, a high school class reunion, automobile insurance, Family First Credit Union (for what appear to be car payments), Fourth District Court, Highland

City, Juab Justice Court, LDS Missionary Fund, Lehi City, New York New York Hotel, Pacificorp, RC Willey, South Jordan City Court, Tooele Federal Credit Union (for what appear to be car payments), Department of Motor Vehicles, Utah Community Credit Union (for what appear to be car payments), the purchase of movie tickets, Hogle Zoo, and Utah Valley State College Foundation.

LBS Advisers

8. Among the records delivered to the Receiver by Mr. Warner were account statements of the investment account FFCF Investors held at LBS Advisers (located in California). Those account statements indicate that:
 - a. The FFCF account at LBS Advisers appeared to have been opened in May 2006.
 - b. The address listed in the account statements for FFCF Investors was Roger Taylor's residence in Santa Clara, Utah.
 - c. Attached to this Third Report is a spreadsheet summarizing the monthly activities in the LBS account. That spreadsheet shows:
 - i. A total of \$8,027,550.00 was sent to LBS by FFCF Investors.
 - ii. LBS reported that FFCF earned \$1,212,195.63 on the investments.
 - iii. FFCF withdrew \$3,839,718.38 between June 2006 and July 31, 2008.
 - iv. On two occasions, money was transferred from the FFCF account at LBS to accounts of two investors whose funds made up a large portion of the FFCF balance. In April 2007, \$3,855,027.25 was transferred to a separate account for

Albert Wirth and in July 2007, \$1,545,000.00 was transferred to a separate account for Richard Young and RC Troy, Ltd. These transfers totaled \$5,400,027.25. The funds transferred to Albert Wirth appear to have remained in an investment pool selected by LBS Advisors, where it was managed by an entity now in receivership. Initial indications are that those funds were lost in a fraudulent investment scheme. The Receiver has not yet been able to determine the status of funds transferred to Richard Young and RC Troy, Ltd.

- d. Out of the \$3,839,718.38 withdrawn by FFCF from the LBS account, only \$2,228,718.38 was deposited into the FFCF bank account. The Receiver is attempting to determine where the remaining \$1,611,000.00 was sent and how the \$3.8 million was used by FFCF (or others) when it was withdrawn.
- e. On December 24, 2007, \$1,500,000 was withdrawn from the LBS account. This \$1.5 million was not deposited into any of the nine bank accounts examined by the Receiver. Two weeks later (January 8, 2008), \$1,400,000 was wired into the bank account of FFCF Investors from Taylor Holdings. The Receiver will attempt to determine whether the \$1.5 million withdrawn from LBS was paid to Roger Taylor/Taylor Holdings, and, if so, what happened to the \$100,000 difference.
- f. After the withdrawals and transfers had been made from the FFCF account at LBS Advisors, the account had a July 31, 2008 closing balance of \$81,849.52. This amount was withdrawn and the account was closed on August 1, 2008. This

\$81,849.52, plus the monthly interest payments from LBS for June and July (totaling \$1,915.05) were deposited into an FFCF bank account on August 11, 2008. Just before that deposit was made, the FFCF bank account had a balance of \$364.45. The deposit brought the bank account balance to \$84,121.02. Ten days later, a check in the amount of \$84, 000 was paid to Taylor Holdings.

Litigation Developments

9. As noted in the prior report, the Receiver has filed a motion to consolidate *FFCF Investors LLC v. Richard Smith, et al.* (case number 080925879) with this case. The Receiver has filed a Notice to Submit, informing the court the motion is ready for a ruling. This motion is under advisement by the Court.
10. On June 23, 2009, a motion was filed in federal court to consolidate the two federal lawsuits filed by Albert Wirth and Annette Donnell against the Receivership Entities and other defendants. That motion is pending. The Receiver does not anticipate objecting to the consolidation of those two lawsuits.

Related Litigation

11. The Receiver has requested information from Superwire and ExtreamTV regarding litigation they filed against FFCF that apparently resulted in a settlement payment to them by FFCF.
12. The Receiver has also requested information from a law firm in another state regarding a settlement payment from FFCF in the face of threatened litigation by what appears to be a former investor.

Overpaid Investors

13. As noted in the Receiver's Second Report, the Receiver believes that some of the investors who were identified by Mr. Warner as having been overpaid were, in fact, overpaid. They were named as defendants in a lawsuit filed by Mr. Warner on behalf of FFCF Investors: *FFCF Investors, LLC v. Richard Smith, et al.*, #080925879. The Receiver has learned that several of these defendants were never served with a copy of the complaint and might be unaware of the litigation. The Receiver has sent notification to these defendants of the existence of the lawsuit and requested information about their financial transactions with FFCF and Ascendus.
14. In his review of the bank records of the Receivership Entities, the Receiver has identified certain individuals and entities who appear to have been investors in the past, and who were paid more in distributions than the amount of principal they invested. The Receiver is requesting information from these persons and entities in an effort to determine whether to seek a return of funds from these recipients.

GUIDANCE REQUESTED FROM THE COURT

Request for Permission to Issue Subpoenas

1. Currently, the Receiver is focusing on trying to identify the recipients of funds from the Receivership Entities and determine the reasons funds were paid to them. This effort has been made more difficult – and often stymied – by the refusal of some recipients of funds to provide information to the Receiver voluntarily. Some of this is understandable, such as

financial institutions wanting the compulsory power of a subpoena before identifying account holders. The Receiver suspects, however, that other recipients of funds are refusing to provide information voluntarily to the Receiver because the funds they received might be subject to a claim by the Receiver that the transfer was a fraudulent conveyance.

2. The court's order appointing a Receiver granted the Receiver permission to issue subpoenas "consistent with the Utah Rules of Civil Procedure" (§ 7). Under Rule 26(d), parties to litigation are prohibited from conducting discovery before the "meet and confer meeting" required by Rule 26, unless stipulated by the parties or ordered by the Court. The Receiver requested a stipulation by the parties to this action that would permit the Receiver to send subpoenas and take depositions before conducting the meet and confer meeting and before exchanging disclosures. Counsel for Dr. Barnes granted consent, but counsel for Roger Taylor declined to stipulate.
3. The Receiver believes it would be cost effective for the investors who have lost money and an efficient administration of justice to permit the Receiver to take depositions and issue subpoenas before having a meet and confer meeting with counsel for the parties and before exchanging disclosures. This position is based on several factors:
 - a. This case is unusual, in that the Receiver is acting under appointment by the Court, not as a representative of any of the parties.
 - b. The Receiver is in a position that is potentially adverse to both parties.
 - c. A goal of this Receivership is to complete the investigation relating to the source and

uses of monies by the Receivership Entities as quickly and as inexpensively as possible, to maximize the recovery for investors. The costs to the Receivership of producing copies of documents it has obtained at this stage of the Receiver's investigation would not materially advance the litigation, as the Receiver knows less than either of the parties about the events underlying the litigation. Requiring the Receiver to disclose information – and provide copies of documents – would detract from work that is more important at present.

- d. This case is complicated by the existence of the related litigation against the investors (*FFCF Investors LLC v. Richard Smith, et al.* (case number 080925879)). If the Court grants the Receiver's motion to consolidate that case into the instant case, requiring an attorney planning meeting would cause significant additional delay in light of the recent realization that several of the defendants in that other action were not served with the complaint.
4. Permitting the Receiver to issue subpoenas and take depositions now, with advance notice to the parties in this action, would expedite the Receiver's goal of determining which funds can be recovered.
5. The Receiver therefore asks the Court to amend the Order Appointing Receiver to permit the Receiver to issue subpoenas for documents and testimony without being required first to conduct the attorney planning meeting and exchange of disclosures.

Notice to the Court of Potential Conflicts of Interest by Counsel for Taylor

1. As noted above, the Receiver has discovered that the Receivership Entities made significant payments to Defendant Roger Taylor and members of his immediate family. In addition, it appears that Mr. Taylor had a significant role in operation of the Receivership Entities during the time that misappropriation occurred and misleading information was given to investors. This raises the likelihood that the Receiver will need to seek information from Defendant Taylor regarding his role in operation of the Receivership Entities and seek repayment of significant funds paid to Taylor. Since Taylor's counsel also previously represented at least two of the Receivership Entities and asserted they were acting in a quasi-Receiver role, their prior representation of the two Receivership Entities creates a potential conflict of interest with their continued representation of Defendant Taylor. In addition, if payments by Defendant Taylor to his counsel derived from funds paid to Taylor by Receivership Entities, the Receiver might find it necessary to demand a return of those attorney fee payments – making counsel a potential relief defendant in an action brought by the Receiver.
2. The Receiver seeks guidance from the Court as to whether the Receiver should seek information from Defendant Taylor through his current counsel or whether Taylor should be required to seek new counsel. Detailed information on this issue is being submitted to the court in a separate Notice and Report of Potential Conflict of Interest.

CONCLUSION

The Receiver respectfully submits this Initial Report for the period from May 15, 2009 through July 10, 2009.

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

DATED this 10th day of July, 2009.



WAYNE KLEIN, Receiver

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of July, 2009, a true copy of the foregoing Third Report of Receiver was mailed to the following:

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