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IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

A. DAVID BARNES, M.D., P.C., Plaintiffs, vs. FFCF INVESTORS, L.L.C., a Utah limited liability company; ASCENDUS CAPITAL MANAGEMENT, L.L.C., a Utah limited liability company; SMITH HOLDINGS, L.L.C., a Utah limited liability company; RICHARD T. SMITH, an individual; ROGER E. TAYLOR, an individual; and Does I through X, Defendants.	**ROGER TAYLOR'S RESPONSE TO RECEIVER'S NOTICE AND REPORT ON POTENTIAL CONFLICT OF INTEREST** (Hearing Requested) Civil No. 080922273 Judge Lindberg

COMES NOW, Defendant, Roger Taylor, by and through his attorneys of record, James J. Warner and Frederick M. Reich, and hereby submits the present Response to Receiver's Notice and Report of Potential Conflict of Interest.

BACKGROUND

Roger Taylor, husband and father of six, (his wife is Jennifer, not "Linda" as stated by the receiver), formed Ascendus Capital Management, LLC,(hereinafter Ascendus) along with Richard Smith, in 2003. Mr. Taylor was the Manager and Investment Advisor Representative. Mr. Taylor became a licensed Investment Advisor. Mr. Smith was responsible for customer service, accounting and billing. The entity was formed for the purpose of facilitating options trading on behalf of its members. Members deposited funds into their own individual personal trading accounts at Penson in their own name. Members signed Subscription Agreements which outlined the risks and required them to certify they were Qualified Investors. Members gave Ascendus authorization to trade. Funds were not deposited into Ascendus. Ascendus had no access to funds to the individual member's Penson accounts. Members could trade their accounts independently of the Ascendus trading. Penson provided real time online access to the Member's accounts, including trading activity and account balances. Ascendus clients had access to accurate, updated account balances the entire time their investments were being traded by Ascendus. Penson provided monthly statements to the owners of the individual trading account and issued yearly 1099s.

Ascendus hired Touch Trade to do the trading. Monthly, Touch Trade would send an accounting of trading activity for each account to Mr. Taylor who would verify the activity and check for any errors. Mr. Smith would then bill the Members according to the billing structure outlined in the Subscription Agreement. Members would then wire profits to themselves and usually wire commissions to the Ascendus account.

In 2004, Mr. Taylor moved from Salt Lake City to St. George. Ascendus Members began losing profits due to increasing carry-over positions. Mr. Taylor advised Members about trading

becoming more challenging and several Members opted to have Ascendus stop trading in their accounts.

In 2005, Ascendus fired Bocor/Touch Trade and hired new traders under Mr. Taylor's supervision. Trading became more and more difficult due to market conditions.

At the end of 2005. Ascendus stopped trading and provided Members with an ending statement. Mr. Smith may not have provided these to all Members. Mr. Smith advised Mr. Taylor that all Members had signed a closing statement acknowledging their closing balances and the end of Ascendus trading within their individual accounts. Mr. Taylor has since learned that this apparently did not occur in all cases. However, all Members had access to their actual account balances online at Penson along with monthly statements from Penson and had the ability to verify their actual balance.

Mr. Smith has admitted that unbeknownst to Mr. Taylor, he did not inform all Ascendus members that Ascendus had stopped operating. Mr. Smith led several people to believe that Ascendus continued to operate. This was a fiction. The Pension monthly statements show that the trading stopped despite what Mr. Smith may have communicated to some individuals. Later, Mr. Smith used FFCF money to pay these individuals.

In January 2006, Mr. Smith and Mr. Taylor entered into an agreement whereby Mr. Taylor would locate investment products and provide consulting services for Mr. Smith for Mr. Smith's proposed new venture, FFCF. Per the consulting agreement, Taylor was to be paid 1-2% of the invested funds for his services.

In February 2006, Mr. Smith formed FFCF Investors, LLC, a Utah limited liability company.

At about this time, Mr. Taylor became a sub advisor for Summit Capital Advisors. Summit had developed a relationship with LBS. After learning of LBS through his work with Summit, and relying on Summit's due diligence, Taylor believed that LBS would provide a sound investment vehicle for Mr. Smith's FFCF.

From the inception of FFCF through September, 2008, Mr. Smith acted as the Manager of FFCF. Mr. Smith listed Roger Taylor as the Manager of FFCF without Mr. Taylor's knowledge or consent. Smith, in a signed statement, verified this misrepresentation to all members of the LLC. (See Exhibit A, attached hereto is a true and correct copy of the Smith Letter).

FFCF was created by Mr. Smith in order to pool funds from individuals to invest in a money management fund known as Franklin Forbes, and later, LBS, which required a large initial investment. Mr. Taylor's role with FFCF as consultant was to locate suitable and profitable investment vehicles, which he did with LBS through Summit Capital. Mr. Taylor also provided independent consulting services to FFCF. He introduced a broker/dealer to LBS for their clients to utilize LBS for investments. He also provided FFCF with an events newsletter and market analysis. He also performed some basic customer service. Through his work with Ascendus, Mr. Taylor had developed relationships with some of the people who opted to participate in FFCF. During the years that FFCF was actively operating, Mr. Taylor had some direct communications with a few FFCF Members with whom he had previously come to know through Ascendus or otherwise.

In February and March of 2006, FFCF received the majority of funds that it would ultimately receive. These funds were received (usually as wire transfers) directly from individuals who wanted to join FFCF. These funds were first invested in commercial paper for a short period of time and then in the LBS product.

In 2006- 2007, Mr. Smith misled some of the FFCF members with inaccurate monthly statements. He continued to misuse the Ascendus name with some investors. Of the approximate 8 million dollars actually placed with LBS, there was approximately 1.8 million reported as profits. LBS reported a return of approximately 14% on the FFCF funds. However, Mr. Smith experienced an increasing amount of customer service issues. He asked Mr. Taylor for assistance on some of these issues as they related to the products at LBS. Mr. Taylor provided his assistance as requested and as provided for in the consulting agreement.

Later in 2007, FFCF member Al Wirth withdrew $3.8 Million even though he contributed only $1.8 Million a year earlier. Mr. Smith had apparently over-promised the return on investment and Mr. Wirth called his bluff. Mr. Smith apparently felt he couldn't admit he had lied.

At about this same time, some FFCF members began to question the stability of their investment and became more demanding of Mr. Smith. Mr. Smith continued with his false promises but more members began demanding their money and wanted out of FFCF.

By the end of 2007, the majority of FFCF funds that had been invested with LBS and earnings thereon had been disbursed to a few investors.

In 2008, more members became more demanding and Mr. Smith became more desperate. In order to fulfill his over-promises, it appears he went so far as take out personal loans to pay some of these members. However, shortly thereafter, he could no longer maintain the fiction he had created. The pressure apparently became so great that Mr. Smith attempted suicide.

On or about Mid-July, 2008, Mr. Smith admitted his wrongdoing. He wrote a lengthy letter of explanation and repentance which he provided to the FFCF members. (Exhibit A). Since that time, Mr. Smith has remained despondent. He has not answered any of the multiple lawsuits that

have been filed against him.

Upon learning of Mr. Smith's suicide attempt, Mr. Taylor began investigating the situation. He initially contacted Susan Smith (Richard Smith's wife), FFCF members, and others in an effort to find out what had happened. Mr. Taylor was able to obtain some documents from Mrs. Smith. The documents included miscellaneous bank records and scattered FFCF documents. However, the documents were in disarray and incomplete. In addition, several FFCF members provided information and documents to Mr. Taylor concerning their individual situations.

TAYLOR OBTAINS LEGAL COUNSEL

In about August 2008, Mr. Taylor hired the Law Offices of James J. Warner (Warner Law Offices) to assist him in sorting out the chaos created by Mr. Smith and also to obtain legal advice as to a possible resolution. Mr. Taylor provided the Warner Law Offices with the documents he had been able to collect and other information.

The Warner Law Offices began its investigation into the matter by first reviewing the documents presented by Mr. Taylor. The limited bank records, LBS statements, Smith Letter, and other documents showed that Mr. Smith had substantially overpaid a few FFCF members, thereby depleting the FFCF funds to the detriment of the remaining FFCF members. Al Wirth obtained the largest overpayment. Based on its initial analysis, the Warner Law Offices determined that the total overpayment was roughly equal to amount of the underpayment. Thus, in the opinion of the Warner Law Offices, it was in the best interests of the FFCF members (the current members constituting the underpaid members) to make efforts to recoup the overpaid funds for pro-rata redistribution to the underpaid members in accordance with the principles set forth in Donell v. Kowell, 533 F.3d 762 (9th Cir. 2008).

To these ends, The Warner Law Offices contacted the members of FFCF. (See Exhibit B, a true and correct copy of the letter from James J. Warner to the FFCF members, dated 8/27/08). In the letter, Mr. Warner recounted the earlier events and proposed a straight-forward, cost-effective plan to resolve the situation.

In September 2008, the majority of existing FFCF members elected Mr. Taylor to act as the new Manager of FFCF. The Warner Law Offices continued with its work gathering and analyzing information. In order to obtain a more complete set of bank records, the Warner Law Offices was able to obtain authorizations from Mr. Smith through his wife, Susan. The Warner Law Offices made requests to the various banks for the missing records.

On September 24, 2008 The Warner Law Offices sent an update letter to the FFCF members. (See Exhibit C, a true and correct copy of the letter from James J. Warner to the FFCF member, dated 9/24/08). In addition to providing information as to the status of the investigation, the letter sought the assistance of each member to provide documents they possessed.

On September 26, 2008, James D. Gilson, on behalf of one FFCF member, Dr. David Barnes, sent an unsolicited correspondence to the FFCF members. (See Exhibit D, a true and correct copy of the letter from James D. Gilson to the FFCF members dated September 26, 2008). In that letter, Mr. Gilson urges the FFCF members to remove Mr. Taylor as Manager and have a receiver appointed.

On September 30, 2008 The Warner Law Offices authored a letter to the FFCF members in response the Mr. Gilson's letter wherein Mr. Warner opines that due to the typically high cost and protracted nature of the receivership process, appointment of a receiver is not in the best interests of the FFCF members. (See Exhibit E, a true and correct copy of the letter from James. J. Warner to the FFCF members, dated September 30, 2008). Mr. Warner explained that the probable result of the

involvement of a receiver would be to reduce the recovery of each member since the members would presumably pay for the receiver and his attorney(s), accountant(s) and expenses. Mr. Gilson's letter to the members did not mention this fact.

On October 2, 2008 The Lighted Candle Society, an underpaid FFCF member, wrote a letter to the other FFCF members, urging the appointment of a receiver. (See Exhibit F, a true and correct copy of the letter from John Harmer, Lighted Candle Society, to the FFCF members dated 10/2/08).

On October 8, 2008 The Warner Law Offices responded to Mr. Harmer's letter and provided a copy of the response the FFCF members. (See Exhibit G, a true and correct copy of the letter from James J. Warner to the Lighted Candle Society, dated 10/8/08).

Also on October 8, 2008 The Warner Law Offices provided another update letter to the FFCF members. (See Exhibit H, a true and correct copy of the letter from James J. Warner to the FFCF members dated 10/8/08).

THE LITIGATION

Five lawsuits have now been filed regarding the above-described events.

A. Barnes v. FFCF et al.

On October 14, 2008, Dr. A. David Barnes filed a Complaint in the present action. He also brought motions for: (1) the appointment of a receiver, and (2) the disqualification of attorney Sara Pfrommer and pro hac vice counsel James J. Warner and Frederick M. Reich. These motions were opposed by Ascendus, FFCF and Taylor by their counsel, Sara Pfrommer and the Warner Law Offices. On March 18, 2009, this court granted Dr. Barnes motion for a receiver and appointed R. Wayne Klein in that capacity. The court allowed Sara Pfrommer and the Warner Law Firm to remain as counsel for Mr. Taylor.

B. FFCF v. Smith et al.

Second, FFCF Investors, LLC v. Richard Smith; Steven James; Barry Jones; Jerry Millard; Millard Living Trust; Stanford Petersen; Kathryn Rowley; Thomas Courtney Smith; Michael Usher; Albert Wirth; Robert Workman; David Young and Richard Young, Case No. 080925879, was filed in Utah State Court by the Warner Law Offices on behalf of FFCF Investors, LLC against its former manager Richard Smith, who wrongfully depleted the funds of FFCF by, among other things, overpaying the other defendants leaving no assets for the remaining FFCF members. This suit seeks to recover FFCF funds from the overpaid, former members for redistribution to the underpaid, current members.

C. Donnell v. Taylor et al.

Third, Annette Kay Donnell v Roger E. Taylor; Richard T. Smith; Smith Holding, LLC; Ascendus Capital Management, LLC; FFCF Investors, LLC; Eastern Securities; Touch Trade; Tom Newren; LBS Management; Hans B. Anderson, CPA; Hans Anderson Accounting; HJ & Associates, LLC; and Franklin Hunt, Case No.: 2:09cv00127, was filed in Federal Court on February 10, 2009. This suit seeks the recovery of Ms. Donnell's funds. This case in now consolidated with Wirth v. Taylor, below.

D. Wirth v. Taylor et al.

Fourth, Albert Wirth and Florence T. Wirth v. Roger E. Taylor, Richard T. Smith, Ascendus Capital Management, LLC, FFCF Investors, LLC, Franklin Forbes Advisors, LP., LBS Fund, L.P., LBS Advisors, Inc., Summit Capital Advisors, Inc., Jeffrey B. Roylance, Jennette L. Roylance, GJB Enterprises, Inc., Gerald Burke a/k/a G.J. Burke, Jason Buck, Richard C. Schmitz, and Kari M Laitinen, Case No.: 2:09cv229, was filed in Federal Court on March 11, 2009. In that suit, Plaintiffs

seek recovery of funds and damages from the numerous Defendants. This case is now consolidated with Donnell v. Taylor, above.

E. Lighted Candle Society v. Ascendus et al.

Fifth, The Lighted Candle Society v. Ascendus Capital Management, LLC, Richard T. Smith, Roger E. Taylor, Robert Alsop, FFCF Investors, LLC, and LBS Partners, Case No. 090906303, was filed in Utah State Court on April 10, 2009, wherein Plaintiff seeks recovery of its funds.

THE RECEIVER

Following the appointment of Mr. Klein as the receiver for FFCF, Ascendus and Smith Holdings, the Warner Law Offices turned over all documents it had been able to obtain during the course of its investigation during the previous eight months. In addition, the Warner Law Firm had prepared accountings which were also provided to Mr. Klein. These accountings included identifying the source of money used to fund FFCF. Mr. Klein was informed that the majority of funds came from individual investor Penson accounts that they authorized Penson to transfer to Mr. Smith/FFCF. In addition, the Warner Law Offices provided the receiver with an outline of events from 2003 to 2008.

In the last four months, Mr. Klein has provided four reports to this court as to his progress. Most recently, in his Third Report, filed July 10, 2009, Mr. Klein recites the progress being made in his investigation and analysis. With regard to his analysis, Mr. Klein states, "The Receiver's analysis of the bank records is a very preliminary stage. It is premature to rely on the accuracy of the records because some of the additional documents requested from banks have only recently been received and the Receiver's analysis is ongoing..."

Mr. Klein also submitted a Notice and Report on Potential Conflicts of Interest by Counsel

for Roger Taylor. It is not a noticed motion. The purpose of the report was to seek this Court's advice and direction. The report contains no legal authority for Mr. Klein's question whether the Warner Law Offices should be disqualified as counsel for Mr. Taylor. The report sets forth three perceived inaccuracies in Mr. Taylor's and/or the Warner Law Offices' previous statements and/or positions. Each of these allegations are addressed below.

ANALYSIS OF RECEIVER'S REPORT ON POTENTIAL CONFLICT OF INTEREST

It is clear from many of the statements by the receiver that he does not have a full grasp of the facts and is making allegations and jumping to conclusions based on his acknowledged incomplete and preliminary investigation. He perceives scenarios that only could be based on an incomplete understanding of the facts. He makes very basic statements that are incorrect, which indicates he has not done a thorough investigation. He believes that Linda Taylor is the wife of Roger Taylor and she probably improperly received funds from FFCF. Of course this is entirely wrong, Linda Taylor is an entirely independent person, unrelated to Roger Taylor. He makes conclusions regarding Roger Taylor being the manager of FFCF based on a few emails without knowing the relationship between Taylor and the recipients of the emails.

For instance, there are a few emails between Taylor and Jamey West that the receiver refers to as a basis to conclude that Taylor was the manager of FFCF or was involved to a greater extent in the day to day management of FFCF. However, the true facts are that Taylor and West were friends, that Jamey West's husband who died very unexpectedly was a good family friend of Taylor. West asked Taylor for assistance with her financial situation and the emails were indicative of Taylor trying to help Jamey West. Similarly, the emails to Quenalee Nelson were also a response for assistance following the tragic airplane crash that took the life of her husband Galen, who was a friend of

Taylor. The email to Mike Usher was written when Smith had become incapacitated, at about the time of Smith's automobile accident that was thought to be a suicide attempt, and Taylor was trying to pick up the pieces for Smith during his anticipated recovery.

In another area, the receiver still mistakenly states that Ascendus was able to transfer funds on its own from the investor's individual Penson accounts to the Ascendus account, even after the receiver was provided with documentation showing that the individual investors had to make the transfers. The receiver's presentation of his version of the facts of this matter is troubling.

Mr. Klein questions whether there is a conflict based on: (1) attempting to pick apart various statements made by Mr. Taylor and/or his counsel; (2) asserting as fact claims based on his preliminary and incomplete investigation; (3) asserting as fact mere allegations made by others; and, (4) ignoring Richard Smith's admission of wrongdoing (Exhibit A). The following is a closer analysis of the receiver's claims and the "facts" upon which they are based. (It should be noted at this time that mere perceived differences of opinion, semantics, or other contested issues of fact are not grounds for any kind of disqualification of counsel or conflict.)

- **The receiver claims that Mr. Taylor "represented to the Court that he had <u>no</u> involvement with FFCF until after Richard Smith's suicide attempt in July 2008." (emphasis added).**

Neither Mr. Taylor nor his counsel has ever, to their knowledge, made the claim that Mr. Taylor had <u>no</u> involvement with FFCF before July 2008. Mr. Taylor has maintained that he was not knowingly the manager of FFCF, he was not involved in the day to day management of FFCF, that he did not deal in the day-to-day operation of FFCF, and that he is not responsible for Richard Smith's admittedly wrongful conduct.

- Mr. Taylor has stated that "The only one running FFCF was Richard Smith. Roger Taylor only became personally involved with FFCF after he learned of the problems caused by Smith."

The receiver cites this statement as an alleged misrepresentation. This is a true statement. Taylor was a consultant to FFCF. He had a consultant agreement The few documents evidencing a very limited amount of communication with a few members of FFCF does not show that Mr. Taylor was "running FFCF." If in fact Mr. Taylor did "run FFCF," surely the receiver would have accumulated a substantial amount of documentary evidence to support that assertion. There would be signed checks, bank account authorizations, numerous letters, contracts with his signature, and hundreds of other documents. Yet, that has not been presented because Taylor was not running FFCF, Smith was, as he has admitted.

As to the second statement, perhaps Mr. Taylor's counsel could have used a better choice of words when he said "personally involved." The phrase "with the day-to-day activities" or "with the management" should have been added to that sentence to make it more clear. The import of the statement is accurate, namely, that Mr. Taylor had very little involvement with the day to day activity FFCF. However, Mr. Taylor does not asserted that he had no involvement with FFFC, whatsoever. Rather, he has maintained that his role was limited, he was a consultant and not managerial .Regardless of his limited involvement, this is still not an issue regarding attorney-client conflict.

Of course, he was the only one who did step forward following Mr. Smith's downfall, contacted the FFCF members (many of whom he had never spoken to before), collected as much information as he could, and began dealing with Mr. Smith's chaos openly. Since that point in time to the present, Mr. Taylor has very much been "personally involved" in: (a) attempting to rectify Mr.

Smith's malfeasance, and (b) defending himself against false accusations.

- Mr. Taylor stated that "Taylor was not involved with the events that have led to this litigation."

This is a true statement, but one that can be taken out of context and is a matter of semantics. The litigation is a result of Smith's malfeasance, misrepresentations, misuse of funds and over-payments, all of which he has admitted. Of course Taylor was known to many of the investors, and so he is named and involved in the litigation, but it was not his conduct that caused the problems. The receiver has not provided any evidence to show that Mr. Taylor was involved in any material misrepresentations, fraud or other intentional misdeeds. Again, this is not a basis for disqualification of counsel.

- Mr. Taylor stated that "Taylor denies that '[h]e worked with Smith in the management of FFCF." (This statement is actually taken from Taylor's answer to the complaint, which puts in issue the gravamen of the allegation.).

This is a true statement. Mr. Taylor has consistently denied that he managed FFCF. Mr. Smith admitted that Mr. Taylor did not manage FFCF. (See Exhibit A.). The relative lack of evidence of his involvement with the operations of FFCF support his claim. If he in fact had managed FFCF during the years of its existence, the receiver should have substantial evidence to support his claim. He has not presented such evidence because Mr. Taylor was not the manager of FFCF. Taylor did work as a consultant for FFCF, and as such he had communications with and contact among investors and Smith from time to time, but this did not constitute management of FFCF.

- The receiver notes that "The $8 million investment account that FFCF had with LBS

Advisors listed FFCF's address as being Roger Taylor's home in Santa Clara, Utah."

Mr. Taylor does not know why LBS listed his home address as the address for FFCF. Perhaps because Taylor referred FFCF to LBS, and was a consultant, LBS used his address. In any event, upon receipt of the monthly statements, Mr. Taylor would forward them to Mr. Smith/FFCF.

- The receiver asserts that "Taylor also appears to have been the recipient of funds withdrawn from LBS Advisors on two separate occasions: $1.5 million withdrawn in December 2007, and $84,000 withdrawn in August 2008."

The fact that Taylor was the recipient of funds from FFCF is really not an issue. Since Taylor was a consultant for FFCF and was the manager of Ascendus prior to that, it could be expected that he might receive some funds. However, the receiver's statement seems to be used to try to paint Taylor in a negative fashion, again without a discussion of the facts. The accounting and bank documentation that the receiver should have reviewed shows that Taylor loaned FFCF $100,000 in late 2007. In December 2007, Smith was in the process of trying to pay off some investors and Smith made a request for funds from LBS, and had the funds sent to Taylor Holdings for reasons Taylor was not fully aware of. The funds that were very temporarily in Taylor's account were transferred back to FFCF shortly after they were received, after repayment of the $100,000 loan had been repaid. This is the simple explanation of those funds Taylor received.

As to the $84,000, which was the balance of all the FFCF assets in August 2008, Taylor had those funds transferred to his account to close the LBS trading account. Smith was incapacitated after attempting suicide, and the underpaid investors were concerned about the status of their investment. By this time, Taylor had started to address and to try to resolve some of the problems created by Smith. Taylor consulted with corporate and SEC counsel in Los Angeles and was advised to

accumulate FFCF assets and try to recover assets from the overpaid investors. After a search for counsel, Taylor retained the Warner Law Offices on behalf of FFCF to represent FFCF and the underpaid investors. Although Taylor was still owed for services he provided to FFCF pursuant to the consulting agreement, those funds were forwarded to the attorney's office. Partial attorney fees, costs, and retainer for local counsel were able to be paid from those funds.

It is clear that there is no basis for disqualification of counsel based on any of these transactions. Counsel was representing FFCF in an attempt to recover funds from the overpaid investors.

- The receiver notes that "Investor Al Wirth alleges in his federal complaint that it was Taylor who urged him to move his funds from Ascendus to FFCF."

Al Wirth is trying to implicate anyone and everyone in his attempt to defend the allegations against him that he was overpaid for his investment by FFCF. Al Wirth was a member in Ascendus with whom Mr. Taylor had come to know. Mr. Wirth allegedly made a profit with Ascendus. When Ascendus was ending, he naturally wanted to continue to enjoy earning profits. It is likely Mr. Taylor and/or Smith told him about FFCF. Like Ascendus, Mr. Wirth received a return on his FFCF investment. The fact that Mr. Taylor and/or Smith informed Mr. Wirth about FFCF does not lead to the conclusion that Mr. Taylor managed FFCF. It also has no relevance to the disqualification of counsel. Further, to rely on the mere allegations of Al Wirth in a lawsuit as the basis for anything, is sheer folly.

- The receiver states that "In April 2008, a letter addressed to The Lighted Candle Society, on FFCF letterhead, was signed by Taylor as 'Manager of FFCF Investors."

Taylor was trying to assist in settling a dispute that arose when LCS wanted a return of their investment and Smith bounced a check to LCS, and Smith's world was starting to spin out of control. Smith requested that Taylor help settle the dispute. This was an error on Mr. Taylor's part. Mr. Taylor was not in fact the Manager of FFCF. Taylor was merely trying to resolve an issue. Mr. Taylor does not deny that he authored the letter or that he became involved with the LCS situation after Richard Smith had bounced a check to them. He should not have signed the letter as manager, but either as consultant or acting manager on behalf of the incapacitated Smith.

- The receiver argues that "Roger Taylor was in frequent contact, primarily through e-mail, with a number of investors..."

The receiver characterizes a handful of e-mails to a very few FFCF investors as "frequent contact" with a "number of investors." This characterization is not supported by the evidence presented or common sense. FFCF operated for more than two years. It had more than 25 members. Those members contributed more than $10 million.

"Frequent contact" in this situation would mean "regular" or "recurring." It would not mean "rare" or "occasional." Near the end of 2006, Mr. Taylor helped Jamey West–who as indicated above was the recent widow of a personal family friend–invest with FFCF as evidenced by the e-mails the receiver has provided to the court. There was also one e-mail in 2007 and one e-mail in 2008. This amount of communication can hardly be deemed "frequent" and the family relationship certainly puts this communication in its proper perspective.

As for Galen and Quenalee Nelson, the receiver submitted three e-mails from Mr. Taylor. Two of these emails were after June 15, 2008, when Taylor was trying to find out what all had happened and to resolve the problems Smith had created. Again, these three e-mails do not constitute

"frequent contact,"and as also stated above, there was a family connection and friendship involved.

As for Mike Usher, the receiver presented a single e-mail from Mr. Taylor, in April 2008, when Smith was spinning out of control, just to request a re-sending of a withdrawal form.

As for Earl and Patty Knight, the receiver presented a single e-mail from Mr. Taylor.

As for Kelly Cook, the receiver presented a single e-mail from Mr. Taylor.

Combined, the receiver has presented less than a dozen e-mails to these few investors over a three year period. A dozen e-mails to a few people including friends over the course of three years does not show control or management. Smith was in contact with all the investors on a daily, weekly and monthly basis throughout the entire period of time before his breakdown.

- The receiver alleges that "Comments made by investors to the Receiver as well as internal documents of The Lighted Candle Society show Taylor's roles."

In 2005, Mr. Taylor and Mr. Smith made a presentation to the Lighted Candle Society (LCS) concerning Ascendus. LCS mistakenly states, and the receiver evidently accepts without any proof, that this meeting occurred in 2006. LCS decided not to invest. At that time, Ascendus was still functioning. FFCF had not yet been conceived. One year later in 2006, LCS apparently decided to invest and contacted Richard Smith. Mr. Taylor was not privy to those discussions or the subsequent transaction. However, John Harmer of LCS signed an FFCF "Qualified Investor" letter. (See Exhibit I, a true and correct copy of the "Qualified Investor" letter).

Whatever LCS alleges that Mr. Taylor said concerning Ascendus has no bearing on LCS decision to invest in FFCF. Mr. Taylor had no personal contact with LCS in the years 2006 or 2007.

- The receiver points out that "Taylor's name being listed on the Operating Agreement."

Richard Smith admitted that he placed Mr. Taylor's name on the Operating Agreement without Mr. Taylor's knowledge or consent. Mr. Smith wrote "Once the LLC [FFCF] was created, under my direction, I was hoping to be able to put the difference in your account by the end of 2006, from yet another project and opportunity, which ended up not happening. I understand I really put my friend, Roger, in a bad position on the LLC by making him the manager without his knowledge. To me, it seemed right to not tell him and hid this from him because it gave me a better chance to make you whole, and it seemed like no big deal. To set the record straight, at first he thought it was fine, but in the end, he refused it flatly because he didn't want any of you to think that he was still working in an Advisor role with the LLC. And he had other things he wanted to do. I just couldn't bring myself to not put his name on it, because I needed time to fund your accounts for the losses that we had had, and I didn't believe that many of you would come over to the LLC if I was the manager..." (See Exhibit A, Smith Letter).

- The receiver notes that "FFCF newsletters sent to investors listing Taylor as one of the authors."

Per the consulting agreement, Mr. Taylor did author newsletters with information he received from Smith.

- The receiver argues that "Admission by Taylor in his Answer to the Verified Complaint that he was at all relevant times the manager of FFCF."

This was an error by Mr. Taylor's counsel as it relates to FFCF, a more complete answer should have been made. Mr. Taylor was not the manager of Ascendus. Taylor was unknowingly listed as the manager of FFCF by Smith However, he has consistently stated that he was not the actual manager of FFCF. Since it has come to the attention of counsel that the Answer contained this

oversight, counsel for Mr. Taylor will move to amend the Answer to delete the words "and FFCF"and explain the circumstances.

- Taylor stated that "Ascendus ended in December, 2005. Ascendus terminated operations at the end of 2005. Ascendus, as an entity, ceased to have any business operations at the end of 2005."

This is a true statement. To the contrary, the receiver states that "Ascendus did not conclude business activity at the end of 2005, but rather sustained its operations through most of 2008." This assertion is quite puzzling. Surely, the receiver possesses evidence that Mr. Smith perpetrated a fraud on several individuals by leading them to believe that Ascendus continued to operate when in fact it did not. In actuality, Mr. Smith was siphoning FFCF money to pay these individuals under the false pretenses that Ascendus continued to operate. Ascendus had conducted business from 2003 through 2005. However, any banking transactions conducted under the guise of Ascendus after 2005 were a sham. There was no Ascendus trading after 2005.

The receiver points out the obvious, namely, that several people were led to believe that Ascendus continued to operate after 2005. Richard Smith admitted as much. (See Exhibit A). The fact that Mr. Smith acted as if Ascendus was still conducting business doesn't make it true. Clearly, Mr. Smith went to great lengths to lead people to believe that Ascendus was still operating. He transferred FFCF funds to the Ascendus bank account so that he could send money with an Ascendus check. He created phoney Ascendus statements.

- The receiver states that "The main Ascendus bank account at Far West Bank (which had 1,624 transactions) was opened in May 2003 and continued through September 2007."

Again, the continued use of the Ascendus checking account was one of the tools that Mr. Smith used in his misguided plan. Mr. Smith signed these Ascendus checks. Mr. Smith perpetrated a fraud by using the bank account of a non-operating business. The receiver has presented no evidence that Mr. Taylor had any knowledge or participated in Mr. Smith's fraudulent use of the Ascendus bank account. Taylor never signed any of the Ascendus checks that Smith continued to use after 2005. The receiver knows this, yet fails to disclose that in his report.

- The receiver now understands that " Many investors who had begun investing in Ascendus state that they never knew about the creation of FFCF and believed Ascendus continued operating until its 2008 collapse. This belief was bolstered by their continuing to receive distribution payments with checks written on Ascendus bank accounts."

Again, this was the heart of Mr. Smith's scam. By using the Ascendus bank account. He led people to believe Ascendus continued to do business-as-usual. This, admittedly, was a complete fiction.

- The receiver notes that "Many investors continued to receive account statements issued by Ascendus Capital Management."

These were Mr. Smith's creation, used as another tool to use FFCF funds to make distributions to those led to believe that Ascendus was continuing to operate. Roger Taylor was still listed as the Investment Advisor even though he allowed his license to expire at the end of 2005. Mr. Taylor allowed the license to lapse because Ascendus had ended and he was no longer acting in that role.

- The receiver states that "Newsletters were sent to investors with sender being Ascendus."

Mr. Taylor did not author this newsletter. The receiver does not claim that he did.

- The receiver mistakenly alleges that Roger Taylor and/or Ascendus had access to investor funds in their individual Penson trading accounts

As stated above, the receiver is correct that Mr. Taylor stated that under the Ascendus system, individual investors opened individual trading accounts, typically at Penson, and authorized Ascendus to trade in those accounts. Ascendus did not have access to funds within those accounts. In other words, Ascendus could not withdraw funds from those accounts. The owners of the accounts could, of course, and did, send funds from those accounts to Ascendus. Ascendus had trading authority only.

The receiver, contrary to Mr. Taylor's assertion, claims "Ascendus and it managers did have access to investor funds held in accounts at Penson Financial..." In support of this claim, receiver points to the fact that money was transferred from Penson to Ascendus, usually via wire transfer. The receiver then jumps to the conclusion that this proves that Ascendus had access to the Penson accounts and, therefore, Mr. Taylor falsely claimed that Ascendus had no access to these funds.

With all due respect, the receiver's claim is absurd. What the receiver fails to mention is that the individual Penson account owners made these payments to Ascendus. It is unclear why the receiver doesn't know this fact, or if he does, fails to mention it. The Warner Law Offices provided the receiver with dozens of Penson forms which were used by the owners of the accounts to transfer funds from their individual account to Ascendus. (See Exhibit J, a true and correct copy of six (6) of the over one-hundred (100) Penson authorization forms in the receiver's possession.)

MEMORANDUM OF POINTS AND AUTHORITIES

A. A Noticed Motion Is the Proper Procedure for Raising a Conflict Claim

Mr. Taylor objects to the lack of standard motion practice in this matter. Mr. Taylor has been prejudiced by the lack of a formal motion. The receiver did submit a Notice and Report on Potential Conflict of Interest which plainly stated that he was seeking advice and direction from the court on how to proceed. He was not and did not make a formal motion. His Report contains no legal authority regarding conflicts, contains no rational as to how any authority applies to the facts of this case, and does not attempt to satisfy the burden that a moving party has in a disqualification motion.

The Report makes numerous factual allegations and innuendos which have been fully addressed above. However, Mr. Taylor must now essentially guess as to what legal basis might exist for a disqualifying conflict under the facts of this case. Due Process is fulfilled through the formal noticed motion practice. The moving party makes a motion based on identified law and fact. The opposing party has notice of the legal theory and basis and has the opportunity to respond accordingly. In the present situation, Mr. Taylor has not been put on notice as to what legal theory the court may rely in making its decision. The receiver made no motion. Rather, Mr. Taylor is left to surmise what legal basis could possibly exist. This inequity violates the principles of fundamental fairness and Due Process.

B. Strongly Disfavored Conflict Motions

Motions to disqualify counsel are strongly disfavored. "Motions to disqualify counsel often pose the very threat to the integrity of the judicial process that they purport to prevent." Gregori v. Bank of America, 207 Cal.App.3d 291, 300-301 (1989) "A motion for disqualification of counsel is a drastic measure which courts should hesitate to impose except when of absolute necessity. They

are often tactically motivated; the tend to derail the efficient progress of litigation." In re Marvel, 251 B.R. 869 (Bankr.N.D.Cal. 2000). Thus, disqualification motions "should be subjected to particularly strict judicial scrutiny." Optyl Eyewear Fashion Int'l Corp. v. Style Cos., 760 F.2d 1045, 1050 (9th Cir. 1985).

C. Burden on Moving Party

The burden is on the moving party to show sufficient grounds for the removal of an attorney from representing a client. Alexander v. Superior Court, 141 Ariz. 157,161, 685, P.2d 1309,1313 (1984). Due to the unusual procedural posture of the present matter, it is unclear who the moving party is. If it is the receiver, he has not met his burden since he has not made established a valid factual basis nor has he provided any legal authority. If it is Dr. Barnes, he has not met his burden for the same reasons.

D. The "Facts" Alleged by the Receiver Do Not Create a Conflict

As fully analyzed above, the receiver's concerns are unfounded. First, Mr. Taylor's role as it relates to FFCF was limited. As plainly demonstrated, Mr. Taylor was not involved in the day-to-day management of the FFCF. He did write a few e-mails to a small number of members. He did author a newsletter. He located what was believed to be a suitable investment vehicle through LBS. He acted as a consultant pursuant to his consulting agreement

If Mr. Taylor had been the major player in FFCF as alleged, surely this would be an easy fact to prove. Mr. Taylor's signature should be all over FFCF documents and checks. It is not. He should have had hundreds of conversations with FFCF members. He did not.

When Mr. Smith had his breakdown Mr. Taylor did take action by making substantial efforts to a) find out what had happened, and b) find a solution. He had no obligation to do so. He believed

it was the right thing to do.

The "facts" as alleged by the receiver concerning the low level of Mr. Taylor's involvement with FFCF do not create a conflict.

Second, the receiver's finding that Ascendus sustained its operations through most of 2008 is simply wrong. If what the receiver means is that Richard Smith fraudulently led people to believe that Ascendus continued to operate, then the receiver is correct. Just because Richard Smith said Ascendus continued to operate, used FFCF money to fund Ascendus, and cover-up his scam does not lead to the receiver's conclusion that Ascendus continued to operate. No trading was done in the Penson accounts. No profits were paid to individuals from money earned in these accounts. The money paid to the phantom "Ascendus members" came from FFCF or Mr. Smith.

Third, contrary to the receiver's finding, Ascendus did not have access to investor funds held in their individual trading accounts. The only way Ascendus could receive these funds was if the account holder transferred the money. In fact, the account holders did freely transfer funds to Ascendus on a regular basis to pay commissions. Later, when Ascendus ceased its operations and Mr. Smith created FFCF, many of these individuals transferred their Penson account funds to Mr. Smith for investment in FFCF. Mr. Smith in turn invested most of this money with LBS. These are the basic facts. To assert that Ascendus "had access" to the funds in the Penson accounts is disingenuous.

Fourth, the receiver makes the bald assertion that "assets may have been paid improperly to Taylor" and that this may require the disqualification of his counsel. This unsupported general assertion does little to support the receiver's position.

Finally, the receiver makes the comment that "due to the <u>possibility</u> that monies paid to James J. Warner and Sara Pfrommer came from Receivership Entities and <u>could</u> be a fraudulent conveyance,

Warner and Pfrommer might be the targets of future litigation by the Receiver." (emphasis added). Again, this statement remains wholly unsupported by fact or law.

E. Any Confidential Information The Warner Law Offices Received During the Joint Representation of Taylor, Ascendus and FFCF Is the Same Confidential Information It Received from Mr. Taylor and Disqualification Is Not Required

Rule 1.9 of the Utah Rules of Professional Conduct "prohibits an attorney from using information relating to his prior representation of a client 'to the disadvantage of the former client.'" Sprately v. State Farm Mutual Insurance, 2003 UT 39, ¶14. However, "[exceptions exist to this rule for circumstances allowed in Rule 1.6 or *when the information becomes "generally known."* Id, emphasis added. The issue in this case is whether or not the so-called "confidential information" the Warner Law Firm may have received in representing FFCF is the same information new counsel for Taylor would receive. Because any information received in the representation came directly from Taylor, disqualification is unnecessary.

In Gong v. RFG, Oil, Inc., 166 Cal.App.4th 209 (2008), the court was presented with an analogous situation to the one at hand. In that case, brothers David Gong and Jeffrey Gong formed a corporation, RFG Oil, Inc. for the purpose of owning and operating an oil change franchise. David held 51 percent of the corporate stock and Jeffrey held 49 percent. The brothers had a falling out and RFG terminated Jeffrey and forced him to resign his position as a corporate officer. Jeffrey then sued RFG and David for involuntary dissolution, breach of fiduciary duty, wrongful discharge and other causes of action. Id. at 212.

During the proceedings, RFG and David were represented by the same counsel. Initially, Luce, Forward Hamilton and Scripps represented both parties and later, Dan Lawton (Lawton)

substituted as counsel for both parties. Jeffrey brought a motion to disqualify Lawton on the grounds that an actual conflict of interested between RFG and David. Id. at 213.

The appellate court analyzed the different duties at issue in this situation. First, the court observed that "where the same attorney simultaneously represents potentially conflicting parties, the primary interest at stake is the attorney's duty of loyalty." Id. at 214. Second, the noted that "[w]here an attorney successively represents one client following prior representation of another client, the concern is to enforce the duty of confidentiality to the former client." Id.

The court found that an actual conflict existed based on the attorney's duty of loyalty and therefore, RFG and David must have separate counsel. Id. at 216.

The court then addressed the issue of whether Lawton could remain as counsel for David. In holding that Lawton was permitted to remain as counsel for David, the court reasoned as follows:

> RFG is a closely held corporation with David as a majority shareholder. Lawton has been working for RFG through David and any personal loyalties will be with David. Additionally, an confidential information Lawton learned from RFG during the time period it jointly represented RFG and David will be the same confidential information it received from David. Stated differently, if David were forced to retain new counsel, that new counsel would be privy to the same information that Lawton received from David and RFG.
>
> In this situation, where the functioning of a corporation is so intertwined with the individual defendant that any distinction between them is fictional, it makes no sense to require Lawton's complete removal from this case based on its prior representation of RFG. Id. at 217.

The same reasoning applies to the present situation. For a period of a few months, after the suit filed by Barnes, the Warner Law Offices jointly represented FFCF, Ascendus and Mr. Taylor. Mr. Taylor, being the only available representative of FFCF and Ascendus, provided information to counsel. (ie. potential confidential information). This is the same information that any new counsel would be privy to. Moreover, the Warner Law Offices have had no direct communication with

Richard Smith and do not possess any confidential information from him.

As in the Gong case, the Warner Law Offices should be allowed to remain as counsel for Roger Taylor.

CONCLUSION

Based on the foregoing reasons and authorities, Roger Taylor respectfully requests that the court take no action regarding the status of his counsel James J. Warner, Frederick M. Reich and Sara Pfrommer, and that they remain as his attorneys of record.

DATED: August 12, 2009.

By: /D. STEIN FOR
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Frederick M. Reich
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