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Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

R. WAYNE KLEIN,

Receiver,

**PLAINTIFF DR. BARNES'
MEMORANDUM IN SUPPORT
OF DISQUALIFICATION OF
COUNSEL FOR ROGER E.
TAYLOR**

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

Plaintiff,

Civil No. 080922273

Judge Lindberg

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 John Does I through X,

Defendants.

Plaintiff A. David Barnes, M.D., P.C. ("Plaintiff" or "Dr. Barnes"), through counsel, at the request of the Court, submits this memorandum in support of the Receiver's suggestion in his

July 10, 2009 Report that counsel for defendant Roger E. Taylor (“Taylor”) have a conflict of interest and ought to be disqualified from further representation of Taylor in this matter.

Given their former representation of the lead defendants, FFCF Investors, LLC (“FFCF”) and Ascendus Capital Management, LLC (“Ascendus”), Taylor’s counsel has a conflict of interest from representing Taylor in this action since Taylor’s interests and that of FFCF and Ascendus are in conflict, and that representation relates to the same matter. The governing rule in this regard is Rule 1.9 of the Utah Rules of Professional Conduct, which provides:

Rule 1.9. Duties to Former Clients.

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(b)(1) whose interests are materially adverse to that person; and

(b)(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9© that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

© A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(c)(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(c)(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Taylor's counsel cannot continue to represent Taylor due to their former representation of defendants FFCF and Ascendus in connection with this same matter, since his position is adverse to that of FFCF and Ascendus, and neither FFCF nor Ascendus have consented to such representation. As manifest by the Receiver's July 10 report and Taylor's August 12 opposition thereto, Taylor's positions in this matter are directly at odds to virtually every position that the court-appointed Receiver for FFCF and Ascendus has taken in this matter since his appointment. Significantly, the Receiver has indicated that there is evidence that Taylor has funds of FFCF that should be returned to FFCF and its investors.

Dr. Barnes notes that Taylor's August 12 opposition memorandum does not cite to any evidence in support of his lawyers' arguments that he was not an active participant in the wrongdoing of FFCF and Richard Smith. No affidavit or evidence has been submitted by Taylor's counsel, only unsupported "background" statements that are at odds with the documents uncovered and disclosed by the Receiver in his July 10 Report.

For all the documented reasons set forth by the Receiver in his July 10 Report about Taylor's direct, repeated, significant involvement with FFCF, including financial involvement, Dr. Barnes strongly supports the Receiver's suggestion that Taylor's counsel has a conflict of interest and should be disqualified. Taylor should be ordered to have new counsel promptly appear in this matter who is free of any conflicts, and in a way to minimize any further delays of this proceeding.

In addition, the concerns raised by Dr. Barnes in his earlier disqualification memoranda filed in this matter on Dec. 4, 2008 and Jan. 1, 2009 remain valid points in support of disqualification of Taylor's counsel, and include the following points:

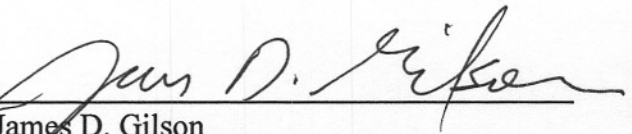
1. As manifest by the records of the Utah Department of Commerce (see Exhibits A and B to Jan. 1, 2009 memo), of which the Court can take judicial notice, Taylor was the manager of both FFCF and Ascendus while the FFCF Ponzi was being operated. No affidavit or other competent evidence has been submitted by Taylor to controvert that fact.
2. Taylor admits that he has been a business partner and long-term friend of the defendant Smith, the admitted lead con man in this Ponzi scheme.
3. Significant funds were transferred between FFCF and Ascendus, and members of Ascendus were transferred to FFCF. Taylor admits that he was the manager of Ascendus.
4. Taylor's counsel have provided false and misleading information to the Court about their "accounting" of funds and about Ascendus being shut down since 2005.
5. Taylor and his counsel have delayed turning over company records. Their non-cooperative approach manifests their conflict of interest and their strategy to obstruct efforts for the victims to obtain a recovery, and to shield Taylor from liability, or to at least delay the day of reckoning.

CONCLUSION

Based on the foregoing, counsel for defendant Taylor should be disqualified from further representing Taylor in this matter and in the other related lawsuits involving FFCF and Ascendus.

DATED: August 13, 2009.

CALLISTER NEBEKER & McCULLOUGH

By: 
James D. Gilson
Attorneys for Plaintiff A. David Barnes, MD

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th of August, 2009, a true copy of the foregoing

PLAINTIFF DR. BARNES' MEMORANDUM IN SUPPORT OF DISQUALIFICATION

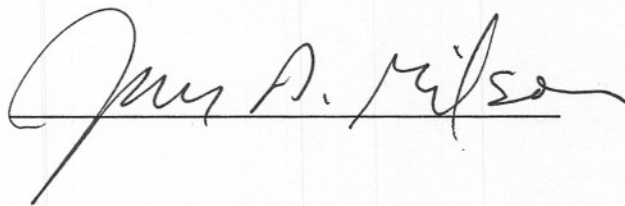
OF COUNSEL FOR ROGER E. TAYLOR was mailed to the following:

Sara J. Pfrommer
2663 Little Kate Road
P.O. Box 3915
Park City, UT 84060

James J. Warner
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3233 Third Ave.
San Diego, CA 92103

Richard T. Smith
443 N. 750 E.
Orem, UT 84097

R. Wayne Klein
299 South Main, Suite 1300
Salt Lake City, UT 84111

A handwritten signature in cursive script, reading "Jay A. Wilson", written over a horizontal line.