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**FILED DISTRICT COURT**  
Third Judicial District

SEP - 8 2009

By                       
SALT LAKE COUNTY  
Deputy Clerk

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.

FFCF INVESTORS, LLC,

Plaintiff,

vs.

RICHARD SMITH, et al.

Defendants.

**RECEIVER'S:**

- 1) REQUEST FOR APPROVAL OF SETTLEMENTS;**
- 2) MOTION TO DISMISS DEFENDANTS; AND**
- 3) REQUEST FOR PERMISSION TO PAY LITIGATION EXPENSES**

**MEMORANDUM IN SUPPORT**

Case No. 080922273

Judge: Denise P. Lindberg

Pursuant to the Order Appointing a Receiver, entered by this Court on March 18, 2009,

R. Wayne Klein, the Receiver requests: 1) the Court's approval of proposed settlement agreements between the Receiver and overpaid investors, 2) dismissal of multiple defendants

from the instant action, and 3) the Court's approval of plans to use funds received in the settlement to pay litigation expenses and to hire litigation counsel for the Receiver. These requests and motion are supported by the following facts and the legal argument below.

### **SETTLEMENT AGREEMENTS WITH RECEIVER**

#### **Proposed Settlement with Bary Jones, Jonesco Enterprises, and Johnson Stokesbury, LLC**

The financial analysis performed by the Receiver indicated that payments to and from Receivership Entities by Bary Jones, Jonesco Enterprises, and Johnson Stokesbury, LLC (collectively, "Jones") were related. The Receiver analyzed information showing transactions between Jones and the Receivership Entities and concluded Jones was overpaid by \$25,436.02.<sup>1</sup>

In response to a demand letter from the Receiver, Jones and the Receiver entered into settlement discussions and signed a settlement agreement. That agreement is now being presented to the court for approval. The settlement agreement provides:

- Jones has paid to the Receiver \$20,000 in settlement of any claims the Receiver might make against Jones. This payment represents approximately 80% of the amount by which Jones was overpaid;
- Jones represents that the accounting performed by the Receiver was accurate and that he did not receive any other funds from other sources unknown to the Receiver;
- Jones represents that he was not a manager of any of the Receivership Entities, had no role in managing or operating the entities, did not solicit others to participate in the

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<sup>1</sup> The Receiver's conclusions differ from the analysis performed by James Warner and as alleged in the lawsuit filed by FFCF against the overpaid investors in December 2008. The differences primarily stem from the Receiver including in his analysis all payments to and from investors from the inception of the scheme while the lawsuit only calculated payments starting with the inception of FFCF in 2006.

investment scheme, and had no knowledge of the financial condition of the entities when he withdrew his funds; and

- The Receiver will seek Court approval of the settlement. If the settlement is approved by the Court, the Receiver will dismiss Jones as a defendant in this lawsuit (with prejudice).

In addition, the settlement operates as a release of any other claims the entities might have against Jones.

#### Proposed Settlement with Kelly Cook

The Receiver analyzed payments to and from Receivership Entities by Kelly Cook. This analysis showed that Cook was overpaid. Cook is not currently a defendant in the action filed against other overpaid investors because he had not been previously identified as being overpaid.

The amount of actual overpayment to Cook was difficult to determine due to the varied and complex nature of payments made to Cook and deposits into his account from Receivership Entities. There was some disagreement with Cook over whether certain payments to Cook should count as principal investment amounts. At the same time, Cook provided information to the Receiver showing a financial inability to pay the highest amount of overpayment under one of the theories advanced by the Receiver. In the end, a settlement agreement was reached with Cook that took into account the disagreement over the appropriate amount of principal and Cook's inability to pay the entire amount sought by the Receiver. The settlement agreement with Cook provides:

- Cook has paid to the Receiver \$20,800 in settlement of any claims the Receiver might make against Cook;

- Cook has agreed to provide (and has provided) valuable assistance to the Receiver in understanding the operation of the investment scheme and previously unknown documents showing the involvement of those affiliated with the scheme;
- Cook represents that the accounting performed by the Receiver was accurate and that he did not receive any other funds from other sources unknown to the Receiver;
- Cook represents that he was not a manager of any of the Receivership Entities, had no role in managing or operating the entities, did not solicit others to participate in the investment scheme, and had no knowledge of the financial condition of the entities when he withdrew his funds; and
- The Receiver will seek Court approval of the settlement. If the settlement is approved by the Court, the Receiver agrees that he will not file suit against Cook as a result of the overpayment by FFCF or name him as a defendant in this action. The settlement also operates as a release of any other claims the entities might have against Cook.

#### Proposed Settlement with Richard C. Young and RC Troy, LLC

The Receiver analyzed payments to and from Receivership Entities by Richard C. Young and RC Troy, LLC and sent information and a demand to Young. Young agreed to engage in negotiations. During negotiations, Young forthrightly acknowledged that he had received more money than indicated in the FFCF lawsuit and provided information permitting the Receiver to identify which other payments by FFCF had been delivered to Young. With this additional

information, the Receiver's analysis showed that Young was overpaid by \$434,353.87.<sup>2</sup>

As a result of the negotiations, a settlement agreement was signed. That agreement is now being presented to the court for approval. The settlement agreement provides:

- Young will pay to the Receiver \$347,483 in settlement of any claims the Receiver might make against Young. This payment represents 80% of the amount by which Young was overpaid. This payment is being made in three parts: \$100,000 is being paid at the time the settlement agreement is signed, \$123,742 will be paid within six months and the remaining \$123,741 will be paid within one year of the date the settlement agreement is signed. The agreement also provides that \$100,000 of the amount owed by Young can be credited to him based on a \$100,000 payment Young previously made to another investor. This credit is conditioned on the other investor entering into an agreement in which the investor agrees to waive any claims against the Receivership Estate.
- Young represents that the accounting performed by the Receiver was accurate and that he did not receive any other funds from other sources unknown to the Receiver;
- Young provided significant assistance to the Receiver including delivering copies of key documents, explaining financial transactions, and forthrightly acknowledging the receipt of funds that had not yet been traced to him.
- Young represents that he was not a manager of any of the Receivership Entities, had no

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<sup>2</sup> The Receiver's conclusions differ significantly from the analysis performed by Warner and the amount alleged in the FFCF lawsuit. The lawsuit alleged that Young was overpaid by \$114,117.73. The Receiver initially calculated that Young was overpaid by \$45,768, by including transactions during the entire Ascendus and FFCF periods. During negotiations, however, Young disclosed that he had received two payments from FFCF that had been listed by the Receiver as unidentified. These two additional payments were adjusted to reflect losses that occurred in Young's account during the transfer of his funds from Ascendus to FFCF.



role in managing or operating the entities, did not solicit others to participate in the investment scheme, and had no knowledge of the financial condition of the entities when he withdrew his funds; and

- The Receiver will seek Court approval of the settlement. If the settlement is approved by the Court, the Receiver will dismiss Young as a defendant in this lawsuit (with prejudice). In addition, the settlement operates as a release of any other claims the entities might have against Young.

#### Proposed Settlement with David A. Young

The Receiver analyzed payments to and from Receivership Entities by David A. Young and sent information and a demand to Young. Analysis of bank records by the Receiver indicated that Young provided funds totaling \$114,516.60 to the Receivership Entities and received funds totaling \$186,162.36 from the Receivership Entities.<sup>3</sup> The Receiver and Young entered into a settlement agreement with the following terms:

- Young will pay to the Receiver \$50,000 in settlement of any claims the Receiver might make against Young. This payment represents approximately 70% of the amount by which Young was overpaid. This payment will be made by September 18, 2009.
- Young has provided certifications to the Receiver of his inability to pay the entire amount of overpayment due to medical problems he faces, his lack of medical insurance, having lost regular employment in his profession, and investment losses he has suffered since

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<sup>3</sup> The Receiver's conclusions differ from the analysis performed by Warner and the amount alleged in the FFCF lawsuit because the Receiver's analysis examined payments to and from both FFCF and Ascendus.

withdrawing funds from FFCF.

- At the same time, Young has provided substantial assistance to the Receiver in documenting the nature of the investment programs of Ascendus and FFCF and demonstrating the roles of their managers.
- Young represents that the accounting performed by the Receiver is accurate and that he did not receive any other funds from other sources unknown to the Receiver;
- Young represents that he was not a manager of any of the Receivership Entities, had no role in managing or operating the entities, did not solicit others to participate in the investment scheme, and had no knowledge of the financial condition of the entities when he withdrew his funds; and
- The Receiver will seek Court approval of the settlement. If the settlement is approved by the Court, the Receiver will dismiss Young as a defendant in this lawsuit (with prejudice). In addition, the settlement operates as a release of any other claims the entities might have against Young.

#### Anticipated Future Settlement Agreements

The Receiver is engaged in settlement discussions with one other overpaid investor and has been exchanging information with attorneys for other overpaid investors. Additional settlement agreements may be signed as a result of those discussions and information exchanges. Moreover, the Receiver might enter into settlement agreements with two underpaid investors who will release all or a portion of their claims against the Receivership Estate in exchange for payments being made to them directly from overpaid investors. Finally, the Receiver has

identified other current and former investors who appear to have been overpaid and who are not presently named as defendants in this litigation. The Receiver expects to make demands on these investors. Those demands might result in additional settlement agreements.

The Receiver seeks direction from the Court whether the Receiver should submit future settlement agreements to the Court for review and approval (also giving notice to the other defendants in this action) or should exercise his independent judgment in accepting settlements.

### **MOTION TO DISMISS**

Assuming Court approval of these settlement agreements, the Receiver hereby moves to dismiss from this consolidated action Bary Jones, Richard C. Young, and David A. Young. These dismissals are with prejudice.

The suit filed by FFCF in December 2008 also alleged that Gerald (Jerry) Millard, Millard Living Trust, Stanford Petersen, and Michael Usher were overpaid. The financial analysis performed by the Receiver indicates that these investors were not overpaid<sup>4</sup> and, consequently, are not proper defendants in this action. The Receiver moves to dismiss these defendants from this action. This dismissal should be without prejudice, in the event later evidence is found indicating that additional payments should be recovered from them.

### **REQUEST FOR INSTRUCTION ON USE OF SETTLEMENT FUNDS**

Up to now, the lack of funds in the Receivership Estate has hampered the Receiver's

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<sup>4</sup> In the case of Jerry Millard and Millard Trust, the Receiver found payments to Receivership Entities of \$57,500 that had not been included in Warner's accounting. In the instance of Petersen, the Receiver found payments of \$68,700 that had not been included in the accounting used as the basis of the FFCF lawsuit. In the case of Usher, \$275,000 had been paid to Receivership Entities that had not been reflected in the prior accounting. In all three cases, these additional principal investments mean the defendants were not overpaid.



ability to act aggressively to determine how funds of the Receivership Entities were expended. The lack of funds has required the Receiver to spend some time performing legal services (such as preparing and filing motions and memoranda of law) instead of identifying and recovering assets. The absence of any operating funds also has created a risk that expenses incurred by the Receiver in paying for depositions and issuing subpoenas would not be recovered. This is one reason the Receiver has been willing to recommend these initial settlements at a discount.

The Receiver is requesting Court permission to use funds in the receivership bank account for the following uses, at the Receiver's discretion:

1. Paying deposition costs, such as the services of court reporters;
2. Paying the costs of issuing subpoenas, including copying charges imposed by banks, costs of service of process, and witness fees;
3. Paying copying costs of outside vendors if use of such vendors is appropriate; and
4. Other incidental expenses, such as bank fees, unusual mailing costs, etc.

In addition, the Receiver believes that the money received in settlements to date would best be utilized as "seed money" to permit the Receiver to hire outside counsel. By hiring outside counsel, the Receiver expects to be able to leverage the success achieved to date by a) issuing subpoenas to financial institutions, companies, and persons who received funds from the Receivership Entities – to determine the reasons for such payments and whether grounds exist to seek recovery of these funds, b) accelerate the current litigation against overpaid investors who have not been willing to reach a settlement with the Receiver, c) take depositions of officers, employees, and agents of the Receivership Entities, and d) prepare and file lawsuits against

persons who improperly received monies from the Receivership Entities, including other overpaid investors who have not yet been sued.

Any payment of fees to outside counsel (as with any payments of fees to the Receiver) would occur only upon submission of a fee application to the Court and approval by the Court. Nonetheless, the absence of any monies in the Receivership Estate before this point has caused counsel contacted by the Receiver to decline to provide legal assistance because the prospects of payment seemed remote. With approval of the Court, the Receiver intends to engage counsel and assure them that funds are available to be approved for work they perform.

### **ARGUMENT IN SUPPORT OF MOTION**

#### **Approval of Settlement Agreements**

The Order Appointing Receiver (“Order”) (dated March 18, 2009) directed the Receiver to: “Marshal and take control of all assets and property belonging to . . . any of the Company Defendants, with full power to take such steps as he deems necessary to secure such premises, assets, and property.” *Id.* at p. 2. It was pursuant to this authority that the Receiver engaged in negotiations with overpaid investors and entered into settlement agreements to obtain funds for the Receivership.

Arguably, the Order already authorizes the Receiver to finalize and implement the settlement agreements described above. The Order authorizes the Receiver to make “such agreements as may be reasonable, necessary and advisable in discharging his/her duties as Receiver.” *Id.* at 3. Similarly, paragraph 5 of the Order empowers the Receiver to “liquidate and convert into money all of the assets, property, and interests” belonging to the Receivership. *Id.*

However, in light of the discounts and unique terms contained in these initial settlement agreements and the Receiver's intent to use the proceeds to seek greater recoveries, the Receiver determined to avoid any question about the scope of his authority by seeking approval and/or guidance from the Court relating to the terms of these initial settlement agreements. The Receiver asks the Court for guidance as to the level of review the Court would like to impose on future settlement agreements.

As the Utah Supreme Court emphasized in *Interlake Co. v. Von Hake*, 697 P.2d 238, 240 (Utah 1985), a Receiver has limited powers and should apply to the court for advice and directions. *Accord, Shaw v. Robinson*, 537 P.2d 487 (Utah 1975) (sales by receiver cannot be completed unless confirmed by the court and consistent with authority previously granted by the court).

#### Dismissal of Defendants

Paragraph 6 of the Order empowers the Receiver to “prosecute, defend, . . . or compromise actions in any . . . court or proceeding of any kind as may be advisable in his sole discretion, to recover or conserve assets and property of Company Defendants.” *Id.* at 4. This language already gives broad discretion to the Receiver to make decisions to dismiss existing defendants from the action, either with or without prejudice and whether or not any payment has been made by the defendant. In light of the Receiver's analysis that Millard, Millard Trust, Petersen, and Usher were not overpaid, they should be dismissed as defendants from this action.

#### Use of Funds Recovered by the Receiver

Paragraph 5 of the Order gives the Receiver broad authority to convert assets and claims

into cash and instructs the Receiver to deposit the funds into a bank account, “pending further order of the Court.” This restriction appears to contemplate judicial approval for any expenditures of monies held by the Receiver. An order of the Court approving the expenditures of Receivership funds for ordinary expenses of litigation as described above would greatly expedite the operation of the Receivership. The Receiver will include a report of financial transactions in his regular reports to the Court and approval will still be sought for major expenditures, such as payments of attorney’s fees and Receiver fees.

### Hiring Counsel

The Order specifically permits the Receiver to employ agents to assist in “carrying out the terms of the Receivership and the orders of this Court, including . . . attorneys.” *Id.* at 4, ¶9. Thus, the Receiver is already authorized to engage outside counsel; the Receiver has not, however, been in a position to represent to counsel that a source of payment is available.

As noted above, Paragraph 5 of the Order requires a further order of the Court before funds can be expended. The Receiver is not proposing to expend these funds at this time to hire counsel, only to inform counsel that these funds have been recovered and are available to pay any fee application that is subsequently approved by the Court. The Receiver seeks to be able to commit to counsel that these funds are available for litigation purposes.

The Receiver notes, however, that the possibility exists that this approach could result in expenditures of legal fees and Receiver fees greater than the amounts ultimately recovered in litigation. The Receiver believes that this strategy will lead to significantly greater recoveries and that this approach will yield the best results for investors, but the Receiver cannot guarantee

such an outcome.

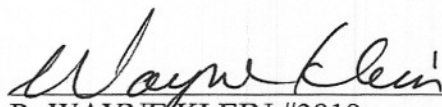
### **REQUESTED ACTION BY THE COURT**

The Receiver asks the Court to enter an order with the following elements:

1. Approve the proposed settlement agreements between the Receiver and Bary Jones, Kelly Cook, Richard C. Young and David A. Young;
2. Authorize the Receiver to finalize future settlement agreements without submitting them to the Court for review and approval;
3. Dismiss Bary Jones, Richard C. Young, and David A. Young from the current action, with prejudice;
4. Dismiss Gerald (Jerry) Millard, Millard Living Trust, Stanford Peterson, and Michael Usher from the current action, without prejudice;
5. Authorize the Receiver to use funds in the Receivership account for routine litigation expenses; and
6. Approve the Receiver's plans to commit the availability of funds in the Receivership bank account as "seed money" for litigation seeking recoveries from other persons.

A proposed order is attached.

Respectfully submitted this 8<sup>TH</sup> day of September, 2009.



R. WAYNE KLEIN #3819

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



## CERTIFICATE OF SERVICE

I hereby certify that on the 8<sup>th</sup> day of September, 2009, true copies of the foregoing Receiver's Motion to Approve Settlements and Proposed Order were mailed to:

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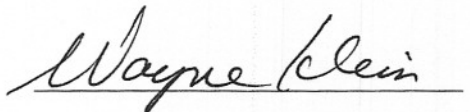
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STATE OF UTAH

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

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Plaintiff,

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Defendants.

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[PROPOSED]

**ORDER APPROVING SETTLEMENT  
AGREEMENTS, DISMISSING  
DEFENDANTS, AND APPROVING  
EXPENDITURE OF FUNDS**

Case No. 080922273

Judge: Denise P. Lindberg

This cause came to be heard before this Court on the Receiver's September 8, 2009

Motion to Approve Settlement Agreements, Dismiss Defendants, and Approve Expenditures of

Funds. The Court having considered the Receiver's motion and memorandum and the record in the case,

IT IS HEREBY ORDERED that the Receiver's motion is granted. Accordingly, it is ordered that:

1. The settlement agreements between the Receiver and Bary Jones, Kelly Cook, Richard C. Young, and David A. Young are approved.
2. The Receiver is hereby authorized to enter into future settlements that he deems appropriate without prior approval of or notice to the Court;
3. Bary Jones, Richard C. Young, and David A. Young are dismissed from the current action, with prejudice;
4. Gerald (Jerry) Millard, Millard Living Trust, Stanford Peterson, and Michael Usher are dismissed from the current action, without prejudice to refile;
5. The Receiver is authorized to use funds in the Receivership account for routine litigation expenses; and
6. The Receiver is authorized to commit the availability of funds in the Receivership bank account as "seed money" for litigation seeking recoveries from other persons.

DATED this \_\_\_\_ day of September, 2009.

BY THE COURT:

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Denise P. Lindberg  
Third District Court Judge