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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

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

Plaintiff,

vs.

FFCF INVESTORS, L.L.C., a Utah limited liability company; ASCENDUS CAPITAL MANAGEMENT, L.L.C., a Utah limited liability company; SMITH HOLDINGS, LLC; RICHARD T. SMITH, an individual; ROGER E. TAYLOR, an individual, and John Does I through X,

Defendants.

VERIFIED COMPLAINT

(Jury Demanded)

Civil No.080922273

Judge Lindberg

Plaintiff A. David Barnes, M.D., P.C., alleges as follows:

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff A. David Barnes, M.D., P.C. (“Plaintiff” or “Dr. Barnes”) is a resident of Salt Lake County, State of Utah.

2. Defendant FFCF Investors, L.L.C. (“FFCF”) is a defunct Utah limited liability company with its former principal place of business at 222 E. South Temple, Salt Lake City, Utah 84111.

3. Defendant Ascendus Capital Management, L.L.C. (“Ascendus”) is a Utah limited liability company with its former principal place of business at 222 E. South Temple, Salt Lake City, Utah 84111. Ascendus has recently moved its business address to defendant Roger E. Taylor’s residence in Santa Clara, Utah.

4. Defendant Smith Holdings, LLC (“Smith Holdings”) is a Utah limited liability company located at defendant Richard T. Smith’s residence at 443 N. 750 E., Orem, Utah County, Utah, 84097.

5. Defendant Richard T. Smith (“Smith”) is an individual who also resides at 443 N. 750 E., Orem, Utah County, Utah, 84097, and was at all relevant times an officer or manager of Ascendus, FFCF, and Smith Holdings.

6. Defendant Roger E. Taylor (“Taylor”) is an individual who currently resides at 1360 Summerwood Circle, Santa Clara, Washington County, Utah, 84765, and is and was at all relevant times an officer (the manager) of Ascendus and FFCF.

7. Defendant John Does I-V are individuals who have aided and abetted Smith and Taylor in their illegal acts as set forth in this Verified Complaint.

8. Defendant John Does VI-X are members of FFCF or other insiders of the defendants who received funds that belonged to the FFCF account of Dr. Barnes.

9. Subject matter jurisdiction is properly vested in this Court pursuant to Utah Code § 78A-5-102.

10. Venue is proper in this Court under Utah Code § 78B-3-307 where Salt Lake County is the principal place of business of defendant FFCF.

ALLEGATIONS APPLICABLE TO ALL CLAIMS

11. In March, 2006, Dr. Barnes was introduced to Smith in Salt Lake County, Utah, for the purpose of investing in FFCF and Ascendus. Smith falsely represented to Dr. Barnes that other members of FFCF and Ascendus had annual returns of 15-30%; that Dr. Barnes would receive that same rate of return if he invested; and that his money would be invested by FFCF or Ascendus in the Franklin Forbes Composite Fund, which also was know as the “LBS Fund.”

12. Smith made these representations to Dr. Barnes knowing they were false, for the purpose of inducing Dr. Barnes to give him money. Dr. Barnes reasonably relied on Smith’s representations and was induced to give Smith a check for \$300,000.00 payable to FFCF.

13. Upon information and belief, Dr. Barnes’ money was never invested in the LBS Fund by the defendants.

14. Quarterly statements were not regularly sent out by any of the defendants to Dr. Barnes.

15. A quarterly statement Dr. Barnes received from FFCF in April 2008 (copy attached hereto as Exh. A), stated that his account balance as of March 31, 2008, with accrued interest, was 353,351.79. That statement falsely stated that it had been prepared by “Hans B. Andersen CPA.”

16. In April 2008, Dr. Barnes requested from Smith that the \$53,000 increase of his investment be paid to Dr. Barnes. On or about July 2, 2008, Smith hand-delivered a check for \$53,000 to Dr. Barnes from an account of Ascendus.

17. On or about July 11, 2008, the aforementioned Ascendus check was returned by the bank due to insufficient funds (a true copy of that check and return notice is attached hereto as Exh. B).

18. Shortly thereafter, on or about July 17, 2008, Taylor sent a letter to Dr. Barnes and other FFCF investors (copy at Exh. C hereto, incorporated herein by this reference), which letter included, among others, the following statements:

- A. That Smith had not invested all the members' funds as promised, but that Smith had distributed money to some members "in excess of what they really owned" and that FFCF "presently has very little money;"
- B. That Smith had "attempted suicide" and "is presently institutionalized";
- C. That Taylor was assuming the responsibility to investigate the irregularities and misappropriation of FFCF member funds by Smith, claiming that he is "the only one in the position to step forward and complete the investigation and reconcile all of the accounts."
- D. That Taylor has "hired experienced counsel from Los Angeles to assist in the investigation;"
- E. That Smith's wife "allowed [Taylor] access to all of the [FFCF] records to the extent they exist."

19. On or about August 8, 2008, Smith wrote a letter to the FFCF members admitting to misdeeds and mismanagement of FFCF, including his paying some members with funds received from other members. (A true copy of Smith's letter is attached hereto as Exh. D, and is incorporated herein by this reference).

20. Smith's letter divulged that Taylor had played a role with FFCF "in finding a good safe place for your money. He did that in LBS." Smith also claimed that "at first [Taylor] thought it was fine [for Taylor to be named as manager of FFCF], 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 [FFCF]." Smith admitted that Taylor is his "dear friend from High School" and that Smith "reported and talked with [Taylor] daily on Ascendus" and that Smith "was in charge of the accounting for Ascendus and [FFCF]." Smith admitted to falsifying records, and claimed that he had deceived Taylor along with the FFCF investors, and he asked Taylor to "please try to fix my mess for everyone's sake."

21. By letter and e-mail dated August 21, 2008 (copy at Exh. E hereto), Dr. Barnes, through his counsel and as a member of FFCF, invoked his inspection rights under Utah Code section 48-2c-113 and demanded that Taylor make available FFCF records for inspection and copying.

22. By letter dated August 29, 2008 (copy at Exh. F hereto, and incorporated herein by this reference), Taylor's California lawyer, James J. Warner, advised Dr. Barnes and other FFCF members, among other items, that:

- A. Taylor hired Mr. Warner and his firm “concerning the issues that relate to FFCF Investors, LLC”;
- B. Taylor “has never been a member or manager of FFCF”;
- C. Taylor was the manager of Ascendus, with which many of the current FFCF members had been involved;
- D. Smith has been a friend of Taylor since high school and a business associate of his for many years;
- E. Taylor “has taken it upon himself to investigate the current situation” and he proposes that “members elect Mr. Taylor as manager of FFCF giving him authority to recoup overpayments from those members who were overpaid.”

23. By letter dated September 24, 2008 (copy at Exh. G hereto, and incorporated herein by this reference), Taylor’s counsel stated to Dr. Barnes and other FFCF members, among other things:

- A. That Taylor’s lawyer has certain FFCF documents;
- B. That Smith used bank accounts of other entities in connection with FFCF, including accounts of Ascendus and of Smith Holdings;
- C. That \$8,027,500.00 of investor funds was wired into the FFCF account at LBS, and that “[m]ost of those funds were later wired out to a very few investors who received substantial overpayment of their principle [sic].”

24. Despite repeated further requests to Taylor and his California counsel to produce FFCF records to Dr. Barnes, and to identify those investors who were overpaid, no such records have been produced by Taylor or by his counsel, other than an incomplete FFCF member address list. (See letter dated Sept. 26, 2008 from Dr. Barnes' counsel, copy at Exh. H hereto).

25. Taylor worked with Smith in the management of FFCF. Due to that involvement, and his involvement with Smith and Ascendus, and his wrongful conduct as alleged herein, Taylor has a conflict of interest in being the manager of FFCF and Ascendus.

26. Other FFCF investors who have lost money with FFCF and Ascendus agree that Taylor should not continue to be involved in managing FFCF or Ascendus, and confirm that Taylor personally participated along with Smith in representations regarding FFCF and regarding the status of their investment. (See e.g. letter dated October 2, 2008 from John L. Harmer of The Lighted Candle Society to Dr. Barnes and other FFCF members, copy at Exh. I hereto).

FIRST CAUSE OF ACTION

(Alter Ego—Against FFCF, Ascendus, Smith, and Smith Holdings)

27. Plaintiff incorporates by this reference the allegations set forth in paragraphs 1 through 27 above as if fully set forth herein.

28. The defendants have commingled funds of FFCF, Ascendus, Smith Holdings; have failed to properly manage FFCF and Ascendus, which are related entities; have failed to

observe other business formalities; have been inadequately capitalized; and have failed to maintain company records.

29. Upon information and belief, Smith's personal funds were commingled with the funds of FFCF.

30. There is a unity of interest and ownership between FFCF, Ascendus, and Smith Holdings such that the separate business entity existence of those entities should no longer be recognized, and they are instead alter egos of each other, and of Smith.

31. To observe the separate limited liability company form of FFCF, Ascendus, and Smith Holdings, and of Smith as an individual, would sanction the fraud and wrongdoing of the defendants, promote injustice, and result in inequity.

32. Upon information and belief, FFCF, Ascendus, Smith, and Smith Holdings, have conducted their business as if they were one.

33. Smith, FFCF, Ascendus, and Smith Holdings, should be held jointly and severally liable for any and all of the liabilities of each of them to Dr. Barnes as alleged in this action.

SECOND CAUSE OF ACTION

(Inspection of records—Utah Code Ann. § 48-2c-113,- 115—Against all Defendants)

34. Plaintiff incorporates by this reference the allegations set forth in paragraph 1 through 34 above as if fully set forth herein.

35. The Defendants have refused to allow Dr. Barnes to inspect or copy the records of FFCF to which he entitled under Utah Code Ann. § 48-2c-113.

36. Pursuant to Utah Code Ann. § 48-2c-115, Dr. Barnes is entitled to have the Court order an inspection and copying of the records of FF CF, including its alter ego entities Ascendus and Smith Holdings, and to have this claim considered by the Court on an expedited basis.

37. Pursuant to Utah Code Ann. § 48-2c-115, Dr. Barnes is also entitled to recover his costs from the defendants, including his reasonable attorneys' fees, incurred in connection with an inspection order, and for damages incurred as a result of the denial to allow inspection and copying, which amount shall be determined at trial.

THIRD CAUSE OF ACTION
(Fraud—Against Smith, FF CF, and Ascendus)

38. Plaintiff incorporates by this reference the allegations contained in paragraphs 1 through 37 above, as if fully set forth herein.

39. Smith, FF CF, and Ascendus knowingly made false representations to Dr. Barnes that the members of FF CF and Ascendus were making a 15-30% annual return on their money, that Dr. Barnes could expect the same, and that FF CF was organized for the principal purpose of investing in the LBS Fund and that his money would be invested in the LBS Fund.

40. Smith, FF CF, and Ascendus made these false representations for the purpose of inducing Dr. Barnes to give his money to FF CF.

41. Dr. Barnes was ignorant of the falsity of the representations that Smith, FF CF, and Ascendus had made, and he reasonably relied on those representations and was thereby induced to give FF CF \$300,000.00.

42. As a result of the fraud of Smith, FFCF and Ascendus, Dr. Barnes has been damaged in an amount to be determined at trial, but not less than \$300,000.00, together with interest, and he is also entitled to recover from these defendants his costs and reasonable attorneys' fees in connection with this action.

FOURTH CAUSE OF ACTION

(Conversion– Against Smith, FFCF, Ascendus, and Smith Holdings)

43. Plaintiff incorporates by this reference the allegations set forth in paragraph 1 through 42 above as if fully set forth herein.

44. Defendants Smith and FFCF have intentionally misappropriated to themselves, their alter egos, including but not limited to Ascendus and Smith Holdings, and to others, \$300,000.00 that belonged to Dr. Barnes, without permission or authority from Dr. Barnes, and without legal justification.

45. Dr. Barnes is entitled to damages against Smith, FFCF, Ascendus, and Smith Holdings in the amount of \$300,000.00, together with interest, and Dr. Barnes is also entitled to recover his costs and reasonable attorneys' fees in connection with this action.

FIFTH CAUSE OF ACTION

(Fraudulent Transfer – Utah Code Ann. § 25-6-1 *et seq.* and common law--
Against Smith, Taylor, FFCF, Ascendus, and Smith Holdings)

46. Plaintiff incorporates by this reference the allegations set forth in paragraphs 1 through 45 above as if fully set forth herein.

47. The distribution of Dr. Barnes' money from FFCF to others was made by the defendants with actual intent to hinder, delay, or defraud Dr. Barnes.

48. Dr. Barnes' money was distributed to insiders of FFCF.

49. The defendants or others who received Dr. Barnes' money (\$300,000) did not provide a reasonably equivalent value in exchange for that money.

50. Upon information and belief, FFCF is insolvent and the defendants had reasonable cause to believe that FFCF was insolvent when they distributed Dr. Barnes' money.

51. At the time of the distribution, the defendants were aware of FFCF's obligations to Dr. Barnes.

52. Pursuant to the Utah Uniform Fraudulent Transfer Act (Utah Code Ann. § 25-6-1 *et seq.*), the distribution of Dr. Barnes's money was a fraudulent transfer.

53. Dr. Barnes is entitled to the remedies available under the common law and the Utah Uniform Fraudulent Transfer Act, including, but not limited to, orders and Judgment against the defendants as follows: an order avoiding payments made by defendants to insiders of defendants, including to other FFCF members, from funds belonging to Dr. Barnes; an attachment against the money involved in the payments and against any subsequent distribution or conversion of funds or other forms of property; and such other relief as is just and proper under the circumstances.

SIXTH CAUSE OF ACTION

(Breach of Fiduciary Duty—Against Defendants Smith and Taylor)

54. Plaintiff incorporates by this reference the allegations set forth in paragraphs 1 through 53 above as if fully set forth herein.

55. Defendants Smith and Taylor, as officers and managers of FFCF, had a fiduciary duty to Dr. Barnes, which included, but were not limited to, a fiduciary duty of care to honestly and accurately account for the money that Dr. Barnes had invested with FFCF, to invest Dr. Barnes' funds consistent with the stated purpose of FFCF, and a fiduciary duty of loyalty to not misappropriate Dr. Barnes' funds or to allow others to do so.

56. Defendants Smith and Taylor breached their fiduciary duties to Dr. Barnes by engaging in the acts set forth in this Verified Complaint, including but not limited to not investing Dr. Barnes' funds as stated; by not providing any regular accounting for his funds; by misappropriating his funds to insiders or other entities; by not making FFCF records available for Dr. Barnes' inspection and review; by withholding and concealing information from Dr. Barnes about what happened to his funds; by falsely representing to Dr. Barnes the status of his investment; and by failing to follow business formalities and failing to exercise reasonable prudent care in the management of FFCF and to safeguard its funds.

57. As a result of Defendants' breaches of their duties to Dr. Barnes, Dr. Barnes has been damaged in an amount to be determined at trial, but not less than \$300,000.00, together with interest, plus Dr. Barnes' costs and reasonable attorneys' fees.

SEVENTH CAUSE OF ACTION
(Punitive Damages—Against all Defendants)

58. Plaintiff incorporates by this reference the allegations set forth in paragraphs 1 through 57 above as if fully set forth herein.

59. Defendants' conduct as alleged herein was willful, intentional, and was done with a conscious disregard of Dr. Barnes' rights, and in violation of defendants' fiduciary duties, and defendants are therefore liable to Dr. Barnes for punitive damages to punish defendants for, and deter defendants from, such conduct, in an amount to be determined at trial.

EIGHTH CAUSE OF ACTION
(Dissolution—Utah Code Ann. § 48-2c-1210)

60. Plaintiff incorporates by this reference the allegations set forth in paragraphs 1 through 59 above as if fully set forth herein.

61. As alleged above, those in control of FFCF, Ascendus, and Smith Holdings, have acted, are acting, and/or will act in a manner that is illegal, oppressive, and/or fraudulent.

62. Smith's decision to overpay certain members of FFCF and Ascendus is a misapplication of the assets of those entities.

63. Pursuant to either Utah Code Ann. § 48-2c-1210(2)(b) or (d), Dr. Barnes is entitled to have FFCF, Ascendus, and Smith Holdings dissolved in this proceeding.

NINTH CAUSE OF ACTION
(Appointment of a Receiver—Utah Code Ann. § 48-2c-1212, Utah Rule of Civil Procedure 66)

64. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through 63 above as if fully set forth herein.

65. Dr. Barnes, as a member of FFCF, and of its alter egos Ascendus and Smith Holdings, has instituted a judicial proceeding for dissolution of FFCF, Ascendus, and Smith Holdings, and requests that a receiver be appointed to handle the business and affairs of those entities FFCF both prior to and after dissolution.

66. FFCF and Ascendus are insolvent or are in imminent danger of insolvency.

67. Pursuant to Utah Code Ann. § 48-2c-1212(1) and Utah R. Civ. P. 66(a)(4), Dr. Barnes is entitled to the appointment of a receiver, prior to entry of a decree of dissolution, to manage the affairs and business of FFCF, Ascendus, and Smith Holdings, and to wind up and liquidate the business and affairs of those entities after dissolution.

TENTH CAUSE OF ACTION

(Injunctive Relief–Utah Code Ann. § 48-2c-1211–Against all Defendants)

68. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through 67 above as if fully set forth herein.

69. Dr. Barnes, as a member of FFCF, has instituted a judicial proceeding for dissolution of FFCF.

70. Taylor, as a defendant in this action, should be enjoined from further action as manager of FFCF or Ascendus, including any efforts to recover the missing funds of FFCF members.

71. Any and all materials and documents relating to FFCF, Ascendus and Smith Holdings in the possession of Taylor, Smith, and their agents and attorneys, should be turned over to Dr. Barnes and to the Court appointed receiver.

72. Pursuant to Utah Code Ann. § 48-2c-1211(3)(a), Dr. Barnes is entitled to this injunctive relief in this proceeding brought to dissolve FFCF, Ascendus, and Smith Holdings.

PRAYER FOR RELIEF

WHEREFORE, plaintiff A. David Barnes, M.D., P.C., hereby demands judgment in his favor, and against Defendants, as follows:

A. For an order providing for the inspection and copying of all business records of FFCF, Ascendus, and Smith Holdings, and at the defendants' expense;

B. For all amounts of damages found to be due and owing to Dr. Barnes after trial, but not less than \$300,000.00;

C. For all of Dr. Barnes' costs and reasonable attorneys fees and expenses in connection with this action as may be allowed at law or in equity;

D. For pre-judgement and post-judgment interest to the fullest extent allowed by law or in equity;

E. For remedies available to Dr. Barnes under the common law and Utah Uniform Fraudulent Transfer Act, including but not limited to orders and Judgments against the defendants as follows: an order avoiding any payments made by FFCF to members in excess to which they were entitled; and the appointment of a receiver to recoup and appropriately distribute FFCF investor funds;

F. For punitive damages in an amount to be determined at trial;

G. For dissolution of FFCF, Ascendus, and Smith Holdings, and for the appointment of a receiver for those entities;

H. For injunctive relief enjoining defendants from taking any further action relating to FFCF, Ascendus, and Smith Holdings other than turning over the records of those entities to Dr. Barnes and to the Court appointed receiver;

I. For such other and further relief as the Court deems just, equitable, or proper.

JURY DEMAND

Plaintiff hereby demands a trial by jury on all issues so triable.

DATED: October _14__, 2008

CALLISTER NEBEKER & McCULLOUGH

By:/s/ _____
James D. Gilson
Attorneys for Plaintiff

Plaintiff's Address:
4822 Holladay Blvd #170
Salt Lake City UT 84117

VERIFICATION

I, A. David Barnes, M.D., being duly sworn, state (1) that I am the President of the plaintiff A. David Barnes, M.D., P.C., (2) that I am authorized to make this Verification on behalf of A. David Barnes, M.D., P.C.; (3) that I am familiar with business and records of A. David Barnes, M.D., P.C.; (4) that the facts set forth in the foregoing VERIFIED COMPLAINT are true to the best of my knowledge, information, and belief.

DATED this 15 day of October, 2008.

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

_____/s/_____
By: A. David Barnes, M.D.
Its: President

SUBSCRIBED AND SWORN to before me this 15 day of October, 2008.

_____/s/_____
Notary Signature and Seal