

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES SECURITIES
AND EXCHANGE COMMISSION,

Plaintiff,

v.

KENNETH R. PAYNE, JOHANN M. SMITH,
DANIEL G. DANKER, CONSTANCE
BROOKS-KIEFER, HEARTLAND
FINANCIAL SERVICES, INC., and,
JMS INVESTMENT GROUP, LLC,

Defendants.

Civil Action No. IP00-1265 C

Judge John D. Tinder

MEMORANDUM IN SUPPORT OF AGNES N. CONDER'S
MOTION FOR RELIEF FROM STAY OF OTHER PROCEEDINGS

I. Introduction

Agnes N. Conder, as Trustee for the Conder Living Trust ("Conder"), has moved this Court for an Order modifying or clarifying the stay of other proceedings entered in this case, to permit Conder to continue prosecuting all of the claims raised in her action against Union Planters Bank, N.A. ("UPB" or "Union Planters"), in the cause entitled *Agnes N. Conder, as Trustee for the Conder Living Trust v. Union Planters Bank N.A.*, U.S. District Court, Southern District of Indiana, Case No. IP-01-0086-C-T/K ("Conder Action"). The Motion for Relief from Stay ("Motion for Relief") should be granted, because:

- Under the framework of the Uniform Commercial Code ("UCC"), neither the checks written by Conder, nor the funds held in Conder's account from which the checks were drawn, were the property of Heartland when Union Planters wrongfully accepted the unendorsed checks for deposit into the Lincoln Fidelity account. The claims of Conder and other Heartland victims against Union Planters therefore existed prior to the payment of any funds into an account held by Heartland.

174

- The claims of Conder and other Heartland victims to the checks or their proceeds existed when Union Planters accepted the unendorsed checks for deposit. Thus, when Union Planters paid money over to Heartland without becoming a holder in due course of the checks, it did so at its own peril, remaining personally liable for claims that existed when the checks were accepted by Union Planters.
- Conder and other Heartland victims whose unendorsed checks were accepted by Union Planters now have a right to assert their claims in full against Union Planters -- *to be paid out of Union Planters' own funds* — despite the payment of funds to Heartland in reliance on the checks. Although Union Planters may now have a claim under the UCC against Heartland assets, *Conder and the class she seeks to represent are not asserting claims against Heartland assets in the Conder Action, and any judgment on those claims could neither add to nor deplete any assets of the Heartland Receivership.*
- Conder's statutory claims under the UCC belong only to Conder and the other "makers" of the subject checks. Neither the Heartland entities nor the Receiver have standing to bring an action against Union Planters under these UCC rules. It is the makers of the checks that were defrauded into writing them, and who thus have a claim to the checks or their proceeds.¹
- The equitable and statutory powers of the Receiver do not extend to the prosecution of the personal claims of Conder and other makers of the checks; the Receiver has standing only to assert claims on behalf of the receivership entities.
- Even if standing existed, the Receiver is precluded from pursuing the UCC causes of action brought by Conder, because Heartland is *in pari delicto* and actually received the funds represented by the checks; indeed, this Court recently held that Heartland could not maintain an action against broker dealers because it had "unclean hands."

¹ Union Planters must now answer to these claims because when it accepted and deposited the checks, it failed to take the relatively simple measures available under the UCC to ensure that it had the protection of holder in due course status. Union Planters did not take the checks subject to any claims of Heartland, because Heartland never had any such claim to the checks or their proceeds. Union Planters' failure to become a holder in due course did not *create* a claim, it rendered Union Planters subject to existing claims. Unlike Conder and other defrauded persons, Heartland does not have any such predicate claims. The *non*-holder in due course status of Union Planters is therefore of no consequence to Heartland and its Receiver, and they have no standing to bring the causes of action asserted by Conder.

For these reasons, the claims brought by Conder and other Heartland victims against Union Planters will not interfere with any assets or claims of the Heartland Receiver, and the Court should clarify or modify the stay of proceedings in this case as necessary to allow the case against Union Planters to go forward.

II. Procedural Background

A. The Heartland Ponzi Scheme.

From its inception, Heartland was a massive Ponzi scheme. The scheme, perpetrated by Heartland's principals, employed the fraudulent solicitation of investments and the payment of fabricated dividends from a "slush fund." The checks accepted for deposit by Union Planters were solicited by persons and entities affiliated with Heartland, who recommended securities and/or other investments to Heartland customers and offered the services of Heartland as a purported means of investing in such securities and other investments. *See*, First Amended Class Action Complaint, attached hereto as Exhibit "A" ("Amended Complaint"), ¶ 20. Heartland regularly targeted senior citizens and/or wealthy individuals for solicitation of investments. Victims were promised a high rate of return on their investments. Amended Complaint, ¶¶ 22-23. Of course, the money paid by Conder and others to Heartland was never intended by its recipients to be invested as promised; every check received by Heartland was therefore procured by fraud.

Conder and other Heartland victims wrote checks payable to persons or entities affiliated with Heartland, for the sole intended purpose of effectuating the purchase of securities or other investments, in amounts totaling millions of dollars. Amended Complaint, ¶ 19. These checks were made payable to numerous persons or entities affiliated

with Heartland or to specific accounts.² Conder's checks totaled more than \$350,000.00. Amended Complaint, ¶ 32. Despite their express purpose, often reflected on the face of the checks, only a very small portion of the proceeds from the checks written by the Plaintiff and Class were used by Heartland to purchase securities or other investments as intended. Amended Complaint, ¶ 24. Instead, most investor funds were spent on the lavish lifestyles of Heartland's principals, or were wrongfully diverted to other schemes and purposes. Amended Complaint, ¶ 24. In order to induce the Plaintiff and Class members to continue investing, and to deflect inquiries and prevent suspicion, some funds from the commingled proceeds of the Checks were used to pay false dividends, and the "investors" were fraudulently told that their "investments" were earning exemplary returns. Amended Complaint, ¶ 24-25.

B. Union Planters' Acceptance and Deposit of the Checks.

At the request of Lincoln Fidelity, an entity created by the Heartland principals, Union Planters Bank opened an account entitled "Lincoln Fidelity Escrow Account" ("Lincoln Account"). Amended Complaint, ¶ 28. Lincoln Fidelity was Union Planters' customer. Amended Complaint, ¶ 28. To perpetuate the Ponzi scheme, the checks solicited by Heartland were tendered to Union Planters, usually by Johann Smith or Constance Brooks-Kiefer, for deposit into the Lincoln Account without endorsements matching the

²The checks were written to entities including but not limited to: "Johann M. Smith," "Johann M. Smith, Escrow Agent," "Johann M. Smith, Escrow Account," "JMS Escrow Agent," "Kenneth Payne," "JMS Investment Group," "BMC Investment Group, LLC," "BMC Investment Group, LLC, c/o Johann Smith, Escrow Agent," "Heartland Group," "JMS," "JMS Escrow Account," "Atlas Income Fund, LLC," or "Heartland Financial." No checks in question were written to Lincoln Fidelity or the Lincoln Fidelity account. Amended Complaint, ¶ 21.

payee of the checks. Amended Complaint, ¶¶ 27-28. Instead, the checks were simply not endorsed at all, or included a purported endorsement stating “For Deposit Only, UP # 0001266190,” “Pay to the Order of Union Planters Bank, For Deposit Only, Lincoln Fidelity Escrow Account, 074014213 0001266190,” or something substantially similar. Amended Complaint, ¶ 27.

Union Planters accepted the unendorsed checks for deposit into the Lincoln Account — the account of an entity other than the payee of the checks — despite the fact that the vast majority of the checks were expressly made payable to the payee as an escrow agent or were made payable to an escrow account other than the Lincoln Account. Amended Complaint, ¶ 28. The Lincoln Account was then used as the “slush fund” from which Heartland’s scheme was perpetrated. Checks totaling more than \$23 million were accepted by Union Planters in this fashion.

C. The SEC Action, Appointment of Receiver, and Entry of Stay.

On August 10, 2000, the SEC initiated this action by filing a Complaint for Ex Parte Temporary Restraining Order, Orders of Preliminary and Permanent Injunction and Other Equitable Relief against Heartland Financial Services, Inc. and related entities. On August 21, 2000, the Court entered an Agreed Order Appointing Receiver for Heartland Financial Services, Inc., and an Agreed Order Appointing Receiver for JMS Investment Group, LLC (“JMS”).

The Agreed Orders stay all investors from “[c]ommencing, prosecuting, continuing or enforcing any suit or proceeding” against Heartland or JMS property, and prohibit investors from “[d]oing any act to interfere with the taking control, possession, or management, by the Receiver,” of Heartland or JMS property and “assets and assets owned,

controlled, or in the possession of the Receiver" For purposes of simplicity, the stay provisions of the two Agreed Orders are referred to herein collectively as the "Stay."

D. The Conder Action.

On December 20, 2000, Conder, on behalf of herself and all others similarly situated, initiated the Conder Action against UPB based upon its acceptance of more than \$23 million in unendorsed checks written to Heartland, JMS and other related entities other than "Lincoln Fidelity" for deposit in the Lincoln Fidelity account. On March 26, 2001, Conder filed her First Amended Class Action Complaint against UPB. The Amended Complaint states claims under four Counts:

- Count I alleges that under IND. CODE § 26-1-3.1-302(a), part of Indiana's adoption of the Uniform Commercial Code ("UCC"), UPB failed to become a holder in due course when it accepted the checks without endorsements and deposited them into an account other than the account of the payee;
- Count II alleges that under IND. CODE § 26-1-3.1-307(a)(1), UPB failed to become a holder in due course when it accepted the checks of Conder and other class members for deposit into the Lincoln Fidelity account, because Union Planters was charged with knowledge of a breach of fiduciary duty in that the checks were payable to Johann Smith as escrow agent, or to a specific escrow account, and not to the non-fiduciary account of Lincoln Fidelity.
- Count III alleges that UPB is liable for common law negligence for its acceptance of the checks of Conder and other class members despite the existence of "danger signals" readily apparent on the face of the checks and in the deposit transaction that demanded further investigation by Union

Planters.

- Count IV alleges that UPB failed to become a holder in due course when it accepted the checks of Conder and other class members because it had knowledge at that time sufficient to confer notice that the checks were subject to claims resulting from Heartland's fraud.

Under the UCC claims, Union Planters's acceptance of the checks was subject to the property rights and claims of Conder and other class members, because Union Planters never obtained "holder in due course" status. IND. CODE § 26-1-3.1-306. Under the negligence claim, Union Planters is answerable to Conder and the class for damages.

E. The Dismissal of Conder's UCC Claims for Lack of Standing.

On April 25, 2001, UPB filed a Motion to Dismiss First Amended Class Action Complaint for Lack of Standing and Subject Matter Jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), arguing that the Stay and Receivership in this case prevented Conder from prosecuting her UCC claims in the Conder Action. On September 27, 2002, the Court in the Conder Action tendered its Entry on Motions to Dismiss ("Entry"), in which the Court dismissed Conder's UCC claims (Counts I, II and IV) for lack of standing.³

According to its Entry, this Court's dismissal of Conder's UCC claims for lack of standing is premised on the Stay in this case. In relevant part, this Court concluded:

... If the right to the proceeds of the Plaintiff's checks belongs to Heartland, then Plaintiff is precluded from bringing a suit against UPB to recover them.

It is clear that the proceeds of Plaintiff's checks are an asset of

³The Court's Entry also denied Union Planters' Rule 12(b)(6) motion to dismiss Conder's negligence claim (Count III), but in light of the standing dismissal did not reach the question of whether Conder's UCC Counts stated a claim for relief.

Heartland. ... Because this court has stayed all investors from doing anything that would interfere with the Receiver's control of Heartland assets, Plaintiff has no standing to bring her UCC claims.

Entry, pp. 12-13. Thus, the standing of Conder to pursue her UCC claims on behalf of the victims of Heartland's Ponzi scheme rests upon the scope of the Stay entered in this case, a matter within the jurisdiction of the Court in this case.

Conder requests that this Court: (i) determine that the UCC claims brought by Conder against Union Planters do not seek the recovery of assets of falling within the scope of the Receivership or the Stay; or (ii) modify the Stay in light of the facts and circumstances of this case to permit Conder to proceed with her UCC claims against Union Planters in the Conder Action. As discussed herein, the Conder Action rests upon sound and long-established principles of commercial law and a careful allocation of risks undertaken by the UCC. The relief sought by Conder is the result contemplated by the drafters of the UCC. It is also the best and last chance to recover anything more than pennies on the dollar for many of the victims of Heartland's fraud.

III. Conder's Request for Relief From the Stay is Supported by Law and the Unique Facts of this Case.

A. Conder's UCC Claims Do Not Seek Property of the Receivership.

The Court's partial dismissal of the Conder Action is premised upon the conclusion that the UCC claims in her Amended Complaint seek the return of property that falls within the Heartland Receivership estate or are themselves claims held by the Receiver. This conclusion is understandable, but mistaken.

Conder's claims to the checks or their proceeds existed before Union Planters accepted the checks for deposit and before any property interest in the checks or their

proceeds passed to Heartland. Union Planters accepted the checks subject to Conder's existing claims because it failed to attain the status of a holder in due course. When Union Planters in turn paid funds to Heartland in reliance upon the checks, it did so at the risk that it would be liable if someone later asserted a claim to the checks or their proceeds – *this is the risk a bank takes under IND. CODE § 26-1-3.1-306 when it conveys money on an instrument without becoming a holder in due course.*

The UCC claims of Conder and other victims are therefore against Union Planters, to be paid by Union Planters with its own funds, regardless of the existence or disposition of funds represented by the checks. The claims are not against Heartland or Heartland property, and are therefore not subject to the Stay. This fundamental aspect of a claim under Section 3-306 of the UCC is illustrated by the cases in which those claims are enforced:

- In *Douglas v. Wones*, 458 N.E.2d 514 (Ill. Ct. App. 1983), the Illinois Court of Appeals found that the drawer of a check stated a cause of action against banks who failed to become holders in due course. The court held that if an “instrument is taken by a holder in due course of business, then the holder takes the instrument free of all claims against it. The language ‘all claims’ under the Uniform Commercial Code includes not only claims of legal title, but also all liens, equities, or claims of any other kind.” The court went on:

Unless one has rights of a holder in due course he takes the instrument subject to all valid claims and defenses to it on the part of any party. ... The pleadings also contained an allegation that plaintiff ... had an immediate right to the property based upon the fact that the property was fraudulently obtained from him. The perpetrator of the fraud was convicted of deceptive practices and theft by

deception on the basis of his fraudulent inducement.

Douglas, 458 N.E.2d at 519-20 (emphasis added; citations omitted). The court therefore permitted the action under Section 3-306.

- In *Travelers Cas. & Sur. Co. of Am. v. Wells Fargo Bank, N.A.*, 205 F.Supp.2d 920 (N.D. Ill. 2002), the court held that plaintiff had stated a cause of action under 3-306 of the Illinois Commercial Code, where it asserted a claim to a check or its proceeds and that the defendant bank had paid the checks without becoming holder in due course. Significantly, the funds from the original checks were not available from the wrongdoer.
- In *ALG, Inc. v. Estate of Eldred*, 35 P.3d 931 (Kan. Ct. App. 2001), the court held that “[t]he liability of a depository bank in accepting for deposit checks having missing or forged endorsements is adequately covered by the UCC,” citing to UCC §§ 3-306 and 3-307(b)(2)(iii), and collecting cases holding that banks without holder in due course status are subject to claims to the checks or their proceeds.
- In *Any Kind Checks Cashied, Inc. v. Talcott*, 2002 WL 31255509 (Fla. Ct. App., October 9, 2002), the court offered a useful discussion of the purpose of the holder in due course doctrine:

Application of the holder in due course status is the law’s value judgment that certain holders are worthy of protection from certain types of claims. For example, it has been argued that application of the old subjective standard facilitated the transfer of checks in the stream of commerce; arguably one would be “more willing to accept the checks if ... she knows ... she can be a holder in due course of that instrument and take it free of defenses that might have existed between the buyer and the seller in the underlying transaction. WHITE & SUMMERS, § 17-1.

Conversely, one who takes a checks without insisting on becoming a holder in due course does so at their own peril, but the result, as intended, is predictable.

Leading UCC commentators White and Summers have also noted that when a bank pays an altered check or a check bearing a forged indorsement, the aggrieved party is rarely able to recoup her losses from the wrongdoer, who has disappeared or squandered the ill-gotten money. "To utter a truism, when the curtain rises on the last act, the wrongdoer will either be off the scene or insolvent." WHITE & SUMMERS, UNIFORM COMMERCIAL CODE § 18-1, p 207 (4th ed. 1995).

The characterization Conder's claims as seeking property of Heartland is also in conflict with the UCC framework governing the status and effect of checks at various stages in a transaction. For example, under IND. CODE § 26-1-3.1-310, which governs the effect of an instrument upon the underlying obligation, delivery of a check is not a satisfaction of the debt:

[I]f a note or an uncertified check is taken for an obligation, the obligation is suspended ... and the following rules apply:

(1) in the case of an uncertified check, suspension of the obligation continues until dishonor of the check or until it is paid or certified. Payment or certification of the check results in discharge of the obligation to the extent of the amount of the check.

IND. CODE § 26-1-3.1-310(b)(1). In other words, delivery of a check is not deemed delivery of the funds themselves. The underlying debt is not satisfied until the check is paid, because until then no funds have been delivered. *Indiana Ins. Co. v. Margotte*, 718 N.E.2d 1226, 1229 (Ind. Ct. App. 1999) (debt is extinguished only when check is paid); *Cox v. Hayes*, 18 Ind.App. 220, 47 N.E.844 (1897) ("[t]he general rule is that a check delivered by a debtor to

his creditor does not extinguish the debt for which it is given”); *Born v. Bank*, 123 Ind. 78, 24 N.E.173 (1890) (“as only money is payment when there is no express agreement, there is no sufficient reason for inferring that an order for money, although accepted, is money, or has the same effect as money ... [i]t is, and long has been, settled law that an ordinary check does not constitute payment”).

It follows that title and interest in the funds represented by a check does not pass until the check is paid. “Before presentment, the check vests no title or interest in the payee in the funds on deposit with the bank and is revocable by the drawer, who has legal control of the money to his credit until payment” *Carmichael v. Gen. Elec. Co.*, 476 N.Y.S.2d 606, 608, 102 A.D.2d 838 (1984) (citations omitted). Until paid, a check is merely a promise to pay:

A check is a request of the customer to pay the whole or a portion of such indebtedness to the bearer, or to the order of the payee. Until presented and accepted, it is inchoate; it vests no title or interest, legal or equitable, in the payee to the fund.

* * *

A check in the usual form, unless accepted or certified by the bank on which it is drawn, does not operate as an assignment of the depositor's funds

....

Standard Factors Corp. v. Mfrs. Trust Co., 50 N.Y.S.2d 10, 13-14, 182 Misc. 701, 706 (1944) (citations omitted). *See also, Atty. Gen. of N.Y. v. Continental Life Ins. Co.*, 71 N.Y. 325, 326 (Ct. App. N.Y. 1877) (check is a request of the customer to pay the whole or a portion of such indebtedness to the bearer, or to the order of the payee; until presented and accepted, it is inchoate; it vests no title or interest, legal or equitable, in the payee to the fund).

This principal is expressly stated in the UCC as adopted by Indiana. *See, IND. CODE* § 26-1-3.1-408 (“[a] check or other draft does not of itself operate as an assignment of funds in the hands of the drawee available for its payment ...”). The same rule prevailed under the

common law:

Our conclusion is, that a check in the ordinary form upon the drawer's banker, without words of transfer, and drawn upon no particular designated fund, does not of itself, operate as an appropriation or equitable assignment of a fund in the hands of the drawee, nor does it operate as an assignment of a part of the drawer's chose in action against the drawee.

Harrison v. Wright, et al., 100 Ind. 515, 1885 WL 8693, *13 (1885). See also, *Offutt v. Rucker*, 2 Ind. App. 350, 27 N.E. 589 (1891) (“a check, without words of transfer, does not operate as an equitable assignment *pro tanto* of the funds on deposit in the bank to the credit of the drawer of the check”).

Conder's checks did not convey any property interest to Heartland until they were paid – a step in the process that occurred *after* Union Planters became obligated to pay existing claims against those checks. Conder's UCC claims against Union Planters therefore do not seek the return of Heartland property. This is consistent with the holder in due course rule itself. Holder in due course status protects banks that insist on the well-known indicia of reliability in the instruments they accept, but is not available for a bank that causes a transfer of the drawer's funds without demanding compliance with the basic rules for properly payable checks. Union Planters must satisfy Conder's claims out of its own money because it accepted Conder's checks and paid funds in reliance on those checks without taking the simple steps necessary to become a holder in due course – *all before any interest or title to any funds represented by the checks passed to Heartland.*

B. Conder's UCC Claims Are Not Held by the Receiver.

Not only are the UCC claims of Conder and other victims not *against* Heartland property, they are not themselves property of Heartland or its Receiver. Union Planters'

failure to become a holder in due course did not create a claim in Conder, Heartland or anyone else – it rendered Union Planters’s acceptance of the checks subject to *existing claims*. Counts I, II and IV of Conder’s Amended Complaint seek to assert these *existing claims* to the checks and their proceeds against Union Planters under IND. CODE § 26-1-3.1-306, because Union Planters is not a holder in due course. But each UCC Count depends upon a predicate claim to the checks or their proceeds arising from Heartland’s fraud when soliciting the checks. *See, Douglas, supra*, 458 N.E.2d at 519-20 (plaintiff could bring action under section 3-306 against non-holder in due course because he held claim to the checks on basis that they were fraudulently obtained from him).

Of course, neither Heartland nor its Receiver have the same claims that Conder and other victims have. Heartland was the very party that fraudulently solicited the checks from Conder and others; it cannot have a claim to the checks or their proceeds based upon this fraud. Moreover, Heartland had no claims to the checks or their proceeds – in the sense recognized by the holder in due course doctrine – at the time they were accepted for deposit by Union Planters. Therefore, Union Planters did not accept the checks subject to any claims of Heartland.

Indeed, Heartland could not possibly have any such claims, because it did not suffer a loss from its own fraudulent conduct – it *received* money. Heartland received the funds when Union Planters paid funds into the Lincoln Account in reliance upon the checks in question. Heartland would also be *in pari delicto* with respect to any such claim against Union Planters, because all of the losses in question are traceable to Heartland’s own bad acts. This conclusion was recently confirmed by this Court in the September 30, 2002 Entry

on Motion to Dismiss in the case entitled *James A. Knauer, et al. v. Jonathon Roberts Financial Group, Inc. et al.*, U.S. District Court, S.D. Ind., Civil Action No. IP01-1168-C-T/K, finding that Heartland, through its Receiver was prevented by the doctrine of *in pari delicto* from recovering against certain brokers alleged to have facilitated the Ponzi scheme.

The claims to which Union Planters must answer under Section 3.1-306 are personal to Conder and other members of the class she seeks to represent. The Receiver in this case plainly does not have standing to assert such claims. In *Scholes v. Lehmann*, 56 F.3d 750 (7th Cir. 1995), the Seventh Circuit Court of Appeals reaffirmed the general rule that a receiver is only authorized to bring actions on behalf of his or her charge:

Like a trustee in bankruptcy or for that matter the plaintiff in a derivative suit, *an equity receiver may sue only to redress injuries to the entity in receivership*, corresponding to the debtor in bankruptcy and the corporation of which the plaintiffs are shareholders in the derivative suit.

Scholes, 56 F.3d at 753 (emphasis added). In *Troelstrup v. Index Futures Group, Inc.*, 130 F.3d 1274 (7th Cir. 1997), the Court of Appeals was called upon to apply the holding of *Scholes* to facts closely aligned with those in the case at bar.

Troelstrup was an action by the Commodities Futures Exchange Commission (hereafter "CFTC") against a trader ("Tobin") for violations of the Commodities Exchange Act. Within the CFTC action, the Commission requested the appointment of a receiver for the trader. As with the Receiver appointed in this case for Heartland and JMS, "[t]he assigned task of the receiver (John Troelstrup) was to identify, take possession of, marshal, and administer Tobin's assets, so that they would be available to persons having claims against Tobin, primarily the defrauded investors." *Troelstrup*, 130 F.3d at 1275.

Following his appointment, the receiver filed a negligence action against a registered

futures commission merchant through which fraudulent trades were alleged to have been made by Tobin. The standing issue arose when the receiver for Tobin sought to amend the negligence complaint to add as co-plaintiffs 57 individual investors whose money had been placed in the "Phoenix Pharymol" accounts by the defendant merchant. In other words, the receiver sought to bring the negligence claim against a third party defendant on behalf of the defrauded investors. From a negative judgment, the receiver and investors appealed.

In support of his standing to bring an action on behalf of the defrauded investors, the receiver relied upon *Scholes* for the proposition that a receiver may bring an action against third parties. The Court of Appeals held that the analogy failed:

Scholes also makes clear, however, that *the receiver did not have standing to sue "on behalf of" the Phoenix Pharymol account (meaning, as a practical matter, on behalf of the investors whose investments were deposited in that account), even though the account was an instrumentality of Tobin's fraud.*

* * *

Troelstrup was not appointed receiver for Phoenix Pharymol as well as Tobin. ... Troelstrup, thus, was just Tobin's receiver, and so he could not sue Index on behalf of Phoenix Pharymol, not having been appointed its receiver. *And he could not sue Index on behalf of either Tobin, the defrauder, who has no possible claim against Index, or on behalf of the investors, the victims of the fraud, because he was not their receiver.*

* * *

... The receiver is not trying to build up Tobin's assets. He is suing a third party on behalf of Tobin's creditors to enforce a personal right of theirs, not a right of Tobin's in which they have an interest by virtue of being his creditors.

Troelstrup, 130 F.3d at 1277 (emphasis added). In sum, *Troelstrup* confirms that the Receiver in this case cannot sue a third party on claims not held by Heartland, and cannot sue a third party on behalf of anyone for whom he is not a receiver.⁴

⁴ See also, *Miller v. Harding*, 2000 WL 1792990, *2 (1st Cir. 2000) (holding, in a Ponzi scheme case, that "[a]n equity receiver, like a bankruptcy trustee, has standing for all claims that would belong to the entity in receivership, and which would thus benefit its creditors

C. Relief From the Stay is Warranted in Any Event.

Finally, even if Conder's claims do fall within the ambit of the Stay, an Order granting relief from the Stay is appropriate. To determine whether relief is warranted from a stay in receivership proceedings, a court should consider:

whether continuance of the stay would maintain the status quo or cause the moving party to suffer substantial injury, the merit of the moving party's claim, and the time at which the motion for relief was made.

FTC v. Med Resorts Int'l, Inc., 199 F.R.D. 601, 608 (N.D. Ill. 2001) (noting absence of applicable case in the Seventh Circuit and relying on *SEC v. Wenke*, 622 F.2d 1363, 1373-74 (9th Cir. 1980)). Each of the factors enunciated by the court in *Med Resorts* weigh in favor of Conder's request for relief from the stay in this case.

1. A continuance of the Stay would cause substantial injury to Conder and other victims of Heartland's Fraud.

It has been over two (2) years since Conder and other Heartland victims learned that their "investments" in Heartland had been stolen. In many cases, investors had already reached retirement and had given Heartland most of their life savings. In Conder's case, Heartland's fraud drew down the value of the Conder Living Trust, which was established to provide for her disabled son. Conder and other victims have an immediate need for return

and investors, but no standing to represent the creditors and investors in their individual claims"), citing *Scholes*, 56 F.3d at 753; *Goodman v. Federal Communications Commission (FCC)*, 182 F.3d 987 (D.C. Cir. 1999) ("nothing in *Scholes* supports Goodman's expansive view of a receiver's authority to sue on behalf of the customers and creditors of the company he represents; in fact, the decision is a straightforward application of the rule that a receiver has authority to bring a suit only if the entity in receivership could itself properly have brought the same action"); *Fleming v. Lind-Waldcock & Co.*, 922 F.2d 20 (1st Cir. 1990) ("[s]ince 1935 it has been well settled that 'the plaintiff in his capacity of receiver has no greater rights or powers than the corporation itself would have'"), citing *McCandless v. Furlaud*, 296 U.S. 140, 148, 56 S.Ct. 41, 80 L.Ed. 121 (1935).

of the money stolen by Heartland, or at the very least are prejudiced each day that they are unable to invest or otherwise make productive use of the money. In short, continued enforcement of the Stay would cause Conder and other victims to suffer irreparable injury by preventing recovery where no comparable opportunity exists.

Importantly, as discussed above, the assets marshaled by the Receiver in these proceedings will not be diminished or otherwise affected if Conder is granted relief from the stay to pursue her claims against Union Planters. Those claims will have no effect on the Receivership estate in this case, because they could neither add to or diminish the proceeds available for distribution. It is also clear that the Receiver could not bring these claims on behalf of Conder and other victims, and only has standing to assert claims on behalf of the Heartland entities. In other words, granting relief from the Stay would avoid substantial injury to Conder and others, but would have no effect on the status quo in this action.

2. Conder has meritorious claims against Union Planters.

One of the underlying purposes and policies of the UCC is “to simplify, clarify, and modernize the law governing commercial transactions,” and its remedies are to be liberally administered. IND. CODE §§ 26-1-1-102 and 106. As one court held:

[T]he chief purpose of Article 3 is greasing the wheels of commerce by establishing clear, practical rules governing negotiable instruments, so that subsequent parties (after the negotiation) know their rights. Article 3 advances the policies of unclogged negotiability and inquiry-free transfer of negotiable paper.

Venaglia, v. Kropinak, 956 P.2d 824 (N.M. Ct. App. 1998). The claims of Conder against Union Planters fall squarely within this purpose.

The “holder in due course” doctrine exists to fix the circumstances under which a person or entity may accept a check in lieu of money without assuming the risk that the

check is subject to certain defenses or claims that could render it worthless. "The purpose of conferring HDC status is to encourage and facilitate the circulation of commercial paper. ... It permits a specified class of holders to receive negotiable instruments free of the risks of claims or defenses which might be valid against the original recipient." *Western State Bank of South Bend v. First Union Bank & Trust Co. of Winamac*, 172 Ind.App. 321, 326-27, 360 N.E.2d 254, 258 (1977).

Union Planters operates under these bedrock principles of the UCC, and failed to take advantage of the protection available to holders in due course. Clearly, the allocation of Conder's losses to Union Planters is precisely what the UCC intends. Conder's claims and those of the class she seeks to represent are straightforward and highly meritorious, further supporting relief from the Stay.

3. Conder's request is timely.

Conder filed her Motion for Relief From Stay promptly after the Court entered a partial dismissal in the Conder Action in reliance on the Stay. Any earlier filing of this Motion would have been untimely. In fact, the particular timing of Conder's request for relief from the Stay weighs heavily in her favor. "As the receivership progresses the merits of the moving party's claim may loom larger in the balance." *Med Resorts*, 199 F.R.D. at 609, citing *Wenke*, 622 F.2d at 1373-74. This receivership has been in existence for well over two years, and it is apparent that the Receiver has already made extensive efforts to marshal Heartland's assets. Also, on February 15, 2002, the Court issued an Entry Approving Receiver's Motion to Make First Interim Distribution of assets. *See contra*, *Med Resorts*, 199 F.R.D. at 609 (denying motion to relief from stay where moving parties did not even

contend that Receiver was ready to being making distributions). It is clear that the timing of the receivership weighs in favor of Conder's request for limited relief from the stay.

IV. Conclusion

For the foregoing reasons, Conder respectfully requests this Court to enter an Order (i) clarifying that the Stay does not bar Conder from asserting Counts I, II and III of her Amended Complaint against Union Planters on behalf of herself and all others similarly situated, or (ii) modifying the Stay as necessary to permit Conder to continue prosecuting Counts I, II and III of her Amended Complaint against Union Planters on behalf of herself and all others similarly situated.

Respectfully submitted,

COHEN & MALAD, LLP

By: 

Irwin B. Levin
Scott D. Gilchrist
Eric S. Pavlack
136 N. Delaware Street, Suite 300
P.O. Box 627
Indianapolis, IN 46206-0627
(317) 636-6481
(317) 636-2593 FAX

Mark E. Maddox
MADDOX KOELLER
HARGETT & CARUSO
7351 Shadeland Station Way, Suite 190
Indianapolis, IN 46256-3924

Attorneys for Proposed Intervener

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served by First Class U.S. Mail, postage paid, this 7 day of Nov., 2002, upon the following counsel of record:

Kara M. Washington
Paul A. Montoya
Jeannette L. Lewis
SECURITIES & EXCHANGE
COMMISSION
175 West Jackson Blvd., Suite 900
Chicago, IL 60604

Fred D. Scott
SCOTT & RADEZ
55 Monument Circle, Suite 814
Indianapolis, IN 46204

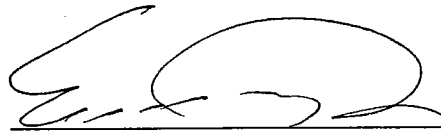
Linda M. Wagoner
ATTORNEY AT LAW
156 East Market Street
Suite 900
Indianapolis, IN 46204

James A. Knauer
KROGER GARDIS & REGAS
Bank One Center/Circle
111 Monument Circle #900
Indianapolis, IN 46204

Dexter B. Johnson
MALLON & JOHNSON PC
19 S La Salle Street Ste 1202
Chicago, IL 60603

Dennis Zahn
SYMMES VOYLES ZAHN
PAUL & HOGAN
700 Jefferson Plaza
One Virginia Avenue
Indianapolis, IN 46204

William Bock III
Samuel D. Hodson
KROGER GARDIS & REGAS
Bank One Center/Circle
111 Monument Circle #900
Indianapolis, IN 46204



Irwin B. Levin
Scott D. Gilchrist
Eric S. Pavlack
136 N. Delaware Street, Suite 300
P.O. Box 627
Indianapolis, IN 46206-0627

allowed Lincoln Fidelity to open and maintain this account as an ordinary business checking account.

3. Defendant Union Planters Bank allowed millions of dollars of checks written by the Plaintiff and other innocent members of the proposed Plaintiff Class to be deposited into the Lincoln Fidelity Escrow Account, even though Lincoln Fidelity Escrow was not the payee of those checks, and the checks had not been indorsed by the payee to Lincoln Fidelity Escrow. Further, Defendant allowed the deposit of these checks into the Lincoln Fidelity Account despite the fact that most of the checks were expressly made payable to specific escrow agents or were made payable to an escrow accounts other than Lincoln Fidelity Escrow.

4. Defendant's practice of allowing the deposit of Plaintiff's and Class members' checks with missing indorsements is contrary to law and directly at odds with the reasonable expectations of the Plaintiff and Class.

5. By improperly allowing the deposit of these checks into a "slush fund" despite patent irregularities, the Defendant permitted a massive Ponzi scheme to be perpetrated by persons affiliated with Heartland Financial Services, Inc., JMS Investment Group, LLC, and related entities (described more particularly below and hereinafter collectively referred to as "Heartland").

6. By depositing these checks with missing indorsements Defendant is prevented from becoming a "holder" and is liable to Plaintiff and the Class (as described below) for the proceeds of those checks.

7. By depositing these checks with missing indorsements, and in light of Heartland's fraud and breach of fiduciary duty, numerous danger signals, and other irregularities surrounding said deposits, Defendant is prevented from becoming a "holder in due course" and is liable to Plaintiff and the Class (as described below) for the proceeds of those checks.

8. Defendant's actions also constitute negligence, for which it is liable in an amount sufficient to compensate the Plaintiff and the Class for their resulting loss.

THE PARTIES

9. The Plaintiff, Agnes N. Conder, is a resident of the State of Indiana and the trustee for the Conder Living Trust, a trust organized and existing in the State of Indiana. The Plaintiff, on behalf of the trust, wrote checks payable to persons or entities affiliated with Heartland for the purpose of purchasing securities, which checks were deposited into the account of Lincoln Fidelity Escrow with missing indorsements.

10. Defendant Union Planters Bank, N.A. is a Tennessee corporation, with its principal place of business in Memphis, Tennessee. Union Planters is registered as a foreign corporation with the Indiana Secretary of State, and its registered agent for service of process in Indiana is Mr. Steven Schenck, One Indiana Sq. Mail Ste 7050, Indianapolis, IN 46226.

JURISDICTION AND VENUE

11. Both at the time of the filing of Plaintiff's initial Class Action Complaint, December 20, 2000, and the date of Defendants' Joint Notice of Removal, January 19, 2001, Union Planters was and is a national banking association chartered under the

laws of the United States, 12 U.S.C. § 21, with its principal place of business in Memphis, Tennessee. Accordingly, for purposes of 28 U.S.C. § 1332(C)(1) Union Planters is a citizen of the State of Tennessee.

12. Plaintiff Agnes N. Conder, both at time of the filing of Plaintiff's initial Class Action Complaint and the date of Defendants' Joint Notice of Removal, was and is a citizen of the State of Indiana. The Conder Living Trust is a trust organized and existing in the State of Indiana.

13. Complete diversity of citizenship is present pursuant to 28 U.S.C. § 1332.

14. Plaintiff Agnes N. Conder's claims against Defendant exceed \$75,000, exclusive of costs and interest, and thus exceed the minimum amount in controversy required by 28 U.S.C. § 1332.

15. Venue is proper in this District pursuant to 28 U.S.C. § 1391, as a substantial part of the events or omissions giving rise to the claims occurred in this District.

CLASS REPRESENTATION ALLEGATIONS

16. Plaintiff brings this action pursuant to F.R.C.P. 23 on behalf of herself and all others similarly situated as members of the following proposed Plaintiff Class:

All persons who wrote checks payable to persons or entities affiliated with Heartland which were deposited with missing indorsements at Union Planters into the Lincoln Fidelity Escrow Account.

(hereinafter referred to as the "Class").

17. The members of the Class are so numerous that the individual joinder of all members is impracticable. Although the exact number is unknown, there are substantially more than forty (40) Class members in the proposed Class.

18. There are questions of law and fact common to all members of the Class, and these common questions predominate over any questions affecting individual Class members.

19. The Plaintiff's claims are typical of the claims of the Class. Plaintiff is a member of the Class and has been injured by the same course of conduct by Union Planters that has damaged the other members of the Class.

20. The Plaintiff will fairly, fully, and adequately protect the interests of the Class, and she has retained competent counsel experienced in prosecuting complex class action litigation. Plaintiff has no interests that conflict with, or are adverse to, those of the Class.

21. Questions of law or fact are common to all members of the Class and predominate over any questions affecting only individual members, such that a class action is superior to other available methods for the fair and efficient adjudication of this controversy. In addition, individual litigation would increase the delay and expense to all parties and to the judicial system. By contrast, the class action device presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

22. There will be no unusual difficulty in the management of this litigation as a class action.

GENERAL ALLEGATIONS

23. "Heartland," as used throughout this Complaint, shall include, but is not limited to, Heartland principals Kenneth R. Payne, Johann M. Smith, Daniel G. Danker, and Constance Brooks-Kiefer, and the following entities affiliated with Heartland: Heartland Financial Services, Inc.; Aero Technologies Ltd.; Atlas Income Fund, L.L.C.; BMC investment Group, L.L.C.; Carribean Federal Services, Ltd.; Carribean Financial Services; Carribean Investment International, Ltd.; Celtic Centre II, Ltd.; Dolphin International Development, Ltd.; Dolphin Peninsula Partners; First Fidelity Trust, Ltd.; First International Limited; Heartland International Trust Services, Ltd.; Heartland Money Management of Florida, Inc.; JMS Investment Group, L.L.C.; KJL Ltd. of Belize; Lincoln Fidelity Escrow Services; Lincoln Fidelity Escrow; MDS Investment Group, L.L.C.; PMK, Ltd., Provident Bank; RMP, Ltd.; Terens, Ltd.; 21st Century Banking Group, Ltd.; 21st Century International Bank & Trust, Ltd. of Grenada; 21st Century International Advisors, Inc.; 21st Century International Advisors of Bermuda, Inc.; 21st Century International Advisors of Ireland, Ltd.; 21st Century Personnel, LLC; and Universal Financial Services, Ltd.

24. The Plaintiff and the members of the Class wrote checks payable to persons or entities affiliated with Heartland, for the sole intended purpose of effectuating the purchase of securities or other investments, in amounts totaling millions of dollars (hereinafter referred to as "Checks").

25. The Checks were solicited by persons and entities affiliated with Heartland, who recommended securities and/or other investments to Heartland

customers and offered the services of Heartland as a purported means of investing in such securities and other investments.

26. Heartland regularly targeted senior citizens and/or wealthy individuals for solicitation of investments.

27. Potential investors were told that the proceeds of the checks they issued to Heartland would be used to purchase securities and other investments. Investors were promised a high rate of return on their investments.

28. In reality, only a very small portion of investor funds were used by Heartland to purchase securities. Instead, most investor funds were spent on the lavish lifestyles of Heartland's principals, were used to pay off claims of prior investors in the facilitation of a Ponzi scheme, or were wrongfully diverted to other schemes and purposes.

29. Meanwhile, investors in Heartland and related entities were fraudulently told that their "investments" were earning exemplary returns.

30. To facilitate the course of this fraudulent and unlawful conduct, the Checks solicited by Heartland were not indorsed with indorsements matching the payee of the Checks. Instead, the Checks were indorsed with the indorsement of "Lincoln Fidelity Escrow" substantially in one of the following ways:

- (a) By writing, "For Deposit Only, UP # 0001266190" [the Lincoln Fidelity Escrow Account]; or

- (b) With a stamp reading, "Pay to the Order of Union Planters Bank, For Deposit Only, Lincoln Fidelity Escrow Account, 074014213 0001266190." (hereinafter referred to as "Stamp").

31. The Checks were deposited, usually by Johann Smith or Constance Brooks-Kiefer, into the Lincoln Fidelity Escrow Account, which account was an ordinary business account, rather than a true escrow account. (hereinafter referred to as the "Lincoln Account").

32. However, the Plaintiff's and Class members' Checks were not made payable to the order of Lincoln Fidelity Escrow or the Lincoln Fidelity Escrow Account. Instead, checks were made payable to numerous persons or entities affiliated with Heartland or to specific accounts other than the Lincoln Account, including but not limited to: "Johann M. Smith," "Johann M. Smith, Escrow Agent," "Johann M. Smith, Escrow Account," "JMS Escrow Agent," "Kenneth Payne," "JMS Investment Group," "BMC Investment Group, LLC," "BMC Investment Group, LLC, c/o Johann Smith, Escrow Agent," "Heartland Group," "JMS," "JMS Escrow Account," "Atlas Income Fund, LLC," or "Heartland Financial," all of which were deposited into the slush fund.

33. Despite the fact that the account was entitled "Lincoln Fidelity Escrow Account," and despite the fact Defendant knew or should have known that its customer, Lincoln Fidelity Escrow, was organized to act as an escrow agent for its clients, Defendant allowed Lincoln Fidelity Escrow to open and to continue to maintain the Lincoln Fidelity Escrow Account as an ordinary business checking account.

34. Defendant further allowed deposit of the Checks into the Lincoln Fidelity Account despite the fact that the vast majority of the Checks expressly were made payable to the payee as an escrow agent or were made payable to an escrow account.

35. Lincoln Fidelity Escrow conducted no legitimate business and did not actually sell or participate in the sale of securities.

36. Nearly all of the hundreds or thousands of Checks bore writing on the memo line indicating that the drawer intended the check to be used for the purchase of securities, such as, but not limited to: "ARBA 1 Unit JMS," "Looksmart," "Kano Communications, Inc. - JMS 3 units," "Expedia, Inc.," "Cobalt Networks, Inc.," and "Palm, Inc. - in name of Kay A. Yoder, Annual Gift from Living Trust." (See, Exhibits A, C, D, G, H, and I, attached hereto).

37. The following chart provides the dates, check numbers, amounts, and nature of the indorsement of checks written by Plaintiff Agnes Conder to Johann M. Smith, Escrow Agent, which checks were deposited at Union Planters with missing indorsements (copies of these checks are attached hereto as Exhibits A-K):

Exhibit	Date	Check #	Amount	Payee	Indorsement	Depository Bank
A	4/5/99	3189	\$25,000	Johann M. Smith, Escrow Agent	"For Deposit Only 000126190" [hand written]	Union Planters
B	6/1/99	3199	\$10,000	Johann M. Smith Escrow Agent	Stamp	Union Planters
C	7/6/99	3196	\$61,442	Johann M. Smith Escrow Agent	Stamp	Union Planters
D	8/16/99	3201	\$10,000	Johann M. Smith Escrow Agent	Stamp	Union Planters

Exhibit	Date	Check #	Amount	Payee	Indorsement	Depository Bank
E	9/13/99	3200	\$30,000	Johann M. Smith Escrow Agent	Stamp	Union Planters
F	9/13/99	3202	\$30,000	Johann M. Smith Escrow Agent	Stamp	Union Planters
G	9/15/99	3203	\$150,000	Johann M. Smith Escrow Agent	Stamp	Union Planters
H	10/21/99	3205	\$10,000	Johann M. Smith Escrow Agent	Stamp	Union Planters
I	10/22/99	3206	\$10,000	Johann M. Smith Escrow Agent	Stamp	Union Planters
J	2/1/00	3212	\$10,000	Johann M. Smith Escrow Agent	Stamp	Union Planters
K	4/17/00	3217	\$10,000	Johann M. Smith Escrow Agent	Stamp	Union Planters
Total			\$356,442			

38. Union Planters' actions in allowing the deposit of the Checks into the ordinary business checking account of Lincoln Fidelity Escrow, rather than requiring their deposit into the designated account of the named payee, facilitated the scheme by Heartland to defraud the Plaintiff and other members of the Class.

39. In early 2000, the United States Securities Exchange Commission ("SEC") began investigating Heartland's activities. On August 10, 2000, the SEC filed a complaint against the Heartland principals, Payne, Smith, Brooks-Kiefer, and Danker, requesting, among other things, that the Court appoint a receiver for Heartland Financial Services, Inc. and JMS Investment Group.

40. James A. Knauer was appointed Receiver for Heartland Financial Services, Inc. and JMS Investment Group, and filed a Complaint against the Heartland

principals and related entities on October 20, 2000. Although the amount of assets potentially recoverable through the receivership proceedings still is uncertain, it is clear that the Plaintiff and the Class members likely will recover only a fraction of their "investments" through the receivership.

Count I

41. The Plaintiff hereby incorporates by reference the allegations contained in Paragraphs 1 through 40 of this Complaint as if fully set forth herein.

42. Because the Checks deposited in the Lincoln Account with Union Planters did not bear the indorsement of the payee of those Checks, the Checks were not negotiated to Lincoln Fidelity Escrow and the Defendant never became a "holder" of the Checks.

43. Because the Defendant was not a holder of the Checks, it could not become a "holder in due course" as defined by I.C. § 26-1-3.1-302(a).

44. The Plaintiff and Class members have made claims to the Checks or their proceeds against Heartland based in part on their breach of fiduciary duty and fraud, through receivership proceedings pending in this Court under the cause entitled James A. Knauer as the Court Appointed Receiver for Heartland Financial Services, Inc. and JMS Investment Group, LLC v. Kenneth R. Payne, *et al.*, Cause No. IP00-1629-C-B/S.

45. The Plaintiff's and Class members' claims against Heartland entitle them to a property or possessory right in the Checks and/or the proceeds of the Checks

46. Pursuant to I.C. § 26-1-3.1-306 the Defendant is subject to the Plaintiff's and Class members' claims of property and/or possessory rights in the Checks and/or

the proceeds of the Checks arising from Heartland's fraud and breach of fiduciary duty related to those instruments.

WHEREFORE, Plaintiff Agnes N. Conder, as trustee for the Conder Living Trust, on behalf of herself and all others similarly situated, by counsel, prays this Court enter a judgment against the Defendant entitling Plaintiff and all others similarly situated to the proceeds of the Checks they wrote to Heartland and deposited at Union Planters with missing indorsements, and for all other relief just and proper in the premises.

Count II

47. The Plaintiff hereby incorporates by reference the allegations contained in Paragraphs 1 through 46 of this Complaint as if fully set forth herein.

48. Heartland acted as a "fiduciary" as defined by I.C. § 26-1-3.1-307(a)(1) with regard to those Checks issued to it by Plaintiff and members of the Class made payable to a fiduciary or to a fiduciary account. Heartland owed a fiduciary duty to Plaintiff and the Class members to deposit the Checks into an escrow account and to use the proceeds of the Checks solely to purchase the securities for which the Checks were issued.

49. The Plaintiff and Class members were "represented persons" as defined by I.C. § 26-1-3.1-307(a)(2), as they were the persons to whom Heartland owed a fiduciary duty.

50. A large subset of the Plaintiff's and Class members' Checks were made payable to Heartland and related persons and entities as fiduciaries, or to a fiduciary account. A substantial majority of the Checks specifically indicated that they were payable to Johann Smith as Escrow Agent.

51. The Checks were taken by the Defendant from Heartland for payment, collection, or for value.

52. The Defendant had knowledge of Heartland's and Johann Smith's fiduciary status.

53. The Plaintiff and Class members have made claims to the Checks or the proceeds of the Checks through Receivership proceedings pending in this Court, Cause No. IP00-1629-C-B/S, based in part on the breaches of fiduciary duty by Heartland and/or Johann Smith.

54. By depositing the Checks into the Lincoln Account, Heartland and Johann Smith deposited the Checks into an account other than an account of the named payee of those Checks, as fiduciaries, or an account of the represented persons. See, I.C. § 1-26-3.1-307.

55. The Defendant, by allowing the deposit of the Checks into an ordinary business checking account of a different entity, Lincoln Fidelity, rather than requiring deposit of the checks into a fiduciary account of Johann Smith or Heartland, despite the fact the Checks were made payable to Johann Smith or Heartland as escrow agents, did not comply with the customs and standards of the banking industry and demonstrated a lack of observance of reasonable commercial standards of fair dealing.

56. The Defendant's actions in receiving the deposits constitute bad faith.

57. Pursuant to I.C. § 26-1-3.1-307 the Defendant had notice of Heartland's and Johann Smith's breach of fiduciary duty and thus notice of the Plaintiff's and Class members' claims of breach of fiduciary duty.

58. As set forth above, because the Checks were not indorsed by the payee of those Checks, namely Heartland and Johann Smith, Defendant was not a holder of the Checks and therefore could not be a holder in due course. Defendant's notice of Plaintiff's and the Class members' claims of breach of fiduciary duty prevents it from becoming a holder in due course pursuant to I.C. § 26-1-3.1-307.

59. The Plaintiff's and Class members' claims against Heartland entitle them to a property or possessory right in the Checks and/or the proceeds of the Checks.

60. Pursuant to I.C. § 26-1-3.1-306 the Defendant is subject to the Plaintiff's and Class members' claims of property and/or possessory rights in the Checks and/or the proceeds of the Checks arising from Heartland's and Johann Smith's breach of fiduciary duty related to those instruments.

WHEREFORE, Plaintiff Agnes N. Conder, as trustee for the Conder Living Trust, on behalf of herself and all others similarly situated, by counsel, prays this Court enter a judgment against the Defendant entitling Plaintiff and all others similarly situated to the proceeds of the Checks they wrote to Heartland and deposited at Union Planters when Union Planters had notice of Heartland's breaches of fiduciary duty, and for all other relief just and proper in the premises.

Count III

61. The Plaintiff hereby incorporates by reference the allegations contained in Paragraphs 1 through 60 of this Complaint as if fully set forth herein.

62. The Defendant owed a duty to the Plaintiff and the Class members to recognize the danger signals related to Heartland's deposit of the Checks, namely:

- a. The amounts of the individual Checks deposited in the Lincoln Account were significant, generally ranging anywhere between \$1,000 and \$150,000.
- b. The aggregate amount of the Checks deposited into the Lincoln Account was in excess of \$25,000,000.
- c. The Checks were deposited into an ordinary business checking account of Lincoln Fidelity despite the fact that most of the Checks were payable to Johann Smith or Heartland entities specifically as fiduciaries.
- d. The indorsements on the Checks did not match the payee of those Checks.
- e. Defendant allowed Lincoln Fidelity Escrow to open and maintain an account entitled Lincoln Fidelity Escrow Account as an ordinary business checking account despite the fact that it knew or should have known that Lincoln Fidelity Escrow was organized to act as an escrow agent for its clients.
- f. Defendant allowed Lincoln Fidelity Escrow to open and maintain the account as an ordinary business checking account despite the fact that the name of the account indicated that it was an "Escrow Account."
- g. The Checks bore on their memo lines designations that the checks were for the purchase of particular securities.
- h. Some of the Checks were payable to specific escrow accounts, namely "JMS Escrow Account" and "Johann M. Smith Escrow Account,"

yet those checks were deposited into the Lincoln Account with the stamped indorsement described above.

63. The potential harm to the Plaintiff and the Class members resulting from Heartland's improper deposit of their checks was sufficiently foreseeable to the Defendant to impose a duty to act with reasonable care with respect to the proper deposit and collection of those Checks.

64. By allowing Lincoln Fidelity Escrow to open and continue to maintain the Lincoln Account as an ordinary business checking account and by allowing the deposit of the Checks into the Lincoln Account, the Defendant failed to act with reasonable care and breached its duty to the Plaintiff and Class members.

65. Defendant's negligence facilitated the massive Ponzi scheme perpetrated by Heartland and caused the Plaintiff and Class members damages.

WHEREFORE, Plaintiff Agnes N. Conder, as Trustee for the Conder Living Trust, on behalf of herself and all others similarly situated, by counsel, prays this Court enter a judgment against the Defendant, in an amount sufficient to compensate the Plaintiff and other Class members for the damages caused by Defendant's negligence and for all other relief just and proper in the premises.

Count IV

66. The Plaintiff hereby incorporates by reference the allegations contained in Paragraphs 1 through 65 of this Complaint as if fully set forth herein.

67. Based on the danger signals known to the Defendant and enumerated throughout this Complaint, particularly in Paragraph 62 above, Defendant was aware of

facts and circumstances sufficient to give Defendant reason to know that a fraudulent scheme was being perpetrated on the Plaintiff and the Class at the time that it was being perpetrated.

68. The Plaintiff and Class members have made claims to the Checks or their proceeds against Heartland and Johann Smith based, in part, on their fraud, through Receivership proceedings pending in this Court, Cause No. IP00-1629-C-B/S.

69. As set forth above, because the Checks were not indorsed by the payee of those Checks, namely Heartland and Johann Smith, Defendant was not a holder of the Checks and therefore could not be a holder in due course. Defendant's notice of Plaintiff's and the Class members' claims of fraud also prevents it from becoming a holder in due course.

70. The Plaintiff's and Class members' claims against Heartland entitle them to a property or possessory right in the Checks and/or the proceeds of the Checks.

71. The Defendant is subject to the Plaintiff's and Class members' claims of property and/or possessory rights in the Checks and/or their proceeds pursuant to I.C. § 26-1-3.1-306 arising due to Heartland's and Johann Smith's fraud related to those instruments.

WHEREFORE, Plaintiff Agnes N. Conder, as trustee for the Conder Living Trust, on behalf of herself and all others similarly situated, by counsel, prays this Court enter a judgment against the Defendant entitling Plaintiff and all others similarly situated to the proceeds of the Checks they wrote to Heartland and deposited at Union Planters when Union Planters had notice of Heartland's fraud, and for all other relief just and proper in the premises.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Irwin B. Levin", is written over a horizontal line.

Irwin B. Levin, #8786-49
Scott D. Gilchrist, #16720-53
Eric S. Pavlack, #21773-49

Cohen & Malad, P.C.
136 N. Delaware Street, Suite 300
P.O. Box 627
Indianapolis, IN 46206-0627
(317) 636-6481

Maddox Koeller Hargett & Caruso
7351 Shadeland Station Way, Suite 190
Indianapolis, Indiana 46256-3924

ATTORNEYS FOR THE PLAINTIFF

JURY DEMAND

Plaintiff, Agnes N. Conder, as trustee for the Conder Living Trust, on behalf of herself and all others similarly situated, respectfully demands a trial by jury of all eligible claims.

Respectfully submitted,



Irwin B. Levin, #8786-49
Scott D. Gilchrist, #16720-53
Eric S. Pavlack, #21773-49

Cohen & Malad, P.C.
136 N. Delaware Street, Suite 300
P.O. Box 627
Indianapolis, IN 46206-0627
(317) 636-6481

Maddox Koeller Hargett & Caruso
7351 Shadeland Station Way, Suite 190
Indianapolis, Indiana 46256-3924

ATTORNEYS FOR THE PLAINTIFF

Certificate of Service

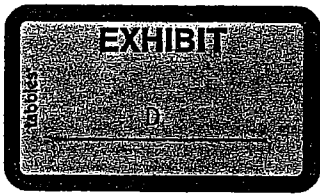
The undersigned hereby certifies that the foregoing First Amended Complaint has been served upon the following counsel of record by First Class U.S. Mail, postage paid, this 26 day of March, 2001:

Max W. Hittle, Jr.
Malcolm C. Mallette
KRIEG DeVAULT
ALEXANDER & CAPEHART, LLP
Suite 2800, One Indiana Square
Indianapolis, IN 46204-2017

Robert P. Johnstone
Karoline R. Jackson
BARNES & THORNBURG
11 South Meridian Street
Indianapolis, IN 46204



Scott D. Gilchrist



AGNES N. CONDER
LIVING TRUST
885 E. BELL DR.
MARION, IN 46953

71-7062/2749
531932631003

3188

DATE *February 15, 1999*

PAY TO THE ORDER OF *Johann M. Smith Escrow Agent* \$ *10,000.⁰⁰/₁₀₀*

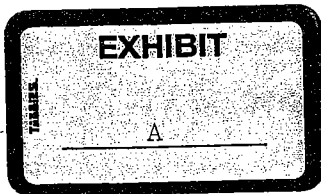
Ten thousand and ~~NO~~ ~~ONE~~ DOLLARS

MEMO *20 months @ 14.9% Monthly Interest Heartland Stock VIT 159*

FIRST FEDERAL SAVINGS BANK of Marion

Agnes N. Conder

⑆ 274970623⑆ 531932631003⑆ 3188 ⑈0001000000⑈



AGNES N. CONDER
LIVING TRUST
885 E. BELL DR.
MARION, IN 46953

71-7062/2749
531932631003

3189

DATE *April 5, 1999*

PAY TO THE ORDER OF *Johann M. Smith Escrow Agent* \$ *25,000.⁰⁰/₁₀₀*

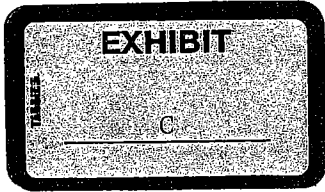
Twenty-five thousand and ~~NO~~ ~~ONE~~ DOLLARS

MEMO *119,245.00 - 2 yrs Program 100% Time Deposit*

FIRST FEDERAL SAVINGS BANK of Marion

Agnes N. Conder

⑆ 274970623⑆ 531932631003⑆ 3189 ⑈0002500000⑈



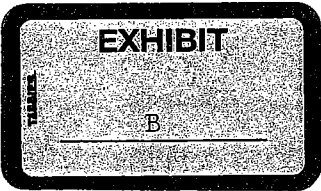
AGNES N. CONDER 00588801 16 71-7062/2749 99 00012681996 ✓
 LIVING TRUST
 885 E. BELL DR.
 MARION, IN 46953
 DATE July 6, 1999

PAY TO THE ORDER OF Johann M. Smith Escrow Agent \$ 61,442.00
Sixty one thousand - four hundred forty two and 00/100 DOLLARS

MEMO Monthly 3 yrs @ 11% Balance of Belize Investment Agnes N. Conder

FIRST FEDERAL SAVINGS BANK of Marion
 VIT 164A

⑆ 274970623⑆ 531932631003⑆ 3196 ⑈0006144200⑈



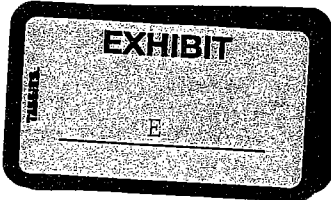
AGNES N. CONDER 60513478 15 71-7062/2749 99 00012681999 ✓
 LIVING TRUST
 885 E. BELL DR.
 MARION, IN 46953
 DATE June 1st 1999

PAY TO THE ORDER OF Johann M. Smith Escrow Agent \$ 10,000.00
Ten thousand and 00/100 DOLLARS

MEMO RRBR Unit MS Agnes N. Conder

FIRST FEDERAL SAVINGS BANK of Marion

⑆ 274970623⑆ 531932631003⑆ 3199 ⑈0001000000⑈



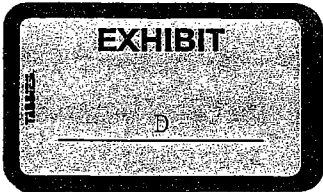
AGNES N. CONDER 173771597 16 71-7062/2749 99 00012681998 ✓
 LIVING TRUST
 885 E. BELL DR.
 MARION, IN 46953
 DATE 9/13/99

PAY TO THE ORDER OF Johann M. Smith Escrow Agent \$ 30,000.00
Thirty thousand and 00/100 DOLLARS

MEMO Kane - MS 3 units Agnes N. Conder
Communications, Inc

FIRST FEDERAL SAVINGS BANK of Marion

⑆ 274970623⑆ 531932631003⑆ 3200 ⑈0003000000⑈



AGNES N. CONDER 172200035 16 71-7062/2749 99 00012681991 ✓
 LIVING TRUST
 885 E. BELL DR.
 MARION, IN 46953
 DATE August 16, 1999

PAY TO THE ORDER OF Johann M. Smith Escrow Agent \$ 10,000.00
Ten thousand and 00/100 DOLLARS

MEMO Look smart Agnes N. Conder

FIRST FEDERAL SAVINGS BANK of Marion

⑆ 274970623⑆ 531932631003⑆ 3201 ⑈0001000000⑈

CR# 3196

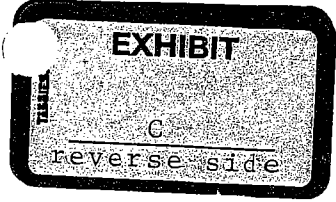
PAY TO THE ORDER OF
UNION PLANTERS BANK
FOR DEPOSIT ONLY
LINCOLN FIDELITY ESCROW ACCOUNT
074014213 0001266190

074014213
UNION PLANTERS BANK
95 Indiana Avenue
Greenville, SC

074014213 A

PAID FHLB INDPLS
PAID 074001019
010123234 07-09-99
010123234 07-09-99 3441

410186175 0740-0020-1
410186175 07-09-99
410186175 1767 1770 11



PAY TO THE ORDER OF
UNION PLANTERS BANK
FOR DEPOSIT ONLY
LINCOLN FIDELITY ESCROW ACCOUNT
074014213 0001266190

CR# 3199

0132 85727

PAID FHLB INDPLS
PAID 074001019
020063271 07-19-99
020053271 07-19-99
UNION PLANTERS BANK
95 Indiana Avenue
Greenville, SC

010041799 0740-0020-1
010041799 07-09-99
010041799 1767 1770 11



CR# 3200

PAY TO THE ORDER OF
UNION PLANTERS BANK
FOR DEPOSIT ONLY
LINCOLN FIDELITY ESCROW ACCOUNT
074014213 0001266190

015 081499 IMAGED
0740-1421-04
UNION PLANTERS BANK
173771 PAID 074001019
010063186 09-14-99
0100220761 09-14-99
440220761 09-14-99
440220761 09-14-99

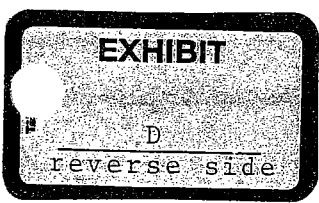


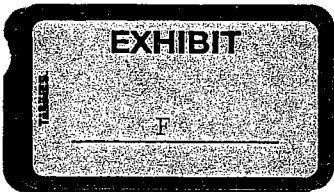
PAY TO THE ORDER OF
UNION PLANTERS BANK
FOR DEPOSIT ONLY
LINCOLN FIDELITY ESCROW ACCOUNT
074014213 0001266190

CR# 3201

0110 857372

015 082099 IMAGED
0740-1421-04
UNION PLANTERS BANK
173771 PAID 074001019
020004213 09-14-99
020004213 09-14-99
UNION PLANTERS BANK
95 Indiana Avenue
Greenville, SC





AGNES N. CONDER LIVING TRUST 173771598 16 71-7062/2749 531932631003 00012681598 3202 ✓
 885 E. BELL DR. MARION, IN 46953 DATE Sept 13, 99

PAY TO THE ORDER OF Johann M. Smith Escrow Agent \$ 30,000.00
Thirty thousand and ¹⁰⁰/₁₀₀ DOLLARS

MEMO Calico - JMS 3 units Agnes N. Conder MP

2749706231 531932631003 3202 0003000000

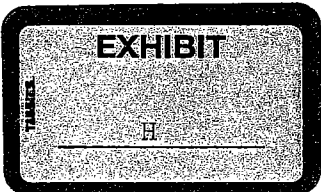


AGNES N. CONDER LIVING TRUST 154553815 16 71-7062/2749 531932631003 00012681203 ✓
 885 E. BELL DR. MARION, IN 46953 DATE Sept 15, 1999

PAY TO THE ORDER OF Johann M. Smith Escrow Agent \$ 150,000.00
One hundred-fifty thousand and ⁰⁰/₁₀₀ DOLLARS

MEMO 1170 5 yrs. Agnes N. Conder MP

2749706231 531932631003 3203 0015000000

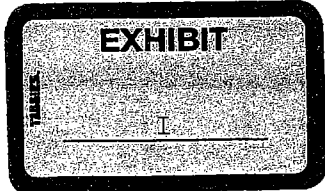


AGNES N. CONDER LIVING TRUST 66852999 16 71-7062/2749 531932631003 00012682005 ✓
 885 E. BELL DR. MARION, IN 46953 DATE 10/21/99

PAY TO THE ORDER OF Johann M. Smith Escrow Agent \$ 10,000.00
Ten thousand and ⁰⁰/₁₀₀ DOLLARS

MEMO Expedia, Inc. Agnes N. Conder MP

2749706231 531932631003 3205 0001000000



AGNES N. CONDER LIVING TRUST 66853003 16 71-7062/2749 531932631003 00012681206 ✓
 885 E. BELL DR. MARION, IN 46953 DATE 10/22/99

PAY TO THE ORDER OF Johann M. Smith Escrow Agent \$ 10,000.00
Ten thousand and ⁰⁰/₁₀₀ DOLLARS

MEMO Cobalt Networks Inc Agnes N. Conder MP

2749706231 531932631003 3206 0001000000

