

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA**

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UNITED STATES SECURITIES)
AND EXCHANGE COMMISSION,)
)
Plaintiff,)
) Case No. 00-cv-1265-JMS/TAB
)
) Hon. Jane Magnus-Stinson
v.)
)
)
KENNETH R. PAYNE, JOHANN M. SMITH,)
DANIEL G. DANKER, CONSTANCE)
BROOKS-KIEFER, HEARTLAND)
FINANCIAL SERVICES, INC., JMS)
INVESTMENT GROUP, LLC,)
)
Defendants.)
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**PLAINTIFF’S MOTION TO DISMISS PRAYERS FOR
DISGORGEMENT, PREJUDGMENT INTEREST, AND
CIVIL PENALTIES AGAINST CERTAIN DEFENDANTS**

Plaintiff, United States Securities and Exchange Commission ("Commission"), respectfully submits this motion seeking an order dismissing its prayers for disgorgement, prejudgment interest, and civil penalties against the defendants Kenneth R. Payne, Daniel G. Danker, Johann M. Smith, Heartland Financial Services, Inc. ("HFS"), and JMS Investment Group, LLC ("JMS"). In support of its motion, the Commission states:

1. The Commission filed its Complaint in this matter on August 10, 2000.

2. The Complaint named six defendants—Payne, Danker, Brooks-Kiefer, Smith, HFS, and JMS.

3. The Commission's Complaint alleged generally that defendants misappropriated at least \$29 million belonging to hundreds of investors. In its prayer for relief, the Commission asked for the entry of permanent injunctions and the award of monetary relief in the form of orders of disgorgement, prejudgment interest, and civil penalties.

4. Following the filing of the Commission's Complaint, criminal charges were brought against Danker, Payne, Smith and Brooks-Kiefer. On March 2, 2001, Danker pled guilty to two counts of mail fraud and one count of money laundering. On June 19, 2001, Danker was sentenced to 71 months in prison and ordered to pay \$27,295,680.76 in restitution. On January 3, 2002, Payne pled guilty to five counts of mail fraud and one count of money laundering. On April 12, 2002, Payne was sentenced to 211 months in prison and ordered to pay \$27,295,680.76 in restitution. On May 24, 2002, Smith, who pled guilty to two counts of mail fraud and one count of unlawfully structuring currency transactions, was sentenced to 37 months in prison and ordered to pay \$11,740,397.76 in restitution. On the same day, Brooks-Kiefer, who pled guilty to one count of unlawfully structuring currency transactions, was sentenced to six months of home detention and fined \$3,100.

5. On November 16, 2000, Judge John D. Tinder entered, pursuant to JMS' written consent [JAMS dkt. 71], a permanent injunction against JMS. [*Id.* 73.] On the same day, Judge Tinder entered, pursuant to Smith's written consent [*Id.* 72], a permanent injunction against Smith. [*Id.* 74.] On August 31, 2009, Judge Tinder entered, pursuant to defendant HFS' written consent [CM/ECF dkt. 17], a permanent injunction against HFS. [*Id.* 18.]

6. On December 23, 2010, this Court granted summary judgment in favor of the Commission and against defendants Danker and Payne [CM/ECF dkt. 29, 30] on the issue of their liability for violations of Counts I through VI of the Complaint. The Court found that Payne and Danker violated Sections 5(a), 5(c), 17(a)(1), 17(a)(2), and 17(a)(3) of the Securities Act of 1933 ("Securities Act"); Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), including Rule 10b-5 promulgated thereunder; and aided and abetted violations of Sections 15(a)(1) and 15(c)(1) of the Exchange Act.

7. On February 18, 2011, the Court found that permanent injunctions were warranted against Payne and Danker [CM/ECF dkt. 42, 44], and, in accordance with its rulings, entered separate judgments of permanent injunction against Payne and Danker. [*Id.* 43, 45.]

8. On March 30, 2011, the Commission filed the Consent of Constance Brooks-Kiefer ("Consent"), including proposed Final Judgment as

to defendant Constance Brooks-Kiefer. [CM/ECF dkt. 58, 58-1.] Pursuant to the Consent, Brooks-Kiefer has agreed to the entry of a permanent injunction against her and an award of disgorgement and prejudgment interest totaling \$6,514.20, which is already in the possession of the court-appointed receiver (“Receiver”). On April 1, 2011, the Commission filed a motion requesting that the Court enter the proposed Final Judgment as to Brooks-Kiefer in accordance with her consent [CM/ECF dkt. 59].

9. Additionally, in light of the orders of restitution entered in the criminal proceedings against defendants and the fact that defendants’ victims in the criminal cases are the same as the victims in this case, the Commission desires to dismiss its prayers for disgorgement, prejudgment interest, and civil penalties against defendants Payne, Danker, Smith, Heartland and JMS. *See* proposed Order Dismissing Commission’s Prayers for Disgorgement, Prejudgment Interest, and Civil Penalties against defendants Payne, Danker, Smith, Heartland, and JMS, which is attached hereto as Exhibit A.

10. Finally, in light of the permanent injunctions already entered against all defendants, and subject to the Court’s entry of the proposed Final Judgment as to Brooks-Kiefer and the entry of an order dismissing the Commission’s prayers for monetary relief against the remaining defendants, there are no further claims asserted in the Complaint to be decided in this case.

11. Notwithstanding the foregoing paragraphs, this motion is not intended to, and shall not be construed to, compromise or affect in any manner the claims of, or payments made or to be made by, the Receiver.

WHEREFORE, the Commission requests that the Court enter the proposed Order Dismissing Commission's Prayers for Disgorgement, Prejudgment Interest, and Civil Penalties against defendants Payne, Danker, Smith, Heartland, and JMS.

Respectfully submitted,

s/Daniel J. Hayes

Daniel J. Hayes
Kara M. Washington
U.S. Securities and Exchange
Commission
175 W. Jackson Blvd., Suite 900
Chicago, Illinois 60604
Tel: (312) 353-7390
Fax: (312) 353-7398
Email: hayesdj@sec.gov
Email: washingtonk@sec.gov

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document has been served upon the following parties by the Court's Electronic Case Filing System or by depositing a copy of same in the United States Mail, first class postage pre-paid, on April 1, 2011:

Fred D. Scott
Attorney at Law
55 Monument Circle
Suite 814
Indianapolis, Indiana 46204
Email: attyfredscott@sbcglobal.net

Dexter B. Johnson
Mallon & Johnson, P.C.
19 S. LaSalle Street
Suite 1202
Chicago, Illinois 60603
Email: djohnson@mallonandjohnson.com

Dennis Zahn
Voyles, Zahn, Paul Hogan
700 Jefferson Plaza
One Virginia Avenue
Indianapolis, Indiana 46204
Email: dzahn@vzphmlaw.com

William Bock , III
KROGER GARDIS & REGAS
Bank One Center
111 Monument Circle
Suite 900
Indianapolis, IN 46204
(317) 692-9000
Email: wb@kgrlaw.com

Kenneth R. Payne
Register # 06422-028
FCI Seagoville
Federal Correctional Institution
P.O. Box 9000
Seagoville, TX 75159

Daniel G. Danker
1910 NW Grove Ave.
Topeka, KS 66606

Constance Brooks-Kiefer
3306 S. Ransdell Street
Indianapolis, IN 46227

s/ Daniel J. Hayes