



DISCLOSURE STATEMENT

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 02-3926

Short Caption: Krauer (Plaintiff-Appellant) v. Jonathon Roberts Financial Group, et. al. (Defendant-Appellees)

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

- (1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

James A. Krauer, Receiver for Heartland Financial Services, Inc. and JMS Investment Group, LLC.

- (2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Kroger, Gardis & Regas, LLP

- (3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

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Attorney's Signature: William Bock, III

Date: 11/26/02

Attorney's Printed Name: William Bock, III

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes No

Address: Kroger Gardis & Regas, LLP

111 Monument Circle, Suite 900, Indianapolis, Indiana 46204

Phone Number: 317-692-9000

Fax Number: 317-264-6832

E-Mail Address: WBOCK@LAW.COM

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JURISDICTION STATEMENT

A. District Court's Jurisdiction

On August 10, 2000, the United States Securities and Exchange Commission filed a Complaint in the United States District Court in the Southern District of Indiana ("District Court"). *The United States Securities and Exchange Commission v. Kenneth R. Payne, Johann M. Smith, Daniel G. Danker, Constance Brooks-Keifer, Heartland Financial Services, Inc., JMS Investment Group, LLC*, Case No. IP00-1265-C-T/G. (Docket No. 1 - Complaint ¶ 1, Exhibit 1; Appellant's Appendix Exhibit B).

The Complaint filed by the United States Securities and Exchange Commission requested, among other things, that the District Court appoint a Receiver for Heartland Financial Services, Inc. and JMS Investment Group, LLC. *Id.* at Exhibit 1. On August 21, 2000, Plaintiff, James A. Knauer ("Receiver"), was appointed by the United States District Court for the Southern District of Indiana to be the Receiver for Heartland Financial Services, Inc. ("Heartland"). *Id.* at ¶ 2. The Receiver is an Indiana resident. *Id.* at ¶ 3. Heartland is an Indiana corporation with its principal place of business in Indianapolis, Indiana. *Id.* at ¶ 4. JMS is an Indiana limited liability company with its principal place of business in Indianapolis, Indiana. *Id.* at ¶ 5.

Defendant, Jonathon Roberts Financial Group, Inc. ("Jonathon Roberts") is a Florida corporation with its principal place of business at 13902 N. Dale Mabry

Highway, Suite 103, Tampa, Florida 33618. *Id.* at ¶ 6. Upon information and belief, Defendant, Alliance Capital Management Corp. (“Alliance”) was or is a Florida corporation with its principal place of business in Tampa, Florida. *Id.* at ¶ 7. Jonathon Roberts is a successor in interest in Alliance and is responsible for all debts and liabilities of Alliance. *Id.* at ¶ 8.

Upon information and belief, Andover Securities, Inc. (“Andover”) is or was a Kansas corporation with its principal place of business in Kansas. *Id.* at ¶ 9. Upon information and belief, Andover is a predecessor to Andover Brokerage, LLC and Andover Brokerage Corp. (collectively “Andover Brokerage”) and Andover Brokerage is liable for all debt and liabilities of Andover. *Id.* at ¶ 10. Andover Brokerage is a New York limited liability company with its principal place of business at 400 Rella Blvd., Montebello, New York, 10901. *Id.* at ¶ 11.

FSC Securities, Corp. (“FSC”) is a Delaware corporation with its principal place of business at 2300 WindyRidge Parkway, Suite 1100, Atlanta, Georgia 30339. *Id.* at ¶ 12. FFP Securities, Inc. (“FFP”) is a Missouri corporation with its principal place of business at 15455 Conway Road, St. Louis, Missouri 63017-2022. *Id.* at ¶ 13.

The acts, practices and course of business constituting the securities violations alleged in the Receiver’s Complaint occurred in material part in the Southern District of Indiana. *Id.* at ¶ 14. The amount in controversy exceeds \$75,000.00. *Id.* at ¶ 15.

The District Court has jurisdiction over this action pursuant to Sections 20, 21(e) and 27 of the Securities and Exchange Act of 1934, as amended (the “Exchange Act”) [15 U.S.C. §§ 78t, 78u(e) and 78aa] and pursuant to 28 U.S.C. § 1331, because they arise under the laws of the United States. The District Court also has jurisdiction over all claims pursuant to the District Court’s supplemental jurisdiction defined by 28 U.S.C. § 1367 and pursuant to the District Court’s diversity jurisdiction defined by 28 U.S.C. § 1332.

B. Appellate Court’s Jurisdiction

On September 30, 2002, the District Court, issued its Entry On Motions To Dismiss and entered a Judgment of Dismissal dismissing all claims in the case, including dismissing the Receiver’s state law claims with prejudice. (Docket Nos. 97 and 98 – Entry on Motions to Dismiss and Judgment of Dismissal; Appellant’s Appendix, Exhibit A). On October 29, 2002, the Receiver filed his Notice of Appeal and Docketing Statement. (Docket Nos. 99, 101). This Court has appellate jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1294.

ISSUE PRESENTED FOR REVIEW

Whether the doctrine of *in pari delicto* bars a corporate receiver from bringing state law claims against defendants who caused injury to the corporation in receivership, after the wrongdoers who had previously controlled the corporate entity (or entities) in receivership were removed by the appointment of the receiver.

STATEMENT OF THE CASE

This is an appeal taken by the Receiver from a final judgment of the United States District Court for the Southern District of Indiana granting Defendants' Motions to Dismiss pursuant to Fed. R. Civ. Pro. 12(b)(1) and 12(b)(6) and dismissing all of the Receiver's claims and in particular dismissing the state law claims with prejudice. (Docket Nos. 97, 98).

The Receiver filed his Complaint setting forth federal and state law claims against the Defendants on August 10, 2001. (Docket No. 1- Complaint, Appellant's Appendix Exhibit A). Attorney William Bock, III simultaneously entered an appearance on behalf of the Receiver. (Docket No. 5). Thereafter, attorney Reynolds B. Brissenden also entered his appearance on behalf of the Receiver. (Docket No. 46).

On August 20, 2001, William L. O'Connor entered his appearance on behalf of FSC (Docket No. 11). On August 30, 2001, James W. Riley, Jr. entered his appearance on behalf of FFP. (Docket No. 13). On September 6, 2001, Thomas E. Wheeler, II entered his appearance on behalf of Jonathon Roberts and Alliance. (Docket No. 15). On October 1, 2001, attorneys Thomas E. Wack and Leo J. Asaro were admitted *Pro Hac Vice* on behalf of Defendant, FFP. (Docket No. 19). On August 2, 2002, Ted S. Helwig was admitted *Pro Hac Vice* on behalf of Jonathon Roberts and Alliance. (Docket No. 93).

On October 5, 2001, Defendant FFP filed its Motion to Dismiss Plaintiff's Complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil

Procedure and Memorandum in Support of Defendant FFP Securities, Inc.'s Motion to Dismiss. (Docket Nos. 23, 24).

On October 9, 2001, Defendants Jonathon Roberts and Alliance filed a joint Motion to Dismiss and a joint Brief in Support of their Motion to Dismiss. (Docket Nos. 25, 26). Also, on October 9, 2001, FSC filed its Motion to Dismiss and Brief in Support of Motion to Dismiss. (Docket Nos. 27, 28).

On October 11, 2001, FFP joined in the Motion to Dismiss and Brief filed by Jonathon Roberts and Alliance. (Docket No. 29).

On January 17, 2002, the Receiver filed his Response to all of the Defendants' motions to dismiss. (Docket No. 67). On February 20, 2002 Jonathon Roberts and Alliance filed their Reply Brief in Support of their Motion to Dismiss. (Docket No. 73). On February 21, 2002, FFP and FSC filed their Reply Briefs as well. (Docket Nos. 74,75).

On June 26, 2002, the Court scheduled oral argument on the pending motions for September 4, 2002. (Docket No. 88). On September 4, 2002, the District Court heard argument from counsel on Defendants' motions to dismiss. (Docket No. 96). On September 30, 2002, the District Court issued its Entry on Motions to Dismiss, granting the Defendants' motions to dismiss and dismissing the case in its entirety. (Docket Nos. 97, 98).

A Notice of Appeal was filed by the Receiver on October 29, 2002. (Docket No. 99). On November 6, 2002, this Court issued a Notice of Docketing Appeal, which pursuant to Fed. R. App. P. 31(a), set forth that the appellant's brief must be filed

by December 16, 2002. On December 4, 2002, counsel for the Receiver filed a Motion for Extension of Time Within Which to File Appellant's Brief and Appendix.

Thereafter, on December 11, 2002, this Court granted the Receiver's Motion for Extension of Time and ordered the Appellant's brief to be filed by January 21, 2003.

The Receiver hereby files this Appellant Brief in a timely manner.

STATEMENT OF THE FACTS

Heartland was founded by Kenneth R. Payne ("Payne") as an Indiana corporation in or about January 1991 and held itself out as a brokerage, insurance and estate planning firm. (Docket No. 97 – Entry on Motions to Dismiss, pg. 3; Appellant's Appendix, Exhibit A; Docket No. 1 – Complaint, Exhibit 1 – ¶ 4; Appellant's Appendix, Exhibit B). Payne formerly was Heartland's president. (Docket No. 97 – Entry on Motions to Dismiss, pg. 3). Daniel G. Danker ("Danker") was the vice president and office manager of Heartland. *Id.* He maintained Heartland's books and records. *Id.* Heartland was not registered with the United States Securities and Exchange Commission ("SEC"). *Id.*

JMS was founded in 1997 as an Indiana limited liability company. *Id.* Johann M. Smith ("Smith") was the manager of and attorney for JMS who along with Payne and Danker solicited investors and made investment decisions for JMS. *Id.*

Constance Brooks-Kiefer ("Brooks-Keifer") was an administrative assistant with Heartland. *Id.* She was responsible at both Heartland and JMS for preparing and issuing checks, depositing investor funds, preparing and issuing account

statements, and maintaining the books and records. *Id.*

Defendants FSC, FFP, Jonathon Roberts and Alliance were broker dealers registered under Section 15 of the Exchange Act, 15 U.S.C. § 78o, and with the National Association of Securities Dealers (“NASD”). (Docket No. 1 – Complaint, ¶ 19; Appellant’s Appendix, Exhibit B). Payne was licensed as a registered securities representative with Defendants for time periods as follows:

- (a) FSC - January 1, 1996 to February 14, 1997
- (b) FFP - February 26, 1997 to October 1, 1998
- (c) Jonathon Roberts - March 15, 1999 to August 10, 2000.
- (d) Alliance - March 1999 to unknown date

Id. at ¶ 20.

Danker was licensed as a securities registered representative with Defendants for time periods as follows:

- (a) FSC - January 1, 1996 to February 14, 1997
- (b) FFP - February 26, 1997 to October 1, 1998
- (c) Jonathon Roberts - March 12, 1999 to March 27, 2000
- (d) Alliance - March 1999 to unknown date

Id. at ¶ 21.

During the time periods set forth above, Payne and Danker were employees and agents of FSC, FFP, Jonathon Roberts and Alliance. *Id.* at ¶ 47. During these time periods in which Payne and Danker were acting as licensed securities dealers and employees and agents of the Defendants, the Defendants had the ability and duty to

