reference.

MR. BOCK: I would be happy to provide a copy of the argument that I have made in terms of the power point presentation that does have the cites at the end of the argument if that would be appropriate.

THE COURT: Actually I prefer just to have the cites if you could give me enough time to write as fast as I can.

For purposes of the record you will have to cite them for the other parties.

MR. BOCK: Thomas v. Hemmelgarn 579 N.E.2d 1333 at page 1336. And Theye v. Bates, 13 -- I'm sorry, 337, N.E.2d, 837, and the page cited is 844 n 6.

I think there's also a factual issue regarding whether Payne and Danker were acting as the agents of the broker dealers or of Heartland or of both when they committed their fraudulent acts. As I explained earlier, this office was designated by at least FSC Securities as an office of supervisory jurisdiction; therefore, they had responsibility to oversee the financial. Payne and -- or Danker had authority to oversee the financial transactions of the office on behalf of FSC. And I think that there is then in terms of applying in pari delicto defense a factual issue regarding whether Payne and Danker were acting as the agents of the broker dealers or of Heartland.

So we don't think the defense applies; but even if it did,

there would be a factual issue before it could be applied.

And finally I told you I would give you the cite for that follow-up opinion in the Johnson case. It's 658F Supp. 1213, District Court of Colorado, decision 1987. And in that case the Court said that while there were not claims by the receiver under I believe its the Commodities Act, that the Court would permit claims of the receiver relating to breach of fiduciary duty and to negligence. And so I don't think that relying on that case helps the defendants in terms of the applicability of the in pari delicto defense to anything other than the federal securities claim.

THE COURT: Are you conceding that?

MR. BOCK: No, Your Honor. The case doesn't apply to the federal securities claims. And the Scholes case clearly reflects that in pari delicto is not applicable. But I am pointing out that we have overlooked -- if we're going to rely on the District Court of Colorado for authority in this case, we don't want to overlook what they said in the same case. And they were permitted, that Court would have permitted all of the state law claims to proceed.

The statute of limitations defense has been raised. The cite in the defendant's brief, that citing specifically citing INB National Bank v. Moran, says the adverse domination doctrine does not apply in Indiana. That's an incorrect statement of Indiana law. The INB National Back v. Moran case

involved the presidential domination doctrine. And the theory that the president of the corporation, the fact that he was a wrongdoer and was in control of the corporation would not toll the statute of limitations.

In that particular case the plaintiff was one of the board members who the Court specifically noted had -- let me see if I can find the quote. It says specifically, the Court specifically noted, "the long acquiescence of the plaintiff." Actually it was his estate that was suing in the president's misconduct. So, the statements that have been made regarding the adverse domination doctrine and its applicability in Indiana are inaccurate. In fact, in Mutual Security Life Insurance Company v. Fidelity And Deposit Company of Maryland, 659 N.E.2d 1096, an Indiana Court of Appeals case from 1995, two years after the Miranda decision, the Court specifically recognized that it was an open question and they didn't have to decide the applicability of the adverse domination doctrine.

In a case following the Court of Appeals decision applying the presidential domination doctrine, and I think the difference is the adverse domination doctrine says that there was nobody in the corporation that could have, that could have brought the wrongdoing to the attention of somebody that could put an end to it because everybody in the corporation either didn't know -- that had any knowledge was complicit in the fraud. And I think that's exactly what has been pled in this

case.

But in the case two years after the Moran case the Northern District of Indiana stated, in citing the Moran case, said that the Court stands by its conclusion that Indiana courts would apply the first domination to calculate the accrual of the resolution trust corporation state law claims. So, the Indiana Court of Appeals in '95 recognized it's an open question.

The only case specifically addressing the adverse domination doctrine both in 1993 and in 1995 was the Northern District of Indiana, Federal District Court, and in both cases the Court said that Indiana courts would apply that doctrine to toll the statute of limitations.

In addition I think the statute of limitations presents defense, an affirmative defense as well. It raises many factual issues. Equitable tolling is certainly appropriate we believe where the defendants had duty of oversight. And in this case I think that as we are enabled to undertake discovery, we will be able to clearly demonstrate that the defendants had a very high duty, a significant duty of oversight; and that may end up providing evidence that would toll the statute of limitations.

But in any case, the defendants' briefs point out that the statute of limitations for fraud is six years. That means the receiver filed its complaint in August of 2001. And so from August of 1995 until August of 2001 any injuries occurring to

Heartland or JMS during that period as a result of fraud are not -- could not be dismissed on the basis of statute of limitations.

The securities statute of limitations is three years and you would have to go three years back from 1998, and the state law claims are two years. Therefore, if you go two years back from when this complaint was filed, even if none of the tolling doctrines would apply, you would have a period of one year in which substantial injury to Heartland occurred.

Now, the arguments have been raised regarding controlling person liability under Section 20 of The Securities And Exchange Act and the Indiana Code, and interestingly I think if I -- I believe that all the concerns that were raised by Mr. Helwig are addressed by the Supreme Court's recent decision in SEC v. Zandford, which was decided by the United States Supreme Court on June 3rd, 2002. The cite is 122 Supreme Court 1899. And as I listened to Mr. Helwig's arguments he said that the problem was with the claims under Section 20 was that the receiver had not alleged an underlying securities violation but had alleged common law violations for breach of fiduciary duty and this was not sufficient to state a claim under the federal securities law.

I believe he also raised the argument that everyone has raised that the defendants allegedly didn't have the practical ability to control Payne and Danker. That's a factual issue

that was clearly inappropriate and will eventually, if we're permitted to proceed, be disproved.

But I believe that the Supreme Court's decision undercuts Mr. Helwig's argument. The Zandford case involved claims in which the wrongdoer had allegedly misappropriated the funds of individuals who had given those funds to him to purchase securities and he put those monies into an account and then later used them for inappropriate purposes. And the claim of the defendant was that this was not a securities law claim, that the wrongful conduct was not, "In connection with the sale of securities." And the Supreme Court analyzed that claim and said that the allegation was both that the respondent engaged in a fraudulent scheme in which he made sales of his customers' securities for his own benefit." The respondent had submitted that the, "both sales, themselves, were perfectly lawful and the subsequent misappropriation of the proceeds, though fraudulent, is not properly viewed as having the requisite connection with the sales and in this view the alleged scheme is not materially different from simple theft of cash or securities in an investment account." And the Supreme Court said we disagree. The Supreme Court said taking the allegations in the complaint as true, and this is a quote, "Each sale was made to further respondents' fraudulent scheme. Each was deceptive because it was neither authorized nor disclosed. Each time the respondent exercised its power of

disposition of the funds obtained from these sales of securities that conduct "without more" was a fraud. The Court said that the sales are properly viewed as a course of business that operated as a fraud or deceit.

And then the Court said -- noted that the securities statute is not to be construed technically or restrictively but flexibly to effectuate its remedial purposes. And the Court said it's enough that the scheme to defraud and the sale of securities coincide. And we submit that that's what happened here, that there was a scheme to defraud and that the sales of securities coincided with that scheme.

The Court said that the complaint describes, "a fraudulent scheme in which securities transactions and breaches of fiduciary duty coincide. Those breaches were therefore in connection with securities sales within the meaning of section 10(b). So we believe that there are numerous instances that the evidence will demonstrate that in which sales of securities coincided with the breach of fiduciary duty and fraud and caused injury to Heartland. And the only way in which this scheme could have been carried out was if the broker dealers did not exercise their ability to control Payne and Danker. And therefore we believe that they have fair and controlling personal liability under The Securities And Exchange Act and under the Indiana Securities Act. And we believe that the Zandford case addresses the point that each sale of security

need not have been the sole cause of the loss as long as those sales of securities were part of the fraudulent scheme and without those sales the scheme could not have been perpetuated. We believe that sufficient injury has been alleged and sufficient connection with the sale of securities has been alleged to stay the claim, and we rely further on the cases cited in our brief to that effect.

I'd like to point out that the Seventh Circuit at least twice has reviewed controlling person liability in the context of a broker dealer relationship. This is not a novel claim and liability has frequently been recognized in broker dealers for the actions of those that they are supposed to control. And direct responsibility on the part of the broker dealers for failing to control activity that resulted in securities fraud or securities violations.

The briefs of the defendants state that there has not been a signif -- or sufficient allegation of control. We would respectfully disagree. Paragraph 35 of the complaint, the allegations made, each defendant was able to directly or indirectly control Payne and Danker during the time period Payne or Danker was a employee and/or agent of that broker dealer.

I don't know how we could state the control more clearly. It is an allegation of our complaint that there was a responsibility to control and the ability to exercise that

control existed. And that a similar statement is made in paragraph 36 in the complaint.

The Indiana statute is very similar, but not identical to the federal statute. And so I'll go back to it for a second. One of the ways in which I believe it's dissimilar from the federal cases or the federal statute is the last sentence. "There is contribution as in cases of contract among the several persons liable." And the contribution doctrine may under the Indiana statute provide an additional basis upon which the receiver would have standing to pursue these claims. There are no cases interpreting that provision that I have been able to find, but it would, in this case the Court has recognized the claims of numerous investors against Heartland and JMS. I believe that those, the recognition of those claims would entitle Heartland to a contribution from the broker dealers pursuant to the last sentence of this statute. But again, we have not found any cases specifically addressing that point and that dissimilarity with the federal statute.

Jonathon Roberts in their brief state that they have conceded that the receiver has a breach of fiduciary duty and fraud claims against Payne and Danker as officers in Heartland and JMS. Now we have independent direct claims of breach of fiduciary duty and negligent supervision against the broker dealers. But we have also asserted claims based on a theory of respondeat superior that the principal is responsible for the

acts of its servant. We think that the NASD regulations that we have shown demonstrate that there is a very close relationship between the broker dealers and those that they license to sell securities. And in fact the regulation requires that Payne and Danker be employed and receive their principal income except for passive income from these broker dealers.

And so we think that there's clearly a factual issue about whether every act that was undertaken in Heartland was either in connection with the duties of Payne and Danker, or so closely related to their duties that agency liability would impose upon the broker dealers' responsibility for those actions as a separate and independent theory of liability.

And so I cite these provisions of the reply brief with Jonathon Roberts to show the Court how much I suppose has been conceded. The defendants apparently don't dispute that the fact that Payne and Danker took these funds make Heartland and JMS crime victims. And I think that is an admission that Heartland and JMS were injured.

And because the defendants at this point in their reply brief are not disputing injury, the only other step to liability is to consider whether the plaintiffs were, or whether Payne and Danker were acting within the scope of their authority with the broker dealers. The reply brief for each of the defendants says, No, can't be, they couldn't have been

acting within the scope of their authority. But that's just not a question that can be decided in a motion to dismiss. And I think we've demonstrated that it is very possible that they were acting within the scope of their authority. First of all, we have clearly alleged that they were acting in the scope of their authority. Paragraph 23 of the complaint, we state during the time periods as set forth above in which Payne and Danker were acting as licensed security dealers and employees agent of the broker dealers. I think taken as a whole, the complaint reflects that at all times Payne and Danker were acting as agents of the broker dealers.

Indiana law is that the determination of whether an employee was acting within the scope of his master's employment or whether an agent was acting within the scope of a principal authority is dependent on the facts and circumstances of each case and is generally a question of fact for the jury. That's the case of Gomez v. Adams, 462 N.E.2d, 212. And the specific cite is page 223. It's an Indiana Court of Appeals' decision that was inadvertently left out of our brief as a result of my oversight and simple reference to agency cases was contained in the brief. But that's the other cases that should have been cited in our brief.

THE COURT: I'm going to have to interrupt you for five minutes.

MR. BOCK: Sure.

THE COURT: We'll be in recess for five minutes.

(A brief recess was held from 12:15 to 12:25 p.m.)

THE COURT: Thank you.

MR. BOCK: Your Honor, I'll be very brief. I wanted to cite for the Court the cases, agency cases, that were missing from our brief. Konkle v. Henson, 672 N.E.2d 450, 456. That indicates the employee's acting within the scope of his employment when he's acting at least in part to further the interest of his employer. And that same case says that even if the employee is primarily motivated by self-serving purposes he's at least partially serving his employer interest, liability will accrue. And so we believe that clearly the indications of the complaint satisfy the standard of alleging that a sufficient agency relationship existed.

Finally, I promised you that I would address the JMS's claims against FSC. That claim was raised, not in the motion to dismiss but in FSC's brief, in the last I believe two sentences, perhaps two paragraphs of their briefs. The receiver's response to the dismissal of JMS claims are this: Really the JMS scheme as alleged in the complaint is part of the entire fraudulent operation of Heartland Financial Services. JMS was operated out of Heartland. And the receiver has asserted claims on behalf of JMS, but those as set forth in the RICO complaint, that is attached and incorporated into the receiver's brief in paragraphs 114 through 135. We believe

that the JMS scheme could not have been carried out absent FSC's negligence or intentionally wrongful conduct in licensing Payne and Danker prior to the creation of JMS.

So the real question we think is whether FSC can be held liable for actual or consequential damages that occurred after Payne and Danker switched licenses with them. And we think that FSC's liability can extend beyond a period in which Payne and Danker were actually licensed representatives of FSC. And they can be responsible for actual or consequential damages and therefore at this --

THE COURT: Well, how? FSC never had, you don't allege, they ever had a relationship with JMS. JMS didn't exist during the relationship that FSC had with Heartland, or with Danker and Payne. How? It didn't even exist.

MR. BOCK: JMS did not exist. Heartland existed and without FSC's -- FSC was followed by FFP, was followed by Jonathon Roberts. And if FSC had in the first instance exercised their duty and responsibility of supervision and control, there would not have been a JMS scheme. And there would not have been a continuing Heartland scheme. And so we think that the real analysis is whether or not any broker dealer can be liable for damages after the period in which they were no longer a holder of Payne or Danker's license.

And that question I don't think was appropriately raised and there's no citation to case authority; and therefore, it