

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

JAMES A. KNAUER, as the Court )  
Appointed Receiver of HEARTLAND )  
FINANCIAL SERVICES, INC., JMS )  
INVESTMENT GROUP, LLC., )  
Plaintiff )

-v-

JONATHON ROBERTS FINANCIAL )  
GROUP, INC., ALLIANCE CAPITAL )  
MANAGEMENT CORP., ANDOVER )  
SECURITIES, INC., FSC )  
SECURITIES CORPORATION, and )  
FFP SECURITIES, INC., )  
Defendants )

) CAUSE NO. IP-01-1168-C T  
) Indianapolis, Indiana  
) December 19, 2002  
) 10:00 A.M.

Before the  
HONORABLE JOHN D. TINDER

OFFICIAL REPORTER'S TRANSCRIPT OF  
ORAL ARGUMENT ON FSC SECURITIES CORPORATION'S MOTION  
TO RECONSIDER AND OBJECTION TO PLAINTIFF'S MOTION TO  
SUPPLEMENT THE RECORD

APPEARANCES:

For the Plaintiff:

Kroger, Gardis & Regas  
By: William Bock, III  
Reynolds B. Brissenden  
111 Monument Circle  
Indianapolis, IN 46204

For the Defendants:

Locke, Reynolds, LLP  
By: John Chavis  
201 N. Illinois Street  
Indianapolis, IN 46204  
and  
Riley, Bennett & Egloff  
By: James W. Riley, Jr.  
One American Square  
Indianapolis, IN 46282  
and

Kightlinger & Gray  
By: William L. O'Connor  
151 N. Delaware Street  
Indianapolis, IN 46204

Court Reporter:

Glen L. Cunningham, CM  
291 U.S. Courthouse  
Indianapolis, IN 46204

PROCEEDINGS TAKEN BY MACHINE SHORTHAND  
TRANSCRIPT PRODUCED BY COMPUTER-ASSISTED TRANSCRIPTION

1 (Call to order of the court, 10:00 A.M.)

2 THE COURT: Good morning.

3 On December 3rd I signed an order that had been tendered  
4 by the plaintiff supplementing the record for purposes of  
5 appeal, and unfortunately I did it precipitously. I was of  
6 the mistaken -- I was not aware there were objections to the  
7 proposed order, and under that misimpression I went ahead and  
8 signed it. It didn't strike me of something that was of all  
9 that much consequence. I assumed then it was not -- from  
10 what my impression led me to believe, it was not a matter  
11 that was going to be contested. Then I find from the filing  
12 by FSC there is an objection, which I take it that,  
13 Mr. Riley, you join in?

14 MR. RILEY: I do.

15 THE COURT: And Mr. Chavis?

16 MR. CHAVIS: Yes, sir.

17 THE COURT: Did you also join in?

18 MR. CHAVIS: That is correct.

19 THE COURT: All right. Mr. Chavis, did you talk to  
20 Mr. Wheeler about this?

21 MR. CHAVIS: I talked to him yesterday, and we were  
22 going to concur with Mr. Riley's arguments today. I don't  
23 know to what extent --

24 THE COURT: The reason I asked that is we were -- my  
25 staff was told by Mr. Wheeler that there was no objection to

1 this, but I take it now there is?

2 MR. CHAVIS: I apologize.

3 THE COURT: So, in any event, I'm going to vacate  
4 the order that I issued on December the 3rd.

5 And I would now like to hear from you, Mr. Bock, as to  
6 why the record should be -- what it is you want me to do,  
7 what supplementation should occur, and why it should occur.

8 MR. BOCK: Thank you, Your Honor. Mr. Brissenden  
9 has been prepared to make the argument for this.

10 THE COURT: Fine.

11 MR. BRISSENDEN: Judge, do you prefer for me to  
12 stand here?

13 THE COURT: That would be great. Wherever you like.  
14 You can go wherever you want.

15 MR. BRISSENDEN: Thank you, Your Honor.

16 My name is Reynolds Brissenden. I'm an attorney for JMS  
17 Investment Group, LLC.

18 As you may recall, we were here last for a hearing to  
19 address the defendants' motions to dismiss. That was a  
20 rather lengthy hearing in which both sides presented  
21 arguments, both sides presented illustrative evidence, both  
22 sides used power point presentations and slides to present  
23 various items and documents to the Court.

24 On October 29th, 2002, James A. Knauer, the receiver,  
25 filed his notice of appeal, and thereafter that set the stage

1 and triggered a series of subsequent events that had to occur  
2 procedurally in which to follow-up to that notice of appeal,  
3 one of which was to prepare the record, and also to prepare  
4 the transcript of the hearing on the motions to dismiss.

5 After counsel for the receiver received the -- or filed  
6 their notice we received a packet from the Clerk here, and it  
7 contained, among other things, including explanation of the  
8 rules themselves. It provided an explanation of various  
9 things that needed to occur procedurally. One of the things  
10 that the Court provided was a 7th Circuit Transcript  
11 Information Sheet, and on November 6th, 2002, I completed  
12 that 7th Circuit Transcript Information Sheet and filled it  
13 out such that it requested a transcript of the hearing that  
14 was conducted on September 4th, 2002, of the defendants'  
15 motions to dismiss and all documents submitted by parties  
16 during the hearing.

17 THE COURT: Now, you are using some terms that maybe  
18 I understand differently than you do. You used the term  
19 "evidence" earlier, "illustrative evidence," and you are  
20 using the term "hearing." I take evidence to be something  
21 that tends to prove something, and I understand that hearing  
22 to be a court proceeding that involves the taking of  
23 evidence, the hearing of evidence, the presentation of  
24 evidence, in contrast to an argument in which the lawyers  
25 advocate their respective positions. And I'm trying to get

1 you maybe a little quicker to where you are going.

2 The matter that we had on September the 4th was -- the  
3 notice that was sent, if I'm not mistaken, was for an  
4 argument on the pending motions to dismiss, not an  
5 evidentiary hearing. And my recollection of the  
6 proceeding -- and the transcript, I think, confirms this --  
7 is that it was argument, not an evidentiary hearing. So when  
8 you are using the term "hearing," are you talking about an  
9 evidentiary proceeding? Are you referring to what we did on  
10 September 4th?

11 MR. BRISSENDEN: Judge, I'm referring to what  
12 occurred on September 4th.

13 THE COURT: Do you contend it was an evidentiary  
14 hearing?

15 MR. BRISSENDEN: Well, Judge, I would --

16 THE COURT: I would think that would call for a yes  
17 or no. If it doesn't, maybe the question is too complex.

18 Tell me what it was. What did I do? What was that  
19 procedure?

20 MR. BRISSENDEN: It was a hearing in which oral  
21 argument was made by both parties, and it was to address  
22 those motions to dismiss.

23 THE COURT: And those motions were 12(b)(C)(6)'s,  
24 correct? They were not motions related to evidentiary  
25 matters, such as lack of personal jurisdiction, things of

1 that nature?

2 MR. BRISSENDEN: Judge, there was a standing  
3 argument that was raised, so it -- and without having the  
4 motion in front of me, it may have also been a 12 --

5 THE COURT: All right. Well, now, tell me what it  
6 is you want to do. What do you want to have incorporated  
7 into the record? My impression is that it is a, what you  
8 would call hard copy, a printed copy of the power point  
9 demonstration that was utilized. Is that it? Is that what  
10 you want in the record?

11 MR. BRISSENDEN: Well, Judge, we would like to --  
12 that is correct, Judge.

13 THE COURT: All right. Now, you contend that it is  
14 a piece of evidence, that it was an evidentiary submission?

15 MR. BRISSENDEN: Yes, Judge. It was part of -- what  
16 we had done, Mr. Bock had had prepared a power point  
17 presentation. He had prepared the slides. Mr. Bock had also  
18 printed out the slides for the Court to follow along, not  
19 only visually, but also directly in front of the Court. The  
20 Court could follow along with these slides during the course  
21 of -- and I would point out that I believe it was Mr. Wack,  
22 counsel for FSC Securities, also had a slide that he  
23 presented to the Court and referred to during his  
24 presentation.

25 In addition --

1 THE COURT: Go ahead.

2 MR. BRISSENDEN: In addition, Judge, during  
3 Mr. Bock's presentation, his power point presentation, there  
4 were documents that were referred to that were used in  
5 support of his argument, and these documents were tendered to  
6 the Court. They were displayed to the Court, both visually  
7 and presented physically to the Court for the Court's review.

8 There were also presented to the Court NASD regulations,  
9 and also there were various relevant cases that were  
10 presented to the Court, and these items were referred to  
11 throughout the hearing by both sides. And as a result, when  
12 we requested the transcript be prepared, when we received  
13 back a copy of the transcript we -- or I reviewed it and  
14 found that there were at least 25 references to documents on  
15 various pages throughout the transcript, and these references  
16 were made to these specific documents, to the slides, and to  
17 the cases. And it was my impression that, upon reviewing the  
18 transcript, the Court of Appeals would have a difficult time  
19 understanding what references were being made by the parties  
20 and by counsel during -- in directing the Court's attention.  
21 I'm not sure if you have the transcript.

22 THE COURT: I do.

23 MR. BRISSENDEN: The Court only has to go so far as  
24 to page 4 to see that Mr. Wack begins referring to his slide  
25 and begins making reference to -- references to line 1 of his

1 slide, and then continues on to line 2 of his slide, and it  
2 seems to us the Court would have a difficult time  
3 understanding here at the District Court level when it  
4 reviewed the transcript.

5 The defendants have objected that, first of all, the  
6 motion was not timely filed. We contend it was. It wasn't  
7 until we received the transcript back that we found out that  
8 the exhibits were not going to be made a part of the  
9 transcript and were not going to be included. Defendants  
10 contend that the motion should have been filed -- the motion  
11 to supplement should have been filed within ten days of the  
12 notice of appeal, but that would have been impossible because  
13 it wasn't only until after that point that we received the  
14 transcript back and learned that the exhibits were not going  
15 to be made a part of the transcript.

16 The defendants have objected to the motion on the fact  
17 that the rule -- Appellate Rule 10 does not apply  
18 procedurally, does not allow for such a motion, and I would  
19 point out to the Court that is not correct. Appellate Rule  
20 10 states that, "If any differences arise about whether the  
21 record truly discloses what occurred in the District Court  
22 the difference must be submitted to and settled by the Court  
23 and the record conformed. If any party is misstated in the  
24 record by error, accident, the omission on the statement may  
25 be corrected and a supplemental record may be certified and

1 forwarded."

2 Circuit Rule 10 goes on to state that, "Under paragraph  
3 B a motion to correct or modify the record pursuant to Rule  
4 10(E) shall be presented first to the District Court," and  
5 that is exactly what we did, Judge, and that is why we are  
6 here this morning to address this issue before the record  
7 goes up to the 7th Circuit.

8 THE COURT: Have you given a copy of that document  
9 that you say should be the supplement to your opponents so  
10 that they can review it to see if that is what was displayed?

11 MR. BRISSENDEN: Judge, they were given a copy at  
12 the hearing, and I believe they still have it.

13 MR. BOCK: We gave a copy to them at the hearing.

14 MR. BRISSENDEN: Also, Judge, the Court had a copy,  
15 as well. When we received a copy of the transcript the court  
16 reporter, Pat Cline, tendered back the packet to me. I have  
17 it here if the Court wishes to have it.

18 THE COURT: Mr. O'Connor, is there a dispute about  
19 the accuracy of this printed copy as to whether that is what  
20 was displayed?

21 MR. O'CONNOR: Your Honor, if I may, there are two  
22 things. This is not just a power point presentation. There  
23 are evidentiary type documents in this binder. Not all of  
24 these things were ever put up on any power point display.  
25 Neither were all of these things ever attempted to be

1 exhibited to the Court.

2 THE COURT: So can I take that to be a no?

3 MR. O'CONNOR: That is a no. I'm sorry.

4 THE COURT: Would all of you at some point -- you  
5 can do this privately later -- tell me how to ask a question  
6 that elicits a yes or no? I guess I have lost any ability I  
7 ever had to do that.

8 So you are contending that is not an accurate copy of  
9 what is displayed?

10 MR. O'CONNOR: The reason that it is difficult to  
11 answer that yes or no is the things that were displayed, it  
12 is an accurate copy; however, there are things included that  
13 were never displayed.

14 THE COURT: All right, thank you.

15 MR. O'CONNOR: Thank you.

16 THE COURT: Mr. Brissenden, aren't you really asking  
17 to reopen the argument on the motion to dismiss to submit  
18 evidentiary materials?

19 MR. BRISSENDEN: No, Judge, we are not. These were  
20 tendered. The standard for Appellate Rule 10A, and it is a  
21 very broad rule, and it states -- and actually it is the  
22 Circuit Rule 10, which is a broader rule, in interpreting  
23 Appellate Rule 10 further states that -- and I'll quote the  
24 transcript of a deposition. Well, first of all, "The Clerk  
25 of the District Court shall prepare within 14 days of filing

1 the notice of appeal the original papers, transcripts filed  
2 in the District Court, and exhibits received or offered in  
3 evidence." And the rule goes on to specifically define that  
4 the transcript of the deposition is considered filed within  
5 the meaning of this rule, and an exhibit is received or  
6 offered to the extent that it is tendered to the District  
7 Court in support of a brief or a motion, whether or not the  
8 rules of the District Court treat the deposition transcript  
9 or the exhibit as part of the record.

10 The defendants contend this needed to be file stamped  
11 formally with the Court, or offered as evidence to the Court,  
12 and we contend, Judge, that under the circuit rule that any  
13 exhibits that are received or offered, to the extent that it  
14 was tendered, and we believe this was tendered in support of  
15 our response brief and in support of our arguments, that,  
16 therefore, Judge, it should be made a part of the record.

17 THE COURT: Where did you do that in the transcript?

18 MR. BRISSENDEN: Where did we -- I'm sorry?

19 THE COURT: When during the argument did you tender  
20 what it is you now say should be supplemented as part of the  
21 record on appeal?

22 MR. BRISSENDEN: Well, we contend -- if I may have  
23 just a moment.

24 THE COURT: Sure.

25 I'll focus your attention on a certain point. I believe

1 at page 61 Mr. Bock said, "I would be happy to provide a copy  
2 of the argument I have made in terms of the power point  
3 presentation that does not have the cites at the end of the  
4 argument -- that does have the cites in the argument, if that  
5 would be appropriate."

6 MR. BRISSENDEN: That is correct, Judge.

7 THE COURT: Is that what you are relying on, or is  
8 there someplace else?

9 MR. BRISSENDEN: There are other places, Judge.  
10 First of all, there are numerous references to the power  
11 point slides that were used.

12 On page 38 there are mentions there of the NASD  
13 regulations.

14 On page 40, at the bottom of the transcript it states,  
15 and this was Mr. Bock in his presentation, "Here is a  
16 statement that the Heartland Financial Services organization,  
17 which Mr. Knauer is receiver for, put out during the tenure  
18 of Payne and Danker." Again he is referring to a specific  
19 document that was used and displayed before the Court.

20 On the top of page 44 of the transcript Mr. Bock  
21 states -- I'll just flip through a couple of the others  
22 referring to the documents and the regulations that he was  
23 referring to.

24 On page 45 he states, "Well, we don't have all the  
25 records, but we do have this document." And again referred

1 the Court and displayed to the Court another document.

2 And then, as you mentioned, Judge, on page 61 he did  
3 state that he would be happy to provide a copy of his  
4 argument, and that did include -- at the time it was packaged  
5 with the documents that were referred to in his argument. It  
6 also contained the NASD regulations and also the case law  
7 that he mentioned.

8 THE COURT: I appreciate your representing that, but  
9 how do I know that other than what you say now, because  
10 didn't I decline his offer of that submission?

11 MR. BRISSENDEN: What he was offering, I believe, at  
12 the time, Judge, was copies of the cases, and you asked him  
13 rather than to -- for you to receive copies of the cases, the  
14 Court asked for Mr. Bock to read the -- provide you with the  
15 citations. And so Mr. Bock read those citations. But with  
16 regards to the documents, the power point slides, and the  
17 NASD regs, those were, we contend, tendered and displayed to  
18 the Court.

19 THE COURT: Tendered and displayed to the Court at  
20 the points you have just indicated?

21 MR. BRISSENDEN: That is correct, Judge.

22 THE COURT: But you agreed that the packet you have  
23 in front of you that you are now wanting supplemented in the  
24 record has documents in it that were not displayed. You do  
25 or do not agree with that?

1           MR. BRISSENDEN: Judge, I believe there were some  
2 documents that were not -- that we did not have an  
3 opportunity to display visually to the Court. They were, we  
4 believe, referred to in reference to -- during Mr. Bock's  
5 argument.

6           Following up, Judge, the other argument that is made by  
7 defendants is that again these were not tendered, they were  
8 not received or offered to the Court in support of the brief  
9 or motion. If they weren't being tendered to the Court in  
10 support of the brief or motion why, then, would defendants  
11 have felt the need to object to them being offered or  
12 tendered at a later time? We contend that the very fact that  
13 after Mr. Bock's presentation that the fact that Mr. O'Connor  
14 felt the need to object to the documents, in and of itself,  
15 is an admission, or recognizes that Mr. O'Connor believed  
16 that these were being offered -- tendered or offered to the  
17 Court in support of the motion.

18           And with regards to Circuit Rule 10, Judge, the rule is  
19 very broad. It is a very broad definition. The Court of  
20 Appeals, 7th Circuit Court of Appeals, has stated that it is  
21 necessary to have all documents before it as it considers  
22 parties' arguments and renders its decision. And in that  
23 case the cite for that is Hill versus Porter Memorial  
24 Hospital, 90 F 3d 220, 7th Circuit, 1996.

25           Following that approach, and what is consistent with

1 that approach, Judge, the 7th Circuit's Practitioner's  
2 Handbook for Appeals, on page 55 specifically states that,  
3 "Parties should be sure that anything conceivably relevant to  
4 the issues on appeal is included on the record." And it goes  
5 on to state, "Of course, the record on appeal cannot be  
6 supplemented with new evidentiary materials not before the  
7 District Court."

8 Judge, we don't -- we are not here trying to submit new  
9 materials to the Court. Judge, these were before the Court.  
10 We are trying merely to make the transcript complete so that  
11 when the 7th Circuit reviews the transcript it has a full  
12 understanding of what occurred here at the District Court  
13 level.

14 I would also like to direct the Court's attention to a  
15 case in the 7th Circuit, specifically Howell versus Tribune  
16 Entertainment Company. The citation for that is 106 F 3d  
17 215, 7th Circuit, 1997. It is a case where, similar to this,  
18 it was a motion to dismiss hearing. The issues that needed  
19 to be addressed were motions to dismiss on the complaint and  
20 whether or not the complaint stated -- or set forth claims  
21 upon which relief could be granted. And in that case, Judge,  
22 the Court of Appeals allowed a videotape that was the subject  
23 matter of the case that was in dispute. It allowed a  
24 videotape to be displayed. It wasn't filed, it wasn't part  
25 of the record. It allowed the videotape to be displayed to

