

# Exhibit 1

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

JAMES A. KNAUER as the Court Appointed )  
Receiver for HEARTLAND )  
FINANCIAL SERVICES, INC., JMS )  
INVESTMENT GROUP, LLC, ) CASE NO. IP-01-1168-C T/K  
 )  
Plaintiff, )  
 )  
v. )  
 )  
JONATHON ROBERTS FINANCIAL )  
GROUP, INC., ALLIANCE CAPITAL )  
MANAGEMENT CORP., ANDOVER )  
SECURITIES, INC., FSC SECURITIES )  
CORPORATION AND FFP SECURITIES, )  
INC., )  
 )  
Defendants. )

**RECEIVER’S RESPONSE TO MOTIONS TO DISMISS OF FSC SECURITIES CORPORATION, FFP SECURITIES, INC., JONATHON ROBERTS FINANCIAL GROUP, INC., AND ALLIANCE CAPITAL MANAGEMENT CORP.**

The Plaintiff, James A. Knauer, Receiver for Heartland Financial Services, Inc. (“Heartland”) and JMS Investment Group, LLC (“JMS”), by counsel, respectfully responds to the motions to dismiss filed by FSC Securities Corporation (“FSC”), FFP Securities, Inc. (“FFP”), and Jonathon Roberts Financial Group, Inc. and Alliance Capital Management Corp. (“Jonathon Roberts”) (collectively the “Broker Dealers”).

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### Statement of Issues Presented

**A. Whether a receiver has standing to bring the claims of entities against third party Broker Dealers when (1) constitutional limitations and prudential limitations are satisfied, (2) Congress has given Federal receivers broad authority to pursue claims of the receivership entities, (3) funds that were invested with the entities which are considered property of the entities, were misappropriated and transferred causing direct injury to the entities, and (4) state law receivership principals support the authority of a receiver to pursue the entities' claims against third parties.**

**B. Whether the defense of *in pari delicto* is invalid as a defense to bar a receiver from bringing suit to recover assets of the entities when the wrongdoers who had previously controlled the entities have been removed by the appointment of the receiver.**

**C. Whether a receiver who has full authority to pursue the claims of the entities is in a better position to bring those claims than individuals whose claims would be derivative of the entities' claims upon which defendants would no doubt argue that such actions were improper because the injuries were to the entities and only derivatively to investors.**

**D. Whether a receiver's actions is timely when the applicable statutes of limitations do not begin to run until the wrongdoers lose control of the entities, when applicable statutes of limitations do not begin to run until the appointment of a receiver at which time the receiver discovers injury to the entities, and when the receiver files his complaint one year from the date of his appointment.**

**E. Whether a receiver's complaint sets forth claims for controlling person liability under provisions of the Securities Exchange Act of 1934 upon which relief can be granted where Broker Dealers were in a position to supervise, influence and control the wrongdoers but failed to do such, where the entities were actual sellers of securities and where the entities were defrauded and actually injured.**

**F. Whether a receiver's complaint sets forth claims for controlling person liability under the Indiana Securities Act upon which relief can be granted where the entities fall within the Indiana Securities Act's definition of "persons," where the entities sustained injury from the**

wrongdoer's actions, where wrongdoers violated provisions of the Indiana Securities Act, and where the Broker Dealers were in a position to control the wrongdoer.

G. Whether a receiver's complaint sets forth claims for breach of fiduciary duty and fraud upon which relief can be granted where the receiver has alleged numerous acts of wrongful conduct and misrepresentations made by the wrongdoers in furtherance of their fraudulent scheme, where Indiana courts have frequently authorized actions for breaches of fiduciary duty against unfaithful officers, directors, and shareholders and where the wrongdoers were acting as agents of the Broker Dealers when such conduct caused direct injury to the receivership entities.

H. Whether a receiver's complaint sets forth claims of civil action by crime victim upon which relief can be granted where the receivership entities were in fact injured or victimized by criminal conduct, where the Indiana statute provides a cause of action for a victim to recover specific damages including treble damages, attorney's fees, and certain costs, and where the criminals were acting as agents of the Broker Dealers within the scope of their authority.

I. Whether a receiver has standing to bring claims of negligent hiring, supervision, and retention where the receivership entities were actually injured by misconduct of agents of Broker Dealers whom the Broker Dealers negligently hired, supervised, and retained.

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## **I. Introduction**

The three (3) principal defendants in this action have filed motions to dismiss that are all premised on a single fundamental misunderstanding of the facts. At the core of each of the defendants' motions is the flawed premise that, "Heartland/JMS . . . [were] not damaged by the illegal activities of Mr. Payne and Mr. Danker." Defendants' Roberts/Alliance Brief in Support of Their Motion to Dismiss ("Jonathon Roberts' Brief") at 3. Each of the defendants' submissions suffers from this critical and utterly baseless misunderstanding. See, e.g., Memorandum in Support of FFP Securities Inc.'s Motion to Dismiss Plaintiff's Complaint ("FFP's Brief") at 4; FSC Securities Corporation Brief in Support of Motion to Dismiss ("FSC's Brief") at 1.

The truth, however, is that Heartland and JMS were grievously damaged by the illegal activities of Payne and Danker. As a result of the illegal conduct of Payne and Danker, Heartland and JMS are subject to 455 claims filed by creditors, totaling \$31,220,703.47.<sup>1</sup> Thus, the premise (on which the motions to dismiss are almost entirely based)--that Payne and Danker did not injure Heartland or JMS is complete fiction.

Moreover, it was the careless and completely irresponsible actions (and failures to act) of the defendant securities corporations that permitted Payne and Danker to obtain and retain securities licenses and perpetuate their massive Ponzi scheme and extensive securities fraud. The failure of the securities brokers to adequately monitor Payne and Danker was therefore the key ingredient that enabled Payne and Danker to take Heartland and JMS funds that should have been invested for the benefit of Heartland, JMS and their investors but were instead used by Payne and Danker for private

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<sup>1</sup> JMS is a limited liability company. Heartland is a corporation. The calculation of damages and claims are based on the Receiver's Motion to Make First Interim Distribution filed November 28, 2001 in United States Securities and Exchange Commission v. Kenneth R. Payne, et al., Cause No. IP 00-1265-C.

pleasure and non-corporate purposes. Thus, the actions of the Broker Dealers directly caused substantial injury to Heartland and JMS.

Furthermore, throughout the relevant time period Payne and Danker were licensed agents of their principals: FFP, FSC and Jonathon Roberts. On the basis of standard agency principals and the doctrine of *respondeat superior*<sup>2</sup> the broker dealers are directly liable for the actions of their untrustworthy agents.

Thus, the claim that Heartland and JMS are only pursuing the claims of investors and have not been injured directly is entirely incorrect. Heartland and JMS face substantial claims of investors, vendors and others which Heartland and JMS cannot pay directly due to the massive depletion of Heartland and JMS funds caused by Payne and Danker for which the Broker Dealers are legally responsible. Moreover, the business reputation of Heartland and JMS and their ability to do business have been irreparably injured. Heartland and JMS do not pursue the claims of investors in this action, rather, Heartland and JMS pursue their own claims for the significant injuries to Heartland and JMS that were caused by the negligent and wrongful conduct of the Broker Dealers who licensed, and as a matter of law were responsible for controlling, Payne and Danker.

## **II. Factual Background**

Defendants FSC, FFP, and Jonathon Roberts were at relevant times broker dealers registered under Section 15 of the Exchange Act [15 U.S.C. § 78o] and with the National Association of Securities Dealers. Kenneth R. Payne ("Payne") was licensed as a securities registered representative with Defendants for time periods as follows:

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<sup>2</sup> The term *respondeat superior* is, of course, Latin for, "let the master answer." "This maxim means that a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent." Black's Law Dictionary, 5<sup>th</sup> ed. (West 1979), p. 1179.

- (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

Daniel G. Danker ("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

During the time periods as set forth above, Payne and Danker were employees and agents of FSC, FFP, and Jonathon Roberts. During these time periods in which Payne and Danker were acting as licensed securities dealers and employees and agents of the Broker Dealers, the Broker Dealers had the ability to directly and indirectly control the actions of Payne and Danker in connection with the offering of, and sale of, securities and other business activities in connection with the offering of, and sale of, securities.

Commencing in 1994, and continuing through August, 2001, Payne, Danker and others, directly and indirectly, through Heartland, JMS and other related and affiliated companies engaged in a massive, fraudulent "Ponzi" scheme whereby, having held themselves out as licensed securities registered representatives, they induced investors to pay to them millions of dollars through the fraudulent sale of securities (the "Ponzi Scheme").

Payne and Danker were able to pursue their Ponzi scheme by holding themselves out as licensed securities dealers. Payne and Danker acquired securities licenses through applications

submitted by the Defendants despite the Defendants' knowledge of Payne and Danker disbarment and admitted drug problems. Once securities licenses were issued to Payne and Danker the Broker Dealers failed to exercise proper supervision over Payne and Danker's activities. As a result, Payne and Danker were able to perpetuate their fraudulent scheme by capitalization the aura of legitimate securities dealers that was afforded to them by virtue of their association with the Broker Dealers and their resultant ability to represent that they had Securities Investor Protection Corporation (SIPC) protection for investments made with Payne and Danker.

### **III. Injuries for Which the Receiver is Seeking Redress**

In their motions to dismiss, the Defendants have taken an overly cramped view of the Receiver's allegations regarding damages in order to attempt to assert that the Receiver is only seeking damages on behalf of the investors in Heartland and JMS. To the contrary, the Receiver has alleged direct and substantial injury to Heartland and JMS that was caused by the Broker Dealers and/or by Payne and Danker and for which the Broker Dealers are legally liable. See, e.g., Broker Dealer Complaint at ¶ 58 ("Heartland, JMS and their investors have suffered pecuniary loss of at least thirty million dollars"); ¶ 63 ("The breach of said duty by each Defendant was a direct and proximate cause of the losses sustained by the investors to whom Payne and Danker fraudulently sold securities **and of the losses and liabilities of Heartland and JMS.**") (emphasis added); RICO Complaint ¶¶ 53, 63, 109, 179 - 199.

It is true that the Receiver has described Heartland's losses, in part, by referencing the claims of the investors. However, this is no more than recognition: (1) that the greatest liability of Heartland is the unsatisfied claims of the investors, and (2) that injury to Heartland occurred when Payne and Danker misappropriated Heartland funds that had previously been paid to Heartland by investors. The Broker Dealers also place far too much weight on the statement in the Receiver's

