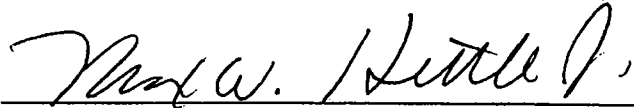


Exhibit A



Max W. Hittle, Jr., Attorney No. 7551-49



Malcolm C. Mallette, Attorney No. 9002-49
Krieg DeVault Alexander & Capehart, LLP
Suite 2800, One Indiana Square
Indianapolis, IN 46204-2017
(317) 636-4341

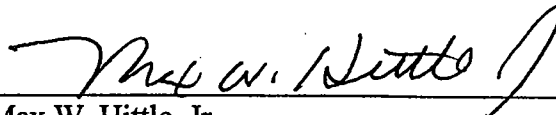
Attorneys for Defendant Union Planters Bank, N.A.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing have been served upon the following counsel of record by depositing copies thereof in the United States mail, first class postage prepaid, this 25th day of April, 2001:

Irwin B. Levin
Scott D. Gilchrist
Eric S. Pavlack
Cohen & Malad P.C.
136 N. Delaware Street, Suite 300
Indianapolis, IN 46206-0627

Mark E. Maddox
Maddox Koeller Hargett & Caruso
7351 Shadeland Station Way, Suite 190
Indianapolis, IN 46256-3924



Max W. Hittle, Jr.

IM-339889-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

FILED
U.S. DISTRICT COURT
INDIANAPOLIS, INDIANA
01 APR 25 PM 4:05

SOUTHERN DISTRICT
OF INDIANA
LAURA A. BRIGGS
CLERK

AGNES N. CONDER, as trustee for the)
CONDER LIVING TRUST, on behalf)
of herself and all others similarly situated,)

Plaintiff)

vs.) CAUSE NO. IP01-0086 C D/F

UNION PLANTERS BANK, N.A.)

Defendant.)

**DEFENDANT'S BRIEF IN SUPPORT OF ITS
MOTION TO DISMISS FIRST AMENDED CLASS ACTION COMPLAINT
FOR LACK OF STANDING AND SUBJECT MATTER JURISDICTION**

Defendant Union Planters Bank, N.A. ("UPB"), by counsel, and pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, respectfully submits this brief in support of its Motion to Dismiss First Amended Class Action Complaint for Lack of Standing and Subject Matter Jurisdiction ("Amended Complaint") filed by Agnes N. Conder, as trustee for the Conder Living Trust ("Conder"), on behalf of herself and all others similarly situated.

INTRODUCTION

Conder claims that she is one of many investors who lost money in a "massive Ponzi scheme . . . perpetrated by persons affiliated with Heartland Financial Services, Inc., JMS Investment Group, LLC, and related entities" whom she identifies and collectively refers to as "Heartland." (Amended Complaint, ¶¶5, 23) (hereafter "Am. Compl., ¶____"). Rather than pursuing Heartland (through its Receiver) for victimizing her, Conder has instead brought suit against a bank where one of Heartland's operatives, Johann M. Smith, deposited checks which she had given to Smith and Heartland for investment.

The United States Securities and Exchange Commission ("SEC") is well aware of the Heartland Ponzi scheme and filed an Enforcement Action in the U. S. District Court for the Southern District which was assigned to the Honorable John D. Tinder. The SEC obtained an order from Judge Tinder placing Heartland in receivership and appointing a local attorney as Receiver with the exclusive authority to deal with Heartland's assets and to help investors recover their losses. The Receiver has established a simple procedure for investors such as Conder to file claims in the receivership to recoup their losses. Conder has in fact already filed such a claim with the Receiver. Accordingly, Conder's exclusive remedy for any recovery lies with the Receiver and she has no standing to pursue UPB for her alleged losses. Because standing is a jurisdictional matter, Conder cannot invoke the subject matter jurisdiction of this Court. *Family & Children's Center, Inc. v. School City of Mishawaka*, 13 F.3d 1052, 1058 (7th Cir. 1994).

The filing of Conder's Amended Complaint has triggered the operation of Local Rule 40.1 of the United States District Court for the Southern District of Indiana governing the consolidation of "related cases." Conder's attempt to recover her losses as a result of Heartland's Ponzi scheme is precisely what the Receiver is attempting to do for Conder and others similarly situated under the auspices of the SEC Enforcement Action.

ARGUMENT

Conder Lacks Standing To Bring This Action Due To The Exclusive Power Of The Receiver To Recover Assets From Heartland And Supervise The Claims Of Investors.

A. Heartland and the SEC Enforcement Action

Conder wrote a series of checks payable to Johann M. Smith, Escrow Agent ("Smith") for the purpose of buying securities (the "Checks"). (Am. Compl., ¶37.) Smith deposited the

Checks in an account in the name of Lincoln Fidelity Escrow, LLC ("Lincoln Fidelity Escrow") at UPB. (Am. Compl., ¶¶37-38.) Lincoln Fidelity Escrow is one of the numerous Heartland entities. (Am. Compl., ¶23.) Conder alleges that the Checks were improperly negotiated by reason of missing or forged endorsements.

Although Conder does not explain how UPB's negotiation of the Checks "facilitated a massive Ponzi scheme," it is clear from her Amended Complaint that Heartland stole her money:

In reality, only a very small portion of investor funds were used by Heartland to purchase Securities. Instead, most investor funds were spent on the lavish lifestyles of Heartland's principals, were used to pay off claims of prior investors in the facilitation of a Ponzi scheme, or were wrongfully diverted to other schemes and purposes.

(Am. Compl., ¶28.) She nevertheless concludes that UPB is liable to her for her investment losses. Conder cannot bring this suit because there is already in place a Receiver for Heartland's assets who is doing precisely what Conder is doing – attempting to trace Heartland's assets and to afford defrauded investors some measure of recovery.

On August 10, 2000, the SEC filed its Complaint for Ex Parte Restraining Order ("SEC Action") in the United States District Court for the Southern District of Indiana against Heartland and its affiliates. The case was captioned United States Securities And Exchange Commission, Plaintiff, v. Kenneth R. Payne, Johann M. Smith, Daniel G. Danker, Constance Brooks-Kiefer, Heartland Financial Services, Inc., And JMS Investment Group, LLC., Defendants, Civil Action No. IP00-1265 C-T/G, and was assigned to the Honorable John D. Tinder, District Judge ("SEC Enforcement Action"). A copy of the SEC Action is attached as Exhibit A to the Appendix filed

contemporaneously with Defendants' Motion and Brief.¹ In the SEC Enforcement Action, the SEC asserted that the Ponzi scheme concocted by the Heartland entities had swindled numerous investors out of millions of dollars. The SEC further alleged that all funds obtained from investors were deposited into a non-interest bearing account in the name of Lincoln Fidelity Escrow. The funds in the Lincoln Fidelity Escrow account were commingled and were used to pay fictitious "dividends" to investors. In actuality, the fictitious dividends that were paid to investors were the result of new investors who "invested" in the various opportunities offered by Heartland. (Sec Action, ¶¶ 51-65.)

The SEC requested among other things that Judge Tinder determine that Heartland had violated the 1933 Securities Act and the 1934 Securities Exchange Act, that the principals of Heartland be required to disgorge monies they had received from Heartland, and that the Judge appoint a receiver "for the benefit of investors to marshal, conserve, protect, hold funds, operate and, with the approval of the Court, dispose of any wasting assets." (Emphasis added.) The SEC also requested the imposition of a temporary restraining order which would freeze all of the assets of Heartland and require an accounting from its principals. (SEC Action, Prayer for Relief at VIII.) The Seventh Circuit has previously recognized, with approval, the SEC's judicial intervention in Ponzi schemes for the appointment of a receiver to recover assets fraudulently obtained by the perpetrators and to distribute the recovered funds to defrauded investors. *Scholes v. Lehman*, 56 F.3d 750 (7th Cir. 1995).

¹ The Court may take judicial notice of pleadings and orders in other District Courts. *See Fed. R. Evid.* 201. Facts subject to judicial notice may also be considered by the Court without converting the dismissal motion into one for summary judgment. *Menominee Indian Tribe of Wis. v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998), *cert denied*, ____ U.S. ____, 143 L.Ed.2d 544 (1999).

On August 10, 2000, Judge Tinder issued an order restraining Heartland from further violations of securities laws, enjoining the dissipation of Heartland's assets, and requiring the principals of Heartland to produce its financial records. The Judge also issued additional orders preventing the transfer of Heartland assets and freezing Heartland's bank accounts. On August 21, 2000, Judge Tinder converted his prior temporary restraining order to a preliminary injunction. In addition, the Court entered its Agreed Order Appointing Receiver For Heartland Financial Services, Inc. (the "Heartland Order") and Agreed Order Appointing Receiver For JMS Investment Group, LLC (the "JMS Order") (collectively, the "Agreed Orders"). The Heartland Order is attached as Exhibit B and the JMS Order is attached as Exhibit C, respectively, to the Appendix. Pursuant to the terms of the Agreed Orders, the Court appointed James A. Knauer, Esq. as the Receiver for the benefit of investors. (Agreed Orders, ¶2.) The Agreed Orders conferred upon the Receiver the pre-emptive right to pursue investor losses to the exclusion of suits such as Plaintiff's.

The Heartland Order provided in pertinent part as to the Receiver:

* * *

2. . . . Accordingly, the Court appoints James A. Knauer as Receiver over Heartland in this matter.
3. The Receiver shall have the following powers and duties to fulfill his obligations:
 - A. Oversee the operations of Heartland.
 - B. Use reasonable efforts to determine the nature, location, and value of all assets and property owned by or in possession of Heartland.

- C. Use reasonable efforts to determine the identity of all investors, amounts invested by investors, and payouts to investors in Heartland or persons who invested through Heartland, and communicate, as necessary, with the investors.
- D. Engage and employ necessary professionals (Retained Personnel), with the approval of the Court, as the Receiver deems necessary to assist in his duties.
- E. Take such action as necessary and appropriate to prevent the dissipation or concealment of any funds and assets or for the preservation of any such funds and assets of Heartland.
- F. The Receiver shall have the authority to issue subpoenas to compel testimony of persons or production of records in a manner consistent with the Federal Rules of Civil Procedure and the Rules of the Court concerning any subject matter relating to the identification, preservation, collection or liquidation of assets of Heartland, and;
- G. The Receiver may bring such legal actions based on law or equity in any state or federal court as he deems necessary or appropriate in discharging his duties as Receiver.

* * *

The Heartland Order further provided in pertinent as to defrauded investors:

11. All investors, creditors, and other persons, and all others acting on behalf of any such investor, creditor or other persons, including sheriffs, marshals, other officers, deputies, servants, agents, employees and attorneys, are stayed from:

- A. Commencing, prosecuting, continuing or enforcing any suit or proceeding against Heartland property, except that such actions may be filed to toll any statutes of limitations;

* * *

- D. Doing any act to interfere with the taking control, possession, or management, by the Receiver, or to in any way interfere with or harass the Receiver, or to interfere in any manner with the exclusive jurisdiction of this Court over Heartland property.

(Heartland Order, ¶2, 3, and 11.) (Emphasis added.) The JMS Order contained nearly identical provisions with respect to the assets and bank accounts of Lincoln Fidelity Escrow. (JMS Order ¶¶2, 3, and 11.)

Subsequently, Judge Tinder ordered the Receiver to establish a plain and simple process for claimants such as Conder to use in recouping their losses from Heartland investments. By order of December 26, 2000 ("Order") Judge Tinder set forth the claims procedures to be followed by the Receiver and all investors who had been swindled by Heartland's Ponzi scheme:

IT IS THEREFORE, ORDERED; ADJUDGED AND DECREED: That March 30, 2001 is hereby established by the court as a Bar Date for the filing of claims by creditors in these proceedings. In order to participate in the distribution of funds of the Receivership all creditors holding claims must file a proof of claim with the Receiver prior to the Bar Date. A proof of claim will be deemed to be filed on the date that it is actually received in the office of the Receiver.

FURTHER ORDERED: That the Receiver shall give notice of the Receivership and of the claims Bar Date as follows:

[VARIOUS NOTICE PROVISIONS]

FURTHER ORDERED: That the form submitted by the Receiver as Exhibit "C" to the Motion is hereby approved as the form to be used by creditors for the filing of claims in these proceedings. The electronic filing of claims through the use of the claim form on the Heartland Companies Website at heartlandfinancialinfo.com is also approved.

FURTHER ORDERED: That the claims of investors allowed in these proceedings should be calculated by taking the sum all payments actually made by the investor to any of the Heartland Companies and then deducting all payments actually received by the investor from any of the Heartland Companies.

FURTHER ORDERED: That the assets and liabilities of the following companies which the Receiver has identified in the Motion, namely *Aero Technolgies Ltd.*, *Atlas Income Fund, LLC*, *BMC Investment Group, LLC*, *Carribbean Federal Trust, Ltd.*, *Carribbean Federal Services, Ltd.*, *Carribbean Financial Services, Ltd.*, *Celtic Centre II, Ltd.*, *Charmar, Ltd.*, *Dolphin International Development, Ltd.*, *Dolphin Peninsula Partners*, *First Fidelity Trust, Ltd.*, *First International Limited*, *Heartland Advisory Services, Inc.*, *Heartland Financial Services, Inc.*, *Heartland International Trust Services, Ltd.*, *Heartland Money Management of Florida, Inc.*, *International Leisure Centers, Inc.*, *JMS Investment Group, LLC*, *KJL Ltd. of Belize*, *Lincoln Fidelity Escrow Services*, *MDS Investment, Ltd.*, *PMK, Ltd.*, *RMP, Ltd.*, *Terens, Ltd.*, *1st Century Banking Group, Ltd.*, *21st Century International Bank & Trust, Ltd. of Grenada*, *21st Century International Advisors, Inc.*, *21st Century International Advisors of Bermuda, Ltd.*, *21st Century International Advisors of Ireland, Ltd.*, *21st Century Personnel, LLC*, *Universal Financial Services, Ltd.* should be consolidated for the administration of the Receivership in these proceedings, subject however, to the right of one or more investors to allege and prove (prior to any distribution of funds of the Receivership) a claim that all or part of the assets of the Receivership may consist of assets held in constructive trust by the Receiver for the benefit of such investors.

(Order dated December 26, 2000, attached as Exhibit D to the Appendix.) (Emphasis Added.)

The Order specifically includes the assets of Lincoln Fidelity Escrow as subject to the Receiver's control.²

² Conder has likewise recognized that "Heartland" includes nearly all of the above-named entities, including Lincoln Fidelity Escrow. See Am. Compl., ¶23 (where Conder defines "Heartland" to include the nearly identical list of entities as listed by the Receiver).

For the foregoing reasons, the Amended Complaint is a related action to the SEC Enforcement Action and the Heartland Receivership pursuant to Local Rule 40.1, which provides in pertinent part:

- D. At the time of filing and at any time thereafter when it becomes known, counsel shall file a notice of related action when it appears that any case:
- (1) grows out of the same transaction or occurrence;
 - (2) involves the same property;

* * *

All counsel appearing in an action shall have a continuing duty to promptly bring to the attention of the Clerk, by filing a Notice of Related Action, that cases are related as such information becomes known to them.

Contemporaneously with this Motion and Brief, UPB has filed its Notice of Related Action, the text of which is incorporated herein by reference. This procedural requirement highlights the fact that Conder's Amended Complaint is "related" to the SEC Enforcement Action and the Heartland Receivership, as defined by Local Rule 40.1, and that Judge Tinder's Court first assumed jurisdiction over these related matters.

In summary, Conder has been provided with a clear, simple, mandatory and court-sanctioned claims process. It includes notice, a claim form and a bar date. Most importantly, for Conder, it provides an opportunity to prove to the Receiver that the monies which went into the Lincoln Fidelity Escrow account and which are the subject of her lawsuit may consist of monies confiscated by the Receiver from Lincoln Fidelity Escrow which are now held in constructive trust for her benefit. In fact, Conder states that she has already made a claim

in the Receivership "to the checks or their proceeds against Heartland, based in part on their breach of fiduciary duty and fraud. . ." (Am. Compl., ¶44.) Accordingly, her lawsuit is duplicative of the powers vested in the Receiver and is therefore legally superfluous.

It should also be noted that "[t]he Receiver is continuing to investigate the possibility of asserting additional claims against third parties who dealt with the Heartland Companies and the Individual Defendants." (Receiver's First Report of Acts and Transactions, ¶47, Dec. 11, 2000 attached as Exhibit E to the Appendix.) Even if a viable claim existed against UPB arising out of its dealings with individual defendant Smith, such claim would belong to the Receiver. *See Family & Children's Center, Inc., supra*, 13 F.3d at 1059 (general prohibition against a litigant's raising another person's legal rights as a self-imposed limit on the exercise of federal jurisdiction). Conder is therefore absolutely barred from bringing her own legal action against UPB.

B. The Exclusivity of the Receivership Court's Jurisdiction

Federal courts have recognized the principle that a court-appointed Receiver remains in exclusive control over property under his control, and the court retains ongoing jurisdiction for the duration of the receivership over claims arising with respect to the property in the receiver's control. In *O'Leary v. Moyer's Landfill, Inc.*, 677 F.Supp. 807 (E.D. Pa. 1988), the court-appointed receiver of a hazardous waste site entered into a Consent Decree with the owners and the Pennsylvania Department of Environmental Resources ("DER") for the site's clean-up. Thereafter, the U. S. Environmental Protection Agency ("EPA") proposed to DER its own plan for clean-up which differed from the plan incorporated into the Consent Decree. The receiver opposed EPA's plan in part and filed a Motion for Enforcement of the Court's Remedy, asking

