

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CAROL CHESEMORE, DANIEL)
DONKLE, THOMAS GIECK, MARTIN)
ROBBINS, and NANETTE STOFLET, on)
behalf of themselves, individually, and on)
behalf of all others similarly situated,)

Plaintiffs,)

vs.)

ALLIANCE HOLDINGS, INC., DAVID B.)
FENKELL, PAMELA KLUTE, JAMES)
MASTRANGELO, STEPHEN W. PAGEDLOW,)
JEFFREY A. SEEFELDT, TRACHTE)
BUILDING SYSTEMS, INC. EMPLOYEE)
STOCK OWNERSHIP PLAN, ALLIANCE)
HOLDINGS, INC. EMPLOYEE STOCK)
OPTION PLAN, A.H.I., INC., ALPHA)
INVESTMENT GROUP, LLC, JOHN MICHAEL)
MAIER, AH TRANSITION CORPORATION,)
and KAREN FENKELL,)

Defendants.)

CASE NO.: 3:09-cv-000413

Judge William M. Conley

SEVENTH CIRCUIT RULE 3(c)

DOCKETING STATEMENT

OF DEFENDANT-APPELLANT DAVID B. FENKELL

Defendant-Appellant David B. Fenkell, by his undersigned counsel, respectfully submits this Docketing Statement pursuant to Circuit Rule 3(c)(1) of the United States Court of Appeals for the Seventh Circuit.

I. DISTRICT COURT JURISDICTION. The United States District Court for the Western District of Wisconsin (the “District Court”) has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 (federal question) because it arises under the laws of the United States and pursuant to 29 U.S.C. § 1132(e)(1) which provides for jurisdiction of actions brought under Title I of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”).

II. APPELLATE COURT JURISDICTION. This appeal is taken from (1) this Court’s August 28, 2015 Opinions and Orders [Dkts. 1085, 1086, and 1087 (at Dkt. 1087, which

Judge William M. Conley signed on the 27th day of August, 2015, and entered in this action on the 28th day of August, 2015, Judge Conley granted in part the “Motion of Judgment Creditors Alliance Holdings[, Inc.] ESOP [(Employee Stock Ownership Plan and Trust)] and Alliance Holdings, Inc. to Enforce the Judgment, for a Constructive Trust, Temporary Restraining Order and Injunction Freezing Fenkell Assets, and for Attorneys’ Fees”, and among other things, ordered Mr. Fenkell to restore to the Alliance ESOP \$2,044,014.42 within seven (7) days of this Court’s Order or show cause why he should not be held in civil contempt of court], (2) this Court’s November 18, 2015, Opinion and Order [Dkt. 1121], denying Mr. Fenkell’s Motion for Reconsideration of this Court’s August 28, 2015, Opinions and Orders; and (3) this Court’s December 9, 2015 Agreed Consent Order [Dkt. 1132](*e.g.*, including without limitation, to the extent that this Court’s December 9, 2015, Agreed Consent Order renders this Court’s November 18, 2015, Opinion and Order a non-final order, and/or with respect to the denial of Mr. Fenkell’s Motion to Stay, Mr. Fenkell being held in civil contempt, the requirement of Mr. Fenkell to post a *supersedeas* bond and to have pledged collateral that he did not own and was otherwise exempt from attachment in order to secure the supersedeas bond and cure this Court’s holding of Mr. Fenkell in civil contempt, and this Court’s imposition of fines and imprisonment consistent with this Court’s November 18, 2015, Opinion and Order); and (4) this Court’s February 3, 2015, Opinion and Order [Dkt. 1031]. The United States Court of Appeals for the Seventh Circuit has jurisdiction to decide this case pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 1294.

David B. Fenkell timely filed the required Notice of Appeal (including this Docketing Statement required pursuant to Circuit Rule 3(c)(1) of the United States Court of Appeals for the Seventh Circuit filed as an attachment to the Notice of Appeal along with a separate Certificate of Service for the Docketing Statement) with the District Court on December 9, 2015 (which is

within thirty (30) days of this Court's November 18, 2015, which purports to address and dispose of all of the issues raised in the motions that sparked the post-judgment proceedings in this matter).¹

III. THIS IS AN APPEAL OF AN IMMEDIATELY APPEALABLE FINAL ORDER OF NOVEMBER 18, 2015 [Dkt. 1121] AND/OR DECEMBER 9, 2015 [Dkt. 1132] TO THE EXTENT THAT THE DECEMBER 9, 2015, ORDER RENDERS THE NOVEMBER 18, 2015, ORDER NON-FINAL. As noted above, the District Court entered a final appealable order on November 18, 2015 and on December 9, 2015. This is a civil appeal as a matter of right pursuant to Federal Rule of Appellate Procedure 3(a) and Circuit Rule 3(a).

IV. PRIOR OR RELATED APPELLATE PROCEEDINGS. An appeal is pending in United States Court of Appeals for the Seventh Circuit, Case No. 14-3181.

V. ADDITIONAL REQUIREMENTS OF CIRCUIT RULE 3(c)(1). None of the parties to this litigation appear in an official capacity. This is a civil case that does not involve any criminal convictions. 28 U.S.C. § 1915(g) is inapplicable. This case does not involve a collateral attack on a criminal conviction.

¹ Mr. Fenkell originally filed a Notice of Appeal on September 25, 2015 [Dkt. 1109], with respect to this Court's August 28, 2015, Opinions and Orders [Dkts. 1085 and 1087]. The U.S. Court of Appeals for the Seventh Circuit dismissed Mr. Fenkell's September 25, 2015, Notice of Appeal as being premature. [USCA 15-3140, Dkt. 17.] The Seventh Circuit reasoned: "Post-judgment supplemental proceedings to enforce a judgment are treated, for purposes of appeal, as separate, free-standing lawsuits. *Resolution Trust Corp. v. Ruggiero*, 994 F.2d 1221, 1224-25 (7th Cir. 1993). Thus, the order appealed generally must address and dispose of all the issues raised in the motion that sparked the post-judgment proceedings. *JP Morgan Chase Bank, N.A. v. Asia Pulp & Pater Co., Ltd.*, 707 F.3d 853, 867-68 (7th Cir. 2013). The district court's orders of August 28, 2015 and September 10, 2015, neither separately nor in combination, constitute a final determination of the post-judgment proceeding that was commenced by appellees' post-judgment motion. The appeal filed on September 25, 2015, therefore, is premature." [USCA 15-3140, Dkt. 17.]

Dated: December 9, 2015

Respectfully submitted,

HAWKINS PARNELL
THACKSTON & YOUNG LLP

By: /s/ David R. Johanson
David R. Johanson (0176102)
445 S. Figueroa Street, Suite 3200
Los Angeles, CA 90071
Telephone: (213) 486-8010
Facsimile: (707) 581-1704
E-Mail: djohanson@hptylaw.com

By: /s/ Douglas A. Rubel
Douglas A. Rubel (29824)
P.O. Box 1285
Cary, North Carolina 27512-1285
Telephone: (919) 523-3638
Facsimile: (404) 614-7500
E-Mail: drubel@hptylaw.com

Attorneys for David B. Fenkell

CERTIFICATE OF SERVICE

This is to certify that on this 9th day of December 2015, I caused to be electronically filed the foregoing DOCKETING STATEMENT OF DEFENDANT-APPELLANT DAVID B. FENKELL via the CM/ECF system, which sent electronic notice to all counsel of record in this matter.

/s/ Douglas A. Rubel
Douglas A. Rubel