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JAN 21 2003  
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U.S. DISTRICT COURT  
CENTRAL DISTRICT OF ILLINOIS

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF ILLINOIS  
PEORIA DIVISION**

**DEBRA K. KEACH and PATRICIA A. SAGE,  
Plaintiffs,**

**vs.**

**U.S. TRUST COMPANY, N.A., f/k/a U.S. TRUST  
COMPANY OF CALIFORNIA, N.A., et al.,  
  
Defendants.**

**CASE NUMBER  
01-1168**

**PLAINTIFFS' CONSOLIDATED SUR-REPLY TO THE  
SUMMARY JUDGMENT MOTIONS OF DICKES, THE  
GEHRING DEFENDANTS AND A. FOSTER**

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Plaintiffs' Consolidated Sur-Reply  
to the Summary Judgment  
Motions of Dickes,  
the Gehring Defendants  
and A. Foster

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Plaintiffs Debra K. Keach and Patricia A. Sage, for their Sur-reply to Motion to File Oversized Motion for Summary Judgment *Instanter* - Defendant Lyle T. Dickes' Motion for Summary Judgment and attachments (d/e 318), William J. Gehring, Henry R. Gregory II, John F. Halpin, James H. Kyle, John Lappegaard, George McKittrick, Jerry L. Rathmann, Mark Swedlund, Leo A. Vandervlugt, Robert Wilson and Bruce B. Wright's Motion for Summary Judgment (d/e 378) and Ashley Bradley, f/k/a Ashley Anne Foster's Motion for Summary Judgment (d/e 392) , state as follows:

**I. Introduction.**

1. Pursuant to the Court's Order dated January 13, 2003, plaintiffs submit the following evidence to supplement the record with respect to the motions for summary judgment filed by Dickes, the Gehring defendants and A. Foster.

**II. Additional Material Facts Claimed to Defeat the Motion for Summary Judgment.**

**A. Plaintiffs' Experts**

**1. James R. Hitchner.**

2. Hitchner has 22 years of valuation experience. P-932 @ 008577. In his expert report, Hitchner opines that:

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- a. Sweepstakes risks were known and were a major threat to MBC and F&G in both 1995 and 1997. Both Houlihan Lokey and Valuemetrics failed to consider this critical risk factor in their valuation analyses. P-932 @ 008523.
- b. U.S. Trust's expert Reilly's risk adjustment was inadequately low and did not fully reflect the extent of such risks to F&G. P-932 @ 008523.
- c. Houlihan Lokey, Valuemetrics and Reilly all grossly overstated the value of F&G in both 1995 and 1997. P-932 @ 008523.
- d. Reilly improperly and inconsistently relied upon and/or applied several main assumptions in valuing F&G. As a result, Reilly significantly overstated the value of F&G in 1995 and 1997. P-932 @ 008523.
- e. After revising the incorrect and the improper assumptions, the value of F&G was \$10.85 per share on 12/20/95 and \$10.37 per share on 6/30/97. P-932 @ 008524.

**2. Thomas S. Bagley.**

3. Bagley has 25 years of transactional experience and has purchased approximately 25 businesses. P-931 @ 008503. In his expert report, Bagley opines that:

- a. A prudent buyer would not have assumed that the information provided by selling shareholders was correct. P-931 @ 008503-04.
- b. A prudent buyer would have conducted sufficient due diligence to assure that the buyer fully understood the nature and operation of the business operated by F&G and its subsidiaries and any risks associated with the business. P-931 @ 008504.
- c. A prudent buyer should have discovered that the purchase of about 30% of the shares of F&G involved significant contingent risks relating to MBC's sweepstakes marketing. P-931 @ 008505.

**3. Charles M. Linke.**

4. Linke has been a Professor of Finance at the University of Illinois since 1966, including more than 10 years as Chairperson of the University's Department of Finance. P-930 @ 008486. In his expert report, Linke opines that:

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- a. Houlihan Lokey and Valuometrics valuations are biased upward because they did not consider the significant increased investment risk associated with the change in the core business of F&G following the October 1992 acquisition of MBC. P-930 @ 008466.
- b. Reilly's valuation purports to introduce a 6% risk premium to account for the investment risk of sweepstakes. Nevertheless, Reilly's valuation is higher than Houlihan Lokey's and Valuometrics' valuations that did not include a sweepstakes risk premium. P-930 @ 008466.
- c. Reilly offset the purported sweepstakes risk premium by using an inappropriate beta. P-930 @ 008466.
- d. When Reilly's 6% risk premium is superimposed on the Houlihan Lokey analysis, the value drops by more than 30%. P-930 @ 008466.

**4. Gregory E. Wolski.**

5. Wolski has conducted over 400 due diligence projects in his 22 years of experience at Ernst & Young. P-929 @ 008464. In his expert report, Wolski opines that:

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- a. Appropriate due diligence was not conducted in connection with the 1995 ESOP transaction. P-929 @ 008445.
  - i. Material risks associated with MBC's sweepstakes marketing practices were not given proper attention. Because thorough due diligence was not conducted, the nature and extent of the sweepstakes risk was not discovered. P-929 @ 008445.
  - ii. Both Houlihan Lokey's and U.S. Trust's engagement letters stated that they would not independently verify the accuracy and completeness of the financial information supplied to them by F&G. P-929 @ 008445.
  - iii. Sonnenschein ignored or overlooked legal and regulatory inquiries by states' Attorneys General relating to MBC's sweepstakes. P-929 @ 008445.
- b. Appropriate due diligence was not conducted in connection with the 1997 ESOP transaction. P-929 @ 008445.
  - i. No formal due diligence procedures were developed or executed by U.S. Trust. P-929 @ 008445.

- ii. The significant risks associated with MBC's overwhelming reliance upon sweepstakes were not adequately assessed by U.S. Trust. P-929 @ 008446.
- c. The risks associated with the sweepstakes marketing conducted through MBC were "material, relevant and prevailing circumstances." P-929 @ 008446.
- d. If appropriate due diligence had been conducted with respect to the 1995 ESOP transaction, a prudent person would have decided not to enter into the 1995 transaction or would have supported a less risky and less debt laden structure such as a performance based earnout. P-929 @ 008446.
- e. If appropriate due diligence had been conducted with respect to the 1997 ESOP transaction, a prudent person would not have proceeded with the transaction when the shares were valued without considering the risks associated with sweepstakes.

### **III. Applicable Law**

6. Under F.R.E. 703, an expert can rely on evidence if that evidence is "of a type reasonably relied upon by experts" in the same field. Other experts' reports are found to be among the materials

reasonably relied upon. *Cf. Concerned Area Residents For the Environment, et al. v. Southview Farm*, 834 F. Supp. 1422, 1436 (W.D.N.Y. 1993).

7. It is common for experts to rely on other expert's opinions. *In re Lake States Commodities, Inc.*, 272 B.R. 233 (N.D.Ill. 2002), unequivocally holds that an expert can rely on another expert's report in arriving at an opinion. *Id.* at 242, citing *Grant v. Chemrex, Inc.* 1997 WL 223071, at \*7-8 (N.D. Ill. 1997).

#### IV. Argument

8. For the reasons previously discussed at length elsewhere, plaintiffs believe that is incumbent upon the selling shareholders, not plaintiffs, to come forth with evidence of the fair market value of F&G stock on the dates of the 1995 and 1997 Transactions. Those transactions were prohibited pursuant to federal law. Inasmuch as the selling shareholders seek the "safe harbor" of ERISA § 408(e) (or the bona fide purchaser defense), (a) they have not yet pleaded such safe harbors, and so they presently remain unavailable, and (b) in any event, it is incumbent upon them to demonstrate that such shelter is, in fact, available to them.

9. Should the Court require otherwise, however, plaintiffs have adduced evidence that more than adequate consideration was paid in the

1995 and 1997 Transactions sufficient to defeat the selling shareholders' respective motions for summary judgment. Plaintiffs intend to show that the true value of F&G shares on December 20, 1995 was no more than \$10.85 per share, such that the ESOP overpaid the selling shareholders by more than \$30 million. *See* P-932 @ 0008524 (expert report of James Hitchner). As to the 1997 Transaction, plaintiffs intend to show that the true value of F&G shares on June 30, 1997 was no more than \$10.37 per share. *Id.*

10. Various parties have asserted that one of plaintiffs expert witnesses, Hitchner, does not opine as to the value of the shares of F&G. Defendant U.S. Trust claims further that Hitchner does not provide an independent appraisal of the value but rather critiqued the opinions of U.S. Trust's expert Reilly.

11. Under F.R.E. 703, an expert can rely on evidence if that evidence is "of a type reasonably relied upon by experts" in the same field. Other experts' reports are found to be among the materials reasonably relied upon. *Concerned Area Residents For the Environment, et al. v. Southview Farm*, 834 F. Supp. 1422, 1436 (W.D.N.Y. 1993).

12. It is common for experts to rely on other expert's opinions. For example, the Bankruptcy Court in *In re Lake States Commodities, Inc.*, 272 B.R. 233 (N.D.Ill. 2002) unequivocally held that an expert can

rely on another expert's report in arriving at an opinion. *Id.* at 242 (citing *Grant v. Chemrex, Inc.* 1997 WL 223071, at \*7-8 (N.D. Ill. 1997)).

13. In *Lake States*, Price Waterhouse had testified at trial. The opposing party called an expert witness to testify as to an accounting issue, and testimony differed from that of Price Waterhouse. The expert witness had relied exclusively on Price Waterhouse's report as the basis of his opinion, and was challenged. However, the court rejected the challenge, ruling the expert witness testimony and opinion admissible. The court further noted that any weakness was to go to the weight of the evidence, as determined by the trier of fact.

14. Notably, the expert witness in *Lake States* had not done any additional research or investigation beyond Price Waterhouse's report. In the instant case, plaintiffs' expert witness Hitchner and his firm expended hundreds of hours on research, reviewing documents while forming his opinions and preparing his expert report. P-575. The voluminous appendix of documents Hitchner reviewed further demonstrates the significant time spent on his evaluation of Reilly's valuation and related issues. P-932. Thus, Hitchner's opinion is the properly admissible result of this detailed research, as applied to the methodology utilized by Reilly, combined with the correction of the error and mistakes made by Reilly.

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15. In addition to Mr. Hitchner's expert report, plaintiffs have also disclosed expert witnesses who state that issues relating to F&G's sweepstakes marketing practices were a material risk to F&G in both December 1995 and June 1997, yet were not considered by U.S. Trust, Houlihan Lokey, and Valuemetrics in determining the stock price to be paid by the ESOP in the 1995 and 1997 Transactions. *See* P-929 (expert report of Gregory Wolski); P-930 (expert report of Prof. Charles Linke); P-931 (expert report of Thomas Bagley).

**V. Conclusion.**

16. For the foregoing reasons and for the reasons stated in plaintiffs' responses to the motions, the summary judgment motions of Dickes, the Gehring Defendants and A. Foster should be denied.

Dated: January 20, 2003.

Debra K. Keach and Patricia A. Sage,

By: Steve Oates  
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Plaintiffs' Consolidated Sur-Reply  
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**CERTIFICATE OF SERVICE**

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The undersigned certifies that a copy of the foregoing was served upon the individuals listed below by enclosing the same in an envelope, postage-prepaid, first-class mail, and depositing said envelope in a United States Post Office Mail Box at Peoria, Illinois on January 20, 2003.

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