

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF ILLINOIS  
PEORIA DIVISION

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

vs. )

U.S. TRUST COMPANY, NA., f/k/a U.S. TRUST )  
COMPANY OF CALIFORNIA, NA., )  
ELLEN D. FOSTER, as Executrix of the Estate of )  
Thomas S. Foster and as Co-Trustee of the )  
Thomas S. Foster Trust executed on April 14, 1994, )  
THE NORTHERN TRUST COMPANY, an Illinois )  
corporation, as Co-Trustee of the Thomas S. Foster Trust )  
executed on April 14, 1994, )  
MELVYN R. REGAL, individually, as trustee or agent )  
of the Steven Jay Regal Trust, as trustee or agent of the )  
Judi Lynn Regal Trust, and as trustee or agent of the )  
John E. Regal Trust, )  
A. ROBERT PELLEGRINO, )  
VALUOMETRICS, INC., )  
HOULIHAN, LOKEY, HOWARD & ZUKIN, INC. )  
ROBERT A. OSTERTAG, JR., TERRY P. COLE, )  
ALAN R. DIX, JON D. ELLETSON, )  
STEPHEN P. BARTLEY, LYLE T. DICKES, )  
JAMES N. FREID, DALE FUJIMOTO, )  
WILLIAM J. GEHRING, HENRY R. GREGORY II, )  
JOHN F. HALPIN, RICHARD S. HODGSON, )  
JAMES H. KYLE, JOHN LAPPEGAARD, )  
GREGORY K. McALLISTER, GEORGE McKITTRICK, )  
MICHAEL F. NORBUTAS, CLAYTON PATINO, )  
JERRY L. RATHMANN, FREDERICK J. STUBER, )  
W. THOMAS STUMB, MARK SWEDLUND, )  
LEO A. VANDERVLUGT, ROBERT J. WILSON, )  
BRUCE B. WRIGHT, and )  
ASHLEY ANNE FOSTER, as trustee or agent of the )  
Ashley Anne Foster Irrevocable Trust, )  
Defendants. )

CASE NO. 01-1168

**REPLY BRIEF OF  
DEFENDANTS STEPHEN  
P. BARTLEY, MICHAEL  
F. NORBUTAS, AND  
FREDERICK J. STUBER  
IN SUPPORT OF THEIR  
MOTION FOR  
SUMMARY JUDGMENT**

**REPLY BRIEF OF STEPHEN P. BARTLEY, MICHAEL F. NORBUTAS, AND  
FREDERICK J. STUBER IN SUPPORT OF THEIR MOTION FOR SUMMARY  
JUDGMENT**

INTRODUCTION

On January 18, 2003, Defendants Stephen P. Bartley, Michael F. Norbutas, and Frederick J. Stuber (hereinafter “these Defendants”) received Plaintiffs’ Response to Defendants Stephen P. Bartley, Michael F. Norbutas, and Frederick J. Stuber’s Motion for Summary Judgment (hereinafter “Plaintiffs’ Response”). Pursuant to this Court’s Order of January 10, 2003, the following represents the Reply Brief of these Defendants.

REPLY TO ADDITIONAL MATERIAL FACTS CLAIMED TO DEFEAT THE MOTION  
FOR SUMMARY JUDGMENT.

Plaintiffs’ Response at 21ff. lists numerous additional facts, which Plaintiffs’ allege are material and which supposedly defeat these Defendants’ Motion for Summary Judgment. These Defendants will follow the paragraph numeration used by the Plaintiffs.

Plaintiffs’ Additional Material Facts section improperly includes argumentative headings, which do not simply direct the Court to the subject of the following paragraphs, but make legal and factual argument, without any citation to the record. Examples include “Prior to the 1995 Transaction, Stuber, Norbutas, and Bartley Knew that Governmental Regulation of Sweepstakes Posed a Significant Threat to F&G’s Business” (page 55) and “U.S. Trust’s Lack of Good Faith/Lack of Due Diligence” (page 62). These Defendants object to all headings in the Statement of Additional Material Facts as improper, argumentative, and unsupported by any citation to the record. These Defendants move to strike all such headings, or in the alternative, deny them.

35. At paragraph 35, Plaintiffs incorporate paragraphs 1 through 189 of Plaintiffs' First Motion for Summary Judgment as to Liability Against Defendants Ellen D. Foster, as Executrix of the Estate of Thomas S. Foster, and Melvyn R. Regal: Admitted Failure to Disclose Material Information. These Plaintiffs herein incorporate the response to those paragraphs filed by Foster and Regal, on August 1, 2002, in the following pleading: Defendant Foster and Regal Response to Plaintiffs' First Motion for Summary Judgment as to Liability. Plaintiffs' paragraph 35 further incorporates paragraphs 1 through 105 of Plaintiffs' Second Motion for Summary Judgment as to Liability Against U.S. Trust: Breach of Loyalty and Prudence: Failure to Investigate. These Defendants herein incorporate as their response to those paragraphs U.S. Trust Company's Response to Plaintiffs' Second Motion for Summary Judgment, filed herein on August 14, 2002. Plaintiffs' paragraph 35 further incorporates paragraphs 22 through 292 of their Response to Defendant Dickes' Motion for Summary Judgment. These Defendants incorporate as their Response to paragraphs 22 through 292 the pleading entitled Reply of Lyle T. Dickes to Plaintiffs' Response to Defendant Dickes' Motion for Summary Judgment, filed herein on approximately October 1, 2002.

36. These Defendants admit the allegations of subparagraphs a, b, and c of paragraph 36. Defendants object to the term "significant positions of managerial authority at F&G or its subsidiaries or business groups" as a vague and nonfactual characterization.

37. These Defendants admit that Stuber was the agent in fact for Norbutas and Bartley for signing closing documents in connection with the 1995 transaction. These Defendants deny that Stuber was the attorney in fact for Norbutas and Bartley for any other purpose. These Defendants admit that Stuber attended F&G Board of Directors meetings from

1994 through July 1996 and received board books of those meetings, but deny that Stuber attended Board of Directors meetings through September, 1996.

38. These Defendants admit that they received funds for selling their shares of F&G stock to the ESOP in 1988. These Defendants deny that they had any other prior experience with ESOP transactions.

39. These Defendants admit that they received the specific documents referred to in paragraph 39. These Defendants object to the statement that they received “a wealth of information” as vague, ambiguous, and nonfactual.

40. These Defendants admit that paragraph 40 contains an accurate quotation of excerpts from a memo authored by Defendant Norbutas, but point out that the entire memo is not quoted. These Defendants later acquired information that a control premium was appropriate. Defendants object to the final paragraph of the quotation, which discusses the 1988 transaction, as not relevant or material to this cause of action.

42. Defendants admit the factual allegations of the first sentence of paragraph 42, but object to the vagueness of “a number of internal discussions.” Defendants admit the factual allegations of the second and third sentences of paragraph 42. Defendants admit that the fourth sentence of paragraph 42 contains accurate, but selective quotations, from the Norbutas memo, and further assert that the entire memo is not quoted. The context and contents of the memo are further described in the Norbutas deposition. These Defendants admit the factual allegations of the last sentence of paragraph 42.

43. These Defendants admit the factual allegations of paragraph 43.

44. These Defendants admit the factual allegations of paragraph 44, but further assert that material portions of the Valuometrics response have been omitted.

45. These Defendants admit that paragraph 45 is an accurate quotation from a portion of Stuber's letter to Van Horn.

46. These Defendants admit the factual allegations of paragraph 46, but further state that Norbutas' concern was not with valuation, but with F&G's tax liability.

47. These Defendants admit the factual allegations of paragraph 47.

48. These Defendants admit the factual allegations of paragraph 48.

49. These Defendants admit that paragraph 49 contains an accurate quotation of a portion of the confidential memorandum of August 25, 1995.

50. These Defendants admit the factual allegations of paragraph 50.

51. These Defendants admit the factual allegations of paragraph 51.

52. These Defendants admit that the quotation in paragraph 52 is a portion of the confidential disclosure memorandum referred to.

53. These Defendants admit that the quotation in paragraph 53 is a portion of the confidential disclosure memorandum referred to.

54. These Defendants admit the factual allegations of the first sentence of paragraph 54 concerning the EIP Program. These Defendants admit that the second sentence of paragraph 54 contains an accurately quoted excerpt from the confidential disclosure memorandum, but further state that this memorandum is not the EIP Plan document.

55. These Defendants admit the factual allegations of paragraph 55, but further assert that the referenced documents are not quoted in their entirety.

56. These Defendants admit the factual allegations of paragraph 56, but further state that the quotations are a not complete statement of the quoted document.

57. These Defendants object to the assertion that the Norbutas tax “scheme” was “an important facet of the 1995 transaction.” This expression is vague, conclusory, and ambiguous. These Defendants admit that PriceWaterhouse issued the opinion letter referenced, but deny that PriceWaterhouse referred to the opinion letter as a “tax scheme opinion.” Further answering, these Defendants assert that Norbutas’ proposal was lawful and beneficial to F&G.

58. These Defendants deny that the term “tax scheme opinion” occurred in the referenced document. These Defendants admit that paragraph 58 (a) through (j) contains a partial recitation of, and partial quotation from, the referenced document.

59. These Defendants deny that the term “tax scheme opinion” was used in the referenced documents. These Defendants admit the other factual allegations of paragraph 59.

60. These Defendants deny that the EIP shares referenced in the first sentence of paragraph 60, “were supposed [to] have restrictions.” The shares did have actual restrictions. These Defendants admit that the second sentence of paragraph 60 accurately quotes an excerpt from the referenced document.

61. These Defendants deny the allegations of the first sentence of paragraph 61. U.S. Trust did not have any obligation or power to redeem the shares. F&G had the authority to redeem a certain number of EIP shares per year, as described in the “Annual Put” section of the Agreement to Purchase Stock, depending upon the financial condition of the company. These Defendants admit that the F&G directors passed a resolution allowing the EIP II shares to be purchased by the ESOP, with the money contributed by F&G to the ESOP. These Defendants object to the words “instead” and “again” in the second sentence as mischaracterizations of the actions of F&G’s Board of Directors. These Defendants admit that U.S. Trust acted on behalf of the ESOP to purchase the shares in the 1997 transaction. These Defendants deny the last

sentence of paragraph 61, including footnote 5. The Plaintiffs' statements mix and confuse three separate transactions carried out in 1997, namely: (1) the purchase of EIP II shares by the ESOP; (2) the purchase of shares, at a discounted price, by F&G from people no longer active in the business; and (3) the purchase of shares by F&G for its Subchapter S election. See Motion for Summary Judgment of Defendants Stephen P. Bartley, Michael F. Norbutas, and Frederick J. Stuber at 22 ff. and the documents cited therein. These Defendants object generally to paragraph 61 on the grounds that it leaves out several essential elements of the transactions it refers to, and thus does not give a fair and complete statement of those transactions.

62. These Defendants admit that the quotations contained in paragraph 62 are accurate selections from the document referenced.

63. These Defendants admit that the quoted language is an excerpt from the referenced document.

64. These Defendants admit that the quoted language is an excerpt from the referenced document.

65. These Defendants admit that the quoted language is an excerpt from the referenced document.

66. These Defendants admit that the quoted language is an excerpt from the referenced document.

67. These Defendants admit the factual allegations of paragraph 67, but note that the quoted language is not a complete recitation of the terms of the referenced document.

68. These Defendants admit that paragraph 68 is a partial recitation of the contents of the referenced document.

69. These Defendants admit that paragraph 69 is a partial recitation of the contents of the referenced document.

70. These Defendants admit that the transaction was consummated on December 20, 1995 and further admit that the language quoted in paragraph 70 is an excerpt from the referenced document.

71. These Defendants admit that Stuber signed the Receipt for Purchase Price referenced in paragraph 71 and admit that the quotation is an excerpt from the referenced document.

72. These Defendants admit the factual allegations of subparagraphs of a, b, and c of paragraph 72, but object to the term “relevant details of that transaction” as being vague and incomplete. These Defendants repeat that the Plaintiffs have confused three separate transactions as “the 1997 transaction.” See Defendants’ Response to paragraph 61 above.

73. These Defendants admit the factual allegations of paragraph 73, but note that the quotation is only a partial statement of the contents of the referenced document.

74. These Defendants admit the factual allegations contained under “shares” and “purchase price,” but deny that paragraph 74 is an accurate summary of the referenced transaction. A significant portion of the after tax proceeds of the purchase price were reinvested in new shares of F&G stock.

75. These Defendants admit the factual allegations of the paragraph 75, but note that what the Plaintiffs describe as the “1997 transaction” is actually three separate transactions. See these Defendants’ response to paragraph 61 above.

76. These Defendants admit the factual allegations of the paragraph 76, but note that what the Plaintiffs describe as the “1997 transaction” is actually three separate transactions. See these Defendants’ response to paragraph 61 above.

77. These Defendants deny the allegations of paragraph 77. The decision to adopt a fair market value based EIP Plan was made on the advice of outside consultants. See Motion for Summary Judgment of Defendants Stephen P. Bartley, et al. at 19-20, paragraph 87 and the Exhibits cited therein.

78. These Defendants admit that Valuemetrics valued the shares of F&G as of the valuation dates, and for the reported values, contained in paragraph 78, but deny that these valuations were done “close to the time of the 1995 transaction.” Defendants further assert that these valuations, being done on a minority basis, are not relevant to the 1995 transaction.

79. These Defendants admit that the book value of their shares of F&G was \$5.39 and admit that \$19.50 was the per share value in the December 1995 transaction. These Defendants deny all other allegations of paragraph 79.

80. These Defendants admit that Stuber served as the agent in fact of Norbutas and Bartley solely for the purpose of executing the transaction documents in connection with the December, 1995 transaction. These Defendants admit that Stuber was Senior Vice President of Finance and Corporate Secretary for F&G, and Secretary/Treasurer for MBC. These Defendants admit that Stuber attended the F&G board meetings from 1994 through July, 1996, but deny all other allegations of paragraph 80, including the implications of “as such.”

81. These Defendants deny that Stuber was “intimately involved with the 1995 transaction” as vague, ambiguous and conclusary. Further responding, these Defendants assert that Stuber’s activities are described in his deposition, Affidavits, and calendar notes.

82. These Defendants deny that Stuber was “intimately familiar” with the 1995 transaction, on the grounds that that expression is vague, ambiguous, and conclusary. These Defendants deny that Valuometrics, Foster, and Regal “were laboring under various conflicts of interest,” and deny that Stuber had any such knowledge of any supposed conflicts of interest. More specifically, these Defendants reply to the subparagraphs of paragraph 82 as follows:

- a. These Defendants admit the factual allegations of subparagraph a.
- b. These Defendants admit that Stuber sent a list of questions to Brad Van Horn of Valuometrics and participated in January 3, 1995 meeting. These Defendants admit that questions were asked concerning maximizing share value, but assert that the summary of that testimony in subparagraph b is incomplete and misleading. The purpose of the questions was not limited to the 1995 transaction.
- c. These Defendants admit that Stuber participated in a May 8, 1995 meeting with Valuometrics and admit that the quoted language from subparagraph c is an excerpt from the document referenced.
- d. These Defendants admit that the final Valuometrics valuation for year end 1994 was issued on our about May 10, 1995.
- e. These Plaintiffs admit that Stuber received the referenced document and admit that the language quoted in subparagraph e consists of excerpts from that document. These Defendants object that subparagraph e is an incomplete statement of the reasons for choosing an ESOP and the goals of the ESOP.
- f. These Defendants admit that Stuber and Norbutas received the referenced memorandum from Sudow, which is quoted in part in subparagraph f.
- g. These Defendants admit the factual allegations of subparagraph g.

h. These Defendants admit the factual allegations of subparagraph h.

i. These Defendants admit the factual allegations of subparagraph i.

j. These Defendants admit the factual allegations of subparagraph j.

k. These Defendants admit the factual allegations of subparagraph k.

l. These Defendants admit the factual allegations of subparagraph l, subject to the qualifications and denials contained in paragraph 74 above.

m. These Defendants admit that Stuber knew on December 20, 1995 that F&G's executive committee (composed of Foster, Regal, and Pellegrino) had appointed U.S. Trust as trustee, pursuant to the instructions and authorization of F&G's Board of Directors.

n. These Defendants admit that the language quoted in subparagraph n is an excerpt from the deposition of Stuber.

o. These Defendants admit the factual allegations of subparagraph o.

83. These Defendants admit that the quoted language of paragraph 83 is contained in Norbutas' deposition.

84. These Defendants admit the factual allegations of paragraph 84, but assert that the Sudow memorandum referred to apparent conflicts of interest.

85. These Defendants object to and deny the expression "e.g.," but admit that Bartley sent to Van Horn a memorandum, which is quoted in part in paragraph 85 and that Bartley had other contacts with Valuometrics.

86. These Defendants object to and deny the phrase "such 'due diligence' as Sonnenschein, Nath & Rosenthal conducted" on the grounds that such language is argumentative

and contains false implications. These Defendants admit that Bartley had discussions with the Sonnenschein firm. These Defendants admit the other factual allegations of paragraph 86.

87. These Defendants admit that the quoted language in paragraph 87 is an accurate recitation of portions of Bartley's deposition.

88. These Defendants admit that paragraph 88, and quotations contained therein, are an accurate recitation of portions of Bartley's deposition.

89. These Defendants admit that they knew of MBC's use of sweepstakes, but deny all other allegations of paragraph 89.

93. These Defendants admit that a meeting occurred on the date and place described, that the Defendants attended that meeting, and that paragraph 93 accurate quotes selected excerpts from the materials prepared for that meeting. These Defendants refer the Court to Motion for Summary Judgment of Defendants Stephen P. Bartley, et al. at 32 ff. (Sweepstakes as a Supposed Threat) for an explanation of the context of these meetings and documents. These Defendants object to footnote 8 as immaterial.

94. These Defendants admit that the documents recited referred to certain threats to F&G's businesses, but assert that the threats were listed by Plaintiffs were among many possible threats identified in the referenced documents.

95. These Defendants admit that paragraph 95 accurately quotes a brief portion of the referenced memorandum, but note that the document refers to a change in the "magazine agency business," which is irrelevant to any issue in the present cause.

96. These Defendants admit that Foster authored the document referred to, and admit that paragraph 96 contains accurate, partial quotations from that document.

97. These Defendants admit that attorney Awerdick sent the referenced document as described, and admit that paragraph 97 contains an accurate quotation from a part of that document. These Defendants further assert that most of the promotional activities referred to by Awerdick were not practiced by MBC.

98. These Defendants admit that paragraph 98 contains an accurate quotation of a portion of Stuber's deposition.

99. These Defendants admit the factual allegation of paragraph 99.

100. These Defendants admit that Stuber and the F&G Board received the referenced memorandum, and admit that paragraph 100 contains an accurate partial quotation from that memorandum. These Defendants object to the word "but" as argumentative.

101. These Defendants admit that Norbutas wrote the referenced document to Goldberg, and admit that paragraph 101 contains an accurate quotation of a portion of the referenced document. These Defendants note that the word "you" is omitted from the last sentence of the quoted text.

102. These Defendants admit that the none of the valuation reports prepared by Valuometrics explicitly referred to sweepstakes as a threat, but assert that Valuometrics was familiar with the nature of MBC's business, including its use of sweepstakes. Unlike the strategic planning documents, the valuations prepared by Valuometrics were not intended to list strengths, weaknesses, opportunities, and threats.

103. These Defendants admit that Stuber, Norbutas, and Bartley had experience with F&G's 1992 due diligence for the acquisition of MBC, but deny that the purpose of that due diligence was comparable to the due diligence carried out in connection with the 1995 valuation of F&G shares.

104. These Defendants admit that Dickes circulated the referenced document, and admit that paragraph 104 contains a partial recitation of and partial quotations from that document. These Defendants admit that Jim Daken circulated the checklist referenced.

105. These Defendants admit the factual allegations of paragraph 105.

106. These Defendants admit the factual allegations of paragraph 106, but assert that the purpose of the due diligence referred to in paragraph 106 was different from the purpose of the due diligence carried out in connection with the 1995 valuation of F&G shares.

107. These Defendants admit the factual allegations of paragraph 107, but assert that purpose of the due diligence referred to in paragraph 107 was different from the purpose of the due diligence carried out in connection with the 1995 valuation of F&G shares.

108. These Defendants deny that the due diligence conducted by U.S. Trust and the due diligence conducted by F&G for the MBC acquisition “bore no resemblance” to each other. These Defendants assert that the purposes of the two episodes of due diligence were quite different, and therefore the methods of due diligence were different for appropriate reasons.

109. These Defendants admit that paragraph 109 accurately recites certain representations or statements contained in the agreements referred to, but Defendants deny that Houlihan referred to “corporate insiders and potentially selling shareholders” in its agreement. These Defendants again assert that the purposes of the two episodes of due diligence (the 1992 and 1995 transactions) were completely different, and therefore the methods of investigation were appropriately different.

110. These Defendants admit that paragraph 110 contains accurate excerpts from and summaries of portions of the referenced document. These Defendants deny and object to the statement that “also the physical effort between the two undertakings differed greatly,” on the

grounds that that expression is unexplained and undefined, and that the purposes of the 1992 and the 1995 episodes of due diligence were quite different.

111. These Defendants admit that paragraph 111 is an accurate recitation of parts of the depositions of Goldberg and Shea concerning their due diligence efforts, but assert that paragraph 111 is not a complete recitation of that due diligence.

112. These Defendants object to and deny the statement that “Finally, the scope of the inquiry and the information revealed by MBC/F&G differed dramatically.” Plaintiffs do not explain or define what they mean by differed dramatically. Given the different purposes of the 1992 and 1995 episodes of due diligence, the types of inquiries were appropriately different. These Defendants admit that paragraph 112 contains an accurate summary of a portion of the deposition of Goldberg.

113. These Defendants admit that Siske requested the documents referred to in paragraph 113, and that the request was forwarded to Norbutas. These Defendants deny that item number 12 was singled out.

114. These Defendants admit that paragraph 114 accurately summarizes a portion of Norbutas’ deposition, but object to the word “however.” These Defendants note that attorney Calisoff stated that he met with Norbutas and took notes regarding that meeting. Calisoff deposition at 98-99.

115. These Defendants admit that Bartley could not recall participating in any due diligence in connection with the 1997 transaction, but assert that that transaction was based upon Valuometrics’ December 31, 1996 valuation of F&G shares, as updated in the summer of 1997.

116. These Defendants admit that paragraph 116 accurately quotes a portion of the referenced document.

117. These Defendants admit that there were no discussions or correspondence with Magna Bank regarding the 1995 transaction on December 19 or December 20, 1995, but assert that there had been prior communications with Magna Bank on the 1995 transaction. Exhibits 490, 491.

118. These Defendants admit that Stuber faxed a document to Friend on December 21, 1995, which is quoted in part in paragraph 118. These Defendants admit that Magna Bank had not previously received a document signed by a representative of U.S. Trust accepting the trusteeship, but assert that Magna Bank had knowledge of U.S. Trust's acceptance prior to December 21, 1995. Exhibits 490, 491.

119. These Defendants admit that paragraph 119 is an accurate summary of a portion of Friend's deposition.

120. These Defendants admit that paragraph 120 is an accurate summary of a portion of Friend's deposition.

121. These defendants admit that paragraph 121 is an accurate summary of a portion of Friend's deposition. However, these Defendants assert that Friend and other employees of Magna Bank were aware of ESOP II before December 18, 1995. Exhibits 490, 491.

122. These Defendants admit that paragraph 122 is an accurate summary of portions of Friend's deposition.

123. These Defendants admit that paragraph 123 is an accurate summary of portions of Friend's deposition.

124. These Defendants admit that paragraph 124 is an accurate summary of portions of Friend's deposition.

125. These Defendants admit that paragraph 125 is an accurate summary of portions of Friend's deposition.

126. These Defendants admit that the documents referred to in paragraph 126 were authored and executed as alleged and admit that paragraph 126 is an accurate summary of portions of Friend's deposition. Defendants assert that the collateralized custody agreement was forwarded in draft by Stuber to Barbara Friend on December 18, 1995. Exhibit 492.

127. These Defendants admit the factual allegations of paragraph 127, but note that Bagley does not state what, if any, experience he has had with ESOP's.

128. These Defendants admit that Bagley made the assertions contained in paragraph 128, but note that Bagley did not state how he would have acquired the information he believed necessary, or how he would have carried out his suggested investigation in connection with an ESOP purchase.

129. These Defendants admit the factual allegations of paragraph 129.

130. These Defendants admit that Hitchner expresses the opinions recited in subparagraphs a through d of paragraph 130. These Defendants deny the allegations of paragraph 130 e, and further assert that Hitchner did not do a valuation of the F&G shares, was not asked to do a valuation, and did not provide evidence showing his competence to do such a valuation. Hitchner deposition at 14-18.

131. These Defendants admit the factual allegations of paragraph 131.

132. These Defendants admit that Linke expressed the opinions contained in subparagraphs a through d of paragraph 132. However, these Defendants note that Linke did not produce a valuation of F&G shares, was not asked to produce a valuation, and did not offer facts showing his competence to do such a valuation. Exhibit 930.

133. These Defendants admit the factual allegations of 133, but state that Wolski does not say how many, if any, of his due diligence projects were for ESOP's. Exhibit 929 at 8464.

134. These Defendants admit that Wolski's report contains the opinions recited in subparagraphs a through i of paragraph 134, but assert that Wolski did not do a valuation of the F&G shares, was not asked to do such a valuation, and admitted that he did not have the competence to do such a valuation. Exhibit 929. Wolski deposition at 57, 115, 205.

THESE DEFENDANTS DENY THAT THE FOLLOWING FACTS CLAIMED BY PLAINTIFFS AS ADDITIONAL MATERIAL FACTS ARE MATERIAL TO THE PRESENT CAUSE.

40. These Defendants object to paragraph 40, to the extent that it refers to the 1988 transaction, as immaterial.

41. These Defendants object to paragraph 41 as immaterial, because it deals with the 1988 transaction.

90-92. These Defendants object to paragraphs 90-92 as immaterial, since they refer to the condition of MBC before its acquisition by F&G.

93, footnote 8. These Defendants object to footnote 8 as immaterial, on the grounds that it refers to food and entertainment provided at a meeting. Those circumstances are not relevant to any issue in this case.

## ARGUMENT

### **I. Plaintiffs' Attempt To Impose On These Defendants A Burden That Is Not Found In ERISA Or In The Relevant Case Law.**

Plaintiffs' Response at 82, 85, 86 characterizes these Defendants as "corporate insiders," with the implication that that label imputes some special burden of proof on these Defendants or some special rule of liability. However, neither "insider" nor "corporate insider" occurs in

ERISA, and Plaintiffs do not cite any ERISA case that purports to define such a category. The Ninth Claim of the First Amended Complaint alleges that these Defendants were parties in interest who received income from the sale of F&G stock to the ESOP. Parties in interest are defined in ERISA to include officers and employees of the employer of any person who is covered by an ERISA plan, and it is presumably this part of the definition that Plaintiffs rely upon. 29 U.S.C. §1002(14). It is improper for Plaintiffs to attempt to create a new category of person, subject to greater scrutiny than ordinary parties in interest, and to apply that definition to these Defendants.

Plaintiffs' attempt to impose further unwarranted burdens on these Defendants by asserting that ERISA §406, which forbids purchases from parties in interest, subject to the exception for ESOP's (ERISA §408), imposes virtually absolute liability upon so called corporate insiders.

“Through the categorical bar represented by ERISA §406, Congress has issued a clear and easily comprehensible warning to all corporate insiders considering transactions with pension funds. ERISA §406 implements the congressional determination that insider transactions are *presumed* to be harmful to the plan. ERISA §406 *itself* provides adequate notice of a breach to defendant-transferees or, at the least, provides transferees with notice that they will be responsible to either: (a) ensure the transaction is fair, or (b) make restitution if it is not.” Plaintiffs' Response at 82-83. Emphasis in the original.

Plaintiffs provide no case law authority that an ESOP is presumed to be harmful and indeed the relevant case law suggests otherwise. *Kuper v. Iovenko*, 66 F.3d 1447, 1458 (6<sup>th</sup> Cir. 1995) (Congress intended to encourage ESOP's). Plaintiffs provide no authority for the proposition that a party in interest has a duty to ensure that the transaction is fair. *Harris Trust and Savings Bank v. Solomon Smith Barney, Inc.*, 530 U.S. 238, 120 S.Ct. 2180, 147 L.Ed.2d

187 (2000), upon which Plaintiffs rely, contains no such statement. Indeed, even a fiduciary is not an insurer, but rather a person who is held to the duty of a prudent man. 29 U.S.C. § 1104.

Plaintiffs' argument, as recited above, misstates the law. Upon the authority of *Harris Trust*, and general trust law, these Defendants, as parties in interest, are liable to a restitutionary remedy if more than adequate consideration was paid for their F&G shares, and if they had actual or constructive knowledge that the sale of these shares was in violation of ERISA. *Harris Trust*, 530 U.S. at 250.

In the Introduction to the Response, at 1-2, but not in their Argument, Plaintiffs assert that these Defendants have not pleaded that the transactions were ESOP's, for which adequate consideration was paid, and therefore exempt (under ERISA §408) from the §406 ban on purchases from parties in interest. However, the Plaintiffs' First Amended Complaint pleads that the transactions were ESOP transactions, and these Defendants, in their Answer, have denied the allegations that more than adequate consideration was paid. In addition, these Defendants, along with Ellen D. Foster as Executrix and Melvyn R. Regal filed (on September 13, 2002) Defendants' Rule 15 Motion to Amend Answer, to assert §408 as an affirmative defense. The Court has not yet ruled on that Motion.

## **II. Plaintiffs Have No Evidence Of Any Misconduct By These Defendants.**

The First Amended Complaint does not allege any misconduct or violation of ERISA by these Defendants, but Plaintiffs' Response at 85-88 refers in pejorative terms to a plan devised by Norbutas to realize a tax savings for F&G in connection with the 1995 ESOP transaction. Specifically, Norbutas authored memos which pointed out that if the existing shareholders right to resell their shares to the corporation for book value were changed to a right to resell at fair market value, the corporation would benefit in the form of \$14.4 million in additional cash. In

fact, the book value restriction on the sale of executive incentive plan shares was eliminated, to allow those shares to be sold for fair market value.

Plaintiffs do not claim that the proposal by Norbutas was unlawful, or that the company failed to realize the promised tax savings. Rather, Plaintiffs imply, without actually saying so, that this project resulted in the ESOP paying a higher price per share than it should have for the shares that it purchased in 1995, in violation of ERISA.

However, Norbutas' plan had nothing to do with the price paid by the ESOP, and Plaintiffs do not assert any facts that would show that it did. The price which the ESOP paid for the shares, sold by these Defendants and others, was determined by valuations by Valuemetrics and Houlihan Lokey, and by negotiations among them, U.S. Trust, and F&G, to arrive at \$19.50 per share. Goldberg deposition at 60-64. That price was, in the opinion of the parties best able to judge, the fair market value of those shares. Fair market value as determined in good faith by the fiduciary is the general definition of adequate consideration under ERISA. *Donovan v. Cunningham*, 716 F.2d 1455, 1467 (5<sup>th</sup> Cir. 1993), *cert. denied*, 467 U.S. 1251, 104 S.Ct. 3533, 82 L.Ed.2d 839 (1984). Book value "...is arrived at by adding all assets and deducting all liabilities and by dividing that sum by the number of shares of common stock outstanding." Black's Law Dictionary (5<sup>th</sup> Ed. 1979) at 165. No one in this case has suggested or even implied that the book value of F&G shares was the fair market value or was adequate consideration in December of 1995. The fact that book value was \$5.39 per share, whereas fair market value was \$19.50 per share, as asserted in Plaintiffs' Response at 88, does not prove constructive fraud or excessive price, contrary to the Plaintiffs' claim. Note even the Plaintiffs' most far fetched speculations about value have asserted that \$5.39 per share was adequate consideration in December of 1995.

**III. Plaintiffs' Allegations Of Misconduct By Others, Supposedly Known To These Defendants, Are Without Factual Support.**

Plaintiffs' response at 88-93 recites a variety of allegations which the Plaintiffs have raised against other Defendants in the above cause. For the sake of convenience to this Court, and without in any way conceding the validity of these arguments, these Defendants refer this Court to the Motions for Summary Judgment previously filed herein by all other Co-Defendants, more specifically the following: Motions for Summary Judgment of U.S. Trust Company; Ellen D. Foster as Executrix of the Estate of Thomas S. Foster, Deceased and Melvyn R. Regal; Valuometrics, Inc.; Houlihan, Lokey, Howard & Zukin, Inc.; A. Robert Pellegrino, Robert A. Ostertag, Terry P. Cole, Alan R. Dix, and Jon D. Elletson; William J. Gehring, et al., James N. Freid and Richard S. Hodgson; Gregory McAllister; and Lyle Dickes. These Defendants also incorporate the Reply Briefs filed by the Co-Defendants recited above.

These Defendants shall address briefly one issue raised by the Plaintiffs in their Response, namely that because the Defendants had participated in the due diligence surrounding the purchase of MBC by F&G in 1992, therefore they should have known that the due diligence being conducted by U.S. Trust Company and others in the fall of 1995 was inadequate. Plaintiffs' Response at 91-92. As to the adequacy of the due diligence conducted in the fall of 1995, that issue has been adequately discussed and documented in the pleadings filed by the Co-Defendants as recited above. These Defendants simply add that their own experience with U.S. Trust Company, Houlihan, Lokey, and Sonnenschein, Nath & Rosenthal, as described in the depositions of these Defendants, and in their Motion for Summary Judgment, showed that those three firms just named were doing a thorough and diligent job of investigation, and that Plaintiffs herein have offered no facts to show that the investigation was other than diligent. These

Defendants further point out that the 1992 due diligence and the 1995 due diligence were for completely separate purposes, the first being a purchase of the assets and taking over the business of one corporation by another, the second being the valuing of the stock of one corporation. The second due diligence was for a much more specific and narrow purpose, namely simply establishing the fair market value of certain shares, and did not require the amount of investigation that was involved in the 1992 transaction. That transaction was designed not simply to value the shares of MBC, but to determine how and whether F&G could take it over, assume its business, run the firm, and make it profitable. That investigation necessitated a much more thorough due diligence than was involved in the 1995 stock purchase.

**IV. Plaintiffs Have Offered No Competent Evidence Of The Value Of The F&G Shares Purchased By The F&G ESOP.**

**A. Issues Addressed by Previous Pleadings.**

Plaintiffs' Response at 72-77, 93-94 argues that Plaintiffs herein have produced competent evidence as to the value of the shares purchased by the F&G ESOP in 1995 and 1997, and that that value is considerably below what was paid. Most of the factual and legal issues raised by the Plaintiffs in this section of their Response have been adequately addressed in the following pleadings by Co-Defendants, which these Defendants hereby adopt: Response of Defendants Freid and Hodgson to the Order of this Court dated December 26, 2002 (filed herein on approximately January 10, 2003); Certain Defendants' Brief in Response to December 26, 2002 Order Regarding "Fatal Absence of Plaintiff Expert Testimony" (filed herein on approximately January 10, 2003); Defendants' Brief in Response to Court Order of December 26, 2002 Regarding Specific Alternative Value (filed herein January 9, 2003); and U.S. Trust's Submission in Response to the Court's Order of December 26, 2002 (filed herein January 9,

2003). As to these issues, the pleadings just cited have addressed them adequately, and these Defendants will not further address them herein.

B. Plaintiffs' Argument Regarding Federal Rule of Evidence 703.

Plaintiffs' Response at 79 cites FRE 703 for the proposition that an expert can base his opinion upon other information of a type reasonably relied upon by experts in his field, including the opinions of other experts. Plaintiffs cite *Concerned Area Residents for the Environment v. Southview Farm*, 834 F.Supp. 1422, 1436 (W.D.N.Y. 1993), *In Re Lake States Commodities, Inc.*, 272 B.R. 233 (N.D.Ill. 2000), *Grant v. Chemrex, Inc.*, 1977 WL 223071, at \*7-8 (N.D.Ill. 1997).

It is of course true that an expert can, under certain circumstances, rely upon the opinions of another expert. However, that procedure cannot be used to sneak in factual findings that would otherwise be inadmissible based upon hearsay or lack of adequate foundation. *In the Matter of James Wilson Associates*, 965 F.2d 160, 172-171 (7<sup>th</sup> Cir. 1992).

In the present cause, the Plaintiffs have identified their four experts whose opinions supposedly support a particular valuation for the stock, but they have not stated whose expert opinions or expert findings these individuals are relying upon pursuant to FRE 703. It is apparent, however, that the findings, reports, and opinions that they are relying upon are those of Robert Reilly. See Hitchner deposition at 138-139. Indeed, it could hardly be otherwise, since none of Plaintiffs' experts claims to have done an actual valuation of F&G stock, and indeed they have admitted that they were not requested to do such a valuation, and did not do such a valuation. They have not demonstrated the necessary qualifications to perform an ESOP valuation. Plaintiffs are attempting to use the thorough evaluation procedures and reports

produced by Reilly, then revise those reports to their own satisfaction, by changing one or two of the variables estimated by Reilly.

These Defendants have not found any precedents which rule on comparable efforts at valuations in other cases, and indeed the Plaintiffs' position is so audacious that it is unlikely that any other litigant has taken it. In effect, the Plaintiffs wish to certify Reilly as an expert, adopt and incorporate his methodology and investigations, accept almost all of his factual findings, and then change one or two variables to produce a different outcome. All of this is to be done by rebuttal, since no such opinion was offered in the Plaintiffs' case in chief.

The case law, as recited above, allows an expert, under certain narrow conditions, to adopt the facts, findings, conclusions, and opinions of another expert, and rely upon them for his own opinion. However, no reported case allows the expert to do that and then disagree with selected elements of the opinions and factual findings that he is supposedly relying upon. Plaintiffs' novel interpretation of FRE 703 should not be permitted by this Court.

**V. Plaintiffs' Lack Of Proof That The Actions Of Any Defendant Caused The ESOP To Pay More Than Adequate Consideration Is Fatal To Their Case.**

Plaintiffs' Response at 78 asserts that, contrary to these Defendants' Motion, there is no requirement that a Plaintiff prove a causal connection between misconduct and loss to the ESOP in order to recover against them. Plaintiffs cite *Chao v. Hall Holding Company, Inc.*, 285 F.3d 415 (6<sup>th</sup> Cir. 2002) and *Reich v. Valley National Bank of Arizona*, 837 F.Supp. 1259 (S.D.N.Y. 1993). Defendants refer this Court to their Motion for Summary Judgment at 36-38 for their authority on the issue of causation. These Defendants further note that the cases cited by Plaintiffs, namely *Chao* and *Reich*, were lawsuits against a fiduciary, not a party in interest. These Defendants further note that despite some language in the two decisions just cited

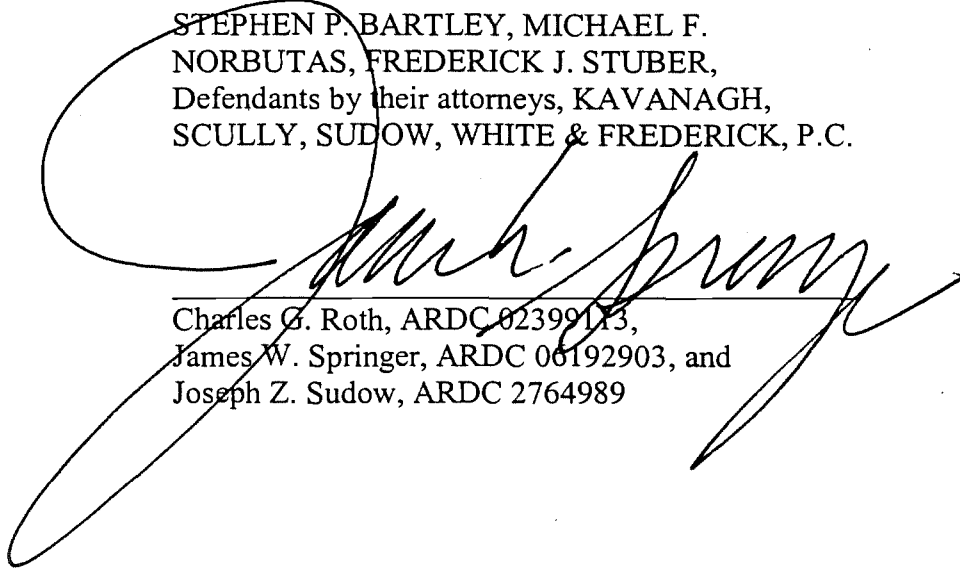
suggesting that causation need not be proved, in fact both cases did find causation and rely upon it for judgment in favor of the plaintiffs. Specifically, *Chao* states “However, *because of defendants’ actions*, the Hall Chemical ESOP overpaid for the stock by more than \$1 million.” *Chao*, 285 F.3d at 444, emphasis added. Likewise, *Reich* found that “As A Result Of Valley’s Fiduciary Breaches, Adequate Consideration Was Not Paid.” 837 F.Supp. at 1281.

In the present cause, Plaintiffs have no evidence of either loss or causal connection.

**VI. Conclusion.**

For the reasons given above, Defendants Stephen P. Bartley, Michael F. Norbutas, and Frederick J. Stuber pray that their Motion for Summary Judgment be granted, and that all claims against them be dismissed with prejudice.

STEPHEN P. BARTLEY, MICHAEL F.  
NORBUTAS, FREDERICK J. STUBER,  
Defendants by their attorneys, KAVANAGH,  
SCULLY, SUDOW, WHITE & FREDERICK, P.C.

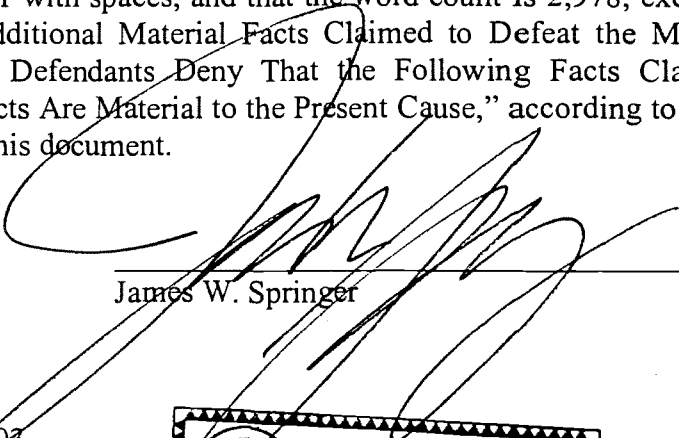


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Charles G. Roth, ARDC 02399113,  
James W. Springer, ARDC 06192903, and  
Joseph Z. Sudow, ARDC 2764989

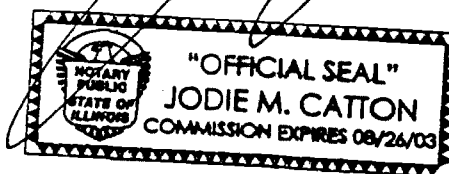
CERTIFICATE OF COMPLIANCE WITH  
CDIL Local Rule 7.1(B)(2)

The undersigned, counsel for Defendants, Stephen P. Bartley, Michael F. Norbutas, and Frederick J. Stuber, hereby swears and affirms that the character count for the present document is 15,577 without spaces and 18,671 with spaces, and that the word count is 2,978, exclusive of the sections entitled "Reply to Additional Material Facts Claimed to Defeat the Motion for Summary Judgment" and "These Defendants Deny That the Following Facts Claimed by Plaintiffs as Additional Material Facts Are Material to the Present Cause," according to the word processing system used to prepare this document.

  
James W. Springer

Subscribed and sworn to before me  
this 31 day of January, 2003.

Jodie M. Catton  
Notary Public



## CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document was served upon the following by placing the same in an envelope, postage fully prepaid, and by depositing said envelope in a U.S. Post Office Mail Box in Peoria, Illinois, or by hand delivery, on the 31<sup>st</sup> day of **January, 2003**, addressed as follows:

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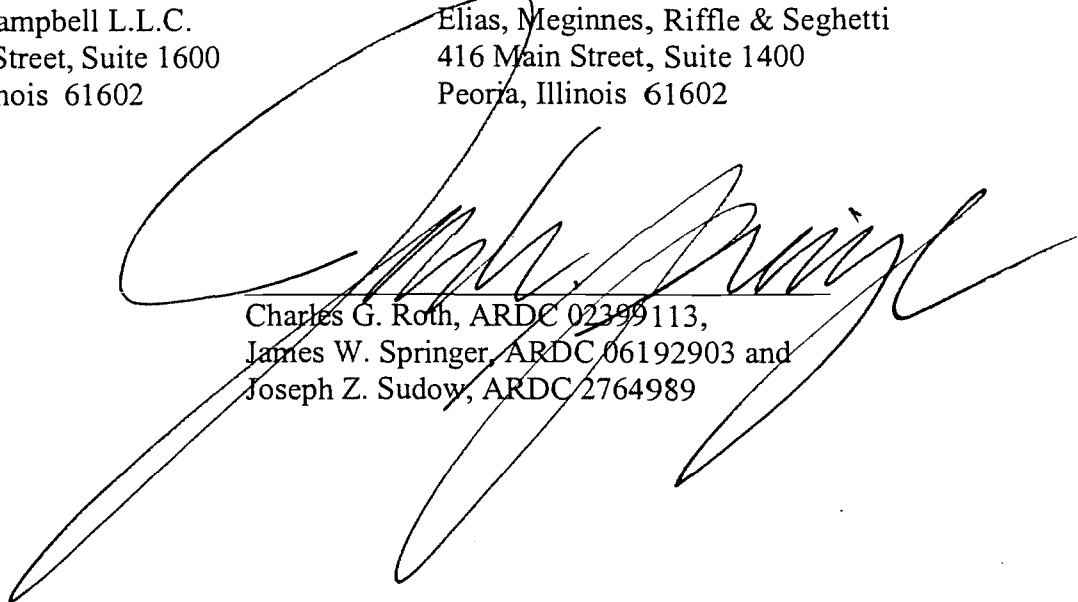
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A large, stylized handwritten signature in black ink, which appears to be "James W. Springer", is written over the typed names of Charles G. Roth, James W. Springer, and Joseph Z. Sudow.

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Joseph Z. Sudow, ARDC 2764989