

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

**DEBRA K. KEACH, and
PATRICIA A. SAGE,**
Plaintiffs,
vs.
U.S. TRUST COMPANY, et. al.,

Defendants.

**CASE NUMBER
01-1168**

**MOTION FOR LEAVE TO SUPPLEMENT AFFIRMATIVE DEFENSES OF
DEFENDANT A. ROBERT PELLEGRINO REGARDING COUNT V
AND
CONDITIONAL MOTION FOR LEAVE TO SUPPLEMENT AFFIRMATIVE
DEFENSES OF TERRY COLE, ALAN DIX, JON ELLETSON AND ROBERT
OSTERTAG, JR. REGARDING COUNT IV
AND
CONDITIONAL MOTION FOR LEAVE TO SUPPLEMENT AFFIRMATIVE
DEFENSES OF ROBERT OSTERTAG, JR. AND A. ROBERT PELLEGRINO
REGARDING COUNT IX**

COMES NOW Defendants Terry Cole, Alan Dix, Jon Elletson, Robert Ostertag Jr. and A. Robert Pellegrino ("Pellegrino"), by and through their undersigned counsel, Richard J. Pautler of Thompson Coburn LLP, and respectfully seek leave to supplement or conditionally supplement their affirmative defenses. In support of their motion these defendants state:

1. This Court in its Order of November 27, 2002, when addressing Plaintiff's ERISA § 406 claim against U.S. Trust found, "this Court now finds that a fiduciary's invocation of an exception under § 408 is an affirmative defense that must be pled." (Order at pp. 23-24). This finding by the Court affects or applies only when a plaintiff has plead a claim under § 406 of ERISA.

2. Defendants Terry Cole, Alan Dix, Jon Elletson and Robert Ostertag do not believe or understand that Count IV directed against them as members of the Administrative Committee includes any claim under ERISA § 406. Indeed, Defendants have understood from Mr. Rhoads statements at the November 8, 2001 hearing that Plaintiffs were expressly not asserting a claim under § 406 against the Administrative Committee. (See Transcript, pp. 33-34) Similarly, Robert Ostertag and Pellegrino do not believe or understand that Count IX includes any claim under ERISA § 406. Rather, Defendants understand Count IX to be a *Harris Trust* claim. Because these Defendants believe that neither Count IV nor Count IX include § 406 claims, § 408 has no applicability to those Counts. Thus, these Defendants do not believe they have the burden of proving that the ESOP paid no more than adequate consideration, and they do not wish to assume needlessly any such burden.

3. Count V is directed solely against Pellegrino and makes no mention of § 406. Thus, it has never been clear whether Count V includes a claim under § 406 or not, although Mr. Rhoads's comments at the November 11, 2001 hearing suggest that Count V was intended to assert a § 406 claim. In the context of this litigation, however, (e.g. Plaintiff's own pleadings), it has not been clear that even if Count V does include a claim under § 406, Pellegrino needed to plead § 408 as an affirmative defense. The Court's Order resolves this second issue though not the first.

4. Pellegrino references and adopts the "Argument" section of U.S. Trust's Alternative Motion for Leave to File an Amended Answer (Docket #347), but will not repeat those arguments here because the Court is no doubt fully aware of these points having already granted U.S. Trust's Alternative Motion.

5. Pellegrino, still uncertain but suspecting that Count V is intended to assert a claim under § 406, seeks leave to supplement by interlineation his Amended Answer and Affirmative Defenses to Plaintiffs' First Amended First Amended Complaint (Docket #262) in the event and to the extent Count V is interpreted to assert a claim under § 406. He seeks leave to add the following:

FIFTH AFFIRMATIVE DEFENSE

The transactions addressed in the First Amended Complaint met the requirements of ERISA § 408 and therefore were exempt from the prohibited transaction provisions of ERISA §406.

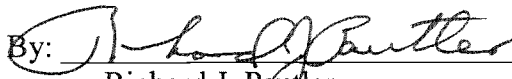
6. If it is somehow later determined that Count IV includes a claim under § 406, then Cole, Dix, Elletson and Ostertag also incorporate this Fifth Affirmative Defense. If it is somehow later determined that Count IX includes a claim under § 406, the Ostertag and Cole also incorporate this Fifth Affirmative Defense.

7. Plaintiffs will not be in any way prejudiced by the Court granting this motion and the Court's allowing this amendment by interlineation will not delay or otherwise affect the trial setting in this matter.

WHEREFORE, Defendant A. Robert Pellegrino moves this Court to enter its Order allowing him to supplement by interlineation *nunc pro tunc* his Amended Answer to include the above-referenced Fifth Affirmative Defense, and holding that such Fifth Affirmative Defense is included as a part of his Amended Answer. If and to the extent it is deemed that Count IV includes a claim under § 406 of ERISA, then defendants Cole, Dix, Elletson and Ostertag move this Court to allow them to supplement by interlineation *nunc pro tunc* their Amended Answer to Count IV to include the above-referenced Fifth Affirmative Defense, and to hold that such Fifth

Affirmative Defense is included as a part of their Amended Answer. If and to the extent it is deemed that Count IX includes a claim under § 406 of ERISA, then defendants Ostertag and Pellegrino move this Court to allow them to supplement by interlineation *nunc pro tunc* their Amended Answer to Count IX to include the above-referenced Fifth Affirmative Defense, and to hold that such Fifth Affirmative Defense is included as a part of their Amended Answer.

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a copy of the foregoing was served upon:

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by United States first class mail, postage prepaid, this 3rd day of December 2002.

