

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

DEBRA K. KEACH and PATRICIA A. SAGE,)
)
 Plaintiffs,)
)
 vs.) Case No. 01-1168
)
 U. S. TRUST COMPANY, NA., et al.,) DEFENDANTS' REPLY IN
) SUPPORT OF SUMMARY
 Defendants.) JUDGMENT OF DEFENDANTS
 ELLEN D. FOSTER, AS EXECUTRIX
 OF THE ESTATE OF THOMAS S.
 FOSTER, DECEASED, AND MELVYN
 R. REGAL

DEFENDANTS' REPLY IN SUPPORT OF SUMMARY JUDGMENT
OF DEFENDANTS ELLEN D. FOSTER, AS EXECUTRIX OF THE
ESTATE OF THOMAS S. FOSTER, DECEASED, AND MELVYN R. REGAL

For their Reply, and in support of their Motion for Summary Judgment, Defendants by their attorneys state as follows:

FACTS

1. Foster and Regal object to Plaintiffs' attempt to incorporate herein facts from Plaintiffs' Response to U.S. Trusts' Motion for Summary Judgment. (Plaintiffs' Response at ¶ 18). Plaintiffs' Response to U.S. Trusts' Motion for Summary Judgment is nearly 400 pages. Plaintiffs submit no motion to permit an oversized response to Foster and Regal's Motion for Summary Judgment. Plaintiffs' justification for including numerous facts in response to U.S. Trust Motion, that U.S. Trust's motion was oversized, has no applicability to Foster and Regal's modestly sized Motion for Summary Judgment.

2. Foster and Regal further object to Plaintiffs' attempt to incorporate facts from (1) Plaintiffs' Response to U.S. Trusts' Motion for Summary Judgment and (2) Plaintiffs' First Motion for Summary Judgment Against Foster & Regal (Plaintiffs' Response at ¶ 18) because this Court has already weighed, considered, ruled on, and, in many cases, rejected these facts. This Court has referred to the many occasions in which Plaintiffs "facts" are: (1) unsupported by the record; (2) out of context; (3) objectively unreasonable; and (4) contain speculative characterization or conjecture. *See, e.g., December 30, 2002 Court Opinion* ("[plaintiffs'] suggestion is without merit as the quotation has been taken out of context, is misleading, and leads to a false conclusion"); *December 12, 2002 Court Opinion* ("Despite Plaintiffs' efforts to take sentences out of context ...the inferences they ask the Court to draw ...are both unsupported by facts and objectively unreasonable"); *December 12, 2002 Court Opinion* ("once again, this is solely Plaintiffs' speculative characterization and is not reasonably supported by the deposition testimony cited"); *December 12, 2002 Court Opinion* ("Plaintiffs merit no further discussion, as they amount to nothing more than speculative conjecture/ characterizations of the facts"); *November 18, 2002 Court Opinion* ("Plaintiffs make far too much of this admission"). Without regard to this Court's orders, Plaintiffs are now replicating the same "facts" that this Court already discarded. This court should not countenance such action.

ARGUMENT

1. As there is no record evidence that Foster and Regal failed to disclose the information that they knew, they are entitled to summary judgment on Plaintiffs' claim of failure to disclose.

Plaintiffs' complaint alleges that Foster and Regal concealed information from U.S. Trust. Discovery is over and there is no support for this allegation. The undisputed evidence supports the opposite conclusion: that Foster and Regal disclosed the information that they had

and directed others to provide full and complete disclosure. Having failed to introduce any evidence to the contrary, Plaintiffs must have summary judgment entered against them with respect to their claims that Foster and Regal concealed information.

Plaintiffs' sole argument, that Foster and Regal's motion is too narrow, must be summarily rejected. This Court, in its prior opinions, has made the exact type of "narrow" ruling being sought by the Defendants here. *See, e.g., December 18, 2002 Court Opinion* ("Cole Defendants are entitled to summary judgment with respect to any assertion in the Amended Complaint that suggests liability for failing to prevent the 1995 stock purchase transaction or other events that occurred before they became named fiduciaries as members of the ESOP Administrative Committee"); *December 18, 2002 Court Opinion* ("As the Cole Defendants have submitted affidavits attesting to their lack of actual knowledge of any breach by any other fiduciary, and Plaintiffs have not introduced evidence sufficient to refute their assertions, the Cole Defendants are also entitled to summary judgment on any claim of co-fiduciary liability pursuant to § 405(a) of ERISA").

Moreover, Foster and Regal's only obligation under ERISA was "to disclose to the beneficiary only those material facts, known to the fiduciary but unknown to the beneficiary, which the beneficiary must know for its own protection." Glaziers and Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Securities, Inc., 93 F.3d 1171 (3d Cir. 1996)(emphasis supplied). Plaintiffs' legal argument that Defendants' obligation extended beyond disclosing known facts is derived from case law relating to director corporate liability, not ERISA fiduciary liability. Plaintiffs have failed to produce any record evidence that Foster and Regal failed to disclose facts "known to the fiduciary." Accordingly, Foster and Regal are entitled to summary judgment on this claim.¹

¹ An entry of summary judgment on all claims concerning concealment of information and failure to disclose would leave for trial those issues discussed in this Court's November 18, 2002 opinion. For example, a fact issue would remain whether Foster and Regal had a fiduciary duty to do more to insure that the disclosures of the company were "adequate" as well as the fact issue whether the disclosures made by the company were adequate. However, as discussed below, there is no need for a dispute to proceed on these liability issues, as there are no damages here.

2. Plaintiffs have failed to present any evidence that Foster and Regal exerted actual control over the trustee.

Instead of presenting any record evidence that Foster and Regal exerted actual control over U.S. Trust, Plaintiffs rely on discrete language in this Court's November 18, 2002 Opinion to treat that point as a foregone conclusion. That language, that Foster and Regal's "fiduciary duties w(ere) not limited merely to their appointment of US Trust as the trustee of the ESOP and the corresponding duty of appropriate monitoring" did not make liability against Foster and Regal assured, with no further evidence required, as Plaintiffs would have it. As set forth in Foster and Regal's Motion for Summary Judgment, that language must be read in context with the overall reasoning of this Court in its Opinions as well as the with legal standards set forth in *Leigh v. Engle*, 727 F.2d 113 (7th Cir. 1984).

Moreover, in an effort to cling to their unsubstantiated assertion that Foster and Regal controlled the Plan's assets and management, Plaintiffs have completely overlooked key findings that this Court made in its December 30, 2002 Opinion regarding Valuometrics:

It is undisputed that Valuometrics had a long-standing relationship with F&G, as well as the ESOP, and played a pivotal and active role in advising the Board of Directors and structuring the proposed stock offer to the ESOP in 1995.

There is simply no evidence in the record indicating that US Trust was a mere puppet acting out Valuometrics' directives in carrying out its duties as trustee. To the contrary, Plaintiffs admit that US Trust initially opined that Valuometrics' offer price of \$24.00 per share "looked somewhat aggressive" and asked Houlihan to prepare an analysis reflecting more conservative revenue projections.

On November 7, 1995, representatives of Valuometrics participated in a telephone call with representatives of US Trust and Houlihan to discuss their respective views on the valuation of F&G stock. Following this conference call, US Trust advised F&G that it was not convinced that the offer price of \$24.00 per share was supportable, and the purchase of a controlling block of F&G stock at \$19.50 per share was ultimately approved.

The \$19.50 per share price was determined by US Trust as trustee and would not have been recommended by the trustee if Houlihan had not been prepared to issue an opinion supporting that price.

Plaintiffs do not assert that Valuemetrics assisted US Trust in determining this price and have presented no evidence indicating that Houlihan and the trustee simply rubber-stamped Valuemetrics' opinion.

In fact, the evidence indicates precisely the opposite, that is that Houlihan and Valuemetrics were on opposite sides of the negotiating table and that Valuemetrics' position did not ultimately prevail.

It was US Trust, not Valuemetrics, that made the final decision and caused the ESOP to purchase the shares of stock, and US Trust had hired the firm of Houlihan, Lokey, Howard & Zukin ("Houlihan") to serve as its own independent financial advisor for the transaction.

Plaintiffs have failed to meet their burden of coming forward with evidence indicating that Valuemetrics exercised actual decision making authority or influence over the ESOP or its trustee amounting to such authority.

After making detailed factual findings, this Court concluded, as a matter of law, "that there is no evidence of record from which a reasonable fact finder could conclude that Valuemetrics exercised influence approaching actual control over the ESOP's investment decisions in relation to the 1995 stock purchase transaction." (December 30, 2002 Opinion). Plaintiffs also overlook crucial findings from this Court's December 12, 2002 Opinion regarding US Trust:

US Trust did engage in some effort to analyze the various professional opinions and information received from F&G prior to making its decision.

In fact, Plaintiffs have admitted that US Trust managed the ESOP's assets, did its own analysis of the ESOP transaction, reviewed Houlihan's preliminary assessments, and directed Houlihan to perform additional analysis based on its review.

These findings apply with equal force to Foster and Regal. It is obvious that if Foster and Regal exercised actual control over the trustee, US Trust would have adopted the findings of

Valuometrics, the valuation firm hired by F&G, which sought a \$24 per share selling price. It did not. Instead, as found by this Court based upon the undisputed facts, US Trust did its own analysis, hired its own advisors, and made its own decision to insist on a \$19.50 selling price. Because Plaintiffs have chosen to completely disregard the factual and legal conclusions reached by this Court and, instead, rely solely on one sentence in a prior Opinion to conclude that Foster and Regal's fiduciary duty was so pervasive as to constitute *per se* control, it is necessary that this Court enter an order confirming that a determination of how much control, if any, that Foster and Regal exercised over US Trust's plan investments remains a factual issue for trial.

The need for such an order is made clear by Plaintiffs' Second Motion for Summary Judgment. That Motion not only quoted the above referenced language in this court's November 18, 2002 opinion, but then took it to an absurd level. Plaintiffs asserted that such a duty made Foster and Regal responsible, under Section 404, for "act(ing) in the best interests of the ESOP participants and beneficiaries." (Plaintiffs' Second Motion at 25.) It is virtually impossible for persons receiving funds from the sale of stock, like Regal and Foster, to survive a requirement that they be responsible for acting in the best interest of the ESOP. Accordingly, were such a duty of loyalty to attach, it would mean automatic liability for Regal and Foster. This cannot have been the court's intention. Accordingly, a confirmation of the court's intention is needed to avoid confusion by the parties.

The Plaintiffs next press, in their Second Motion, for a ruling that, if Regal and Foster were not liable for breaching their duty of loyalty, they at least had an obligation to "engage in an intensive and scrupulous independent investigation of their options to insure that they act in

the best interests of the plan beneficiaries” (Second Motion at 24.)² Plaintiffs assert that, by agreeing with US Trust and Houlihan Lokey not to raise the Eyler issue that Regal and Foster “acted in their own self interest.” Id. at 25. This is precisely the argument that this court rejected in entering Summary Judgment in favor of Houlihan Lokey on December 12, 2002, when it said that “Plaintiffs conten(tion) that Houlihan ‘met with Regal and agreed up front not to push the Eyler issue’ ...is solely Plaintiffs’ speculative characterization and is not reasonably supported by the deposition testimony cited.” December 12, 2002 Order at 6.

Accordingly, this court may have resolved the issue once and for all in its December 12, 2002 ruling on the Houlihan Lokey Motion for Summary Judgment. However, to the degree it does not, Foster and Regal seek an Order confirming the Court’s intention.

3. As there is no evidence that Foster and Regal exerted any authority or control respecting management or disposition of the Plan assets after December 20, 1995, Foster and Regal are entitled to summary judgment in their favor with respect to claims after this date.

As of December 20, 1995, the ESOP Administrative Committee was fully functioning and US Trust was a functional trustee. Any fiduciary duty that Foster and Regal may have had with regard to the design and implementation of an ESOP transaction was completed. To proceed with a claim against Foster and Regal for events after the realization of the plan, Plaintiffs are required to present record evidence that after December 20, 1995, Foster and Regal met the definition of a fiduciary contained in 29 U.S.C. § 1002(21): namely, that Foster and Regal (i) exercised any discretionary authority or discretionary control respecting management of such plan or exercised any authority or control respecting management or disposition of its

² Even if this were the standard, Foster and Regal should survive it. For the fact that Foster and Regal still owned a substantial portion of the outstanding stock would certainly mean that maintaining sound business transactions would be in their best interest also.

assets, (ii) rendered investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or had any authority or responsibility to do so, or (iii) had any discretionary authority or discretionary responsibility in the administration of such plan.

Plaintiffs failed to provide any record evidence that Foster and Regal had or exercised any discretionary authority, control, or responsibility respecting the administration of the plan or the disposition of its assets subsequent to December 20, 1995. The sole argument Plaintiffs make is to quote from this Court's November 18, 2002 opinion that Foster and Regal had "the corresponding duty of appropriate monitoring" US Trust. Plaintiffs' argument is deficient. The Court was referring to monitoring US Trust from the time US Trust was hired to represent the ESOP until the December 20, 1995 date of closing. This Court expressly ruled that Foster and Regal's status as fiduciary existed only through December 20, 1995: "In their capacity as members of F&G's board and executive committee, Foster and Regal exercised control over the structure and orchestration of the ESOP transaction through the closing on December 20, 1995." (November 18, 2002 Opinion)(emphasis supplied).

Plaintiffs' incongruous suggestion that Foster and Regal continued to have fiduciary duties once they ceased being fiduciaries is contrary to the facts and to the basic tenants of ERISA law. At the time of the closing, an Administrative Committee was appointed to monitor the Trustee's actions. At no time did either Foster or Regal belong to that Administrative Committee. Further, as expressed by this Court, "ERISA makes it clear that no fiduciary can be held liable for any breach of fiduciary duty that occurred either before he became a fiduciary or after he ceased to be a fiduciary." 29 U.S.C. § 1109(b). (December 18, 2002 Court Opinion)(emphasis supplied). This Court has set out the well-established law that "a fiduciary

can only be liable to the extent that it was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." (December 30, 2002 Court Opinion)(citing *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000); *Brandt v. Grounds*, 687 F.2d 895, 898 (7th Cir. 1982)).

Plaintiffs have presented no evidence that Foster and Regal were fiduciaries after December 20, 1995. To the contrary, all evidence shows that they were not. As a result, no fiduciary duties attach, and Foster and Regal are entitled to summary judgment to the degree the Amended Complaint suggests liability for events that occurred after December 20, 1995.

4. As there is no evidence in the record that Foster and Regal caused any loss to the plan, Foster and Regal are entitled to summary judgment in their favor on all claims.

In their motion for summary judgment, Foster and Regal argued that they were entitled to summary judgment because Plaintiffs have adduced no evidence that would establish a causal connection between any fiduciary breach on the part of Foster and Regal and a loss to the plan. In response, Plaintiffs failed to present any evidence to support this necessary element of causality. Instead, Plaintiffs argued that their response to US Trust's motion sets forth "factual issues to be resolved at trial as to whether the 1995 ESOP transaction and alleged breaches of fiduciary duty caused loss to the plan." (Plaintiffs' Response at ¶ 37). Plaintiffs' response to US Trust's motion on this issue is confined to a single contention: "Although US Trust argues that the demise of sweepstakes in 1998 was not foreseeable in December 1995, there are material disputed facts on that issue." (Plaintiffs' Response to US Trust Motion at ¶ 264 Plaintiffs' inadequate response entitles Foster and Regal to summary judgment in their favor for several independent reasons.

First, it is undisputed that “beginning in 1998, MBC’s revenue bases suffered extensive damage as a result of the negative publicity targeting sweepstakes marketing.” (November 18, 2002 Court Opinion). Plaintiffs’ argument that in 1995, the ESOP fiduciaries should have seen this coming, is pure conjecture. The need for conjecture swells when considering that the revenues of F&G increased in 1996 and 1997. The hypothetical fiduciary under Plaintiffs’ theory, then, would not only need to be a prophet extraordinaire, but would need the fortitude to be proved wrong for a number of years, believing that eventually its prescience would be proven correct. This type of conjecture and rhetoric is the very type of ‘unwarranted deductions that this Court has found insufficient to create a genuine issue of material fact.’ *Cf December 12, 2002 Court Opinion.*

Second, Plaintiffs’ claim that the demise of the sweepstakes in 1998 was foreseeable in December 1995 is not a valid ESOP claim. What Plaintiffs are positing is that in 1995 Foster and Regal should have seen the future demise of sweepstakes. The fact is, Foster and Regal did not and there is no evidence that they did. Whether they “should have” goes to their ability to make astute business decisions, not whether they breached an ERISA fiduciary duty. An ERISA fiduciary has a “legal duty to disclose to the beneficiary only those material facts, known to the fiduciary,” Glaziers and Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Securities, Inc., 93 F.3d 1171 (3d Cir. 1996), not facts that the fiduciary “should have” known.

But whether these Defendants should have foreseen the future demise of sweepstakes and whether they should have modified F&G’s business operations are questions of corporate judgment and business decisions. They do not involve ESOP fiduciary law. "ERISA does not require that day-to-day corporate business transactions, which may have a collateral effect on prospective, contingent employee benefits, be performed solely in the interest of plan

participants." *Adams v. Avondale Indus., Inc.*, 905 F.2d 943, 947 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990) (internal quotations and citations omitted). Once again, Plaintiffs "have lost sight of the fact that this ERISA action is not a crusade to right all wrongs." (December 18, 2002 Court Opinion).

Third, and most critical, Plaintiffs' causation argument fails to even mention Foster and Regal specifically. Plaintiffs' causation argument generally refers to the "1995 ESOP transaction and alleged breaches of fiduciary duty caused loss to the plan" and to alleged deficiencies of US Trust. To defeat this summary judgment, Plaintiffs are required to produce evidence that ties the loss to specific fiduciary breaches by Foster and Regal. *Brandt v. Edward Grounds and Mount Prospect State Bank*, 687 F.2d 895 (7th Cir. 1982). In *Brandt*, the Seventh Circuit first determined that the Bank's alleged fiduciary breach involved its investment advising function. The Court then opined that "without a causal connection between the advice and the loss no liability can exist under 29 U.S.C. 1109(a)."

The situation is the same here. Plaintiffs allege that Foster and Regal failed to disclose information to US Trust in 1995. Accordingly, Plaintiffs are obligated to demonstrate that this alleged failure to disclose had a causal connection to the loss. Plaintiffs have not made such a showing. Plaintiffs' non-responsive evidence merely demonstrates that if US Trust had received more documents, "US Trust would have asked for more information." (Plaintiffs' Response to US Trust Motion at ¶ 84).

As set forth in Foster and Regal's Motion for Summary Judgment, however, the information that Plaintiffs claim that US Trust did not receive is duplicative of the information it actually did receive. Moreover, the bulk of Plaintiffs' 400 page submittal in response to US Trust's motion for summary judgment is devoted to Plaintiffs' argument that voluminous public

information existed that should have alerted US Trust to the risks of sweepstakes marketing. Accordingly, to prevail against Foster and Regal, Plaintiffs would need to present evidence that Foster and Regal had an obligation to produce to US Trust (1) duplicative information; and (2) publicly held information, and that such a production would have changed US Trust's handling of the 1995 ESOP. Plaintiffs have failed to make such a showing. Nor can they, since no such obligation exists. Duplicative materials cannot be considered "material" and an ERISA fiduciary's legal duty to disclose extends only to those material facts "unknown to the beneficiary." Glaziers and Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Securities, Inc., 93 F.3d 1171 (3d Cir. 1996). Even if a duty existed, Plaintiffs have produced no evidence showing that a production of duplicative, publicly available information would have changed anything. Accordingly, Foster and Regal are entitled to summary judgment in their favor.

5. Foster and Regal are entitled to summary judgment in their favor on all claims because Plaintiffs have failed to produce evidence that they suffered a loss.

Plaintiffs claim that a "prima facie case of loss to the plan" is demonstrated by a calculation that assumes that the ESOP funds were invested at the prime rate. Plaintiffs' argument is senseless on its face. By definition, ESOPs invest in company stock. ESOPs are not invested at the "prime rate." Risks are inherent in ESOPs and a "retiree can end up with little beyond Social Security benefits" or "may live in the lap of luxury." *White v. Sundstrand Corp.*, 256 F.3d 580 (7th Cir. 2001). Plaintiffs point to no case law whatsoever that permits damages to an ESOP to be based upon an hypothetical prime rate investment by a corporation.

Plaintiffs' protestations to the contrary, Plaintiffs have failed to present any evidence concerning the value of F&G's shares on December 20, 1995.³ In their response, Plaintiffs argue that they presented such evidence through James R. Hitchner. Plaintiffs admit that Hitchner never conducted an independent appraisal of the value of F&G's shares on December 20, 1995, but nonetheless contend that \$ 10.85 is competent valuation evidence because Hitchner analyzed the report of US Trust's expert. In this regard, Plaintiffs insist that under Rule 703 of the Federal Rules of Evidence, an expert may "reasonably rely" upon another expert's report.

Every significant aspect of Plaintiffs' argument is wrong. Although it is no doubt true that, under Rule 703, experts may rely upon reports of other experts, whether such reliance was "reasonable" would depend on the specific case. In this case, it defies logic for Plaintiffs to claim that Rule 703 permits Hitchner to "reasonably rely" on the very expert report that Hitchner opines is wrong. More importantly, reliance on another expert report is only permitted as part of the expert's overall testimony. The expert still must prove the underlying basis for his opinion, and that he cannot do because, as he admits, he has not done the independent research to back it up.

Plaintiffs' two-page discussion of *In re Lakes States Commodities, Inc.*, 272 B.R. 233 (N.D. Ill. 2002) is an entire misrepresentation of the findings of the case. The court did not rule that the "expert witness testimony and opinion" was admissible. Far from it. The expert witness' testimony was admitted because the parties consented to the admission. Even though the parties had consented to the admission, the court determined that the expert's testimony and opinion was

³ Foster and Regal incorporate prior arguments concerning the deficiencies of Plaintiffs' experts, including Plaintiffs' failure to timely disclose their experts.

entitled to “no weight.” Moreover, the court stated that it may have excluded the testimony and opinion all together had there been a *Daubert* challenge.

Plaintiffs’ further assertion that the expert witness in *In re Lakes* did not do any additional research is also false. The expert witness consulted with attorneys and witnesses, reviewed business records, and reviewed documents relating to the assets in question. Nonetheless, the court rejected the expert’s testimony because of “inadequate showing of meaningful testing and the insufficient validation of the underlying sources.” The court concluded that the party’s burden of proof was not met when the expert’s testimony relied entirely upon another expert report and entered judgment in favor of defendants.

In short, Plaintiffs’ representation of the rulings of *In re Lakes* is downright wrong. Yes, Hitchner may rely upon the report of another expert, but if that is all he does, his testimony is inadequate and does not assist Plaintiffs in meeting their burden of proof. The case law is clear that Hitchner is required to prove the validity of the underlying assumptions and values in the report that he relies on. *Id.* (quoting *TK-7 Corp. v. Estate of Ihsan Barbouti*, 993 F.2d 722 (1993)(reliance on another expert’s report does “not relieve the plaintiffs from their burden of proving the underlying assumptions contained in the report”). Where Hitchner reached his “valuation” by distinguishing the findings of another report, and did not do any independent research, he will not be able to prove the underlying assumptions of that report, and therefore cannot help Plaintiffs meet their burden of proof.

Precedent mandates that such proof be made with an independent appraisal of the value of F&G’s shares on December 20, 1995. Otherwise the expert would be unable to provide meaningful testimony explaining the assumptions underlying his valuation. As a matter of law,

Hitchner's critique of US Trust's expert is inadequate to meet Plaintiffs' burden of proof. Accordingly, Foster and Regal are entitled to judgment in their favor.

6. No Valuation Produced by Plaintiffs Demonstrates that The ESOP's Damages Exceed the \$ 34.5 Million debt the ESOP Still Owes to F&G, and Therefore the ESOP Has Suffered No Losses.

As with *In re Lakes, supra*, Plaintiffs' reading of *McDannold v. Star Bank, N.A.*, 261 F. 3d 478 (6th Cir. 2001) is flawed. Plaintiffs' entire four-page argument based upon *McDannold* is erroneous. In truth, the *McDannold* decision supports Foster and Regal's argument that any recovery here must go toward the \$34.5 million loan.

The critical point in *McDannold*, missed by Plaintiffs, is that the settlement involved a malpractice claim. The Sixth Circuit upheld the trial court's determination that the "settlement fund compensates plaintiffs for unsound legal and financial advice, not for loss of collateral." The Court distinguished between malpractice claims, on the one hand, and claims, such as the one before this Court, involving the diminution of a stock's value, on the other. When the claim concerns the diminution of a stock's value, 20 U.S.C. Sec. 1108(b)(3) applies and the outstanding indebtedness under the loan may be considered in determining the ESOP's damages. *Id.* (citing *McGonigle v. Combs*, 968 F.2d 810 (9th Cir. 1992)). Thus, the *McDannold* court did not "reject" Foster and Regal's "theory," it endorsed it.

Whether this is viewed as an affirmative defense⁴ or a damages argument,⁵ the simple fact is that this litigation has no chance of recovering any funds for the ESOP. In particular,

⁴ If it is viewed as an affirmative defense, then Foster and Regal have moved to Amend their Complaint to add this as an Affirmative Defense and, like US Trust, Pelligrino and Ostertag, who are being allowed to Amend their Complaint to assert a section 408 Affirmative Defense, and the Plaintiffs, who are being permitted a late subsequent filing of rebuttal expert evidence to already completed Summary Judgment Motions, this court should grant their Motion to Amend.

even accepting Hitchner's reference to a \$10.85, which Plaintiffs now claim constituted a valuation, that number is 55.6% of the selling price of \$19.50. Applying this 55.6% to the ESOP's total stock purchase price of \$70 million would mean that the stock purchased was only worth \$38.92 million, leaving the ESOP with damage of \$31.06 million. Since the ESOP still owes \$34.5 million to F&G, it has no damages. Alternatively, if one accepts Linke's rebuttal testimony, which Plaintiffs now claim to be a valuation, the stock was 1/3 or 33% overpriced. That would mean the ESOP suffered a loss of \$23.33 million, which is still less than the \$34.5 million owed by the ESOP to F&G.

In *White v. Sundstrand Corp.*, the Seventh Circuit, acknowledged that the plaintiffs there had "claims" that "became the subject" of a lawsuit, but added "it is hard to see why" considering that the Plaintiffs did not suffer any damages. 256 F.3d 580 (7th Cir. 2001). The same question should be asked here.

Plaintiffs' counsel caused this litigation to be brought, thereby causing huge expense, costs, and burdens to be incurred by the parties and this Court. Why? The aim certainly cannot have been to benefit the ESOP, since the \$34.5 million loan from F&G first has to be repaid. The *White* Court noted that a class action ERISA suit is "designed to generate a substantial financial return, (thereby) induc(ing) lawyers to compete for the opportunity to represent the class." *Id.* In an ERISA suit such as the one here, even if there is no financial recovery for the ESOP, the lawyers still get their fees paid. The reason this action was brought is clear.

⁵ Unlike Section 408, it is arguable that Foster and Regal's claim that the Plaintiffs have not suffered any losses is not an affirmative defense at all but simply a damages argument. If the court believes this to be the case, then there is no need for it to approve the Motion to Amend in order to address this argument.

Conclusion

For all of these reasons, this Court should enter Summary Judgment in favor of these Defendants.

FOSTER, as Executrix, REGAL,
BARTLEY, NORBUTAS, STUBER and
A. FOSTER, Defendants

and also for Melvyn R. Regal
by LAWSON & WEITZEN, LLP

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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 day of January, 2003, addressed as follows:

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