

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

DEBRA K. KEACH, et al.,)	
)	
Plaintiffs,)	
)	
vs.)	Case No. 01-1168
)	
U.S. TRUST COMPANY, N.A., f/k/a)	
U.S. Trust Company of California, et al.,)	
)	
Defendants.)	

**REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANT JAMES N. FREID'S
MOTION FOR SUMMARY JUDGMENT**

On November 25, 2002, the Court initiated a telephone conference to all counsel to specifically discuss the briefs that were being filed. The Court expressed to all counsel its concern about the length and the focus of the briefs. The Court directed all counsel to file briefs that focused on the issues and that were not longer than necessary. The Court also warned counsel that they were to address only issues that were related to the parties that were the subject of the briefs.

The Court expressly warned all counsel that it was going to start striking long briefs.

The Plaintiffs' Response to Freid's Motion For Summary Judgment should be stricken and Freid so moves. A review of the Response reveals that it is simply a regurgitation of the generic arguments made in almost every pleading filed by the Plaintiffs. For example, when the Plaintiffs seek to add 564 additional allegations that they claim are material facts that defeat Freid's Motion, Plaintiffs do not even bother to change their stock response so that it at least has the appearance of applying to Freid.

“14. As additional background and material facts in support of their Response to the *Gehring Defendants*’ Motion, Keach and Sage restate . . . “ (See pg. 11 of Plaintiffs’ Response to Defendant Freid’s Motion For Summary Judgment.)

The fact that the Plaintiffs had no intention of focusing their Response on Freid is born out by a review of the 564 allegations larded onto their Response. Not only do these allegations fail to focus on the conduct of Freid, not one of the allegations mentions James N. Freid by name. Plaintiffs’ Response is simply another example of Plaintiffs’ repeated attempts to bludgeon the Defendants, especially individuals like Freid, with unfocused recitations of every allegation and every argument made in this lawsuit.

The Court also warned counsel against using pejorative language in the briefs. As in the bloated First Amended Complaint, Plaintiffs continue to include words and accusations that have no place in legal documents. For example, Plaintiffs accuse Freid of “looting”. (Plaintiffs’ Response, p. 70) Plaintiffs also include references meant to portray Defendants in a poor light. According to Plaintiffs, apparently Freid is a corporate fat cat because he was offered a sail on a boat and had his choice of New York Strip or Broiled Salmon. (Plaintiffs’ Response, p. 69) Unfortunately, Plaintiffs’ briefs still read like they are fodder for the press and the public rather than a brief for the Court.

Plaintiffs’ utter lack of regard for the Court’s Order is demonstrated in their Response at pages 52 through 56. Plaintiffs apparently wish to flog the dead carcass of the argument regarding U.S. Trust’s lack of authority. Somehow they must believe that the issue involving Magna Bank, previously decided by this Court, is somehow relevant to James N. Freid’s Motion For Summary Judgment.

The Plaintiffs have abused their right to petition the Court for relief against James Freid. The Response to the Motion For Summary Judgment by James N. Freid should be stricken and judgment granted for Freid. At the very least, the Court should sanction the Plaintiffs for their pleading.

For the benefit of everyone involved, this case must move forward. Consequently, in the event the Court does not grant the relief requested, Freid files the following Reply.

**FREID'S REPLY TO STATEMENT OF
ADDITIONAL UNDISPUTED MATERIAL FACTS.**

Plaintiffs seek to add as additional material facts 189 allegations from the Plaintiffs' First Motion For Summary Judgment As To Liability Against Defendants Ellen E. Foster, as Executrix of the Estate of Thomas S. Foster, and Melvyn R. Regal. Plaintiffs seek to add another 105 allegations from their Second Motion For Summary Judgment As To Liability Against U.S. Trust. Plaintiffs also seek to add an additional 270 allegations from their Response to Lyle T. Dickes' Motion For Summary Judgment. Finally, Plaintiffs add 93 additional allegations of fact they claim are relevant to James N. Freid.

In keeping with the Court' admonishments during the status conference of November 25, 2002, and what counsel believes to be some common sense about judicial economy, Freid will not seek to divide these 564 allegations into undisputed material facts, material facts claimed to be disputed, and facts to be immaterial to the Motion. Freid would ask that the Court allow him to incorporate the responses by Ellen D. Foster, as Executrix, and Melvyn R. Regal, U.S. Trust, and Lyle T. Dickes.

With respect to the almost 50 pages of additional facts actually recited in the Response, Freid will respond directly. However, generally the “undisputed material facts” supplied by Plaintiffs are a combination of fact and argument and will be answered accordingly.

UNDISPUTED MATERIAL FACTS

15. Freid was a Senior Vice President of Merchandising and was thereby a corporate officer but denies that he held a significant position of managerial authority to F&G or its subsidiaries or business groups. Freid was basically working with the Foster & Gallagher trade styles of Breck and Spring Hill. His titles were basically changed depending upon what they wanted to call him. (Freid at 10-12)

16. Freid admits that he appointed Stuber as his attorney-in-fact to sign the necessary agreements. Freid has no knowledge as to whether Stuber attended every F&G Board of Director’s meeting from 1994 through September of 1996.

17. Freid did have prior experience with ESOP transactions in that he sold stock to the ESOP in 1988.

18. Freid was provided with information concerning the 1995 transaction. Freid denies the characterization that it was a “wealth” of information as Plaintiffs claim.

45. Freid admits the allegations contained in paragraph 45.

46. Freid admits the allegations contained in paragraph 46.

59. Freid admits the allegations contained in paragraph 59.

60. Freid admits the allegations contained in paragraph 60.
61. Freid admits the allegations contained in paragraph 61.
62. Freid admits the allegations contained in paragraph 62.

FACTS CLAIMED TO BE IMMATERIAL TO FREID'S MOTION

26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97.

ARGUMENT

In an attempt to focus this Reply on relevant matters, Freid will address the few allegations contained in the Response that are actually directed towards his knowledge and his conduct.

Freid will not address issues that have been previously decided by the Court, such as the "lack of authority" argument relating to Magna Bank (see pages 52 through 56 of Plaintiffs' Response) and the alleged Valuemetrics' conflicts (see pages 31 through 35 of Plaintiffs' Response). These arguments have no place in any brief at this point, much less one directed to a Motion filed by Freid, a Claim Nine Defendant.

Freid's Background

Plaintiffs wish to declare as immaterial all types of information relating to Freid's knowledge and his background. On the contrary, this information is particularly relevant to what Freid allegedly knew or should have known.

Plaintiffs find it immaterial that Freid was never a member of the Foster & Gallagher Board and that he never attended a Board of Director's meeting. The same goes for Freid's complete lack of training in finance or accounting. (Plaintiffs' Response, pg. 8)

Plaintiffs claim that Freid's knowledge of the debt undertaken in the 1988 ESOP transaction and the successful repayment of most of that debt is irrelevant. (Plaintiffs' Response, pg. 9) The fact that Foster & Gallagher revenues had almost doubled from 1991 to 1995 is, according to Plaintiffs, irrelevant. The fact that Freid knew that the \$40 million borrowed for the ESOP in 1988 had been for the most part repaid was not relevant according to Plaintiffs. The \$70 million proposed ESOP in 1995 as compared to the size of the company in 1995 apparently has no bearing as far as the Plaintiffs are concerned. (Plaintiffs' Response, pg. 9)

In short, Plaintiffs expect the Court to declare as immaterial any knowledge that F&G employees had about the financial successes of the company throughout the years.

Knowledge of MBC

In his Motion, Freid swore that after January of 1993 and until the year 1998, he had no involvement with Michigan Bulb Company and was not aware of the operations of Michigan Bulb Company. Plaintiffs never state any facts which rebut this sworn statement. Instead, Plaintiffs quote from a work of fiction by Freid that apparently they procured from him prior to filing suit against him. Any statements by Freid were made in an effort to sell a book and not thoroughly researched. (Freid at 72, 73)

Even the excerpts in Plaintiffs' Response do not support their position. Freid is obviously distressed by the ethics of sweepstakes marketing but does not question the fact that it was successful.

“Quick money and questionable ethics quickly displace the founders’ ethics and vision. But the tactics produced \$100 million plus in added sales from our new ‘sweeps’ business sector in a period of five years and gives birth to new business segments and joint ventures.” (Plaintiffs’ Response, pg. 41, quoting Freid’s Outline)

The Court should be reminded also that Freid wrote these passages after both the ESOP transactions. In addition, when Freid talks about sweepstakes marketing, he is not basing any discussion on his knowledge of Michigan Bulb Company sweepstakes but the general method of selling. Freid admitted that he frankly didn’t know anything about sweepstakes marketing and what actually goes on. (Freid, p. 71, 72)

The Plaintiffs wish the Court would ignore the most telling fact about Michigan Bulb. Freid knew that the company had been around for 30 or 40 years. People in the industry always commented about the quality of the merchandise of Michigan Bulb Company back in the 1960s. (Freid, p. 74) MBC was not a short term company and always had good sources of new names to sell to. (Freid, p. 74, 75)

Freid’s Knowledge of the Transaction

As with every other defendant in Claim Nine, Plaintiffs generically recite language of the materials given to the selling shareholders. However, Plaintiffs do not explain why these materials would not give the Defendants comfort rather than arouse their suspicions.

Freid was told in writing that the ESOP trustee for the transaction would be an independent trustee, the U.S. Trust Company of California, N.A. He was told that if major fiduciary duties arise, the ESOP trustee may be required to override company instructions, take independent action or petition the courts for instructions. He was told that the ESOP trustee acting in a fiduciary capacity

as the controlling shareholder must be able to demonstrate its loyalty to the interests of the ESOP beneficiaries, and exercise appropriate prudence and diligence. (Plaintiffs' Response, p. 15)

With respect to the offering price of the stock, he was told that the price would be the same price as the arms-length negotiated final purchase price paid by the ESOP to the selling shareholders.

There is no question as to what materials were received by Freid before the sales of stock. What this Court must decide is whether a Claim Nine Defendant such as Freid is obligated to review the recommendations of professional valuation companies and a professional trustee and then arrive at a different conclusion. Freid would suggest to the Court that he was not equipped or trained to be more astute than U.S. Trust, Houlihan, Lokey or Valuemetrics.

Plaintiffs claim that Freid is culpable in this matter because he was unaware of the due diligence conducted by U.S. Trust or its agents and did not take any steps to investigate the circumstances. Plaintiffs seek to imply that because Freid was not contacted in the due diligence process, he must have known the process to have been deficient. (Plaintiffs' Response, p. 76) Plaintiffs supply no evidence to the Court to suggest that the failure to involve Freid in the due diligence process was necessary to U.S. Trust's evaluation.

Freid freely admits that he did no investigation into what due diligence was performed by U.S. Trust. Plaintiffs ask this Court to find that a shareholder selling shares in a \$70 million transaction, if not informed as to the basis for a trustee's action, must inquire about those actions and make an assessment as to the appropriateness of those actions. Plaintiffs have provided no authority to the Courts to suggest this absurd burden must be shouldered by a selling shareholder.

The Stuber Issue

When Plaintiffs cannot prove that a Claim Nine Defendant has any knowledge about a certain proposition, they make the claim that a particular Defendant is charged with knowledge because Fred Stuber allegedly had that knowledge. This is the method by which Plaintiffs bloat the allegations contained in their Responses to the Claim Nine Defendants. The basis for Plaintiffs' claim is the Appointment of Seller's Representative that was signed by each one of the selling shareholders other than the controlling shareholders. That Appointment simply allowed Stuber to act for and on behalf of a Seller whenever any consent or action is to be given or performed by one or more of the Sellers, including, without limitation, the execution and delivery of any agreement, instrument or other document to be executed and delivered. (See 11.1 of the December 20, 1995 Stock Purchase Agreement, quoted at pg. 27 of Plaintiffs' Response.)

Plaintiffs do not address the verified statement of Freid that once he signed this appointment, he had no contact with Stuber until after the transaction was completed. (See para. 26 of the Affidavit of James N. Freid attached to his Motion For Summary Judgment.) Freid simply had no information from Stuber.

Valuation of the Stock

There are really two aspects to the issue of stock value. First, Plaintiffs must show that Freid knew or should have known that the ESOP transaction was unlawful because he received more than adequate value for his stock. Unless Freid had this knowledge (assuming it was in fact true that more than adequate value was paid), Plaintiffs' Complaint against Freid must fail.

As the Supreme Court stated in *Harris Trust*, a transferee must be demonstrated to have had actual or constructive knowledge of the circumstances that rendered the transaction unlawful. *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*, 120 S.Ct.2180 (2000).

Acquisition of stock by a plan is not unlawful under §406 of ERISA (29 USC §1106(a)(1)(A)) if the acquisition is for adequate consideration. §406 simply does not apply.

“Sections 1106 and 1107 of this Title shall not apply to the acquisition or sale by a plan of qualifying employer’s securities (as defined in Section 1107(d)(5) of this Title) . . .

(1) if such acquisition, sale or lease is for adequate consideration . . .”
29 USC §1108(e).

Therefore, unless Freid knew or should have known that he was receiving more than adequate consideration, he is entitled to summary judgment. Plaintiffs have produced no evidence that Freid was smarter or more well informed than U.S. Trust, Houlihan, Lokey, or Valuemetrics. There simply is no proof that the Claim Nine Defendants, such as Freid, knew or should have known they were receiving more than adequate value.

The second point to the stock valuation issue is that there is no evidence that there was more than adequate consideration paid.

Plaintiffs in their Response still provide no opinion as to the fair market value of the shares of Foster & Gallagher at the time of the ESOP transactions. Although Plaintiffs tell the Court in the Response that the value of F&G was \$10.85 per share on 12/20/95 and \$10.37 per share on 6/30/97, no such opinion was given by their expert, James R. Hitchner. As explained in the U.S. Trust submission in response to the Court’s Order of December 26, 2002, Hitchner testified that he did not

state his own opinion as to what fair market was of Foster & Gallagher shares. In the deposition attached to the U.S. Trust submission, Hitchner was asked the ultimate question:

“Q: But my question is: Have you stated your own opinion of what fair market was of Foster & Gallagher shares at that time?

A: No.

Q: What you have done, as it goes down that sentence, is provide your opinion with respect to the Willamette valuation report dated September 4th, correct?

A: Yes.

Q: You haven’t provided an expert opinion with regard to any other valuation reports?

A: Only as they relate to the Willamette information and report.

Q: You’ve commented on them in stating your opinions, explaining the basis for your opinion, as to the Willamette report; that’s is what you’re saying?

A: Correct.” (Deposition of James R. Hitchner, pg. 14, 15)

Hitchner was the only rebuttal expert hired by Plaintiffs that mentioned any particular stock price.

As was stated in Freid’s Response to the Court Order dated December 26, 2002, even if Hitchner gave some opinion that was admissible in evidence, it could not be used in Plaintiffs’ case in chief against these Defendants. Rebuttal witnesses may testify only for the sole purpose of rebutting a defendant’s contentions in the case. *Berg v. Figel*, 725 F.Supp.406 (1989).

CONCLUSION

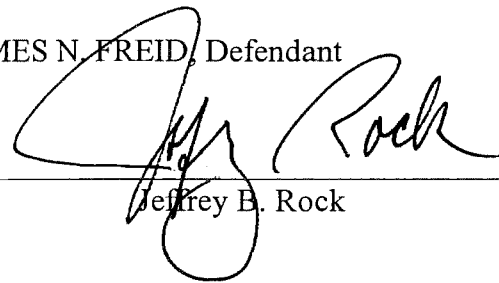
This Court should strike the abusive Response of the Plaintiffs and grant Freid summary judgment.

Even if this relief is not granted, Freid is still entitled to summary judgment. Plaintiffs have not produced any evidence to show that Freid knew or should have known that he was receiving more than adequate consideration, thereby making the transaction unlawful. In addition, because Plaintiffs have failed to produce any competent evidence of stock value other than the actual sales price, there is no proof that more than adequate compensation was paid and the case against Freid must fail.

DEFENDANT REQUESTS ORAL ARGUMENT ON THIS MOTION.

JAMES N. FREID, Defendant

By:

A handwritten signature in black ink, appearing to read "Jeffrey B. Rock", is written over a horizontal line. The signature is stylized and cursive.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 31st day of January, 2003, Defendant, James N. Freid, filed the **foregoing document**, with the U.S. District Court, Central District of Illinois, Peoria Division and served said documents upon the attorneys for all parties of record in this cause by placing same in the U.S. Mail, postage prepaid, at Peoria, Illinois, in envelopes addressed as follows:

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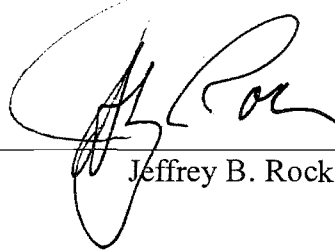
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