



The fact that the Plaintiffs had no intention of focusing their Response on Hodgson 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 Hodgson, not one of the allegations mentions Richard S. Hodgson by name. Plaintiffs' Response is simply another example of Plaintiffs' repeated attempts to bludgeon the Defendants, especially individuals like Hodgson, 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 Hodgson of "looting". (Plaintiffs' Response, p. 65)

Plaintiffs' utter lack of regard for the Court's Order is demonstrated in their Response at pages 47 through 51. 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 relevant to Richard S. Hodgson's Motion For Summary Judgment.

The Plaintiffs have abused their right to petition the Court for relief against Richard Hodgson. The Response to the Motion For Summary Judgment by Richard S. Hodgson should be stricken and judgment granted for Hodgson. 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, Hodgson files the following Reply.

**HODGSON'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 91 additional allegations of fact they claim are relevant to Richard S. Hodgson.

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, Hodgson 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. Hodgson 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, Hodgson 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. Defendant admits the allegations of paragraph 15.
16. Defendant admits the allegations of paragraph 16.

17. Defendant admits the allegations of paragraph 17.

18. Hodgson admits he was provided the information stated but denies that it was a “wealth of information”.

20. Defendant admits the allegations of paragraph 20.

21. Defendant admits the allegations of paragraph 21.

22. Defendant admits the allegations of paragraph 22.

23. Defendant admits the allegations of paragraph 23.

24. Defendant admits the allegations of paragraph 24.

25. Defendant admits the allegations of paragraph 25.

32. Defendant admits the allegations of paragraph 32.

33. Defendant admits the allegations of paragraph 33.

34. Defendant admits the allegations of paragraph 34.

35. Defendant admits the allegations of paragraph 35.

36. Defendant admits the allegations of paragraph 36.

38. Defendant admits the allegations of paragraph 38.

39. Defendant admits the allegations of paragraph 39.

40. Defendant admits the allegations of paragraph 40.

41. Defendant admits the allegations of paragraph 41.

50. Defendant admits the allegations of paragraph 50.

54. Defendant admits the allegations of paragraph 54.

55. Defendant admits the allegations of paragraph 55.

65. Defendant admits the allegations of paragraph 65.

66. Defendant admits the allegations of paragraph 66.

### **FACTS CLAIMED TO BE IMMATERIAL TO HODGSON'S MOTION**

26, 27, 28, 29, 30, 31, 37, 42, 43, 44, 45, 46, 47, 48, 49, 53, 56, 57, 58, 59, 60, 61, 62, 63, 64, 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.

Hodgson makes no answer to paragraphs 51 and 52 for the reason that they are not statements of fact but rather argument.

### **ARGUMENT**

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

Hodgson 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 47 through 51 of Plaintiffs’ Response) and the alleged Valuemetrics’ conflicts (see pages 29 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 Hodgson, a Claim Nine Defendant.

#### **Hodgson’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.

Hodgson 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 Hodgson before the sales of stock. What this Court must decide is whether a Claim Nine Defendant such as Hodgson is obligated to review the recommendations of professional valuation companies and a professional trustee and then arrive at a different conclusion. Hodgson would suggest to the Court that he was not equipped or trained to be more astute than U.S. Trust, Houlihan, Lokey or Valuometrics.

Plaintiffs claim that Hodgson 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 Hodgson must have known the process to have been deficient. (Plaintiffs' Response, pg. 43-47) Plaintiffs supply no evidence to the Court to suggest that the failure to involve Hodgson in the due diligence process was necessary to U.S. Trust's evaluation.

Hodgson 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. 26 of Plaintiffs' Response.)

Plaintiffs do not address the verified statement of Hodgson that once he signed this appointment, he had no contact with Stuber until after the transaction was completed. (See the Affidavit of Richard S. Hodgson attached to his Motion For Summary Judgment.) Hodgson 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 Hodgson knew or should have known that the ESOP transaction was unlawful because he received more than adequate value for his stock. Unless Hodgson had this knowledge (assuming it was in fact true that more than adequate value was paid), Plaintiffs' Complaint against Hodgson 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 Hodgson 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 Hodgson was smarter or more well informed than U.S. Trust, Houlihan, Lokey, or Valuometrics. There simply is no proof that the Claim Nine Defendants, such as Hodgson, 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 4<sup>th</sup>, 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 Hodgson’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 Hodgson summary judgment.

Even if this relief is not granted, Hodgson is still entitled to summary judgment. Plaintiffs have not produced any evidence to show that Hodgson 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 Hodgson must fail.

**DEFENDANT REQUESTS ORAL ARGUMENT ON THIS MOTION.**

RICHARD S. HODGSON, Defendant

By: \_\_\_\_\_

  
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## CERTIFICATE OF SERVICE

The undersigned certifies that on the 31st day of January, 2003, Defendant, Richard S. Hodgson, 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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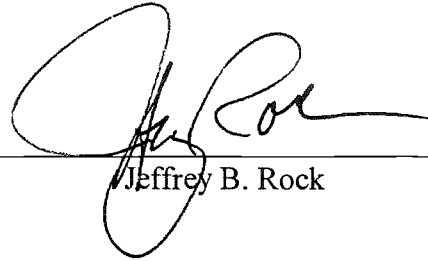
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