

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

DEBRA K. KEACH and PATRICIA A. SAGE,	)	
	)	Case No. 01-1168
	)	
Plaintiffs,	)	
	)	
v.	)	Judge Michael M. Mihm
	)	
U.S. TRUST COMPANY, NA., F/K/A U.S. TRUST COMPANY OF CALIFORNIA, N.A., et al.,	)	
	)	
Defendants.	)	
	)	

**DEFENDANT HOULIHAN, LOKEY, HOWARD & ZUKIN, INC.’S  
MOTION FOR SUMMARY JUDGMENT**

Defendant, Houlihan, Lokey, Howard & Zukin, Inc. (“Houlihan”), by its attorneys and pursuant to Fed. R. Civ. P. 56 and Gen. & Civ. LR 7.1(D), respectfully submits its motion for summary judgment.<sup>1</sup>

**INTRODUCTION**

In December 1995, the Foster & Gallagher Inc. (“F&G”) Employee Stock Ownership Plan (“ESOP”) paid \$70 million to purchase shares of F&G stock from

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<sup>1</sup> Houlihan has moved for summary judgment because it is not a fiduciary under the Employee Retirement Income Act of 1974 (“ERISA”), in accordance with the Court’s request at the November 8, 2001 hearing to narrow the litigation by resolving preliminary issues at the earliest possible time. (Doc. No. 157, 11/13/01 Tr. of Proceedings at pp. 114-15). If this motion is granted, Houlihan would be dismissed from the case without the need to address other issues raised by its answer to the FAC. In the event that the motion is denied, Houlihan reserves the right to file or join in motions for summary judgment on other grounds.

certain F&G shareholders. Plaintiffs are participants in the ESOP. In their first amended complaint (“FAC”), plaintiffs allege that the 1995 transaction (and a subsequent stock sale to the ESOP in 1997) violated ERISA. Plaintiffs seek to hold 31 defendants liable for breaching their alleged duties under ERISA.<sup>2</sup>

Houlihan is a valuation firm and was retained by defendant U.S. Trust Company, N.A. (“U.S. Trust”), the trustee and fiduciary of the ESOP, to render a fairness opinion in connection with the 1995 transaction. Plaintiffs claim that, in addition to U.S. Trust, Houlihan was a fiduciary of the ESOP within the meaning of Section 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A), and breached its duties under ERISA. (FAC ¶¶ 20, 267). This claim has no basis in law or fact.

*It is undisputed* that Houlihan was merely one of several service providers to U.S. Trust in connection with the 1995 transaction, and performed the traditional functions of a valuation firm in advising U.S. Trust on the fairness of the proposed transaction from a financial point of view. *It is undisputed* that Houlihan was not appointed as an investment manager or named as a fiduciary pursuant to the ESOP plan documents. *It is undisputed* that Houlihan had no discretionary authority or control over the ESOP assets or administration. *It is undisputed* that U.S. Trust, not Houlihan, made the decision to enter into the 1995 transaction. The undisputed facts conclusively establish that

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<sup>2</sup> The complaint was filed on April 6, 2001 and named 32 defendants. Houlihan was apparently an afterthought to the plaintiffs, and was named only in the FAC, which was filed on September 13, 2001. Since that date, plaintiffs have dismissed Dale Fujimoto and W. Thomas Stumb from the ranks of defendants.

Houlihan did not possess any (let alone the requisite) discretion or control over the ESOP's assets.

*It also is undisputed* that U.S. Trust did not delegate its decision-making authority to Houlihan. To the contrary, *it is undisputed* that, before deciding to enter into the transaction, U.S. Trust independently reviewed financial information provided by F&G, directed Houlihan to perform additional analysis and relied on the advice provided by Houlihan, and the advice of tax and legal professionals. Given these undisputed facts, as a matter of law, Houlihan is not a fiduciary under ERISA. Houlihan therefore could not have breached any ERISA fiduciary duties allegedly owed to the ESOP. The Court should grant Houlihan's motion for summary judgment and dismiss plaintiffs' claims against it in their entirety.

### **UNDISPUTED MATERIAL FACTS**

#### **I. PERTINENT ENTITIES/PARTIES**

##### **A. Foster & Gallagher, Inc.**

1. At all relevant times, F&G was a marketer of horticultural products, magazine subscriptions, toys and specialty foods by direct mail. (FAC ¶ 52).<sup>3</sup>

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<sup>3</sup> Most of the materials cited herein, excluding transcripts of proceedings before the Court and pleadings filed with the Court, are contained in Volumes 1-5 of Defendants' Joint Exhibits, filed contemporaneously with defendant Lyle Dickes' motion for summary judgment, dated July 31, 2002 (Doc. Nos. 319-323). Citations to those materials will identify the docket number of the pleading in which they are located. The remaining materials are submitted herewith as Volume 6 of Defendants' Joint Exhibits. Citations to those materials will appear as "(Vol. 6, [Name of deponent or Ex.] \_\_\_\_).".

**B. The Foster & Gallagher, Inc. Employee Stock Ownership Plan**

2. The ESOP was established on or about January 1, 1988. (FAC ¶ 6). At all relevant times, the ESOP was a tax qualified defined contribution plan designed to invest primarily in employer securities. (Doc. No. 319, Ex. 63 at 00863).

**C. Debra K. Keach and Patricia A. Sage**

3. Plaintiffs are participants in the ESOP. (FAC ¶ 9).

**D. Houlihan, Lokey, Howard & Zukin, Inc.**

4. Defendant Houlihan is a nationally known valuation firm that enjoys a very good reputation across the country. (Doc. No. 323, Goldberg Dep. 236). Houlihan is one of the premier valuation firms with regard to ESOP transactions. (*Id.*; Doc. No. 323, Shea Dep. 111).

5. At all relevant times, Martin Sarafa was a senior vice-president in Houlihan's Los Angeles, California office. (Doc. No. 320, Ex. 79 at 001102).

6. At all relevant times, Todd Strassman was a senior associate in Houlihan's Los Angeles office. (*Id.*).

**E. U.S. Trust Company, N.A., formerly known as U.S. Trust Company of California, N.A.**

7. Defendant U.S. Trust is the trustee of the ESOP and a fiduciary with respect to the ESOP within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). (FAC ¶ 10).

8. U.S. Trust manages the assets of the ESOP, makes distributions to participants, and administers the payments of interest and principal on certain loans, the proceeds of which were used to purchase F&G shares. (*Id.*).

9. At all relevant times, Norman Goldberg managed U.S. Trust's Washington, D.C. office. (Doc. No. 323, Goldberg Dep. 8-9). Goldberg was also a member of the Special Fiduciary Committee, which at all relevant times had the ultimate authority to approve fiduciary decisions made by U.S. Trust. (Doc. No. 323, Goldberg Dep. 20-21). Prior to joining U.S. Trust, and from 1977 through approximately 1984 or 1985, Goldberg served as an attorney in the United States Department of Labor ("DOL"). (Doc. No. 323, Goldberg Dep. 9). As a DOL attorney, Goldberg supervised a group of trial attorneys, evaluated whether to sue for violations of ERISA, and managed DOL litigation challenging the conduct of fiduciaries alleged to have violated ERISA. (Doc. No. 323, Goldberg Dep. 11).

10. At all relevant times, Michael Shea served as Financial Analyst in U.S. Trust's Special Fiduciary and Closely Held Business Department in its Asset Management Division. (Doc. No. 323, Shea Dep. 11-12). Shea also served as the financial analyst for U.S. Trust's Special Fiduciary Committee. (Doc. No. 323, Shea Dep. 12-13).

**F. Valumetrics, Inc.**

11. Defendant Valumetrics Advisors, Inc. ("Valumetrics") served as an appraiser of the value of F&G stock for the ESOP for the calendar years ending 1988 through 1994 and 1996 through 2001. (FAC ¶ 19).

## **II. U.S. TRUST'S RETENTION OF HOULIHAN TO PROVIDE A FAIRNESS OPINION IN CONNECTION WITH THE 1995 TRANSACTION**

12. In 1995, F&G was considering a leveraged stock sale transaction, in which certain of the company's shareholders would sell to the ESOP a controlling block of the outstanding F&G common stock. (Doc. No. 319, Ex. 63 at 00857-858).

13. Plaintiffs admit, as set forth in their 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, dated June 4, 2002 ("First Motion for Summary Judgment against Foster & Regal") that: "U.S. Trust was contemplated to be retained to act as the transactional decision-maker in connection with the ESOP II [i.e. 1995] transaction and serve as trustee for a short stub period." (Doc. No. 269, Pl. Mot. at 69, ¶ 135).

14. Plaintiffs admit, as set forth in their First Motion for Summary Judgment against Foster & Regal, that: "As of August 30, 1995, U.S. Trust was being retained to act as the decisional trustee and to serve as trustee of the ESOP for a short additional period." (Doc. No. 269, Pl. Mot. at 73, ¶ 143).

15. In accordance with its engagement letter dated August 30, 1995, F&G engaged U.S. Trust to act "as the independent trustee of the Foster & Gallagher, Inc. Employee Stock Ownership Plan (the 'ESOP') in conjunction with a possible purchase of Company stock by the ESOP and related actions." (Doc. No. 319, Ex. 61 at 00834).

16. On or about September 21, 1995, Houlihan's Sarafa sent Norman Goldberg of U.S. Trust a retainer agreement. (Doc. No. 319, Ex. 62).

17. Houlihan's retainer agreement provides, in part, that:

Houlihan Lokey has been retained on behalf of, and will report solely to, the Trustee [U.S. Trust], notwithstanding that Houlihan Lokey's fees and expenses will be paid by the Company [F&G], and that certain covenants and representations are made by the Company [F&G] herein.

We [Houlihan] understand that the Trustee has or will request that Houlihan Lokey render a written opinion (the "Fairness Opinion") to the Trustee as to whether the proposed [1995] Transaction is fair to the ESOP from a financial point of view.

(Ex. 62 at 000840).

18. Houlihan's retainer agreement was signed by U.S. Trust on September 22, 1995, and by F&G on September 26, 1995. (Doc. No. 319, Ex. 62 at 000846).

### **III. U.S. TRUST'S RETENTION OF SONNENSCHN TO SERVE AS LEGAL ADVISOR TO U.S. TRUST IN CONNECTION WITH THE 1995 ESOP TRANSACTION**

19. U.S. Trust also retained the law firm of Sonnenschein Nath & Rosenthal ("Sonnenschein") as its legal counsel in connection with the 1995 transaction. (Doc. No. 323, Siske Dep. 24; Doc. No. 323, Goldberg Dep. 41; Doc. No. 322, Exhibit 359).

20. Sonnenschein is a premier, nationally known law firm. U.S. Trust specifically engaged Sonnenschein, and one of its attorneys, Roger Siske, who is a widely recognized, successful ERISA attorney who enjoys an exceptional reputation. (Doc. No. 323, Goldberg Dep. 237).

21. Siske was the Sonnenschein partner responsible for the December 1995 ESOP transaction. He managed the team of lawyers who did the legal work for U.S. Trust in connection with the December 1995 ESOP transaction. (Doc. No. 323, Siske Dep. 29).

22. ESOPs were created by ERISA in 1974, and Siske has served as ESOP transaction counsel since that time (and functionally prior thereto). (Doc. No. 323, Siske Dep. 163). These transactions have ranged from fairly routine to cutting edge, including the first ESOP public debt offering and the first convertible preferred ESOP stock arrangement. (Doc. No. 323, Siske Dep. 163-64). Approximately 90% of Siske's practice in 1995 was in employee benefits. (Doc. No. 323, Siske Dep. 164).

#### **IV. HOULIHAN'S PRELIMINARY PRICE ANALYSIS FOR U.S. TRUST**

23. On or about September 30, 1995, Valuometrics issued its first transaction memorandum to F&G's board of directors. (Doc. No. 319, Ex. 63). The memorandum described a proposed \$70 million offer to sell 2,916,667 F&G shares to the ESOP at \$24.00 per share. (Id. at 00850).

24. On October 17, 1995, Strassman and Sarafa, on behalf of Houlihan, as well as Goldberg and Shea, on behalf of U.S. Trust, visited F&G's headquarters in Peoria. (Doc. No. 323, Sarafa Dep. 16, 19; Doc. No. 323, Shea Dep. 15-16). They met with several members of F&G's management team. (Doc. No. 323, Shea Dep. 21).

25. Houlihan reviewed, among other things, F&G's audited financial statements for the five fiscal years ending December 31, 1994, company-prepared interim financial statements, the transaction memorandum prepared by Valuometrics, a Bank of America financing memorandum for the transaction, forecasts and projections prepared by company management for the years 1995-2000, and drafts of ESOP plan and trust documents. (Doc. No. 320, Ex. 79 at KE008371; Doc. No. 323, Strassman Dep. 66-67; Doc. No. 323, Shea Dep. 35-36).

26. After reviewing the financial and operating information from F&G, Houlihan presented U.S. Trust with a preliminary “assessment of the company’s financials versus the offer price” of \$24 per share. (Doc. No. 323, Shea Dep. 45; Doc. No. 323, Strassman Dep. 30-31). U.S. Trust’s Shea had “ample time” to personally review Houlihan’s preliminary assessment. (Doc. No. 323, Shea Dep. 45).

27. Shea “did a lot of [his] own analysis of the information provided to us by Foster and Gallagher in preparation for discussions with both Houlihan, Valuometrics and obviously Norman [Goldberg].” (Doc. No. 323, Shea Dep. 67).

28. In the latter part of October, U.S. Trust arranged a conference call with Sarafa and Strassman of Houlihan to discuss the contents of Houlihan’s analyses. (Doc. No. 323, Shea Dep. 45-47).

29. After a lengthy discussion with Houlihan, U.S. Trust concluded that the \$24 price proposed by Valuometrics “looked somewhat aggressive.” (Doc. No. 323, Shea Dep. 46). U.S. Trust asked Houlihan to consider a more appropriate level of pricing for the shares in light of the resulting valuation parameters. (*Id.*). U.S. Trust “felt it was prudent to take a more conservative view of the forecast and, therefore, requested that in - in -- in Houlihan's analyses that they be sensitized to show, particularly, lower revenue growth for the projection period.” (Doc. No. 323, Shea Dep. 46-47).

#### **V. U.S. TRUST’S NEGOTIATION OF A PRICE OF \$19.50 PER SHARE WITH F&G EXECUTIVES**

30. Houlihan provided U.S. Trust with a second analysis that lowered the range of the value of the shares. (Doc. No. 323, Shea Dep. 46-47).

31. On November 7, 1995, Goldberg, Shea, Sarafa, Strassman and representatives of Valuometrics participated in a telephone conference. (Doc. No. 323, Strassman Dep. 51; Doc. No. 321, Ex. 267 at 4663; Doc. No. 323, Shea Dep. 52-53). Shea testified: “[W]e clearly agreed to disagree [about the stock price]. Valuometrics held their position that it was a superior premium deserving company. We held our position that it was a great company, but didn’t deserve more than a near medium multiple.” (Doc. No. 323, Shea Dep. 53).

32. After the phone call with Valuometrics, Goldberg and Shea (without Houlihan’s participation) phoned F&G executives to explain to them that “we [U.S. Trust] were unconvinced that the price of \$24 was supportable and advised them as such.” (Doc. No. 323, Shea Dep. 57-60). When F&G executives asked U.S. Trust what price would work, U.S. Trust offered \$18.50, knowing that it could negotiate up to \$19.81 per share based on the point estimate in Houlihan’s more recent valuation analysis. (Doc. No. 323, Shea Dep. 58).<sup>4</sup> Ultimately, U.S. Trust and F&G agreed on a price of \$19.50 per share. (Doc. No. 323, Goldberg Dep. 61; Doc. No. 323, Dickes Dep. 70-71; Doc. No. 320, Ex. 72).

33. Negotiations on the price, at all times, were between Goldberg and F&G executives. (Doc. No. 323, Goldberg Dep. 61). Houlihan did not participate in the price negotiations. (Doc. No. 323, Strassman Dep. 30; Doc. No. 323, Sarafa Dep. 48-49).

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<sup>4</sup> A “point estimate” is the mid-point of a pricing range. (Shea Dep. 112-13).

34. On November 29, 1995, Goldberg informed F&G's Executive Vice President, Lyle Dickes, that he would recommend to the U.S. Trust Special Fiduciary Committee that the ESOP agree to purchase a controlling block of common stock of F&G for \$19.50 per share. (Doc. No. 320, Ex. 71 at FG16862; Doc. No. 323, Goldberg Dep. 58-60). The decision to make this recommendation was U.S. Trust's and only U.S. Trust's. (Doc. No. 323, Goldberg Dep. 219).

## **VI. U.S. TRUST'S APPROVAL OF THE 1995 TRANSACTION**

35. On December 19, 1995, Houlihan provided U.S. Trust with its fairness opinion. (Doc. No. 320, Ex. 79; Doc. No. 323, Goldberg Dep. 87; Doc. No. 323, Sarafa Dep. 58). The text of the opinion states that:

- a. the consideration to be paid by the ESOP for F&G's securities in the transaction was not greater than adequate consideration for such securities;
- b. the transaction was fair and reasonable to the ESOP from a financial point of view;
- c. the loan between the ESOP and F&G, taken as a whole, was fair and reasonable to the ESOP from a financial point of view; and
- d. the interest rate, with respect to such loan, was fair and reasonable to the ESOP from a financial point of view.

(Doc. No. 320, Ex. 79 at KE08372).

36. The fairness opinion also confirmed that:

We [Houlihan] have not been engaged to give advice as to whether the ESOP should engage in the Transaction, nor have we been requested to seek or identify alternatives or to advise the Trustee with respect to its duties generally. Houlihan, Lokey, Howard & Zukin, Inc. ("Houlihan Lokey") represents that it is an "independent appraiser" with respect to the ESOP

within the meaning of Title I of ERISA and Section 401(a)928) of the Internal Revenue Code.

(Doc. No. 320, Ex. 79 at KE008370).

37. On December 19, 1995, U.S. Trust's Special Fiduciary Committee met in Sonnenschein's offices in Chicago. (Doc. No. 323, Goldberg Dep. 85-86). The Special Fiduciary Committee received a copy of Houlihan's fairness opinion. (Doc. No. 323, Goldberg Dep. 86-87). In addition, Sonnenschein and Houlihan (by teleconference) each made a summary presentation to the Committee. (*Id.*, Doc. No. 323, Sarafa Dep. 82). Houlihan's only part in the Special Fiduciary Committee Meeting was its presentation followed by a question and answer session. (Doc. No. 323, Sarafa Dep. 83).

38. At the meeting, Goldberg recommended to the Special Fiduciary Committee that U.S. Trust consummate the transaction. (Doc. No. 323, Goldberg Dep. 86). Goldberg and Shea were responsible for determining what price would be recommended to the Special Fiduciary Committee. (Doc. No. 323, Shea Dep. 63-64). In plaintiffs' "Motion for Summary Judgment as to Liability Against U.S. Trust: Absence of Authority" and "Second Motion for Summary Judgment as to Liability Against U.S. Trust: Breach of Loyalty and Prudence: Failure to Investigate," dated June 12 and June 21, 2002, respectively, plaintiffs concede that "Goldberg made the recommendation to U.S. Trust's Special Fiduciary Committee to go ahead with the 1995 transaction relating to the F&G ESOP." (Doc. No. 278, Pls. Mot. at 4, ¶ 10; Doc. No. 287, Pls. Mot. at 6, ¶ 10).

39. On the basis of the presentations made at the meeting, the Special Fiduciary Committee approved the ESOP transaction. (Doc. No. 323, Goldberg Dep. 86-87; Vol. 6, Ex. 419 at 18078-80). The Special Fiduciary Committee possessed the *sole* discretion to approve the transaction. (Doc. No. 323, Goldberg Dep. 217). Houlihan was not a member of the Special Fiduciary Committee. (Doc. No. 323, Goldberg Dep. 216-17). Moreover, no one from Houlihan was present when the Special Fiduciary Committee voted to approve the transaction. (Doc. No. 323, Sarafa Dep. 118; Doc. No. 323, Strassman Dep. 47).

40. In their First Motion for Summary Judgment against Regal and Foster, plaintiffs concede that “[o]n December 19, 1995 U.S. Trust’s Special Fiduciary Committee approved the ESOP II transaction.” (Doc. No. 269, Pls. Mot. at 85, ¶ 172).

41. On December 20, 1995, Sonnenschein followed-up its summary presentation to the Special Fiduciary Committee with a written opinion to U.S. Trust (Vol. 6, Ex. 85). Sonnenschein opined that the loan to the ESOP and the purchase of F&G “should comply with the fiduciary requirement of Section 406(a)(1) of ERISA,” and that both the loan and the stock purchase should both qualify for exemption from ERISA’s prohibited transaction provisions (*Id.* at 7). In reaching its opinions, Sonnenschein separately addressed each of U.S. Trust’s fiduciary duties, including the duties of loyalty and prudence and the duty to act in accordance with the governing plan documents and instruments. (*Id.* at 8-18.)

42. On December 20, 1995, U.S. Trust, based on a number of factors, including the legal opinions rendered by Sonnenschein and two other law firms, the fairness

opinion rendered by Houlihan, and a tax opinion from PricewaterhouseCoopers, made the decision to consummate the \$70 million ESOP transaction, thereby purchasing the shares of F&G stock on behalf of the ESOP at the price of \$19.50 per share. (FAC ¶¶ 220-22; Doc. No. 321, Ex. 86; Doc. No. 323, Goldberg Dep. 88; Doc. No. 269, Pls. Mot. at 88, ¶ 182). U.S. Trust made the following findings:

WHEREAS, the Trustee has retained, consulted with and received and considered opinions and advice of Houlihan Lokey Howard & Zukin (the “Financial Advisor”) regarding certain financial matters in respect of the Loan and the offer of the Selling Shareholders to sell the Shares to the Trust; and

WHEREAS, the Trustee has retained, consulted with and received and considered opinions and advice of Sonnenschein Nath & Rosenthal (the “Trustee Counsel”) regarding certain legal matters in respect of the Loan and the offer of the Selling Shareholders to sell the Shares to the Trust; and

WHEREAS, the Trustee has also received and considered opinions of Mayer Brown & Platt, the Company’s special ESOP counsel (the “Special ESOP Counsel”), regarding certain legal matters in respect of the Loan and the offer of the Selling Shareholders to sell the Shares to the Trust; and

WHEREAS, the Trustee has also received and considered opinions of Kavanagh, Scully, Sudow, White & Fredrick, P.C., the general corporate counsel to the Company (the “Company Counsel”); and

WHEREAS, the Trustee has received and considered the opinions of Mayer Brown & Platt and Price Waterhouse (the “EIP Tax Opinions”) dealing with the deductibility of compensation under the Foster & Gallagher Executive Incentive Plan.

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Based on the foregoing findings, the Trustee hereby finds and concludes that the execution of the Stock Purchase Agreement, ESOP Credit Agreement, the ESOP Notes, the

Pledge Agreement and the Collateral Custodial Agreement (collectively the “ESOP Agreements”) by the Trustee and the entering into of the transactions contemplated in the ESOP Agreements are appropriate and consistent with the Trustee’s fiduciary responsibilities under the terms of the Trust Agreement and under the fiduciary responsibility requirements of ERISA and that the transactions contemplated in the ESOP Agreements are exempt from the prohibited transaction restrictions under ERISA and the Code. (Doc. No. 321, Ex. 86 at 01376-77, 1380).

43. Goldberg and Shea agree that U.S. Trust made the decision to enter into the 1995 transaction. (Doc. No. 323, Goldberg Dep. 86-87, 217; Doc. No. 323, Shea Dep. 120). Houlihan had no control over the decision to consummate the transaction. (Doc. No. 323, Sarafa Dep. 119).

44. In their motions for summary judgment against U.S. Trust, plaintiffs concede that U.S. Trust, as trustee of the ESOP, “caused” the ESOP to enter into the 1995 ESOP transaction. (Doc. No. 278, Pl. Mot. at 12, ¶ 41; Doc. No. 287, Pl. Mot. at 40, ¶ 104).

45. Houlihan’s last involvement with the ESOP was the preparation of a March 1996 report regarding a valuation of F&G’s shares as of December 31, 1995. (Vol. 6, Sarafa Dep. 106-07; Vol. 6, Ex. 209). Houlihan had no further business dealings with F&G and had no role in the June 30, 1997 ESOP transaction. (Vol. 6, Sarafa Dep. 107). Plaintiffs, then, do not allege any wrongdoing by Houlihan in connection with the 1997 ESOP transaction. (FAC).

**VII. THERE WAS NOTHING OUT OF THE ORDINARY WITH RESPECT TO HOULIHAN'S INVOLVEMENT IN THE 1995 TRANSACTION.**

46. Valuation firms have provided valuation services to U.S. Trust on “certainly hundreds, possibly in excess of a thousand” deals. (Doc. No. 323, Shea Dep. 108-09). Moreover, Goldberg, who has been involved in more than 50 leveraged ESOP transactions, testified that it was customary for U.S. Trust to retain a financial consultant and lawyers in those types of transactions. (Doc. No. 323, Goldberg Dep. 219-21). There was nothing unusual or out of the ordinary with respect to the services provided by Houlihan to U.S. Trust in connection with the 1995 transaction. (Doc. No. 323, Goldberg Dep. 221; Doc. No. 323, Shea Dep. 109; Doc. No. 323, Sarafa Dep. 119).

47. Houlihan did not draft the stock purchase agreement, trust documents, note agreements or any other closing document for the 1995 transaction, and was not in charge of structuring the transaction. (Doc. No. 323, Goldberg Dep. 218; Doc. No. 323, Sarafa Dep. 118).

48. Houlihan was not appointed as investment manager or named as a fiduciary pursuant to the ESOP plan documents, and had no discretionary authority or control over the ESOP, its assets or administration. (Doc. No. 323, Goldberg Dep. 215-16, 221; Doc. No. 323, Sarafa Dep. 116).

49. Neither plaintiff Keach nor plaintiff Sage made the decision to sue Houlihan in this case. (Doc. No. 323, Keach Dep. 263; Doc. No. 323, Sage Dep. 203). In fact, they do not even know why Houlihan is being sued in this case. (Doc. No. 323, Keach Dep. 256-57; Doc. No. 323, Sage Dep. 203-04). Prior to meeting with her

lawyers, plaintiff Sage had no concerns about Houlihan's role in connection with the 1995 transaction. (Doc. No. 323, Sage Dep. 203).

50. Other than Houlihan, none of the service providers retained by U.S. Trust have been named as defendants in this case. (FAC).

### **APPLICABLE LAW**

#### **I. HOULIHAN IS ENTITLED TO SUMMARY JUDGMENT BECAUSE THE UNDISPUTED FACTS DO NOT ESTABLISH ERISA FIDUCIARY STATUS.**

Summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). No genuine issue exists “unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). There is “no genuine issue” when, taking the record as a whole, a rational trier of fact could not find in favor of the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Under settled principles, neither the “mere existence of some alleged factual dispute” nor the existence of “some metaphysical doubt as to the material facts” is sufficient to avoid summary judgment. Fairchild v. Forma Scientific, Inc., 147 F.3d 567, 571 (7th Cir. 1998) (quoting Matsushita, 475 U.S. at 586). Rather, the plaintiff must tender cold, hard, specific facts that establish a necessary and genuine issue for trial. See Patt v. Family Health Sys., 280 F.3d 749, 752 (7th Cir. 2002).

ERISA Section 409 creates a federal remedy against “any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations or duties imposed upon fiduciaries” by ERISA. 29 U.S.C. § 1109(a). The fundamental question, then, is whether Houlihan is a fiduciary under ERISA. If Houlihan is not a fiduciary, “then of course it cannot be said that it breached any fiduciary duties owed to the Plan.” Farm King Supply v. Edward D. Jones & Co., 884 F.2d 288, 291 (7<sup>th</sup> Cir. 1989).

**II. TO BE A FIDUCIARY UNDER ERISA, HOULIHAN MUST HAVE EXERCISED ACTUAL DISCRETIONARY AUTHORITY OR CONTROL OVER THE ESOP TRANSACTION.**

Plaintiffs allege that Houlihan is a fiduciary within the meaning of ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A) “based on its control over the plan assets.” (Doc. No. 151, Pls. 10/31/01 Resp. at 1; FAC ¶ 20). That section defines “fiduciary” as follows:

[A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has authority or responsibility to do so, or (iii) he has any discretionary authority or responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A); Farm King, 884 F.2d at 291.

The Seventh Circuit has held that, under ERISA, “a fiduciary is a person who exercises any power of control, management or disposition with respect to monies or other property of an employee benefit fund, or has the authority or responsibility to do so.” Farm King, 884 F.2d at 292 (citing Forys v. United Food & Commercial Worker’s

International Union, 829 F.2d 603, 607 (7<sup>th</sup> Cir. 1987)). Thus, courts have read the terms “discretionary authority,” “discretionary control,” and “discretionary responsibility” in ERISA Section 1001(21)(A) “as speaking to actual decision-making power rather than to the influence that a professional may have over the decisions made by the plan trustees she advises.” Id. In other words, plaintiffs must have evidence that Houlihan is effectively acting for the plan. See Schloegel v. Hancock Bank Profit Sharing Plan, 994 F.2d 266, 271-72 (5<sup>th</sup> Cir. 1993); Associates in Adolescent Psychiatry v. Home Life Ins. Co., 941 F.2d 561, 570 (7<sup>th</sup> Cir. 1991).

### **III. IN THE ABSENCE OF SUCH AUTHORITY AND CONTROL, PROFESSIONAL SERVICE PROVIDERS ARE NOT ERISA FIDUCIARIES AS A MATTER OF LAW.**

Courts have refused to find that professional service providers are ERISA fiduciaries when all they have done is advise the trustee of a plan. Pappas v. Buck Consultants Inc., 923 F.2d 531, 535 (7<sup>th</sup> Cir. 1991) (collecting cases). The DOL, responsible for overseeing benefit plan administration and compliance with ERISA, has also concluded that professional service providers engaging in non-discretionary functions do not constitute fiduciaries under ERISA:

Answering the question of whether “an attorney, accountant, actuary or consultant who renders legal, accounting, actuarial or consulting services to an employee benefit plan becomes a fiduciary to the plan solely by virtue of rendering of such services,” the regulations respond that these consultants, when “performing their usual professional functions will ordinarily not be considered fiduciaries.”

Pappas, 923 F.2d at 531, 537 (citing to 29 C.F.R. § 2509.75-5 (1990)).

Thus, in order to defeat this motion for summary judgment, plaintiffs must offer *facts* that show that Houlihan, while serving in a traditional role as advisor to the trustee of a plan, should be labeled otherwise and, most unusually, as a fiduciary under ERISA. This the plaintiffs cannot do.

### ARGUMENT

#### **PLAINTIFFS' CLAIMS AGAINST HOULIHAN FAIL AS A MATTER OF LAW BECAUSE HOULIHAN WAS NOT A FIDUCIARY UNDER ERISA.**

While the Court may have given plaintiffs the benefit of the doubt in denying Houlihan's motion to dismiss under Fed. R. Civ. P. 12(b)(6) at the outset of the case,<sup>5</sup> plaintiffs have adduced no facts in discovery to create a genuine issue of material fact as to Houlihan's fiduciary status. To the contrary, the undisputed facts show that Houlihan had no discretionary authority or control over the ESOP transaction:

- Houlihan did not give investment advice to the plan (Facts ¶¶ 16-18, 35-45);
- Houlihan was not appointed as investment manager or named as a fiduciary pursuant to the ESOP plan documents, and had no discretionary control over the ESOP, its assets or administration (Facts ¶ 48);
- U.S. Trust, not Houlihan, negotiated the sales price with F&G and made the decision to purchase the F&G stock in December 1995 (Facts ¶¶ 30-44);

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<sup>5</sup> In their response in opposition to Houlihan's motion to dismiss, plaintiffs conceded that there is no per se rule that a valuation company is an ERISA fiduciary, and argued that fiduciary status turns on the facts (Doc. No. 151, Pls. 10/31/01 Resp. at 1). Plaintiffs told the Court that they expect to prove that Houlihan is a fiduciary. Now that fact discovery is completed, it is incumbent upon the plaintiffs to offer their proof, and not to rest upon mere allegation and argument.

- Plaintiffs concede that U.S. Trust, as trustee of the ESOP, “caused” the ESOP to enter into the 1995 transaction (Facts ¶ 44);
- Plaintiffs have represented to this Court that U.S. Trust was the “transactional decision-maker in connection with the ESOP II transaction” and “decisional trustee” (Facts ¶¶ 13-14);
- In making the decision to enter into the transaction, U.S. Trust relied not only on Houlihan’s fairness opinion, but also the opinions of the Sonnenschein, Mayer Brown and Kavanagh law firms and Price Waterhouse (Facts ¶¶ 19-23, 37, 42); and
- Houlihan’s fairness opinion expressly confirmed that it had not been engaged to give advice as to whether the ESOP should engage in the transaction (Facts ¶ 36).

These undisputed facts confirm that Houlihan had no “power of control, management or disposition with respect to monies or other property of an employee benefit fund ....” Farm King, 884 F.2d at 292. “Those cases which hold that the person or firm was a fiduciary have a common theme conspicuously absent here, viz., the authority to exercise control unilaterally over a portion of a plan’s assets, not merely to propose investments.” Id.

Throughout this litigation, plaintiffs have asserted that Houlihan somehow was transformed into an ERISA fiduciary simply because U.S. Trust relied on Houlihan’s opinion that the \$19.50 purchase price was fair to the ESOP in making the decision to enter into the transaction. If plaintiffs’ argument is accepted by the Court, then *all* opinion providers to trustees must be ERISA fiduciaries. Needless to say, the Seventh Circuit has squarely rejected plaintiffs’ contention. In Pappas, the Seventh Circuit held that the terms “discretionary authority,” “discretionary control,” and “discretionary responsibility” in ERISA Section 1001(21)(A) mean “*actual decision-making power*

rather than to the influence that a professional may have over the decisions made by the plan trustees she advises.” 923 F.2d at 535 (emphasis added).<sup>6</sup> See also Painters of Philadelphia Dist. Council No. 21 Welfare Fund v. Price Waterhouse, 879 F.2d 1146, 1150 (3d Cir. 1989) (“Congress intended accountants, attorneys, and other outside consultants to be treated as plan fiduciaries only if they go beyond their normal roles and assume management or administrative responsibilities.”).

There is no genuine dispute that Houlihan did not have “actual decision-making power.” Even though Houlihan delivered a fairness opinion to U.S. Trust, it is undisputed that U.S. Trust, not Houlihan, made the decision to request and consider trust advice, and to enter into the transaction. (Facts ¶¶ 30-44). No Houlihan representative was even present when U.S. Trust’s Special Fiduciary Committee approved the transaction. (Facts ¶ 39). Indeed, in support of their First Motion for Summary Judgment against Foster and Regal, plaintiffs represented to this Court that U.S. Trust was the “*decisional trustee*” and “*transactional decision-maker*.” (Facts ¶¶ 13-14) (emphasis added).

Even apart from plaintiffs’ representations to this Court, it is undisputed that, in deciding to proceed with the ESOP transaction, U.S. Trust did not rely solely on Houlihan’s opinion. It also considered the legal opinions rendered by three different law

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<sup>6</sup> Indeed, U.S. Trust’s retention of outside advisors to assist it in its fiduciary obligations is precisely the step that courts have found to be evidence of a prudent investigation by a fiduciary. See, e.g., Howard v. Shay, 100 F.3d 1484, 1489 (9th Cir. 1996); Martin v. Fellen, 965 F.2d 660, 671 (8th Cir. 1992); Rech v. Hall Holding Co., 990 F. Supp. 955, 964 (N. D. Ohio 1998). See also 29 C.F.R. § 2509.75-8.

firms, and a tax opinion provided by PricewaterhouseCoopers. (Facts ¶¶ 19-23, 37, 42). It is certainly curious that none of these other opinion providers are alleged to be fiduciaries by plaintiffs. (Facts ¶ 50).

Equally significant, U.S. Trust did not blindly rely on Houlihan's valuation. Rather, U.S. Trust analyst Michael Shea "did a lot of [his] own analysis of the information provided to us by Foster and Gallagher in preparation for discussions with both Houlihan, Valuometrics and obviously Norman [Goldberg]." (Facts ¶ 27). Shea also had "ample time" to personally review Houlihan's preliminary assessment. (Facts ¶ 26). U.S. Trust even directed Houlihan to perform additional analysis based on its review of Houlihan's preliminary valuation. (Facts ¶¶ 28-29).

The undisputed facts demonstrate that U.S. Trust did not delegate any of its decision-making power to Houlihan. In point of fact, Houlihan's services were no different than the ordinary functions performed by financial consultants and appraisers in advising plan trustees (Facts ¶¶ 46-50)<sup>7</sup> -- a fact which plaintiffs cannot contradict. Under these circumstances, the Seventh Circuit, other circuit courts and the Department of Labor all agree that Houlihan cannot be considered a fiduciary under ERISA as a matter of law. See Associates in Adolescent Psychiatry, 941 F.2d at 569 (rejecting claim that financial consulting firms and professionals that assisted in designing the benefit plan were fiduciaries); Pappas, 923 F.2d at 535-38 (actuary who provided actuarial services

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<sup>7</sup> Indeed, prior to meeting with their lawyers, plaintiffs themselves had no concerns about Houlihan's performance in connection with the 1995 ESOP transaction. (Facts ¶ 49).

and filed reports for the plan was not a fiduciary because trustee had not acceded discretionary control or authority to the actuary); Farm King, 884 F.2d at 291-92 (brokerage firm's selection of a few securities and a proposal to the trustees that the Plan purchase from among those securities did not constitute discretion over plan administrations or assets); Schloegel, 994 F.2d at 271 (consultant who made investment proposal to plan trustee did not qualify as an ERISA fiduciary because he did not have discretion over plan administration and did not make the investment decision); Yeseta v. Baima, 837 F.2d 380, 285 (9<sup>th</sup> Cir. 1988) (neither attorney who provided legal advice nor accountant who provided ministerial acts for benefit plan qualify as an ERISA fiduciary); Anoka Orthopaedic Assoc., P.A. v. Lechner, 910 F.2d 514, 517 (8th Cir. 1990) (neither accountant nor attorney who prepared plan documents and government reports qualify as ERISA fiduciaries); Foltz v. U.S. News & World Report, Inc., 627 F. Supp. 1143, 1146 (D.D.C. 1986) (independent appraiser of stock for private company held not a fiduciary); Scott v. Evins, 802 F. Supp. 411, 413 at n. 11 (N.D. Ala. 1992) (appraisal firm determining value of stock to be sold in ESOP was "not now and never [has] been" an ESOP fiduciary), aff'd without opinion, 998 F.2d 1022 (11<sup>th</sup> Cir. 1992); 29 C.F.R. § 2509.75-5.

In short, months of discovery have confirmed that plaintiffs have no facts to support their bald assertion to this Court during the November 8, 2001 hearing that "Houlihan Lokey exercised actual control over plan assets." (11/8/01 Tr. Of Proceedings, p. 38). Because Houlihan's fiduciary status is a necessary pre-requisite to

plaintiffs' breach of fiduciary claims, plaintiffs' claims against Houlihan must fail as a matter of law under Fed. R. Civ. P. 56.

**CONCLUSION**

For the foregoing reasons, the Court should grant its motion for summary judgment and dismiss plaintiffs' claims against Houlihan in their entirety.

Respectfully submitted,

HOULIHAN, LOKEY, HOWARD & ZUKIN,  
INC.

By



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September 4, 2002

CHI 10419019.2

**CERTIFICATE OF SERVICE**

The undersigned attorney hereby certifies that he served a copy of Defendant Houlihan Lokey Howard & Zukin, Inc.'s Motion for Summary Judgment upon the attached service list by United States Mail, first-class postage prepaid this 4th day of September, 2002.

A handwritten signature in cursive script, appearing to read "S. Alamuddin", written over a horizontal line.

Sari M. Alamuddin

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