

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>JOHN WILSON, and all other similarly situated persons,</b>	:	<b>CIVIL ACTION</b>
	:	
	:	
<b>and</b>	:	
	:	
<b>LESLEY SIMMONS, and all other similarly situated persons,</b>	:	
	:	
	:	
<b>Plaintiffs,</b>	:	
	:	
<b>v.</b>	:	<b>NO. 01-CV-6126</b>
	:	
<b>THE UNITED INTERNATIONAL INVESTIGATIVE SERVICES 401(k) SAVINGS PLAN, et al.</b>	:	
	:	<b>Special Management Track</b>
	:	<b>(Class Action)</b>
<b>Defendants.</b>	:	

**Reed, S.J.**

**December 18, 2002**

**M E M O R A N D U M**

Now before the Court is the motion of class plaintiffs for attorneys' fees and costs under Section 502(g)(1) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(g)(1). Defendants have not answered the motion. For the reasons set forth below, the motion of plaintiffs will be granted.

***Background***

The named plaintiffs instituted this action on behalf of persons who were employees of defendant United International Investigative Services ("UIIS") and who further participated in defendant the United International Investigative Services 401(k) Savings Plan ("the Plan") from April 1, 1999 to December 7, 2001. UIIS, under contracts with the United States Marshall Service, provides protective security services to various government buildings and agencies, including federal courthouses in the Third, Fourth, and Ninth Judicial Circuits and U.S.

embassies abroad. As part of their employment package, UIIS offered the Plan under which employees may contribute up to twenty-five percent of their wages to their individual account. On repeated occasions, deposits of the employees' deductions by UIIS were delayed, at times up to three months, in violation of the provisions under ERISA. Plaintiffs asserted claims for breach of fiduciary duty and prohibited transactions against defendants UIIS and William J. Guidice ("Guidice"), an officer and shareholder of UIIS. The Court conditionally certified the class on April 24, 2002.

On October 8, 2002, plaintiffs filed a motion for summary judgment, against which defendants failed to respond.<sup>1</sup> This Court granted summary judgment in favor of plaintiffs, ruling that the failure to timely deposit the employee deductions was a prohibited transaction under ERISA and constituted a breach of the defendants' fiduciary duties. See Wilson v. United Int'l Investigative Servs. 401(k) Sav. Plan, 01-CV-6126, 2002 U.S. Dist. LEXIS 22259 at \* 8 (E.D. Pa. Oct. 28, 2002) ("Wilson II"). The named plaintiffs as plan representatives were granted damages in the amount of \$102,135.30, against defendants UIIS and William Guidice. Plaintiffs now seek attorneys' fees from defendants under ERISA. Pursuant to a telephone conversation with counsel for the defendants, the Court understands that defendants have no plans to file a response or objections thereto.

**A. Section 1132(g)(1)**

***Legal Standard***

Under ERISA, a court may, in its discretion, award "reasonable" attorneys' fees to either

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<sup>1</sup> After class certification and prior to the filing of the motion for summary judgment, the Court was informed by letter that defendants are in poor financial straits and are subject to, among other liens, an IRS lien in a large amount.

party. See 29 U.S.C. § 1132 (g) (1).<sup>2</sup> While the statute itself offers no criteria to guide a court's exercise of its discretion, the Court of Appeals for the Third Circuit has used the following five-factor test for determining whether an award of fees to a prevailing party is warranted:

- (1) the offending parties' culpability or bad faith;
- (2) the ability of the offending parties to satisfy an award of attorneys' fees;
- (3) the deterrent effect of an award of attorneys' fees against the offending parties;
- (4) the benefit conferred on members of the pension plan as a whole; and
- (5) the relative merits of the parties' positions.

See Ursic v. Bethlehem Mines, 719 F.2d 670, 673 (3d Cir. 1983). According to the Third Circuit Court of Appeals, district courts must articulate their analyses and conclusions as to each of the five factors. See Anthuis v. Colt Indus. Operating Corp., 971 F.2d 999, 1012 (3d Cir. 1992).

#### **1. Culpability or Bad Faith**

The first Ursic factor does not require a finding of bad faith or ulterior or sinister purpose.

See McPherson, 33 F.3d at 256-57.

In a civil context, culpable conduct is commonly understood to mean conduct that is "blameable; censurable; . . . at fault; involving the breach of a legal duty or the commission of a fault . . . . Such conduct normally involves something more than simple negligence. . . . [On the other hand, it] implies that the act or conduct spoken of is reprehensible or wrong, but not that it involves malice or a guilty purpose."

Id. (quoting BLACK'S LAW DICTIONARY (6th ed. 1990)). In granting summary judgment in favor of plaintiffs, I have already determined that defendants UIIS and Guidice had engaged in prohibited transactions and violated their fiduciary duties to the Plan and its participants by repeatedly delaying the deposit of employee contributions. I find that defendants engaged in culpable conduct, and that the first Ursic factor weighs in favor of the plaintiffs.

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<sup>2</sup> The statute provides, "In any action under this subchapter ... by a participant ... the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132 (g) (1).

## **2. Ability to Pay**

Under the second Ursic factor, the Court must also assess the losing party's ability to satisfy an award of fees and costs. Ursic, 719 F.2d at 673. Defendants have provided no supporting affidavit or submitted any documents reflecting their current financial status. While informal communications from defense counsel indicate that defendants are in poor financial straits, there is nothing in the record from which the Court may find the defendants are unable to pay. As far as the Court is aware, defendants are not in bankruptcy proceedings and UIIS is still a viable operation with large federal government contracts to provides security services to numerous government buildings and agencies. The fact that the Plan participants lost \$102,135.30 in lost interest income for delayed deposits during several months over the two year class period reflects a high cash flow through the Plan's accounts. I therefore find based on the foregoing facts that it is likely that defendants are capable of paying for an award of attorneys' fees and costs.

## **3. Deterrent Effect**

An award of attorneys' fees in this case would have a deterrent effect in discouraging other plan fiduciaries from similarly delaying deposits of employee contributions. This deterrence has the beneficial effect of furthering the goals of ERISA. Therefore, I conclude that this factor weighs in plaintiffs' favor.

## **4. Benefit to Plan Members**

Because the class plaintiffs were awarded damages as representatives of the Plan, the damages should have been disbursed to all Plan participants who lost interest income from defendants' actions. Thus, all plan members benefitted from the action; consequently, this Ursic

factor weighs in the plaintiffs' favor.

## **5. Relative Merits of the Parties' Positions**

Not only did the Court find in favor of the class plaintiffs on summary judgment, but defendants admitted all the allegations in their responses to plaintiffs' interrogatories. Thus, there was no dispute that they had engaged in the alleged conduct, or that they had breached their fiduciary duties. Plaintiffs' arguments were clearly meritorious. I thus find that the last Ursic factor also weighs in favor of an award of attorneys' fees and costs.

### **B. Amount of Award**

Plaintiffs have requested \$36,376.03, comprising \$654.78 in costs and \$35,721.25 in attorneys' fees. The party seeking attorneys' fees has the burden of proving that its request is reasonable. Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 92 L. Ed. 2d 439, 106 S. Ct. 3088 (1986). The objecting party has the burden to challenge, through affidavit or brief, with sufficient specificity to provide notice to the fee applicant the portion of the fee petition which must be defended. Rode v. Dellarciprete, 892 F.2d 1177, 1183 (3d Cir. 1990). A district court may only decrease a fee based on factors raised by an adverse party, but has a great deal of discretion to adjust fees in light of the objections. Id.

Plaintiffs' counsel, Louis Agre, has requested an hourly rate of \$250 for himself, and an hourly rate of \$50.00 for work by his legal assistant. In support of his request, Mr. Agre has submitted his time records in this matter, as well as a report on court awarded attorneys' fees issued by the Third Circuit Task Force, affidavits by two federal litigators, a survey by attorney Edward Foley, Jr. surveying hourly rates for ERISA litigators in the Philadelphia area, and two district court opinions from the U.S. District Court for the District of New Jersey, granting Mr.

Agre an hourly rate of \$225.00, issued in October 2000 and February 2001. Mr. Agre also affirmed that he had litigated this action in the most expeditious manner possible. Defendants have not objected to any of the submissions, nor to the requested rate or number of hours billed. Absent any specific objections thereto, I am satisfied that the requested hourly rate and hours billed are reasonable, and will grant the request in its entirety.

***Conclusion***

My consideration of the five factors reveals that the requisite factors support the award of attorneys' fees and costs against defendants. The Court exercises its discretion herewith and the plaintiffs' request for attorneys' fees and costs under § 1132 (g) (1) will be granted.

An appropriate Order follows.

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	:	<b>Special Management Track</b>
	:	<b>(Class Action)</b>
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**ORDER**

AND NOW this 18<sup>th</sup> day of December, 2002, upon consideration of the motion of class plaintiffs for allowance of attorneys' fees and costs under the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* ("ERISA") (Doc. No. 91) and having concluded, for the reasons stated in the foregoing memorandum, that class plaintiffs are thus entitled to attorneys' fees or costs under ERISA, **IT IS HEREBY ORDERED** that the motion is **GRANTED** and plaintiffs are awarded attorneys' fees in the amount of \$35,721.25 and costs in the amount of \$654.78.

It is **FURTHER ORDERED** that defendants United International Investigative Services and William Guidice shall pay the total sum of \$36,376.03 to Louis Agre, Esquire, no later than January 10, 2002.

It is **FURTHER ORDERED** that upon praecipe and certification of plaintiffs' counsel that the full sum remains unpaid after January 10, 2002, this Court will enter judgment on the award.

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**LOWELL A. REED, JR., S.J.**