

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

DEBRA K. KEACH and PATRICIA A. SAGE, )

Plaintiffs, )

vs. )

Case No. 01-1168

U.S. TRUST COMPANY, NA., f/k/a U.S. TRUST )  
COMPANY OF CALIFORNIA, NA., et al., )

Defendants. )

ASHLEY ANNE FOSTER MOTION FOR SUMMARY JUDGMENT

Now comes the Defendant, Ashley Bradley, f/k/a Ashley Anne Foster, in the above captioned case, by her attorneys, Charles G. Roth, James W. Springer and Joseph Z. Sudow of Kavanagh, Scully, Sudow, White & Frederick, P.C., and pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 7.1 moves for summary judgment on all claims against her. The material facts in this case are undisputed that this Defendant is entitled to judgment in bar of all claims as a matter of law.

I. PLAINTIFF'S COMPLAINT

1. This Defendant is described in paragraph 47 of Plaintiff's Amended Complaint as "... at relevant times a trustee or agent of the Ashley Anne Foster

Irrevocable Trust and a party in interest as to the ESOP within the meaning of ERISA Section 3(14), 29 U.S.C. Sec. 1002(14).” Defendant’s Answer denied she was a party in interest and affirmatively stated she “had no responsibilities or duties with regards to the ESOP.”

2. This Defendant’s identification in the Plaintiff’s Complaint does not again appear until paragraph 271 where it is stated that she “... received ESOP Plan assets in one or more transactions in which fiduciaries with respect to the ESOP breached the responsibilities, obligations or duties imposed upon a fiduciary by Title I of ERISA, 29 U.S.C. Sec. 1001-1144.” Defendant’s Answer denied all allegations of fact.

3. By court order Plaintiffs were required to add paragraph 272 which alleged that this Defendant “... had actual or constructive knowledge of the circumstances that rendered the 1995 and 1997 ESOP stock transactions unlawful, including that one or more plan fiduciaries, with actual or constructive knowledge of the facts satisfying the elements of a Section 406 transaction, caused the ESOP to engage in the 1995 and 1997 stock transactions.” Defendant’s Answer denied all allegations of fact.

## II. UNDISPUTED MATERIAL FACTS

1. In December of 1995, this Defendant lived in Cook County, Illinois. Affidavit of Ashley Anne Foster (Exhibit A), paragraph 1.

2. This Defendant has never been an employee of Foster & Gallagher or any of its subsidiaries or trade styles and has never been an officer or director of F&G or any of its subsidiaries or trade styles. Foster Affidavit, paragraphs 2 and 3.

3. This Defendant has never been a participant in the F&G ESOP. Foster Affidavit, paragraph 4.

4. This Defendant has never been a member of any ESOP committee and has never attended any Board of Directors or committee meetings of F&G or of any of its subsidiaries or trade styles. Foster Affidavit, paragraphs 5 and 6.

5. This Defendant never purchased, owned, transferred or sold any F&G stock. Foster Affidavit, paragraph 7.

6. This Defendant on 6 November 1987 created an irrevocable trust with the Commercial National Bank of Peoria as trustee. The trust was known as the Ashley Anne Foster Irrevocable Trust. Foster Affidavit, paragraph 8.

7. This Defendant has never been the trustee or agent of the trust. She is the beneficiary of the trust. The Commercial National Bank of Peoria and its successors were the trustee of the trust until it was terminated when this Defendant reached the age of 35. Foster Affidavit, paragraph 8.

8. The First of America Bank Trust Company, now NC Illinois Trust Company, was the successor to the Commercial National Bank of Peoria as Trustee. Foster Affidavit, paragraph 9.

9. On 25 July 1995, the trustee, First of America Bank Trust Company received from Thomas Foster, this Defendant's father, stock certificate No. 83 representing 6,475 shares of the common stock of Foster & Gallagher. Foster Affidavit, paragraph 9.

10. This Defendant never owned or possessed the stock personally. Foster Affidavit, paragraph 9. Affidavit of John R. Blahnik, paragraph 7, Exhibit B hereto.

11. A true copy of the F&G stock certificate No. 83 representing 6,475 shares is attached to the Affidavit of Trust Officer John R. Blahnik.

12. A receipt for the stock certificate was executed by Mary Alice Lytle, a Trust Officer for First of America Trust Company, on behalf of the trustee. Blahnik Affidavit, paragraph 7.

13. Stock certificate No. 83 representing the 6,475 shares of F&G stock was sold by the trustee to the F&G ESOP for a total price of \$126,062.50. Blahnik Affidavit, paragraph 10.

14. This Defendant never owned nor sold the certificate. Foster Affidavit, paragraph 10.

15. This Defendant did not receive the sale proceeds from the sale of the certificate. The proceeds were added to the trust corpus. Foster Affidavit, paragraph 10.

16. Ashley Anne Foster never acted as trustee or agent for the trustee. Foster Affidavit, paragraph 10. Blahnik Affidavit, paragraph 9.

17. At no time has this Defendant signed anything as trustee or agent at any time on behalf of the trust. Foster Affidavit, paragraph 11.

18. In 1995, all documents pertaining to the sale of stock by the trustee were executed by the trustee, then First of America Bank Trust Company. Foster Affidavit, paragraph 11. Blahnik Affidavit, paragraph 8.

19. The proceeds or consideration for the sale of certificate No. 83 representing the 6,475 shares was never received by this Defendant but was received by the trustee on behalf of the trust. Blahnik Affidavit, paragraph 8. Foster Affidavit, paragraph 12.

20. At no time did this Defendant hold title or ownership interest in any shares of stock of F&G and at no time did this Defendant personally receive any proceeds from the sale of any stock of F&G. Foster Affidavit, paragraph 12. Blahnik Affidavit, paragraphs 8 and 9.

21. This Defendant did not participate in any manner in the 1997 ESOP transaction. Foster Affidavit, paragraph 13.

22. The trustee of the Ashley Anne Foster Irrevocable Trust did not participate in the 1997 ESOP transaction. Foster Affidavit, paragraph 13.

23. When this Defendant reached the age of 35 in November 2001, the trust was terminated and its assets were distributed to this Defendant by the trustee. Foster Affidavit, paragraph 14.

24. In 1995 and 1997, this Defendant was personally unaware of the nature of the business performed by Valuemetrics, Inc., Houlihan, Lokey, Howard & Zukin, Inc. or U.S. Trust Company. Foster Affidavit, paragraph 15.

25. In 1995 and 1997, this Defendant was personally unaware of the function of Valuemetrics, Houlihan Lokey, the Sonnenschein, Nath & Rosenthal law firm or U.S. Trust Company with respect to any ESOP transaction. Foster Affidavit, paragraph 16.

26. This Defendant has never had any contact, correspondence or communication of any kind with Valuemetrics, Houlihan Lokey, the Sonnenschein law firm or U.S. Trust Company. Foster Affidavit, paragraph 17.

27. In 1995 and 1997, this Defendant was unaware of the function performed by U.S. Trust Company with regards to the ESOP. Foster Affidavit, paragraph 18.

28. This Defendant does not know, believe or suspect that Valuemetrics, Houlihan Lokey, the Sonnenschein law firm or U.S. Trust Company, in either 1995 or 1997, when determining the fair market value of F&G stock or its adequate consideration, had been without access to all material information. Foster Affidavit, paragraph 19.

29. This Defendant does not know, believe or suspect that Valuemetrics, Houlihan Lokey, the Sonnenschein law firm or U.S. Trust Company breached any duty at any time to anyone. Foster Affidavit, paragraph 20.

30. This Defendant does not know, believe or suspect that adequate consideration for a controlling interest in F&G in December of 1995 was less than \$19.50 per share of F&G stock. Foster Affidavit, paragraph 21.

31. This Defendant does not know, believe or suspect that anyone breached any fiduciary duty relating to the 1995 December transaction. Foster Affidavit, paragraph 22.

32. No one from Valuometrics, Houlihan Lokey, the Sonnenschein law firm nor U.S. Trust Company has ever advised this Defendant that any document or information needed or requested had been withheld. Foster Affidavit, paragraph 23.

33. No one from Valuometrics, Houlihan Lokey, the Sonnenschein law firm or U.S. Trust has ever advised this Defendant that it may have been misled in any evaluation of F&G stock at any time. Foster Affidavit, paragraph 23.

34. No one from Valuometrics, Houlihan Lokey, the Sonnenschein law firm or U.S. Trust Company has ever advised this Defendant that the valuation of F&G stock in 1995 might have been inaccurate. Foster Affidavit, paragraph 23.

53. No one from Valuometrics, Houlihan Lokey, the Sonnenschein law firm or U.S. Trust Company has ever advised this Defendant that the ESOP paid more than adequate consideration for the F&G stock in 1995. Foster Affidavit, paragraph 23.

36. This Defendant does not know, believe or suspect that Valuometrics, Houlihan Lokey, the Sonnenschein law firm or U.S. Trust Company may have been misled in any valuation of F&G stock or that the valuation was incomplete or inaccurate for any reason. Foster Affidavit, paragraph 24.

### III. APPLICABLE LAW

#### A. SUBSTANTIVE LAW.

1. Plaintiffs' Complaint alleges that this Defendant, as a party in interest:

"... had actual or constructive knowledge of the circumstances that rendered the 1995 and 1997 ESOP stock transactions unlawful, including that one or more Plan fiduciaries, with actual or constructive knowledge of the facts satisfying the elements of a Section 406 transaction, caused the ESOP to engage in the 1995 and 1997 stock transactions."

2. In *Harris Trust and Savings Bank v. Solomon Smith Barney, Inc.*, 530 U.S. 238 (2000), the Supreme Court established a knowledge upon knowledge burden of proof standard for cases against parties in interest. The Supreme Court described the plaintiff's burden of proof with respect to this defendant as an alleged party in interest transferee as follows:

"The transferee must be demonstrated to have had actual or constructive knowledge of the circumstances that rendered the transaction unlawful. Those circumstances, in turn, involve a showing that the plan fiduciary, with actual or constructive knowledge of the facts satisfying the elements of a Section 406(a) transaction, caused the plan to engage in the transaction."

3. A party in interest to a transaction is not required "to monitor the plan for compliance with each of ERISA's intricate details." *Harris Trust, supra*, 530 U.S. at 252.

4. Plaintiffs bear the burden of demonstrating that this Defendant was unjustly enriched in order to request a constructive trust or restitution remedy. It is fundamental

law that the basis for restitution is convincing proof that the Defendant has been unjustly enriched by receiving something that belongs to the Plaintiff.

B. SUMMARY JUDGMENT STANDARD.

1. The respondent to a motion for summary judgment must make a showing sufficient to establish the existence of all elements essential to the party's case and on which the respondent will bear the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

2. Neither an alleged factual dispute nor a metaphysical doubt as to material facts is a sufficient defense to avoid the entry of summary judgment. *Fairchild v. Forma Scientific, Inc.*, 147 F.3d 567 (7th Cir. 1998).

3. The Plaintiffs must provide the Court hard specific facts to establish a necessary and genuine issue for trial. *Patt v. Family Health Sys.*, 280 F.3d 749 (7th Cir. 2002).

4. One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

5. The Plaintiffs must present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 597 (1986); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984).

C. ADOPTION OF PRIOR BRIEFS.

This Defendant, in compliance with the Court's 2002 Order, adopts the statement of applicable law filed previously by co-defendants as if herein set forth.

IV. ARGUMENT

1. Defendant could not be a party in interest. As evidenced by the Affidavits of this Defendant and of Trust Officer Blahnik, this Defendant never received stock or proceeds from the sale of the stock in either 1995 or 1997. In fact, this Defendant had nothing to do with either transaction and the trust had nothing to do with the 1997 transaction. Nor was she ever a fiduciary or employee or employer of employees covered by the plan. Nor was she ever an officer or director of Foster & Gallagher.

2. Even if this Defendant was a party in interest, Plaintiffs have not satisfied the Supreme Court *Harris Trust* knowledge upon knowledge requirement for liability. No witness identified by the Plaintiffs has offered testimony that this Defendant "had actual or constructive knowledge of the circumstances that rendered the transaction unlawful." Defendant denies any such knowledge.

3. Plaintiffs' expert witness on claimed issues of fiduciary and party in interest liability, John Langbein, does not even know who this Defendant is. In fact he has no opinion as to whether this Defendant was a fiduciary or a party in interest. At pages 219 and 220 of Langbein's deposition, Exhibit C, the transcript reads as follows:

“Q. Do you have any opinion as to whether she was a fiduciary or a party in interest?”

A. I do not.”

4. There simply is an absence of any evidence from any source that this Defendant was a party in interest or had any knowledge of any kind regarding any breach by any trustee or fiduciary in either 1995 or 1997.

5. Further, there is no evidence that the stock was sold to the ESOP by the trustee for more than adequate consideration. Plaintiffs’ case includes no such evidence.

6. Finally, even if all of the other preconditions had been met, there is no evidence that there was any unjust enrichment by this Defendant to justify the imposition of a constructive trust or an award of restitution.

## V. CONCLUSION

Plaintiffs have tendered no evidence or witness to support Plaintiffs’ Complaint with respect to this Defendant. She was never a party in interest because she was never a transferee. She had no actual or constructive knowledge of circumstances that rendered the 1995 or 1997 ESOP stock transactions unlawful. She did not participate in either the 1995 or 1997 ESOP transaction. The Plaintiffs have introduced no evidence in their case in chief that the stock was sold by the trustee for more than adequate consideration in either 1995 or 1997, and the Plaintiffs have introduced no evidence to justify the imposition of a resulting trust or an award of restitution.

WHEREFORE, Defendant, Ashley Bradley, f/k/a Ashley Anne Foster, prays that this Court enter judgment in her favor in bar of Plaintiffs' claim.

DEFENDANT, ASHLEY ANNE FOSTER,  
by KAVANAGH, SCULLY, SUDOW, WHITE  
& FREDERICK, P.C., Her Attorneys

By Charles G. Roth  
Charles G. Roth, ARDC #02399113  
James W. Springer, ARDC #06192903  
Joseph Z. Sudow, ARDC #2764989

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 4 day of November, 2002, addressed as follows:

Mr. Dean Rhoads  
Sutkowski & Rhoads, Ltd.  
124 S.W. Adams St.  
Suite 560  
Peoria, IL 61602

Mr. Richard J. Pautler  
Thompson Coburn LLP  
One Firststar Plaza  
34<sup>th</sup> Floor  
St. Louis, MO 63101

Mr. Timothy Bertschy  
Heyl, Royster, Voelker & Allen  
124 S.W. Adams St., Suite 600  
Peoria, IL 61602

Mr. Robert Eccles  
O'Melveny & Myers  
555 13<sup>th</sup> St. NW  
Washington, DC 20004

Ms. Nancy Ross  
McDermott, Will & Emery  
227 W. Monroe Street  
Chicago, IL 60606-5096

Mr. Jeffrey B. Rock  
Hasselberg, Rock, Bell & Kuppler  
4600 N. Brandywine Drive  
Assoc. Bank Bldg. Suite 200  
Peoria, IL 61614-5591

Mr. Dean R. Essig  
135 Washington Square  
Washington, IL 61571

Mr. Bradley M. Jones  
Mr. Richard L. Pemberton  
Meagher & Geer, P.L.L.P.  
4200 Multifoods Tower  
33 South Sixth Street  
Minneapolis, MN 55402

Mr. Sari Alamuddin  
Seyfarth Shaw  
55 E. Monroe, Suite 4200  
Chicago, IL 60603

Mr. Roy G. Davis  
Davis & Campbell L.L.C.  
401 Main Street, Suite 1600  
Peoria, Illinois 61602

Mr. Stephen D. Gay  
Husch & Eppenberger L.L.C.  
401 Main Street  
Suite 1400  
Peoria, IL 61602

Mr. Leland L. Smith  
Hinshaw & Culbertson  
456 Fulton Street  
Suite 298  
Peoria, IL 61602-1220

Mr. James C. Bailey  
Steptoe & Johnson LLP  
1330 Connecticut Avenue NW  
Washington, DC 20036

Mr. Robert Riffle  
Elias, Meghinnes, Riffle & Seghetti  
416 Main Street, Suite 1400  
Peoria, Illinois 61602



Charles G. Roth, ARDC 02399113