

**SUTKOWSKI & RHOADS LTD**

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

**DEBRA K. KEACH and PATRICIA A. SAGE,  
Plaintiffs,**

**vs.**

**U.S. TRUST COMPANY, N.A., f/k/a U.S. TRUST  
COMPANY OF CALIFORNIA, N.A., et al.,**

**Defendants.**

**CASE NUMBER  
01-1168**

**PLAINTIFFS' RESPONSE TO DEFENDANT ASHLEY  
ANNE FOSTER'S MOTION FOR SUMMARY  
JUDGMENT**

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Plaintiffs Debra K. Keach and Patricia A. Sage, for their response to the motion for summary judgment of defendant Ashley Anne Foster (“Ashley Foster Motion”), state as follows:

**I. Introduction.**

1. The Ashley Anne Foster Irrevocable Trust (“A. Foster Trust”) and/or its trustee, First of America Trust Company (or related entities, collectively termed “First of America” herein), were on notice that the 1995 Transaction was consummated in breach of trust because it employed two agents in that transaction, Melvyn R. Regal (“Regal”) and Fredrick J. Stuber (“Stuber”), each of whom knew or should have known of the breach. The assets of the F&G ESOP were therefore immediately impressed with a constructive trust in favor of the ESOP’s participants and beneficiaries. That constructive trust survived any subsequent conveyance to defendant Ashley Anne Foster (“Ashley Foster”), for two independent and adequate reasons: (1) Ashley Foster was a gratuitous donee, meaning, she gave no value for such assets, and (2) Ashley Foster had notice of the breach of trust, or of facts which should have put her on reasonable inquiry, well before she received the ESOP’s property. In any

event, these issues involve disputed questions of material fact. Thus, her motion for judgment as a matter of law must be denied.

**II. Response to Allegedly Undisputed Material Facts.**

**A. Undisputed Material Facts.**

2. ¶¶ 1, 6, 8, 9, 11, 12, and 23.

**B. Material Facts Claimed to Be Disputed.**

3. ¶ 13: The Blahnik Affidavit states that the A. Foster Trust received \$126,062.50. Blahnik Affidavit ¶ 10. The December 20, 1995, Stock Purchase Agreement (“Stock Purchase Agreement”) indicates that the A. Foster Trust sold 6,475 shares at \$19.50 per share for total of \$126,262.50 in proceeds. P-87 @ 001418.<sup>1</sup>

4. ¶¶ 15, 19, and 20: Plaintiffs admit that the proceeds of the sale by the A. Foster Trust were added to that trust’s corpus. However, Ashley Foster admits that she received the corpus of the trust in November 2001. Ashley

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<sup>1</sup> The Stock Purchase Agreement’s calculation is mathematically correct. The \$200 discrepancy is unaccounted for in the record.

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Foster Affidavit ¶ 23. Ashley Foster therefore received the proceeds of the sale, or their product.

5. ¶ 18: Regal, acting as agent of the A. Foster Trust, executed the Stock Purchase Agreement on behalf of the trust. P-87 @ 001409. Stating further, Stuber, acting as agent and attorney-in-fact for the A. Foster Trust, executed the receipt for the sales price on behalf of the trust. P-88; Deposition of Frederick J. Stuber taken March 26, 2002 (“Stuber dep.”) @ 99.

6. ¶¶ 28, 29, 30, 31, and 36: Ashley Foster received actual or constructive notice that F&G ESOP assets had been transferred in breach of trust, and that the 1995 Transaction was otherwise illegal, before she received those assets (or their product) in November 2001, because she received Plaintiffs’ First Amended Complaint and, in fact, appeared before this Court prior to that time. *See, e.g.*, Defendants’ 12(b)(6) Motion to Dismiss Count XXIII [sic] of Plaintiffs’ Amended Complaint, filed October 12, 2001 (d/e 113). Stating further, and as further detailed in Section III: Applicable Law, whether or not Ashley Foster received notice of the various breaches of trust occurring in the 1995 Transaction is immaterial to her liability as a gratuitous donee of assets previously impressed with a constructive trust.

**C. Facts Claimed to be Immaterial to the Motion.**

7. ¶¶ 2, 3, 4, 5, 10, and 14: Whether Ashley Foster was ever employed by F&G or its ESOP, owned or possessed any F&G stock, or participated in the management or activities of either F&G or its ESOP, are all immaterial to her liability as a gratuitous donee of assets (or their product) previously impressed with a constructive trust for the benefit of the F&G ESOP's participants and beneficiaries. Stating further, prior to receiving such assets, Ashley Foster had actual or constructive notice that such assets had been transferred in breach of trust.

8. ¶¶ 7, 16, and 17: Whether Ashley Foster ever served as trustee or agent of the A. Foster Trust is immaterial to her liability as a gratuitous donee of assets (or their product) previously impressed with a constructive trust for the benefit of the F&G ESOP's participants and beneficiaries. Stating further, prior to receiving such assets, Ashley Foster had actual or constructive notice that such assets had been transferred in breach of trust.

9. ¶¶ 21 and 22: The circumstances surrounding the 1997 Transaction are immaterial to Ashley Foster's liability as a gratuitous donee of assets (or their product) previously impressed with a constructive trust for the bene-

fit of the F&G ESOP's participants and beneficiaries owing to the circumstances surrounding the 1995 Transaction. Stating further, prior to receiving such assets, Ashley Foster had actual or constructive notice that such assets had been transferred in breach of trust.

10. ¶¶ 24, 25, 26, and 27: Ashley Foster's contacts with defendants Valuemetrics, Inc. ("Valuemetrics"), Houlihan, Lokey, Howard & Zukin, Inc. ("Houlihan Lokey"), or U.S. Trust Company ("U.S. Trust"), or her awareness of their respective businesses or functions in the 1995 Transaction, are all immaterial to her liability as a gratuitous donee of assets (or their product) previously impressed with a constructive trust for the benefit of the F&G ESOP's participants and beneficiaries. Stating further, prior to receiving such assets, Ashley Foster had actual or constructive notice that such assets had been transferred in breach of trust.

11. ¶¶ 32, 33, 34, and 35 (erroneously numbered 53): Whether Valuemetrics, Houlihan Lokey, U.S. Trust, or Sonnenschein, Nath and Rosenthal ever advised Ashley Foster of the circumstances surrounding the 1995 Transaction is immaterial to her liability as a gratuitous donee of assets (or their product) previously impressed with a constructive trust for the benefit of the F&G ESOP's participants and beneficiaries. Stating further, prior to receiving

such assets, Ashley Foster had actual or constructive notice that such assets had been transferred in breach of trust.

**D. Additional Material Facts Claimed to Defeat the Motion for Summary Judgment.**

**1. Undisputed Material Facts**

12. By way of its written orders dated November 18, 2002 (d/e 397) (“November 18th Order), and November 27, 2002 (d/e 408) (“November 27th Order”), the Court has previously made findings as to certain undisputed material facts central to this case. From these orders, Plaintiffs have prepared a document entitled Undisputed Material Facts from 11/18/02 and 11/27/02 Orders, attached hereto at Tab A (“Undisputed Material Facts from Court Orders”). Plaintiffs hereby restate and incorporate by reference all such Undisputed Material Facts from Court Orders as if fully alleged herein.

**2. Both Regal and Stuber were the Agents of the A. Foster Trust with Regard to the 1995 Transaction.**

13. Regal executed the December 20, 1995, Stock Purchase Agreement on behalf of the A. Foster Trust. P-87 @ 001409.

14. The A. Foster Trust also designated Stuber as its agent and attorney-in-fact for the 1995 Transaction. Section 11.1 of the December 20, 1995 Stock Purchase Agreement provided:

11.1 Appointment of Sellers' Representative. Each of the Sellers (other than the Controlling Shareholders) hereby irrevocably designates and appoints Frederick J. Stuber as its attorney-in-fact and agent (the "Sellers' Representative"), and Frederick J. Stuber hereby accepts such designation and appointment. By such designation and appointment each of the Sellers (other than the Controlling Shareholders) irrevocably authorizes and directs the Sellers' Representative to act for and on behalf of such Seller whenever any consent or action is to be given or performed hereunder by one or more of the Sellers (other than the Controlling Shareholders) (including, without limitation, the execution and delivery of any agreement, instrument or other document to be executed and delivered hereunder). Delivery to Sellers' Representative of any amount, notice, document or instrument which is to be given, delivered or paid to any Seller (other than the Controlling Shareholders) shall be deemed to be, and shall be effective as, delivery to such Seller.

P-87 @ 001404.

15. On December 20, 1995, Stuber executed a "Receipt for Purchase Price" ("Receipt"). The Receipt was addressed to U.S. Trust, "Trustee of the Foster & Gallagher, Inc. Employee Stock Ownership Trust." P-88 @ 001429.

The Receipt stated:

Gentleman:

Pursuant to the Stock Purchase Agreement dated the date hereof among you and the shareholders (the "Sellers") of Foster & Gallagher, Inc. (the "Company"), you have purchased from the Sellers 3,589,743 common shares of the Company (the "Purchased Shares").

Thomas S. Foster hereby acknowledges receipt from you of the sum of \$33,120,789.00, Melvyn R. Regal hereby acknowledges receipt from you of the sum of \$13,414,284.00, and Frederick J. Stuber ("Sellers' Representative") hereby acknowledges receipt from you of the sum of \$23,464,920.00, constituting, in the aggregate, the purchase price for the Purchased Shares.

P-88 @ 001429; Stuber dep. @ 99.

16. The A. Foster Trust's portion of the assets Stuber received totaled \$126,262.50, representing the sale of 6,475 shares of F&G stock to the F&G ESOP at a price of \$19.50 per share. P-87 @ 001418.

**3. Both Regal and Stuber Had Actual or Constructive Knowledge of the Breach of Trust**

**a. Regal Knew or Should Have Known that F&G ESOP Property Was Transferred in Breach of Trust in the 1995 Transaction**

17. As further detailed in Undisputed Material Facts from Court Orders, Regal was at all relevant times a shareholder and executive of F&G. In

1995, he was Vice Chairman of the F&G Board of Directors and a director of Michigan Bulb Company ("MBC"). Regal was a fiduciary with respect to the selection of U.S. Trust as successor trustee for the ESOP. He was also part of the three-person Executive Committee empowered by the Board to make changes to the 1995 Transaction itself, and he otherwise exercised control over the structure and orchestration of the 1995 Transaction through the closing on December 20, 1995.

**b. Stuber Knew or Should Have Known that F&G ESOP Property Was Transferred in Breach of Trust in the 1995 Transaction**

18 - 56. For paragraphs 18 through 56 of their response to the Ashley Foster Motion, plaintiffs restate, re-allege and incorporate by reference paragraphs 36, 41-52, 67, 68, 70-72, 74-76, 78, 84-89, and 99-109 of Plaintiffs' Response to Defendants William J. Gehring, Henry R. Gregory II, John F. Halpin, James H. Kyle, John Lappegaard, George McKittrick, Clayton Patino, Jerry L. Rathmann, Mark Swedlund, Leo A. Vandervlugt, Robert J. Wilson and Bruce B. Wright's Motion for Summary Judgment, filed November 18,

2002 (d/e 396) (“Response to Gehring Defendants’ Motion”), as if fully set forth herein.<sup>2</sup>

57. In summary, like Regal, Stuber was also intimately involved with the 1995 Transaction and intimately familiar with its relevant details. As Senior Vice-President of Finance and Corporate Secretary for F&G, as well as Secretary and Treasurer for MBC, Stuber participated in the 1995 Transaction from its inception, including serving as a principal contact with Valuemetrics and as a principal contact between the company and the other selling shareholders. Stuber was furthermore privy to relevant confidential information and numerous discussions concerning that transaction. Stuber also oversaw the transaction between U.S. Trust and Magna Bank as trustee of the F&G ESOP.

58. Finally, Ashley Foster has asserted that plaintiffs have no evidence that more than adequate consideration was paid for the F&G stock in

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<sup>2</sup> In keeping with the Court’s directives as set forth in the joint teleconference held on November 25, 2002, in an effort to keep this response as brief as possible plaintiffs will incorporate by reference such relevant facts and law as can be found in prior pleadings. Beyond summaries of such information, only the facts and law as specifically relate to Ashley Foster will be recounted in detail.

the 1995 and 1997 Transactions. Setting aside the fact that Ashley Foster confuses the burden of proof, *see infra*, plaintiffs have, in fact, provided such evidence. *See* P-932 @ 0008524 (expert report of James Hitchner, opining that value of F&G stock on December 20, 1995 was \$10.85, and that on June 30, 1997 the value of the F&G stock was \$10.37). *See also* P-929 (expert report of Gregory Wolski); P-930 (expert report of Professor Charles Linke); and P-931 (expert report of Thomas Bagley), all of which provide further support for the proposition that issues relating to F&G Sweepstakes Marketing were a material risk to F&G on both dates yet were not considered in the stock price paid by the ESOP.

**III. Applicable Law.**

**A. Summary Judgment Standard.**

59. Summary judgment may only be granted where “the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). The moving party has the responsibility of informing the Court of the portions of the record or affidavits that demonstrate the absence of a

triable issue. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Any doubt as to the existence of a genuine issue for trial is resolved against the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Cain v. Lane*, 857 F.2d 1139, 1142 (7<sup>th</sup> Cir. 1988).

60. If the moving party meets its burden, the non-moving party then has the burden of presenting specific facts to show that there is a genuine issue of material fact. *Matsushida Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). Federal Rule of Civil Procedure 56(e) requires the non-moving party to go beyond the pleadings and produce evidence of a genuine issue for trial. *Celotex*, 477 U.S. at 324. Nevertheless, this Court must “view the record and all inferences drawn from it in the light most favorable to the [non-moving party].” *Holland v. Jefferson Nat. Life Ins. Co.*, 883 F.2d 1307, 1312 (7<sup>th</sup> Cir. 1989). Summary judgment will be denied where a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928, 931 (7<sup>th</sup> Cir. 1995).

**B. Statutory Law (ERISA).**

61 - 73. For paragraphs 60 through 72 of this response, plaintiffs restate and incorporate by reference paragraphs 111-120 and 139-140 of their Response to Gehring Defendants' Motion as if fully set forth herein, being the applicable sections of ERISA regarding fiduciary duties, prohibited transactions, a plan participant or beneficiary's right to relief, and the burden of proof on these issues.

**C. Common Law of Trusts**

**1. The Bona Fide Purchaser Defense**

74- 105. For paragraphs 73 through 104 of this response, plaintiffs restate and incorporate by reference paragraphs 121-138 of their Response to Gehring Defendants' Motion, and paragraphs 305, 309-317, and 320-322 of Plaintiffs' Response to Defendant Dickes' Motion for Summary Judgment, filed September 10, 2002 (d/e 355), as if fully set forth herein.

106. In summary, when a trustee transfers trust property to a person who knew or should have known that the transfer was in breach of trust, then the transferee holds the property subject to a constructive trust in favor of the beneficiaries. "Knew or should have known" contemplates both actual and

constructive knowledge, and is an objective standard. 4 A. Scott & W. Fratcher, *Law of Trusts* § 284, 288 p.64, § 291.1 pp. 77-78, § 294.2 p. 101 (4th ed. 1989) (“Law of Trusts”). When circumstances suggest that (1) the person is dealing with a trustee and (2) the trustee may be committing a breach of trust, a duty of inquiry arises. If such inquiry, pursued with reasonable intelligence and diligence, would have revealed the breach of trust, then the transferee “should have known” of the breach of trust. *Law of Trusts* § 297 pp. 110-11; *Consumers Produce Co. v. Volante Wholesale Produce, Inc.*, 16 F.3d 1374, 1383 (3rd Cir. 1994).

107. Thus, a person takes the property free of any constructive trust only if he can demonstrate that he was a bona fide purchaser – that he gave value, and that he had no notice of the trust or its breach. Relying on numerous trust law treatises, the Court in *Harris Trust and Savings Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 250 (2000) outlined the contours of the bona fide purchaser defense:

[I]t has long been settled that when a trustee in breach of his fiduciary duty to the beneficiaries transfers trust property to a third person, the third person takes the property subject to the trust, unless he has purchased the property for value and without notice of the fiduciary’s breach of duty. The trustee or the beneficiaries may then maintain an action for restitution of the property (if already disposed of) or dis-

gorgement of the proceeds (if already disposed of) and disgorgement of the third person's profits derived therefrom.

*Harris Trust*, 530 U.S. at 250 (citing *inter alia* Law of Trusts § 284, § 291.1 pp. 77-78, § 294.2 p. 101, §297). Thus, under general trust law a person claiming bona fide purchaser status must demonstrate both that he took the property without notice of the breach of trust *and* that he paid value for the property. The two predicates are conjunctive, not disjunctive. "A third-party transferee may escape liability . . . if it (i) gave value for the trust property *and* (ii) had not actual or constructive notice of the trust." *Albee Tomato, Inc. v. A.B. Shalom Produce Corp.*, 155 F.3d 612, 615 (2nd Cir.1998) (citing *Restatement (Second) of Trusts* § 284(1)) (emphasis in original).

108. For the purpose of establishing lack of notice and the other elements of the bona fide purchaser defense, the knowledge of the transferee's agent is imputed to the transferee. *Restatement of Agency* 2d, § 247, comment a; *Restatement (Second) of Trusts* § 297, comment p; 76 *Am.Jur. 2d Trusts* § 313 (2001).

109. In any event, bona fide purchaser status is a defense to be pleaded and proved by the party seeking its protection. *Wright-Blodgett Co. v. United*

*States*, 236 U.S. 397, 403-04 (1915); *Consumers Produce*, 16 F.3d at 1379-84.<sup>3</sup>

This compliments the fundamental principle that one who urges the favorable construction of a statute of general application has the burden of bringing himself or herself clearly within it. *See, e.g., NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711 (2001).

## **2. Gratuitous Donees**

110. Under the law of trusts, the situation is much different when a person has given no value in exchange for the trust property, *i.e.*, is a gratuitous donee. Having given no value, the gratuitous transferee has no bona fide purchaser defense against an equitable claimant, and so the question of notice is irrelevant:

Now, of course, it is well-settled law that were a trustee in breach of trust transfers trust property to a person who pays no value for the property, the transferee

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<sup>3</sup> Ashley Foster asserts: "In *Harris Trust* . . . the Supreme Court established a knowledge upon knowledge burden of proof standard against parties in interest. . . ." Ashley Foster Motion at 8. But contrary to Ashley Foster's assertion (and as more fully detailed in the materials incorporated herein by reference), the *Harris Trust* Court specifically stated: "The issue of which party, as between the party seeking recovery and the defendant-transferee, bears the burden of proof on whether the transferee is a purchaser for value and without notice, is not currently before us and may require resolution on remand." *Harris Trust*, 530 U.S. at 251 n.3.

takes subject to the trust, even though he had no notice of the breach of trust or of the existence of the trust. Mr. Justice Holmes in *Otis v. Otis* said: 'A person to whose hands a trust fund comes by conveyance from the original trustee is chargeable as a trustee in his turn, if he takes it without consideration, whether he has notice of the trust or not. This has been settled for three hundred years, since the time of uses.

Law of Trusts § 289, pp. 67-69. *See also* 5 Law of Trusts § 470, p. 363 ("It is, of course, well settled that equitable interests [such as a beneficial interest under a trust] are not cut off by a transfer of the property to one who has notice or does not pay value.").

111. Nor is such a constructive trust extinguished simply because the original transferee makes a gift of the property to a third person:

Where the wrongdoer acquires title to property by fraud, duress, or undue influence, he may transfer the property to a third person. If the third person . . . does not pay value, he holds the property subject to the constructive trust for the person wronged.

5 Law of Trusts § 468, p. 353. *See also id.* § 469, p. 360 (If "the fraudulent person had first obtained the property for himself and had then made a gift of it to another[, i]n that case the fraudulent person would hold the property upon a constructive trust for the person whom he defrauded, and his gratuitous transfer of the property would not cut off the constructive trust."); 1

Dobbs, Law of Remedies § 4.7(1) p. 661 (“[T]he constructive trust and other equitable remedies will take precedence over subsequent takers who do *not* qualify as bona fide purchasers. Donees, as well as purchasers who have notice of the plaintiff’s rights are among those who could not count as bona fide purchasers.”) (emphasis in original).

112. Furthermore, because a gratuitous donee has given no value for the property upon which a constructive trust has been placed, her retention of *any* of such property constitutes unjust enrichment:

Why is it that an innocent donee of trust property transferred to him in breach of trust is compelled to hold it subject to the trust? . . . A gratuitous transferee of trust property takes subject to the trust . . . because he would be unjustly enriched at the expense of the beneficiaries of the trust if he were permitted to retain the property. He will not be permitted to profit through a breach of trust, even though he had no reason to know of the breach of trust or even of the existence of the trust. . . . The truth clearly is that the innocent donee takes subject to the trust, even though he has no notice of the trust, because he would otherwise be unjustly enriched at the expense of the beneficiaries as a result of the violation of the trustee of his duty to them.

Law of Trusts § 289, pp. 69-70.

113. Finally, the foregoing principles hold true without regard to whether the property has been exchanged for other property, as the constructive trust will also attach to the proceeds or product of property impressed with a constructive trust:

If the wrongdoer himself exchanged the property for other property and then gave the product to one who paid no value, the [equitable] claimant is entitled to the product. The constructive trust that attached to the product before it was transferred is not cut off by the transfer. Thus if the wrongdoer acquires bonds by fraud and sells them and with the proceeds buys stock that he gives away, the donee of the stock although he has no notice of the fraud holds the stock upon constructive trust for the defrauded person. The principle nicely illustrated in several cases in which the wrongdoer used money wrongfully obtained, in paying premiums upon a policy of insurance upon his life payable to his wife, and then died. It is held that the person from whom the money was wrongfully taken is entitled to the proceeds of the policy, although the wife had no notice of the wrong.

Law of Trusts § 510, pp. 589-90.

**IV. Argument**

**A. The A. Foster Trust and/or Its Trustee Had Notice of the Breach of Trust Through Its Agents, Regal and Stuber**

114. On July 25, 1995, the A. Foster Trust received 6,475 shares of F&G common stock. At that time, First of America was trustee of the trust. Blahnik Affidavit ¶ 7. Approximately five months later, on December 20, 1995, the A. Foster Trust sold those shares to the F&G ESOP. In that sale, the A. Foster Trust employed not one but *two* agents who had actual or constructive knowledge that the sale was made in breach of trust, namely, Regal and Stuber. Regal executed the Stock Purchase Agreement on behalf of the A. Foster Trust, thereby consummating the sale. On behalf of the A. Foster Trust, Regal also appointed Stuber as another agent of the A. Foster Trust.<sup>4</sup>

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<sup>4</sup> Plaintiffs need not resolve on Ashley Foster's motion for summary judgment whether Regal was, e.g., acting with apparent authority, or whether the A. Foster Trust ratified his actions (for it is well settled that retaining the benefits of a contract constitutes ratification, see *Alterman v. Lydick*, 241 F.2d 50, 53 (7th Cir. 1957); *George F. Muller & Sons, Inc. v. Northern Illinois Gas Co.*, 299 N.E.2d 601, 603 (Ill.App.1973)): "On either theory - actual authorization to make the fee arrangement, or ratification - the existence of an agency relationship is the key question of fact which, if contestable and contested, as it was here, could not be taken away from the jury by granting a motion for summary judgment." *Goldstick v. ICM Realty*, 788 F.2d 456, 460 (7th Cir.1986).

115. This Court has already held that Regal exercised *de facto* control over the F&G ESOP's assets and management. November 18th Order at p. 19. This Court has also already held that Regal was a fiduciary to the F&G ESOP, and that Regal's fiduciary duties extended beyond the appointment of U.S. Trust as trustee to the ESOP. November 18th Order at pp. 18-20. The Court has further held that Regal's knowledge, as well as the extent and timing of that knowledge, present issues of fact involving assessments of credibility to be resolved at trial. November 18th Order at p.21.<sup>5</sup> Accordingly, the knowledge of the A. Foster Trust in entering into the 1995 Transaction also remains unresolved, and so Ashley Foster's motion for summary judgment must be denied.

116. Likewise, Stuber, on behalf of the A. Foster Trust, acknowledged the receipt of \$126,262.50 from the F&G ESOP and otherwise served as agent and attorney-in-fact for the A. Foster Trust with respect to the 1995 Transac-

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<sup>5</sup> In addition to those issues already partially addressed by Court order, factual issues regarding Regal's knowledge pertaining to other fiduciary breaches, such as the failure to negotiate the *Eyler* issue, also remain pending before the Court. See Plaintiffs' Second Motion for Summary Judgment Against Defendants Ellen D. Foster, as Executrix of the Estate of Thomas S. Foster, and Melvyn R. Regal: Breach of ER-ISA § 404 Duty of Loyalty (d/e 401).

tion. Stuber, too, knew or should have known that the F&G ESOP's property was being transferred in breach of trust, and as with Regal, this knowledge is imputed to the A. Foster Trust or its trustee, First of America. Hence, when the proceeds from the 1995 Transaction passed from the ESOP to Stuber and then the A. Foster Trust, they were impressed with a constructive trust in favor of the ESOP's participants and beneficiaries. "Where title to property is acquired by one person under such circumstances that he is under a duty to surrender it, a constructive trust immediately arises." 5 Law of Trusts § 462.4 p. 322.

**B. Ashley Foster Was a Gratuitous Donee**

117. The corpus of the A. Foster Trust, including the assets the trust received from the F&G ESOP (or their product), was distributed to Ashley Foster on or about November 2, 2001. Ashley Foster Affidavit ¶¶ 10, 14; Blahnik Affidavit ¶ 10. There is no evidence in the record indicating that Ashley Foster gave value to the A. Foster Trust in exchange for those assets. It must therefore be presumed, on her motion for summary judgment, that Ashley Foster was a gratuitous donee. Accordingly, she received such property subject to a constructive trust in favor of the F&G ESOP's participants and beneficiaries, and was unjustly enriched to at least the same extent.

**C. Ashley Foster Had Notice of the Breach of Trust Before Receiving Assets Impressed with a Constructive Trust**

118. Even if Ashley Foster had given value to the A. Foster Trust in exchange for its corpus – and there is no such evidence in this case – Ashley Foster still cannot be a bona fide purchaser, for she received the F&G ESOP's assets (or their product) with ample notice that such assets had been transferred in breach of trust. By her own admission, the corpus of the A. Foster Trust was not distributed to Ashley Foster until November 2001. Ashley Foster Affidavit ¶ 14. But summons in the present case was issued to Ashley Foster on September 19, 2001 (d/e 75), and her attorney agreed to accept service of process on the next day. Correspondence to James Springer dated September 20, 2001, attached hereto at Tab B. At the very least, Ashley Foster had notice of the breach of trust by October 12, 2001, when she appeared before this Court and filed a motion to dismiss herself from this case. *See Defendants' 12(b)(6) Motion to Dismiss Count XXIII [sic] of Plaintiffs' Amended Complaint, filed October 12, 2001 (d/e 113).* All of these events took place before Ashley Foster received a distribution from the A. Foster Trust, and accordingly, she took that distribution with notice that the proceeds received from the F&G ESOP (or their product) were impressed with a constructive trust. (Or, at the least, plaintiffs' first amended complaint gave Ashley Foster notice of such

facts as should have put her on reasonable inquiry.) For this reason, too, Ashley Anne Foster was not a bona fide purchaser of the F&G ESOP's property.<sup>6</sup>

119. Finally, to the extent that Ashley Foster claims the benefit of the protections of ERISA § 408, she has the burden of proving all the elements of that defense. She has failed to do so in her motion for summary judgment, and has similarly ignored plaintiffs' evidence that more than adequate consideration was paid for the F&G stock in the 1995 and 1997 Transactions. *See* P-932 @ 0008524 (expert report of James Hitchner, opining that value of F&G stock on December 20, 1995 was \$10.85, and that on June 30, 1997 the value of the F&G stock was \$10.37). *See also* P-929 (expert report of Gregory Wol-ski); P-930 (expert report of Professor Charles Linke); and P-931 (expert report of Thomas Bagley), all of which provide further support for the proposition that issues relating to F&G sweepstakes marketing were a material risk to F&G on both dates, yet were not considered in the stock price paid by the ESOP.

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<sup>6</sup> And again, resolution of this issue involves disputed questions of material fact.

**V. Conclusion**

120. The A. Foster Trust and/or its trustee First of America had actual or constructive notice that the 1995 Transaction was consummated in breach of trust because it employed two agents in that transaction, Regal and Stuber, each of whom knew or should have known of the breach. The assets of the F&G ESOP were therefore immediately impressed with a constructive trust in favor of the ESOP's participants and beneficiaries. That constructive trust survived any subsequent conveyance to Ashley Foster, for two independent and adequate reasons: (1) Ashley Foster was a gratuitous donee, and (2) Ashley Foster had notice of the breach of trust, or of facts which should have put her on reasonable inquiry, well before she received the ESOP's property. In any event, these issues involve disputed questions of material fact. Thus, Ashley Anne Foster's motion for judgment as a matter of law must be denied.

Dated: December 13, 2002.

Debra K. Keach and Patricia A. Sage,

By:   
One of their attorneys

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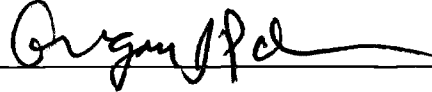
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**CERTIFICATE**

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The undersigned certifies that based on the word and character count of the word processing system used to prepare this document, this document contains 5,649 words and 28,661 characters.

A handwritten signature in black ink, appearing to read 'Orign Pd', is written over a horizontal line.

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**CERTIFICATE OF SERVICE**

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The undersigned certifies that a copy of the foregoing Response to Ashley Anne Foster's Motion for Summary Judgment was served upon the individuals listed below by enclosing the same in an envelope, postage-prepaid, first-class mail, and depositing said envelope in a United States Post Office Mail Box at Peoria, Illinois on December 13, 2002.

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