

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

Case No. 08-80101 CIV-MIDDLEBROOKS/JOHNSON

DIALLO JOHNSON, MARY RAFTER
and LINDA STANLEY, individually and
on Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

WILLIAM S. WHITE, CLAIRE MOTT
WHITE, CHARLES STEWART MOTT
FOUNDATION, ROBERT H. BUKER,
JR., JOHN BUTLER, RIDGWAY H.
WHITE, FREDERICK KIRKPATRICK,
ROY E. PETERSON, W. ARCHIBALD
PIPER, WILLIAM H. PIPER, LLOYD E.
REUSS, HORACE WILKINS, GERARD
BERNARD, UNITED STATES TRUST
COMPANY, N.A., and UNITED STATES
SUGAR CORPORATION,

Defendants.

**UNITED STATES SUGAR CORPORATION'S MOTION TO DISMISS AND
INCORPORATED MEMORANDUM OF LAW**

Defendant United States Sugar Corporation ("U.S. Sugar"), pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), respectfully files its Motion to Dismiss Plaintiffs Diallo Johnson and Linda Stanley's Complaint against it (Plaintiff Mary Rafter does not allege claims against U.S. Sugar) and in support thereof states:

INTRODUCTION AND FACTUAL BACKGROUND

In Counts VI, VIII and IX, Plaintiffs sue U.S. Sugar for alleged violations of the Employee Retirement Income Security Act ("ERISA"). Plaintiffs are disgruntled current

(Plaintiff Johnson) and former (Plaintiff Stanley) participants in U.S. Sugar's Employee Stock Ownership Plan ("ESOP"), which, through its Trustee, owns 38% of U.S. Sugar's stock. Plaintiffs complain that U.S. Sugar failed to disclose to the ESOP participants an August 4, 2005 alleged "offer" by the Lawrence Group to buy 100% of U.S. Sugar's outstanding stock for \$293 per share, a price greater than the per share ESOP valuation. They also allege that Defendants failed to properly consider and, then, approve the "offer." As alleged, Plaintiffs do not have any ownership interest in shares of U.S. Sugar apart from their ESOP participation. Accordingly, Plaintiffs' rights in connection with U.S. Sugar stock are limited to those provided by the ESOP.

The U.S. Sugar ESOP is a noncontributory, defined contribution retirement benefit plan covering substantially all of the employees of U.S. Sugar and is subject to the provisions and protections of the Employee Retirement Income Security Act ("ERISA"). (Complaint at ¶ 59.) Overall responsibility for administering the ESOP rests with a Trustee and an ESOP Committee, both of which are selected by the Board of Directors of U.S. Sugar. (*Id.*) At all relevant times, the Trustee of the U.S. Sugar ESOP was Defendant United States Trust Company, N.A. ("U.S. Trust"). (*Id.* at ¶ 60.) The ESOP's assets are held in trust by the Trustee, who has power to "hold, invest, and administer the Trust assets as a single fund without identification of any part of the Trust assets to the Company or to any Participant" (Ex. 1, (United States Sugar Corporation Employee Stock Ownership Plan Trust Agreement ("ESOP Trust Agreement"))) at § 2.3)¹ U.S. Sugar is the Plan Sponsor. (Complaint at ¶ 60.)

¹ In addressing a motion to dismiss under Fed. R. Civ. P. 12(b)(1) or (b)(6), the Court may rely on exhibits to the complaint, documents referenced in the complaint, documents central to the plaintiff's claims and public records. Brooks v. Blue Cross and Blue Shield, Inc., 116 F.3d 1364, 1369 (11th Cir. 1997); Hoffman-Pugh v. Ramsey, 312 F.3d 1222, 1225 (11th Cir. 2002); Jackson v. BellSouth Telecomm., Inc., 181 F. Supp. 2d 1345, 1353 (S.D. Fla. 2001). Because Plaintiffs'

Neither the Plan nor the ESOP Trust Agreement provides participants with the rights of shareholders during their participation in the Plan. Although the ESOP provides an Account for each participant, which represents each participant's beneficial interest in the Plan's assets (Ex. 2 (U.S. Sugar ESOP Plan Document) at § 5.1; see supra n.1.), "[t]he legal and equitable title and ownership of all assets at any time constituting a part of the Trust Fund shall be and remain with the Trustee." (Ex. 1 (ESOP Trust Agreement) at § 10.9.) According to the ESOP Trust Agreement, it is the Trustee who has the power to sell or otherwise dispose of the property in the Trust Fund, subject only to the requirements in section 4.3. (Id. at § 4.2.) The Trust Agreement also provides that the Trustee shall acquire and hold the shares for the benefit of the participants and distribute such shares to participants only in accordance with the terms of the Plan. (Id. at § 3.3.) The Plan specifically provides that: "... neither the establishment of the Plan ... nor the creation of the Trust or any Account ... shall be construed as giving any Participant ... any legal or equitable right against the Company, and Employer, the Committee, or the Trustees, unless such right shall be specifically provided for in the Plan" (Id. at § 12.2.)

Plaintiffs Johnson and Stanley bring two types of ERISA claims against U.S. Sugar. First, Plaintiffs claim that U.S. Sugar breached its fiduciary duty to the ESOP participants. Plaintiffs bring this claim in Count VI under ERISA § 409, which provides that ERISA fiduciaries who breach their fiduciary duties are liable for resulting ERISA plan losses, and §502(a)(2), which allows ERISA plan participants to sue to recover such losses. In Count IX, Plaintiffs also seek equitable relief for the alleged breaches of fiduciary duty. Second, Plaintiffs claim that they are entitled to recover benefits under the ESOP. Plaintiffs bring this claim in

claims arise from their alleged rights under the ESOP, the governing ESOP documents are fairly considered on a motion to dismiss. See Bickley v. Caremark RX, Inc., 471 F.3d 1325, 1329 (considering prescription drug plan on motion to dismiss, where plan was central to plaintiff's ERISA breach of fiduciary duty claim).

Count VIII under §502(a)(1)(B), which allows ERISA plan participants to sue to recover benefits due under the terms of the participants' ERISA plan or to enforce their rights under the plan.²

Plaintiffs' claims against U.S. Sugar should be dismissed for four reasons. First, Plaintiffs lack standing. Although Plaintiffs complain that U.S. Sugar denied them the opportunity to sell the stock in their ESOP accounts to the Lawrence Group, Plaintiffs had no legal right to tender those shares. Only the ESOP Trustee, the owner of the stock, had that right. Accordingly, Plaintiffs suffered no injury.

Second, Plaintiffs fail to allege that they exhausted the administrative remedies provided by the ESOP. The ESOP's Summary Plan Description sets forth an administrative procedure. See, e.g., Ex. 3 (ESOP Summary Plan Description) at 19. Plaintiffs do not allege that they satisfied that procedure or made any attempt whatsoever to obtain relief administratively by bringing their claims to the attention of the Plan Administrator before filing suit. Under ERISA, this failure mandates dismissal.

Third, Plaintiffs cannot sue U.S. Sugar under ERISA §502(a)(1)(B) to recover benefits purportedly due under the ESOP. A claim for ERISA benefits can only be made against an ERISA plan itself or the plan administrator, and Plaintiffs allege that an ESOP Committee, not U.S. Sugar, is the plan administrator. U.S. Sugar is just the plan sponsor.

Fourth, Plaintiffs cannot sue for equitable relief under ERISA §502(a)(3). It is well-established that a plaintiff cannot pursue a claim under §502(a)(3) if he can pursue a claim under either of the other sections under which Plaintiffs sue.³

² In Count VIII of the Complaint, Plaintiffs allege a claim under §502(a)(1)(B), codified as §29 U.S.C. §1132(a)(1)(B), but miscited to 29 U.S.C. §1132(a)(1)(A). U.S. Sugar assumes that Plaintiffs assert a claim under §502(a)(1)(B), codified as 29 U.S.C. §1132(a)(1)(B).

³ Plaintiffs bring this case as a putative class action. To the extent Plaintiff Johnson purports to sue on behalf of all current, vested ESOP participants as of August 4, 2005, U.S. Sugar's bases

MEMORANDUM OF LAW

I. PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED UNDER FED. R. CIV. P. 12(B)(1) BECAUSE PLAINTIFFS LACK STANDING.

For a federal court to have subject matter jurisdiction, the plaintiffs must, among other things, have standing to bring their claims. Westchester Fire Ins. Co. v. Punit Corp., 2006 WL 3755198, * 2 (N.D. Fla. 2006). “The constitutional limits on standing eliminate claims in which the plaintiff has failed to make out a case or controversy between himself and the defendant.” Lynch v. Baxley, 744 F.2d 1452 (11th Cir. 1984) (quoting Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979)). At an “irreducible minimum,” Article III requires a plaintiff to meet three requirements of standing:

First, the plaintiff must show that she has suffered an injury-in-fact. The plaintiff must show that the alleged injury arises from the invasion of a legally protected interest that is sufficiently concrete and particularized, and not abstract and indefinite. Second, the plaintiff must establish a causal connection between the asserted injury-in-fact and the challenged action of the defendant. Third, the plaintiff must show that it is likely, rather than speculative, that a favorable decision will redress her injury.

Williams v. Board of Regents of University System of Georgia, 477 F.3d 1282, 1302 (11th Cir. 2007) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal citations and quotations omitted)). When addressing a motion to dismiss under Rule 12(b)(1) that factually challenges the court’s subject matter jurisdiction, the court need not accept the allegations in the Complaint as true and may consider extrinsic evidence, including affidavits. Morrison v. Amway Corp., 323 F.3d 920, 925 n. 5 (11th Cir. 2003).

As to the first standing requirement, it is well-settled that a plaintiff must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third

for dismissal against Johnson also apply to the putative class members who are ESOP participants. To the extent Plaintiff Stanley purports to sue on behalf of all former ESOP participants who retired and sold the stock in their ESOP accounts back to U.S. Sugar, U.S. Sugar’s bases for dismissal against Stanley apply to this group of former ESOP participants.

parties. AT& T Mobility, LLC v. Nat'l Ass'n For Stock Car Auto Racing, Inc., 494 F.3d 1356, 1361-62 (11th Cir. 2007) (internal quotations omitted). Absent exceptional circumstances, a third party does not have standing to challenge injury to another. Id. (internal quotations omitted).

Here, Plaintiffs Johnson and Stanley assert claims arising from a right to sell U.S. Sugar stock that belonged not to them, as ESOP participants, but to the ESOP's Trustee. The ESOP documents, which control Plaintiffs' rights under ERISA, state that the ESOP's Trustee has the right to decide whether to tender or not tender all the stock in the ESOP. See Moore v. Metropolitan Life Ins. Co., 856 F.2d 488, 492 (2d Cir. 1988) (Congress intended that plan documents and Summary Plan Descriptions exclusively govern an employer's obligations under ERISA plans). Nonsensically, Plaintiffs repeatedly allege that the ESOP participants should have had the opportunity to "sell or not to sell" their shares to the Lawrence Group, see Complaint at ¶¶ 53, 58, 61, 62, 71, 98, 105, 120, 125, 139, 152, and claim that "[i]t is not a decision for the Trustee to make, and certainly not a decision for the Mott White Family or the Board of Directors of U.S. Sugar to make," Complaint at ¶ 61. But that allegation is directly contradicted by the controlling ESOP documents.

The ESOP Trust Agreement, in § 4.4 ("Tender Offer for Company Stock"), states that "[i]f the Company does not have a registration-type class of securities [as defined in Section 409(e)(4) of the Internal Revenue Code], then the Trustee shall tender or exchange, or not tender or exchange, all allocated and unallocated shares in its own discretion." (Ex. 1 (ESOP Trust Agreement.)) Section 409(e)(4) of the Internal Revenue Code defines a registration-type class of securities as a class (a) that is required to be registered under Section 12 of the Securities Exchange Act of 1934 or (b) that would be required to be registered except for the exemption from registration provided in Section 12(g)(2)(H) of the Securities Exchange Act of 1934.

Under Section 12 of the Securities Exchange Act of 1934, a class of securities is required to be registered if (a) the issuer of the securities wants the securities to be listed and traded on a national securities exchange (15 U.S.C. § 78l(b)) or (b) if the issuer of the securities has total assets of more than \$10 million *and* the class of equity securities is held by more than 500 holders of record as of the last day of the issuer's fiscal year (15 U.S.C. § 78l(g); 17 C.F.R. § 240.12g-1) (emphasis added).

U.S. Sugar's stock is not a "registration-type class" of securities. As acknowledged in Plaintiffs' Complaint, U.S. Sugar stock is not listed or traded on a national securities exchange. (Complaint at ¶ 63.) Although not addressed in Plaintiffs' Complaint, it is undisputed that U.S. Sugar has less than 500 shareholders of record, as that term is defined in the securities rules. The company currently has 68 shareholders of record, including the ESOP, and, at all times since August 4, 2005, has had less than 500 shareholders of record. (Ex. 4 (Declaration of Gerard Bernard.)) As a matter of law, for purposes of determining the number of holders of record, securities identified as held of record by a trust, including the Trustee of the ESOP, are counted as held by one person. See Securities Exchange Act of 1934 Rule 12g5-1(a)(2) ("For the purpose of determining whether an issuer is subject to the provisions of Section[] 12(g) . . . securities shall be deemed to be 'held of record' by each person who is identified as the owner of such securities on records of security holders maintained by or on behalf of the issuer, subject to the following: (2) Securities identified as held of record by a corporation, a partnership, a trust whether or not the trustees are named, or other organization shall be included as so held by one person."). See also Ex. 1 (ESOP Trust Agreement) at § 10.9 ("The legal and equitable title and ownership of all assets at any time constituting a part of the Trust Fund shall be and remain with the Trustee.")

Because U.S. Sugar's stock is not a registration-type class of securities, even if the Lawrence Group had made a tender offer for U.S. Sugar's stock, the Trustee -- not the ESOP participants -- would have had the right to tender or not tender the shares in the ESOP. Because Plaintiffs had no right to sell the shares allocated to their ESOP accounts to the Lawrence Group, they lack standing to assert claims arising from their inability to sell those shares.

II. PLAINTIFFS' ERISA CLAIMS SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UNDER ERISA.

A. PLAINTIFFS CLAIMS SHOULD BE DISMISSED FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

Plaintiffs in ERISA actions must exhaust available administrative remedies before filing suit to recover plan benefits (as Plaintiffs assert in Count VIII) and to assert claims for ERISA statutory violations, including breach of ERISA fiduciary duty (as Plaintiffs assert in Counts VI and IX). See Bickley v. Caremark RX, Inc., 461 F.3d 1325, 1328 (11th Cir. 2006); Perrino v. Southern Bell Telephone & Telegraph Co., 209 F.3d 1309, 1315 (11th Cir. 2000); Byrd v. MacPapers, Inc., 961 F.2d 157, 160 (11th Cir. 1992). As fully set forth in Defendant U.S. Trust's Motion to Dismiss, all three ERISA counts must be dismissed because Plaintiffs fail to plead -- and cannot plead -- that they exhausted their administrative remedies. U.S. Sugar adopts and incorporates by reference Section B of U.S. Trust's memorandum of law in support of its motion to dismiss.

B. PLAINTIFFS FAIL TO STATE A CLAIM AGAINST U.S. SUGAR FOR BENEFITS UNDER ERISA § 502(A)(1)(B).

1. U.S. SUGAR IS NOT A PROPER DEFENDANT UNDER § 502(A)(1)(B) BECAUSE IT IS NOT THE PLAN ADMINISTRATOR.

“The proper party defendant in an action concerning ERISA benefits is the party that controls administration of the plan.” Garren v. John Hancock Mutual Life Ins. Co., 114 F.3d 186, 187 (11th Cir. 1997) (affirming dismissal of §502(a)(1)(B) claim against insurance company because it was not the plan administrator). Under ERISA § 502(d), “any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity,” Id. §1132(d), or against the plan “administrator.” Rosen v. TRW, Inc., 979 F.2d 191, 193-94 (11th Cir. 1992).

ERISA defines “administrator” as “the person specifically so designated by the terms of the instrument under which the plan is operated.” 29 U.S.C. § 1002(16). If the employer is not the designated administrator, then the employer may not be held liable under § 502(a)(1)(B) unless the employer is the *de facto* administrator of the plan or holds itself out as the administrator. Rosen, 979 F.2d at 193-94; Hamilton v. Allen-Bradley Co., Inc., 244 F.3d 819, 824 (11th Cir. 2001).

Here, the Complaint and applicable documents show that U.S. Sugar is neither the designated plan administrator nor the *de facto* plan administrator. Rather, as Plaintiffs allege, “[o]verall responsibility for administering the ESOP rests with a Trustee and an ESOP Committee.” (Complaint at ¶ 59.) Under the ESOP, “[t]he Plan shall be administered by the Committee,” which “is hereby designated as the ‘plan administrator’ within the meaning of Act Section 3(16)(A)” (Ex. 2 (ESOP Plan Document) at § 11.1.) The ESOP Summary Plan Description also states that “[t]he Plan is administered by the Committee.” (Ex. 3 (ESOP Summary Plan Description) at 19.) Additionally, the ESOP Trust Agreement states that U.S.

Trust, as the Trustee, has the power to “hold, invest, and *administer* the Trust assets...” (Ex. 1 (ESOP Trust Agreement) at § 2.3) (emphasis added). Plaintiffs allege that the Trustee, not U.S. Sugar, determines the Fair Market Value of the U.S. Sugar stock in the ESOP. (Complaint at ¶ 64.) Consequently, Count VIII should be dismissed.

2. PLAINTIFFS WERE NOT DENIED A RIGHT TO SELL THE STOCK ALLOCATED TO THEIR ESOP ACCOUNTS TO THE LAWRENCE GROUP.

Plaintiffs wrongly claim that they “possessed the right under the ESOP Plan documents and Trust Agreement, to sell or not sell their shares to the Lawrence Group, and were deprived of that right.” (Complaint at ¶ 152.) However, as already discussed, the ESOP participants did not have the right to sell the stock allocated to their ESOP accounts. The Trustee had the right to decide to tender or not tender all allocated and unallocated stock in the ESOP. For this reason too, Johnson’s § 502(a)(1)(B) claim should be dismissed in its entirety (as this is the only “right” Johnson allegedly was denied) and Stanley’s § 502(a)(1)(B) claim should be dismissed to the extent it is based on this purported denial.

C. PLAINTIFFS FAIL TO STATE A CLAIM UNDER ERISA § 502(A)(3) BECAUSE THEY ARE PROCEEDING UNDER §§ 502(A)(1)(B) AND 502(A)(2).

Equitable relief under ERISA § 502(a)(3) is *not* appropriate if Congress provided for adequate non-equitable relief elsewhere in the statute. Katz v. Comprehensive Plan of Group Ins., 197 F.3d 1084, 1088-89 (11th Cir. 1999); Dupree v. The Prudential Ins. Co. of America, 2007 WL 2263892 , *54 (S.D. Fla. Aug. 7, 2007). Accordingly, an ERISA plaintiff who has an adequate remedy under §§ 502(a)(1)(B) or 502(a)(2) cannot alternatively plead for equitable relief and proceed under § 502(a)(3). Katz, 197 F.3d at 1088.

The availability of an adequate remedy does not mean or guarantee an adjudication in the Plaintiffs’ favor. Id. at 1089. Rather, where a plaintiff’s ERISA claims arise from the same

alleged facts, the bar to equitable relief exists at the pleading stage, before the merits of the Plaintiffs' claims under §§ 502(a)(1)(B) or 502(a)(2) have been adjudged, and continues even if Plaintiffs' claims under those other sections fail. See id. at 1089 (holding that district court properly granted summary judgment on plaintiff's § 502(a)(3) claim even though plaintiff did not prevail on merits of § 502(a)(1)(B) claim); Ogden v. Blue Bell Creameries U.S.A., Inc., 348 F.3d 1284, 1285 (11th Cir. 2003) (holding that an ERISA plaintiff has no cause of action under § 502(a)(3) where Congress provided for an adequate remedy elsewhere in ERISA, even if *res judicata* bars the adequate remedy provided).

Here, although they are suing the wrong defendant, Plaintiffs Johnson and Stanley allege claims under ERISA § 502(a)(1)(B). Plaintiffs also are proceeding under § 502(a)(2). Plaintiffs' claim under § 502(a)(3) is based on the same alleged facts. Accordingly, Count IX should be dismissed.

Wherefore, for the foregoing reasons U.S. Sugar respectfully requests that the Court dismiss Counts VI, VIII and IX of Plaintiffs' Complaint, and for such other relief as the Court deems proper.

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CERTIFICATE OF SERVICE

I certify that on the 7th of April, 2008, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following: Curtis B. Miner, Esquire, Lewis S. Eidson, Esquire, and Roberto Martinez, Esquire, COLSON HICKS EIDSON, *Attorneys for Plaintiffs*; and all Defendants' counsel of record on the attached Service List.

/s/ Curtis Alva
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Diallo Johnson, et al. vs. William S. White, et al.
United States District Court, Southern District of Florida, Case No.: 08-80101-CIV-
Middlebrooks/Johnson

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