

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 08-80101 -- Civ -- Middlebrooks/Johnson

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

Plaintiffs)

v.)

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)

**DEFENDANT UNITED STATES TRUST COMPANY, N.A.’S MOTION TO DISMISS
AND INCORPORATED MEMORANDUM IN SUPPORT¹**

Defendant United States Trust Company, N.A. files this motion to dismiss the complaint as against U.S. Trust. While plaintiffs assert a variety of claims against a variety of defendants, the sole claim against U.S. Trust is a claim under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001-1461 (“ERISA”). Plaintiffs have entirely failed to

¹ As of February 22, 2008, United States Trust Company, N.A. was merged into Bank of America, N.A. There is no longer any entity named United States Trust Company, N.A. This suit was filed in January 2008, prior to the merger. In filing this motion, the surviving entity, Bank of America N.A., responds to the claim asserted against the defendant named as United States Trust Company, N.A., and will refer to that entity in this brief as U.S. Trust for ease of analysis.

allege that they satisfied ERISA's threshold requirement to exhaust administrative remedies. As a consequence, plaintiffs are not permitted to assert any claim under ERISA, and the claim against U.S. Trust must be dismissed.

I. FACTUAL ALLEGATIONS

Plaintiffs are three former employees of U.S. Sugar Corporation who purport to bring this putative class action to challenge, among other things, the valuation of U.S. Sugar's stock in the Company's Employee Stock Ownership Plan (the "ESOP").² Plaintiffs claim that the valuation from August 2005 forward was and is too low because it allegedly fails to take into account two alleged outside offers to purchase the Company's stock in 2005 and 2007. The ESOP is an employee benefit plan within the meaning of Internal Revenue Code § 4975(e)(7), 29 U.S.C. § 4975(e)(7), and an "eligible individual account plan" under ERISA § 407(d)(3), 29 U.S.C. § 1107(d)(3).³ The ESOP's Summary Plan Description sets forth an administrative procedure. (*See, e.g.*, Exhibit 2 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.

² Two of the three plaintiffs expressly allege that they are participants in the ESOP. (Compl. ¶¶ 14, 16.) Plaintiff Rafter does not allege that she is a participant in the ESOP (*id.* ¶ 15) and does not appear to seek any relief under ERISA. (*Id.* un-numbered "wherefore" paragraphs immediately following ¶¶ 141, 147, 154, 157.) In any event, all of plaintiffs' purported ERISA claims are barred because they failed to exhaust their administrative remedies.

³ Copies of the United States Sugar Corporation Employee Stock Ownership Plan and the United States Sugar Corporate Employee Stock Ownership Plan Summary Plan Description are attached as Exhibits 1 and 2, respectively. This Court can consider the attached plan documents in ruling upon this Rule 12 motion because they are "central to the plaintiff[s]' claim" and "undisputed." *Hanna v. WCI Commc'ns, Inc.*, 348 F. Supp. 2d 1322, 1325 (S.D. Fla. 2004) ("Under established Eleventh Circuit precedent, a document attached to a motion to dismiss may be considered by the court without converting the motion into one for summary judgment if the attached document is: (1) central to the plaintiff's claim; and (2) undisputed.") (citing *Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002)).

The ESOP is administered by the United States Sugar Corporation Employee Stock Ownership Plan Committee (the “ESOP Committee”). (Exhibit 1 Article 11.1.) The ESOP Committee is ultimately responsible for, among other things, valuing the U.S. Sugar stock allocable to each participant’s account. (*Id.* Article 5.3.) U.S. Sugar is a closely held company. Thus, there is no public market for the Company’s shares and no publicly available means to determine the value of those shares. (Compl. ¶ 3.) Under the terms of the ESOP, the Committee is responsible for determining the “[F]air [M]arket [V]alue” of the stock allocable to each participant’s account “based upon the determination of one or more independent appraisers having expertise in rendering such evaluations and in accordance with applicable regulations under the [Internal Revenue] Code and the [Employee Retirement Income Security] Act.” (Exhibit 1 Article 5.3.)

The ESOP Committee contracted with U.S. Trust to serve as the Trustee of the ESOP. (Compl. ¶ 60.) As Trustee, U.S. Trust is a named fiduciary of the ESOP and has undertaken certain of the ESOP Committee’s tasks. (*Id.* ¶ 33.) Hence, U.S. Trust has assumed responsibility for setting the “Fair Market Value” of the U.S. Sugar stock allocable to each participant’s account. (*Id.* ¶ 64.) In determining the “Fair Market Value” of shares of the Company, U.S. Trust obtains an appraisal from Houlihan, Lokey, Howard & Zukin, the international investment banking firm. (*Id.*) Houlihan Lokey conducts those appraisals three times a year, as of April 30, October 31, and December 31. The “Fair Market Value” of the Company’s stock ranged from \$194 per share to \$204 per share during the two-year period from 2005 until 2007. (Compl. ¶ 3.)

On August 4, 2005, Gaylon M. Lawrence, Sr. and Gaylon M. Lawrence, Jr. (the “Lawrence Group”) allegedly made an offer to U.S. Sugar’s then Chief Executive Officer,

Robert Dolson, to purchase the Company for \$575,000,000 or \$293 per share. (*Id.* ¶ 4.) The Board of Directors of U.S. Sugar rejected the Lawrence Group’s alleged offer on March 14, 2006. (*Id.* ¶ 7.) In January 2007, the Lawrence Group renewed its offer to purchase U.S. Sugar for \$293 per share. (*Id.*) Plaintiffs claim (1) that U.S. Trust should have taken the Lawrence Group offers into account; (2) that U.S. Trust allegedly was unaware of the offers or failed to take them into account; and (3) that U.S. Trust and the ESOP allegedly undervalued U.S. Sugar’s stock, causing damage to any participants who redeemed their stock at a value lower than the Lawrence Group offers. (*Id.* ¶¶ 14-16.) Based on these allegations, plaintiffs allege in Count VII of their Complaint that U.S. Trust breached its fiduciary duties under ERISA § 502(a)(2), 29 U.S.C. 1132(a)(2), because U.S. Trust “failed to learn of the existence of the [Lawrence Group] offer and/or failed to ensure that the offer was properly taken into consideration in the valuation of the ESOP shares.” (*Id.* Count VII, ¶¶ 145-46.)

II. ARGUMENT AND CITATION OF AUTHORITIES

A. Legal Standard For Motion To Dismiss

Rule 12(b)(6) of the Federal Rules of Civil Procedure authorizes the early dismissal of claims based on dispositive issues of law. *See Neitzke v. Williams*, 490 U.S. 319, 326 (1989). “This procedure, operating on the assumption that the factual allegations in the complaint are true, streamlines litigation by dispensing with needless discovery and fact finding.” *Id.* at 326-27. A complaint must set forth factual allegations sufficient to “raise a right to relief above the speculative level . . . on the assumption that all the allegations . . . are true (even if doubtful in fact).” *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007) (upholding dismissal under Rule 12) (internal citations omitted). In *Twombly*, the Supreme Court retired the standard set forth in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), that “a complaint should not be dismissed

for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” 127 S. Ct. at 1969.

B. Plaintiffs Have Not Exhausted Their Administrative Remedies And Their ERISA Claims Must Be Dismissed.

Plaintiffs purport to assert a claim against U.S. Trust solely under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), which permits participants to bring a civil action “for appropriate relief” to address a breach of the fiduciary duty. Of course, the crux of plaintiffs’ claim is that ESOP participants who redeemed their stock under a valuation lower than the Lawrence Group’s offer of \$293 per share should have received higher benefits. (See Compl. ¶¶ 149-54.) Properly characterized, plaintiffs’ claim is really an assertion that they were denied benefits under the terms of the ESOP (i.e., the “fair market value” of their U.S. Sugar stock), a claim that falls under ERISA § 502(a)(1)(B).⁴ But regardless of whether plaintiffs’ claim falls under § 502(a)(2) as they claim, or more correctly, under § 502(a)(1)(B), the same exhaustion requirement applies to both claims under Eleventh Circuit law.

The Eleventh Circuit has expressly considered whether ERISA’s exhaustion requirement applies to breach of fiduciary claims asserted under § 502(a)(2), and ruled that it does. See *Bickley v. Caremark RX, Inc.*, 461 F.3d 1325, 1328 (11th Cir. 2006) (holding that the exhaustion requirement is not limited to benefits claims, but also applies to claims arising from the substantive provisions of the statute itself, including claims based on the defendant’s breach of

⁴ In *Varity v. Howe*, 516 U.S. 489, 515 (1996), the Supreme Court held that participants with benefits claims under ERISA § 502(a)(1)(B) cannot bring claims for “appropriate relief” under ERISA § 502(a)(3). The same limitation should apply to claims brought under ERISA § 502(a)(2), which uses identical statutory language. See *LaRue v. DeWolff, Boberg & Assocs., Inc.* 128 S. Ct. 1020, 1026-28 (2008) (Roberts, C.J., concurring) (discussing *Varity* and noting that “[a]pplying the same rationale to an interpretation of ‘appropriate’ in § 502(a)(2) would accord with our usual preference for construing the ‘same terms [to] have the same meaning in different sections of the same statute’”) (quoting *Barnhill v. Johnson*, 503 U.S. 393, 406 (1992)).

an ERISA-imposed fiduciary duty under ERISA § 502(a)(2)); *Perrino v. S. Bell Tel. & Tel. Co.*, 209 F.3d 1309, 1313-14 (11th Cir. 2000) (same). Under the controlling law in this Circuit, plaintiffs were required to exhaust the administrative remedies under the ESOP before filing suit. Plaintiffs do not allege that they exhausted those remedies, and do not allege any grounds to avoid the exhaustion requirement. Under governing Eleventh Circuit law, plaintiffs' claims against U.S. Trust must be dismissed. See *Byrd v. MacPapers, Inc.*, 961 F.2d 157, 160-61 (11th Cir. 1992) (affirming dismissal because ERISA plaintiff "did not allege anything about whether she pursued any available relief under the claims procedures terms of [defendant's] employee benefits plan").

III. CONCLUSION

For the foregoing reasons, U.S. Trust Company, N.A. should be dismissed as a defendant, and Count VII of plaintiffs' Complaint asserting the claim against U.S. Trust must be dismissed.

Dated: April 7, 2008

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by CM/ECF on April 7, 2008 on all counsel of parties of record on the attached service list.

/s/ David Tetrick, Jr.
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