

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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IN RE UNITED STATES SUGAR	:	Master File No.
CORPORATION LITIGATION	:	08-80101-CIV-MIDDLEBROOKS
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**PLAINTIFFS' CONSOLIDATED RESPONSE TO
DEFENDANTS' MOTIONS TO DISMISS THE CONSOLIDATED COMPLAINT**

Plaintiffs DIALLO JOHNSON, MARY RAFTER and LINDA STANLEY (Case No. 08-80101); and Plaintiffs MIGUEL MATURA (Case No.: 08-80711); Plaintiff MICHAEL TEXTON (Case No. 08-80778); and Plaintiff MICHAEL ROLAND (Case No. 08-80780), file this consolidated response to the following motions: (1) Defendant William S. White's and Ridgway White's Motion to Dismiss Consolidated Class Action Complaint (D.E. 147); (2) Motion to Dismiss Consolidated Class Action Complaint by Defendants Robert H. Buker, Jr., et al. (D.E. 146); (3) Defendant Charles Stewart Mott Foundation's Motion to Dismiss the Consolidated Complaint (D.E. 145); (4) Defendant United States Trust Company, N.A.'s Motion to Dismiss Consolidated Complaint (D.E. 143); and (5) United States Sugar Corporation's Motion to Dismiss Consolidated Class Action Complaint (D.E. 148).

INTRODUCTION

Plaintiffs Diallo Johnson and Linda Stanley, former employees of United States Sugar Corporation ("U.S. Sugar" or the "Company"), are current and former participants in U.S. Sugar's Employee Stock Ownership Plan (the "ESOP"). Plaintiffs Miguel Matura, Michael Texton and Michael Roland are also participants in the ESOP. Plaintiff Mary Rafter, also a former employee, is a direct minority shareholder in U.S. Sugar. One of the purposes of the ESOP was to provide U.S. Sugar's employees with retirement benefits in the form of shares in their employer. These employee shareholders have never had an opportunity to sell their shares to an outside purchaser and can only sell their shares back to U.S. Sugar at a price that is dictated to them. The employee shareholders also have no representation on U.S. Sugar's Board.

Unfortunately for the employee shareholders, the price they have been provided for their shares has steadily declined since the events at issue, from a price of \$199.10 per share to a price more recently of just \$180.00 per share. Even the dividend on the shares, on which many of the employee shareholders depended, has been suspended.

It did not need to turn out this way for U.S. Sugar's employee shareholders. As set forth in detail in the 50-plus page Consolidated Class Action Complaint, Plaintiffs allege that in August 2005 an outside purchaser, the Lawrence Group, reached agreement with U.S. Sugar's former CEO to buy every share of U.S. Sugar for \$293 per share in cash (or \$575 million total in cash). The Lawrence Group's offer was the only outside offer to purchase U.S. Sugar's shares in decades and was an extraordinarily valuable offer to U.S. Sugar's shareholders by any reasonable measure. It was at a premium price roughly 50% higher than what the ESOP participants were being told was the "Fair Market Value" of their shares, and roughly 91% higher than what certain charitable shareholders were representing to the Internal Revenue Service as the "Fair Market Value" of their shares.

The Board of Directors, led by its Chairman William S. White, nonetheless rejected the offer without disclosing it to the employee shareholders. This is no case where a Board can simply couch its decision in terms of a "business judgment" as to what was in the best interests of the shareholders. U.S. Sugar is a company that is controlled by the descendants of its founder, Charles Stewart Mott, and in particular by William S. White (who is married to one of those descendants). White controls the Company's Board of Directors, a majority of whom are not independent. Moreover, White was operating under a conflict of interest that prevented him and the Board from giving fair consideration to the outside offer, as it would not only result in his family's loss of its longtime control over U.S. Sugar but would also put an end to his ongoing plan to increase his family's ownership interest in U.S. Sugar by repurchasing and retiring the ESOP participants' shares for unfairly cheap prices.

What is worse, following the rejection of the Lawrence Group's offer, a series of misrepresentations were made to the employee shareholders by certain of the Defendants that the value of their shares was declining further, without ever taking into account the fact that an outside

party was ready, willing and able to purchase their shares for \$293 per share. Remarkably, according to public pronouncements by U.S. Sugar's CEO (defendant Robert Buker), following the filing of this lawsuit, the \$293 per share offer was a "ridiculous offer," and it would have been an "absolute crime to sell it" at that price. Consolidated Class Action Complaint ("Compl.") ¶ 75. But if the \$293 per share price is "ridiculous" and a "crime," what does that say of U.S. Sugar's conduct in paying its employee shareholders \$100 less than that "ridiculous" amount per share? The Defendants are seeking to have it both ways: holding out an extremely high valuation of U.S. Sugar in an effort to justify rejecting the Lawrence Group's offer, but then paying their employee shareholders a purported Fair Market Value price that is far worse than that offer.

There are two general parts to Plaintiffs' claims. The first part relates to the rejection of the Lawrence Group's offer. Plaintiffs, in their capacity as direct and beneficial shareholders in U.S. Sugar, bring common law claims for breach of fiduciary duty (Counts I – III) and conversion (Count V) against William S. White and the other members of the Board Directors who presided over this conduct (collectively, the "Director Defendants"), U.S. Sugar's CFO Gerard Bernard, and one of its controlling shareholders, the Charles Stewart Mott Foundation (the "Mott Foundation"). The second part relates to the distinct wrongful conduct and undervaluation of the ESOP participants' shares that followed the rejection of the offer. The Plaintiffs (other than Rafter, the direct shareholder) bring these claims under the Employee Retirement Income Security Act ("ERISA") based on their status as participants in the U.S. Sugar ESOP (Counts VI – XIII).

BACKGROUND

U.S. Sugar is a privately held corporation with its headquarters in Clewiston, Florida. Compl. ¶ 18. The Company was founded in 1931 by Charles Stewart Mott, and to this day is controlled by his descendants. *See id.* ¶ 35. William S. White, who is married to one of Mott's granddaughters, has been Chairman of the Board of Directors of the Company for the past 20 years

(and on the Board for the past 37 years) and is Chairman of its Executive Committee, its Compensation Committee and its Director Selection Committee. *See id.* ¶ 21. A majority of his Board of Directors, most of whom have been Directors for over a decade, is beholden to him for their jobs at U.S. Sugar or other Mott family organizations. *See id.* ¶¶ 24-30, 39. The Board's most recent addition is White's 27-year-old son. *See id.* ¶ 54.

William S. White and his family maintain control of U.S. Sugar through their direct and indirect holdings in its stock, through the holdings of the Mott Foundation, a Michigan foundation founded by Charles Stewart Mott, and through certain agreements not to sell U.S. Sugar shares that the Mott Foundation has entered into with other Michigan charities associated with the Mott family. Compl. ¶¶ 35-38.

U.S. Sugar has an ESOP through which its current and former employees own approximately 35% of the Company. Compl. ¶ 40. Despite holding the largest single bloc of shares, the employee shareholders have no representation on the Board. *See id.* ¶ 40. The ESOP was a vehicle, formed in 1983, by which the Mott family took the Company private when they "wished to reduce their holdings in U.S. Sugar but did not wish to relinquish their aggregated ability to exercise majority control over the company." *Kahn v. U.S. Sugar Corp.*, 1985 WL 4449, at *2 (Del. Ch. Dec. 10, 1985). That "aggregated ability to exercise majority control" remains to this day. Compl. ¶¶ 35-37. The employees are beneficial owners of the shares, but do not receive them until they become eligible for a distribution from the ESOP when they retire, reach early retirement or in other specific circumstances. Compl. ¶¶ 43-44. The only way employees can sell their shares, in the absence of an outside offer, is to "put" them back to U.S. Sugar at the Fair Market Value, a price determined with the assistance of an appraisal obtained by U.S. Sugar and the trustee of the ESOP, United States Trust Company, N.A. ("U.S. Trust"). *See id.* ¶¶ 42-44.

A. The Lawrence Group's Offers.

In June 2005, the Lawrence Group, a group with agricultural and business holdings worth more than one billion dollars, entered into negotiations to purchase U.S. Sugar with its then-CEO Robert Dolson. Compl. ¶¶ 46-47. Dolson initially asked \$600 million for the purchase of all of the Company's stock, and they eventually reached agreement, in August 2005, on a price of \$575 million in cash or \$293 per share in cash for the purchase of all of U.S. Sugar's outstanding shares by the Lawrence Group. *See id.* ¶¶ 47-48. Dolson, who knew this was the first time in decades that the shareholders would have an opportunity to sell their shares, assured the Lawrence Group that he could deliver all of the shares in the Company at that price. *See id.* ¶ 49.

The Lawrence Group's offer was extraordinary by any measure. It was at a 51% premium, or approximately \$100 per share more, over what U.S. Sugar was representing to its employees as the Fair Market Value of their shares. Compl. ¶¶ 48-50. It was also at a premium of 91% over the amount that the Mott Foundation and other charitable shareholders were representing their shares to be worth in their tax filings with the IRS. *See id.* ¶ 73.

After the offer was presented to the Board, William S. White promptly took control of the dealings with the Lawrence Group, installed a new CEO (defendant Robert Buker) in Dolson's place, and authorized an extraordinary severance payment of \$10 million to be wired to Dolson who proceeded into retirement. Compl. ¶¶ 51-53. While the purchase offer represented an extraordinary benefit for U.S. Sugar's employee and certain other shareholders, it would have meant White and his family losing control of the Company, something he was not going to allow happen. *See id.* ¶¶ 53-54. White had been overseeing a plan to increase the ownership of U.S. Sugar by his family and shrink the ownership by the employee shareholders: every time that U.S. Sugar purchased and cancelled the shares of employees whom it fired or who retired, the stake in U.S. Sugar held by White's family grew in size and value, without having to pay anything. *See id.* ¶ 53. As a result,

from 2000 to just 2005, the percentage of U.S. Sugar owned by members of the Mott family increased by 19.4% without them paying a penny. *See id.* ¶ 63.

In a foreordained conclusion, the Board formally rejected the offer on March 14, 2006. Compl. ¶ 58. At no time did White, Buker or the Board even seek a higher or better offer from the Lawrence Group. *See id.* ¶ 60. Claiming their actions were in the best interests of the shareholders, White and his Board have since presided over a further decline in the price paid to the employee shareholders (now just \$180 per share) and have even suspended the dividend payments that many of these employee shareholders depended upon. *See id.* ¶¶ 71-72.

The Lawrence Group returned, on January 8, 2007, and made a second offer to U.S. Sugar to buy all of its stock for \$293 per share. Compl. ¶ 65. This time, the Board summarily rejected the offer. *See id.* ¶ 66.

B. The Subsequent Misrepresentations Regarding the ESOP Share Value.

At the same time that U.S. Sugar's Board was purportedly giving consideration to the adequacy of an offer of \$293 in cash for each share of the Company's stock, it was representing to its employee shareholders that the Fair Market Value of their shares was only \$199.10 per share (almost \$100 per share less). Compl. ¶ 61. In fact, after William S. White and the Board rejected the offer, the employee shareholders were told that their shares had decreased in value, to \$194.10 per share. *See id.* ¶ 64. These representations were sent in writing to the ESOP participants, as set forth in detail in the Complaint. *See id.* ¶¶ 61-62.

The price paid to the ESOP participants for their shares when they become eligible for a distribution is supposed to be the "Fair Market Value" – that is, the price at which the shares would change hands between a willing buyer and a willing seller. Compl. ¶¶ 3, 45. Whether a *bona fide* outside offer has been made to purchase a non-public stock is and should be a primary factor in the determination of the Fair Market Value of the shares. *See id.* ¶ 45. The ESOP participants allege

that, after the rejection of the Lawrence Group's offer, the valuation of their shares of U.S. Sugar was improper and unfairly low. In addition, to the extent the Director Defendants purported to rely on information, including a valuation of its land, to suggest that the shares of U.S. Sugar were worth even more than what the Lawrence Group offered in order to justify their decision, then the undervaluation of the shares held by the ESOP participants is even worse. *See id.* ¶ 74.

C. Plaintiffs' Claims.

Plaintiffs' claims arise from two distinct wrongs. Plaintiffs' common law claims arise out of the Defendants' conduct in failing to disclose the Lawrence Group's offers to the employee and certain other shareholders and rejecting those offers. Plaintiffs bring a claim for breach of the fiduciary duty of loyalty and good faith (Count I) against the Director Defendants, including U.S. Sugar's Chairman William S. White and its President & CEO Robert Buker. Plaintiffs bring a claim for breach of fiduciary duty by self-dealing (Count II) against the Director Defendants, U.S. Sugar and the Mott Foundation. Plaintiffs also bring a claim for breach of fiduciary duty against the Mott Foundation and William S. White as controlling shareholders of U.S. Sugar (Count III). Plaintiffs in Case No. 08-80101 also bring a tort claim for conversion against William S. White individually and against the Mott Foundation vicariously (Count V).¹

Plaintiffs (other than Mary Rafter, who is a direct shareholder) also bring ERISA claims against certain of the Defendants arising out of conduct following the rejection of the Lawrence Group's offer with respect to the valuation of the U.S. Sugar shares held by the ESOP participants. Specifically, Plaintiffs bring claims (a) for violations of ERISA's various fiduciary (and co-fiduciary) duty provisions (Counts VI, VII VIII, IX, and X) against U.S. Sugar, the U.S. Sugar

¹ In addition, Plaintiffs brought a claim for breach of fiduciary duty against the Director Defendants (Count IV) based on the potential transaction with the State of Florida. Plaintiffs do not dispute that the terms of the potential deal are not yet final, and so not currently ripe for consideration, and so give notice of their voluntarily dismissal of Count IV (and only that Count) without prejudice pursuant to Fed.R.Civ.P. 41(a)(1)(A)(i).

ESOP Committee, the Director Defendants, CFO Gerard Bernard and U.S. Trust; (b) for violations of ERISA's prohibition against self-dealing transactions (Count XI); (c) for removal of ESOP fiduciaries U.S. Trust and the ESOP Committee (Count XII); and (d) for unlawful interference with the attainment of benefits in violation of ERISA § 510 (Count XIII).

STANDARD OF REVIEW

When considering a Rule 12(b)(6) motion to dismiss, a court must accept the allegations in the complaint as true and construe them in a light most favorable to the plaintiffs. *See Kirby v. Siegelman*, 195 F.3d 1285, 1289 (11th Cir. 1999). To satisfy the pleading requirements of Rule 8, a complaint must simply give the defendant fair notice of what the plaintiffs' claims are and the grounds upon which they rest. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002). The complaint must include "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. ___, 127 S.Ct. 1955, 1965 (2007). Finally, the issue is not whether the plaintiffs will ultimately prevail on their claims, but whether the plaintiffs may be entitled to offer some evidence to support their claims. *See Little v. North Miami*, 805 F.2d 962 (11th Cir.1986).

ARGUMENT

I. PLAINTIFFS' COMMON LAW CLAIMS RELATING TO THE LAWRENCE GROUP'S OFFERS (COUNTS I – III & V) SHOULD NOT BE DISMISSED.

A. Plaintiffs Have Standing to Bring Common Law Claims Against the Defendants.

The Defendants argue that the ESOP participants should not be considered shareholders of U.S. Sugar and were not entitled to vote on any offer by the Lawrence Group, depriving them of standing to bring any common law claims. This argument does not apply to plaintiff Mary Rafter, a director shareholder.

The ESOP participants' shares are held in trust by the ESOP trustee, U.S. Trust, which holds legal title to the shares. ESOP participants do not become direct shareholders of the shares until they qualify for a distribution due to retirement, early retirement, or some other reason. However, the ESOP participants are "beneficial" owners of the shares in U.S. Sugar. They receive the dividends from the shares; they direct the Trustee how to vote the shares;² and they are entitled to the shares when they qualify for a distribution. *See* ESOP Plan §§ 5.4(b), 8.5; ESOP Trust Agreement § 4.4(a). The shares are simply held in trust during the time they are ESOP participants.

A number of courts have held that ESOP participants and other beneficial stockholders have standing under Delaware law to bring common law claims under a variety of circumstances. *See, e.g., Housman v. Albright*, 857 N.E.2d 724, 730 (Ill. App. 2006) ("Hence, the ESOP participants in the present case are equitable stockholders and have standing to maintain a shareholders' derivative suit pursuant to Delaware law."); *Elish v. Wilson*, 434 S.E.2d 411, 418 (W. Va. 1993) (ESOP participants are beneficial stockholders with standing to sue pursuant to Delaware law); *Brown v. Dolese*, 154 A.2d 233, 239 (Del. Ch. 1959) ("[T]he rule [under Delaware law] that an equitable owner of stock may sue derivatively has also been recognized in so-called trust cases."); *Rosenthal v. Burry Biscuit Corp.*, 60 A.2d 106, 113 (Del. Ch. 1948) ("I conclude that under the common law of Delaware as applicable to proceedings in equity an equitable owner of stock can maintain a stockholder's derivative action . . .").

White, who takes the lead on this point, cites no relevant case law to support his argument. *See* White Motion at 4. In fact, *Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399 (7th Cir. 2000), on which he relies, supports Plaintiffs' standing. In that case, ESOP participants sued their

² Under a provision entitled "Voting Company Stock," the ESOP Trust Agreement provides that "[a]ll Stock held by the Trust which is allocated to the Stock Accounts of Participants and Terminated Participants . . . shall be voted by the Trustee in accordance with directions received from each such Participant." ESOP Trust Agreement § 4.3(c) (emphasis added). There is thus a presumption of what is known as "pass through" voting by the ESOP participants.

employer and its directors challenging the price paid in a transaction to repurchase all of the ESOP's shares. *See id.* at 404. The ESOP participants were specifically permitted to amend their complaint to add a claim for breach of fiduciary duty under Delaware law. *See id.*; *Montgomery v. Aetna Plywood, Inc.*, 39 F. Supp.2d 915, 918 (N.D. Ill. 1998) (“Leave to amend was granted to add a stockholder fiduciary claim under Delaware law against defendants in their separate capacity as Aetna directors.”). White relies on a portion of the case that has nothing to do with the issue at hand: as part of a settlement, the ESOP was to receive additional company stock in the future and thus was a “prospective” holder of those shares. *See id.* at 405. The court merely held that the ESOP participants did not have standing to challenge actions taken with respect to that stock before the ESOP ever came into possession of it. *See id.* at 407.³

The Defendants also argue that the ESOP participants would not be entitled to vote on the Lawrence Group's offer (and only the Trustee would) as further reason that they lack standing. As an initial matter, this argument should not impact Plaintiffs' standing to bring suit. White and the Director Defendants breached their fiduciary duties to the shareholders by rejecting the Lawrence Group's offer irrespective of who would have been or would not have been entitled to tender their shares in response to the offer.

Regardless, this argument relies on a misreading of the ESOP Trust Agreement. Section 4.4(a) of the ESOP Trust Agreement provides that “[i]f the Company has a registration-type class of securities (as defined in Section 409(e)(4) of the Code), then all tender or exchange decisions with respect to Company Stock held by the Trust shall be made in accordance with [this Section].” The

³ Similarly, *Anardako Petroleum Corp. v. Panhandle Eastern Corp.*, 545 A.2d 1171, 1175 (Del. 1988), also relied on by White, dealt with “prospective owners” of stock, not ESOP participants or other trust beneficiaries. The other cases relied on by White are equally off point. *North Am. Catholic Ed. Prog. Found., Inc. v. Gheewalla*, 930 A.2d 92, 99 (Del. 2007) and *Becker v. Midwest Stamping & Mfg. Co. Profit Sharing Plan*, 2000 WL 924072, at *1 (6th Cir. June 29, 2000) have nothing to do with standing to sue (let alone standing of ESOP participants). And *Sommers Drug Stores Co. Empl. Profit Sharing Trust v. Corrigan Enter., Inc.*, 793 F.2d 1456, 1465 (5th Cir. 1986) is merely an example of a case where the Plan trustee brought suit and says nothing about whether the trust beneficiaries also had standing to sue.

threshold question is thus whether U.S. Sugar has a “registration-type class of securities.” It does. 26 U.S.C. § 409(e)(4) defines a “registration-type class of securities” as including “(B) a class of securities which would be required to be so registered except for the exemption from registration provided in subsection (g)(2)(H) of [Section 12 of the Securities Exchange Act of 1934].” Section 12(g)(2)(H) contains an exemption from registration that applies to any qualifying “stock-bonus, pension, or profit-sharing plan” (*e.g.*, an ESOP). But for this exemption, U.S. Sugar could not treat its over 4,000 employee shareholders as a single shareholder in order to avoid Section 12’s registration requirements (which would ordinarily apply to a company with that many shareholders, *see* 15 U.S.C. § 78l(g)).⁴

Accordingly, the ESOP shares should be treated as “registration-type class of securities,” and Section 4.4(a) of the ESOP Trust Agreement applies. Specifically, Section 4.4(a)(i) provides:

In the event an offer shall be received by the Trustee (including a tender offer for shares of Company Stock subject to [the Securities and Exchange Act of 1934]) to purchase or exchange any shares of Company Stock held by the Trust, the Trustee will advise each participant who has shares of Company Stock credited to such Participant’s Account. . . . All shares of Company Stock subject to the offer shall be tendered or exchanged by the Trustee only in accordance with directions made by Participants

By its plain language, this provision applies to “an offer” to purchase shares, and not just a “tender offer.” And by its plain language, it is the ESOP participants (not the trustee) who are entitled to sell (tender) or not to sell their shares in response to “an offer.”

The provision relied upon by White and the Director Defendants only comes into play in the specific and limited case of a “tender offer” when the company “does not have a registration-type

⁴ U.S. Sugar asserts that “it is undisputed that U.S. Sugar has less than 500 shareholders of record.” U.S. Sugar Motion at 11. Plaintiffs certainly do not agree that this is an “undisputed” fact. U.S. Sugar has submitted a Declaration from Gerard Bernard as evidence of this fact, but such evidence should not be considered on a motion to dismiss, and in any event attaches no documentation (such as a shareholder list) to support the assertion. Even setting aside the ESOP participants, Plaintiffs do not concede that U.S. Sugar has less than 500 shareholders of record.

class of securities,” in which case the Trustee is entitled to tender or not tender the ESOP shares in its own discretion. ESOP Trust Agreement § 4.4(b). As explained above, U.S. Sugar does have a “registration-type class of securities.” Moreover, a “tender offer” is a term of art, and is “generally defined as a public invitation to a corporation’s shareholders to purchase their stock for a specified consideration.” *E.H.I. of Florida, Inc. v. Insurance Co. of North America*, 652 F.2d 310, 315 (3d Cir. 1981) (emphasis added); *see also Armstrong World Indus., Inc. v. Adams*, 961 F.2d 405, 414 n.18 (3d Cir. 1992) (“the conventional definition of a tender offer – a publicly made invitation addressed to all shareholders of a corporation to tender their shares for sale at a specified price”). The Lawrence Group’s offer was not a public solicitation of U.S. Sugar’s shareholders. It was an offer conveyed to its management and Board of Directors. White himself acknowledges as much subsequently in his Motion. *See* White Motion at 12 (“The Lawrence overture was not a tender offer made to shareholders generally . . .”).

Finally, the Director Defendants also argue that Mary Rafter, despite being a direct shareholder, lacks standing to bring common law claims because “she has not sold any of her shares of U.S. Sugar stock, let alone at a price less than the price allegedly offered by the Lawrences.” Director Defendants’ Motion at 5. This argument simply misconstrues the injury suffered by Rafter. Rafter was not damaged by being paid too little for her shares; she was damaged by being denied the opportunity to sell her shares at all in response to the Lawrence Group’s offer. Simply put, the measure of her damages may be different than the measure of damages for ESOP participants who sold their shares, but she has been damaged nonetheless.

B. Plaintiffs Have Asserted Valid Breach of Fiduciary Duty Claims Against the Director Defendants.

There is no dispute that William S. White and the Director Defendants each owed U.S. Sugar’s shareholders a fiduciary duty. Under Delaware law, “directors are charged with an

unyielding fiduciary duty to protect the interests of the corporation and to act in the best interests of its shareholders.” *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1993). In particular, the fiduciary duty of loyalty has been defined by Delaware courts in “broad and unyielding terms” and “mandates that the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally.” *Id.* at 361.

White and the Director Defendants argue that “it is a well established principle of Delaware law that the business and affairs of a corporation shall be managed by the board of directors,” that “a decision to merge or consolidate a corporation lies with the board,” and that Plaintiffs’ have a “fundamental misunderstanding” of Delaware law to suggest otherwise.⁵ White Motion at 7-8. Plaintiffs do not disagree with Defendants’ recitation of this law. However, it is an equally well established principle of Delaware law that a board of directors must abide by its fiduciary duties to the company’s shareholders when presented with a purchase offer (or a merger or consolidation offer for that matter). *See, e.g., Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985) (“When a board addresses a pending takeover bid it has an obligation to determine whether the offer is in the best interests of the corporation and its shareholders.”); *Gantler v. Stephens*, 2008 WL 401124, at *9 (Del. Ch. Feb. 14, 2008) (“[W]hile the Directors may not have had any duty to sell the Company, they still had to satisfy their traditional fiduciary duties.”). It is Plaintiffs’ claim that, under the particular facts and circumstances of this case, White and the Director Defendants

⁵ White’s argument that “a decision to sell a company’s assets or merge a corporation lies with the board,” and his reliance on Delaware’s merger statute (White Motion at 8), are based on a fundamental misunderstanding of the facts here. The Lawrence Group’s offer did not involve a proposal to but the “company’s assets” or “merge” with U.S. Sugar (which would entail the absorption of one company into the other and the exchange of shares for consideration); it was a proposal to purchase all of U.S. Sugar’s stock (leaving U.S. Sugar in existence as a separate corporation).

failed to do so – and that one of the ways in which they failed to do so was by failing to extend the Lawrence Group’s offer to the employee shareholders.

1. **Delaware’s “business judgment” presumption does not require dismissal of Plaintiffs’ breach of fiduciary duty claims.**

White and the Director Defendants argue that the Board’s rejection of the Lawrence Group’s offer is protected by Delaware’s “business judgment” rule to such a degree that Plaintiffs’ claims should be dismissed on the pleadings alone. However, the business judgment presumption may be rebutted in a variety of ways, including where a majority of the individual directors are interested or lack independence relative to the decision at issue. *See, e.g., Orman v. Cullman*, 794 A.2d 5, 31 (Del. Ch. 2002) (where allegations make it “reasonable to question the independence and/or disinterest of a majority” of the directors, the business judgment presumption is not a basis to dismiss fiduciary duty claims). The presumption may also be rebutted where the challenged transaction was not otherwise the product of a valid exercise of business judgment. *See Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 174 (Del. Ch. 2005); *In re Walt Disney Co. Deriv. Litig.*, 2005 WL 2056651, at *36 n.464 (Del. Ch. Aug. 9, 2005). Plaintiffs have sufficiently alleged a number of circumstances that render Delaware’s business judgment presumption an inappropriate basis to grant Defendants’ motion to dismiss on the pleadings.

First, a majority of the individual directors of U.S. Sugar who voted to reject the Lawrence Group’s offer were not “disinterested and independent.” There were nine Directors of U.S. Sugar who voted to reject the Lawrence Group’s offer in March 2006, at least five of whom were either improperly interested in the decision (White and Butler) or were beholden to the interested directors and particularly White (Buker, Kirkpatrick and William H. Piper). In connection with the rejection of the Lawrence Group’s second offer in January 2007, this number goes up to at least six, as White’s 27-year-old son, Ridgway White, was installed on the Board in the interim. Compl. ¶ 31.

William S. White (married to a great granddaughter of C.S. Mott) and John Butler (a great grandson of C.S. Mott) are both members of the Mott family. *See id.* ¶¶ 21, 24. Both were improperly interested in the decision at issue – particularly White. A sale to the Lawrence Group would result in a loss of the longtime control over the Company by the Mott family. A loss of control would also mean that White’s plan for increasing the size and value of the Mott family’s ownership interest in U.S. Sugar by purchasing and retiring employees’ shares at a cheap price, and without costing the Mott family anything, would come to an abrupt end.

White stocked his Board of Directors with individuals beholden to him. Robert Buker, as President & CEO of U.S. Sugar, was put in that position by White and is dependent on him for his continued employment and his salary at U.S. Sugar. Compl. ¶¶ 6, 37. This is a prime example of a non-independent director. *See In re Tyson Foods, Inc. Cons. Sh. Litig.*, 919 A.2d 563, 584 (Del. Ch. 2007) (doubt raised as to CEO’s disinterestedness as his service as CEO was “essentially at the pleasure of the Tyson family,” who were interested in the transaction); *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993) (where interested directors were Chairman of the Board and Chairman of its Executive Committee, they were “in a position to exert considerable influence” over the company’s President & CEO, and “there is a reasonable doubt that [CEO director] can be expected to act independently”).

Similarly, William H. Piper’s outside employment is with the Mott Foundation, of which White is the Chairman, CEO and President, making Piper beholden to White for his employment and salary. Compl. ¶¶ 21, 27. Frederick Kirkpatrick’s outside employment is with the Mott Family Office, which manages Mott family affairs and which White controls, making Kirkpatrick beholden to White for his employment and salary as well. *See id.* ¶¶ 21, 25. Again, these are prime examples of non-independent directors. *See Orman*, 794 A.2d at 31 (reasonable doubt as to independence was raised where director “was beholden to the controlling shareholders for future renewals of his

consulting contract”); *Rales*, 634 A.2d at 936 (where interested directors were also directors and majority shareholders of separate corporation where outside director was president, “there is a reasonable doubt regarding [outside director’s] ability to act independently since it can be inferred that he is beholden to the [interested directors] in light of his employment.”).

Second, Plaintiffs allege that the Board (and particularly its Chairman William S. White) was improperly motivated by protecting their own entrenchment in rejecting the Lawrence Group’s offer. *See Unocal*, 493 A.2d at 954 (noting “the omnipresent specter that a board may be acting primarily in its own interests” when faced with an outside offer that would result in change of control). This is no ordinary case of “entrenchment” by a Board of Directors. The Mott family has effectively controlled U.S. Sugar since its founding in 1931 by Charles Stewart Mott. Compl. ¶ 2. William S. White has now been on the Board for 37 years, and the Chairman for two decades. *See id.* ¶ 21. Indicative of the hereditary succession of U.S. Sugar’s leadership is the fact that, not long after the Board rejected the Lawrence Group’s offer, Ridgway White, at the age of only 27 and without any noteworthy business experience, was appointed to the Board of Directors of U.S. Sugar by his father. *See id.* ¶ 54. In addition, the length of time that the majority of the Directors has been on U.S. Sugar’s Board is extraordinary. A majority of the Directors have been on the Board for over a decade (with combined years of service over a century): William S. White (37 years), William H. Piper (18 years), Roy E. Peterson (16 years), Frederick Kirkpatrick (14 years), W. Archibald Piper (12 years), Lloyd Reuss (12 years). *See id.* ¶¶ 25-29. As even U.S. Sugar’s own investment bankers stated to the Lawrence Group’s bankers during the negotiations that led to the offer, “the Board is the Lawrence Group’s biggest competitor and not an offer from a third party.” *See id.* ¶ 55. Of course, a non-entrenched Board is not supposed to be in competition with an offer to buy the Company’s shares.

Another clear indication of White's entrenchment motives can be found in the agreements between the Mott Foundation on the one hand and the Mott Children's Health Center and the Community Foundation of Greater Flint on the other, as discussed in detail in Part II.C below. The purpose of these agreements is to attempt to protect his family's control of U.S. Sugar. White, in his capacity as Chairman of the Mott Foundation, entered into a contract with the Mott Children's Health Center with the express purpose of "avoiding a change in the present control of the Corporation" (*i.e.*, his own family's control). Compl. ¶ 36. As Chairman of U.S. Sugar, White had a fiduciary duty to all of the Company's shareholders, including the employee shareholders. That fiduciary duty could, of course, require maximizing shareholder value by selling the Company. White, however, was willing to elevate his own family's desire to keep control of U.S. Sugar over his broader fiduciary duties to U.S. Sugar's other shareholders.

Third, the Directors' actions were not made in good faith and in the best interests of the Company and its shareholders. Since the creation of the ESOP in 1983, the employee shareholders have never had an opportunity to cash out of their shares in a sale to a third party; nor have the charitable shareholders that have large, unmarketable holdings in U.S. Sugar. Compl. ¶ 4. The Lawrence Group's offer was an extraordinarily valuable offer for the shareholders of U.S. Sugar by any reasonable standard. The offer was at a premium price roughly 50% higher than the Trustee for the ESOP had determined the Fair Market Value of the shares to be. *See id.* ¶ 4. And the offer was at a premium roughly 91% higher than what the charitable shareholders, including the Mott Foundation, were representing the shares to be worth in their filings with the IRS. *See id.* ¶ 73. In other words, while a third-party buyer was ready, willing and able beginning in August 2005 to pay \$293 per share for every single share, U.S. Sugar was paying its employee shareholders almost \$100 per share less than that amount. Since the rejection of the Lawrence Group's offer, the price being paid to U.S. Sugar's employee shareholders has continued to drop, most recently to just \$180

per share, and the dividend payments have even been suspended. *See id.* ¶¶ 71-72. The rejection of such an extraordinary offer, in light of the circumstances described above, raises additional red flags about the motivations behind the Board’s decision.

Chrysogelos v. London, 1992 WL 58516 (Del. Ch. March 25, 1992) is instructive on this issue. In that case, an investor group approached the defendant company’s board of directors about a possible acquisition of the company, and subsequently made a formal proposal to acquire all of the company’s shares for \$4.50 per share (a 63% premium over the share’s publicly-traded price). The defendant board of directors engaged in defensive measures and rejected the offer without disclosing to the company’s shareholders that it had been made until afterwards. *See id.* at *2-*3. The plaintiff shareholder brought suit claiming, among other things, that the directors breached their fiduciary duty of loyalty by rejecting the acquisition proposal. The Delaware court held:

A board of directors has considerable latitude in deciding whether to entertain an acquisition proposal, but that discretion is not unbridled. Its exercise necessarily presupposes – indeed, requires – that the directors make an informed, good-faith business judgment. To state it differently, corporate directors are not free to ignore an acquisition proposal for reasons extraneous to a good-faith, informed business judgment.

Id. at *6. The court denied the directors’ Rule 12(b)(6) motion to dismiss the claim. Likewise here, Plaintiffs have made sufficient allegations to call into question whether White and the Director Defendants rejected the Lawrence Group’s acquisition proposal for reasons extraneous to a good-faith business judgment.

White’s and the Director Defendants’ heavy reliance on the unpublished opinion in *Gantler v. Stephens*, 2008 WL 401124 (Del. Ch. Feb. 14, 2008) is misplaced. In *Gantler*, after first initiating a sales process for the company, the board of directors subsequently decided to reject a particular merger proposal. The court recognized that, in considering whether or not to sell the company, the Directors “had to satisfy their traditional fiduciary duties.” *Id.* at *9. The court

simply found that, on the particular facts of that case, the plaintiffs had not alleged sufficient facts to rebut Delaware's business judgment presumption. *See id.* at *11-*12. Concerns raised by the *Gantler* court included that "this is not a situation where a board affirmatively interposed itself between the shareholders and a potential acquirer by implementing a defensive measure to an unconditional tender offer." *Id.* at *9. In that case, the suing shareholder had also been a (dissenting) Board member and was thus fully apprised of the merger proposal. That is not the case here. White and the Director Defendants effectively interposed themselves between the shareholders and a potential acquirer by failing even to advise the shareholders of the Lawrence Groups offers.

Finally, several of the Defendants also make reference to the potential deal between the State of Florida and the Company to suggest that there was no breach of fiduciary duty in rejecting the Lawrence Group's offers because the State's proposed deal represents a "higher offer." *See, e.g.,* White Motion at 8; Director Defendants' Motion at 5-6. However, it is entirely misleading for the Defendants to suggest that a \$575,000,000 offer for all of the stock of the Company (or \$293 per share) can be compared to a contingent proposal to buy the assets of the Company for \$1,750,000,000 (and what is now reduced to a potential deal for \$1,340,000,000 to buy most of the land).⁶ This is a classic (and misleading) "apples to oranges" comparison. Compl. ¶¶ 76-77. The former is a stock purchase: the consideration would go directly to the shareholders, and the new owners would assume all of the debt and other obligations of the Company. The latter is an asset purchase: the consideration would go to the Company, not the shareholders. Once the large capital gains and other taxes are paid and the repayment of U.S. Sugar's substantial debt are deducted from

⁶ *See* "Long-Term Costs Might Escalate in Florida's Deal with U.S. Sugar to Help Preserve the Everglades," *Ft. Lauderdale Sun-Sentinel*, Nov. 13, 2008 ("The new deal announced this week cuts the price to \$1.34 billion, with the state getting 181,000 acres and U.S. Sugar keeping its sugar mill, citrus plant, railroads and other assets.").

that amount, the net amount left for distribution to the shareholders (assuming the Company decides to distribute anything to the shareholders) will be far less than the \$293 per share in cash that would go directly to the shareholders in a stock purchase. In any event, these are factual matters not yet properly before the Court or part of the record on these motions to dismiss.

C. Plaintiffs Have Also Asserted Valid Breach of Fiduciary Duty Claims (Counts II and III) Against the Mott Foundation and William S. White as Controlling Shareholders.

The Mott Foundation argues that it is only a minority shareholder and does not owe any duty to the Plaintiffs. It is true that, standing in isolation, the Mott Foundation owned approximately 19% of the shares of U.S. Sugar in 2005. However, Plaintiffs allege that the Mott Foundation cannot be looked at in isolation, and that in conjunction with William S. White and his family, and in light of certain agreements with other charitable shareholders that will be discussed below, the Mott Foundation is a *de facto* majority and controlling shareholder of U.S. Sugar. This is the basis for Plaintiffs' claims against the Mott Foundation in Count II and against both the Mott Foundation and William S. White in Count III.

The majority shareholder of a corporation need not be a single shareholder but can be a "group of shareholders who combine to form a majority." *In the Matter of Reading Co.*, 711 F.2d 509, 517 (3d Cir. 1983) (applying Delaware law). That is the case here. Indeed, this has been the situation since the formation of the U.S. Sugar ESOP. The ESOP was formed in 1983, at a time when 72% of the shares of U.S. Sugar "were owned either by charitable organizations established by Charles Stewart Mott, the founder of U.S. Sugar, or by members of the Mott family." *Kahn v. U.S. Sugar Corp.*, 1985 WL 4449, at *1 (Del. Ch. Dec. 10, 1985). The ESOP was a tool the Mott family used to take U.S. Sugar private in a tender offer to the public shareholders: "[t]he tender offer came about because the Mott Interests wished to reduce their holdings in U.S. Sugar but did

not wish to relinquish their aggregated ability to exercise majority control over the company.” *Id.* at *2 (emphasis added). That majority control over the Company remains to this day. Compl. ¶ 19.

Remarkably, the Mott Foundation has entered into express, written agreements with two other charitable shareholders in order to preserve its control of U.S. Sugar.⁷ The first agreement is between the Mott Foundation and the Mott Children’s Health Center, a Michigan non-profit corporation that currently owns approximately 22% of U.S. Sugar’s shares, and is signed by William S. White on behalf of the Mott Foundation. The express purpose of that Agreement is “avoiding a change in the present control of the Corporation (control being defined as the ownership of more than 50 percent of the outstanding voting shares of the Corporation).” Compl. ¶ 36; Amended Compl., Ex. A at 1. Under the terms of the Agreement, the Children’s Health Center was prohibited from “sell[ing] Corporation shares, if the result of such a sale, after taking into account the other Corporation shares acquired, or intended to be acquired, by the potential purchaser, would give the latter, . . .” Compl. ¶ 36; Amended Compl., Ex. A at 2.

Similarly, the second agreement is between the Mott Foundation and the Community Foundation of Greater Flint (the “Community Foundation”), another Michigan non-profit corporation that owns a substantial number of shares of U.S. Sugar. The express purpose of that Agreement is likewise “avoiding a change in the present control of the Corporation (control being defined as the ownership of more than 50 percent of the outstanding voting shares of the Corporation).” Compl. ¶ 37; Amended Compl., Ex. B at 1. The Agreement likewise contains the same “no sale” provision if it would result in change of control of U.S. Sugar. *See id.*

⁷ Plaintiffs do not dispute that the parties may rely on these Agreements on these Motions. The Mott Foundation’s suggestion that the Plaintiffs are attempting to hide these Agreements by not attaching them to the Consolidated Complaint (while previously attaching them to the Amended Complaint) is simply wrong. These Agreements are the foundation for the Plaintiffs’ argument on this point; the relevant parts are quoted verbatim in the Consolidated Complaint; and the Plaintiffs’ arguments regarding these Agreements remain unchanged.

The Mott Foundation's argument that it is a mere minority shareholder flies in the face of the express provisions of these agreements. What "present control" is William White and the Mott Foundation talking about in these agreements if not their own? What "present control" would William White and the Mott Foundation care enough about to enter into such agreements if not their own?

The Mott Foundation also argues that, "even combining the shares held by the two charities, as set forth in the Shareholder Agreements, with the alleged holdings of the Foundation and the Family, the total alleged is below 50%." See Mott Foundation Motion at 6. However, the Mott Foundation is relying on the outdated, 16-year-old ownership figures for the Community Foundation's ownership interests reflected in the 1992 agreement. The Plaintiffs' claims are not based on the ownership interests held in 1992; they are based on the ownership interests held in 2005 and after. In any event, Plaintiffs have alleged (and properly alleged) that this combined group (Mott family plus Mott Foundation plus Children's Health Center plus Community Foundation) has *de facto* control over 51% or more of U.S. Sugar (Compl. ¶ 19).⁸ This is a factual issue that is not appropriate for resolution on a motion to dismiss based on the pleadings.

Moreover, even without a majority of the shares, the Mott Foundation can still be considered a "controlling" shareholder with a fiduciary duty to the minority shareholders. "Under Delaware law, the notion of a 'controlling' stockholder includes both *de jure* control and *de facto* control." *Solomon v. Armstrong*, 747 A.2d 1098, 1116 n.53 (Del. Ch. 1999). "Although a majority of shares owned by a shareholder would be conclusive in finding that a controlling shareholder exists, the reverse cannot be said to be true." *Gradient OC Master, Ltd. v. NBC Universal, Inc.*, 930 A.2d 104, 130 (Del. Ch. 2007). Here, Plaintiffs have alleged that there is actual control over U.S. Sugar's

⁸ White, in his argument, simply omits the Community Foundation when adding up the combined interests. See White Motion at 14 & n.12.

corporate conduct (particularly the conduct relevant to the rejection of the Lawrence Group's offer) by Chairman William S. White, the Mott Foundation's agent and representative on the Board.

The Mott Foundation also argues that a fiduciary duty cannot be imputed to it based on its agents' (William White's) position on the U.S. Sugar Board of Directors. Plaintiffs do not argue that this is the basis for the Mott Foundation's fiduciary duty; its duty arises from its status as a controlling shareholder of U.S. Sugar as described above. In other words, the Mott Foundation owes the minority shareholders of U.S. Sugar a fiduciary duty in its own right, not by virtue of the presence of its Chairman on the Board of U.S. Sugar.

The Mott Foundation also argues that "there are still no allegations that the [Mott] Foundation did one single thing." Mott Foundation Motion at 1.⁹ The Mott Foundation itself, as a corporate entity, of course cannot do a single thing in its own regard; it can only act through its agents. Its primary agent, its Chairman William S. White, is the principal actor in the conduct set forth in the Complaint. The Mott Foundation also argues that the actions of William White, in his capacity as a Director of U.S. Sugar, cannot be imputed to the Mott Foundation. It is true that officer and directors can wear different "hats" in different capacities and contexts, as White argues. However, in this case, White is the Mott Foundation's representative on the Board and his conduct in connection with the Lawrence Group's offer was taken to further the interests of the Mott Foundation; indeed, his conduct was comporting with the agreements he caused the Mott Foundation to enter into with the other charitable shareholders. Under such circumstances, his conduct should be considered undertaken on behalf of the Mott Foundation and be attributed to the Mott Foundation.

⁹ The Mott Foundation's statements that the Plaintiffs are now on their "tenth complaint" rest on silly math. The *Johnson* Plaintiffs have amended their complaint one time. When additional related actions were filed, the parties jointly moved to have the actions consolidated and jointly requested that a Consolidated Complaint be filed. The Court granted that joint motion, and that is the sole operative complaint before this Court now.

Finally with respect to the claim for breach of fiduciary duty in Count III, the Mott Foundation argues that Plaintiffs fail to meet the pleading specificity requirements of Rule 9(b). As an initial matter, it is questionable whether Rule 9(b) has any applicability to Plaintiffs' claim for breach of fiduciary duty. *See, e.g., Mehlenbacher v. Jitaru*, 2005 WL 4585859, at *4 (M.D. Fla. June 06, 2005) ("Rule 9(b)'s particularity requirement does not apply to a breach of fiduciary duty claim because fraud and *scienter* are not necessary elements of such a claim."). Regardless, there is ample specificity in Plaintiffs' allegations to "alert defendants to the precise misconduct with which they are charged," which is Rule 9(b)'s purpose. *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001).

Plaintiffs' breach of fiduciary duty claim arises out of the Lawrence Group's offer and William S. White's and the Director Defendants' handling of it. The Consolidated Complaint states with specificity who made the offer (the Lawrence Group), the specific terms of the offer (\$575 million in cash or \$293 in cash per share), when it was made (August 2005), to whom it was made (then-CEO Robert Dolson, President & CEO Robert Buker, White and the Director Defendants), and what was done in response (rejection by the Board in March 2006, and again in January 2007, without disclosure to the employee shareholders). *See* Compl. ¶¶ 61-64 and 68-71. In addition, where Plaintiffs allege that fraudulent misrepresentations were made with respect to the value of U.S. Sugar shares, they recite those statements with specificity, including the dates they were made and the form they were made in. *See id.* ¶¶ 61-64 and 68-71. These allegations are more than sufficient to alert the Mott Foundation as to what wrongful conduct it is being charged with.

D. Plaintiffs' Conversion Claim Should Not Be Dismissed.

Plaintiffs in *Johnson, et al. v. White, et al.* (Case No. 08-80101) have also asserted a common law conversion claim (Count V) against William S. White and the Mott Foundation, and only those Defendants. The conversion claim is based on their wrongful taking of an intangible

property right held by the shareholders — their right to sell their shares in response to the Lawrence Group’s offers. White and the Mott Foundation argue that the conversion claim should be dismissed because “the ‘property’ converted must be tangible and identifiable.” *See* Mott Foundation Motion at 18-19.

1. **Florida Law Should be Applied to This Tort Claim.**

As an initial matter, Plaintiffs disagree that this particular tort claim is governed by Delaware law, as White and the Mott Foundation argue. This Court should apply the choice of law rules of the Restatement (Second) of Conflicts of Laws (1971) in this context. *See International Ins. Co. v. Johns*, 874 F.2d 1447, 1458 n.19 (11th Cir. 1989). Section 309 of the Restatement provides as follows: “The local law of the state of incorporation will be applied to determine the existence and extent of a director’s or officer’s liability to the corporation, its creditors and shareholders, except where, with respect to the particular issue, some other state has a more significant relationship . . . to the parties and the transaction, in which event the local law of the other state will be applied.” As the Commentary to Section 309 explains:

The local law of some state other than the state of incorporation is most likely to be applied to determine issues of this sort in a situation where the corporation does all, or nearly all, of its business and has most of its shareholders in this other state and has little contact, apart from the fact of its incorporation, with the state of incorporation. Within the [exception] fall acts, such as seizing a corporate opportunity or causing the making of a contract or the commission of a tort.

Restatement (Second) of Conflicts of Laws § 309, comm. g (1971) (emphasis added).

Plaintiffs’ conversion claim falls squarely within this exception. This is a tort claim. It is alleged against White in his personal capacity, not in his capacity as Chairman of U.S. Sugar, and vicariously against the Mott Foundation. *See* Compl. ¶ 117. U.S. Sugar’s principal place of business is in Florida, *see id.* ¶ 18; its business operations are in Florida, *id.*; and the majority of its employee shareholders, the victims of this conduct, live in Florida, *see id.* ¶¶ 12-17. Although

incorporated in Delaware, none of U.S. Sugar's business operations are there, and none of its officers or directors resides there. *See id.* ¶¶ 21-32. *See Tinwood N.V. v. Sunbanks, Inc.*, 570 So. 2d 955, 959 n.3 (Fla. App. 1990) (applying Florida law to tort claims against officer of foreign corporation where corporation had "office in Florida, the corporate purpose (investing in Florida property) was to be carried out in Florida, and a corporate bank account was maintained here. Florida had the most 'significant relationship' to the transaction.").

2. Conversion Applies to the Intangible Property Rights at Issue.

The tort of conversion can be applied to intangible property rights of the kind at issue here.

As the Restatement (Second) of Torts provides:

One who effectively prevents the exercise of intangible rights of the kind customarily merged in a document is subject to a liability similar to that for conversion, even though the document is not itself converted.

Restatement (Second) of Torts § 242(2) (1965). Florida courts have allowed conversion claims to be brought in connection with a variety of intangible property rights, such as an interest in a business venture: "In Florida, an action for tortious conversion will lie for a wrongful taking of intangible interests in a business venture." *Portionpac Chem. Corp. v. Sanitech Sys., Inc.*, 217 F. Supp. 2d 1238, 1252 (M.D. Fla. 2002); *see also In re Aqua Clear Tech., Inc.*, 361 B.R. 567, 574 (Bankr. S.D. Fla. 2007) ("A claim for conversion is appropriate where the defendant has wrongfully taken personal property or an intangible interest in a business venture. Misappropriation of a business opportunity likewise constitutes conversion."); *In re Estate of Corbin*, 391 So.2d 731, 732 (Fla. App. 1980) ("Actions for conversion may properly be brought for a wrongful taking over of intangible interests in a business venture.").

Accordingly, conversion claims have been recognized with respect to a variety of intangible rights comparable to what is at issue here. *See Estate of Corbin*, 391 So.2d at 733 (ownership

interest in a business enterprise); *Bel-Bel Int'l Corp. v. Community Bank of Homestead*, 162 F.3d 1101, 1108-09 (11th Cir. 1998) (right of possession to receivable from a crop); *Aqua Clear Tech.*, 361 B.R. at 574-75 (right to use a telephone number and the profits derived from using that number). In *Estate of Corbin*, for example, a case involving the conversion of an interest in a business, Florida's Third District Court of Appeal held that "[t]he proper measure of damages for conversion in Florida is the interest's reasonable market value, measured as of the time and place of conversion." *Estate of Corbin*, 391 So.2d at 733. Here, Plaintiffs' interest in their U.S. Sugar shares had a reasonable market value of at least \$293 per share as of the time of the conversion based on the Lawrence Group's offer.

Even one of the cases relied upon by the Mott Foundation indicates that "[c]ourts generally recognize the conversion of intangible rights, the claim here, only in cases in which those rights arise from, or are merged with, a document, such as a contract, promissory note, bond, etc." *Unlimited Screw Prods., Inc. v. Malm*, 781 F. Supp. 1121, 1131 (E.D. Va. 1991) (citing Restatement (Second) of Torts § 242). That is the case here. The shareholders' ownership interest in U.S. Sugar is evidenced in a document, a share certificate, and their right to sell their ownership interests arises from that document.¹⁰

E. Plaintiffs' Common Law Claims Relating to the Lawrence Group's Offers Are Not Preempted By ERISA.

William S. White, the Director Defendants and the Mott Foundation each argue that all of the common law claims raised by the Plaintiffs are preempted by ERISA because the claims relate

¹⁰ Even though this tort claim should be governed by Florida law, it is viable under Delaware law as well. As one of the cases cited by the Mott Foundation states: "Delaware follows the modern trend of expanding conversion to encompass intangible goods where the intangible property relations are merged into a document." *In re Wal-Mart Wage and Hour Empl. Practices Litig.*, 490 F. Supp. 2d 1091, 1101-02 (D. Nev. 2007) (quotation omitted). In particular, as the Delaware Supreme Court has stated, "[a] stockholders' shares are converted by any act of control or dominion . . . without the [stockholder's] authority or consent, and in disregard, violation or denial of his rights as a stockholder of the company." *Arnold v. Soc'y for Savings Bancorp, Inc.*, 678 A.2d 533, 536 (Del. 1996) (quotation omitted).

to their rights under the ESOP. Again, this argument does not apply to the same claims raised by Mary Rafter, as she is a direct shareholder and not an ESOP participant, and so there can be no ERISA preemption of her same common law claims.

There are two general parts to Plaintiffs' claims – the “Lawrence Group offer claims” and the subsequent “ESOP valuation claims.” The breach of fiduciary duty (and common law conversion) claims arise out of the Defendants' conduct in failing to extend the Lawrence Group's offer to the shareholders and their rejection of that offer. That conduct harmed all of the Company's shareholders as shareholders. The ERISA violations occurred after that, when certain of the Defendants proceeded to misrepresent to the ESOP participants that the Fair Market Value of their shares was far below what the Lawrence Group had offered. That conduct harmed only the ESOP participants as ESOP participants. That conduct is governed by ERISA, and Plaintiffs bring only ERISA claims attacking that conduct. In short, there are distinct wrongs at issue here.

The Mott Foundation mischaracterizes Plaintiffs' common law claims against it as being based on “alleged rights as participants in the ESOP, namely to sell, or not to sell, their beneficial stakes in U.S. Sugar shares held through the ESOP at fair market value.” Mott Foundation Motion at 7. Similarly, White characterizes Plaintiffs' claims against him as being an effort to receive “increased ESOP Plan benefits.” White Motion at 6. That is not the case. Plaintiffs' claims regarding the Lawrence Group offer have nothing to do with benefits they would be entitled to receive under the ESOP: likewise, they have nothing to do with their right to receive the Fair Market Value of their shares when they reach retirement age, early retirement age or otherwise become eligible to receive a distribution. Plaintiffs' common law claims are based on the Defendants' wrongful conduct in connection with the Lawrence Group offers, and the basis for those claims is the same as it is for the direct shareholder (and non-ESOP participant), plaintiff Mary Rafter – their status as minority shareholders.

The Eleventh Circuit and other courts have confirmed that ERISA preemption does not apply to a claim for breach of fiduciary duty raised by an ESOP participant in his or her distinct capacity as a shareholder. In *Ervast v. Flexible Products Co.*, 346 F.3d 1007 (11th Cir. 2003), an ESOP participant brought a breach of fiduciary duty claim alleging that the former employer failed to disclose that it was in merger negotiations at the time when the plaintiff resigned and sold his company stock back to the company. As the Eleventh Circuit described the case, “[Plaintiff] claims that he is entitled to the difference in the price he received for his ESOP shares and post-merger announcement price of the shares because the defendants, as the majority shareholder and officers/significant shareholders, had the fiduciary duty to inform him, as a minority shareholder, of the merger discussions . . . and they did not.” *Id.* at 1014-15. Plaintiffs here make a similar claim for damages. The Eleventh Circuit held that the ESOP participant’s breach of fiduciary duty claim was not “super preempted” by ERISA. *See id.*

As in the instant case, the ESOP participant in *Ervast* did not contend in his breach of fiduciary duty claim that he was paid an unfair price for his shares under the terms of the ESOP. The Eleventh Circuit also noted: “[Plaintiff] also does not claim entitlement to this information under the terms of the ESOP; rather, his claim is based on his status as minority shareholder and the duty owed to him by the majority shareholders.” *Id.* at 1015. Likewise here, the ESOP participants’ claim is identical to the direct minority shareholder’s claim. As the *Ervast* court put it: “[T]he breach of corporate fiduciary duty is premised on the parties’ roles of majority and minority

shareholders. The common law action does not implicate the traditional ERISA roles, nor does it call into question the administration of the ESOP.” *Id.* at 1016.¹¹ The same is true here.

Similarly, in *Williams v. Cypert*, 708 F. Supp. 229 (W.D. Ark. 1989), the Plan participants brought both breach of fiduciary duty and ERISA claims against certain directors and officers of their employer. The court held that the breach of fiduciary duty claim (and other common law claims) were not preempted by ERISA:

The state law and ERISA duties are parallel but independent: as director, the individual owes a duty, defined by state law, to the corporation’s shareholders, including the plan; as fiduciary, the individual owes a duty, defined by ERISA, to the plan and its beneficiaries. Thus, the state law does not affect relations between the ERISA fiduciary and the plan or plan beneficiaries as such; it affects them in their separate capacities as corporate director and shareholder.

Id. at 231-32 (citations omitted). *See also Sommers Drug Stores Co. Empl. Profit Sharing Trust v. Corrigan Enter., Inc.*, 793 F.2d 1456, 1470 (5th Cir. 1986) (“The state law [of fiduciary duty] is a law of general application; it imposes a duty on all corporate directors, whether or not they are plan fiduciaries, and it runs in favor of all shareholders, including benefit plans. It does not affect relations among the principal ERISA entities — the employer, the plan fiduciaries, the plan, and the beneficiaries — as such, but only in their independent capacities as corporate director and shareholder.”); *Montgomery*, 39 F. Supp.2d at 918 (“Leave to amend was granted to add a stockholder fiduciary claim under Delaware law against defendants in their separate capacity as Aetna directors. The state law corporate claim, which is not based on defendants’ ERISA fiduciary status, is not preempted by ERISA.”); *Housman*, 857 N.E.2d at 732-33 (“In the instant case, the

¹¹ *Ervast* was decided based on Georgia law, but that should not affect the result here. The Eleventh Circuit stated: “Simply put, *Ervast* claims that [Defendants], as the majority shareholder and corporate officers, had the fiduciary duty to tell him, as a minority shareholder, that it was considering a merger with Dow. Georgia corporate law apparently permits this direct action by a minority shareholder, apparently even if those shares are held in a trust form, as were *Ervast*’s in the ESOP.” *Id.* at 1016 (citing O.C.G.A. § 10-5-2(a)(26) (defining “security” broadly)). As discussed in Part I.A above, under Delaware law, the ESOP participants likewise have standing to bring their common law claims here.

complaint's allegations do not implicate fiduciary duties arising pursuant to ERISA. . . . The plaintiffs in the instant case brought this action against the defendants in their separate capacities as the officers and directors of the corporation, not in their capacities as plan fiduciaries.”).

II. PLAINTIFFS' ERISA CLAIMS RELATING TO THE VALUATION OF THE ESOP PARTICIPANTS' SHARES SHOULD NOT BE DISMISSED.

A. The ESOP Participants Have Standing to Bring Their ERISA Claims.

U.S. Sugar argues that Plaintiffs lack standing to bring ERISA claims against it “because they fail to allege an injury-in-fact that is sufficiently concrete and particularized, and not abstract and indefinite.” U.S. Sugar Motion at 5. According to U.S. Sugar's argument, “the Lawrence Group never made an offer for U.S. Sugar's stock and, even if it had, the Lawrence Group could not have purchased 100% of the stock.” *Id.*¹²

U.S. Sugar's argument misconstrues Plaintiffs' ERISA claims. Plaintiffs' ERISA claims are based on the unfair valuations of the U.S. Sugar shares held by the ESOP participants following the Lawrence Group's offer. Whether the Lawrence Group's offer was reduced to final documentation or received written approval from the Board is largely irrelevant. Regardless of whether the Lawrence Group's offer could have been, would have been or should have been accepted, it was made — and the Lawrence Group was ready, willing and able to follow through on it. That fact alone affects the proper valuation of the ESOP participants' shares.

The measure of Fair Market Value generally accepted in the ESOP context is “the price at which an asset would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, and both parties

¹² The materials on which U.S. Sugar relies for this argument — a document that is not part of the pleadings (a Confidentiality Agreement) and an affidavit from its CEO & President — are not properly considered on a Rule 12(b) motion to dismiss on the pleadings. For this reason alone, the extrinsic materials should be disregarded, and the argument rejected at this stage.

are able, as well as willing, to trade and are well-informed about the asset and the market value of the asset.” *See* Proposed Regulation Relating to Definition of Adequate Consideration, 53 Fed. Reg. 17,632 (May 17, 1988). Despite the fact that the Lawrence Group was ready, willing and able to pay \$293 per share for every share of U.S. Sugar, U.S. Sugar proceeded to tell its employee shareholders their shares were worth only \$199.10 and subsequently even less. In addition, to the extent the Board purported to rely on a land appraisal for even higher valuations of U.S. Sugar to justify its rejection of the Lawrence Group offer, the undervaluation of the ESOP participants’ shares is even worse. This is what gives rise to Plaintiffs’ valuation claims under ERISA.

Regardless, U.S. Sugar’s arguments are based on wordplay over what it means to make “an offer.” Plaintiffs do not allege that the Lawrence Group’s “offer” was ever extended to the U.S. Sugar shareholders (and Plaintiffs would not be here if it had been, because a majority of shareholders would have tendered their shares). However, the Lawrence Group plainly made an offer to the Chairman, the CEO & President, and the Board of U.S. Sugar to purchase all of the shares for \$575 million. *See* Compl. ¶¶ 50-51. Indeed, they did it twice. *See id.*; Amended Compl., Ex. D (“[We] want to again offer to purchase all of the stock of U.S. Sugar for \$575 million (\$293 per share), exactly the same offer we made last year.”). If there was never an “offer” in the first place, as U.S. Sugar now claims, why did the Board vote to reject the offer at a meeting on March 14, 2006 (*id.* ¶ 58)? And why did U.S. Sugar’s CEO & President have the need to send the Lawrence Group a letter after that meeting stating that the Board had considered “your family’s interest in acquiring the Company” and had decided not to sell (Amended Compl., Ex. C)?

U.S. Sugar is simply distorting the import of the Confidentiality Agreement in making this argument. The Confidentiality Agreement has no bearing on how the Lawrence Group extended its offer to the Board. Rather, the purpose of the Confidentiality Agreement was to channel the Lawrence Group’s offer through White and the Board and to bar the Lawrence Group from

contacting the shareholders of U.S. Sugar directly. Plaintiffs do not allege that the Board gave “written consent” to the offer being extended to the shareholders or that the transaction was reduced to definitive agreements. However, these points do not go to whether the Lawrence Group made an offer to the Board; they go to whether the Board breached its fiduciary duties to the shareholders in its consideration and handling of that offer.

U.S. Sugar also argues that no sale could have occurred, because Plaintiffs allege that more than 51% of the shares are controlled by the Mott Foundation and the Mott family, and so the Lawrence Group could not hope to acquire control. However, Plaintiffs allege that the Children’s Health Center owns approximately 22% of the shares. Compl. ¶ 26. The employee shareholders’ interests combined with such other shareholder interests would have governed the result. While the Mott Foundation has entered into an agreement with the Children’s Health Center regarding the sale of their shares, Plaintiffs also allege that such agreement was unlawful (and thus void as against public policy), which would allow the Children’s Health Center to sell their shares in response to the Lawrence Group’s offer. Among other things, the agreement (a) attempts to improperly constrain the ability of fiduciaries of charitable organizations from acting in those charities’ best interests, and (b) violates the IRS’s “excess business holdings rules” for private foundations, which prohibit foundations (in conjunction with persons associated with the foundations) from holding interests in a business enterprises above certain thresholds. *See* 26 U.S.C. § 4943, *et seq.* At a minimum, Plaintiffs submit that it is an issue of fact to be resolved after discovery as to whether the trustees of the Children’s Health Center (and the Community Foundation) would fulfill their own fiduciary duties owed to their charitable wards and tender their shares in response to the Lawrence Group’s offer. Given that the Children’s Health Center is currently sitting on unmarketable shares

of U.S. Sugar that do not even earn a dividend when it could have received \$126,500,000 (22% of \$575 million) on the Lawrence Group's offer, it is hard to fathom that they would not.¹³

B. Plaintiffs' ERISA Claims Should Not Be Delayed By An "Exhaustion" Requirement.

U.S. Trust, U.S. Sugar, William S. White, the Director Defendants and Gerard Bernard all argue that Plaintiffs' ERISA claims (Counts VI – XIII) should all be dismissed because the ESOP Plan contains administrative procedures for complaints regarding the denial of benefits, and the Plaintiffs failed to exhaust those administrative procedures before bringing suit.¹⁴ This is, at heart, an argument seeking simply to delay resolution of Plaintiffs' claims, not to address them on their merits or even lead to an efficient resolution of them on their merits.

Defendants are correct that a plaintiff in an ERISA action must ordinarily exhaust available administrative remedies provided by his or her employee benefit plan as a prerequisite to bringing an action for the denial of benefits. *See Counts v. American Gen. Life & Accident Ins. Co.*, 111 F.3d 105, 108 (11th Cir. 1997). However, the district court has discretion to excuse the exhaustion requirement when resort to administrative remedies would be futile or the remedy inadequate. *See id.* The "decision of a district court to apply or not apply the exhaustion of administrative remedies requirement for ERISA claims is a highly discretionary decision which we review only for a *clear* abuse of discretion." *Bickley v. Caremark RX, Inc.*, 461 F.3d 1325, 1328 (11th Cir. 2006) (quotation omitted; emphasis in original); *see also Curry v. Contract Fabricators Inc. Profit Sharing Plan*, 891 F.2d 842, 846 (11th Cir. 1990) ("We recognize of course that despite the usual applicability of the exhaustion requirement, there are occasions when a court is obligated to exercise

¹³ Finally, U.S. Sugar argues that the ESOP participants never could have sold their shares in response to the Lawrence Group's offer anyway, as only the Trustee had the right to tender the shares and in its own discretion. *See* U.S. Sugar Motion at 10-11. As discussed in detail in Part I.A. above, this argument relies on a misreading of the ESOP Trust Agreement.

¹⁴ U.S. Trust raises no substantive challenges to Plaintiffs' ERISA claims against it.

its jurisdiction and is guilty of an abuse of discretion if it does not, the most familiar examples perhaps being when resort to the administrative route is futile or the remedy inadequate.”).

As an initial matter, the U.S. Sugar ESOP Plan does not contain a procedure for resolution of denied benefit claims. *See* ESOP Plan § 11.11. So, to support their argument, the Defendants have to rely on an extrinsic document entitled “Summary Plan Description” to describe the administrative remedies purportedly available to the ESOP Participants. This document is not properly considered on a motion to dismiss based on the pleadings. Plaintiffs do not dispute that the Plan (and the related Trust Agreement) may be considered, as they are specifically cited and relied upon in Plaintiffs’ Complaint. This is not a matter of “artful reference” to some documents and not others in the Complaint. Plaintiffs rely upon the formal Plan documents; the “Summary Plan Description”, however, is a document created by U.S. Sugar to give *its own* description of what the Plan provides – and not a Plan document. *See, e.g., Oplchenski v. Parfums Givenchy, Inc.*, 2007 WL 495289, at *1 n.1 (N.D. Ill. Feb. 12, 2007) (“The Court may consider the ERISA plan documents referenced within Plaintiffs’ Third Amended Complaint without converting the Motion to Dismiss to a motion for summary judgment. However, other documents, *i.e.*, Summary Plan Description and affidavits that are not referenced or included in the Third Amended Complaint are not considered in ruling on the present motion to dismiss.”).

One of the reasons the Summary Plan Description should be treated as a matter for evidence, and not a matter for consideration on a motion to dismiss, is that there is no indication on this record that the Plaintiffs ever were even provided with the Summary Plan Description, that the “procedures” set forth in it were ever actually utilized by the ESOP Committee, or that the Plaintiffs even knew of any administrative remedies provided by the ESOP. *See, e.g., Watts v. Bellsouth Telecomm., Inc.*, 316 F.3d 1203, 1207 (11th Cir. 2003) (“The claim ought not to be barred by the doctrine of exhaustion [on motion for summary judgment] if the reason the claimant failed to

exhaust is that she reasonably believed, based upon what summary plan description said, that she was not required to exhaust her administrative remedies before filing a lawsuit.”). Without this document, there is no foundation for the Defendants’ exhaustion argument, and this document should not be considered on the pleadings.

Regardless, the text of this “Summary Plan Description” actually points out flaws in Defendants’ argument. Under a section entitled “How to file a claim,” the Summary Plan Description states that “[a]ll claims for benefits under the ESOP which have been denied by the Benefits Department must be filed with the [ESOP] Committee in writing.” Summary Plan Description at p. 19. What Johnson and Stanley complain of, however, is not something that is even within the purview of the ESOP Committee. Johnson and Stanley are not making a claim for particular benefits under the ESOP, and they had no claim for benefits “denied”; they claim that certain of the Defendants breached their fiduciary duty by failing to provide them (and all of the other ESOP participants) with proper valuations of the Fair Market Value of their shares in U.S. Sugar. Thus, even the procedures set forth in the Summary Plan Description are a “square hole,” in which the “round peg” of Plaintiffs’ ERISA claims does not fit.

In addition, as a practical matter, there is nothing that the ESOP Committee can do to correct the issue at hand. The valuation of the shares held by the ESOP is the responsibility of the trustee, U.S. Trust. *See* ESOP Trust Agreement, Art. 5.3(b) (“The fair market value of assets of the Trust Fund [including Company Stock] shall be determined by the Trustee.”). The ESOP Committee does not make this determination. While U.S. Trust argues that the Plan gives the ESOP Committee broad discretion, it does not point to anything that would allow the ESOP Committee to supplant U.S. Trust’s role and take charge of determining the Fair Market Value of the shares for itself. In effect then, Defendants appear to be suggesting Plaintiffs should engage in a time-consuming exercise that will be fruitless.

More fundamentally, the ESOP Committee is appointed by the Board of Directors. ESOP Plan § 11.1. As set forth in Part II.A above, Plaintiffs have alleged that a majority of the Board of Directors is not disinterested and not independent in this matter. Just as making demand on such a Board of Directors would be considered futile, demanding a change in the valuation of the ESOP shares from a Committee appointed by that very same Board should be considered futile.

In addition, none of the purposes of imposing an exhaustion requirement would be served by doing so under the circumstances of this case. The Eleventh Circuit has held that exhaustion of administrative remedies can reduce the number of frivolous lawsuits under ERISA, minimize the cost of dispute resolution, assist fiduciaries in carrying out their duties, prevent premature judicial intervention, and allow prior fully considered actions by pension plan trustees to assist courts if the dispute is eventually litigated. *See Mason v. Cont'l Group, Inc.*, 763 F.2d 1219, 1227 (11th Cir. 1985). This is far from a frivolous lawsuit. Requiring certain Plaintiffs to delay resolution of their ERISA claims will not minimize costs, it will just increase them. Mary Rafter is not an ESOP participant at all, and her claims will proceed with the completion of discovery and other pretrial proceedings in this case – as should the other Plaintiffs’ common law claims. These claims will involve many of the same factual issues as the ERISA claims. Requiring certain of the Plaintiffs to complain to the U.S Sugar ESOP Committee on certain of their claims, while other claims proceed before this Court, will just be a recipe for delay, duplication of efforts and increased expense.

Finally, to the extent the Court accepts Defendants’ “exhaustion” argument, the more practical approach would be to abate the ERISA claims of the Plaintiffs other than Mary Rafter, while the common law claims proceed, with leave to reinstate them as this case proceeds to trial. *Cf. Harris Corp. v. Dunn*, 2006 WL 1275062, at *4 n. 6 (M.D. Fla. May 5, 2006) (“The alternative would be to dismiss the action as premature without prejudice to refiling, if necessary, after

completion of the internal appeal process. Since all parties are already present, however, abatement seems better course to serve the interests of justice.”).

C. Plaintiffs’ ERISA Claims Against Gerard Bernard and the Director Defendants Should Not Be Dismissed.

The Director Defendants and Defendant Gerard Bernard, the CFO of U.S. Sugar and a member of its ESOP Committee, also argue that they were not fiduciaries to the ESOP “with respect to the vast majority of the conduct asserted in the Complaint,” and thus cannot be held liable for ERISA violations.¹⁵ Director Defendants’ Motion at 18. This argument is wrong for multiple reasons.

First, Bernard was a member of the U.S. Sugar ESOP Committee, and thus a named fiduciary of the ESOP (ESOP Plan, Art. 11.10(a)), since June 23, 2006. A named fiduciary unequivocally owes the ESOP participants a fiduciary duty. *See, e.g., In re Enron Corp. Secs., Derivative & ERISA Litig.*, 284 F. Supp. 2d 511, 543 (S.D.Tex.2003). Relevant wrongful conduct at issue, including misrepresentations to the ESOP participants, did take place during Bernard’s tenure as a named fiduciary. *See* Compl. ¶¶ 68-73.

Second, regardless of when he became a member of the ESOP Committee, as CFO of U.S. Sugar, Bernard owed a fiduciary duty to the ESOP participants. Generally, “under ERISA, a person or entity may be deemed a fiduciary either by assumption of the fiduciary obligations (the functional or *de facto* method) or by express designation by the ERISA plan documents.” *Enron Corp.*, 284 F. Supp. 2d at 543. Someone is a functional fiduciary under ERISA “to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan

¹⁵ The Director Defendants note that Plaintiffs, although correctly labeling their ERISA claims in Counts VI through VIII as claims for breach of ERISA fiduciary duties, in certain paragraphs (¶¶ 132, 143, 154) mis-cited the applicable provision (citing ERISA § 502(a)(3) as opposed to § 502(a)(2)). Those counts are, as labeled, claims for breach of ERISA fiduciary duties, and the Defendants have correctly treated them as such in their motions.

or exercises any authority or control respecting management of its assets, [or] . . . (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.” 29 U.S.C. § 1002(21)(A).

Here, Plaintiffs’ allege that, as CFO, Bernard exercised discretionary authority and/or discretionary control respecting the management of the ESOP, and had discretionary authority and/or discretionary responsibility in the administration of the ESOP, by virtue of his role in determining what information (and when) the ESOP Trustee and ESOP appraiser did and did not receive regarding the Lawrence Group’s offer, and by determining what information was and was not communicated to the appraisers. Compl. ¶ 129. “Fiduciary status is a fact sensitive inquiry and courts generally do not dismiss claims at this early stage where the complaint sufficiently pleads defendants’ ERISA fiduciary status.” *In re Schering-Plough Corp. ERISA Litig.*, 2007 WL 2374989, at *7 (D.N.J. Aug. 15, 2007).

Third, the same holds true for Robert Buker. Plaintiffs allege that, Buker, “determined what information was, and more importantly was not communicated to the appraisers. In addition, Buker communicated misrepresentations directly to the ESOP participants in letters, the preparation and dissemination of which constituted fiduciary functions with respect to the ESOP.” Compl. ¶ 129. Such allegations should plainly qualify Buker as a “functional fiduciary” to the ESOP.

Finally, the Director Defendants other than Buker were likewise functional fiduciaries to the ESOP. Even the Director Defendants appear to concede they were functional fiduciaries with respect to disclosures made or not made to the trustee. *See* Director Defendants’ Motion at 18. More broadly, the Complaint alleges that the Director Defendants “had discretionary authority and/or discretionary responsibility in the administration of the ESOP, by virtue of (a) their role in the selection and appointment of the Trustee of the ESOP, the appraisers for the ESOP, and the ESOP Committee, (b) their role in failing to inform the ESOP participants of the Lawrence Group’s

offer and failing to provide the Employee Shareholders the opportunity to vote on the offer, (c) their role in failing to timely inform the ESOP participants of the Lawrence Group's offer, and (d) their role in adopting a process for consideration of the Lawrence Group's offer that was inadequate and unreasonable with respect to the ESOP participants." Compl. ¶ 128. Allegations of a defendant's fiduciary status that essentially follow the language of the statute, "unless squarely refuted by Plaintiffs' own pleading or by documents essential to their claims, are sufficient." *In re Honeywell Int'l ERISA Litig.*, 2004 WL 3245931, at *10 n.13 (D.N.J. Sept. 14, 2004).

D. Plaintiffs' ERISA § 510 Claim (Count XIII) Should Not Be Dismissed.

1. Plaintiffs Have Standing to Bring Their Section 510 Claim.

Plaintiffs have also brought a claim against U.S. Sugar, William S. White and Robert Buker for "unlawful interference with attainment of benefits under the ESOP in violation of ERISA § 510 [29 U.S.C. §§ 1149 and 1132(a)(3)]" (Count XIII). Plaintiffs allege that the named Defendants "terminated the employment of [U.S. Sugar's] employees based upon years of service, age and the amount of Company stock owned and invested in the ESOP allocable to the employees . . . with the specific intent to interfere with their attainment and receipt of benefits under the ESOP." Compl. ¶ 191. Plaintiffs then allege that they and other class members were injured and have suffered losses as a result of this scheme. *Id.* ¶ 192.

Defendants argue that Plaintiffs lack standing to bring claims under Section 510 of ERISA because they have failed to allege an "injury-in-fact." Defendants base this argument on the assertion that none of the Plaintiffs have alleged that they were terminated by Defendants in order to deny them their right to their benefits. Defendants' argument is wrong. First, Defendants mischaracterize Plaintiffs' pleadings to support their argument and try to assert that Plaintiffs have only brought this claim on behalf of the putative class. As described above, Plaintiffs' have sufficiently pled that they were personally injured by Defendants' wrongful conduct under Section

510 and do not rely solely on pleading injury on behalf of the class members. *See 31 Foster Children v. Bush*, 329 F.3d 1255, 1263 (11th Cir. 2003) (“At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim.” (citation omitted)). Specifically, Plaintiffs allege “[a]s a result of the [defendants conduct as alleged in ¶¶ 190-191], Plaintiffs and other class members have suffered losses [value of their benefits] caused by defendants’ violations of ERISA.” Compl. ¶ 192. As with the other allegations in the Complaint, Plaintiffs’ ERISA § 510 claim puts Defendants on sufficient notice and states a claim for relief, which is all that is necessary at this stage. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002).

Second, Defendants cite to a handful of inapposite cases that supposedly stand for the position that a plaintiff who has failed to allege that they were personally terminated in their complaint lack standing to assert a Section 510 claim.¹⁶ For example, unlike here, the court in *Griffin v. Dugger*, 823 F.2d 1476, 1483-1484 (11th Cir. 1987) had to determine whether the lower court had erred in granting class certification, when based on the factual record the named plaintiff did not meet the prerequisites of Rule 23(a). Similarly, in *Vuyanich v. Republic National Bank of Dallas*, 723 F.2d 1195 (5th Cir. 1984), the court vacated the district court’s class certification order that it had made after holding a two-day hearing on the matter. Each of these courts had an evidentiary record to make its decision and neither of them had to decide whether plaintiffs’

¹⁶ The Director Defendants cite to *Warth v. Seldin*, 422 U.S. 490, 498-501 (1975) to support their position that Plaintiffs have failed to sufficiently plead standing. Director Defendants’ Motion at 17. However, the Supreme Court in *Warth* summarized that, on a motion to dismiss for lack of standing, a court’s review “must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. At the same time, it is within the trial court’s power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff’s standing.” Applying that standard here, Plaintiffs have met their burden.

complaints sufficiently alleged standing. The holdings of these cases are confined to class certification after there has been sufficient discovery on the matter.

Defendants seem to argue that Plaintiffs have not proven that the Defendants terminated them in order to interfere with their benefits; but this is an inappropriate inquiry at this stage in the litigation where there has not been any discovery or a hearing on the issue. *See Bischoff v. Osceola*, 222 F.3d 874, 879 (11th Cir. 2000) (“[A] district court *cannot* decide disputed factual questions or make findings of credibility essential to the question of standing on the paper record alone but *must* hold an evidentiary hearing.”); *Steele v. National Firearms Act Branch*, 755 F.2d 1410 (11th Cir. 1985) (remanding to district court to allow plaintiff to establish the factual background necessary to permit the court to resolve the standing question and explaining that, when determining standing, a district court should resolve disputed factual issues either at a pretrial evidentiary hearing or at trial); *see also Swierkiewicz*, 534 U.S. at 512 (“The complaint . . . must contain only a short and plain statement of the claim showing that the pleader is entitled to relief.”); *Warth v. Seldin*, 422 U.S. 490, 501-502 (1975) (“For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. At the same time, it is within the trial court’s power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff’s standing.”).

In sum, it is premature at this stage to decide if Plaintiffs have proven whether the Defendants intentionally terminated any of them in order to prevent them from accruing benefits under the ESOP and thereby unlawfully interfering with their attainment of benefits. Plaintiffs should therefore be permitted to proceed with this claim.

2. **Defendants White and Buker Are “Employers,” and Plaintiffs § 510 Claim Should Not Be Dismissed Against These Two Defendants.**

Defendants also argue that Plaintiffs’ ERISA § 510 claims against William S. White and Robert Buker should be dismissed because neither of them were Plaintiffs’ “employer.” Defendants are wrong under the statute. ERISA §3(5) defines employer as: “any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.” 29 U.S.C. § 1002(5); *see also Valentine v. Carlisle Leasing Intern. Co.*, 1998 WL 690877, at *6 (N.D.N.Y. 1998) (“Nothing in Section 510 restricts its scope to employers, as defendants argue. Rather, a proper interpretation of the statute is one that extends its application to any person who has the ability to affect a plaintiff’s employment relationship.” (citation omitted)).

Defendant White is on the Company’s Board of Directors and has served as Chairman for over 20 years and in that role “exercises actual direction and control over the conduct of U.S. Sugar and its Board of Directors” Compl. ¶ 21. Defendant Buker serves as the Company’s President and CEO and became a member of both the Board of Directors and the Company’s Executive Committee. *See id.* ¶ 22. Plaintiffs’ Complaint specifically alleges that both Defendants “designed and implemented a corporate scheme or policy with the specific intent to interfere with the attainment and receipt of benefits under the ESOP.” *See id.* ¶ 190. Thus, White and Buker are “employers” under ERISA, because as alleged they acted indirectly in the interest of U.S. Sugar, which in any event cannot act independently, in order prevent Plaintiffs from accruing benefits.

Defendants appear to be arguing that only Defendant U.S. Sugar can be the “employer” by their assertion that White and Buker are not the Plaintiffs’ employer; but this both ignores the statutory definition of “employer” and the reality that the Company is an entity dependent on the

individual Defendants to act.¹⁷ The statute makes it clear that individuals can be -- and are -- employers under ERISA. *See* 29 U.S.C. § 1002(5) (defining employer); 29 U.S.C. § 1002(9) (defining person as “an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee”); 29 U.S.C. § 1140. Section 510 of ERISA states: “[i]t shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate ... for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act.” 29 U.S.C. § 1140. Because White and Buker qualify as employers under the plain language of the statute their argument should be dismissed outright.

Moreover, if the Defendants’ argument were validated, individuals would never be held responsible for their actions and Section 510 of ERISA would not have any teeth to carry out Congress’ intent behind its passage. *See Byrd v. McPapers*, 961 F.2d 157, 161 (11th Cir. 1992) (“Congress designed § 510 primarily to protect the employment relationship that gives rise to an individual’s pension rights”) (citation omitted); *see also Gavalik v. Continental Can Co.*, 812 F.2d 834, 851 (3rd Cir. 1987) (“Congress enacted § 510 primarily to prevent unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights”) (internal quotations and citation omitted). Thus, Defendant’s assertion that they are not employers should be rejected, and Plaintiffs’ Section 510 claim should be allowed to proceed against them.

¹⁷ Further, neither case that Defendants rely upon to assert this proposition dealt with the present issue of whether a Plaintiff could bring a Section 510 claim against Director Defendants. In *Byrd v. McPapers*, the court dismissed plaintiff’s Section 510 claim that she had brought against the insurance company of the employer benefit plan. *See* 961 F.2d at 157; *accord Nankivil v. Lockheed Martin Corp.*, 2003 WL 25568817 (M.D. Fla. 2003). Plaintiffs here are bringing an action against agents of the employer who have acted in its interest and have interfered with their attainment of benefits.

CONCLUSION

Plaintiffs respectfully request that this Court deny in their entirety the Defendants motions to dismiss the Consolidated Class Action Complaint.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of November 2008, I caused the foregoing document to be served via CM/ECF on all counsel of record on the attached Service List.

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