

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE UNITED STATES SUGAR	:	Master File No.
CORPORATION LITIGATION	:	08-80101-CIV-MIDDLEBROOKS
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PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT

Plaintiffs Linda Stanley, Diallo Johnson, Mary Rafter, Michael Texton and Miguel Maturana respectfully move for an order: (1) granting preliminary approval of the settlement of this litigation; (2) granting certification of the proposed Classes pursuant to Rule 23 of the Federal Rules of Civil Procedure; (3) approving the forms for the mailing and publication of the Notice of Settlement; (4) authorizing the mailing and publication of those notices; and (5) setting the date and time for the Final Fairness Hearing and related deadlines as set forth in the proposed Preliminary Approval Order¹

INTRODUCTION

Plaintiffs seek preliminary approval of a proposed settlement (the "Settlement") on behalf of (1) a class consisting of certain shareholders who held Class A common stock of United States Sugar Corporation ("U.S. Sugar") between August 4, 2005 and September 24, 2009 to be certified pursuant to Rule 23(b)(3) as an opt-out class (the "Shareholder Class"); and (2) a class consisting of all participants and beneficiaries of the U.S. Sugar Employee Stock Ownership Plan ("ESOP") during the period beginning January 31, 2002 and ending September 24, 2009 to be certified pursuant to Rule 23(b)(1) as a non-opt out class (the "Participant Class") (and collectively referred to as the "Classes"). If the Court preliminarily approves the Settlement, pursuant to Rule 23(e)(1)(B), members of the Settlement Classes will be provided with a notice (the "Notice") advising them, *inter alia*, of the terms of the Settlement, how to object to the Settlement, and the date of the Final Fairness Hearing. The Notice will also explain who is a member of each of the Settlement Classes.

¹ Attached to this motion as Exhibit 1 is the Settlement Agreement. The proposed form of Notice of Settlement, the proposed Preliminary Approval Order, and the proposed Final Approval Order are attached to the Settlement Agreement as Exhibits 1A-1C, respectively.

The Settlement, as described in greater detail below, will require a cash payment on behalf of the Defendants of **\$8.4 million**, to be followed by an additional cash payment of **\$7.5 million**, the latter payment to be made if and only if certain conditions are met, for a total potential value of the Settlement of **\$15.9 million**. The Settlement of this action was reached approximately nineteen months after the first complaint was filed on January 31, 2008. By that point in time, this Court had entered its Order Granting in Part and Denying in Part Defendants' Motions to Dismiss [Doc. 224], extensive document discovery had taken place both from the parties and from a substantial number of non-parties, consulting and testifying experts had been retained and utilized, 21 depositions of potential fact witnesses and 4 depositions of expert witnesses had been taken all around the United States, and an independent mediator (Bruce Greer) had facilitated three separate negotiation sessions throughout the pendency of the litigation. Each term and detail of the Settlement is the product of extensive arm's-length negotiations.

As set forth in detail below, Plaintiffs submit that the Settlement is fair, reasonable and adequate under the governing standards for evaluating class action settlements in the Eleventh Circuit. Further, Plaintiffs submit that certification of two settlement classes, one as an opt-out class and the other as a non-opt out class, is appropriate pursuant to Rule 23, and that the proposed notice plan more than meets the requirements of due process

BACKGROUND

A. Procedural Background and Litigation History.

The Complaints. Plaintiffs Linda Stanley, Diallo Johnson and Mary Rafter filed their initial complaint on January 31, 2008, followed successively by three similar complaints. This Court consolidated the four complaints on September 23, 2008. On October 6, 2008, Plaintiffs filed their Consolidated Class Action Complaint [Doc. 142] (the "Complaint") alleging thirteen

separate causes of action for breaches of fiduciary duty under the Employee Retirement Income Security Act ("ERISA") and under Delaware law, and for conversion under Florida law, against Defendants William S. White, Robert H. Buker, Jr., John Butler, Frederick Kirkpatrick, Roy E. Peterson, W. Archibald Piper, William H. Piper, Lloyd E. Reuss, Horace Wilkins, Ridgway White, Gerard Bernard, Bank of America, N.A. (as successor to United States Trust Company, N.A.), the Charles Stewart Mott Foundation (the "Mott Foundation"), and U.S. Sugar.

The Complaint sought to recover losses under ERISA §§ 409 and 502(a)(2) suffered by the ESOP and its participants and under Delaware law and Florida law for losses to the shareholders as a result of Defendants' alleged breaches of their fiduciary duties. There are two general parts to the Plaintiffs' claims. The first part relates to the rejection of alleged offers to acquire all of the shares of U.S. Sugar for \$293 per share by a third party purchaser known as the Lawrence Group. Plaintiffs, as direct and beneficial shareholders in U.S. Sugar, brought 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 of Directors who presided over this conduct (collectively, the "Director Defendants"), U.S. Sugar's CFO Gerard Bernard, and one of its shareholders, the Charles Stewart Mott Foundation (the "Mott Foundation"). The second part relates to allegations of additional wrongful conduct and undervaluation of the ESOP participants' shares in U.S. Sugar that followed the rejection of the alleged offers from the Lawrence Group. The Plaintiffs (other than Mary Rafter, who is a direct shareholder) brought these claims under various ERISA provisions based on their status as participants in the U.S. Sugar ESOP (Counts VI – XIII).

Plaintiffs' Counsel conducted a thorough and lengthy investigation into Plaintiffs' claims and the allegations set forth in the Complaint prior to the filing of this action.

The Motions to Dismiss. On October 27, 2008, the Defendants filed four separate motions to dismiss the Complaint. (Motions to dismiss were also filed prior to this by the Defendants, to which the Plaintiffs responded by amending the complaint, thus mooted the first round of motions.) Plaintiffs filed a consolidated opposition brief to the Defendants' motions on November 17, 2008, and the Defendants' motions to dismiss were fully briefed after the Defendants filed their replies on December 4, 2008. The Court held a lengthy oral argument on the motions on March 16, 2009.

On April 27, 2009, this Court entered its 47-page Order Granting in Part and Denying in Part Defendants' Motions to Dismiss the Complaint [Doc. 224]. In the Order, the Court dismissed with prejudice or dismissed without prejudice all counts in the Complaint with the exception of Count I on behalf of Plaintiff Mary Rafter, the direct shareholder. The Court held that the Plaintiffs had failed to exhaust their administrative remedies prior to filing suit with respect to all of the ERISA claims (Counts VI-XIII), dismissing each of those claims without prejudice. In addition, the Court dismissed with prejudice (1) the ESOP participant Plaintiffs' claims for breach of common law fiduciary duties in Counts I and II, (2) all Plaintiffs' claims for breach of fiduciary duty in Count III, and (3) Plaintiff Mary Rafter's claim for conversion against the Mott Foundation in Count V.

The Director Defendants and defendants William S. White and Ridgeway H. White subsequently filed Answers to Plaintiffs' Complaint on May 12, 2009.

Discovery. In the interim, the parties also engaged in extensive discovery to prepare this case for trial. The investigative efforts carried out by Plaintiffs' Counsel to date have included inspecting, reviewing and analyzing nearly 100,000 pages of documents produced by the parties and approximately 28 subpoenaed non-parties, as well as voluminous publicly available

documents, ranging from news articles and press releases to information obtained from public records requests. Plaintiffs' Counsel have also reviewed and analyzed numerous documents concerning the ESOP and its administration, and have consulted with ERISA experts on such documents. Plaintiffs' Counsel have also researched the applicable law, often in highly complex and technical areas of the law, with respect to the claims asserted and the potential defenses thereto. Outside of the "formal" discovery process, Plaintiffs' Counsel have also continued their investigation into the claims by interviewing potential fact witnesses and ESOP participants. Plaintiffs' Counsel have also employed consulting and expert witnesses, two of whom produced expert reports in this matter and were deposed. Similarly, Plaintiffs' Counsel reviewed and analyzed expert reports prepared by four expert witnesses utilized by the Defendants and deposed two of them.

In total, depositions were taken of 21 fact witnesses, and of 4 testifying expert witnesses (2 from each side). These depositions, a number of which involved complex subject matter, were conducted in Florida, Michigan, Louisiana, Mississippi, New York, Illinois, North Carolina, South Carolina, Tennessee and Georgia. The parties also served nearly 100 subpoenas to various non-parties either for testimony or for documents or for both. Since reaching a settlement in principle, Plaintiffs' Counsel have also engaged in certain additional discovery with the Defendants, including reviewing thousands of pages of documents and deposing a U.S. Sugar officer, relating to the potential transaction between U.S. Sugar and the South Florida Water Management District.

In addition, while discovery was ongoing, Plaintiffs' Counsel prepared a motion for class certification that was due to be filed shortly after a settlement in principle was reached.

Mediations. While discovery was ongoing, the parties discussed the possibility of settlement and retained an experienced mediator, Bruce Greer, and participated in three separate mediations with Mr. Greer during the pendency of this case on August 15, 2008, September 29, 2008, and May 28, 2009. After the Court's Order granting in part and denying in part the Defendants' motions to dismiss, the parties met for their third mediation, on May 28, 2009, and at its conclusion reached a settlement in principle of the case

THE SETTLEMENT

The terms and conditions of the Settlement are set forth in the Stipulation and Agreement of Settlement ("Settlement Agreement"), which is attached as Exhibit 1. The following is a summary of the principal terms of the Settlement Agreement (none of which is meant to alter any of the actual terms of the Settlement Agreement itself, which terms control):

I. **The Settlement Classes.** The Settlement Agreement contemplates that the Court will certify the following two classes for settlement purposes:

(A) A settlement class under Rule 23(b)(3) defined as:

All holders of Class A common Stock of U.S. Sugar during the period beginning August 4, 2005 and ending September 24, 2009.

This settlement class is referred to as the "Shareholder Class." This class includes but is not limited to: (1) Evercore Trust Company, N.A., (which succeeded Bank of America, N.A., which succeeded U.S. Trust, N.A.) as trustee for the ESOP with regard to the ESOP's shares and on behalf of the participants to whose accounts shares have been allocated, and (2) the Mott Foundation. This class excludes defendants William S. White, Ridgeway H. White and John Butler and any trusts in which (1) William S. White is both the trustee and sole beneficiary, (2) Ridgeway H. White is both the trustee and sole beneficiary, or (3) John Butler is both the trustee and sole beneficiary.

(B) A settlement class under Rule 23(b)(1) defined as:

All participants and beneficiaries of the ESOP during the period beginning on January 31, 2002 and ending September 24, 2009.

This settlement class is referred to as the "Participant Class " This class excludes defendants Gerard A. Bernard and Robert H. Buker, Jr.

Together, the two classes are referred to as the "Settlement Classes "

2. The Proposed Class Representatives. In connection with their request that the Court certify the two classes for settlement purposes, Plaintiffs respectfully request that the Court appoint Plaintiffs Diallo Johnson, Linda Stanley and Miguel Maturana as class representatives for the Participant Class and Mary Rafter for the Shareholder Class. The former are or were participants in the ESOP during the relevant time period, and the latter is a direct shareholder of U.S. Sugar stock. Plaintiffs have been actively involved in the litigation, having provided their Rule 26 Initial Disclosures to the Defendants, formally responded to discovery requests served upon them, and have each been deposed by the Defendants. Additionally each plaintiff has been advised of the Settlement and approves of it.

3. Settlement Amount. The Plaintiffs and the Defendants have agreed to settle this action for the sum of \$8,400,000 (the "Settlement Payment") to the Settlement Classes. The Settlement Agreement requires U.S. Sugar to pay for all costs of administration of the Settlement and for the services of an independent fiduciary to examine the settlement terms as they relate to the ESOP. Garden City Group, a professional claims administrator, will be utilized to administer the Settlement.

The Defendants also agree to pay an additional \$7,500,000 (the "Additional Settlement Payment") to the Shareholder Class if and only if U.S. Sugar closes on the transaction with the South Florida Water Management District (the "SFWMD") that is set forth in the Amended and

Restated Agreement for Sale and Purchase, between U.S. Sugar, SBG Farms, Inc. Southern Garden Groves Corporation, and the SFWMD, dated May 13, 2009, or a transaction involving a sale of assets of U.S. Sugar and/or its subsidiaries to the SFWMD for the purchase price of at least \$500,000,000 that closes on or before December 31, 2011 (the "SFWMD Transaction")

The Additional Settlement Payment is fully contingent on the closing of the SFWMD Transaction. In other words, if the SFWMD Transaction does not close, there will be no Additional Settlement Payment (and there will be no release of certain claims identified in the Settlement Agreement). However, the balance of the Settlement (including the \$8.4 million payment) will remain intact and proceed to completion if approved by the Court. At present, the contract embodying the SFWMD Transaction has been approved of by the boards of both the SFWMD and U.S. Sugar and has been executed by both parties. In addition, on August 26, 2009, a court challenge to the issuance of bonds (certificates of participation) to finance the purchase of the U.S. Sugar land was resolved in favor of the SFWMD and U.S. Sugar. *See* Final Judgment Validating Certificates of Participation Lease-Purchase Financing, Not to Exceed \$650 Million, in *South Florida Water Management District v State of Florida*, Case No. 50-2008-CA-031975 (Palm Beach County Circuit Court). Under state law, that decision is now subject to a direct appeal to the Florida Supreme Court. According to published news reports, the SFWMD anticipates selling \$650 million in bonds by March 2010 to fund the purchase of land contemplated by the SFWMD Transaction. *See* "Florida Plans \$650 Million Everglades-Land Bond Sale by March," *Bloomberg.com* (August 31, 2009).

Although these developments suggest that the SFWMD Transaction is headed in the direction of a closing, there is no guarantee that the SFWMD Transaction will close – and thus no guarantee that the Additional Settlement Payment will be made. Plaintiffs' Counsel

negotiated the Settlement Agreement with the view that the payment of \$8.4 million settlement payment was a fair and adequate settlement of this lawsuit, but that the Additional Settlement Payment provision was a way to leverage the amount paid to the Settlement Classes if and when U.S. Sugar received an infusion of cash as a result of the SFWMD Transaction.

4. The Plan of Allocation. The Settlement Agreement contemplates, subject to the Court's approval, that after payment of Court-approved attorneys' fees, litigation expenses and costs, and the named Plaintiffs' contribution awards, the net proceeds of the \$8,400,000 Settlement Payment will be distributed to both Settlement Classes according to the plan of allocation formulas stated in the Settlement Agreement. In general terms, the amount received by a member of either class will be on a *pro rata* basis based on the highest number of shares the class member held during the respective class period -- or the highest number of "participation units" held by participants in the ESOP. The calculation will be limited by an additional formula to avoid double recovery between the Shareholder Class and the Participant Class. In this way, the Plan of Allocation is intended to distribute the net proceeds equitably based upon each Class Member's number of shares held.

Similarly, if the Additional Settlement Payment is made, then it will be distributed using the same formula to the Shareholder Class. Current ESOP participants will also benefit from this payment because the Trustee of the ESOP, as a shareholder of U.S. Sugar, will receive the payments on behalf of the ESOP and will allocate the payment to the ESOP participants' accounts based on the number of participation units that they have.

All payments received by the Participant Class -- and by the ESOP Participants through the Trustee of the ESOP for payments made to the Shareholder Class -- will be made in the form of cash to the ESOP participants' account (or an account created for them if they are a

former participant) Those sums will be subject to the same rules and restrictions otherwise applicable to the ESOP (e.g., no withdrawals until retirement, early retirement or certain other circumstances specified in the ESOP Plan documents) All payments received by the Shareholder Class will be in the form of direct cash payments.

5. The Released Parties. The parties who will be released of potential liability are as follows: William S. White, Robert H. Buker, Jr., John Butler, Frederick Kirkpatrick, Roy E. Peterson, W Archibald Piper, William H Piper, Lloyd E Reuss, Horace Wilkins, Claire Mott White, Ridgway H. White, Gerard Bernard, all members of the U.S. Sugar ESOP Committee during the Class Period, the Mott Foundation, Bank of America, N.A. (as successor to United States Trust Company, N.A.), Evercore Trust Company, N.A. (as the current Trustee of the ESOP which succeeded Bank of America, N.A. as Trustee), and U.S. Sugar. The Released Parties include, for all of the above, all predecessors, successors and assigns or any current or former affiliate, partner, principal, directors, officers, representatives, insurers, attorneys, agents and accountants and, in the case of individuals, their respective heirs, beneficiaries, executors, administrators, successors, and legal representatives.

6. Settled Claims. Paragraphs 4-5 and 8 of the Settlement Agreement define with specificity the settled claims. The released claims in exchange for the Settlement Payment include, in general terms, all claims raised or that could have been raised in this action. The released claims do not include claims for personal injury or wrongful death or for wrongful termination or employment discrimination (other than those under ERISA). In addition, in the event that the Additional Settlement Payment is made, additional claims against the Defendants will be released that include, in general terms, all claims raised or that could have been raised relating to the SFWMD Transaction. Again, these released claims do not include claims for

personal injury or wrongful death or for wrongful termination or employment discrimination (other than those under ERISA). In the event that the Additional Settlement Payment is not made (because the SFWMD Transaction is not closed), then the additional release set forth in paragraph 8 of the Settlement Agreement will not be provided.

7. Notice. A proposed Notice to be sent to each Class Member is attached as Exhibit 1.B. The proposed Preliminary Approval Order provides for the following regarding notice to the Class Members:

- The Notice will be mailed by first class mail to the last known address of all members of the Settlement Classes who can be identified with reasonable effort by U.S. Sugar
- The Notice will be posted on U.S. Sugar's website (www.ussugar.com).

8. Attorneys' Fees & Costs. Plaintiffs' Counsel will make an application to the Court for an award of attorneys' fees and litigation costs and expenses out of the common fund created as a result of this Settlement. The Defendants agree to not object to the amount of attorneys' fees sought in the fee application so long as the amount of the attorneys' fees sought in connection with the recovery of the Settlement Payment is less than or equal to 30% of the Settlement Payment Fund, and the amount sought in connection with the recovery of Additional Settlement Payment is less than or equal to 30% of the Additional Settlement Payment Fund. If the Additional Settlement Payment is not made (because the SFWMD Transaction does not close), then Plaintiffs' Counsel will receive no fee in connection with the Additional Settlement Payment. Litigation costs and expenses to be sought will not count towards the 30% limit

9. Jerry Grace Agreement. Separate and apart from the Settlement Agreement, U.S. Sugar and Jerry Grace, a former employee of U.S. Sugar, entered into an agreement, the principal terms of which are as follows: (1) mutual agreements not to disparage each other, (2)

an agreement by Grace not to participate in any litigation against U.S. Sugar, (3) an agreement by Grace to return any confidential or other company information he possesses to U.S. Sugar, and (4) an agreement by U.S. Sugar to forebear from withholding payments due to Grace under U.S. Sugar retirement plans known as the SERP and the Phantom Stock Plan so long as he abides by his covenants under the agreement. Grace provided paralegal-related services to Plaintiffs Counsel and who was deposed by the Defendants in this lawsuit. This agreement is separate and apart from the Settlement Agreement; it is not subject to Court approval, and does not affect the members of the Settlement Class. However, Plaintiffs' Counsel has included a description of this agreement in this motion in the interests of full disclosure as the agreement does relate to the underlying litigation

PROPOSED SCHEDULE

As laid out in the Preliminary Approval Order, the parties have agreed to the following schedule of events, the dates of which will be determined after the Court sets a date for the Final Fairness Hearing:

<u>Event</u>	<u>Time for Compliance</u>
Claims Administrator shall cause the Notice to be mailed to all Shareholder Class Members and Participant Class Members	__ days from entry of Preliminary Approval Order
Notice to be published on the U S Sugar website	__ days from entry of Preliminary Approval Order
Any Shareholder Class Members wishing to make an exclusion ("opt-out") request shall mail the request to the Claims Administrator	__ days before the Fairness Hearing
Any "Objector" wishing to object to the fairness, reasonableness or adequacy of the Settlement shall serve his or her objection on Class Counsel	__ days before the Fairness Hearing
Objectors or their attorneys intending to appear at the Final Approval Hearing must serve a "Notice of Intention to Appear"	__ days before the Fairness Hearing
Class Counsel shall file a motion for final approval of the Settlement	__ days before the Fairness Hearing

Application by Class Counsel for attorney fees and reimbursement of expenses must be filed	___ days before the Fairness Hearing
The Parties shall file any response to any Objector	___ days before the Fairness Hearing
Proposed Final Fairness Hearing	_____ 2009

The events set forth above are all tied to the Fairness Hearing date, which Plaintiffs respectfully request be scheduled for approximately 50-60 days from the date a Preliminary Approval Order is entered, which would be _____.

LEGAL STANDARD

To conclude the Settlement, Rule 23(e) requires that there be notice to the Class, a fairness hearing, and this Court’s approval. Before scheduling a fairness hearing and ordering Class Notice, this Court must be presented with a settlement that warrants implementing the Rule 23(e) procedures. The purpose of obtaining preliminary approval “is to ascertain whether there is any reason to notify the class members of the proposed settlement and proceed with the fairness hearing.” *Armstrong v Bd of School Dir’s*, 616 F 2d 305, 314 (7th Cir. 1980). In reviewing a motion for preliminary approval, a court “is to determine if the proposed settlement falls within the range of possible approval, i.e., whether probable cause exists to certify the class and issue notification of the settlement’s terms.” *Matter of Skinner Group, Inc*, 206 B.R. 252, 261 (N.D. Ga. 1997).

In determining whether to preliminarily approve a class action settlement, the court assesses whether there is “probable cause” to provide notice and hold a fairness hearing. *See In re Mid-Atlantic Toyota Antitrust Litig*, 564 F. Supp. 1379, 1385 (D. Md. 1983). An inquiry into the ultimate fairness of the Settlement is not necessary at this time, because there will be a further hearing at which the fairness of the Settlement will be addressed, after notice to the Class

Members. Therefore, even if there are aspects of a proposed settlement that raise questions, they “should not derail the orderly workings of the settlement process at this point.” *Id.* at 1386. Preliminary approval should be denied only if there are apparent grounds to doubt the settlement’s fairness, or other “obvious deficiencies” MANUAL FOR COMPLEX LITIGATION, § 30.41 (3d ed. 1993).

DISCUSSION

A. THE SETTLEMENT AGREEMENT MEETS THE STANDARDS FOR PRELIMINARY APPROVAL.

Federal courts strongly favor the voluntary resolution of complex class action cases. *See Bennett v. Behring Corp.*, 737 F.2d 983, 986 (11th Cir. 1984) (stating that the court’s decision to uphold the district court’s approval of settlement was “informed by the strong judicial policy favoring settlement as well as by the realization that compromise is the essence of settlement”); *Wal-Mart Stores Inc. v. USA Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (“We are mindful of the strong judicial policy in favor of settlements, particularly in the class action context”). Consequently, a district court has broad discretion in evaluating a class action settlement, and its decisions will not be overturned “absent a clear abuse of discretion” *Bennett*, 737 F.2d at 986 (citations omitted); *see also Weiner v. Roth*, 791 F.2d 661, 662 (8th Cir. 1986) (same).

In deciding whether to grant preliminary approval, the court does “not decide the merits of the case or resolve unsettled legal questions” *Carson v. American Brands, Inc.* 450 U.S. 79, 88 n.14 (1981). Rather, a strong initial presumption of fairness attaches to the proposed settlement if the settlement is reached by experienced counsel after arm’s length negotiations. *See In re PaineWebber Ltd. P’ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997) (“[S]o long as the integrity of the arm’s length negotiation process is preserved . . . a strong presumption of fairness attaches to the proposed settlement”); *see also* MANUAL FOR COMPLEX LITIGATION §

