

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

<p><b>Matthew T. Zilhaver, <i>etc.</i>,</b></p> <p style="text-align:center"><b>Plaintiff,</b></p> <p style="text-align:center"><b>v.</b></p> <p><b>UnitedHealth Group Incorporated, <i>et al.</i>,</b></p> <p style="text-align:center"><b>Defendants.</b></p>	<p><b>Civil File No. 06-cv-02237 (JMR/FLN)</b></p> <p><b>United Defendants' Reply to Plaintiffs' Memorandum in Opposition to the Consolidated Motion of Defendants (i) for Summary Judgment on Claims of Sascha Linn, (ii) to Dismiss the Claims of Matthew Zilhaver for Lack of Subject Matter Jurisdiction and (iii) to Dismiss the Claims Asserted Against Defendants Johnson, Spears, Mundinger and Hemsley for Failure to State a Claim Upon Which Relief Can Be Granted.</b></p>
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UnitedHealth Group Incorporated ("United"), L. Robert Dapper, James A. Johnson, William G. Spears, Mary O. Mundinger and Stephen J. Hemsley (the "United Defendants") submit this Reply to Plaintiff's Opposition to the United Defendants' Motion for Summary Judgment and Dismissal ("Pl. Opp.").<sup>1</sup>

**I. PLAINTIFF LINN'S CLAIMS ARE BARRED BY THE RELEASE**

**A. Linn's Release Bars His ERISA Claims.**

Plaintiffs argue that Linn's Severance Agreement and Release (the "Release") does not bar Linn's claims because, as they see it, the claims alleged by Linn are not *his* claims but instead are claims that belong to the Plan as an entity. Pl. Opp. at 13-14. Linn asserts claims under ERISA §§ 502(a)(2) and (3) to

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<sup>1</sup> Hemsley, Johnson, Spears, and Mundinger are referred to as the "Director Defendants."

remedy alleged breaches of fiduciary duty. Only a participant, beneficiary, or fiduciary of a plan may claim under those sections. A plan itself may not. *See, e.g., Pressman Unions-Printers League Income Sec. Fund v. Cont'l Ass. Co.*, 700 F.2d 889, 892-93 (2d Cir. 1983).

To be sure, when a plan beneficiary sues for money under ERISA § 502(a)(2), any recovery must be paid to the plan, rather than to the individual who brought the suit. *See Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 144 (1985) ("Congress did not intend [ERISA § 502(a)(2)] to authorize any relief except for the plan itself"). Under black-letter trust law, which "applies to trusts established under ERISA," *Rickie v. Armco*, 92 F.3d 720, 724 (8th Cir. 1996), a releasing beneficiary "precludes[s] himself from holding the trustee liable for a breach of trust by a release or contract . . . ." Restatement (Second) of Trusts, § 217(1). The beneficiary's release is a conveyance of his property interest in the trust to the trustee, and although the release will not extinguish claims that may be asserted by *other* trust beneficiaries, "the beneficiary making the transfer no longer has an interest under the trust and is precluded from enforcing the trust." *Id.* § 343, cmnt. D.

Applying these black-letter principles to Linn's Release, it is clear that even though other Plan participants may not have released their claims, Linn voluntarily surrendered *his* right to sue.

Plaintiffs argue that *Bowles v. Reade*, 198 F.3d 752 (9th Cir. 1999), permits a beneficiary to maintain claims on behalf of a plan despite having expressly

released his claims. But *Bowles* only held that a plaintiff suing must receive the plan's consent before reaching a settlement. *Id.* at 760. Nothing in *Bowles* permits a beneficiary like Linn to sue where, as here, he released claims against the defendants and retains no stake in the outcome of this action.

Furthermore, Linn's Release contained a separately enforceable promise not to sue. Although a "release" and a "promise not to sue" are often used interchangeably, the terms have distinct meanings. *E.g.*, *Wilson v. Wilson*, 46 F.3d 660, 662 (7th Cir. 1995) (distinguishing between releases and covenants not to sue). And Linn agreed to both of them. This promise was supported by consideration and is enforceable. *Mead v. Intermec Techs. Corp.*, 271 F.3d 715, 717 (8th Cir. 2001).

**B. The Release Is Enforceable.**

Plaintiffs next argue that the Release is unenforceable because Linn now contends that he did not "knowingly and voluntarily" sign it. Pl. Opp. at 3, 14-19. This new, self-serving contention fails to raise a genuine issue of material fact. *E.g.*, *Pilon v. Univ. of Minn.*, 710 F.2d 466, 467-68 (8th Cir. 1983) (affirming summary judgment because release was knowing and voluntary and clearly waived all potential claims despite plaintiff's subsequent argument that she did not intend to extinguish a claim under a consent decree). Whether execution of a release is knowing and voluntary is based on an *objective* evaluation of the "totality of the circumstances in which the release was signed . . . ." *Leavitt v. Nw. Bell Tel. Co.*, 921 F.2d 160, 162 (8th Cir. 1990). Specifically, courts consider the

following factors:

(1) [Plaintiff's] education and business experience; (2) [plaintiff's] input in negotiating the terms of the settlement; (3) the clarity of the release language; (4) the amount of time [plaintiff] had for deliberation before signing the release; (5) whether [plaintiff] read the release and considered its terms before signing it; (6) whether [plaintiff] knew of his rights under the plan and the relevant facts when he signed the release; (7) whether [plaintiff] was given an opportunity to consult with an attorney before signing the release; (8) whether [plaintiff] received adequate consideration for the release; and (9) whether [plaintiff's] release was induced by improper conduct on the [defendant's] part.

*Id.* (citations omitted).

Linn took money in exchange for his Release.<sup>2</sup> Transcript of Deposition of Sascha Linn ("Linn Dep."), attached as Exhibit 1 to Pl. Opp., at 65:15-66:4. Linn holds college degrees in mathematics, physics and mechanical engineering, *id.* at 7:7-8:3, so objectively he has the capacity to understand the three-page Release. The Release expressly provides that Linn would release any claim arising under ERISA and "any rights in any welfare plan *or pension or retirement plan* sponsored by" United. Release ¶ 3. Linn knew that subject matter, having participated in 401(k) plans sponsored by various employers. Linn Dep. at 9:4-23:2.

Moreover, Linn had ten days to consider the Release, and he had multiple conversations during this time period with United regarding his severance. *Id.* at

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<sup>2</sup> Contrary to his claim that he received "only" two weeks severance as consideration for the Release (Pl. Opp. at 19), Linn received a lump sum payment of fifty-six days' base pay plus his accrued paid time off. Release § 2; Linn Dep. 65:22-66:4.

70:11-13, and 72:10-78:6. Further, Linn knew about the alleged options practices at issue in this action *before* he signed the Release. *Id.* at 63:16-64:7; 64:16-21. Indeed, the Release itself specifically provides that "I [Linn] have had adequate opportunity to consult with an attorney, and I have read *and understand* the terms of this Release and am voluntarily signing this Release." *Id.* ¶ 7 (emphasis added). These undisputed and objective facts show that the Release is enforceable. *See Leavitt*, 921 F.2d at 162-63 (employee who had eleven days to consider a release and who declined to consult with an attorney knowingly and voluntarily released his claims).

**C. The Release Covers the United 401(k) Plan.**

Plaintiffs next argue that because the Release provides that it does not preclude Linn from obtaining "the vested and non-forfeitable balance in [his] account under any pension or retirement plan sponsored by [United]," this must mean that *all* claims with respect to the United Plan are excluded from the Release. Pl. Opp. at 19. Plaintiffs misread the provision, which only permits Linn to bring a claim for his *own* vested benefits under ERISA § 502(a)(1)(B), which is nowhere pled in the Complaint.

**II. PLAINTIFF ZILHAVER LACKS STANDING**

In addressing Zilhaver's standing, Plaintiffs rely on three recent cases from other circuits which, they contend, hold that "former participants have standing to sue even if they 'cash out' or close their plan accounts after the fiduciary breaches." Pl. Opp. at 8. Those cases are of no consequence given that the Eighth Circuit has

held that "standing is determined as of the lawsuit's commencement." *Harley v. Zoesch*, 413 F.3d 866, 872 (8th Cir. 2005). Specifically, to have ERISA standing based on "participant" status in the Eighth Circuit, a plaintiff must, among other things, be a plan participant as of the lawsuit's commencement date. *See Gilquist v. Becklin*, 675 F. Supp. 1168, 1170-71 (D. Minn. 1987), *aff'd* 871 F.2d 1093 (8th Cir. 1988); *In re Patterson Cos.*, 479 F. Supp. 2d 1014, 1044-45 (D. Minn. 2007).

In *Gilquist*, the court ruled that a former employee who, like Zilhaver, received a lump-sum distribution of pension benefits before filing suit lacks standing to sue for breach of fiduciary duty under ERISA. 675 F. Supp. at 1171 ("[b]ecause plaintiffs . . . have no possibility of receiving benefits, they are no longer participants . . . and have no standing to bring this action"). The Eighth Circuit commented favorably on *Gilquist's* rationale in *Adamson v. Armco*, 44 F.3d 650, 655 (1995), describing *Gilquist* as "the law in this circuit" for the holding that "former employees who received lump-sum vested benefits are not participants." *Id.* *Adamson* also held that "[ERISA] by its terms does *not* permit a civil action to be brought by someone who *was* a participant at the time of the alleged ERISA violation. Rather, it is written in the current tense, indicating that *current participant status is the relevant test.*" 44 F.3d at 654 (emphasis added). In the recent case of *In re Patterson Cos.*, 479 F. Supp.2d 1014 (D. Minn. 2007), Judge Doty held that a plaintiff who accepted a lump-sum distribution from a defined contribution plan before filing her amended complaint lacked ERISA standing. *Id.* at 1044-45. In so ruling, the court specifically cited the Eighth

Circuit's decisions in *Zoesch* and *Adamson* for the proposition that standing to sue under ERISA § 502(a) is generally limited to only *current* plan participants. *Id.* at 1042-43.

Put simply, the recent decisions upon which Plaintiffs rely are contrary to rulings of the Eighth Circuit and this Court, as reflected in *Zoesch*, *Adamson*, *Gilquist*, and *In re Patterson Cos.*<sup>3</sup>

### **III. THE DIRECTOR DEFENDANTS ARE NOT PLAN FIDUCIARIES**

#### **A. The Plan Document Does Not Assign Fiduciary Authority to the Director Defendants.**

Plaintiffs argue that §§ 12.1.1, 12.1.2, 12.6, and 12.7 of the Plan Document<sup>4</sup> "at least partially demonstrate the fiduciary duties delegated to Director Defendants . . . ." Pl. Opp. at 24.<sup>5</sup> Those sections, however, only address duties assigned to *United* as the Plan's Administrator and named fiduciary (§§ 12.6 and 12.7), which *may* be delegated to corporate *officers* or the Chief Executive Officer. *Id.* at §§ 12.1.1 and 12.1.2. In fact, the United Plan assigns only two functions to United's Board of Directors: (i) the authority to amend the Plan

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<sup>3</sup> As also detailed in the United Defendants' opening brief (at 19-21), Zilhaver does not have a colorable claim for vested benefits; he seeks damages. *In re Patterson Cos.*, 479 F. Supp. 2d at 1044.

<sup>4</sup> The Plan Document is attached as Exhibit A to the Declaration of Patricia Gilroy (the "Gilroy Decl."), which accompanied the United Defendants' opening brief.

<sup>5</sup> Plaintiffs incorrectly assert that "it is undisputed that all of the defendants in this case were fiduciaries under ERISA." Pl. Opp. at 4. As detailed in the United Defendants' opening brief (at 22-33), the Director Defendants vigorously deny that they acted as fiduciaries with respect to the United Plan.

(which is not a fiduciary function, but is instead a "settlor" function, *see Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999)); and (ii) the authority to appoint or remove a directed trustee. *See* Gilroy Decl., Ex. A. § 12.1.3. Neither of these functions is at issue in Plaintiffs' lawsuit.

The Plan Document is clear: it assigns *all* administrative and management responsibilities for the Plan either to United in its capacity as plan administrator, or to United's Vice President, Human Capital. *Id.*, §§ 12.2.1, 12.6. Likewise, the Plan Document mandates that the Plan's Trustee (who is *not* a defendant in this case) must maintain the Employer Stock Fund at issue in this action. *Id.*, § 4.2.1. Long closed to new investments, that Fund serves only as a vehicle to permit participants to continue holding United stock on a tax-deferred basis. In short, there is nothing in the Plan Document that provides the Director Defendants with any authority concerning the Employer Stock Fund or any other matter at issue in this action.

**B. The Director Defendants Are Not *De Facto* Fiduciaries.**

Plaintiffs argue that the Director Defendants acted as *de facto* fiduciaries and that "the Complaint clearly explains what Defendants' fiduciary duties were and how they were breached . . . ." Pl. Opp. at 26. Plaintiffs fail to cross-reference even a single paragraph of their Complaint to support this argument. This is hardly surprising, given that the only paragraph of the Complaint which in any way "details" the Defendants' alleged status as *de facto* fiduciaries is paragraph 20, which simply alleges that "[a]ll of the Individual Defendants were

*de facto* fiduciaries of the Plan as a result of their discretionary authority or control over the Plan and the very broad definition of 'fiduciary' set forth in ERISA . . . ." This states a legal conclusion, *not* a factual allegation. It is well-settled that "the court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." *Wiles v. Capitol Indem. Corp.*, 280 F.3d 868, 870 (8th Cir. 2002); *see also Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (a "plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do").

Plaintiffs argue that *In re ADC Telecomm., Inc. ERISA Litig.*, 03-2889, 2004 WL 1683144, at \*4-\*5 (D. Minn. July 26, 2004), precludes dismissal of their claims. In that case, the complaint expressly alleged that *all* defendants were named fiduciaries, and cited specific provisions of the governing plan document as factual support. Further, the complaint alleged that under the plan, the director defendants had the authority to appoint and remove members of the retirement committee that established the plan's investment objectives, which imposed a fiduciary duty on the part of the directors to monitor the committee's performance. *Id.*, 2004 WL 1683144, at \*4.

Here, in contrast, the Complaint alleges that *only* United and Defendant Dapper are named fiduciaries. Compl. ¶¶ 11-12. And the Complaint does *not* allege that the Director Defendants were delegated fiduciary authority, and it does

not allege that the Director Defendants had the power to appoint or remove United or Defendant Dapper as the Plan's named fiduciaries. Indeed, the Plan Document itself (i) designates the named fiduciaries of the Plan, (ii) designates United as Plan Administrator, and (iii) mandates inclusion of the Employer Stock Fund as a "closed" investment option. Gilroy Decl., Ex. A, §§ 4.2.1, 12.2.1, 12.6.

Plaintiffs next cite *In re Xcel Energy, Inc.*, 312 F. Supp. 2d 1165 (D. Minn. 2004), to support of their claim that they have sufficiently pled *de facto* fiduciary status. In *Xcel*, the court noted that the "defendants' contention that the plaintiffs fail to cite facts showing which defendants breached which duty is well-taken." *Id.* at 1178. Plaintiffs, however, argued that their complaint should survive dismissal because the plan document "fail[ed] to properly identify the named fiduciaries or to identify their fiduciary responsibilities[,]" and that, accordingly, they should be afforded latitude in pleading pending further discovery. *Id.* Unlike *Xcel*, the United Plan Document clearly delineates who has responsibilities and discretionary authority with respect to the Plan. Plaintiffs have not alleged any difficulty or confusion identifying such persons or entities – nor could they.

This court recently dismissed a complaint that raised a similar claim of *de facto* fiduciary status, holding that "[s]uch a conclusory allegation—that [the] defendants 'performed fiduciary functions' is insufficient to survive a motion to dismiss." *Hastings v. Wilson*, 05-2566, 2007 WL 333617, at \*5 (D. Minn. Feb. 1, 2007). Plaintiffs argue that *Hastings* is inapposite because the court ruled that the action was subject to arbitration. Pl. Opp. at 26. But the court considered plan

provisions and determined that the complaint "[was] utterly devoid of facts that support" its allegations that the defendants acted as *de facto* fiduciaries. *Id.*

Dismissal is especially warranted here because the Complaint does *not* allege that the Director Defendants exercised discretion over the Plan's assets or administration, which is the only manner in which one can become a *de facto* fiduciary. Instead, the Complaint alleges that the Director Defendants *failed* to take action concerning the Plan – which is the antithesis of a *de facto* fiduciary. Given that the Director Defendants do not have responsibility for the Plan's administration or investments, their purported *failure* to take action concerning the Plan cannot result in them being deemed *de facto* fiduciaries. *Hastings*, 2007 WL 333617, at \*5 ("[the defendants] did not 'exercise' discretionary authority because they did not take action to sell the assets of the Plan—indeed, the essence of the Plaintiffs' claims is the *failure* on Defendants' part to sell the Plan's [company] stock. Accordingly, Plaintiffs have not established that the . . . defendants 'exercised' discretionary authority over the . . . Plan").

**C. The Status of Director Defendants as Corporate Directors Does Not Cause Them to Be Fiduciaries.**

Plaintiffs finally argue that the Director Defendants were *de facto* fiduciaries because they were members of United's Board of Directors and, in the case of Defendants Johnson, Munding, and Spears, members of the Board's Compensation and Human Resources Committee (the "Committee"). Compl.

¶¶ 13-16, 18. But "status as a corporate officer of a fiduciary corporation is insufficient by itself to create fiduciary duty." *Trustees of GCIU Health & Welfare Plan v. Bjorkedal*, No. 04-3371, 2006 WL 3511767, at \*11 (D. Minn. Dec. 6, 2006).

Recognizing that the Plan Document does not assign fiduciary responsibility to United's Board of Directors or the Committee, Plaintiffs allege that the "Plan fiduciaries incorporated the Company's misleading securities disclosures in Plan communications . . . ." Pl. Opp. at 29. The only allegedly misleading communication identified in Plaintiffs' Opposition or Complaint is a United proxy statement that Plaintiffs allege was "sent to Plan participants annually." *Id.*; Compl. ¶ 13. As a preliminary matter, the proxy statement's general recitation of the Committee's purpose does not even mention the United Plan that is at issue in this case. Nor, in any event, could the proxy statement override the terms of the formal Plan Document. Because the Plan Document clearly identifies the persons and entities to which fiduciary authority has been assigned, a general statement in United's 2006 proxy is insufficient to impose fiduciary responsibilities upon the Committee which is not specifically assigned by the Plan. *See Walker v. Nat'l City Bank of Minneapolis*, 18 F.3d 630, 633 (8th Cir. 1994) ("[W]here, as here, the Plan allocates specific duties to specific fiduciaries, each fiduciary is responsible only for the responsibilities allocated to it."). *See also In re Honeywell Int'l ERISA Litig.*, 03-1214, 2004 WL 3245931, at \*9 (D.N.J., September 2004) ("garden variety corporate disclosures do not take on

the status of ERISA fiduciary communications (and their authors do not become ERISA fiduciaries) just because those disclosures are available to plan participants as members of the public") (citing *In re Williams Companies ERISA Litig.*, 271 F.Supp.2d 1328, 1338 (N.D.Okla.2003)).

### **CONCLUSION**

The Court should grant summary judgment dismissing Linn's claims, and dismiss Zilhaver's claims.

October 1, 2007

Respectfully submitted,

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