



who received lump-sum vested benefits are not participants,” *Adamson v. Armco Inc.*, 44 F.3d 650, 655 (8th Cir. 1995), *cert denied*, 516 U.S. 823 (1995) (citing *Gilquist v. Becklin*, 675 F. Supp. 1168 (D. Minn. 1987), *aff’d mem.*, 871 F.2d 1093 (8th Cir. 1988)). And, though he urges this Court to draw a distinction for purposes of the standing analysis between defined benefit and defined contribution plans, he fails to acknowledge that the plan in *Gilquist* was an *employee stock ownership plan* (“*ESOP*”), just like the one in this case. In the Eighth Circuit, Mr. Zilhaver lacks standing.

*Second*, the plaintiffs candidly admit that Dr. McGuire is not a named fiduciary and that they have failed to identify any specific action that he undertook in a fiduciary capacity. Instead, they appeal for an opportunity to conduct discovery in the hope that they might uncover some action and, as a last-ditch effort that was not alleged in the complaint, they suggest that the issuance of a proxy statement mentioning executive compensation is a fiduciary action undertaken by Dr. McGuire in a fiduciary capacity. The plaintiffs’ argument ignores Supreme Court case law dismissing ERISA complaints under Rule 12(b)(6) because fiduciary status is a “threshold question.” And, (even apart from the complaint’s failure to allege that Dr. McGuire issued any proxy statement), the issuance of a proxy statement is a corporate function not an ERISA fiduciary action. Nor have the plaintiffs alleged a single fact to establish that any representations in the proxy statement can be attributed personally to Dr. McGuire. The plaintiffs’ complaint is woefully insufficient and fails to state a

claim upon which relief can be granted.

## **ARGUMENT**

### **I. MR. ZILHAVER LACKS STANDING**

*First*, although Mr. Zilhaver points to recent cases from the Third, Sixth, and Seventh Circuits pursuant to which he would have standing to pursue this action, he does not confront Eighth Circuit precedent holding that a plaintiff who voluntarily takes a lump sum distribution from a defined contribution employee stock ownership plan does not have standing. That is fatal to his claim.

All of the distinctions Mr. Zilhaver attempts to draw, therefore, are meaningless. He urges this Court to focus on the fact that the plan is a defined contribution plan, and suggests that ERISA should be interpreted so that past participants in defined contribution plans retain standing, even if past participants in defined benefit plans do not. Even if the statute admitted such a construction, resort to that distinction is unavailing in this Circuit. *Gilquist*, which is reaffirmed by *Adamson*, establishes beyond dispute that Mr. Zilhaver does not have standing in this Circuit.

In *Adamson*, the Eighth Circuit held that the plaintiffs did not have standing and “[t]he fact that they were plan participants in the past *is irrelevant*. ‘The statute by its terms does not permit a civil action by someone who was a participant at the time of the alleged ERISA violation. Rather, it is written in the present tense, indicating that current participant status is the relevant test.’” 44 F.3d at 654. Mr. Zilhaver attires to distinguish *Adamson* by pointing out that the

plaintiffs did not have standing because their claims were time-barred. Opp. at 12 (citing *Adamson*, 44 F.3d at 654). That is true, but is not the end of the analysis. The Eighth Circuit explained that “[a] person who gives up participant status through inaction [*i.e.*, letting the statute of limitations run],” like a person who gives up participant status through a voluntary distribution of his vested benefits “also relinquishes standing to complain of prior plan mismanagement.” *Adamson*, 44 F.3d at 655. A plaintiff who loses participant status because the statute of limitations runs is no different from a plaintiff who loses participant status by taking a lump-sum distribution of his benefits: “the law in this circuit” is established by *Gilquist*, which held that “former employees who received lump-sum vested benefits are not participants.” *Id.* at 654. That is precisely the case here—Mr. Zilhaver is a former employee who voluntarily received a lump-sum distribution of his vested benefits—and the plaintiffs fail to acknowledge this dispositive holding.<sup>1</sup>

*Second*, Mr. Zilhaver emphasizes, as did the Third and Seventh Circuits, that if plaintiffs such as Mr. Zilhaver do not have standing, then underhanded companies could avoid liability for their fiduciary breaches by terminating potential plaintiffs’ participant status thereby preventing them from bringing suit. That parade of horrors is a red-herring. The Eighth Circuit, like some other

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<sup>1</sup> Judge Doty also recently confronted the same legal issue involving an ESOP and comprehensively and persuasively concluded that *Adamson* and *Gilquist* are controlling. *In re Patterson Co., Inc. Securities, Derivative & ERISA Litig.*, 479 F. Supp. 2d 1014, 1043 (D. Minn. 2007).

circuits, has explicitly adopted an exception to *Adamson* and *Gilquist* “for cases in which ‘but for the employer’s conduct alleged to be in violation of ERISA,’ the employee or former employee would be a plan participant.” *Id.* at 654 (quoting *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1221 (5th Cir. 1992)). In the Eighth Circuit, if an underhanded company terminates a participant’s status in an effort to avoid liability, that plaintiff retains the ability to sue. Mr. Zilhaver’s concerns are therefore baseless (and he also never alleged that he fits this exception). He lacks standing and must be dismissed from the case under Rule 12(b)(1).

## **II. THE PLAINTIFFS’ ARGUMENTS AGAINST DISMISSAL UNDER RULE 12(b)(6) ARE MERITLESS**

Plaintiffs candidly admit that the complaint failed to identify any specific fiduciary action undertaken by Dr. McGuire with respect to the plan. *Opp.* at 28-30. That is, under the law, an acknowledgement that Dr. McGuire should be dismissed from this case. However, armed with little more than a spattering of unpublished district court decisions, the plaintiffs ask this Court to disregard Supreme Court and court of appeals cases that have repudiated their arguments time and again.

The plaintiff argue that “[b]ecause the determination of fiduciary status is so dependent on the specific actions of each Defendant ... resolution of whether or not a defendant was a Plan fiduciary is particularly inappropriate for resolution on a motion to dismiss.” *Opp.* at 23. That is simply untrue. Fiduciary status is a

“threshold question” and the plaintiffs’ argument is unabashedly contrary to Supreme Court and court of appeals precedent dismissing claims under Rule 12(b)(6) where plaintiffs fail to identify a fiduciary acting in a fiduciary capacity.

Recognizing their vulnerabilities and in search for any possible way to connect Dr. McGuire to the company’s ERISA plan, the plaintiffs argue for the first time that the issuance of a proxy statement constitutes a fiduciary action by Dr. McGuire with respect to the plan. But the plaintiffs do not identify any false or misleading statement in any specific proxy statement, nor do they attribute any statement to Dr. McGuire. Regardless, issuing a proxy statement is a corporate action and not a fiduciary one. The plaintiffs’ claim must be dismissed.

**1. The Plaintiffs Do Not Plead That Dr. McGuire Undertook Any Particular Fiduciary Action In A Fiduciary Capacity**

The plaintiffs misunderstand general pleading standards. They spill much ink arguing how limited Fed. R. Civ. P. 8(a) is, and block quote for two full pages an unpublished district court decision from 2004 blessing a complaint that, like the complaint in this case, “merely parrots the language of ERISA without much factual elaboration.” *In re ADC Telecoms., Inc.*, No. 03-2989, 2004 WL 1683144, at \*5 (D. Minn. July 26, 2004). But that is unmistakably wrong. The Supreme Court has explicitly held that under Rule 8, “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.*” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (emphasis added).

The plaintiffs, moreover, do not really even argue that they have *stated* a claim for relief; instead, they argue that it is too early to conclude that they did not. That is not the standard—and this Court’s analysis should begin with awareness that the plaintiffs do not cite one single court of appeals case allowing a complaint like the plaintiffs’ to proceed.<sup>2</sup> And they fail to acknowledge the torrent of contrary authority.

The plaintiffs also plead for an opportunity to conduct discovery so that they might be able to unearth some action that Dr. McGuire might have taken in a fiduciary capacity. The plaintiffs beseech the court to conclude that “[i]t is premature for the Court to decide the merits of this dispute on a motion to dismiss.” Opp. at 21. But, the plaintiffs do not even frame the issue correctly. In *Kalda v. Sioux Valley Physician Partners, Inc.*, for example, the Eighth Circuit explained that “[b]efore proceeding with the merits of any breach-of-fiduciary-duty claim, we must address the *threshold issue* of whether the defendants were

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<sup>2</sup> Indeed, the only two court of appeals cases cited in support of the plaintiffs’ pleading argument, Opp. at 23 n.11, are vastly different. In *Bd. of Trustees of Bricklayers v. Wettlin Assocs., Inc.*, 237 F.3d 270, 275 (3d Cir. 2001), the court allowed a complaint to proceed where the plaintiffs alleged that the defendant was delegated the “day to day responsibility to control, manage, safeguard, and account for the Fund’s assets and income.” Nothing like that appears in the plaintiffs’ complaint, and the court acknowledged that it was applying a more permissive standard for allegations that a defendant had “control over the cash” as compared to allegations of “control over administration.” *Id.* at 274. And *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1459-61 (9th Cir. 1995) involved allegations related to the choice of a “group annuity contract to pay vested retirement benefits.” *Id.* at 1453. Unlike these cases, the plaintiffs have made no allegation that Dr. McGuire exercised any “control over the cash” or exercised any specific administrative plan duty.

acting in a fiduciary or an employer capacity when the acts in question took place.” 481 F.3d 639, 644 (8th Cir. 2007) (emphasis added and citation omitted). The “merits” of the plaintiffs’ claim is still a different question from whether the plaintiffs have named the correct defendants or whether the named defendants were acting in a fiduciary capacity. *E.g., Pipefitters Local 636 v. Blue Cross & Blue Shield*, 213 Fed. Appx. 473, 476 (6th Cir. 2007) (“the question is not whether [the defendant] actually breached a fiduciary duty under ERISA, but whether the plaintiff has set forth sufficient allegations that such a duty existed and that it was breached”). And, “any suggestion by Plaintiffs that further discovery is necessary to determine whether [Dr. McGuire] acted as a fiduciary is contrary to three leading Supreme Court decisions—*Lockheed, Hughes Aircraft*, and *Pegram v. Herdrich*, 530 U.S. 211 (2000)—all of which affirmed Rule 12(b)(6) dismissals of ERISA claims on the ground that the conduct of the defendant was not that of a ‘fiduciary’ ....” *Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090, 1102 (9th Cir. 2004).

The Supreme Court has held that the “threshold question” in any ERISA fiduciary case is “whether [a particular defendant] was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint.” *Pegram*, 530 U.S. at 226. In *Pegram*, the Supreme Court emphasized that the plaintiff must allege that a defendant was “acting in the capacity of manager, administrator, or financial advisor to a ‘plan,’” *Id.* at 222 (citation omitted), and affirmed a dismissal under Rule 12(b)(6) because, after explaining

that “[t]he pleadings must ... be parsed very carefully to understand what acts ... are alleged to be fiduciary in nature,” it found that “*Herdrich does not point to a particular act by any [defendant] as a breach [of a fiduciary duty],*” *id.* at 226-27 (emphasis added). See also *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999) (reinstating district court’s dismissal pursuant to Rule 12(b)(6)); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996) (same); *S. Council of Indus. Workers v. Ford*, 83 F.3d 966, 968 (8th Cir. 1996) (affirming dismissal under Rule 12(b)(6) where “the complaint failed to state a claim ... for violation of a fiduciary duty owed to the plan”); *Hickman v. Tosco Corp.*, 840 F.2d 564, 566 (8th Cir. 1988) (same). This is eminently sensible: “ERISA is designed to accomplish many worthwhile objectives, but the regulation of purely corporate behavior is not one of them.” *Akers v. Palmer*, 71 F.3d 226, 229 (6th Cir. 1995).

The plaintiffs, of course, have identified no specific action—and admit as much—taken outside of Dr. McGuire’s role as a corporate officer and have identified no action of “plan administration”—*i.e.*, managing or investing plan assets—by Dr. McGuire. They have simply not made any allegation “indicating that [Dr. McGuire] made any decisions with respect to plan management or the collection or distribution of plan assets ....” *Briscoe v. Fine*, 444 F.3d 478, 487 (6th Cir. 2006). Like *Custer v. Sweeney*, which affirmed a dismissal under Rule 12(b)(6), although the “amended complaint is replete with assertions of ... ‘discretionary authority, control, and responsibility over the management of the Fund and certain assets of the Fund,’ it nevertheless lacks any specific allegations

capable of demonstrating that [Dr. McGuire] transcended his role as [CEO]” and undertook any responsibility with respect to the plan. 89 F.3d 1156, 1163 (4th Cir. 1996).<sup>3</sup>

Instead, the plaintiffs argue that “[i]t is pled that McGuire, as CEO, had authority to control plan management and administration, which is sufficient under Rule 8(a).” Opp. at 29. No it is not. Every court of appeals to address the question (plus the Department of Labor) has held that it is *not* enough to plead that a defendant was a corporate officer and therefore had some amorphous authority over an ERISA plan. A company official is not a *de facto* fiduciary merely by holding a senior position. *E.g.*, Dep’t of Labor, Interpretive Bulletin 75-8, 29 C.F.R. § 2509.75-8 (questions D-4 and D-5); *Confer v. Custom Eng’g Co.*, 952 F.2d 34, 37 (3d Cir. 1991); *Riley v. Murdock*, 890 F. Supp. 444, 453 (E.D.N.C. 1995) (“Plaintiffs’ contention that [defendant] assumed an expanded fiduciary role simply due to his status as an officer and director is without merit.”), *aff’d* 83 F.3d 415 (4th Cir. 1996).

The plaintiffs complaint against Dr. McGuire must be dismissed under Rule 12(b)(6).

### **III. THE NEW ALLEGATIONS IN THE PLAINTIFFS’ OPPOSITION CANNOT CURE THE INADEQUACIES OF THEIR COMPLAINT**

“[I]t is axiomatic that a complaint may not be amended by the briefs in

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<sup>3</sup> The circuits are unanimous that broad general allegations are insufficient under ERISA. *See, e.g., Beddall v. State St. Bank & Trust Co.*, 137 F.3d 12, 18 (1st Cir. 1998); *Martin v. Feilen*, 965 F.2d 660, 665 (8th Cir. 1992) (rejecting such a “sweeping” and “broad brush” approach).

opposition to a motion to dismiss.’” *Morgan Distrib. Co. v. Unidynamic Corp.*, 868 F.2d 992, 995 (8th Cir. 1989) (citation omitted); *see also Jojola v. Chavez*, 55 F.3d 488, 494 (10th Cir. 1995) (“It is well-established ... that ... [courts] are limited to assessing the legal sufficiency of the allegations contained within the four corners of the complaint.” (quoting district court)). “Any allegations made in subsequent legal memoranda cannot correct inadequacies within a complaint.” *Tuttle v. Lorillard Tobacco Co.*, 118 F. Supp. 2d 954, 959 (D. Minn. 2000).

The plaintiffs make two new claims. *First*, the plaintiffs point to various provisions of the plan documents, and claim that they “at least partially demonstrate the fiduciary duties delegated to ... McGuire.” That is insufficient to survive a motion to dismiss for two reasons: (1) they made no such allegation in the complaint<sup>4</sup>; and (2) they are wrong.

Their attempts to make new allegations now is particularly egregious here because before the stipulation re-starting briefing, Dr. McGuire explicitly pointed out this failure in the plaintiffs’ first amended complaint. Yet, already aware of this, the plaintiffs *again* filed their *second* amended complaint without any allegations with respect to Dr. McGuire and the plan documents.

But that is not all. Even if the Court were to consider the plaintiffs’ new

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<sup>4</sup> The only mention of Plan Section 12.1.1 in the entire Complaint is with respect to the *Company’s* liability under the doctrine of respondeat superior. Am. Compl. ¶ 11 (“The Company is also liable for the misconduct of the other defendants named herein under the principles of agency and respondeat *superior*. Section 12.1.1 of the governing Plan document makes clear that the Company’s responsibilities with respect to the Plan ‘shall be discharged by the Sponsor’s [the Company’s] officers.’”).

allegations, they are unsupported by the Plan documents on which they rely. The plaintiffs note that Plan Section 12.1.1 states: “functions generally assigned to the Principal Sponsor ... shall be discharged by its officers *or* delegated and allocated as provided herein.” But they fail to apprise the Court of Section 12.2.1 that “delegate[s] all duties, authority and responsibilities ... to the Senior Vice President, Human Capital.” Thus, no Plan functions were delegated to or discharged by Dr. McGuire and the plan documents are no help to the plaintiffs.

*Second*, the plaintiffs argue that “at the very least, [Dr. McGuire] sent a proxy statement to Plan participants annually” and that “each proxy statement during the Class Period understated McGuire’s compensation because it was not disclosed that he was receiving backdated options.” Opp. at 29. The plaintiffs made no such allegation in the complaint and, for the reasons discussed above, cannot prevail by arguing it now.

The point fails on its own merit anyway. The plaintiffs state that “[w]hether these communications were made in a fiduciary capacity presents a question of fact that must be resolved at a later date.” Opp. at 29. Not so. There is little difference between this argument and the one that Dr. McGuire was a fiduciary just because he was a corporate officer and it fails for the same reasons. Nor do the plaintiffs shed any light on whether these particular (unidentified) proxy statements were ERISA *plan* communications, or explain why the mere fact that a plan participant receives information about the corporation or its business practices makes that a *plan* communication. It does not and corporate officers do

not subject themselves to ERISA fiduciary obligations by virtue of every public document they file or send to stockholders just because plan participants holding company stock will receive a copy. Sending a proxy statement does not involve administering a plan or investing its assets.

The plaintiffs' logic would also result in a watershed change in ERISA and corporate law. The Eighth Circuit has long held that the analysis begins with "examin[ing] whether each defendant was responsible as a fiduciary for each [action complained of]," *Martin*, 965 F.2d at 669, because "fiduciary status ... is not an 'all or nothing concept .... [A] court must ask whether a person is a fiduciary with respect to the particular activity in question." *Maniace v. Commerce Bank, N.A.*, 40 F.3d 264, 267 (8th Cir. 1994) (citation omitted).

"ERISA does require ... that the fiduciary with two hats wear only one at a time, and wear the fiduciary hat when making fiduciary decisions." *Pegram*, 530 U.S. at 225. And an ERISA fiduciary must "discharge his duties with respect to a plan *solely* in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1) (emphasis added). But when making business decisions—and "obviously, not all ... business activities involve[] plan management or administration," *Varity Corp. v. Howe*, 516 U.S. 489, 498 (1996)—corporate officers must make and are entitled to make decisions without regard to how it will impact plan assets. Nothing in ERISA "prohibit[s] an employer from acting in accordance with its interests as employer when not administering the plan or investing its assets." *Hickman*, 840 F.2d at 566.

Nor does a business decision morph into a fiduciary one simply because the decision has some “collateral effect on prospective, contingent employee benefits.” *Adams v. Avondale Indus., Inc.*, 905 F.2d 943, 947 (6th Cir. 1990). As the Eighth Circuit held in *Martin*, “[v]irtually all of an employer’s significant business decisions affect the value of its stock .... However, ERISA’s fiduciary duties ... attach only to transactions that involve investing the ESOP’s assets or administering the plan. A broader rule would make ESOP fiduciaries virtual guarantors of the financial success of the plan ....” *Martin*, 965 F.2d at 665 (rejecting argument that “defendants’ ERISA fiduciary duties were implicated by every ... corporate transaction that ‘affected’ the value of the stock”); *Kalda*, 481 F.3d at 646.<sup>5</sup>

If courts are not vigilant in distinguishing between ordinary business decisions taken by corporate officers and fiduciary actions taken with respect to an ERISA plan, corporate officers would be forced to serve a “dual capacity,” or wear two hats at once—which ERISA does not permit—and ERISA would be converted into a statute policing general corporate behavior. But Congress did not intend to saddle employers with ERISA fiduciary responsibilities when engaging in such business activities outside of the plan administration context. *E.g.*, *Baker*

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<sup>5</sup> See also *Holdeman v. Devine*, 474 F.3d 770, 778 (10th Cir. 2007) (citation omitted); *Eckelkamp v. Beste*, 201 F. Supp. 2d 1012, 1023 (E.D. Mo.) *aff’d on other grounds*, 315 F.3d 863 (8th Cir. 2002); *Varity v. Howe*, 516 U.S. at 529 (Thomas, J., dissenting) (“Even business decisions that directly affect the plan and plan participants, ..., are not governed by ERISA’s fiduciary obligations because they do not involve discretionary administration of the plan.”).

*v. Kingsley*, 387 F.3d 649, 662 (7th Cir. 2004) (creation of broader duties under ERISA would “run the risk of disturbing the carefully delineated corporate disclosure laws”); *Varity*, 516 U.S. at 533 (Thomas, J., dissenting) (“An employer will also make countless representations in the course of managing a business about the current and expected financial condition of the corporation. ... The untruthfulness of a statement cannot magically transform it from a nonfiduciary representation into a fiduciary one; the determinative factor is not the truthfulness but the capacity in which the statement is made.”).

The Eighth Circuit correctly affirmed the dismissal of the complaint under Rule 12(b)(6) in *Hickman*, 840 F.2d at 566, recognizing the crucial difference between actions taken as corporate officers and actions taken as plan administrators. The court “held that defendants were not subject to ERISA’s fiduciary duty requirements because their action was a ‘day-to-day corporate business transaction’ made in their capacity as corporate officers, not as plan administrators.” *Martin*, 965 F.2d at 666 (quoting and describing *Hickman*). That is the case here too.

It is also entirely unclear exactly what the plaintiffs are saying Dr. McGuire did with respect to whatever proxy statements they are claiming were false or misleading ERISA communications—to be sure, a direct result of the fact that none of this is pleaded in the complaint. The plaintiffs point to no facts that, if true, would demonstrate that Dr. McGuire sent them a proxy statement after voluntarily assuming a fiduciary role outside of his normal corporate duties. They

have not even identified a particular proxy statement or a date when it was issued. They have not identified an author of the proxy statement. They have failed to identify a sentence or sentences they allege to be false or misleading. And they have not attributed the proxy statement or any part of the proxy statement to Dr. McGuire.

A corporate officer can only wear “one [hat] at a time, and [must] wear the fiduciary hat when making fiduciary decisions,” *Pegram*, 530 U.S. at 225. The plaintiffs’ allegation that the corporation’s issuance of a proxy statement is a fiduciary action by Dr. McGuire necessarily means that the plaintiffs are arguing that whenever a corporation issues a proxy statement, it is not doing so as part of its ordinary business operations, but that proxy statements are, and must be, issued in the CEO’s fiduciary capacity with respect to an ERISA plan. That is wholly incorrect. Issuing a proxy statement is not a fiduciary communication and is a normal incident of conducting business, and there is an adequate remedy under the securities laws for false or misleading proxy statement. 15 U.S.C. §78n(a); 17 C.F.R. § 240.14a-9(a).

### **CONCLUSION**

For the foregoing reasons, Mr. Zilhaver’s claim must be dismissed for lack of standing pursuant to Rule 12(b)(1); summary judgment granted against Mr. Linn under Rule 56(b); and the entire complaint against Dr. McGuire dismissed under Rule 12(b)(6).

Respectfully submitted this 1st day of October, 2007,

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