

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

<p>Matthew T. Zilhaver,</p> <p style="text-align:center">Plaintiff,</p> <p style="text-align:center">v.</p> <p>UnitedHealth Group Incorporated, <i>et al.</i>,</p> <p style="text-align:center">Defendants.</p>	<p>Civil File No. 06-cv-02237 (JMR/FLN)</p> <p>Memorandum of Law in Support of the Motion of Defendants UnitedHealth Group Incorporated, L. Robert Dapper, James A. Johnson, William G. Spears, Mary O. Mundinger and Stephen J. Hemsley to Dismiss the Amended Complaint for Lack of Subject Matter Jurisdiction Under Rule 12(b)(1) and Failure to State a Claim Under Rule 12(b)(6)</p>
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UnitedHealth Group Incorporated, L. Robert Dapper, James A. Johnson, William G. Spears, Mary O. Mundinger and Stephen J. Hemsley respectfully submit this Memorandum of Law in Support of their Motion to Dismiss Plaintiff's Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and (6).

I. INTRODUCTION

Plaintiff's Complaint, alleging that the continued holding of UnitedHealth Group Incorporated ("United" or the "Company") stock in a Company-sponsored 401(k) plan violates the Employee Retirement Income Security Act of 1974, as amended ("ERISA")¹, should be dismissed because, as a matter of law, Plaintiff lacks standing to bring this ERISA action. Moreover, the action must be

¹ 29 U.S.C. § 1001 *et. seq.* All further statutory citations are to ERISA as codified in Title 29 of the United States Code.

dismissed against (i) Defendants Johnson and Munding, outside directors of United, (ii) Defendant Spears, a former outside director (and together with Defendants Johnson and Munding, the "Director Defendants"), and (iii) Defendant Hemsley, because Plaintiff fails to allege facts sufficient to establish that those Defendants acted as ERISA fiduciaries in the matters about which Plaintiff complains.

II. BACKGROUND

A. United's 401(k) Savings Plan

United sponsors the UnitedHealth Group 401(k) Savings Plan (the "Plan") for the benefit of its employees. *See* Am. Compl. ¶ 34; Gilroy Decl., Ex. A, p.1.² The Plan is an "individual account plan" or "defined contribution plan" within the meaning of 29 U.S.C. § 1002(34). Am. Compl. ¶ 30. This means that the Plan provides for an individual account for each participant, and that each participant's benefit under the Plan consists solely of the amounts contributed to that account

² Plan documents referenced in, or necessarily embraced by, the Complaint may be considered on Defendants' motion to dismiss under R. 12(b)(6). *See, e.g., Enervations, Inc. v. Minnesota Mining & Mfg. Co.*, 380 F.3d 1066, 1068 (8th Cir. 2004); *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999). Copies of relevant Plan documents are attached as Exhibits to the accompanying Declaration of Patricia Gilroy ("Gilroy Decl."). Additional evidence relating to Plaintiff's lack of standing may also be considered on Defendants' Rule 12(b)(1) motion to dismiss, to the extent that the pleadings and Plan documents alone do not conclusively establish that Plaintiff lacks standing. *See Frisone v. Pepsico, Inc.*, 369 F. Supp. 2d 464, 470 (S.D.N.Y. 2005) (citing *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000)); *Augienello v. F.D.I.C.*, 310 F. Supp. 2d 582, 588 (S.D.N.Y. 2004).

plus earnings thereon and other adjustments. Am. Compl. ¶ 30; *see also* 29 U.S.C. § 1002(34).

Participation in the Plan is voluntary, and each participant directs how the contributions made to his or her account are to be invested. *See* Am. Compl. ¶ 31. For this purpose, an array of pooled investment funds is maintained under the Plan. Gilroy Decl., Ex. A, § 4.1; Ex. B, pp.16-17.

The Plan's investment funds include a set of 12 diversified stock and bond funds (together, the "Active Funds"). *Id.* The Plan documents give the Company's Senior Vice President, Human Capital responsibility for selecting these Active Funds. Gilroy Decl., Ex. A, §§ 4.1.1, 4.1.4, 12.2.1. The Active Funds are not at issue in this lawsuit.

B. The Plan's Frozen ESOP Fund

This lawsuit instead focuses on a "frozen" fund maintained under the Plan—the UnitedHealth Group Stock Fund (the "Employer Stock Fund"). The Employer Stock fund is materially different than the Active Funds selected by the Senior Vice President, Human Capital. The Employer Stock Fund traces its roots to a separate Employee Stock Ownership Plan ("ESOP") maintained by United before 2002. Gilroy Decl. Ex. A, § 4.2.1, and Ex. B, p.17. The ESOP, which invested primarily in Company stock, was merged into the Company's 401(k) Plan in August 2002. *Id.*, Ex. B, p.17. At the time of the 2002 merger, United stock held by the ESOP was transferred to the 401(k) Plan's newly-created Employer Stock Fund. *Id.* Simultaneously, the Employer Stock Fund was "frozen," so that

participants could not purchase any more shares of Company stock through the Plan. *Id.* at Ex. A, § 4.2.1. However, participants could, at any time, transfer all or part of their balance from the Employer Stock Fund to another investment option available under the Plan. *Id.*, Ex. A., § 4.2.3, Ex. B, p.17. Once money was transferred out of the Employer Stock Fund, it could not be transferred back. Am. Comp. ¶ 33; Gilroy Decl. Ex. A, § 4.2.1 and Ex. B, p.17.

In contrast to the operation of the Active Funds, inclusion of the Employer Stock Fund as a frozen investment option is a function solely of how United designed the Plan. It is not a function of any discretionary decision made by a Plan fiduciary acting as such. The Plan does not provide the Senior Vice President, Human Capital with any discretion with respect to the Employer Stock Fund. Instead, the Plan provides that only participants have discretion to sell United stock in their individual accounts, and that participants can sell their United stock at any time. Specifically, § 4.2.1 of the Plan Document provides in relevant part that "[t]he Trustee *shall* also maintain at least one Subfund which *shall* be invested in qualifying Employer Securities . . .", and § 4.2.3 provides in relevant part that "[e]ach Participant and Beneficiary will be permitted to sell units of the [Stock Fund] at any time" Gilroy Decl. Ex. A, § 4.2.1 and § 4.2.3 (emphasis added).

C. Plaintiff Was Never an Employee of United

The sole plaintiff in this case is Matthew T. Zilhaver. United never employed Mr. Zilhaver. Gilroy Decl. ¶ 4. Mr. Zilhaver instead worked for a

separate, and then-unrelated, company called PacifiCare Health Systems, Inc. ("PacifiCare"). *Id.* He worked for PacifiCare from October 28, 2002, until September 23, 2005. *Id.* As a PacifiCare employee, Mr. Zilhaver participated in a voluntary individual account plan sponsored by that company (the "PacifiCare Plan"). *Id.* ¶ 5. The PacifiCare Plan offered its participating employees a menu of investment fund options, including a PacifiCare company stock fund. *Am. Compl.* ¶ 9. At the time Mr. Zilhaver left PacifiCare's employ in September 2005, his account balance in the PacifiCare Plan was valued at approximately \$19,000, and was allocated among four of the PacifiCare Plan's mutual fund options. *Gilroy Decl.* ¶ 6.

In December 2005, three months after Mr. Zilhaver left PacifiCare, the company merged with a United subsidiary. *Gilroy Decl.* ¶ 7. At the time of the merger, Mr. Zilhaver had 100 percent of his PacifiCare Plan account balance invested in that Plan's company stock fund. *Id.* ¶ 8. Once the merger closed, all outstanding shares of PacifiCare stock were exchanged for shares of United stock and other consideration. *Id.* ¶ 9. As a consequence of this corporate merger, Mr. Zilhaver's PacifiCare Plan account came to be invested in shares of United stock. *Id.* ¶ 10.

Following the *corporate* merger, United caused the PacifiCare Plan to merge with and into United's Plan, effective May 1, 2006. *See Gilroy Decl.* ¶ 11; *id.*, Ex. A, Appendix E, Section 37 (reflecting the merger of the PacifiCare and United Plans). As a consequence of this *plan* merger, Mr. Zilhaver came to have

an account balance in the frozen Employer Stock Fund within the United Plan, even though he never worked as a United employee. *Id.* ¶ 12.

D. Mr. Zilhaver Participated in the Plan for Only 17 Days

On May 16, 2006, Mr. Zilhaver requested a distribution of his entire account balance. Gilroy Decl. ¶ 13. That request was carried out May 17, 2006. *Id.* As a result, Mr. Zilhaver participated in the Plan for a total of only 17 days.

E. The Wall Street Journal Article and the Ensuing Investigations and Derivative and PSLRA Actions

On March 18, 2006, the *Wall Street Journal* published an article suggesting that executives at certain public companies, including United, had received options that were dated to coincide with a low point in the price of the companies' stock. Am. Compl. ¶ 61. Inquiries by the United States Securities and Exchange Commission and other government agencies followed, *id.* ¶¶ 62, 67, as did derivative lawsuits and federal securities law actions which are now pending before this Court.

Mr. Zilhaver alleges that, as the public learned of these events, the market price of United stock declined. Am. Compl. ¶¶ 63, 68-69, 80. Mr. Zilhaver further alleges that this price decline, coupled with other fallout from the "executive stock option scandal," resulted in losses to the Plan. *Id.* ¶ 80. More specifically, Mr. Zilhaver alleges that "[t]he market price of the Company's common stock, and the value of units of the UnitedHealth Group Stock Fund held by participants, would now be substantially higher, and would have been

substantially higher throughout the Class Period, but for the executive stock option scandal at the Company." *Id.* ¶ 80.

F. Mr. Zilhaver's Claims for Relief

On June 2, 2006, Mr. Zilhaver commenced this ERISA action under 29 U.S.C. § 1132(a)(2) and (3), seeking to recover the Plan's alleged losses and to obtain other equitable relief on behalf of the Plan and an alleged Class of Plan participants, and he filed an Amended Complaint on November 17, 2006. The Amended Complaint (hereafter referred to as the "Complaint") targets United itself, plus six individuals, on the theory that each such Defendant acted as an ERISA "fiduciary" with respect to the Plan's continued holding of United stock. The Complaint asserts three claims for relief.

In Count I of the Complaint (the "Disclosure Claim"), Mr. Zilhaver alleges that all Defendants breached fiduciary duties under 29 U.S.C. § 1104(a), by making "repeated misrepresentations and conceal[ing] material information" pertaining to the stock options. Am. Compl. ¶ 83. Mr. Zilhaver claims that participants in the Plan relied to their detriment on these alleged misrepresentations and non-disclosures, *id.* ¶ 84, and that the Plan itself suffered losses as a consequence. *Id.* ¶ 85.

In Count II of the Complaint (the "Prudence Claim"), Mr. Zilhaver alleges that the stock option matter had made United stock an "imprudent" and "high risk" investment option by December 21, 2005 (the beginning of the alleged "Class Period"). Am. Compl. ¶ 92. Mr. Zilhaver alleges that all Defendants "should have

terminated the UnitedHealth Group Stock Fund" (*id.* ¶ 94), and that they breached their fiduciary duties under 29 U.S.C. § 1104(a) by failing to do so. *Id.* ¶ 96.

Count III of the Complaint alleges claims that are derivative of those in Counts I and II. Specifically, Count III (the "Monitoring Claim") alleges that Mr. Hemsley and the Director Defendants (as well as United's Chief Executive Officer, Dr. William McGuire) failed to communicate information about the stock options to Defendant Dapper, and that had Mr. Dapper been better informed on that subject he would have taken action to terminate the Employer Stock Fund. Am. Compl. ¶¶ 12, 106. This alleged failure, according to Count III, resulted in breaches of the targeted Defendants' fiduciary duty to properly appoint, monitor and/or inform other fiduciaries.

G. Timeline Summarizing Relevant Dates

For ease of reference, a timeline summarizing the key dates relevant to Mr. Zilhaver's lack of standing to bring this action is set forth below. This summary is based on the facts and source material described more fully in Parts II.C-II.F, above.

10/28/2002: Mr. Zilhaver begins work for PacifiCare, a company unrelated to United, and participates in PacifiCare's own defined contribution plan. That PacifiCare Plan offered a fund that allowed participants to invest in PacifiCare stock.

09/23/2005: Mr. Zilhaver terminates employment with PacifiCare.

12/19/2005: Mr. Zilhaver allocates his entire account balance under the PacifiCare Plan to the PacifiCare Stock Fund.

12/21/2005: PacifiCare merges into a United subsidiary.

- 12/22/2005: PacifiCare stock is converted to United stock and other consideration, and Mr. Zilhaver's account with the PacifiCare Plan becomes invested in shares of United stock.
- 05/01/2006: The PacifiCare Plan is merged into the United Plan, and Mr. Zilhaver for the very first time has an account in the United Plan.
- 05/17/2006: Mr. Zilhaver receives a distribution of his entire account balance under the United Plan, and he ceases to be a participant in the United Plan.
- 06/02/2006: Mr. Zilhaver commences this lawsuit against United and other defendants.
- 11/17/2006: Mr. Zilhaver files an Amended Complaint against United and the Defendants presently before the Court.

III. STANDARD FOR DECIDING DEFENDANTS' MOTION TO DISMISS

Defendants' motion seeks dismissal under Federal Rules of Civil Procedure 12(b)(1) for lack of jurisdiction over the subject matter, and 12(b)(6) for failure to state a claim upon which relief can be granted. Dismissal under Rule 12(b)(1) is warranted because, as shown in Part IV.A below, Mr. Zilhaver lacks standing to sue under ERISA and his lack of standing deprives this Court of jurisdiction over the subject matter. *See Faibisch v. Univ. of Minn.*, 304 F.3d 797, 801 (8th Cir. 2002) ("if a plaintiff lacks standing, the district court has no subject matter jurisdiction").

In deciding a motion under Rule 12(b)(1), the court must distinguish between a "facial attack" and a "factual attack." *Osborn v. United States*, 918 F.2d 724, 729 n. 6 (8th Cir.1990). In a factual attack, as here, the court must inquire

into and resolve any factual disputes, *Faibisch*, 304 F.3d at 801, and in so doing, may consider facts outside of the pleadings. "When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations. A court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve jurisdictional facts under Rule 12(b)(1)." *Soc. of Prof. Eng'g Employees in Aerospace, IFPTE Local 2001, AFL-CIO v. Boeing Co.*, 05-1251-MLB, 2006 WL 2850325, at *2 (D. Kan. September 29, 2006). *See also Frisone v. Pepsico, Inc.*, 369 F. Supp. 2d 464, 470 (S.D.N.Y. 2005) ("[w]hen considering a motion to dismiss for lack of subject matter jurisdiction . . . the court may properly refer to evidence beyond the pleadings to resolve disputed jurisdictional facts" (citing *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir.2000)); *Augienello v. F.D.I.C.*, 310 F. Supp. 2d 582, 588 (S.D.N.Y. 2004) (a court may decide questions of subject matter jurisdiction "on the basis of affidavits or other evidence, and 'no presumptive truthfulness attaches to the complaint's jurisdictional allegations'" (quoting *Guadagno v. Wallack Ader Levithan Assoc.*, 932 F. Supp. 94, 95 (S.D.N.Y. 1996)).

As explained more fully below, all of the facts needed to resolve the standing issue in this case are contained or referenced within the pleadings, with one possible exception. That one possible exception is the fact – which Mr. Zilhaver is in no position to dispute – that he took a distribution of his entire Plan benefit weeks before filing this civil action. As demonstrated by the cases cited at

n.3, *infra*, courts have routinely dismissed ERISA cases for lack of standing in similar circumstances and on similar records.

Mr. Hemsley and the Director Defendants also seek dismissal under Rule 12(b)(6) because, as shown in Part IV.B below, even if Mr. Zilhaver did have standing (he does not), his allegations nevertheless fail to state any viable claim against those Defendants. In resolving the Defendants' Rule 12(b)(6) motion, the Court must accept all well-pleaded factual allegations in the Complaint. *See Westcott v. City of Omaha*, 901 F. 2d 1486, 1488 (8th Cir. 1990). However, "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. Indemn. Corp.*, 280 F.3d 868, 870 (8th Cir. 2002). This Court is also free to rely upon the documents referenced in the Complaint, or which are "necessarily embraced by the complaint" *Enervations, Inc. v. Minnesota Mining & Mfg. Co.*, 380 F.3d 1066, 1068 (8th Cir. 2004). *See also Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999). Where, as here, the complaint refers to one or more ERISA-covered plans, the plans and instruments under which they are maintained are considered incorporated by reference and may be considered by the Court. *See, e.g., Borden v. Blue Cross & Blue Shield of Western New York*, 418 F. Supp. 2d 266, 273 (W.D.N.Y. 2006). Indeed, "[i]n evaluating a motion to dismiss under rule 12(b)(6), a court may consider any document . . . that is 'integral to or explicitly relied upon on in the complaint' as well as any 'undisputedly authentic document that a defendant attaches as an exhibit to a

motion to dismiss if plaintiff's claims are based on the document." *Graden v. Conexant Sys., Inc.*, 2006 WL 1098233, at *1, n.1 (quoting *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir.1997)).

IV. ARGUMENT

A. **Mr. Zilhaver Lacks Standing to Maintain this ERISA Action Because He Was Not a Plan Participant, Beneficiary or Fiduciary at the Time He Commenced the Lawsuit.**

Mr. Zilhaver sues for relief under 29 U.S.C. §§ 1132(a)(2) and (3). Those sections authorize a private civil action to be brought only by a "participant, beneficiary or fiduciary" of the employee benefit plan in question. *Id.* Standing under 29 U.S.C. § 1132(a) "is determined as of the time of the lawsuit, not at the time of the alleged ERISA violations." *Donohue v. Teamsters Local 282 Welfare, Pension, Annuity, Job Training and Vacation & Sick Leave Trust Funds*, 12 F. Supp. 2d 273, 279 (E.D.N.Y. 1998) (citing *Raymond v. Mobil Oil Corp.*, 983 F.2d 1528, 1535 (10th Cir. 1993)). *See also Harley v. Zoesch*, 413 F.3d 866, 872 (8th Cir. 2005) ("standing is determined as of the lawsuit's commencement," so courts must "consider the facts as they existed at that time") (quoting *Steger v. Franco, Inc.*, 228 F.3d 889, 892 (8th Cir. 2000)); *Harris v. Provident Life & Accident Ins. Co.*, 26 F.3d 930, 933 (9th Cir. 1994) (participant status must exist "at the time of the filing of the lawsuit"). "The fact that [a plaintiff participated] 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."

Adamson v. Armco, Inc., 44 F.3d 650, 654 (8th Cir. 1995) (quoting *Raymond*, 983 F.2d at 1534-35) (emphasis in original).

To maintain this action, Mr. Zilhaver must, therefore, plead and prove facts sufficient to establish his status as a Plan "participant, beneficiary or fiduciary" as of the "time of the filing of the lawsuit." *See Harris v. Provident Life & Accident Ins. Co.*, 26 F.3d at 933. He does not.

Mr. Zilhaver makes no allegation that he ever held the status of a Plan "beneficiary" or "fiduciary" under ERISA. Instead, Mr. Zilhaver alleges only that he "*was a Plan participant during time periods relevant to*" his action. Am. Compl. ¶ 1 (emphasis added). Significantly, however, Mr. Zilhaver does not—and cannot—allege that he was a Plan participant "as of the lawsuit's commencement," which is the time relevant for determining standing under ERISA. *See Harley*, 413 F.3d at 872. Indeed, it is beyond dispute that, after participating in the Plan for only 17 days, Mr. Zilhaver took a distribution of 100 percent of his account balance in the Plan on May 17, 2006—two weeks before he filed this lawsuit on June 2, 2006. Gilroy Decl. ¶ 13. Upon that distribution, his brief tenure as a Plan "participant" under ERISA came to end.

ERISA defines the term "participant" at 29 U.S.C. § 1002(7). In relevant part, that section provides that the term means "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit . . . from an employee benefit plan which covers employees of such employer" 29 U.S.C. § 1002(7). The Supreme Court has ruled that the term "participant" under ERISA

is "naturally read to mean" (1) current employees "in, or reasonably expected to be in, currently covered employment", (2) former employees "who have a reasonable expectation of returning to covered employment", or (3) former employees "who have 'a colorable claim' to vested benefits." *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 117 (1989) (citations omitted). As shown below, Mr. Zilhaver fails to satisfy the *Firestone* requirements because he is not now, and was not at the time of the commencement of this lawsuit: (1) a current employee of United; (2) a former employee of United (or PacifiCare) with a reasonable expectation of returning to covered employment; or (3) a former employee with a colorable claim to vested benefits.

1. Mr. Zilhaver Is Not a Current Employee of United.

Mr. Zilhaver has never been employed by United. Gilroy Decl. ¶ 4. He worked instead for a separate company, PacifiCare, and left that company's employ months before PacifiCare had any connection to United or to the United Plan. *Id.* In particular, he terminated his employment with PacifiCare in September 2005 (Am. Compl. ¶ 9), three months *before* PacifiCare merged into a United subsidiary, three months *before* the alleged Class Period commenced, and nine months *before* he filed his initial lawsuit. Gilroy Decl. ¶ 4. Accordingly, Mr. Zilhaver does not have standing to maintain this action as a "current employee" of United.

2. Mr. Zilhaver Is Not a Former Employee with a Reasonable Expectation of Returning to Covered Employment.

Mr. Zilhaver also fails to qualify as a "former employee" with a reasonable expectation of returning to covered employment—the second prong of the *Firestone* test. To establish a reasonable expectation of returning to employment, "there must be a claim of right on the part of the former employee to return to work." *Raymond*, 983 F.2d at 1537 (quoting *Shawley v. Bethlehem Steel Corp.*, 784 F. Supp. 1200, 1205 (W.D. Pa. 1992)).

Mr. Zilhaver's employment with PacifiCare terminated well before PacifiCare's merger with United (Am. Compl. ¶ 9) and, pursuant to his voluntary instructions, all of Mr. Zilhaver's vested benefits under the merged PacifiCare-United Plan were distributed on May 17, 2006. Gilroy Decl. ¶ 13. Mr. Zilhaver does not allege that he asked for—or is entitled to—reinstatement of his employment with PacifiCare (or any successor thereto). "As a matter of law[,] a reasonable expectation of returning to covered employment cannot encompass the undisputed situation here, where plaintiffs retired, received all of their vested benefits, did not ask their employer for reinstatement and can point to nothing suggesting that [the employer] will, should or must reinstate them." *Raymond*, 983 F.2d at 1537.

3. Mr. Zilhaver Does Not Have a Claim for Vested Benefits.

Finally, Mr. Zilhaver has no "colorable claim for vested benefits" under the United Plan. Mr. Zilhaver requested and received a distribution of his entire

account balance on May 17, 2006, two weeks before he filed his lawsuit on June 2, 2006. Gilroy Decl. ¶ 13. Thus, Mr. Zilhaver no longer has any account with or relationship to the United Plan. *Id.* A former employee who receives a lump-sum distribution of pension benefits lacks standing to sue for breach of fiduciary duty under ERISA. *See Gilquist v. Becklin*, 675 F. Supp. 1168, 1171 (D. Minn. 1987) ("Because plaintiffs . . . have no possibility of receiving benefits, they are no longer participants . . . and have no standing to bring this action."), *aff'd*, 871 F.2d 1093 (8th Cir. 1988). *See also Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir. 1986) (affirming dismissal of complaint because former plan participant who received all benefits due under the plan lacked standing to sue for breach of fiduciary duty); *Mitchell v. Mobil Oil Co.*, 896 F.2d 463, 474 (10th Cir. 1990) (ERISA's definition of participant excludes retirees who have accepted lump-sum distributions). Accordingly, courts have not hesitated to dismiss a complaint where, as here, the plaintiff is a former employee who has received a full distribution of benefits from a defined contribution plan.³

³ *See, e.g., Caltagirone v. New York Community Bancorp.*, 457 F. Supp. 2d 145, 149 (E.D.N.Y. 2006) (granting motion to dismiss for lack of standing where plaintiff was former employee who had received a distribution of all benefits from a defined contribution plan); *Dickerson v. Feldman*, 426 F. Supp. 2d 130, 136-37 (S.D.N.Y. 2006) (same); *Holtzschler v. Dynegy, Inc.*, 2006 WL 626402, at *4-*5 (S.D. Tex. March 13, 2006) (same); *Graden v. Conexant Sys., Inc.*, 2006 WL 1098233, at *2-*5 (D.N.J. March 31, 2006) (same); *In re Guidant ERISA Litig.*, 2006 WL 2828882, at *4 (S.D. Ind. September 15, 2006) (same); *In re RCN Litig.*, 2006 WL 753149, *13-*14 (D.N.J. March 21, 2006) (same). *See also In re AEP ERISA Litig.*, 437 F. Supp. 2d 750, 759-760 (S.D. Ohio 2006) (denying class certification motion and dismissing action where plaintiff received distribution of benefits from the plan); *Evans v. Akers*, 2006 WL 3518305, at *4-*5 (D. Mass.

Furthermore, Mr. Zilhaver cannot characterize his claim as one for "vested benefits" and bootstrap himself back into status as a United Plan "participant." In *Gilquist*, the Court held that where "plaintiffs received lump-sum distributions and . . . there is no claim that any plaintiff plans on returning to work and starting again to accrue benefits under the plan," any recovery in an action for breach of fiduciary duty would be for damages, not vested benefits, and that plaintiffs therefore lacked standing under ERISA. *Gilquist*, 675 F. Supp. at 1171.

The text of the Complaint confirms that Mr. Zilhaver is suing for damages, not benefits. Mr. Zilhaver claims that he *might* have earned a greater return on his Plan account *if* he had not held onto his United stock holdings until May 17, 2006 (although he does not identify what investment alternative he would have selected or what its rate of return would have been). Am. Compl. ¶ 9. The difference between what Mr. Zilhaver's account *might have earned* and what it actually did earn is not a benefit that is promised for, or under, the terms of the United Plan. It is therefore clear that the Complaint does not seek "benefits;" it seeks damages. *See In re RCN Litig.*, 2006 WL 753149 at *14; *Evans v. Akers*, 2006 WL 3518305, at *4.

December 6, 2006) (same); *Howell v. Motorola, Inc.*, 2006 WL 2355586, *5-6 (N.D. Ill. August 11, 2006) (denying motion to intervene by putative plaintiff, where intervenor had received a distribution of benefits from the plan, and sought damages rather than vested benefits); *Lalonde v. Textron, Inc.*, 418 F. Supp. 2d 16, 19-20 (D.R.I. 2006) (granting summary judgment to defendants on ground that plaintiff lacked standing under ERISA following receipt of distribution from plan).

There is good reason for this distinction. Mr. Zilhaver's claim for damages is purportedly brought on behalf of the Plan. But how can he seek damages on behalf of a plan in which he does not participate? How can the Plan distribute any recovery to someone who is no longer in the Plan? "[A] plaintiff who divests himself of plan holdings . . . has already collected all vested benefits due to him under the plan." *In re AEP Litig.*, 437 F. Supp. 2d at 758 (citing *Crawford v. Lamantia*, 34 F.3d 28, 31 (1st Cir. 1994)). Further, it is well-settled that "damages stemming from [an] alleged breach of fiduciary duty does not constitute a 'benefit' within the meaning of ERISA." *Daniels v. Thomas & Betts Corp.*, 263 F.3d 66, 77 (3d Cir. 2001) (citing *Kuntz v. Reese*, 785 F.2d at 1410). In describing the distinction between a suit for benefits and suit seeking damages, the Fifth Circuit held that:

Clearly, a plaintiff alleging that his benefits were wrongly computed has a claim for vested benefits. Payment of the sum sought by such plaintiff will not increase payments due him. On the other hand, a plaintiff who seeks the recovery for the trust of an unascertainable amount, with no demonstration that the recovery will directly effect payment to him, would state a claim for damages, not benefits.

Sommers Drugs Stores Co. Employee Profit Sharing Trust v. Corrigan, 883 F.2d 345, 350 (5th Cir. 1989).

This distinction between claims for benefits and damages was also addressed in *Hargrave v. TXU Corp.*, 392 F. Supp. 2d 785 (N.D. Tex. 2005). In *Hargrave*, as here, the plaintiffs accepted full distributions of their account balances from the employer's defined contribution plan. After receiving their

distributions, the plaintiffs sued the plan's fiduciaries, alleging that they breached ERISA's fiduciary duties by allowing plan participants to invest in company stock.

In ruling that the plaintiffs lacked standing, the court held:

The [p]laintiffs . . . do not allege that the [d]efendants held back a portion of the benefits under the plan. Rather, they argue the amount in the entire plan was too small. Specifically, [p]laintiffs allege that [d]efendants' investment in TXU stock resulted in an overall diminution of plan assets, which were then distributed to plaintiffs. *The allegation is not that benefits were withheld, but that there should have been more benefits to go around.* This argument states a claim for 'a sum of money that could have been earned' if [d]efendants had made prudent investment decisions with respect to plan assets. . . . The [p]laintiffs have already received all the benefits they accrued under their Thrift Plan accounts. *They are now seeking additional damages that might have accrued but for the [d]efendants' alleged misconduct. These additional damages are speculative and cannot be considered vested under ERISA.*

392 F. Supp. 2d 789-90 (emphasis added).

The court in *Howell v. Motorola*, 2006 WL 2355586 (N.D. Ill. August 11, 2006), rejected a "lost earnings" theory of damages that is virtually identical to that advanced by Mr. Zilhaver, noting that:

As much as one might wish to engage in semantic gymnastics, there is simply no way to conclude that a claim which seeks reimbursement for the 'lost return on investments that would have resulted from prudent and loyal investment of plan assets' is one for vested benefits. Nor is there any way to conclude that a claim for 'the return that would have been obtained had the assets been prudently invested in the best performing alternative investment in the plan' is anything other than a claim for damages.

Id. at *6.

In sum, Mr. Zilhaver's allegations and other undisputed facts establish that he was not a fiduciary, beneficiary, or participant at the time he filed this lawsuit.

Because he did not hold such status at the time he commenced the lawsuit, he lacks standing to maintain this ERISA action. This, in turn, deprives the Court of subject matter jurisdiction, and requires dismissal of the lawsuit under Rule 12(b)(1).

B. Plaintiff's Claims Against the Director Defendants and Mr. Hemsley Should be Dismissed Pursuant to Rule 12(b)(6) for the Additional and Independent Reason that the Complaint Fails to Allege Facts Sufficient to Establish that those Defendants Acted as ERISA Fiduciaries With Respect to Alleged Misrepresentations and Omissions.

Even if Mr. Zilhaver had standing to sue under ERISA, which he does not have for the reasons set forth in Part IV.A, his claims against the Director Defendants and Mr. Hemsley should be dismissed because Mr. Zilhaver fails to allege facts sufficient to establish any fiduciary liability on the part of those Defendants under ERISA.

In order to plead breach of fiduciary duty under ERISA, a plaintiff must establish that: "(1) the defendant was [acting as] an ERISA fiduciary; (2) defendant breached its fiduciary duty; and (3) the breach caused [plaintiff's] loss." *Dale v. Wells Fargo Bank, N.A.*, 370 F. Supp. 2d 880, 883 (D. Minn. 2005) (citing *Eckelkamp v. Beste*, 315 F.3d 863, 867 (8th Cir. 2002)). Thus, it is a fundamental requirement that Mr. Zilhaver plead Defendants' ERISA fiduciary status concerning the subject matters at issue with respect to each Count of the Complaint. *See Hickman v. Tosco Corp.*, 840 F.2d 564, 566 (8th Cir. 1988) (affirming dismissal of claim for breach of fiduciary duty where alleged

wrongdoing was undertaken by defendant in its capacity as an employer and not as a plan fiduciary).

Fiduciary status under ERISA can be established in two ways. First, an ERISA fiduciary may be named in the plan instrument or through a procedure specified therein. *See* 29 U.S.C. § 1102(a)(2) (governing "named fiduciary" status). Second, a person may be deemed a fiduciary on the basis of his or her functional authority or control relative to the plan. *See Mertens v. Hewitt Assoc.*, 508 U.S. 248, 262 (1993) ("The statute provides that not only the persons named as fiduciaries by a benefit plan, . . . but also anyone else who exercises discretionary control or authority over the plan's management, administration, or assets . . . is a fiduciary").

Mr. Zilhaver's Complaint nowhere alleges that the Director Defendants or Mr. Hemsley are named fiduciaries of the Plan, and the Plan instrument would refute any such allegation had it been made. With the possible exception of the Plan's directed trustee (not a party to this case), the only fiduciaries allegedly named in the Plan instrument are United itself and United's Senior Vice President, Human Capital (a job formerly held by Defendant Dapper). *See* Am. Compl. ¶¶ 11-12 (alleging named fiduciary status of Defendants United and Dapper).

Instead, Mr. Zilhaver purports to maintain ERISA claims against the Director Defendants and Mr. Hemsley on the theory that those individuals acted as "de facto" or "functional" fiduciaries under 29 U.S.C. § 1002(21)(A) with respect to the misrepresentations and omissions alleged in the Complaint. As shown

below, however, that theory fails because it is not supported by sufficient factual allegations in the Complaint and, indeed, is refuted by the structure of the Plan.

1. Fiduciary Status is Transaction-Specific.

There are no "general fiduciaries" who bear a fiduciary duty under ERISA with respect to every act taken with respect to the Plan. Instead, a person may be a fiduciary only with respect to specific actions or transactions. *See* 29 U.S.C. § 1002(21)(A) ("a person is a fiduciary with respect to a plan to the extent" that the person exercises one of the listed fiduciary functions). Thus, to maintain an ERISA breach of fiduciary duty claim, the plaintiff must allege facts sufficient to establish that the defendant was acting as a fiduciary with respect to the particular activity in question. The Supreme Court has explained this bedrock principle of ERISA fiduciary status as follows:

[T]he statute does not describe fiduciaries simply as administrators of the plan, or managers or advisers. Instead it defines an administrator, for example, as a fiduciary only "to the extent" that he acts in such a capacity in relation to a plan. . . . In every case charging breach of ERISA fiduciary duty, then, the threshold question is not whether the actions of some person employed to provide services under a plan adversely affected a plan beneficiary's interest, but whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint.

Pegram v. Herdrich, 530 U.S. 211, 225-26 (2000); *see also Kerns v. Benefit Trust Life Ins. Co.*, 992 F.2d 214 (8th Cir. 1993) ("Fiduciary status under § 1002(21)(A) 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.") (quoting *Coleman v.*

Nationwide Life Ins. Co., 969 F.2d 54, 61 (4th Cir. 1992)); *Coyne v. Delaney Co.*, 98 F.3d 1457, 1465 (4th Cir. 1996) ("The inclusion of the phrase 'to the extent' in ERISA's definition of fiduciary 'means that a party is a fiduciary only as to the activities which bring the person within the definition.'" (citations omitted)).

Nor does the Director Defendants' and Mr. Hemsley's status as current or former Company directors (and in Mr. Hemsley's case, also an officer) of United (itself a named fiduciary of the Plan) confer ERISA fiduciary status on those Defendants. *See* Am. Compl. ¶¶ 11, 13, 15-16, 18. Settled law holds that "status as a corporate officer of a fiduciary corporation is insufficient by itself to create fiduciary duty." *See, e.g., Trustees of GCIU Health and Welfare Plan v. Bjorkedal*, 04-3371, 2006 WL 3511767 at *11 (D. Minn. December 6, 2006) (quoting 29 C.F.R. § 2509.75-8 at D-5); *Briscoe v. Fine*, 444 F.3d 478, 487 (6th Cir. 2006) (holding that directors are not fiduciaries based solely on their status as directors and affirming district court's holding that directors were not fiduciaries "[b]ecause the plaintiffs do not argue that the limited discretionary acts of the Fines gave rise to a breach of duty and because the Fines did not exercise discretionary authority over any other aspects of plan management or plan assets . . .").

Rather, the starting point for evaluating a particular defendant's functions (if any) with respect to a plan is the plan document itself. This is because plan documents establish and delimit the fiduciary duties of each person with responsibility for the Plan. *See, e.g., Walker v. National City Bank of*

Minneapolis, 18 F.3d 630, 633 (8th Cir. 1994) ("The Department of Labor, charged with implementing and regulating ERISA, has clearly stated that where, as here, the Plan allocates specific duties to specific fiduciaries, each fiduciary is responsible only for the responsibilities allocated to it.") (citing DOL interpretive bulletins); *Agway, Inc. v. Magnuson*, 2006 WL 2934391, at *11 (N.D.N.Y. Oct. 12, 2006) ("I reject the notion that as named fiduciaries, for example, the Director Defendants were responsible for all aspects of administration of the Plan, notwithstanding the narrow role carved out for them under its express terms, and instead will limit my focus on the responsibilities of each of the named fiduciaries pursuant to the authority and discretion granted under Plan documents, and exercised by them."); *Henry v. Champlain Enter., Inc.*, 288 F.Supp.2d 202, 222 (N.D.N.Y. 2003) ("Thus, all that is left as evidence of Owens's fiduciary status with respect to the transaction is his *status* as a member of the board of directors. Without more, namely, *conduct* amounting to discretionary control or authority, Owens cannot be considered a fiduciary with respect to the alleged overcharge."). As shown below, the document governing this Plan does not assign to the Director Defendants or to Mr. Hemsley any of the fiduciary functions at issue in this lawsuit.

2. The Director Defendants and Mr. Hemsley Are Not Fiduciaries with Respect to the Alleged Misrepresentations and Omissions.

As a threshold matter, it is readily apparent that the Plan document assigns no authority or responsibility to the Director Defendants or Mr. Hemsley for the

matters at issue in Count I (the Disclosure Claim) and Count II (the Prudence Claim) of the Complaint. Those Counts claim breaches of duty arising from alleged misrepresentations and from the continued maintenance of the Plan's Employer Stock Fund. As a matter of law, a misrepresentation is actionable under ERISA's fiduciary responsibility provisions only if it is made in the course of managing or administering the plan. *Varity Corp. v. Howe*, 516 U.S. 489 (1996). Here, the Plan document assigns all such administrative or management responsibilities to either United or to United's Vice President Human Capital. *See* Gilroy Decl., Ex. A, § 12.2.1, 12.6. More specifically, § 12.6 of the Plan provides that "[t]he Principal Plan Sponsor [*i.e.*, United] shall be the administrator for purposes of section 3(16)(A) of ERISA," and § 12.2.1 of the Plan explains that "[e]ffective May 15, 2002, the Committee [*i.e.*, the Plan's prior Administrative Committee] was dissolved . . . [and] the Principal Sponsor delegated all duties, authority and responsibilities assigned to the Committee to the Senior Vice President, Human Capital of the Principal Sponsor." *Id.*

Similarly, continued maintenance of the Employer Stock Fund is mandated by § 4.2.1 of the Plan, while the more general responsibility for selection of other investment funds is assigned solely to United's Vice President, Human Capital. *See* Gilroy Decl., Ex. A §§ 4.1 and 12.2.1 of the Plan. More specifically, § 4.2.1 of the Plan requires that the Plan's directed trustee "*shall* . . . maintain at least one Subfund which *shall* be invested in qualifying Employer Securities . . .", and § 4.2.3 provides that "[e]ach Participant and Beneficiary will be permitted to sell

units of the [Stock Fund] at any time" Gilroy Decl. Ex. A, § 4.2.1 and § 4.2.3 (emphasis added). This contrasts with the discretionary responsibility given to the Vice President, Human Capital (and formerly to the Committee) under §§ 4.1.1 through 4.1.4 of the Plan to "establish[]" and "revis[e]" the Plan's Active Funds. *Id.*⁴

Mr. Zilhaver's remaining theory – alleged in Count III (the Monitoring Claim) of the Complaint – is that the Director Defendants and Mr. Hemsley somehow had authority to appoint and to remove (and hence, a concomitant fiduciary duty to monitor) the subordinate fiduciaries having direct responsibility for the communication and selection functions at issue in Counts I and II. However, the Plan document delegates no such authority to Mr. Hemsley personally or to the office that he held during the alleged Class Period. And the only duties or authorities that the Plan delegates to United's Board of Directors are

⁴ The Plan's mandate, in § 4.2.1 of the Plan document, that the Trustee "shall" maintain the frozen Employer Stock Fund serves a valid and lawful purpose. Participants in the now-defunct United ESOP had acquired shares of Company stock through that plan with some expectation that they would be allowed to continue to hold those shares on a tax-favored basis until retirement. The frozen Employer Stock Fund gives such participants a tax-favored vehicle for doing so in the wake of the ESOP's termination. But the Plan otherwise is structured to give each such participant complete and sole control over the continued holding of his or her Company stock. Because none of the Defendants has any authority or means to usurp that participant control, they should have no fiduciary responsibility with respect to the continued holding of such Company stock. *See Maniace v. Commerce Bank of Kansas City*, 40 F.3d 264, 267 (8th Cir. 1994) (dismissing breach of fiduciary duty claims against a directed trustee, where the plan document required the trustee to invest in company stock. "Commerce had no discretion or control with respect to [company] stock, the central asset of the ESOP at issue. As such, Commerce does not fit within the ERISA definition of a fiduciary . . .").

those (a) to amend the Plan, and (b) to appoint or remove the Plan's directed trustee. *See* Gilroy Decl., Ex. A. § 12.1.3 ("Notwithstanding the foregoing, the Board of Directors of the Principal Sponsor shall have the exclusive authority, which may not be delegated . . . , to act for the Principal Sponsor: (a) to amend this Plan Statement . . . ; to terminate the Plan, and (b) to appoint or remove a Trustee or accept the resignation of a Trustee"). Neither of those authorities or duties is implicated by the Complaint. The Complaint does not allege misconduct related to either plan amendment (which is itself a nonfiduciary "settlor" function under ERISA) or the selection or oversight of the Plan's directed trustee (which is not a defendant). Mr. Zilhaver's claims against the Director Defendants and Mr. Hemsley should thus be dismissed. *See, e.g., Brandt v. Grounds*, 687 F.2d 895, 898-99 (7th Cir. 1982) (dismissal proper where the conduct alleged is unrelated to the defendants' fiduciary duties, if any, under the plan).

Two final points warrant mention. First, the Complaint includes three conclusory allegations to the effect that the Director Defendants or Mr. Hemsley are "de facto" or "functional" fiduciaries under ERISA. *See* Am. Compl. ¶¶ 1, 20, and 34. It is black letter law, however, that the court is free to ignore "sweeping legal conclusions cast in the form of factual allegations, *Wiles Indemn. Corp.*, 280 F.3d at 870, and that "[t]he court need not accept [plaintiff's] conclusory allegations as true . . ." when evaluating a Rule 12(b)(6) motion. *Moffett v. Halliburton Energy Serv., Inc.*, 291 F.3d 1227, 1231 (10th Cir. 2002)). Indeed, Judges Kyle and Doty have both recognized that a court is not bound to accept

purely conclusory allegations as to a defendant's fiduciary status when deciding a motion to dismiss in this kind of ERISA case. *See Hastings v. Wilson*, No. 05-2566, slip op. at 12 (D. Minn. Feb. 1, 2007) (Exhibit A to the accompanying Declaration of Thomas S. Gigot) (citing *Briscoe v. LaHue*, 663 F.2d 713, 723 (7th Cir. 1981)); *In re Xcel Energy, Inc.*, 312 F. Supp. 2d 1165, 1178 (D. Minn. 2004) (quoting *Moffett*, and noting that "defendants' contention that the plaintiffs fail to cite facts showing which defendants breached which duty is well-taken"). Here, as in *Hastings*, "Plaintiff's amended Complaint is utterly devoid of any facts that support" the conclusory allegations that Hemsley or the Director Defendants are "functional" or "de facto" fiduciaries with respect to the Plan's continued holding of Company stock or to Plan communications relating thereto. "Such a conclusory allegation . . . is insufficient to survive a motion to dismiss." *Hastings*, slip op. at 12.⁵

⁵ While the court in *Xcel Energy* ultimately denied the motion to dismiss, its reasons for doing so are inapplicable here. Unlike *Xcel Energy*, this is not a case in which there is any dispute over how the governing plan document assigns fiduciary authority and responsibility. Further, unlike *In re ADC Telecommunications, Inc. ERISA Litig.*, 03-2989, 2004 WL 1683144, at *4 (D. Minn. July 26, 2004), where the plaintiff alleged that all defendants were named fiduciaries (with citation to the plan's governing document), Mr. Zilhaber alleges that only United and Defendant Dapper are named fiduciaries. Am. Compl. ¶¶ 11-12. Additionally, unlike the allegations in *In re ADC Telecommunications*, Mr. Zilhaber's Complaint makes no allegation that the Director Defendants or Mr. Hemsley were delegated fiduciary authority under the terms of the Plan, and he does not allege that they had the power or authority to appoint United or Defendant Dapper as the Plan's named fiduciaries. *See In re ADC Telecomm., Inc. ERISA Litig.*, 2004 WL 1683144, at *4.

In addition, as in *Hastings*, the "essence of" Mr. Zilhaver's case is an alleged *failure* to act on the Defendants part. *See Hastings, supra*, slip op. at 12. As Judge Kyle recognized in *Hastings*, a defendant's alleged failure to act is the opposite of an allegation that the defendant "exercised" a fiduciary role under the statute's functional definition of fiduciary. Indeed, that backwards theory of "functional" fiduciary status collapses where, as here, the governing plan document assigns the defendants in question no such authority or responsibility to act as a fiduciary in the matters at issue.

Second, the Complaint suggests that the Director Defendants' approval of the stock options, the alleged failure properly to disclose those options, and the receipt of the options by Mr. Hemsley, somehow violated *ERISA* because such actions negatively affected the value of United stock, and, consequently, the value of the Plan's Employer Stock Fund. Am. Compl. ¶¶ 13-16, 18, 80. Mr. Zilhaver's theory incorrectly assumes that the Director Defendants and Mr. Hemsley acted as *ERISA* fiduciaries in doing these things and are hence responsible *under ERISA* for the consequences thereof. The actions of the Director Defendants and Mr. Hemsley with respect to the Company's stock options are on their face unrelated to the Plan, and Mr. Zilhaver has not alleged any facts to the contrary.

Mr. Zilhaver's theory, which would have the effect of transforming all corporations whose stock is owned by employee benefit plans, and their directors, into insurers of such plans' investments, has been rejected by the Eighth Circuit. In *Eckelkamp v. Beste*, 201 F. Supp. 2d 1012 (E.D. Mo. 2002), *aff'd*, 315 F.3d 863

(8th Cir. 2002), plaintiffs filed an ERISA claim on behalf of an ESOP that owned 100 percent of the company's stock, alleging that corporate directors and officers took actions that diminished the value of the ESOP's stock holdings. Granting summary judgment in favor of the defendants, the court unequivocally rejected the plaintiffs' contention.

[P]laintiffs contend that the Executive Defendants breached their fiduciary duties as trustees of the . . . ESOP by paying themselves (as corporate officers of Melton Machine and Control Company) unreasonable and excessive salaries, bonuses, and other benefits, thereby allegedly causing the underpayment of dividends to . . . ESOP participants (including the plaintiffs) and/or the undervaluation of the . . . ESOP's stock in annual appraisals.

* * *

While corporate conduct and fiduciary responsibilities may be linked, *not all corporate acts are fiduciary acts*. Virtually all of an employer's significant business decisions affect the *value* of its stock, and therefore, the benefits that ESOP plan participants will ultimately receive. However, *ERISA's fiduciary duties under § 1104 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.

201 F.Supp.2d. at 1013-14, 1022 (emphasis added).⁶

Put simply, there is no ERISA claim against a company or its directors merely because a plan loses money by investing in the company's stock, even if those losses can be traced to corporate activities of the directors. In order for Mr.

⁶ In reaching its conclusion, the court expressly relied upon the language of 29 U.S.C. § 1002(21)(A), which limits the scope of fiduciary responsibility and releases a fiduciary who also serves in a corporate capacity from fiduciary obligations when such a person acts in his or her corporate capacity. *Id.* at 1022 (citing *Reich v. Hall Holding Co.*, 990 F. Supp. 955, 959 (N.D. Ohio 1998)).

Hemsley or the Director Defendants to be fiduciaries of the United Plan, they would have to have exercised authority or control with respect to the management or administration of the *Plan* which, as shown above, they did not. The Director Defendants' alleged approval of backdated stock options to senior executives, and the senior executives' alleged exercise of such options, involve corporate decisions that are wholly unrelated to the United Plan or its assets. As such, neither Mr. Hemsley nor the Director Defendants can be deemed fiduciaries based upon their alleged conduct with respect to the stock options at issue in the Complaint.

V. CONCLUSION

The Court should dismiss the Complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

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Respectfully submitted,

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