

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

<p>Matthew T. Zilhaver,</p> <p style="text-align:right">Plaintiff,</p> <p>v.</p> <p>UnitedHealth Group Incorporated, L. Robert Dapper, James A. Johnson, William G. Spears, Mary O. Mundinger, William W. McGuire, and Stephen J. Hemsley,</p> <p style="text-align:right">Defendants.</p>	<p>Civil File No. 06-CV-02237 (JNE/SRN)</p> <p style="text-align:center">AMENDED MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT WILLIAM W. MCGUIRE’S MOTION TO DISMISS AMENDED COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION UNDER RULE 12(b)(1) AND FAILURE TO STATE A CLAIM UNDER 12(b)(6)</p>
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Dr. William W. McGuire respectfully submits this Amended Memorandum of Law in Support of his Motion to Dismiss Plaintiff’s Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6).

I. INTRODUCTION

Plaintiff’s Amended Complaint alleges that UnitedHealth Group’s company-sponsored 401(k) Plan’s continued holding of United stock during the alleged “Class Period” violated the Employee Retirement Income Security Act of 1974, as amended (“ERISA”).¹ Mr. Zilhaver’s claim is typical of the many “stock-drop” lawsuits filed in federal court since the early 2000s. These cases

¹ Dr. McGuire adopts and incorporates by reference the statement of background facts by Defendants UnitedHealth Group, Incorporated, Robert Dapper, James A. Johnson, William G. Spears, Mary O. Mundinger, and Stephen J. Hemsley.

piggyback on and assert claims identical to those in parallel federal securities fraud actions and name the same defendants, including executives, like Dr. McGuire, who have no role whatsoever in the administration or management of the Company's ERISA plan.

In this case, however, the Court need not even reach the substantive defects in the allegations against Dr. McGuire, because Mr. Zilhaver has no standing. The Eighth Circuit has held that under Sections 502(a)(2) and (3) of ERISA, a plaintiff does not have standing unless he is a "participant, beneficiary or fiduciary" of the plan in question *at the time the Complaint is filed*. Mr. Zilhaver does not allege that he is a beneficiary or fiduciary; he alleges only that he "*was* a Plan participant during time periods relevant to" his action. That past relationship is irrelevant. He currently lacks standing, and that is the end of the matter.

Moreover, even if Mr. Zilhaver had standing, his pleading would have to be dismissed under Rule 12(b)(6). The Supreme Court, the Eighth Circuit, and other federal circuits have consistently affirmed dismissals under Rule 12(b)(6) where, as here, a plaintiff fails to allege facts that, if true, establish both (1) that a defendant is a fiduciary and (2) that he acted in a fiduciary capacity when he took the actions that are the subject of the complaint. Mr. Zilhaver concedes that Dr. McGuire is not a named fiduciary and can only be held liable as a "*de facto*" or functional fiduciary and only "to the extent" that "he exercises any discretionary authority or control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets" or "he has any

discretionary responsibility in the administration of such plan.” 29 U.S.C. § 1002(21)(A). In one short sentence of the 45-page, 110-paragraph Complaint Mr. Zilhaver attempts to allege that Dr. McGuire specifically was a *de facto* plan fiduciary: “Defendant McGuire was a fiduciary of the Plan during the Class Period.” Am. Compl. ¶ 17. Mr. Zilhaver does not allege anywhere in the Complaint that Dr. McGuire specifically exercised any discretionary authority or control with respect to management of the plan, disposition of the assets, or discretionary administrative responsibility. The only wrongful conduct alleged relates to the timing of stock-option grants used to compensate United’s executives and employees—in other words, business decisions that have nothing to do with Plan administration or management. Mr. Zilhaver’s conclusory legal assertions are not enough to survive Dr. McGuire’s motion to dismiss.

II. ARGUMENT

A. The Complaint Must Be Dismissed Because Mr. Zilhaver Lacks Standing

A plaintiff does not have standing unless he is a “participant, beneficiary or fiduciary” of the Plan in question *at the time his Complaint is filed*. 29 U.S.C. §§ 1132(a)(2)-(3). Mr. Zilhaver does not allege that he is a beneficiary or fiduciary. He alleges only that he “*was* a participant during time periods relevant to” his action. Am. Compl. ¶ 1 (emphasis added). However, the Eighth Circuit has held that past status as a plan participant “*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) (emphasis added) (quoting *Raymond v. Mobil Oil Corp.*, 983 F.2d 1528, 1535 (10th Cir. 1993)).

And it is indisputable that Mr. Zilhaver was *not* a participant when his Complaint was filed. The Supreme Court has interpreted 29 U.S.C. § 1002(7), which defines “participant,” to mean: (1) a current employee; (2) a former employee with a reasonable expectation of returning to employment; or (3) a former employee with a colorable claim to vested benefits. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117 (1989) (citations omitted). Mr. Zilhaver does not allege that he falls within any of these categories:

First, Mr. Zilhaver is not a current employee of United. In fact, he was never employed by United. He was only employed by PacifiCare Health Systems, but terminated his employment at PacifiCare on September 23, 2005, *see* Am. Compl. ¶ 9, three months *before* PacifiCare and United merged, three months *before* the alleged Class Period commenced, and nine months *before* he filed his Complaint.

Second, Mr. Zilhaver does not allege that he has any right to return to work and therefore has no reasonable expectation of returning to covered employment. *See Raymond*, 983 F.2d at 1537 (citation omitted).

Third, Mr. Zilhaver does not allege that he has a claim for vested benefits. Mr. Zilhaver received a lump-sum distribution of his entire account balance on

May 17, 2006. As the Ninth Circuit held in a case the Supreme Court cited with approval in *Firestone Tire*, 489 U.S. at 117-18:

[P]laintiffs are not participants because, as former employees whose vested benefits under the plan have already been distributed in a lump sum, the Kuntz plaintiffs were not ‘eligible to receive a benefit,’ and were not likely to become eligible to receive a benefit, at the time that they filed the suit. Because, if successful, the plaintiffs’ claim would result in a damage award, not in an increase of vested benefits, they are not plan participants.

Kuntz v. Reese, 785 F.2d 1410, 1411 (9th Cir. 1986).

And in *Adamson*, the Eighth Circuit made clear that there is no exception to the requirement of current participant status for “claimants whose loss of participant status resulted from their own actions.” 44 F.3d at 655 (favorably citing *Gilquist v. Becklin*, 675 F. Supp. 1168 (D. Minn. 1987) (former employees receiving lump-sum vested benefits are not participants), *aff’d*, 871 F.2d 1093 (8th Cir. 1988)). Mr. Zilhaver voluntarily took a lump-sum distribution of his benefits before filing the Complaint and seeks damages based on a speculative amount he claims he might have earned had he sold his United stock. Accordingly, he has no colorable claim to vested benefits, and his Complaint must be dismissed for lack of standing.

B. Mr. Zilhaver Failed To Allege Facts That, If True, Would Establish That Dr. McGuire Was A Plan Fiduciary Or Exercised Fiduciary Duties Within The Meaning Of ERISA

In the entire 45-page, 110-paragraph Complaint, there is only one specific allegation that Dr. McGuire was a Plan fiduciary or exercised fiduciary duties in

the administration or management of the Plan. That allegation is a patently insufficient conclusory statement: “Defendant McGuire was a fiduciary of the Plan during the Class Period.” Am. Compl. ¶ 17. That does not state a claim upon which relief can be granted. Although the Court is required to accept well-pleaded factual allegations as true, “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 Indemn. Corp.*, 280 F.3d 868, 870 (8th Cir. 2002).²

A defendant “does not become a fiduciary simply by a litigant’s assertion that this is the case.” *Akers v. Palmer*, 71 F.3d 226, 230 (6th Cir. 1995). Conclusory legal assertions are insufficient because “[a] fiduciary within the meaning of ERISA must be someone *acting in the capacity* of manager, administrator, or financial advisor *to a ‘plan.’*” *Pegram v. Herdrich*, 530 U.S. 211, 222 (2000) (emphasis added). The Complaint makes no allegation that Dr. McGuire is a named fiduciary or took any specific action in the capacity of a manager, administrator, or financial advisor to the Plan. Yet, even named fiduciaries and those hired specifically to administer plans do *not* always act in a fiduciary capacity. “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*

² This Court may also rely on the documents, such as the Plan and SPD, “necessarily embraced by the complaint.” *Enervations, Inc. v. Minn. Mining & Mfg. Co.*, 380 F.3d 1066, 1067 (8th Cir. 2004) (citation omitted).

whether that person was *acting* as a fiduciary (that is, performing a fiduciary function) when taking *the action* subject to complaint.” *Id.* at 226 (emphases added). *See also Mertens v. Hewitt Assocs.*, 508 U.S. 248, 263 (1993) (ERISA “defines ‘fiduciary’ not in terms of formal trusteeship, but in functional terms of control and authority over the plan.”).

The single sentence specifically addressing Dr. McGuire’s alleged fiduciary status in Mr. Zilhaver’s Complaint falls far short of alleging that Dr. McGuire acted in the capacity of a manager, administrator, or financial advisor by taking specific action *with respect to the Plan*. In these circumstances, the Supreme Court has approved 12(b)(6) dismissals. *See, e.g., Pegram*, 530 U.S. 211 (affirming district court’s dismissal of ERISA suit under Rule 12(b)(6) where allegations of fiduciary status were insufficient). In addition to *Pegram*, the Supreme Court has upheld at least two other Rule 12(b)(6) dismissals in ERISA cases where the plaintiff’s allegations did not implicate fiduciary duties. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999) (reinstating district court’s dismissal pursuant to Rule 12(b)(6) in ERISA case where allegations did not implicate fiduciary duties); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996) (same). Courts of appeals, including the Eighth Circuit, have also affirmed Rule 12(b)(6) dismissals where the complaint failed to state a claim against the defendants “for violation of a fiduciary duty owed to the plan,” *S. Council of Indus. Workers v. Ford*, 83 F.3d 966, 968 (8th Cir. 1996), or where the plaintiff “allege[d] not one fact tending to show that [the defendant] exercised control or authority specifically

over the decisions” challenged, *Custer v. Sweeney*, 89 F.3d 1156, 1162 (4th Cir. 1996).³

1. Dr. McGuire is not a named fiduciary

Mr. Zilhaver concedes that Dr. McGuire is not a named fiduciary under the Plan. *See* Am. Compl. ¶ 11-12 (acknowledging that only United and Defendant Dapper are “named fiduciaries” under the Plan). Thus, Dr. McGuire can only be held responsible for a violation of ERISA if he has voluntarily assumed responsibility for managing or administering the Plan. However, the Complaint contains no allegation that he has done so, as discussed below.

2. The allegations of the Complaint are insufficient as a matter of law to establish that Dr. McGuire is a *de facto* or functional fiduciary under the Plan

Dr. McGuire can only qualify as a *de facto* or functional “fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary responsibility in the

³ *See also Pipefitters Local 636 v. Blue Cross & Blue Shield*, 2007 WL 128773, at *3 (6th Cir. 2007) (affirming 12(b)(6) dismissal and stating that “[i]n reviewing the motion to dismiss, 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.”) *DeFelice v. U.S. Airways, Inc.*, 397 F. Supp. 2d 735 (E.D. Va. 2005) (dismissing complaint under 12(b)(6) in an ERISA “stock drop” case).

administration of such plan.” 29 U.S.C. § 1002(21)(A). Mr. Zilhaver’s observation in Paragraph 17 of the Complaint that Dr. McGuire “has been a director of UnitedHealth since 1989” speaks to none of these predicates. A company official does not qualify as a *de facto* fiduciary merely by holding a senior position. Dep’t of Labor, Interpretive Bulletin 75-8, 29 C.F.R. § 2509.75-8 (questions D-4 and D-5) (officers and “directors of an employer which maintains an employee benefit plan will be fiduciaries only to the extent that they have responsibility for the functions described in section 3(21)(A)[29 U.S.C. § 1002(21)(A)] of the Act.”).⁴

As the Supreme Court has emphasized, a fiduciary “must be someone acting in the capacity of a manager, administrator, or financial advisor to a ‘plan.’” *Pegram*, 530 U.S. at 222. Therefore, a plaintiff must allege that a person “was acting as a fiduciary” *id.* at 226 (emphasis added), and “fulfilling *certain defined functions*, including the exercise of discretionary authority or control over plan

⁴ See also *Confer v. Custom Eng’g Co.*, 952 F.2d 34, 37 (3d Cir. 1991) (“[W]hen an ERISA plan names a corporation as a fiduciary, the officers who exercise discretion on behalf of the corporation are not fiduciaries ... unless it can be shown that these officers have *individual* discretionary roles as to plan administration.”); *Kerns v. Benefit Trust Life Ins. Co.*, 992 F.2d 214, 217 (8th Cir. 1993) (“Fiduciary status under § 1002(21)(A) is not ‘an all-or-nothing concept.’”); *Am. Fed’n of Unions Local 102 v. Equitable Life Assurance Soc’y*, 841 F.2d 658, 662 (5th Cir. 1988) (“A person is a fiduciary only with respect to those portions of a plan over which he exercises discretionary authority or control.”); *Beddall v. State Street Bank & Trust Co.*, 137 F.3d 12, 18 (1st Cir. 1998) (“Because one’s fiduciary responsibility under ERISA is directly and solely attributable to his possession or exercise of discretionary authority, fiduciary liability arises in specific increments correlated to the vesting or performance of particular fiduciary functions in service of the plan, not in broad general terms.”).

management or administration,” *Lockheed Corp.*, 517 U.S. at 890 (citation omitted and emphasis added).

Mr. Zilhaver does not identify any specific action taken by Dr. McGuire in a fiduciary capacity with respect to plan administration or management. The “complaint does not specify how [Dr. McGuire] was exercising discretionary authority in [any specific action taken], and offers only the conclusion that [Dr. McGuire] is a fiduciary under ERISA.” *Pipefitters Local 636*, 2007 WL 128773, at *6. “[L]ack[ing] any specific allegations capable of demonstrating that [Dr. McGuire] transcended his role” as corporate CEO and became an ERISA fiduciary, the Complaint is insufficient to withstand a motion to dismiss. *Custer*, 89 F.3d at 1162. *See also Pegram*, 530 U.S. at 226 (holding complaint insufficient because “Herdrich does not point to *a particular act* by any [defendant] as a breach [of a fiduciary duty]”) (emphasis added).

All courts, including the Eighth Circuit, have rejected a “broad brush” approach, where every decision that “affects” the value of company stock is deemed a fiduciary decision. *See Martin v. Feilen*, 965 F.2d 660, 665 (8th Cir. 1992) (rejecting such a “broad brush” and “sweeping approach”). Otherwise, because “[a]n employer’s business decisions will often indirectly affect an ERISA plan or its beneficiaries,” *id.*, every corporate decisions could lead to ERISA liability. Although “ERISA is designed to accomplish many worthwhile objectives, ... the regulation of purely corporate behavior is not one of them.” *Akers*, 71 F.3d at 229. Therefore, “ERISA’s fiduciary duties ... attach only to

transactions that involve investing the [Plan's] assets or administering the plan.”
Martin, 965 F.2d at 666.

Even transactions that benefit executives and adversely affect a company's long-term financial health do not qualify as fiduciary actions unless they involve plan assets or plan administration. *See Hickman v. Tosco Corp.*, 840 F.2d 564, 556 (8th Cir. 1988) (holding that fiduciary duties were not implicated by executive's corporate action of acquiring control of company and causing it to declare dividends, adversely affecting the company's long-term financial health); *Martin*, 965 F.2d at 668 (holding that fiduciary duties were not implicated by unwise business transactions that destroyed the company and its plan).⁵

Significantly, in a ruling left undisturbed by the Eighth Circuit, the Eastern District of Missouri rejected the claim that executives' determination of their own compensation levels—even if it adversely affects plan assets—is a fiduciary action. *Eckelkamp v. Beste*, 201 F. Supp. 2d 1012, 1023 (E.D. Mo.) (“The discretion required to invoke ERISA's fiduciary obligations must relate to

⁵ *See also Holdeman v. Devine*, —F.3d—, 2007 WL 102980, at *7 (10th Cir. 2007) (“Because virtually every business decision an employer makes can have an adverse impact on an employee benefit plan, courts must examine the conduct at issue to determine whether it constitutes management or administration of the plan, giving rise to fiduciary concerns, or merely a business decision that has an effect on an ERISA plan not subject to fiduciary duties. This is so even where some of the decisions personally benefited the employer.”) (citations omitted).

fiduciary functions such as plan management or administration. A business decision regarding salary levels does not meet this requirement. ... Thus, the Executive Defendants were not acting in their fiduciary capacities when compensation levels were determined for themselves.”), *aff’d on other grounds*, 315 F.3d 863 (8th Cir. 2002)). *Cf. Flanigan v. Gen. Elec. Co.*, 242 F.3d 78, 88 (2d Cir. 2001) (determination of whether particular conduct is fiduciary in nature depends on whether the conduct “at its core, [was] a corporate business decision, [or] one of a plan administrator”).

The bare and conclusory allegation in Mr. Zilhaver’s Complaint regarding Dr. McGuire’s fiduciary status is insufficient as a matter of law, and the claims against him must be dismissed.

III. CONCLUSION

For the foregoing reasons, Mr. Zilhaver’s claim must be dismissed for lack of standing pursuant to Rule 12(b)(1), or for failure to state a claim upon which relief can be granted under Rule 12(b)(6).

Respectfully submitted this 12th day of February, 2007,

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