UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Matthew T. Zilhaver, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. UNITEDHEALTH GROUP INC., L. ROBERT DAPPER, JAMES A. JOHNSON, WILLIAM G. SPEARS, MARY O. MUNDINGER, WILLIAM W. McGUIRE, and STEPHEN J. HEMSLEY, Defendants.	x : : : : : : : : : : : : : x	06-CV-2237 (JMR/FLN)

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANTS' MOTIONS TO DISMISS

Plaintiff Matthew T. Zilhaver respectfully submit this single memorandum of law in opposition to the motions to dismiss which have been filed by Defendants UnitedHealth Group Inc. ("UNH" or the "Company"), L. Robert Dapper, James A. Johnson, William G. Spears, Mary O. Mundinger and Stephen J. Hemsley and, separately, by Defendant William W. McGuire. Both motions contend that Plaintiff Zilhaver, a former participant in the UnitedHealth Group 401(k) Savings Plan (the "Plan") lacks standing to sue and so the case should be dismissed for lack of subject matter jurisdiction. Both motions also seek dismissal as to certain Defendants on the ground that the claims against such Defendants are insufficiently pled.

First, the case should not be dismissed for lack of standing. The Complaint alleges and the Company concedes, that Plaintiff Zilhaver was a participant in the Plan, and held Company stock in his individual account under the Plan, at the time of the breaches of fiduciary duty alleged in this case. Those breaches of fiduciary duty caused a diminution in Plaintiff Zilhaver's retirement savings to the extent that his retirement savings were invested in Company's stock. As such, he has the requisite personal stake in the outcome to satisfy the requirement for standing, and the fact that he (like many other former Company employees) rolled over his retirement savings into an individual retirement account or another company's 401(k) plan does not deprive him of standing to sue.

Second, a current plan participant, Mr. Sascha Linn, is contemporaneously moving the Court for leave to intervene as an additional plaintiff and propose class representative. If the Linn intervention motion is granted, standing will be satisfied even if Defendants' argument, that current participant status is required for ERISA standing, had merit (which it does not).

Defendants also present no other ground supporting dismissal. The Company and Defendant Dapper, the two named fiduciaries of the Plan, seek dismissal only on the ground of standing. It is also clear that the pleading to which the motions to dismiss are directed (the Amended Class Action Complaint for Violations of ERISA dated November 17, 2006) (the "Complaint") need only satisfy the notice pleading standard of Fed R. Civ. 8(a). The Complaint more than adequately does so. The Complaint, in a nutshell, informs each Defendant that he, she or it is alleged to have been a fiduciary of the Plan; that the Defendant breached fiduciary duties imposed by ERISA by offering employer common stock as

investment option under the Plan when it was not prudent to do because of the well-publicized stock option scandal at UHN; that the Defendant also violated ERISA by concealing important information from the Plan's participants and by other misconduct, and that the Defendant must now make good to the Plan the losses suffered by the Plan resulting from the fiduciary breaches. The Complaint tells each Defendant what he or she allegedly did wrong so that he can present a defense on the merits (such as that he or she was not a fiduciary, or that it was not imprudent to offer employer stock, or that full disclosure was made to the participants of the Plan, or any other defense). Nothing more is required from a pleading in a case of this nature.

The Complaint

The Complaint alleges that, from at least December 21 to May 24, 2006 (the proposed Class Period), each of the Defendants was a named fiduciary (in the case of the Company and Dapper) or a *de facto* fiduciary of the Plan, and that as a result each Defendant owed the fiduciary duties of prudence and loyalty to the Plan itself and to participants and beneficiaries of the Plan. The Complaint alleges that each Defendant negligently misrepresented and failed to disclose material information to the participants of the Plan (Claim I, paras. 81-88) and imprudently allowed the investment of the participants' retirement savings in Company stock when it was not prudent to do so (Claim II, paras. 89-100). As to Defendants Johnson, Spears, Mundinger, McGuire and Hemsley, these Defendants are further charged with failing to properly inform and monitor named fiduciary Dapper with respect to the backdating of

executive stock options which personally benefited Defendants McGuire and Hemsley (Claim III, paras. 101-110).

This case, of course, arises from the backdating of executive stock option grants at UNH. Paragraph 5 of the Complaint, largely relying on and even quoting from the recent Wilmer Cutler Report, as well as paragraphs 41-58 and 64-79, allege in detail that UNH and its senior executives systematically and over a long period of time engaged in the backdating of executive stock option grants and concealed from participants in the Plan, whose retirement savings were invested in Company stock, these unethical and unlawful practices. Since none of the motions to dismiss challenge, as a matter of pleading, the sufficiency of the allegations relating to the executive stock option scandal at UNH further detail concerning the challenged practices is not provided here. It should suffice to say, as alleged in the Complaint, that the executive stock option scandal at the Company has resulted in a substantial decline in the value of UNH stock, including stock held in the Plan accounts (paras. 63,68, 79), placement of the Company's debt on a negative ratings watch (para. 69) and other adverse consequences.[1]

According to the Complaint, Defendants McGuire and Hemsley personally benefited by millions of dollars from the unlawful executive stock option practices at UNH (Complaint, para. 17, 18). According to the Complaint, these defendants knew all about it: "each authorized, approved and ratified the backdating of executive stock options described

1 Since the filing of the Complaint on November 17, 2006 additional adverse consequences to the Company and the value of its stock have included the resignation of Defendant McGuire, ongoing federal and state investigations, stockholder suits, potential tax liabilities in amounts not yet determined and, most recently, a $1.53 billion restatement of the Company's financial statements from 1994 to 2005. If the motions to dismiss are denied these post-Complaint developments will be introduced into the case in an appropriate manner, such as by further amended pleading or as part

herein." *Id.* According to the Complaint, these Defendants concealed from the named fiduciary, Dapper, this important information (Claim III). Defendants McGuire and Hemsley are thus charged with breaching their duty to properly monitor and inform the named fiduciary, thereby preventing him from protecting the Plan and the participants from loss.[2]

According to the Complaint (paras. 13-16), each of the Defendants Johnson, Spears and Mundinger also "authorized, approved and ratified the backdating of the executive stock options described herein." As to Spears, the Complaint (para. 5) also accuses him (and McGuire) with concealing their financial relationship from the Compensation Committee of the Board and others. According to the Complaint, each of these Defendants was also a member of the Board committee which had specific oversight responsibility for the Plan. Each of these Defendants is alleged to have failed in his or her oversight responsibility with respect to the Plan, and each of these Defendants is charged (like McGuire and Hemsley) with concealing important information from named fiduciary Dapper (Claim III).

All defendants are thus alleged to have breached the ERISA-imposed duties of prudence and loyalty, which are among "the highest [duties] known to the law." *Chao v. Hall Holding Co.,* 285 F.3d 415, 426 (6th Cir. 2002) (citation omitted).

We turn to the threshold issue of standing, and then to a Defendant-by-Defendant discussion of the Complaint's allegations.

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of the pre-trial Order.

2 For the proposition that there is a duty for executives such as McGuire and Hemsley to monitor and inform plan fiduciaries, such as Dapper, *see, e.g.*, *In re Sears, Roebuck & Co. ERISA Litig.,* 2004 U.S. Dist. LEXIS 3241 at *21 ("a fiduciary who delegates responsibility or appoints other fiduciaries has a duty to monitor those delegates"); *In re Elec. Data Sys. Corp. "ERISA" Litig.,* 305 F. Supp. 2d 658, 670 (E.D. Tex. 3004) ("ERISA law imposes a duty to monitor

Plaintiff Zilhaver Has Standing to Sue

Paragraph 9 of the Complaint alleges that Plaintiff Zilhaver was employed by PacifiCare Health Systems, Inc. and was a participant in that company's 401(k) defined contribution retirement plan, when PacifiCare was acquired by, and merged into, UNH. Paragraph 9 of the Complaint further alleges that when PacifiCare was merged into UNH, and PacifiCare's 401(k) Plan was merged into the Plan, "Plaintiff Zilhaver became a Participant in the Plan and his holdings of PacifiCare common stock were converted into units of the UnitedHealth Group Stock Fund. As a result of the wrongdoing alleged herein the value of the units of the UnitedHealth Group Stock Fund held by Plaintiff and the Participants has decreased …"

These allegations are clearly sufficient to establish participant standing and subject matter jurisdiction. In a similar action alleging the imprudent investment of 401(k) plan assets in employer stock, and related non-disclosures to participants, Judge Doty found virtually identical allegations sufficient. *In re Xcel Energy, Inc., Securities Derivative & "ERISA" Litigation*, 312 F.Supp.2d, 1165, 1178 (D. Minn. 2004). While more will be said about Zilhaver's standing in this case, *Xcel* is right on point and supports denial of all Defendants' motions to dismiss on the ground of standing as a matter of pleading.

Zilhaver's standing is, moreover, established by UNH's admissions. UNH admits in its Memorandum of Law and supporting materials that "Mr. Zilhaver participated in the Plan." UNH Mem. at 6. See also Gilroy Declaration para. 12, 13 ("Mr. Zilhaver came to have an account balance under the United Plan… on May 16, 2006, Mr. Zilhaver requested

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appointees on fiduciaries with appointment power").

that the United Plan distribute his entire account balance in the Plan."). The Company states that Zilhaver was only a participant in the Plan for 17 days, but offers no explanation for why this is relevant. Whether he was a participant for one day, or 17 days, or years, the dispositive fact on the instant motion is that Zilhaver was a participant in the Plan at the time of the wrongs alleged.

Further, UNH's own admissions establish that Zilhaver was a participant in the Plan precisely from May 1, 2006 to May 17, 2006. *Id*. This was a critical time period because, as alleged in the Complaint, this was the time period that the value of UNH stock , including the UNH stock which the Company concedes Zilhaver held in his individual account under the Plan, suffered serious diminution in value. *See*, *e.g*. Complaint ¶ 65-68 (alleging that on May 11, 2006, the Company filed a report with the SEC admitting to "significant deficiencies" in its executive stock option practices, a 3.9% drop in the Company's stock price attributable to this announcement (para. 66) and an overall decline in the value of the Company's stock to less than $42.00 per share in May 24, 2006 (para. 68), compared to a market price of over $54.00 per share in April 2006 (para. 63)).

Thus, as a matter of pleading and based on the Company's own admissions, Plaintiff Zilhaver held Company stock in his individual account under the Plan during the period of the alleged fiduciary breaches and during the period that his retirement savings were diminished as a result of those fiduciary breaches. Nothing further is or should be required for Plaintiff Zilhaver to be considered a "participant" within the meaning of ERISA §502(a)(2) and (a)(3), 29 U.S.C. §1132(a)(2) and (a)(3). Yet Defendants contend that even

though Zilhaver was a participant in the Plan at the time of the wrongs alleged he lacks standing to sue because he closed his plan account prior to filing suit. Defendants are utterly mistaken on the law. The law is that participant status for the purpose of bringing suit under ERISA §502(a)(3) and (a)(3) is determined at the time of the fiduciary breaches alleged, and resulting loss incurred, not on the date suit is instituted or thereafter. Many cases have so held. E.g., *Drennan v. Gen. Motors Corp.*, 977 F.2d 246, 260 (6th Cir. 1992) (standing present when "[t]he Class members were eligible for such a plan at the time the asserted breach of fiduciary duty occurred"); *Smith v. Sydnor*, 184 F.3d 356, 363 (4th Cir. 1999); *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan*, 883 F.2d 345 (5th Cir. 1989), (plaintiffs had standing, despite having received their benefits, where their claim was "that the amount received was not the full amount of vested benefits due under the terms of the profit sharing plan but was less, because the amount received for the shares was less than fair arket value"); *Rankin v. Rots*, 220 F.R.D. 511, 519 (E.D. Mich 2004); *In re Polaroid ERISA Litig., ___F.R.D. ___*, No. Civ. 8335, 2006 WL 2792202 (S.D.N.Y. Sept. 29, 2006) (holding that former employees have standing as participants where they alleged that the distributions they received from their defined contribution plan were reduced because of fiduciary breaches); *In re Williams Cos. ERISA Litig.,* 231 F.R.D. 416, 422-23 (N.D. Okla. 2005) (holding that former employees have colorable claims to vested benefits where their account balances would have been larger at the time they took their distributions from a defined contribution plan if there had been no fiduciary breach); *In re CMS Energy ERISA Litig.*, 225 F.R.D. 539, 544 (E.D. Mich 2004); *S. Ill. Carpenters Welfare Fund v. Carpenters*

Welfare Fund of Ill., 326 F.3d 919, 923 (7th Cir. 2003) (former participant has standing as long as his claim for breach of fiduciary breach is not frivolous).

The rule recognizing standing on the part of those who are participants at the time of fiduciary breaches and resulting loss is consistent with the traditional concept of constitutional standing, which focuses on whether the plaintiff "has alleged such a personal stake in the outcome of the justiciable controversy that he should be entitled to obtain its judicial resolution." *Astor v. Int'l Bus. Machs. Corp.,* 7 F.3d 533, 538-39 (6th Cir. 1993). The rule affording standing to former participants is also completely consistent with, if not mandated by, the statutory definition of "participant" in 29 U.S.C. '. 1002(7), where "participant" is defined broadly as "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer."

Zilhaver in this case clearly has a more than colorable claim to vested "benefits" under the employee benefit plan (the Plan) in which he participated in May of 2006. If his allegations are true, Zilhaver and others similarly situated suffered loss in their retirement savings as a result of Defendants' breaches of fiduciary duty. Indeed, in the case of Zilhaver, it is crystal clear that he received a smaller benefit from the Plan when he closed his account on May 17, 2006 than would have been the case had the value of UNH stock not declined from, for example, April 2006 to May 24, 2006 or, specifically, on May 11, 2006 (the 3.9% drop in UNH's stock price on May 11, 2006 as alleged in paragraph 66 of the Complaint). Zilhaver is thus clearly within the "zone of interests ERISA was intend to protect", *see Astor*

v. IBM, 7 F.3d 533, 538-39 (6th Cir. 1993), an important consideration in determining standing to sue under ERISA.

The Court's attention is also respectfully directed to what appears to be the most recent appellate pronouncement on the issue of former participant standing, *Coan v. Kaufman*, 457 F.3rd 250 (2nd Cir. 2006). There, an individual who participated in a 401(k) plan and accepted a lump-sum payment upon terminating the plan account claimed to have standing to sue notwithstanding receipt of the lump sum benefit and his former participant status. The Second Circuit stated that, at least "arguably," former participants who receive lump-sum payments nonetheless have standing to sue under ERISA:

> [W]hether acceptance of a lump-sum payment terminates a person's status as a participant may depend on whether the plan is a "defined benefits" or a "defined contribution" plan. <u>*Coan*, unlike the plaintiffs discussed in other circuits' case law, participated in a 401(k) plan</u>, which is an "individual account" or "defined contribution" plan under ERISA. See 29 U.S.C. '1002(34). According to ERISA, an individual's "accrued benefit[s]" under such a plan are simply "the balance of the individual's account." *Id*. '1002(23)(B). Arguably, therefore, Coan's claim that the lump-sum distribution of her account balance would have been greater absent the defendants' breach of fiduciary duty is a claim "for benefits" – which, if "colorable," means that she "may become eligible for benefits" and thus qualifies as a "participant" under ERISA. See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 at 117-118, 103 L.Ed. 2d 80 [*12] (internal quotation marks omitted); see also *Gray v. Briggs* No. 97 Civ. 6252, 1998 WL 386177, at *4-*6, 1998 U.S. Dist. LEXIS 10057, at *9-*13 (S.D.N.Y. July 7, 1998) (concluding that former employee who claimed that distributions received under a defined contribution plan were reduced because of defendants' breach of fiduciary duty was a "participant" for purposes of ERISA).
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> 457 F. 3d at 255 (footnote omitted) (emphasis added).

Although admittedly not a square holding on the issue of a former participant's standing to sue ("arguably"), the reasoning of the Court in *Coan* is persuasive. Unlike traditional pension plans, where the beneficiary's right is to a set amount,[3] the benefit of a 401(k) plan participant will be greater or less depending upon the investment performance of the investments held in the individual account. If, as alleged here, fiduciary breaches directly resulted in lesser amounts being made available for either a lump-sum distribution or later payout such a claim qualifies as one where the "individual may become eligible for benefits" and thus qualify as a "participant."

Defendants ask the Court to impose a "participant at the time of suit" requirement to be entitled to sue under ERISA for alleged breaches of fiduciary duty. The Court should reject this invitation. First, there is no such requirement in the Eighth Circuit case law. Certainly the two Eighth Circuit cases cited by Defendants, *Harley v. Zoesch*, 413 F.3d 866 (8th Cir. 2005), and *Adamson v. Armco, Inc.*, 44 F3d 650 (8th Cir. 1995), offer no support for a "participant at the time of suit" requirement. In *Harley*, plan participants were held to lack standing to bring an action under Section 1132(a)(2) because the plan in question was a traditional defined benefit (pension) plan, where the participant's right is to a set amount and where that set amount was fully paid. 413 F.3d at 869. The participants in *Harley* lacked standing because they did not suffer injury in fact, since they were suing for a "loss to plan surplus" to which they were not entitled. *Id.* at 869-870.

3 *See, e.g., Wilson v. Bluefield Supply Co.,* 819 F.2d 457, 459 (4th Cir. 1987) (noting that a defined benefit plan is "designed and administered to provide fixed–or 'defined'–benefits to the participants based on a benefit formula set forth in the Plan").

The real relevance of *Harley* to the instant motions to dismiss is that *Harley* is consistent with *Coan v. Kaufman* in its recognition that the definition of "participant" for defined benefit plans and defined contribution plans is different, and that the definition of participant in defined contribution plans is broader to take into account the greater or lesser benefits to which an individual in a 401(k) plan may be entitled depending upon investment performance, and specifically, investment performance which is directly affected by alleged fiduciary breaches.

As to *Adamson,* that case also did not impose a current participant requirement. Rather, all of the plaintiffs' claims in *Adamson* were time-barred. 44 F.3rd at 654. Because they had no claims at all, they had no colorable claim for vested benefits. *Id.* "[P]laintiffs lost their participant status when they allowed their benefit claims to become time-barred." *Id.* at 655. There is no suggestion here that Zilhaver's claims are time-barred or that he has, through inaction, relinquished the right to sue which ERISA affords him.

Nor is *Hastings v. Wilson,* No. 05-2566 (RHK/AJB) (D. Minn. February 1, 2007) (Gigot Declaration Exhibit A) relevant to the issue of standing as presented by Zilhaver's former participant status. Standing was found lacking in *Hastings* not because plaintiffs were not current plan participants, but because none of the plaintiffs were ever participants of the particular plan (so-called Pilots' Plan) for which they sought plan-wide relief under ERISA 502(a)(2). *See Hastings* at page 9 ("because Plaintiffs have not alleged that they participated in the Pilot's Plan, they do not have standing to sue the Pilot Defendants for actions related to the administration of that Plan…").

The Court should also decline to find a current participant status requirement because such a rule would lead to nonsensical results and undermine the primary purpose of ERISA, which is, "to protect … the interests of participants in employee benefit plans … by establishing standards of conduct, responsibility, and obligation[s] for fiduciaries of [such] plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." ERISA Section 2(b), 29 U.S.C. '1001(b). Under such a rule one who first became a participant in UNH's Plan yesterday would have standing to sue today, even though he or she did not suffer loss from the breaches of fiduciary duty which took place months ago. Such a rule would also mean that a participant in the Plan in May 2006 (like Zilhaver) would have standing to sue and gain a Plan-wide recovery which would also inure to his individual benefit[4] if he remains a participant today, but not if he or she was discharged and/or closed his 401(k) account. Again, two individuals in the exact same situation who suffer the exact same loss should have equal access to the federal courts and rights of recovery irrespective of employment-related decisions made by them, or for them, months or years later.

For each of these reasons, if the Court (in light of the pending motion to intervene by current Plan participant Sascha Linn) reaches the merits of the motions to dismiss for lack of standing, the Court should find that Plaintiff Zilhaver has standing to sue and the Court has subject matter jurisdiction.

The Motions To Dismiss For Alleged
<u>Insufficient Pleading Should Also Be Denied</u>

4 Under ERISA Section 502(a)(2), "appropriate relief," which includes monetary relief, flows to the plan and, through the plan, to the individual accounts. *See*, *e.g.*, *Nechis v. Oxford Health Plans*, 421 F.3d 96, 103 (2d Cir. 2005); *Amalgamated Clothing & Textile Workers Union v. Murdock*, 861 F.2d 1406, 1417-1418 (9th Cir. 1988) (constructive trust established for former plan participants to that the former participants may benefit from plan-wide relief).

Most of the Defendants have also moved to dismiss on the ground that the Complaint's allegations against them are insufficient as a matter of law. It is clear, however, that the pleading standard applicable to this case is the notice pleading standard of Fed. R. Civ. P. 8(a). There is no special pleading rule applicable to this ERISA case which obligates the plaintiff to plead any more than "a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds on which it rests." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002). *Accord*: *Doe v. Cassel,* 403 F.3d 986, 988-89 (8th Cir. 2005) (ERISA pleadings only subject to Rule 8(a))*; Glass v. Illinois Farmer Ins. Co*., No. 06-CV-1148(PJS/RLE), 2006, US DIST LEXIS 87775*9-10 (D. Minn Dec. 4, 2006); *Smith v. Aon Corp.*, No. 04 C 6875, 2006 WL 1006052 at *5 (N.D. Ill. April 12, 2006) (*citing Doe v. Cassel).*

Significantly, the notice pleading standard of Rule 8(a), when applied to a case such as this one alleging that certain individuals were employee benefit plan fiduciaries and that they acted in a fiduciary capacity, requires only that defendants be put on notice of what plaintiff is claiming against them so that they may defend on the merits (such as by offering proof that they were not fiduciaries of the plan in question, or that they fulfilled their fiduciary responsibilities, or that actions which they undertook were unrelated to any plan responsibilities.) *See, Xcel*, 312 F. Supp 2d, at 1178. As noted in *Xcel,* in cases of this nature the pleader is "afforded some latitude in pleading because ERISA's assignment of fiduciary duties on the basis of function requires the development of additional facts in discovery." *Id* (citation omitted.). Other courts have reached the same conclusion as Judge

Doty reached in *Xcel* and have held that given ERISA's liberal definition of "fiduciary," and the practical need for discovery to determine precisely which individuals engaged in what activities with respect to plan management and administration (as well as disclosure to participants), motions to dismiss for allegedly failing to properly plead fiduciary status and fiduciary conduct should be generally be denied. E.g., *In re Cardinal Health, Inc. ERISA Litigation*, 424 F. Supp 2nd 1002, 1029-30 (S.D. Ohio 2006); *Smith v. Aon Corp.*, No. 04 C 6875, 2006 WL 1006052 at *5 (N.D. Ill. April 12, 2006); *In re Sprint Corp. ERISA Litigation*, 388 F. Sub 2nd 1207, 1223 (D. Kan. 2004); *In re AEP ERISA Litigation,* 327 F. Supp. 2nd 812, 826 (S.D. Ohio 2004). As stated in *Cardinal Health*,

> "This court adheres to the view that fiduciary status is a "fact intensive inquiry making the resolution of that issue inappropriate for a motion to dismiss … therefore, dismissal is not warranted on any count based on Defendant's arguments that Plaintiffs have failed to set forth facts establishing that each Defendant qualified as a Plan fiduciary."

424 F. Supp. 2nd at 1030 (internal citations omitted)

Under these principles the motions to dismiss on pleading grounds should be denied as to each Defendant for the following reasons:

Defendant UNH

As alleged in the Complaint (para. 11), the Company is sued as a named fiduciary of the plan and under the doctrine of *respondeat superior*. The Company does not advance any argument for dismissal of the claims against it other than the ground of standing, discussed above.

Defendant Dapper

As alleged in the Complaint (para. 12), Defendant was one of the two named fiduciaries of the Plan. Defendant Dapper does not advance any argument for dismissal of the claims against it other than the ground of standing.

Defendants Johnson and Mundinger, Outside Directors of UNH

The Complaint alleges that Defendant Johnson was a *de facto* fiduciary of the Plan in that he was a member of UNH's Board of Directors and, specifically, a member of the Committee of the Board of Directors which had oversight responsibility for the Plan, the Compensation and Human Resources Committee (para. 13). UNH's 2006 Proxy Statement represents that Defendant Johnson was, as of April 7, 2006, the Chair of UNH's Compensation and Human Resources Committee, that Committee is responsible for "overseeing" the Company's "compensation, employee benefit and stock-based programs," and, further, that that Committee negotiates and administers the Company's employment arrangements with Defendants McGuire and Hemsley (complaint Para. 13). According to the well-pleaded allegations of the Complaint, Defendant Johnson was a *de facto* fiduciary of the Plan because he was responsible, as Chair of the Compensation and Human Resources

Committee, to oversee the Plan. Further, he was charged with direct responsibility for the Company's executive stock option program and direct dealings with Defendants McGuire and Hemsley in connection with that program. Even if Defendant Johnson was not involved in the similar executive stock option scandal plaguing another public company, KB Home (see complaint para. 14), the Complaint allegations of fiduciary responsibility and misconduct against Johnson would be more than sufficient under the applicable pleading standard.

As to Defendant Mundinger, paragraph 16 of the Complaint alleges that she, like Johnson, was a member of the Compensation and Human Resources Committee which had both oversight responsibility for the Plan and the responsibility to negotiate and administer the Company's employment arrangements with the Chief Executive Officer (Defendant McGuire) and others. Defendant Mundinger is also, like Defendant Johnson and Defendants Spears, McGuire and Hemsley, charged with failing to use due care in the oversight of the Plan and in failing to properly monitor and inform the named fiduciary (Defendant Dapper) (Claim III, para. 101 et. seq.)

Simply put, Defendants' efforts to mischaracterize Defendants Johnson and Mundiger as merely outside directors on the Company's board with no responsibility for the Company's 401(k) Plan or the proper informing of the named fiduciary (Dapper) so that he could properly protect the Plan's assets is inconsistent with the well-pleaded allegations of the Complaint and should not form the basis of dismissal of the claims against these Defendants.

Defendant Spears

Paragraph 15 of the Complint alleges that "William G. Spears was a member of the Company's Board of Directors during the Class Period. Defendant Spears was Chairman of the Compensation and Human Resources Committee at UnitedHealth from approximately 1999 to approximately 2004. He authorized, approved and ratified the backdating of the executive stock options described herein. As noted in the Wilmer Cutler Report, he also maintained close financial ties to Defendant McGuire which were not fully disclosed to other Company officials on a timely basis."

The Complaint thus charges that Defendant Spears, like Defendants Johnson and Mundinger, had the responsibility, through service on the Board Committee which oversaw the Plan, to prudently manage the assets of the Plan and make sure that all required disclosures were timely made to all Plan participants. Defendant Spears is also alleged to have had close financial ties to Dr. McGuire which were not timely disclosed to other company executives … at the very same time he was supposed to be making sure that the Plan was properly managed and that the individual named fiduciary (Dapper) was informed of information he needed to fulfill his fiduciary functions. His concealment of his financial dealings with Dr. McGuire alone evidence a breach of the fiduciary duty of loyalty, of putting the participants' interests before his own. These allegations too are sufficient under Rule 8(a) and 12(b)(6).

Defendant Hemsley

The Complaint (para. 18 and 101) et seq. alleged that Defendant Hemsley has been the president of the Company since 1999 and a member of the Board of Directors since 2000. As a member of the Board, Defendant Hemsley was also responsible for the proper appointment, monitoring and informing of the named fiduciary, Defendant Dapper. The Complaint alleges that Defendant Hemsley breached his duty to keep Dapper informed when he concealed from him the backdating of executive stock options at the Company, a practice which (paragraph 18 of the Complaint alleges) Defendant Hemsley, authorized, approved, ratified and personally benefited from. Further, Defendant Hemsley is charged as a senior executive and Board member with having the responsibility to oversee and monitor the Plan and the management and administration of the Plan. Had he done so prudently, the Plan's holdings of employer stock would not have suffered the great loss which has been suffered. Nothing further or more specific is required to plead the claims in the Complaint against Defendant Hemsley.

Defendant Hemsley misreads or mischaracterizes the governing plan document in arguing that he was "only" a Director and senior executive officer of the Company and was not a fiduciary by the terms of the Plan. The governing plan document, however, which is Exhibit A to the Gilroy Declaration, makes clear that the Principal Sponsor of the Plan is the Company (Section 1.1.37) and that the Company acts to fulfill its fiduciary obligations as Plan Sponsor *through its officers and other designees*. See Section 12.1.1 ("Except has hereinafter provided, functions generally assigned to the Principal Sponsor shall be

discharged by its officers or delegated and allocated as provided herein."). In other words, the Plan itself provides that the Company is a named and principal fiduciary and that it acts as a fiduciary through its officers, that is, principally through Hemsley and McGuire. Further, while it is true that Section 12.2.1 delegates certain responsibilities to a "Committee" (in reality, Defendant Dapper) there is nothing in the Plan which invalidates the responsibility entrusted to the Company's officers to fulfill the Company's obligations as Principal Sponsor as set forth in Section 12.1.1. Section 12.2.1 does not trump or displace Section 12.1.1. Section 12.2.1 does make Dapper a fiduciary, but it does not excuse Hemsley and McGuire from being the fiduciaries through whom the Company acted as stated in Section 12.1.1.

Defendant McGuire

Defendant McGuire was, like Hemsley, a fiduciary by virtue of Section 12.1.1 of the governing Plan document. And as noted above, there is no individual who benefited more from the backdated stock options, or who knew more about the details of this transactions, or who is more responsible for concealing vital information from the Compensation Committee of the Board (Complaint, para. 5) and from the individual who could have most effectively prevented the losses to the Plan which have occurred, named fiduciary Dapper (Complaint, Claim III).

In his separate Memorandum Defendant McGuire refers to a series of cases and one Department of Labor regulation, see Gaskins Declaration, Exhibit A-C, which purportedly exclude him from potential liability in this case. These authorities, however, merely stand for

the undisputed proposition that one who has no discretion with respect plan management or administration matters, but only has ministerial responsibilities, cannot be found liable under ERISA. *See e.g., Pipefitters Local 636 v. Blue Cross, Gaskins Exhibit A* at *5. Here, however, both as Chairman of the Board, as Chief Executive Officer, as an officer through whom the Principal Sponsor was required to act under Section 12.1.1, and as the single most knowledgeable individual concerning the backdated grants which so benefited him, Defendant McGuire can hardly be fairly characterized as having only ministerial responsibility for management of the Plan. According to the well-pleaded allegations of the Complaint, Defendant McGuire clearly failed to tell the truth about a matter vital to the Participants' retirement savings when he concealed information from them, from the Board and the Compensation Committee thereof, and from named fiduciary Dapper. The Complaint provides sufficient notice to Defendant McGuire of all he fairly needs to defend this case on its merits. Nothing more is required from Plaintiff at this juncture.

Conclusions

For each of these reasons, both motions to dismiss should be denied.

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