

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Matthew T. Zilhaver, Individually and
On Behalf of All Others Similarly
Situated,

Plaintiff,

vs.

UnitedHealth Group, Inc., et al.,

Defendants.

Court File No. 06-2237 JMR/FLN

**DEFENDANT WILLIAM W.
MCGUIRE'S REPLY TO
PLAINTIFF'S MEMORANDUM OF
LAW IN OPPOSITION TO
DEFENDANTS' MOTIONS TO
DISMISS**

Dr. William W. McGuire respectfully submits this Reply to Plaintiff's Memorandum of Law in Opposition to Defendants' Motions to Dismiss.

INTRODUCTION

In response to Dr. McGuire's motion to dismiss for lack of standing, Mr. Zilhaver essentially ignores controlling Eighth Circuit precedent, cites inapposite cases, and relies on cases justified by an exception to the current participant requirement that the Eighth Circuit has specifically rejected in Mr. Zilhaver's circumstances. *Adamson v. Armco, Inc.* is dispositive. 44 F.3d 650, 654 (8th Cir. 1995). Mr. Zilhaver lacks standing.

Furthermore, standing is a jurisdictional question; without it, the Court must dismiss the case. Mr. Zilhaver's reference to Mr. Sascha Linn's proposed complaint in intervention cannot cure the flaws in Mr. Zilhaver's complaint. Even if Mr. Linn demonstrates that he would have standing to pursue a claim against Dr.

McGuire, “standing is not dispensed in gross,” and each plaintiff must separately demonstrate his standing for each claim. *See Lewis v. Casey*, 518 U.S. 343, 357 (1996). Moreover, because Mr. Zilhaver lacks standing, Mr. Linn’s motion will have to be denied as moot. Intervention “presuppose[s] an action duly brought”; it cannot “cure ... vice in the original suit” or “be treated as an original suit,” and it must “abide the fate of that suit.” *United States ex rel. Tex. Portland Cement Co. v. McCord*, 233 U.S. 157, 163-64 (1914). Without a valid case over which this Court has jurisdiction, Mr. Linn’s motion to intervene is moot and certainly cannot cure Mr. Zilhaver’s lack of standing.

Finally, Plaintiff’s memorandum—like the Complaint—is full of generalizations, but contains no specific allegations that Dr. McGuire acted in the capacity of a manager, administrator, or financial advisor to the ERISA Plan. If this Court finds that it has jurisdiction, it should nonetheless hold that Mr. Zilhaver’s Complaint fails to state a claim under Rule 12(b)(6).

ARGUMENT

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

First, Mr. Zilhaver’s statement of the law on standing is directly contrary to binding Eighth Circuit precedent. Mr. Zilhaver states: “The law is that participant status for the purpose of bringing suit under ERISA § 502(a)(3) [sic] 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.” Plaintiff’s Opposition at

8; *id.* at 7 (“[T]he dispositive fact on the instant motion is that Zilhaver was a participant in the Plan at the time of the wrongs alleged.”). That is wrong. The Eighth Circuit has held: “The fact that [plaintiffs] were plan participants in the past is irrelevant. ‘The statute by its terms does *not* permit a civil action by someone who *was* a participant at the time of the alleged ERISA violation. Rather, it is written in the present tense, indicating that current participant status is the relevant test.’” *Adamson*, 44 F.3d at 654 (citation omitted). Plaintiff’s argument that *Adamson* “offer[s] no support for a ‘participant at the time of suit’ requirement,” Plaintiff’s Opposition at 11, cannot be correct.

In his Complaint Mr. Zilhaver alleges only that he “*was* a participant in the Plan during time periods relevant to” his action. Am. Compl. ¶ 1 (emphasis added). Now in his Opposition, Mr. Zilhaver claims that he has “a more than colorable claim to vested ‘benefits,’” Plaintiff’s Opposition at 9, and therefore qualifies as a participant with standing under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117 (1989). On May 17, 2006, however, prior to filing this Complaint, Mr. Zilhaver voluntarily took a lump-sum distribution of his entire account balance—*i.e.*, all of his vested benefits. The Eighth Circuit in *Adamson* cited *Gilquist v. Becklin*, 675 F. Supp. 1168 (D. Minn. 1987), *aff’d mem.*, 871 F.2d 1093 (8th Cir. 1988), as “the law in this circuit” for the holding that “former employees who received lump-sum vested benefits are not participants.” 44 F.3d at 655. Mr. Zilhaver’s claim, therefore, is for *damages*, not vested benefits. *See also Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir. 1986) (“[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’ Because, if successful, the plaintiffs’ claim would result in a damage award, not in an increase in vested benefits, they are not plan participants.”); *Daniels v. Thomas & Betts Corp.*, 263 F.3d 66, 78 (3d Cir. 2001) (“[D]amages stemming from [an] alleged breach of fiduciary duty ... does not constitute a ‘benefit’ within the meaning of [ERISA].”) (citing *Kuntz v. Reese*); *Raymond v. Mobil Oil Corp.*, 983 F.2d 1528, 1535 (10th Cir. 1993) (former employees who received lump-sum payment of vested benefits seek “‘a damage award, not vested benefits improperly withheld’” (citation omitted)).

Second, not only is *Adamson* controlling, but none of the cases from other jurisdictions that Mr. Zilhaver cites support his standing. Contrary to Mr. Zilhaver’s characterization, *In re Xcel Energy, Inc., Securities, Derivative & “ERISA” Litigation*, 312 F. Supp. 2d 1165, 1178 (D. Minn. 2004), is not “right on point.” Plaintiff’s Opposition at 6. There, the defendants argued only that the plaintiffs failed to *allege* that they had standing; not that plaintiffs did not in fact *have* standing.¹ The court rejected the defendant’s claim because “plaintiff Barday alleges that he *is* an Xcel 401(k) participant.” 312 F. Supp. at 1178 (emphasis added). *Drennan v. General Motors Corp.*, 977 F.2d 246, 250 (6th Cir. 1992), *Rankin v. Rots*, 220 F.R.D. 511, 519 (E.D. Mich. 2004), and *In re CMS*

¹ Moreover, Judge Doty properly followed *Gilquist* in *Zinn v. Donaldson Co.*, 799 F. Supp. 69, 74-75 (D. Minn. 1992).

Energy ERISA Litigation, 225 F.R.D. 539, 544 (E.D. Mich. 2004), each rely on a “but for” exception to the current participant requirement, where a plaintiff retains her standing if the employer’s conduct alleged to be in violation of ERISA directly *caused* the loss of participant status.² As the Eighth Circuit explained in *Adamson*, “[t]his exception only applies when the fiduciary’s breach of duty has deprived the § 502(a)(2) or § 502(a)(3) plaintiff of participant status. *It does not apply to claimants whose loss of participant status resulted from their own actions.*” 44 F.3d at 655 (emphasis added). Here, the exception cannot apply because Mr. Zilhaver *voluntarily* took a lump-sum payment of his vested benefits and he has never claimed otherwise.³

Third, even if *Adamson* were not controlling, Mr. Zilhaver’s invocation of dicta from *Coan v. Kaufman*, 457 F.3d 250 (2d Cir. 2006), and his attempt to distinguish between defined benefit and defined contribution plans, is unavailing.

² See *Crawford v. Roane*, 53 F.3d 750, 755-56 (6th Cir. 1995) (describing *Drennan* as an “exception to the definition of ‘participant’ for standing purposes” and reiterating the “rule that a person who terminates his right to belong to a plan cannot be a ‘participant’ in the plan”).

³ None of the other cases cited by Mr. Zilhaver help either. *Smith v. Sydnor*, 184 F.3d 356, 363 (4th Cir. 1999), does not mention or discuss standing at all. *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan*, 883 F.2d 345, 350 (5th Cir. 1989), involved plaintiffs who “seek their share of the difference between the price the representatives received for their shares and the fair market value of those shares at the time they were sold”—clearly benefits under the plan. The Seventh Circuit’s decision in *Southern Illinois Carpenters Welfare Fund v. Carpenters Welfare Fund of Illinois*, 326 F.3d 919 (7th Cir. 2003), is inapposite and does not support standing here. *In re Williams Co. ERISA Litigation*, 231 F.R.D. 416, 422-23 (N.D. Okla. 2005), cannot be squared with *Adamson*, and also failed to cite or distinguish binding Tenth Circuit precedent, *see Raymond*, 983 F.2d 1528.

No court of appeals has adopted such a distinction and it simply makes no sense. Mr. Zilhaver argues that he retains standing because the plan at issue is a defined contribution plan and the cases Dr. McGuire relies upon address defined benefit plans. And, he posits that someone who alleges a breach of fiduciary duty after receiving a lump-sum distribution of all vested benefits under a defined *contribution* plan—that is, a plan with a fixed investment and contingent benefits—still has “a colorable claim to vested benefits.” But if that is true, then surely someone who received the same distribution under a defined *benefit* plan—a plan that entitles the participant to a guaranteed level of benefits—still has a colorable claim to vested benefits. In short, if Mr. Zilhaver’s proposal were adopted, the rule that a lump-sum distribution of benefits terminates participant status would cease to exist. And, in any event, *Gilquist*, “the law in this circuit,” *Adamson*, 44 F.3d at 655 (describing *Gilquist*, 675 F. Supp. 1168), addressed an employee stock plan.⁴ Mr. Zilhaver’s distinction is illogical and irrelevant.

Mr. Zilhaver lacks standing and his Complaint must be dismissed.

2. Without An Action Over Which This Court Has Jurisdiction, There Is No Basis For Intervention

Plaintiff’s counsel have identified a new plaintiff, Mr. Sascha Linn, who has brought a motion to intervene in this case. Mr. Linn’s motion, however, is irrelevant to Mr. Zilhaver’s standing.

⁴ See also Memorandum of Law in Support of the Motions of Defendants UnitedHealth Group, et al., at 16 & n.3 (collecting cases).

It is fundamental that whether a statute “authorizes [a] plaintiff to sue” is jurisdictional, *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 92 (1998), and “[w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause,” *id.* at 94 (quoting *Ex parte McCardle*, 74 U.S. 506, 514 (1869)). “[S]tanding to bring an action founded on ERISA is a ‘jurisdictional’ matter.” *Cobb v. Central States*, 461 F.3d 632, 635 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 1153 (2007); *Ward v. Alternative Health Delivery Sys., Inc.*, 261 F.3d 624, 627 (6th Cir. 2001) (“[P]laintiff’s ERISA standing is a jurisdictional matter. Once the district court dismissed the only claims within its original jurisdiction for lack of subject matter jurisdiction, it did not have jurisdiction to retain plaintiff’s state law claims.”).

It is also a fundamental “prerequisite of an intervention” that there be “an existing suit within the Court’s jurisdiction.” *Non Commissioned Officers Ass’n of U.S. v. Army Times Publ’g Co.*, 637 F.2d 372, 373 (5th Cir. Unit A. Feb. 1981). Because Mr. Zilhaver has no standing, this Court has no existing jurisdiction over the case, and there will be nothing for Mr. Linn to intervene into. *Mattice v. Meyer*, 353 F.2d 316, 319 (8th Cir. 1965) (“Mattice lacked standing at law to maintain the proceeding as a formal action; absent the pendency of an action, there was no basis for an intervention under Rule 24”); *Houston Gen. Ins. Co. v. Moore*, 193 F.3d 838, 840 (4th Cir. 1999) (“[I]t is well-settled law that ‘intervention presupposes pendency of an action in a court of competent

jurisdiction.” (citation omitted)); *Madison-Hughes v. Shalala*, 80 F.3d 1121, 1131 (6th Cir. 1996) (“Because the district court properly dismissed the case for lack of subject matter jurisdiction, it also acted properly in dismissing these motions [to intervene] as moot.”); *Chiles v. Thornburgh*, 865 F.2d 1197, 1212 (11th Cir. 1989) (“[S]tanding concerns the subject matter jurisdiction of the court. The standing doctrine ensures that a justiciable case or controversy exists between the parties. Intervention under Rule 24 presumes that there is a justiciable case into which an individual wants to intervene.”); *Cane Creek Conservation Auth. v. Orange Water & Sewer Auth.*, 590 F. Supp. 1123, 1129 (M.D.N.C. 1984) (dismissing motions to intervene as moot “since none of the original or amended complaints in these actions are sufficient to give plaintiffs standing to sue, there exists no case or controversy over which this Court can consider the intervenors’ motion in the first instance”) (citing *Mattice v. Meyer*); *Sipes v. Bd. of Mun. & Zoning Appeals*, 635 A.2d 86, 94 (Md. Ct. App. 1994) (“[A] party cannot intervene in an action where none of the original parties to that action has standing.”).⁵ Simply put, a motion to intervene by a plaintiff alleged to have standing provides no basis to continue a suit by a person without standing. *See generally Lewis*, 518 U.S. at 357.

⁵ Plaintiff’s styling his claim as a Class Action does not save it from dismissal or permit Mr. Linn to intervene. No class has been certified, and it is well-settled that the class members have no independent legal stake in the controversy that would allow their claims to survive the dismissal of Plaintiff’s claim for lack of standing. *See Sosna v. Iowa*, 419 U.S. 393, 399 & n.8 (1975); *Dickerson v. Feldman*, 426 F. Supp. 2d 130, 137 (S.D.N.Y. 2006).

3. The Complaint Fails To Allege Facts That, If True, Establish That Dr. McGuire Was A Plan Fiduciary Or Exercised Fiduciary Duties

Mr. Zilhaver's Complaint—all 45 pages and 110 paragraphs—makes only one conclusory statement that: “Defendant McGuire was a fiduciary of the Plan during the Class Period.” Am. Compl. ¶ 17. Dr. McGuire's Motion to Dismiss makes abundantly clear why this unsupported assertion fails to state a claim. In response, Mr. Zilhaver argues that “no individual ... benefited more from the backdated stock options” and that “as Chairman of the Board, [and] as Chief Executive Officer ... [Dr. McGuire was] the single most knowledgeable individual concerning the backdated grants which so benefited him.” Plaintiff's Opposition at 20. Both of these allegations are irrelevant in an ERISA case. Moreover, Mr. Zilhaver fails to address or respond to any of the cases requiring dismissal that Dr. McGuire cited in his Motion to Dismiss, at 5-12.

As Dr. McGuire's motion to dismiss makes plain, even transactions that benefit executives and adversely affect a company's financial health do not qualify as fiduciary actions unless they involve *plan* management or administration. The Eighth Circuit very recently reiterated this well-established law, holding that “normal business decisions with potential collateral effects on prospective, contingent benefits need not be made in the interest of plan participants.” *Kalda v. Sioux Valley Physician Partners, Inc.*, No. 06-1277, -- F.3d --, 2007 WL 925245, at *5 (8th Cir. Mar. 29, 2007); *see also Hickman v. Tosco Corp.*, 840 F.2d 564, 566 (8th Cir. 1988) (“ERISA does not prohibit an employer from acting in

accordance with its interests as employer when not administering the plan or investing its assets.’” (citation omitted)); *Eckelkamp v. Beste*, 201 F. Supp. 2d 1012, 1023 (E.D. Mo.) (“The discretion required to invoke ERISA’s fiduciary obligations must relate to 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)).⁶ Accordingly, a plaintiff must allege facts to demonstrate that the defendant took a specific action to manage or administer the *Plan*, sufficient to “distinguish transactions that are subject to ERISA’s fiduciary provisions from those transactions that are not.” *Kalda*, 2007 WL 925245, at * 5.

Mr. Zilhaver fails to make these allegations with respect to Dr. McGuire. In fact, 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 v. Blue Cross & Blue Shield of Mich.*, No. 05-2580, 2007 WL 128773, at *6

⁶ The Tenth Circuit also recently reiterated this well-established law, stating that: “‘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’” *Holdeman v. Devine*, 474 F.3d 770, 778 (10th Cir. 2007) (citations omitted) (emphasis added).

(6th Cir. Jan. 17, 2007) (citation omitted). Instead of addressing the Complaint’s shortcomings in his Opposition, Mr. Zilhaver states only that Dr. McGuire received “backdated stock options” and was the “single most knowledgeable individual concerning the backdated grants.” Plaintiff’s Opposition at 20-21. That says nothing about *Plan* management or administration or how the ordinary business decision of granting options has anything but a “potential collateral effect[] on prospective, contingent benefits.” *Kalda*, 2007 WL 925245, at *5.

Mr. Zilhaver’s second response—that Dr. McGuire was Chairman of the Board and Chief Executive Officer, Plaintiff’s Opposition at 21—is equally meritless. A company official is not 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”); *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 that 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.’” (citation omitted)); *Am. Fed’n of Unions Local 102 Health & Welfare Fund v. Equitable Life Assurance Soc’y of U.S.*, 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.”). “[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 v. Sweeney*, 89 F.3d 1156, 1163 (4th Cir. 1996).

Mr. Zilhaver essentially asks this Court to hold that plaintiffs can sue a company’s Chairman and CEO for ERISA violations any time the company’s stock drops allegedly as a result of a disclosure correcting previous financial SEC filings. That, however, is what securities laws are for—not ERISA. *See also Pegram v. Herdrich*, 530 U.S. 211, 226 (2000) (holding complaint insufficient because “Herdrich does not point to *a particular act* by any [defendant] as a breach [of a fiduciary duty]”) (emphasis added); *Beddall v. State St. Bank & Trust Co.*, 137 F.3d 12, 18 (1st Cir. 1998) (“[F]iduciary 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.”). Although “ERISA is designed to accomplish many worthwhile objectives, ... the regulation of purely corporate behavior is not one of them.” *Akers v. Palmer*, 71 F.3d 226, 229 (6th Cir. 1995).

Finally, although Mr. Zilhaver made no allegations in his Complaint with respect to Dr. McGuire’s status under the Plan documents, he now claims that Dr.

McGuire was “a fiduciary by virtue of Section 12.1.1 of the governing Plan document.”⁷ That is insufficient to survive a motion to dismiss for two reasons.

First, Mr. Zilhaver made no such allegation in his Complaint, and “it is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss.” *Morgan Distrib. Co. v. Unidynamic Corp.*, 868 F.2d 992, 995 (8th Cir. 1989) (citation omitted); *see also Jojola v. Chavez*, 55 F.3d 488, 494 (10th Cir. 1995) (“It is well established ... that ... [courts] are limited to assessing the legal sufficiency of the allegations contained within the four corners of the complaint.” (quoting district court)). “Any allegations made in subsequent legal memoranda cannot correct inadequacies within a complaint.” *Tuttle v. Lorillard Tobacco Co.*, 118 F. Supp. 2d 954, 959 (D. Minn. 2000).

Second, Section 12.1.1 states: “functions generally assigned to the Principal Sponsor shall be discharged by its officers *or* delegated and allocated as provided herein.” Section 12.2.1 then “delegate[s] all duties, authority and responsibilities ... to the Senior Vice President, Human Capital.” Thus, no Plan functions are discharged by Dr. McGuire.

In short, the Complaint’s conclusory assertions are insufficient because “[a] fiduciary within the meaning of ERISA must be someone *acting in the capacity of*

⁷ The only mention of Section 12.1.1 in the entire Complaint is with respect to the *Company’s* liability under the doctrine of respondeat superior. Am. Compl. ¶ 11 (“The Company is also liable for the misconduct of the other defendants named herein under the principles of agency and respondeat *superior*. Section 12.1.1 of the governing Plan document makes clear that the Company’s responsibilities with respect to the Plan ‘shall be discharged by the Sponsor’s [the Company’s] officers.’”).

manager, administrator, or financial advisor *to a ‘plan.’*” *Pegram*, 530 U.S. at 222 (emphasis added). Plaintiff’s two paragraph response does nothing to bolster the complete absence of any allegation that Dr. McGuire took a specific action in the capacity of a manager, administrator, or financial advisor to the Plan. And, it has long been established that an ERISA fiduciary “may wear different hats,” but the Complaint must allege that the defendant engaged in some act *while wearing his ERISA hat*. *Id.* at 225-26.⁸ Mr. Zilhaver has made no such allegation as to Dr. McGuire. Accordingly, dismissal under Rule 12(b)(6) is appropriate. *See* Memorandum of Law in Support of Defendant William W. McGuire’s Motion to Dismiss, at 7-8 (collecting cases).

CONCLUSION

For the foregoing reasons, Mr. Zilhaver’s Complaint must be dismissed for lack of standing pursuant to Rule 12(b)(1). Mr. Linn’s motion to intervene will have to be dismissed as moot. Alternatively, Mr. Zilhaver’s Complaint fails to state a claim upon which relief could be granted against Dr. McGuire and must be dismissed under Rule 12(b)(6).

⁸ “ERISA does require ... that the fiduciary with two hats wear only one at a time, and wear the fiduciary hat when making fiduciary decisions. Thus, the 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*, 530 U.S. at 225-26.

Respectfully submitted this 16th day of April, 2007,

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