

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Matthew T. Zilhaver and Sasha Linn,

Plaintiffs,

v.

**UnitedHealth Group Incorporated, L.
Robert Dapper, James A. Johnson,
William G. Spears, Mary O. Mundinger,
William W. McGuire, and Stephen J.
Hemsley,**

Defendants.

Civil File No. 06-cv-02237 (JMR/FLN)

**Memorandum of Law in Support of the
Consolidated Motion of Defendants
UnitedHealth Group Incorporated, L.
Robert Dapper, James A. Johnson,
William G. Spears, Mary O. Mundinger
and Stephen J. Hemsley (i) for Summary
Judgment on Claims of Plaintiff Sascha
Linn, (ii) to Dismiss the Claims of Plaintiff
Matthew Zilhaver for Lack of Subject
Matter Jurisdiction, and (iii) to Dismiss
the Claims Asserted Against Defendants
Johnson, Spears, Mundinger and Hemsley
for
Failure to State a Claim Upon Which
Relief Can Be Granted**

UnitedHealth Group Incorporated, L. Robert Dapper, James A. Johnson, William G. Spears, Mary O. Mundinger and Stephen J. Hemsley (the "United Defendants") respectfully submit this Memorandum of Law in Support of their Consolidated Motion (i) for summary judgment dismissing all claims of Plaintiff Sascha Linn pursuant to Fed. R. Civ. P. 56(b), (ii) to dismiss all claims of Plaintiff Matthew T. Zilhaver pursuant to Fed. R. Civ. P. 12(b)(1), and (iii) to dismiss all claims asserted against Defendants Johnson, Spears, Mundinger and Hemsley (the "Director Defendants") pursuant to Fed. R. Civ. P. 12(b)(6).

I. INTRODUCTION

Plaintiff Matthew T. Zilhaver commenced this putative class action in June 2006 alleging that the continued holding of UnitedHealth Group Incorporated ("United" or the "Company") stock in a Company-sponsored 401(k) plan during an alleged five-month class period violated the Employee Retirement Income Security Act of 1974, as amended ("ERISA").¹ Following briefing of initial motions to dismiss a first amended complaint on grounds that included, among others, Mr. Zilhaver's lack of standing to sue under ERISA, Mr. Zilhaver and a new plaintiff, Sascha Linn, filed a Second Amended Complaint (the "Complaint") alleging the same substantive ERISA claims, but with two named plaintiffs rather than only one. As shown below, the United Defendants are entitled to a judgment of dismissal on all counts of the Complaint for three reasons.

First, in January 2007, Plaintiff Sascha Linn signed a Severance Agreement and Release that expressly releases any and all claims against the United Defendants, including ERISA claims. That incontrovertible Agreement, although nowhere mentioned in the Complaint, entitles the United Defendants to a judgment of dismissal of all claims asserted by Mr. Linn.

Second, all claims asserted by Plaintiff Matthew T. Zilhaver should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. Mr. Zilhaver lacks standing to sue under ERISA because, having

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.

voluntarily "cashed out" his account with the plan, he was no longer an ERISA "participant" in the plan at the time he filed this lawsuit. As shown below, at least twelve court decisions have held that a cashed-out participant like Mr. Zilhaver lacks standing to sue under ERISA.

Third, both Plaintiffs fail to allege viable claims against the Director Defendants because Plaintiffs fail to allege facts sufficient to establish that those Defendants acted as ERISA fiduciaries in the matters about which Plaintiffs complain. The document governing United's 401(k) Plan assigns only two functions to United's Board of Directors: (i) the authority to amend the Plan, and (ii) the authority to appoint or remove a trustee. The Complaint does not allege any misconduct concerning Plan amendments or the appointment of a trustee, but instead complains of matters involving Company stock held by the Plan for which the Director Defendants had no authority or responsibility.

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* Complaint ¶ 34; Declaration of Patricia Gilroy ("Gilroy Decl."), Ex. A, p.1.² The Plan is an "individual account plan" or

² Plan documents referenced in, or necessarily embraced by, the Complaint may be considered on Defendants' motion to dismiss under Rule 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 Declaration of Patricia Gilroy.

"defined contribution plan" within the meaning of 29 U.S.C. § 1002(34).

Complaint ¶ 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 plus earnings thereon and other adjustments. Complaint ¶ 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* Complaint ¶ 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. Complaint ¶ 32; Gilroy Decl., 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. Complaint ¶ 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 in 2002. 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 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. Plaintiffs' Relationships to United

1. Mr. Zilhaver

The first named 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. Complaint ¶ 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 one hundred 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.

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

2. Mr. Linn

The Second Amended Complaint alleges that the second and only remaining plaintiff, Sascha Linn, "was employed by the Company during time periods relevant to this Complaint." Complaint ¶ 9A. It further alleges that Mr. Linn is a participant in the Plan, and that he both held and continues to hold units of the Employer Stock Fund in his Plan account. *Id.*

Mr. Linn left the Company's employ on December 29, 2006. Declaration of David Kuhl ("Kuhl Decl."), Ex. A, § 1. On January 1, 2007, Mr. Linn signed a written Severance Agreement and Release with the Company. *Id.*, Ex. A. Mr. Linn's Severance Agreement and Release gave Mr. Linn additional payments and benefits (described in section 2 of the Agreement, headed "Consideration") in exchange for a general release (described in section 3 of the Agreement, headed

"Release") of all claims against United, its "present or former agents, directors, officers, employees, representatives" and others, specifically including claims arising under ERISA. *Id.*, Ex. A, § 3.

D. 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. Complaint ¶ 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. Plaintiffs allege that the market price of United stock declined as a result of these events, which caused losses to the Plan. *Id.* ¶¶ 63, 68-69, 80.

E. Plaintiffs' Claims for Relief

On June 2, 2006, Mr. Zilhaver commenced this ERISA action under 29 U.S.C. §§ 1132(a)(2) and (3). The Second Amended Complaint (referred to as the "Complaint") targets United itself, plus six individuals, on the theory that each 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"), Plaintiffs allege 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. Complaint ¶ 83. Plaintiffs claim 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"), Plaintiffs allege 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"). Complaint ¶ 92. Plaintiffs allege 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 the Director Defendants (as well as United's former 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. Complaint ¶¶ 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.

III. STANDARD FOR DECIDING THE UNITED DEFENDANTS' MOTION

The United Defendants' motion first seeks a judgment of dismissal on all claims asserted by Plaintiff Sascha Linn on the ground that Mr. Linn released

those claims under his Severance Agreement and Release. The United Defendants' motion for this relief is made pursuant to Rule 56(b) of the Federal Rules of Civil Procedure because the motion relies upon a fact outside of the Complaint – *i.e.*, Mr. Linn's Severance Agreement and Release. As shown in Part IV.A below, Mr. Linn's Severance Agreement and Release is incontrovertible and unambiguously releases Mr. Linn's claims.

Defendants' motion also seeks dismissal of all claims asserted by Plaintiff Zilhaver under Rule 12(b)(1) for lack of jurisdiction over the subject matter. Dismissal under Rule 12(b)(1) is warranted because, as shown in Part IV.B 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) ("[I]f 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.*, No. 05-1251-MLB, 2006 WL 2850325, at *2 (D. Kan. Sept. 29, 2006); *see also Frisone v. Pepsico, Inc.*, 369 F. Supp. 2d 464, 469-470 (S.D.N.Y. 2005) ("When 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 his initial civil action. As demonstrated by the cases cited at n.5, *infra*, and its accompanying text, district courts have routinely dismissed ERISA cases for lack of standing in similar circumstances and on similar records.

The Director Defendants also seek dismissal under Rule 12(b)(6) because, as shown in Part IV.C below, even if Mr. Linn had not released his claims, and even if Mr. Zilhaver had standing, the Complaint's 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).³ Further, a well-pleaded complaint "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, ___ U.S. ___, 127 S.Ct. 1955, 1965 (May 21, 2007).

IV. ARGUMENT

A. **All Claims Asserted by Plaintiff Sascha Linn Must Be Dismissed Because He Expressly Released Those and Other Claims in Exchange for Severance Benefits.**

"Releases of legal claims in exchange for severance benefits are enforceable under ERISA." *Mead v. Intermec Techs. Corp.*, 271 F.3d 715, 717 (8th Cir. 2001) (citing *Mange v. Petrolite Corp.*, 135 F.3d 570, 571 (8th Cir.1998),

³ As noted above, this Court also is free to rely upon the documents referenced in the Complaint, or which are "necessarily embraced by the complaint" *Enervations, Inc.*, 380 F.3d at 1068. 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 W.N.Y.*, 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 or 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.*, No. 05-0695, 2006 WL 1098233, at *1, n.1 (D.N.J. Mar. 31, 2006) (quoting *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir.1997)).

and *Leavitt v. Nw. Bell Tel. Co.*, 921 F.2d 160, 162-63 (8th Cir.1990)). Plaintiff Linn signed such a severance agreement and release here. Kuhl Decl., ¶ 2, and Ex. A thereto.

Mr. Linn's Severance Agreement and Release gave him the additional payments and benefits described in section 2 of the Agreement (headed "Consideration") in return for the broad and general claims release set forth in section 3 of the Agreement (headed "Release"). Kuhl Decl., Ex. A, §§ 2-3. That release, by its plain terms, covers all claims that Mr. Linn seeks to pursue in this ERISA action.

Specifically, section 3 of Mr. Linn's Severance Agreement and Release broadly and generally releases United, and all of its "present or former agents, directors, officers, employees" and others from "all claims, demands, actions or liabilities [Mr. Linn] may have or may claim to have, known or unknown" The Severance Agreement and Release further provides that it "covers . . . any federal, state, or local statute, regulation or common law doctrine regarding or relating to employment discrimination, terms and conditions of employment including but not limited to . . . the Employee Retirement Income Security Act of 1974 (ERISA)." *Id.*, § 3. Mr. Linn's signature on the Severance Agreement and Release is dated January 1, 2007 (*id.*, p. 3), a date that falls after his December 29, 2006 termination from employment with the Company (*see id.*, § 1), after the close of the alleged Class Period (Complaint ¶ 21) and after the point Mr. Linn alleges that the market had "learned about the Company's inappropriate executive

stock options practices" that form the conceptual basis for his ERISA claims.

Complaint ¶ 68.

Nor is there any genuine dispute that Mr. Linn gave the release knowingly and voluntarily. Section 7 of Mr. Linn's Severance Agreement and Release contains express representations that Mr. Linn "read and understand[s] the terms of this Release" and that he signed it "voluntarily." Kuhl Decl., Ex. A, § 7 (headed "Consulting an Attorney").

In short, Mr. Linn's Severance Agreement and Release effectuated a full and valid release of the ERISA claims that he now seeks to pursue in this action. Consistent with *Mead, supra*, the United Defendants are entitled to judgment dismissing those claims.⁴

B. 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.

Plaintiffs sue 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 & Vacation & Sick Leave Trust Funds*, 12 F. Supp.

⁴ Mr. Linn purports to sue on behalf of an alleged class of Plan participants. His release provides a defense that makes him an inadequate representative of the proposed class. *See, e.g., Langbecker v. Electronic Data Systems*, 476 F.3d 299, 313 (5th Cir. 2007).

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*, 26 F.3d at 933. Mr. Zilhaver fails to do so. 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. Complaint ¶ 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 seventeen days, Mr. Zilhaver took a distribution of one hundred 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.

1. Mr. Zilhaver Does Not Satisfy ERISA's Definition of a "Participant" With Standing to Sue.

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 & Rubber Co. v. Bruch*, 489 U.S. 101, 117 (1989) (citations omitted).

Mr. Zilhaver fails all three prongs of the *Firestone* test. First, he does not allege that he is a "current employee" of United; indeed, he *never* worked for United. Instead, Mr. Zilhaver worked for PacifiCare, and he left that company's employ in September 2005 (Complaint ¶ 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.

Second, Mr. Zilhaver does not allege that he is a "former employee" with a reasonable expectation of returning to covered employment. 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 (Complaint ¶ 9) and, pursuant to his voluntary instructions, all of his vested benefits under the merged PacifiCare-United Plan were distributed on May 17, 2006. Gilroy Decl. ¶ 13. "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.

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. *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); *In re Patterson Cos.*, 479 F. Supp.2d 1014,1044-45 (D. Minn. 2007) (a plaintiff who accepts a lump-sum distribution from a defined contribution plan before filing her amended complaint lacks standing under ERISA); *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, district 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.⁵

⁵ *See, e.g., Caltagirone v. N.Y. 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. Dynege, Inc.*, No. 05-3293, 2006 WL 626402, at *4-*5 (S.D. Tex. Mar. 13, 2006) (same); *Graden v. Conexant Sys., Inc.*, No. 05-0695, 2006 WL 1098233, at *2-*5 (same); *In re RCN Litig.*, No. 04-5068, 2006 WL 753149, *13-*14 (D.N.J. Mar. 21, 2006) (same); *see also In re AEP ERISA Litig.*, 437 F. Supp. 2d 750, 759-60 (S.D. Ohio 2006) (denying class certification motion and dismissing action where plaintiff received distribution of benefits from the plan); *Evans v. Akers*, 466 F. Supp.2d 371 (D. Mass. 2006) (same); *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).

2. Mr. Zilhaver Seeks Damages, Not Benefits.

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: (i) 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 (ii) that plaintiffs therefore lacked standing under ERISA. *Gilquist*, 675 F. Supp. at 1171.

The language 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). Complaint ¶ 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 under the terms of the United Plan. It is therefore clear that the Complaint does not seek "benefits;" it seeks damages. *In re Patterson Cos.*, 479 F. Supp.2d at 1044-45. 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); *see also Sommers Drugs Stores Co. Employee Profit Sharing Trust v. Corrigan*, 883 F.2d

345, 350 (5th Cir. 1989); *In re RCN Litig.*, 2006 WL 753149, at *14; *Evans*, 466 F. Supp. 2d at 377-78.

The distinction between claims for benefits and damages was 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).

A recent opinion by the United States Court of Appeals for the Seventh Circuit disagrees with this analysis, and allowed an ERISA breach-of-fiduciary duty claim by a cashed-out participant to proceed. *See Harzewski v. Guidant Corp.*, -- F.3d --, 2007 WL 1598097 (7th Cir. June 5,

2007). Defendants respectfully submit that *Harzewski* is contrary to the weight of authority. *See* pages 17-18, *supra*.

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).⁶

C. Plaintiffs' Claims Against the Director Defendants 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. Linn's claims had not been released, and even if Mr. Zilhaver had standing to sue under ERISA, the claims asserted against the Director Defendants should be dismissed because Plaintiffs fail to allege facts sufficient to establish any fiduciary liability under ERISA on the part of those Defendants.

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."

⁶ As is the case with Mr. Linn's release, Mr. Zilhaver's status as a former employee who no longer has an account with the Plan makes him an inadequate representative of the proposed class because not all members of the proposed class share that attribute.

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 Plaintiffs 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 ERISA 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.").

Plaintiffs' Complaint nowhere alleges that the Director Defendants are named fiduciaries of the Plan, and the Plan instrument would refute any such allegation had it been made. Plaintiffs allege that the only named fiduciaries detailed in United's Plan are the Company and United's Senior Vice President, Human Capital (a job formerly held by Defendant Dapper). *See* Complaint ¶¶ 11-

12 (alleging named fiduciary status of Defendants United and Dapper). Instead, Plaintiffs purport to maintain ERISA claims against the Director Defendants on the theory that the Directors 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.

"Fiduciary status under [ERISA] 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.'" *Kerns v. Benefit Trust Life Ins. Co.*, 992 F.2d 214, 217 (8th Cir. 1993) (quoting *Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 61 (4th Cir.1992)). Under ERISA, 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 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)).

The Director Defendants' 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)) does not confer ERISA fiduciary status on those Defendants. *See* Complaint ¶¶ 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., Trs. of GCIU Health & Welfare Plan v. Bjorkedal*, No. 04-3371, 2006 WL 3511767 at *11 (D. Minn. Dec. 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 [directors] gave rise to a breach of duty and because the [directors] 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*, No. 5:03-1060, 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 only assigns two functions to United's Board of Directors, neither of which is at issue in this lawsuit.

2. The Director Defendants Are Not Fiduciaries With Respect to the Alleged Misrepresentations and Omissions.

The United Plan assigns only two functions to United's Board of Directors. Those are: (i) the authority to amend the Plan (which is not a fiduciary function, but is instead a "settlor" function, *see Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999)); and (ii) the authority to appoint or remove a directed trustee.⁷ *See Gilroy Decl.*, Ex. A. § 12.1.3. Plaintiffs do not complain in any way about Plan amendments or the appointment of a directed trustee. Instead, Plaintiffs contend that there were breaches of ERISA duty arising from alleged misrepresentations and from the continued maintenance of the Plan's Employer Stock Fund. The Plan document, however, makes clear that the Director Defendants lack any authority or responsibility for the matters about which Plaintiffs complain. Moreover, 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. *See Varsity Corp. v. Howe*, 516 U.S. 489, 504 (1996) (describing the necessity that a misrepresentation be made by a defendant acting in a fiduciary capacity); *Borst v. Chevron Corp.*, 36 F.3d 1308, 1323 n. 28 (5th Cir. 1994) (ERISA's fiduciary duties do not apply to

⁷ A directed trustee generally refers to a fiduciary that carries out specific investment transactions on behalf of a plan at the direction of another plan fiduciary. *See* 29 U.S.C. § 1103(a) (recognizing limits on a directed trustee's fiduciary authority under ERISA).

"statements of intended action in [a company's] corporate non-fiduciary capacity as plan sponsor or settlor.").

Here, the Plan document assigns all administrative or management responsibilities with respect to the Plan to persons other than the Director Defendants. *See* Gilroy Decl., Ex. A, § 12.2.1, 12.6 (delegating Administrative Committees' functions and identifying plan administrator). Similarly, continued maintenance of the Employer Stock Fund is *mandated* by § 4.2.1 of the Plan. *See* Gilroy Decl., Ex. A § 4.2. 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 under §§ 4.1.1 through 4.1.4 of the Plan to "establish[]" and "revis[e]" the Plan's Active Funds. *Id.*⁸ Accordingly,

⁸ The Plan's mandate, in § 4.2.1, 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 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

Count I (the Disclosure Claim) and Count II (the Prudence Claim) of Plaintiffs' Complaint fail to state claims against the Director Defendants, and should be dismissed.

Plaintiffs' remaining theory – alleged in Count III (the Monitoring Claim) of the Complaint – is that the Director Defendants 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 does not delegate such authority to the Director Defendants. As noted above, the only duties or authorities that the Plan delegates to United's Board of Directors are 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 either to plan amendment or termination (which is itself a nonfiduciary "settlor" function under ERISA) or to the selection or oversight of the Plan's directed trustee (which is not a defendant). Plaintiffs' claims against the Director

[company] stock, the central asset of the ESOP at issue. As such, Commerce does not fit within the ERISA definition of a fiduciary . . .").

Defendants 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 are "de facto" or "functional" fiduciaries under ERISA. *See* Complaint ¶¶ 1, 20, and 34. It is well-settled 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, 2007 WL 333617, at *5 (D. Minn. Feb. 1, 2007) (citing *Briscoe v. LaHue*, 663 F.2d 713, 723 (7th Cir. 1981)), *appeal pending*); *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 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*, 2007 WL 333617, at *5.⁹

In addition, as in *Hastings*, the "essence of" Plaintiffs' case is an alleged *failure* to act on the Defendants part. *See Hastings, supra*, at *5. 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' alleged approval of the stock options, the alleged failure properly to disclose those options, and the alleged receipt of the options by Mr. Hemsley, somehow violated *ERISA* because such actions allegedly and negatively affected the value of United

⁹ 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.*, No. 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), Plaintiffs allege that only United and Defendant Dapper are named fiduciaries. Complaint ¶¶ 11-12. Additionally, unlike the allegations in *In re ADC Telecommunications*, Plaintiffs' Complaint makes no allegation that the Director Defendants were delegated fiduciary authority under the terms of the Plan, and it 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.

stock, and, consequently, the value of the Plan's Employer Stock Fund. Complaint ¶¶ 13-16, 18, 80. Plaintiffs' theory incorrectly assumes that the Director Defendants acted as ERISA fiduciaries in allegedly doing these things and are hence responsible *under ERISA* for the consequences thereof. The alleged actions of the Director Defendants with respect to the Company's stock options are on their face unrelated to the Plan, and Plaintiffs' have not alleged any facts to the contrary.

Plaintiffs' 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, was rejected by another district court in a decision affirmed 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 one hundred 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 [29 U.S.C.] § 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).¹⁰

More broadly, the Eighth Circuit has held that "normal business decisions with potential collateral effects on prospective, contingent benefits need not be made in the interest of plan participants" and that "ERISA does not prohibit an employer from acting in accordance with its interests as employer when not administering the plan." *Kalda v. Sioux Valley Physician Partners*, 481 F.3d 639, 646 (8th Cir. 2007) (internal citations omitted, and quoting *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986)). 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 the Director Defendants to be fiduciaries of the United Plan, they must have exercised authority or control with respect to the management or administration of the *Plan* which, as shown above, they did not.

¹⁰ 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)).

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, the Director Defendants cannot be deemed fiduciaries based upon their alleged conduct with respect to the stock options at issue in the Complaint.

V. CONCLUSION

The Court should (i) enter summary judgment in favor of the United Defendants with respect to the claims asserted by Plaintiff Sascha Linn, (ii) dismiss all claims of Plaintiff Matthew Zilhaver for lack of subject matter jurisdiction, or, in the alternative, (iii) dismiss all claims asserted against the Director Defendants for failure to state a claim for which relief can be granted.

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Respectfully submitted,

/s/ Thomas S. Gigot

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