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**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

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

Plaintiff,

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)
(Electronically Filed)**

**Opposition of Defendants UnitedHealth
Group Incorporated, L. Robert Dapper,
James A. Johnson, William G. Spears,
Mary O. Mundinger and Stephen J.
Hemsley to Plaintiffs' Motion for Class
Certification**

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 in Opposition to Plaintiffs' Motion for Class Certification [Docket No. 59].

I. INTRODUCTION

The two plaintiffs in this case, Matthew T. Zilhaver and Sascha Linn, seek to represent all participants in the UnitedHealth Group 401(k) Savings Plan (the "Plan" or "United 401(k) Plan") whose Plan accounts held shares of UnitedHealth Group Incorporated ("United") common stock as part of the Plan's UnitedHealth Stock Fund at any time between December 21, 2005, and May 24, 2006 (the alleged "Class Period").¹ Plaintiffs allege that the price of United stock dropped during the Class Period, and they blame the price drop on "improprieties involving the backdating of executive stock options at United" (Compl. ¶ 4), which they contend started to become known to the public market in the wake of a *Wall Street Journal* article published roughly midway through the Class Period. *See* Compl. ¶ 61. Plaintiffs contend that Sections 502(a)(2) and (a)(3) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§ 1132(a)(2)-(3), provide them a means to hold the Defendants in this case personally liable to restore value lost during the five-month Class Period.

¹ Plaintiffs' Motion for Class Certification and Related Relief [Docket No. 59] ¶ 2; *see also* Second Amended Complaint ("Compl.") [Docket No. 57] ¶ 21.

As detailed in the Defendants' pending Motions to Dismiss, Mr. Zilhaver lacks standing to sue under ERISA because, having 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. For his part, Mr. Linn signed a Severance Agreement and Release in January 2007 that expressly released any and all claims against the United Defendants, including ERISA claims, and further provided that Mr. Linn would not sue the United Defendants. Because of the factual and legal issues that are unique to Messrs. Zilhaver and Linn, their claims are not typical of the Class and they are not adequate Class representatives under Rule 23.

Even if Mr. Zilhaver's lack of standing and Mr. Linn's release do not preclude them from serving as Class representatives, class certification would still be unwarranted. Plaintiffs' Misrepresentation Claim (Count I of the Complaint) alleges that the Defendants negligently provided Class members with false or incomplete information about United's financial condition upon which the participants purportedly relied in deciding to remain invested in the UnitedHealth Stock Fund. This claim fails to satisfy Rule 23, given that the claim necessarily requires the Court to make individualized inquiries as to both materiality and reliance (*i.e.*, what each Class member heard or read, and relied on, when making his or her decision to remain invested in the UnitedHealth Stock Fund). Accordingly, Plaintiffs' Misrepresentation Claim cannot satisfy the commonality and typicality requirements of Rule 23.

Moreover, for all the claims, including the Misrepresentation Claim, the Prudence Claim (Count II of the Complaint), and the Monitoring Claim (Count III of the

Complaint), the facts reveal that the proposed Class comprises claims arising out of a hodgepodge of individual investment elections made by Zilhaver, Linn, and the absent Class members. As to Mr. Linn, he and approximately 21,966 absent Class members continued holding their interests in the UnitedHealth Stock Fund following disclosure of the alleged stock option practices at issue, and Mr. Linn purchased United stock outside of the Plan *after* public disclosure of the alleged stock options practices. Accordingly, Mr. Linn's own conduct (and that of other Class members who did not sell their Plan-based stock) contradicts the very claims pled in this action, and Plaintiffs' unique investment decisions make their claims unsuitable for class treatment.

Further, because the Plan is an "ERISA § 404(c) plan" (*see* 29 U.S.C. § 1104(c)), which permits participants to control the investments in their accounts and which relieves fiduciaries of liability for participants' investment decisions, the Court must make individual determinations as to whether each Class member exercised individual control with respect to his or her Plan investment. Class certification is inappropriate on this additional and independent ground.

Plaintiffs also fail to satisfy Rule 23(b)(1) and (2), which are the two provisions under which Plaintiffs seek certification. Among other things, Plaintiffs' claims require individualized inquiries as to reliance, and the core relief Plaintiffs seek – the recovery of alleged investment losses to be deposited into participants' individual Plan accounts – is not authorized under Rule 23(b)(2) because it is not incidental to any requested equitable relief.

The conflicts, divergences in interest, and individual inquiries raised by Plaintiffs' action go to the fundamental questions in this ERISA case, including not just the remedies but the core liability issues as to when, and to whom, fiduciary duties were allegedly due. The conflicts and divergences negate any typicality or commonality between and among Mr. Zilhaver, Mr. Linn, and the absent Class members, and make class certification inappropriate.

II. FACTS RELEVANT TO CLASS CERTIFICATION

A. **Plaintiffs Do Not, and Cannot, Allege that They Acquired Their Plan-Based Interest in United Stock by Reason of Any ERISA Breach by These Defendants.**

1. Plan Design

The United 401(k) Plan is an "individual account plan" or a "defined contribution plan" within the meaning of ERISA § 3(34), 29 U.S.C. §1002(34).² Compl. ¶ 30. The Plan allows Eligible Employees to make pre-tax contributions, and to invest those contributions in any of twelve traditional investment funds or in a self-managed brokerage account. First Gilroy Decl., Ex. A, § 4.1; *id.*, Ex. B, at 16-17. All contributions made by or for a participant are credited to an individual account created for that participant. Compl. ¶ 30; 29 U.S.C. § 1002(34). The participant's benefit under the Plan consists solely of that account. *Id.* Participants may direct and redirect how

² The United 401(k) Plan document and its summary plan description were previously submitted to the Court as Exhibits A and B, respectively, to the First Declaration of Patricia Gilroy (the "First Gilroy Decl.") [Docket No. 77], which was submitted in (continued)

their account is to be allocated among the Plan's traditional investment fund options. First Gilroy Decl., Ex. B, at 15-18; Compl. ¶ 31.

In addition to the twelve funds noted above, the Plan provides for the maintenance of a separate UnitedHealth Stock Fund. First Gilroy Decl., Ex. A, § 4.2.1; *id.*, Ex. B, at 17. The UnitedHealth Stock Fund is a pooled investment fund that holds shares of United common stock plus a small amount of cash. Second Declaration of Patricia Gilroy, submitted herewith (the "Second Gilroy Decl."), ¶ 6. Unlike the Plan's twelve traditional investment funds, the UnitedHealth Stock Fund has, since its 2002 inception, been closed both to new investments and to incoming transfers from the Plan's other investment fund options. Compl. ¶ 32; First Gilroy Decl., Ex. A, § 4.2.1; *id.*, Ex. B, at 17; Second Gilroy Decl. ¶ 7.

Plan Participants have acquired interests in the Plan's UnitedHealth Stock Fund in either of two ways. First, some participants worked for United before August 2002 and participated, at that time, in a tax-qualified Employee Stock Ownership Plan ("ESOP") established by United. First Gilroy Decl., Ex. A, § 4.2.1; *id.*, Ex. B, at 17. That ESOP enabled participating employees to acquire and hold shares of United common stock on a tax-deferred basis. Effective August 1, 2002, United discontinued all further stock purchases under the ESOP, and merged the ESOP into the United 401(k) Plan. *Id.*, Ex. B, at 17. The ESOP's assets, which consisted of shares of United common stock, were

support of the United Defendants' Motion to Dismiss Plaintiffs' Amended Complaint [Docket No. 67].

transferred to the United 401(k) Plan and into the newly-established UnitedHealth Stock Fund. First Gilroy Decl., Ex. A, § 4.2.1; *id.*, Ex. B, at 17. This structure enabled ESOP participants to continue holding, on a tax-favored basis, the shares of United common stock acquired for their benefit under the ESOP.

Second, United has acquired a number of other corporations that maintained their own 401(k) plans (an "Acquired Employer"). First Gilroy Decl., Ex. B, at 17. At or after such an acquisition, United typically merged the Acquired Employer's 401(k) plan into the United 401(k) Plan. *See* First Gilroy Decl., Ex. A, Appendix E (reflecting merger of plans sponsored by Acquired Employers into the United 401(k) Plan). Some of those Acquired Employer plans allowed participants to invest in stock of their sponsoring employer. *Id.* When the Acquired Employer's stock converted to United stock as a result of the corporate acquisition, the Acquired Employer's 401(k) plan would come to hold shares of United stock. *See* First Gilroy Decl., Ex. B, at 17; *id.*, at Appendix E, § 37. Then, upon the merger of the Acquired Employer's plan into the United 401(k) Plan, the merged United Plan continued to hold that United common stock through its UnitedHealth Stock Fund.

As noted, the Plan's UnitedHealth Stock Fund has, since its inception, been closed to new investments and to the transfer of money from other investment funds within the Plan. Participants may, however, transfer all or part of their balance in the Fund to an array of other investment funds maintained under the Plan. First Gilroy Decl., Ex. A, § 4.2.3; *id.*, Ex. B, at 17; Second Gilroy Decl., ¶ 7. Once money is transferred out of the UnitedHealth Stock Fund, the money cannot be transferred back into the Fund at a later

date. First Gilroy Decl., Ex. A, § 4.2.3; *id.*, Ex. B, at 17. This "closed end" feature of the Plan's UnitedHealth Stock Fund has been part of the Plan's design since the Fund's 2002 inception. *Id.* Plaintiffs do not, and cannot, dispute that this is a lawful plan design feature under ERISA.

2. Messrs. Zilhaver and Linn's Employment with PacifiCare

Messrs. Zilhaver and Linn never participated in the United ESOP. Instead, Messrs. Zilhaver and Linn once worked for an Acquired Employer called PacifiCare Health Systems, Inc. ("PacifiCare"). Second Gilroy Decl. ¶ 18. As PacifiCare employees, Messrs. Zilhaver and Linn participated in a voluntary individual account plan sponsored by that company (the "PacifiCare 401(k) Plan"). *Id.*; Compl. ¶ 5. The PacifiCare 401(k) Plan offered its participating employees a menu of investment fund options, including a fund designed to invest primarily in shares of PacifiCare common stock. Compl. ¶ 9; Second Gilroy Decl., ¶¶ 12-13; *see also id.*, Ex. A (Plan document for the PacifiCare 401(k) Plan).

In December 2005, PacifiCare merged with and into a United subsidiary. Second Gilroy Decl. ¶ 9. At the time of the corporate merger, Messrs. Zilhaver and Linn each had a portion of his PacifiCare 401(k) Plan account invested in the PacifiCare 401(k) Plan's company stock fund. *Id.* ¶ 18. Messrs. Zilhaver and Linn had decided to invest in that company stock fund for different reasons, but each made that investment decision *before* United acquired PacifiCare and *before* either Plaintiff had any ERISA-based relationship to the Defendants in this case. *See* Deposition Transcript of Matthew Zilhaver ("Zilhaver Dep."), excerpts of which are attached as Exhibit 1 to the

accompanying Declaration of Thomas Gigot (the "Gigot Decl."), at 25:2-16; Deposition Transcript of Sascha Linn ("Linn Dep."), excerpts of which are attached as Exhibit 2 to the Gigot Decl., at 32:24-33:11, 33:21-34:10, and 35:4-36:1.

Once the PacifiCare-United corporate merger closed on December 21, 2005, all outstanding shares of PacifiCare stock were exchanged for shares of United stock and other consideration. Second Gilroy Decl. ¶ 14; *id.*, at Ex. C (amendment reflecting the exchange of PacifiCare shares for United shares). As a consequence of this corporate merger, the PacifiCare 401(k) Plan accounts of Messrs. Zilhaver and Linn came to be invested in shares of United stock for the very first time. *Id.* at Ex. E; First Gilroy Decl., ¶ 10. Coincident with the corporate merger, the PacifiCare 401(k) Plan was amended to close that Plan's company stock fund to any new investments in United common stock and to incoming transfers from other investment fund options under the PacifiCare 401(k) Plan. Second Gilroy Decl., at ¶ 15; *id.* at Ex. C. In this way, the PacifiCare 401(k) Plan maintained, immediately after the corporate merger, the same kind of "closed end" UnitedHealth Stock Fund as had been maintained under the United 401(k) Plan since August 1, 2002.

Following the corporate merger, United caused the PacifiCare 401(k) Plan to merge with and into United's 401(k) Plan effective May 1, 2006. *See* First Gilroy Decl. ¶ 11; *id.*, Ex. A, Appendix E, § 37 (reflecting the merger of the PacifiCare and United Plans). As a consequence of this plan merger, the two Plans' UnitedHealth Stock Funds were combined, and Messrs. Zilhaver and Linn each came to have an account balance in the United 401(k) Plan's UnitedHealth Stock Fund. *Id.* at Ex. A, Appendix E, § 37.

B. Plaintiffs Made Individualized Choices to Sell, or to Hold, the United Common Stock Held Through Their 401(k) Plan Accounts.

Although both the United 401(k) Plan and the PacifiCare 401(k) Plan foreclosed participants from transferring money *into* a UnitedHealth Stock Fund, each 401(k) plan allowed participants – at any time – to transfer out of that Fund, and into any other investment fund options. Second Gilroy Decl., ¶¶ 7, 15. Neither Mr. Zilhaver nor Mr. Linn complains in any way about the other investment fund options maintained under the two Plans. Nor does either Plaintiff contend that he ever received false or incomplete information about those other investment fund options. *See* Zilhaver Dep., at 39:12-18 and 40:12-19; Linn Dep., at 58:16-59:22.

Instead, Messrs. Zilhaver and Linn contend that Plan participants received false or incomplete information about United and its stock option grants, and that this somehow impacted their decisions whether to sell, or to hold, the United stock they *already had* in the UnitedHealth Stock Fund. Compl. ¶¶ 87-89. In keeping with the voluntary participant-directed features of the two 401(k) Plans, however, each Plaintiff made different decisions in this area, and for materially different reasons.

1. Mr. Zilhaver's Investment Decisions

As noted, Mr. Zilhaver's account in the PacifiCare 401(k) Plan first came to hold an interest in that Plan's UnitedHealth Stock Fund because of the December 21, 2005 merger of PacifiCare into a United subsidiary. *See* First Gilroy Decl., ¶¶ 9-10; Zilhaver Dep., at 29:12-16. Shortly after that corporate merger, Mr. Zilhaver considered making a transfer out of the UnitedHealth Stock Fund and into another investment fund. Zilhaver

Dep., at 31:18-32:7. According to Mr. Zilhaver, this was because "[t]he stock was in decline from the moment that it moved into United in December of '05." Zilhaver Dep., at 31:22-31:23. Mr. Zilhaver decided, however, to wait for United's first-quarter earnings call in Spring 2006. *Id.*, at 31:23-32:2. After that earnings call, Mr. Zilhaver decided to stay invested in the UnitedHealth Stock Fund "because all of the results from the earnings showed positive growth for the company and [he] expected growth in the stock [or] just a higher price." *Id.*, at 33:7-16. According to Mr. Zilhaver, there was no factor other than what he read in that first quarter earnings call that caused him to reach his decision to stay in the UnitedHealth Stock Fund through this point in time. *Id.* at 33:17-20.

Mr. Zilhaver's view on the continued holding of an interest in the UnitedHealth Stock Fund changed when "[t]he stock option story came out on the *Wall Street Journal*" *Id.*, at 34:15-16. After the *Wall Street Journal* article was published, Mr. Zilhaver claims he made a decision to sell his interest in the UnitedHealth Stock Fund as soon as possible. *Id.*, at 34:4-21. According to Mr. Zilhaver, the only facts or factors that caused him to make this investment decision were "the story in the *Wall Street Journal*" and the fact that "the stock was continuing to slip, the price." *Id.*, at 35:16-36:11. Mr. Zilhaver implemented this decision by liquidating his entire account in the United 401(k) Plan and transferring the proceeds to an individual retirement account that is invested in a Vanguard mutual fund. *Id.*, at 37:13-38:15. With that transfer of his Plan account, Mr. Zilhaver permanently ceased to participate in the United 401(k) Plan. First Gilroy Decl.,

¶ 13.

2. Mr. Linn's Investment Decisions.

Like Mr. Zilhaver, Mr. Linn's account in the PacifiCare Plan first came to hold shares of United common stock upon the December 21, 2005 merger of PacifiCare into a United subsidiary. Unlike Mr. Zilhaver, however, Mr. Linn *never* sold his 401(k) Plan-based interest in United common stock. Linn Dep., at 37:7-13. Rather, Mr. Linn continued to hold that interest even after learning of the *Wall Street Journal* article and price declines that supposedly led Mr. Zilhaver to sell. *Id.*, at 37:14-38:17 and 39:16-40:3. Additionally, Mr. Linn voluntarily decided, both before and after he learned of those facts, to buy even more shares of United common stock through a separate stock purchase program (the "ESPP") maintained outside of his 401(k) Plan account. *Id.*, at 44:6-45:8 and 45:9-46:9.

The factors upon which Mr. Linn based these investment decisions differed from the factors upon which Mr. Zilhaver based his decisions. During the period between the December 21, 2005 PacifiCare corporate merger and the May 1, 2006 plan merger, Mr. Linn chose not to transfer out of the PacifiCare Plan's UnitedHealth Stock Fund because, in his words, "I was kind of leaving it where it was." *Id.*, at 36:12-19. When asked whether there were any specific facts or factors he relied upon in making that decision, Mr. Linn answered as follows:

The only thing I can recall — I don't recall when, but at some point they said that if you did transfer out you couldn't transfer back in. So I didn't want to limit my options really. That's really the only thing I can think of. Like I said, I'm not exactly sure when we were made aware of that, but that was the one thing I do recall.

Id., at 36:20-37:6.

After the May 1, 2006 merger of the PacifiCare 401(k) Plan into the United 401(k) Plan, Mr. Linn considered transferring out of the Plan's UnitedHealth Stock Fund. According to Mr. Linn, he "briefly considered" the possibility of such a transfer "[a]fter the backdating scandal came out." *Id.*, at 37:14-17. But he "decided that the value had gone down too much and there was still the issue of not being able to get back into the fund after leaving so I felt like I kind of had to leave it where it was." *Id.*, at 38:12-17. In making that decision, Mr. Linn looked "at the stock price," but "not really" anything else. *Id.*, at 40:1-13.

As for the purchase that he made through the ESPP, the one and only factor upon which Mr. Linn based his purchase decisions was that "the stock was purchased at a discount." *Id.*, at 46:5-9.

C. Plaintiffs' Claims Compared to Those of the Class They Seek to Represent

The investment decisions made by, and the economic interests of, Messrs. Zilhaver and Linn are far from co-extensive with those of the Plan participants they seek to represent. According to records maintained by the United 401(k) Plan, there were 16,787 participants in the United 401(k) Plan, and another 6,881 participants in the PacifiCare 401(k) Plan, who were invested in the Plan's UnitedHealth Stock Fund at the start of the alleged Class Period. Second Gilroy Decl., ¶¶ 18-20. Just as Messrs. Zilhaver and Linn made different investment decisions for different reasons, however, these other participants undoubtedly made different decisions based on different rationales.

These individualized differences are material to the claims that Plaintiffs wish to pursue on behalf of the alleged Class. For example, Plaintiffs' Misrepresentation Claim (Count I of the Complaint) theorizes that the Defendants provided false and incomplete information about United's financial condition and stock option practices, and that those alleged misrepresentations caused individual participants to continue holding an interest in the UnitedHealth Stock Fund when they would otherwise have sold that interest. Even ignoring the speculative nature of that theory, it is readily apparent that many participants would be unable to make the factual showing required to fit Plaintiffs' Misrepresentation theory.

Some participants may have been completely indifferent to what the Defendants allegedly said, or failed to say, about United or its stock option practices. Other participants, like Mr. Linn, decided to hold, rather than to sell, based solely on facts and factors unrelated to any misrepresentation or omission by these Defendants. Still others may have been fully aware of United's financial condition and stock options practices, yet deliberately continued to hold their interest in the UnitedHealth Stock Fund at all times.

Additionally, Plaintiffs' economic interests may differ materially from those of the other Plan participants they seek to represent. Messrs. Zilhaver and Linn claim economic injury arising solely from the continued holding (rather than from the purchase) of United common stock. Although their damage theory remains opaque, it appears to hinge on the notion that Plan participants missed an opportunity to sell United stock before the public market learned the facts about allegedly backdated United stock options and bid the stock price downward to reflect those facts. It is readily apparent that other Plan participants

may have no use for Plaintiffs' theory. For example, between the start of the Class Period and publication of the March 18, 2006 *Wall Street Journal* article that Plaintiffs identify as the first event in revealing the truth about United's financial condition and options practices, at least 874 participants transferred out of, or took distributions from, the UnitedHealth Stock Fund. Second Gilroy Decl., ¶ 21. Having sold their units at the allegedly artificially inflated price posited by Plaintiffs' theory, these 874 participants would have *benefited* from the misrepresentations alleged by Plaintiffs, and, as a consequence, would have interests adverse to the claims asserted by Plaintiffs in this action. *See Langbecker v. Electronic Data Systems*, 476 F.3d 299, 317 (5th Cir. 2007) (describing the intra-class conflict between "many potential class members [who] voted with their investments to remain in the EDS Stock Fund" after disclosure of alleged accounting irregularities, and "other potential class members [who] profited from stock swings caused by the alleged fiduciary violations").

III. ARGUMENT

A. Plaintiffs Have the Burden to Establish the Requirements for Class Certification.

Plaintiffs bear the burden of establishing each requirement for class certification under Rule 23. *Coleman v. Watt*, 40 F.3d 255, 258-59 (8th Cir. 1994). "The Court may certify a class action 'only when it is satisfied after rigorous analysis that all of Rule 23's prerequisites are met.'" *In re GenesisIntermedia, Inc. Securities Litig.*, 232 F.R.D. 321, 327 (D. Minn. 2005) (quoting *Lockwood Motors, Inc. v. General Motors Corp.*, 162 F.R.D. 569, 573 (D.Minn.1995)). Plaintiffs must establish more than "some showing"

that the requirements of Rule 23 are satisfied, since it is "beyond dispute that a district court may not grant class certification without making a determination that all the Rule 23 requirements are met." *In re Initial Public Offerings Securities Litig.*, 471 F.3d 24, 40 (2d Cir. 2006).

Plaintiffs' obligations require two levels of proof. First, under Rule 23(a), they must prove: (1) numerosity ("joinder of all members is impracticable"); (2) commonality ("questions of law or fact common to the class"); (3) typicality (named parties' claims or defenses "are typical . . . of the class"); and (4) adequacy of representation (class representatives "will fairly and adequately protect the interests of the class"). *Elizabeth M. v. Montenez*, 458 F.3d 779, 786 (8th Cir. 2006). *See also Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 613 (1997). Additionally, Plaintiffs must prove that the requirements of Rule 23(b)(1) or 23(b)(2) – the two provisions under which they seek certification – are satisfied. "[S]uch determinations can be made only if the [Court] resolves factual disputes relevant to each Rule 23 requirement and finds that whatever underlying facts are relevant to a particular Rule 23 requirement have been established and is persuaded to rule, based on the relevant facts and the applicable legal standard, that the requirement is met[.]" *In re Initial Public Offering Securities Litig.*, 471 F.3d at 41. These core certification decisions can no longer be postponed by "conditionally" certifying the class pending subsequent proceedings. *See Fed. R. Civ. P. 23(c)(1)(C) & Adv. Comm. Notes (2003) (eliminating "conditional" class certification).*

When undertaking a class certification analysis, the Court should not accept the Complaint's allegations as true. Rather, the Court should make such factual and legal

inquiries as are necessary to ensure that all class certification requirements are satisfied, even if the underlying considerations overlap with the merits of the case. *Blades v. Monsanto Co.*, 400 F.3d 562, 566-67 (8th Cir. 2005) ("The preliminary inquiry at the class certification stage may require the court to resolve disputes going to the factual setting of the dispute, and such disputes may overlap with the merits of the case") (citation omitted); *In re Initial Public Offering Securities Litig.*, 471 F.3d at 27 ("[T]he fact that a Rule 23 requirement might overlap with an issue on the merits does not avoid the court's obligation to make a ruling as to whether the requirement is met . . ."). To that end, the Court may receive evidence to enable it to conduct a "rigorous analysis" as to whether Rule 23's requirements have been satisfied. *See Monentez*, 458 F.3d at 786 (quoting *Amchem Prods., Inc.*, 521 U.S. at 622-23).³

B. Mr. Zilhaver and Mr. Linn's Claims Are Not Typical, and They Are Inadequate Class Representatives

As detailed in the Defendants' pending Motions to Dismiss, Mr. Zilhaver lacks standing to sue under ERISA because, having voluntarily "cashed out" his account with the Plan, he was no longer an ERISA "participant" in the Plan at the time he filed this

³ The Complaint's proposed Class definition (Compl. ¶ 21) mixes two different Plans—the United 401(k) Plan and the PacifiCare 401(k) Plan (Compl. at n. 1). The proposed Class definition also conflates the present and past tenses to define the Class as including, first, "[a]ll participants in" the United 401(k) Plan (which also includes the PacifiCare Plan), and second, those *former* participants who "held shares" of United through the UnitedHealth Stock Fund. (Compl. ¶ 21). As detailed in the pending motions to dismiss, former Plan participants, like Mr. Zilhaver, lack standing to bring this action, and thus cannot be included in the Class.

lawsuit. (*See* United Defendants' Memo. in Support of Motion to Dismiss [Docket No. 69], at 14-21). As also detailed in the United Defendants' Motion to Dismiss, Mr. Linn signed a Severance Agreement and Release in January 2007 that expressly released any and all claims against the United Defendants, including ERISA claims, and further provided that Mr. Linn would not sue the United Defendants. *Id.*, at 12-14; Declaration of David Kuhl, attached hereto, Exhibit A, ¶ 4.

Because the factual and legal positions of Messrs. Zilhaver and Linn differ significantly from those of absent Class members, their claims are not typical of those of the Class, and they are not adequate Class representatives under Rule 23. *See, e.g., Spann v. AOL Time Warner*, 219 F.R.D. 307, 318-19 (S.D.N.Y. 2003) (holding that "to the extent that [r]eleases could provide a defense as to recovery under the claims posed in this [ERISA] lawsuit, that defense requires a fact-specific inquiry into the circumstances of each individual's release").

C. The Individualized Nature of Plaintiffs' Claims Defeats Commonality, Typicality, and Adequacy.

1. The Elements of the Misrepresentation Claim Are Individual-Specific.

Plaintiffs' Misrepresentation Claim (Count I of the Complaint) cannot be maintained as a class action because the Claim defies Rule 23(a)'s commonality and typicality requirements. Federal courts have repeatedly denied class certification where wide variation potentially exists as to what misrepresentations were received by members of the proposed class, and the extent (if any) that those misrepresentations affected each member's decision-making. *See, e.g., Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 398

(6th Cir. 1998) (denying certification in an ERISA case in which plaintiffs sought continuation of free retiree health care, noting that "[b]ecause of their focus on individualized proof, estoppel claims are typically inappropriate for class treatment"); *Tootle v. ARINC, Inc.*, 222 F.R.D. 88, 97 (D. Md. 2004) (denying certification in an ERISA breach of fiduciary duty case on commonality and typicality grounds because an ERISA misrepresentation claim will require "individualized inquiries of the class as to the information they received").⁴

In fact, several courts have denied class certification for lack of commonality and typicality in the very situation presented here, *i.e.*, where plaintiffs assert misrepresentation claims under ERISA relating to a participant-directed individual account plan. *See, e.g., Fisher v. J.P. Morgan Chase & Co.*, 230 F.R.D. 370, 376-78 (S.D.N.Y. 2005) (no showing of commonality, typicality or adequacy); *Thomas v. ARIS Corp. of America*, 219 F.R.D. 338, 341-43 (M.D. Pa. 2003) (no typicality); *Wiseman v. First Citizens Bank & Trust Co.*, 212 F.R.D. 482, 486-87 (W.D.N.C. 2003) (finding no commonality or typicality).⁵

⁴ *See also Retired Police Ass'n v. City of Chicago*, 7 F.3d 584, 597 (7th Cir. 1993) (finding no typicality where it was not possible to assume that communications promising free lifetime health care reached each of the proposed class members in the same manner and with the same impact); *In re Sears Retiree Group Life Ins. Litig.*, 198 F.R.D. 487, 492 (N.D. Ill. 2000) (denying certification in an ERISA case on commonality and typicality grounds where questions existed as to whether each plaintiff received "a materially misleading set of communications" from defendants).

⁵ *See also Lively v. Dynegy, Inc.*, 05-cv-00063, 2007 WL 685861, at *16 (S.D. Ill. March 2, 2007) (denying certification of misrepresentation claim based on failure to meet requirements of Rule 23(b)(1) and (2)); *In re Elec. Data Sys. Corp. "ERISA" Litig.*, 224 (continued)

Plaintiffs' Misrepresentation Claim depends on each participant's reliance (if any) on allegedly false and incomplete statements that purportedly were made to participants by the Defendants. Reliance is a necessary element of an ERISA breach of fiduciary duty claim that is premised on a misrepresentation. *See Kamler v. H/N. Telecomm. Serv., Inc.*, 305 F.3d 672, 681-82 (7th Cir. 2002); *Burstein v. Ret. Account Plan For Employees of Allegheny Health Educ. & Research Found.*, 334 F.3d 365, 387 (3d Cir. 2003).⁶ Plaintiffs contend that such reliance should be "presumed." *See* Compl. ¶ 88. But courts have refused to recognize a presumption of reliance under ERISA. *See, e.g., In re Elec. Data Sys. Corp. "ERISA" Litig.*, 224 F.R.D. at 630 ("A plaintiff *must* establish reasonable and detrimental reliance upon a material misrepresentation to recover for breach of fiduciary duty based on misrepresentations") (emphasis added) (citing *Weir v. Fed. Asset Disposition Ass'n*, 123 F.3d 281 (5th Cir. 1997)). *See also Thomas*, 219 F.R.D. at 342 ("[I]n the context of an ERISA claim, a plan participant's detrimental reliance upon the representation or omission of a fiduciary may not be presumed"); *In re Unisys Corp. Retiree Med. Benefits Litig.*, U.S. Dist. LEXIS 1577, at *18 n.13 (E.D. Pa. Feb. 4, 2003)

F.R.D. 613, 630 (E.D. Tex. 2004) (denying certification of misrepresentation claim based on failure to meet requirements of Rule 23(b)(3)).

⁶ One district court in this Circuit has suggested that the "Eighth Circuit is silent on the issue of the elements of a misrepresentation-based breach of fiduciary duty claim." *In re Aquila ERISA Litig.*, 237 F.R.D. 202, 208 (W.D. Mo. 2006). But such a requirement of loss causation is fundamental to ERISA's remedial scheme; indeed, it is embedded in one of the statutory provision that Plaintiffs invoke to maintain their claim for monetary relief. ERISA § 409(a), 29 U.S.C. § 1109(a), makes a plan fiduciary liable only for those losses "resulting from" a breach of his or her ERISA duties.

("Contrary to Plaintiffs' contention, reliance may *not* be presumed") (emphasis in original)). That is because establishing reliance requires "individualized determinations," including assessments about participants' "innumerable different positions" that "giv[e] them access to vastly different information" about the sponsoring company's "financial position." *In re Elec. Data Sys. Corp. "ERISA" Litig.*, 224 F.R.D. at 630. Therefore, "each member of the proposed class" would have to establish that he "relied on the defendants' alleged misrepresentations in making his investment decision[]" to stay in the UnitedHealth Stock Fund. *Wiseman*, 215 F.R.D. at 510. "This burden is too individualized to meet the commonality requirement of a class action." *Id.*

Further, even if the law allowed such a presumption, Plaintiffs' own conduct and testimony here would easily rebut such a presumption. The "reliance" that Plaintiffs apparently want the Court to presume is that all Plan participants would have sold United stock, rather than held it, had they known the alleged facts about backdated United stock options. But Messrs. Zilhaver and Linn themselves behaved differently once they learned those alleged facts: Mr. Zilhaver sold his Plan-based interest in United stock two months after the *Wall Street Journal* article appeared. Zilhaver Dep., at 34:4-21. In contrast, Mr. Linn continued to hold his interest in United stock under the Plan throughout the Class Period, and even purchased additional shares of United outside of the Plan after the alleged backdating was publicly disclosed. Linn Dep., at 37:7-13 and 44:6-45:8. Moreover, both Plaintiffs testified that they relied on different factors in making their decisions, and one conceded that his investment decision had nothing to do with options backdating. Specifically, Mr. Linn explained that the only factors he relied upon in

deciding to continue holding his interest in the UnitedHealth Stock Fund were (i) the Fund's "closed end" design feature, and (ii) the market price of the stock. Linn Dep. at 38:12-17 and 40:1-13. No ERISA-based communication from the Defendants played any role whatsoever in his decision-making process. Thus, Plaintiffs' own testimony defeats their allegations of commonality, typicality, and adequacy.

Those differences in decision-making are magnified when the entire proposed class is considered. For example, some participants will not be able to prove reliance because they made a decision prior to the Class Period to hold United common stock long term, and not react to market fluctuations or day-to-day corporate events or announcements. Others will not be able to establish reliance because they dismissed the entire options backdating issue as unrelated to United's core business and were thus indifferent to what these Defendants allegedly said or failed to say about it. Still others may have been very interested in the options issue, but could not show reliance because they factored all of the information into their decision whether to hold or to sell.

In sum, Plaintiffs' Misrepresentation Claim is inherently individualized and the Court cannot presume that these Plaintiffs can establish reliance on behalf of the entire class. As a result, like the cases cited above, this case cannot be maintained as a class action.

2. Plaintiffs' Unique Investment Decisions Make the Prudence and Monitoring Claims Unsuitable for Class Treatment.

The same pattern of individualized behavior precludes certification of the Prudence Claim (Count II of the Complaint) and the Monitoring Claim (Count III of the

Complaint). Such behavior is demonstrated by the fact that most proposed class members continued to hold their Plan-based investments in United stock after public disclosure of United's alleged stock option practices, and that some – like Plaintiff Linn – acquired additional United stock outside of the Plan even after publication of the *Wall Street Journal* article. See Linn Dep., at 37:7-40:13 and 44:6-45:8.

Plaintiffs contend that United's alleged backdated stock option practices began "to be revealed" when the *Wall Street Journal* published an article on options backdating on March 18, 2006. Compl. ¶ 61. However, at and even after that time, most Plan participants continued to hold onto their interests in the UnitedHealth Stock Fund. For example, of the 23,668 participants with a balance in the UnitedHealth Stock Fund as of the start of the Class Period, only 828 transferred out of (or obtained a distribution from) the Fund following publication of the *Wall Street Journal* article and before the close of the Class Period. See Second Gilroy Decl., ¶¶ 22-23. Indeed, others, including Mr. Linn, purchased *additional* shares of United stock notwithstanding their knowledge of the alleged backdated stock options. See Linn Dep., at 44:6-45:8.

These individuals cannot complain of the Defendants' alleged decision to maintain the closed-end UnitedHealth Stock Fund as an investment option because they made the exact same decision to continue holding their interests in United stock. Thus, the facts relevant to them *directly conflict* with the very claim Plaintiffs assert as Class representatives – that United stock is an imprudent Plan investment that should have been

terminated long ago.⁷ In *Langbecker*, 476 F.3d at 315, the Fifth Circuit addressed an ERISA breach of fiduciary duty case plan in which tens of thousands of plan participants continued to hold their investments in employer stock offered through the company's 401(k) plan, despite public knowledge of information that negatively impacted the value of the stock, and in which one of the named plaintiffs acquired additional shares of company stock notwithstanding such information. According to the Fifth Circuit, such facts indicated that "[s]ubstantial conflicts exist among the class members, raising questions about the adequacy of the lead Plaintiff's ability to represent the class." *Id.* at 315. Specifically, the court found that:

Even after the EDS earnings warning and the drop in its stock price, thousands of Plan Participants (would-be class members), including [a named plaintiff] continued to direct money *into* the EDS Stock Fund. Over forty-four thousand Participants maintained investments in EDS stock as of February, 2004. This aggregate conduct seriously undermines the claim that the EDS Stock Fund was an imprudent investment that Appellants should not have offered in the first place.

Id.

⁷ Such conflicts preclude certification under Rule 23(a)(4). The aggregate conduct by Plan participants refutes the core premise of the Misrepresentation Claim (Count I) by showing clearly that Plan participants would not necessarily have sold their Fund interests had they known the alleged facts relating to United's stock options practices. It also undermines the Prudence Claim (Count II) and the Monitoring Claim (Count III), by showing that fully-informed stakeholders did, in fact, consider United stock a prudent investment for their 401(k) plan accounts even following public disclosure of issues related to United's options practices. As the Fifth Circuit observed in *Langbecker*, 476 F.3d at 315, this kind of divergent investment behavior among plan participants creates precisely the kind of intra-class conflicts that Rule 23(a)(4) is designed to weed out.

This conflict is exacerbated by the declaratory relief Plaintiffs seek, which would declare that the Defendants violated their fiduciary duties under ERISA by including the UnitedHealth Stock Fund as an investment option under the Plan (Compl. ¶ 95, Prayer for Relief (A)). The relief Plaintiffs seek, which could result in the dissolution of the UnitedHealth Stock Fund,⁸ would be directly adverse to the interests of Plan participants who wish to remain invested in the UnitedHealth Stock Fund. *Langbecker*, 476 F. 3d at 315.

Because Mr. Linn (and other Plan participants) have perpetuated the very "harm" they seek to correct as class and Plan representatives – by continuing to hold purportedly "imprudent" United stock – they are inadequate class representatives. Moreover, their conduct is plainly inconsistent with that of many proposed class members who are no longer invested in United stock.

3. Because Individualized Analyses Are Required for the ERISA § 404(c) Defense, Class Certification Is Not Appropriate.

ERISA § 404(c), 29 U.S.C. § 1104(c), provides that a plan may allow participant direction of plan investments and that, if participants control the investments in their accounts, then "no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control." *See also In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 443 (3d Cir.

⁸ See *Langbecker*, 476 F.3d at 315, n. 27 ("[E]ven if [plaintiffs] prevail without an injunction, their assertion that that the mere existence of the EDS Stock Fund violated a (continued)

1996) (holding that a fiduciary was not responsible for losses that resulted from an investor exercising independent control over his plan investment account). The Department of Labor's § 404(c) regulation confirms that the determination of whether the § 404(c) defense is available "depends on the facts and circumstances of the particular case." 29 C.F.R. § 2550.404(c)-1(c)(2). Accordingly, the § 404(c) analysis requires individualized assessments of each participant's control over account investment decisions. *See Langbecker*, 476 F.3d at 313 (noting, in the discussion of class certification, that a § 404(c) defense "contemplates an individual, transactional defense").

Courts recognize that this "facts and circumstances" inquiry with respect to participants' exercise of independent control over their plan accounts may make class certification inappropriate. In *Thomas*, the court found that the § 404(c) defense applied to "some of the claims asserted by potential class members." 219 F.R.D. at 342. Noting the possibility that the defendants would assert a § 404(c) defense in response to "some of the putative class members claims," the court concluded that "the possibility of such a defense render[ed] the potential class members' claims significantly different from and atypical of [the lead plaintiff's failure to disclose] claim," and denied class certification on the basis of such divergence. *Id.*

Similarly, the court in *Wiseman* held that a § 404(c) defense required individual determinations as to whether each participant exercised individual control with respect to

fiduciary duty under ERISA will have won the day. It is hard to imagine that the Fund would continue after such a finding").

his or her plan investment. 212 F.R.D. at 482. In a suit charging that the defendants breached their ERISA fiduciary duties in administering the plan, the court held that the issue of independent control would "require an individual analysis for each class member," and found that "[e]xamining the issue of independent control for each of hundreds or thousands of [plaintiffs would] make a class action unwieldy and impracticable." *Id.* at 487. Specifically, the court highlighted two plaintiffs who had made "conscious and informed" decisions to continue investing in the stock at issue, and noted that one plaintiff had unique knowledge of investment options by virtue of his professional background. *Id.* at 487-88. According to the court, the factual circumstances surrounding the plaintiffs' decision-making processes demonstrated the "individual analysis required to determine liability with regard to each class member." *Id.* at 488.

Here, the governing Plan documents clearly meet section 404(c) standards: participants have a wide range of investment options (First Gilroy Decl., Ex. A, at § 4.2.1 and 4.3; *id.*, at Ex. B, at 16-17), including virtually unlimited alternatives in self-directed brokerage accounts (*id.*); and the opportunity to control the disposition of their contributions among these investment options (*see* Sec. II.A, *supra*). And Plaintiffs do not dispute that they received accurate and complete information about the Plan's other investment options. Zilhaver Dep., at 39:12-18 and 40:4-19; Linn Dep., at 58:16-59:22. However, to adjudicate the § 404(c) defense, the Court must conduct an individual analysis of each class member's knowledge of the stock options practices at issue, and the extent to which their alleged lack of knowledge defeated the exercise of independent

control. Moreover, the Court will have to assess the impact, on each participant, of the *Wall Street Journal* article and subsequent public disclosures concerning United's stock options practices. The fact that the vast majority of proposed Class members – including Linn – continued to hold United stock notwithstanding such disclosures suggests that at least that sizeable portion of the putative Class did, in fact, exercise independent control for purposes of the § 404(c) defense.

In sum, if this action survives Defendants' motion to dismiss, issues of independent control over individual accounts will require an individual analysis for each participant, thus precluding class certification.

C. Plaintiffs Fail to Meet Their Burdens Under Rule 23(b).

1. Rule 23(b)(1) Is Not Satisfied Due to the Individualized Nature of the Claims.

Federal Rule of Civil Procedure 23(b)(1) provides that a class may be certified if:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests[.]

This action is not suitable for certification under Rule 23(b)(1) because of the individualized nature of Plaintiffs' claims, and the affirmative defenses that may be asserted against such claims, as detailed above. For example, Plaintiffs'

Misrepresentation Claim is not certifiable under Rule 23(b)(1) because it necessarily raises issues of reliance by each Class member. *See Lively*, 2007 WL 685861, at *16

(fiduciary misrepresentation claim, brought as part of an ERISA "stock drop" case against the sponsor of a 401(k) plan that invested in employer stock, failed to satisfy the class certification requirements set forth in Rule 23(b), with the court holding that "[i]n light of the individualized issues of reliance presented by [plaintiffs' misrepresentation claim], the Court concludes that class certification is inappropriate . . .").

Moreover, given that Plan participants made their own investment decisions with respect to their Plan accounts, for undoubtedly different reasons, and are subject to a § 404(c) defense, certification under Rule 23(b)(1) is not appropriate. *See Nelson v. Ipalco Enterprises Inc.*, IPO2-477CHK, 2003 WL 23101792, at *10-11 (S.D. Ind. Sept. 30, 2003) ("The existence of the individual accounts and individual investment decisions . . . means that the correct decisions for different class members may be different. . . . The presence of those individual issues and the prospect of different results for different class members means that Rule 23(b)(1) does not fit this case"). Accordingly, the Court should deny class certification under Rule 23(b)(1).

2. Rule 23(b)(2) Is Not Satisfied Because the Monetary Relief Plaintiffs Seek Is Not Incidental.

Class certification under Rule 23(b)(2) should be denied since the relief Plaintiffs ultimately seek – money damages – is not permitted under that Rule. "Class certification under Rule 23(b)(2) is proper *only* when the primary relief sought is declaratory or injunctive." *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1121 (8th Cir. 2005) (emphasis added). It is axiomatic that certification under Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money

damages." *Clay v. Am. Tobacco Co.*, 188 F.R.D. at 494 (citing 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 23 App. 04[02]). At its core, money is precisely what Plaintiffs seek here: the recovery of alleged investment losses deposited into participants' individual Plan accounts. Compl., Prayer for Relief (G)-(H).

Under Rule 23(b)(2), money may be recovered only if the predominant relief sought by plaintiffs is an injunction or declaration, and damages are "merely incidental" to the requested injunctive or declaratory relief. *Exhaust Unlimited, Inc. v. Cintas Corp.*, 223 F.R.D. 506, 512 (S.D. Ill. 2004) (monetary damages are proper only when they are "merely incidental to the litigation, as required under Rule 23(b)(2)") (citing *Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894, 896 (7th Cir. 1999)). See also *Lemon v. Int'l Union of Op. Eng'rs, Local No. 139*, 216 F.3d 577, 580 (7th Cir. 2000). Money damages are "incidental" under Rule 23(b)(2) only when they flow directly from liability to the class as a whole, and when such damages "do *not* depend in any significant way on the intangible, subjective differences of each class member's circumstances" and do not "require additional hearings to resolve the disparate merits of each individual's case." *Lemon*, 216 F.3d at 581 (emphasis added).

That is plainly not the case here, where Plaintiffs demand that damages be calculated to "allocate the restored losses to the accounts of Plan participants in proportion to the accounts' losses." Compl., Prayer for Relief (G).⁹ The individualized

⁹ Although Plaintiffs seek a declaration that Defendants breached their fiduciary duties, the mere request for such relief does not transform this case into an action in which (continued)

hearings required by Plaintiffs' action are unmanageable and prohibited in the 23(b)(2) class context. *See, e.g., Langbecker*, 476 F.3d at 317 ("[I]ndividual claimants may present issues of causation and reliance, so that a classwide determination that defendants violated ERISA's requirements would not necessarily lead to an award in favor of a particular claimant. Also, defendants may be able to raise individual defenses regarding each class members. Thus monetary relief here would not 'flow directly from liability to the class as a whole'"); *Nelson*, 2003 WL 23101792, at *11 (holding that, in stock drop case, monetary award to a plan would require individualized calculation, with issues of causation and reliance and individual defenses regarding class members, and therefore monetary relief would not "flow directly from liability to the class as a whole").¹⁰

Accordingly, class certification under Rule 23(b)(2) is not appropriate.

monetary damages are merely incidental to class-wide equitable relief. The Court must look beyond the label under which Plaintiffs cloak their demands and examine the true nature of the remedies sought. *See Nelson*, 2003 WL 23101792, at *11 (the "estimated \$170 million in monetary relief sought here is obviously not incidental" to the equitable relief requested in the complaint); *Exhaust Unlimited*, 223 F.R.D. at 512 (noting that a request for money damages raises suspicions as to the propriety of certifying a class under Rule 23(b)(2)); *Fisher*, 230 F.R.D. at 379 (denying certification under Rule 23(b)(2), noting that plaintiffs failed to substantiate their contention that they were seeking primarily equitable relief). *Cf. Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 216 (2002) (money held not to be equitable relief under ERISA where plaintiffs do not seek "particular funds or property in the defendant's possession").

¹⁰ *See also Gesell*, 216 F.R.D. at 626 (concluding that even though "a monetary award may be classified as equitable, determining the award of each individual class member would 'require judicial inquiry into the particularized merits of each individual plaintiff's claim.' When such an inquiry is necessary, certification under Rule 23(b)(2) is improper") (citation omitted); *In re Elec. Data Sys. Corp. "ERISA" Litig.*, 224 F.R.D. at 629-30 (denying class certification because "[p]laintiffs' Misrepresentation Claim (continued)

IV. CONCLUSION

The two named Plaintiffs have different—and conflicting—theories of breach of fiduciary duty, reliance, and damages that preclude either of them from acting on the other's behalf, let alone on behalf of the proposed Class. As set forth above, the Court should deny Plaintiffs' Motion for Class Certification.

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Respectfully submitted,

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requires individual determinations of materiality and reliance, and therefore class-wide relief is precluded"); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415-16 (5th Cir. 1998) (holding that where individualized proof of injury is necessary and monetary damages are sought, class certification is inappropriate).

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