

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

<p>Matthew T. Zilhaver and Sascha Linn,</p> <p style="text-align:center">Plaintiffs,</p> <p>vs.</p> <p>UnitedHealth Group, Inc., et al.,</p> <p style="text-align:center">Defendants.</p>	<p style="text-align:right">Court File No. 06-02237 JMR/FLN</p> <p style="text-align:center">DEFENDANT WILLIAM MCGUIRE'S MEMORANDUM OF LAW OPPOSING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND FOR RELATED RELIEF</p>
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Defendant William W. McGuire adopts and incorporates by reference the statement of facts, arguments, and authorities of the Opposition of Defendants UnitedHealth Group Incorporated, L. Robert Dapper, James A. Johnson, William G. Spears, Mary O. Munding, and Stephen J. Hemsley to Plaintiffs' Motion for Class Certification. Plaintiffs' motion for class certification should be denied for the reasons stated therein.

Dr. McGuire respectfully submits this Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification and for Related Relief to emphasize that both proposed named Plaintiffs are subject to unique individual defenses that make them wholly unsuited to serve as class representatives. A proposed named plaintiff who is subject to a unique hurdle that other members of the class are not burdened by cannot adequately represent the interests of the proposed class. Certifying this class will result in its representation by two named plaintiffs that, due to the differences in their claims

and the claims of the proposed class, will have every incentive to make strategic decisions in their own personal interests as opposed to the interests of the class members.

Plaintiffs' motion for class certification should be denied.

I. NEITHER NAMED PLAINTIFF IS A PROPER CLASS REPRESENTATIVE UNDER RULE 23(a)

Rule 23(a) permits “[o]ne or more members of a class” to sue “as representative parties” on behalf of the class but only if the requirements of Rule 23(a) are met.

“Without a class representative, the putative class cannot be certified and its claims cannot survive.” *Great Rivers Coop. v. Farmland Indus.*, 120 F.3d 893, 899 (8th Cir. 1997). *See also In re Milk Products Antitrust Litig.*, 195 F.3d 430, 435-36 (8th Cir. 1999) (affirming denial of motion for class certification where claim of named plaintiff was dismissed for lack of standing). Therefore, “[a] district court must ‘evaluate carefully the legitimacy of the named plaintiff’s plea that he is a proper class representative under Rule 23(a).’” *In re Milk Products*, 195 F.3d at 436 (citation omitted).

Both plaintiffs are subject to unique defenses. It is well-established that “[a] proposed class representative is not adequate or typical if [he] is subject to a unique defense that threatens to play a major role in the litigation.” *In re Milk Products*, 195 F.3d at 437. It is not necessary that the defense ultimately succeed: “the presence of even an arguable defense peculiar to the proposed representative may destroy typicality . . .” *In re Genesis Intermedia, Inc. Secs. Litig.*, 232 F.R.D. 321, 329 (D. Minn. 2005); *see also J.H. Cohn & Co. v. Amer. Appraisal Assocs., Inc.*, 628 F.2d 994, 999 (7th Cir. 1980). The reason is that a plaintiff who is subject to a unique defense (likely to impede

ultimate success on the merits) will be less willing to press forward and more willing to settle for amounts maximizing the value of *his* personal claim, even though it is undoubtedly worth less than the claims of class members not subject to these unique defenses. Rule 23 requires adequacy and typicality precisely in order to ensure that the class representatives' incentives are aligned with the class they purport to represent.

A. Mr. Zilhaver Is Not A Proper Class Representative

Mr. Zilhaver's circumstances are not typical of the class he proposes to represent. Mr. Zilhaver's voluntary decision to take a lump-sum distribution of all of his benefits places him in the distinct minority of the 23,668 persons who were participants at the start of the proposed class period. More importantly, Mr. Zilhaver does not have statutory standing and a named plaintiff "is not a proper representative of the class where he himself lacks standing to pursue the claim." *Hall v. LHACO, Inc.*, 140 F.3d 1190, 1196 (8th Cir. 1998); *see also In re Milk Products*, 195 F.3d at 436. As explained in Dr. McGuire's Motion to Dismiss, *Adamson v. Armco, Inc.*, holds that only current participants have standing to pursue a claim under ERISA, 44 F.3d 650, 654 (8th Cir. 1995) (citation omitted), and further holds that a former employee who voluntarily takes a lump sum distribution from a defined contribution employee stock plan is not a current participant, *id.* at 655 (describing *Gilquist v. Becklin*, 675 F. Supp. 1168 (D. Minn. 1987), *aff'd mem.*, 871 F.2d 1093 (8th Cir. 1988), as "the law of this circuit"). Accordingly, Mr. Zilhaver does not have standing and is not a proper class representative under Rule 23(a).

Even in the Seventh Circuit where Mr. Zilhaver's issue would be analyzed as a merits and not a standing issue, *see Harzewski v. Guidant Corp.*, 489 F.3d 799, 804 (7th

Cir. 2007) (“the question whether an ERISA plaintiff is a ‘participant’ entitled to recover benefits under the Act should be treated as a question of statutory interpretation fundamental to the merits of the suit rather than as a question of the plaintiff’s right to bring the suit”), he would still be subject to a unique defense on the merits that past participants are not entitled to recover, making him an inadequate class representative.

B. Mr. Linn Is Not A Proper Class Representative

Mr. Linn also is an inappropriate class representative because, on January 1, 2007, he signed a written Severance and Agreement Release with the Company. Linn Dep. Ex. 3; Linn Dep. at 29. The release included a letter explaining to Mr. Linn that it was his choice to sign the release, but that by doing so, he could “not take any legal action against UnitedHealth Group . . . arising out of [his] employment.” Linn Dep. Ex. 2. The release itself (Linn Dep. Ex. 3) provided that Mr. Linn would receive various enhanced severance benefits, *id.* at Section 2, and in exchange, he would release the company, “its present or former agents, directors, officers . . . whether in their official or Individual capacities” of all claims “known or unknown,” including “claims under . . . the Employee Retirement Income Security Act of 1974 (ERISA),” *id.* at Section 3.

A release of claims obviously conflicts with the other proposed class interests and would play a major role in this litigation if Mr. Linn were certified as a class representative. A proposed class representative who has signed a release, like Mr. Linn, has a claim that is questionable at best and will be at odds with the claims of other members of the class who have not signed any release. Such a class representative, therefore, may be substantially more anxious to settle and for a discounted amount,

regardless of the unreleased claims of the class he represents. Accordingly, courts have refused to certify classes where a named plaintiff has signed a release. *See Matthews v. Sears Pension Plan*, No. 95 C 1988, 1996 WL 199746, at *4-5 (N.D. Ill. Apr. 23, 1996) (denying class certification because named plaintiff signed release); *Walker v. Asea Brown Boveri, Inc.*, 214 F.R.D. 58, 66 (D. Conn. 2003) (finding release a “pivotal issue” and denying class certification).¹ In light of this “unique hurdle not faced by other class members,” Mr. Linn is not a typical or adequate class representative. *In re Milk Products*, 195 F.3d at 437.

II. CONCLUSION

Because Mr. Zilhaver is not a current participant, and because Mr. Linn signed a release of ERISA claims, each proposed named plaintiff is subject to a unique defense that prevents him from adequately representing the interests of the proposed class. Moreover, because the proposed class does not meet the requirements of Rule 23(a) or (b) as argued in *UnitedHealth et al.*’s brief, this Court should deny Plaintiffs’ Motion for Class Certification and for Related Relief in its entirety.

¹ *See also Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 313 n.26 (5th Cir. 2007) (noting that named plaintiffs who had not signed general release might be inadequate representatives of class members who had signed such releases, and instructing district court to consider issue on remand) (citing Jayne E. Zanglein & Susan J. Stabile, *ERISA Litigation* 479-80 (2d ed. 2005) (“[C]ourts have regularly found standing, typicality, or adequacy lacking where the defense of a release of claims was not shared by the named plaintiffs and the purported class”).

Dated: 8/7/07

s/Jodi F. Colton

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