**UNITED STATES DISTRICT COURT**
**DISTRICT OF CONNECTICUT**

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| HEALTHCARE STRATEGIES, INC., ET AL., Plaintiffs, | : | CIVIL ACTION NO. 3:11-CV-282 (JCH) |
| v. | : | |
| ING LIFE INSURANCE & ANNUITY CO. Defendant. | : | SEPTEMBER 26, 2012 |

**RULING RE:**
**PLAINTIFF'S MOTION TO CERTIFY CLASS (Doc. No. 43); PLAINTIFF'S MOTION TO DISMISS DEFENDANT'S COUNTERCLAIMS (Doc. No. 63); DEFENDANT'S MOTION TO FILE A SUR-REPLY (Doc. No. 80)**

## I. INTRODUCTION

Plaintiff Healthcare Strategies, Inc. ("HSI"), brings this action on behalf of itself and "all others similarly situated" against ING Life Insurance and Annuity Company ("ILIAC"), alleging that revenue sharing payments received by ILIAC constitute prohibited transactions and violations of fiduciary duties under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 et seq. Before the court are HSI's Motion for Class Certification (Doc. No. 43), HSI's Motion to Dismiss Counterclaims (Doc. No. 63), and ILIAC's Motion For Leave to File a Sur-Reply (Doc. No. 80). For the reasons set forth below, HSI's Motion for Class Certification is granted, HSI's Motion to Dismiss Counterclaims is granted in part and denied in part, and ILIAC's Motion for Leave to File is denied.

## II. BACKGROUND

HSI is the Plan Administrator of two 401(k) plans, and as such is a fiduciary of those plans. Compl. ¶ 11. Until March 2011, when the parties to this case terminated their contractual relationship, See Def.'s Mem. in Opp'n to Mot. to Certify (Doc. No. 69)

("Def.'s Mem. in Opp'n") at 33-34, ILIAC provided investment services to HSI in the manner described as follows. ILIAC provides retirement services through a "comprehensive suite of dedicated tools and resources to help support and manage" retirement plans. Compl. ¶¶ 21, 24.

One of the services that ILIAC provides is management of retirement plan assets pursuant to the terms of "Group Contracts." Compl. ¶ 26. ILIAC controls which investments are available to the plans and participants, and it provides advice about those options. Plan assets are invested in three types of accounts: fixed accounts, guaranteed accumulation accounts, and separate accounts. Compl. ¶ 29. This court previously dismissed HSI's claims related to the fixed accounts and guaranteed accumulation accounts. See Ruling Re Motion to Dismiss (Doc. No. 40).

ILIAC offers the plans at issue in this case in the form of its Multiple Asset Portfolio ("MAP") products, which are typically sold by third-party brokers. Declaration of Robert A. Richard, Ex. B to Def.'s Mem. in Opp'n (Doc. No. 72-2) ("Richard Declaration") ¶¶ 2-3. ILIAC chooses funds to make up a menu of investment options, from which plan sponsors may choose options to offer to plan participants. Id. ¶ 8. All of the MAP products allow participants to allocate contributions to variable investment options, by which allocation the participant purchases units of participation in a pooled separate account, which in turn owns shares of underlying investments such as mutual funds. Id. ¶ 10. The separate accounts are divided into sub-accounts corresponding to plan participants' choices of mutual funds. Compl. ¶¶ 33-35. ILIAC owns the separate accounts, which are used to invest in mutual funds on behalf of plan participants, and it acts as a single shareholder in the underlying mutual funds. Richard Declaration ¶ 10;

Pl.'s Mem. in Support of Mot. to Certify Class (Doc. No. 43-1) ("Pl.'s Mem. in Support") at 11; see also Dep. of Gordon Elrod, Ex. A to Pl.'s Reply (Doc. No. 79-1) at 18, 79. ILIAC controls the investment of separate account assets, determines charges and fees, retains authority to change the funds available through the separate account, and to discontinue any fund offered through the separate account. See Application for Group Pension Contract, Ex. 1 to Richard Declaration at 23; Dep. of Robert Richard, Ex. C to Pl.'s Mem. in Support at 60-64..

HSI posits that ILIAC has breached its fiduciary duties under ERISA in several ways. First, HSI alleges that ILIAC uses its control over account options and investments to obtain revenue sharing payments from mutual funds and to engage in other self-dealing in violation of ERISA section 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A) and (B). Compl. ¶¶ 101, 105. Specifically, HSI alleges that ILIAC has included certain mutual funds as investment options based on the funds' revenue sharing payments to ILIAC rather than the funds' potential to benefit the plans. Compl. ¶ 70. HSI claims that ILIAC is "liable to restore to the Plans the losses they have suffered as a direct result of [ILIAC]'s breaches of fiduciary duty and are liable for any other available equitable or remedial relief . . . ." Compl. ¶ 108. In the second count, HSI contends that ILIAC's receipt of revenue sharing payments constitute prohibited transactions under ERISA sections 406(b)(1) and (3), 29 U.S.C. §§ 1106(b)(1) and (3), and seeks "an order declaring that the above-described practices of [ILIAC] in connection with the revenue sharing payments and its earning of excessive compensation through self-dealing violate ERISA . . . and seeks a permanent injunction preventing [ILIAC] from engaging in such conduct in the future" pursuant to ERISA

section 502(a)(3), 29 U.S.C. § 1132(a)(3). Compl. ¶ 114. In its third count, HSI claims in the alternative for "all recoverable damages and relief" recoverable from ILIAC, if it is not deemed a fiduciary, for knowing participation in a breach of trust. Compl. ¶ 106.

ILIAC asserts five counterclaims against HSI: for contribution and indemnity under ERISA; for common law contribution and indemnity, and for breach of fiduciary duty under ERISA. See Answer (Doc. No. 52) at 23-43. All of the counterclaims are contingent on a finding that ILIAC is liable to HSI and are premised on the theory that HSI--as a fiduciary of the plan with knowledge of ILIAC's actions and policies alleged in the Complaint--may be held liable for those actions and policies. Id.

## III. MOTION TO CERTIFY CLASS

### A. Standard

Plaintiffs bear the burden of showing that the class they have proposed meets the requirements for class certification. See Amchem Products, Inc. v. Windsor, 521 U.S. 591, 614 (1997). "[T]he preponderance of the evidence standard applies to evidence proffered to establish Rule 23's requirements." Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc., 546 F.3d 196, 202 (2d Cir. 2008). A court must "receive enough evidence, by affidavits, documents, or testimony, to be satisfied that each Rule 23 requirement has been met." In Re Initial Pub. Offerings Secs. Litig., 471 F.3d 24, 41 (2d Cir. 2006).

The Second Circuit has defined the standard that district courts are to use in deciding whether a plaintiff has met its burden under Rule 23. Id. at 41. A "district court may not grant class certification without making a determination that all of the Rule 23 requirements are met." Id. at 40. These determinations "can be made only if the judge

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." Id. at 41. Although the court does not rule on the merits of a claim at the certification stage, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974), "[t]he obligation to make such determinations is not lessened by overlap between a Rule 23 requirement and a merits issue, even a merits issue that is identical with a Rule 23 requirement." In Re Initial Pub. Offerings Secs. Litig., 471 F.3d at 41.

B. Discussion

HSI seeks to certify a class pursuant to Rule 23(b)(1), or, in the alternative, Rule 23(b)(3), defined as follows:

> All administrators of employee pension benefit plans covered by the Employee Retirement Income Security Act of 1974 subject to Internal Revenue Code §§ 401(a), (k) with which ING has maintained a contractual relationship based on a group annuity contract or group funding agreement and for which, since February 23, 2005, ING has received revenue sharing payments (e.g., asset based sales compensation, service fees under distribution and/or servicing plans adopted by funds pursuant to Rule 12b-l under the Investment Company Act of 1940, administrative service fees and additional payments, and expense reimbursement) from any mutual fund, investment advisor or related entity.[1]

Pls.' Mem. in Support of Mot. to Certify at 24; Pl.'s Reply at 10 n.29.

1. Numerosity

Rule 23(a)(1) requires that the class be "so numerable that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Generally, numerosity is presumed when a proposed class includes at least forty members. See Consol. Rail

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[1] HSI, in its Reply at 10 n.29, agrees to modify its class description to delete "and other similar revenue and compensation," a phrase objected to by ILIAC. See Def.'s Mem. in Opp'n. at 40.

Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir. 1995). HSI claims, and defendants apparently concede, that the relevant plans number in the thousands, thus satisfying the numerosity requirement. Pls.' Mem. in Support of Mot. to Certify at 4, 25.

2. Commonality

Rule 23(a)(2) requires "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Commonality is met if the "plaintiffs' grievances share a common question of law or of fact." Marisol A. v. Giuliani, 126 F.3d 372, 376 (2d Cir. 1997). A single common question is sufficient to meet this standard; however, the question must be of the type that is capable of classwide resolution. See Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2551, 2556 (2011). That is, resolution of the common question "will resolve an issue that is central to the validity of each one of the claims in one stroke." Id. at 2251. In determining commonality, courts should focus on "the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." Id. (internal quotations omitted) (emphasis in original).

HSI argues that the proposed class shares a "common grievance": "that [ILIAC] was a fiduciary and that it violated ERISA by accepting revenue sharing payments from the mutual fund complexes." Pls.' Mem. in Support of Mot. to Certify at 26. It contends that factual and legal issues common to members of the proposed class and susceptible to common proof include: whether ILIAC is or was an ERISA fiduciary; whether revenue sharing payments were prohibited transactions under ERISA; whether the revenue sharing payments were received in connection with ILIAC's fiduciary status; and the form of relief available. Id. at 26-27.

ILIAC argues that HSI has not made a sufficient case for commonality. Specifically, it argues that individualized, plan-by-plan analyses are necessary to determine in the case of each proposed class member: whether ILIAC was acting as a fiduciary at the relevant time; whether revenue sharing payments involved plan assets; whether other factors caused alleged losses to plans; whether revenue sharing payments constituted "excessive compensation"; whether claims are time-barred; and whether ILIAC may have meritorious counterclaims as against each proposed class member. See Def.'s Mem. in Opp'n at 13-31.

a. ILIAC's Status as a Fiduciary

In ERISA suits alleging breach of fiduciary duty, the threshold question is whether the defendant acted as a fiduciary when taking the action subject to the complaint. In re Citigroup ERISA Litig., 662 F.3d 128, 135 (2d Cir. 2011) (citing Pegram v. Herdrich, 530 U.S. 211, 226 (2000). ERISA creates fiduciary duties only to the extent that a person or entity exercises discretionary authority or discretionary control respecting management of a covered plan or has discretionary authority or responsibility in the administration of a covered plan. Id.; see also 29 U.S.C. § 1002(21)(A)) ("a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan"). "[Section] 1002(21)(A) creates a bifurcated test: 'Subsection one imposes fiduciary status on those who exercise discretionary authority, regardless of whether such authority was ever granted. Subsection three describes

those individuals who have actually been granted discretionary authority, regardless of whether such authority is ever exercised.'" Bouboulis v. Transp. Workers Union, 442 F.3d 55, 63 (2d Cir. 2006) (quoting Olson v. E.F. Hutton & Co., 957 F.2d 622, 625 (8th Cir. 1992)).

HSI argues that ILIAC is a fiduciary because "it maintains the Plans' assets in separate accounts under its own name, which it owns, manages, administers, controls and over which it possesses and exercises discretion." Pl.'s Mem. in Support at 4; see also id. at 15-17. ILIAC does not dispute that it owns the separate accounts. See Def.'s Mem. in Opp'n at 17.

ILIAC first argues that it cannot be held to fiduciary status as to all putative class members based on its control of the universe of options available to plan trustees. See Def.'s Mem. in Opp'n at 15 (citing Hecker v. Deere & Co., 556 F.3d 575, 583-84 (7th Cir. 2009)). ILIAC's claim that "[t]he overwhelming weight of authority rejects the theory that simple creation of a menu of investment options renders a service provider a fiduciary" is unsupported by the cases it cites. Def.'s Mem. in Opp'n at 15. In Hecker, for example, the Seventh Circuit distinguished the investment advisor who "played a role in the selection of investment options," as alleged in Hecker, from cases in which service providers had "ultimate authority over the selection of funds" or "the authority to delete and substitute mutual funds." Hecker, 556 F.3d at 584. In Zang v. Paychex, the court similarly distinguished cases in which service providers had final authority to delete or substitute the funds available, holding that Paychex was not a fiduciary because, inter alia, it lacked authority to unilaterally delete offerings. 728 F. Supp. 2d 261, 270-72 (W.D.N.Y. 2010).

Moreover, ILIAC's attempt to distinguish Haddock, in which the court held that the defendant's contractual right to substitute and delete mutual funds from its menus made it a fiduciary without regard to whether such authority was exercised, is unavailing. See Def.'s Mem. in Opp'n at 16 n.28; Haddock v. Nationwide Fin. Servs., Inc., 262 F.R.D. 97 (D. Conn. 2009) ("Haddock IV") vacated on other grounds by Nationwide Life Ins. Co. v. Haddock, 460 Fed. App'x 26 (2d Cir. 2012). ILIAC argues that Haddock IV is inapposite because the defendant in that case "could alter the investment menu without any input from or notice to the plan fiduciaries," Def.'s Mem. in Opp'n at 16 n.28, whereas ILIAC is required to provide notice of a change, and "plan fiduciaries could reject it by opting out of the contract," id. at 16. The cited portion of Haddock IV merely indicates, however, that the defendant retained the authority to delete and substitute mutual funds from the plan "without seeking approval from the named fiduciary," and does not indicate whether notice to plans was required. Haddock IV, 262 F.R.D. at 108 n.6.[2] Haddock IV is emphatic in its holding that the defendant's contractual right to modify the menu, rather than any other feature of the contract, determines its status as a fiduciary. Id. at 108.

ILIAC's contracts provide for notice upon such changes, but not the opportunity to reject the changes and keep their plans. Some of ILIAC's contracts also provide for

[2] The court cannot locate in any of the Haddock decisions an indication of whether the defendant in that case was required to notify plans of mutual fund deletions orsubstitutions. The defendant cites Hecker, 556 F.3d at 584, but that court does not provide a pincite for where that point can be found in Haddock I.

asset-based fees upon termination under certain conditions.[3] See Pl.'s Mem. in Support at 15 (citing Deposition of Robert Richard, Ex. C to Pl.'s Mem. in Support at 63-64); Application for Group Pension Contract, Ex. 1 to Richard Declaration at 23; Def.'s Mem. in Opp'n at 16 n.29. The ability to reject a change to a contract clearly implies the ability to reject a change while maintaining the meaningful aspects of that contract. The Department of Labor has recognized as much. In an advisory opinion addressed to ALIAC, the predecessor to ILIAC, the Department of Labor advised that, even if ALIAC provided only non-discretionary administrative and recordkeeping services, it could be a fiduciary if it retained the authority to change the menu of available investment options unless it provides advance notice of any change and permits plan fiduciaries to reject the change and terminate services without penalty. Dep't of Labor Op. No. 97-16A, 1997 WL 27797, at *5 (May 22, 1997). ILIAC's argument that the ability of plans to terminate contracts without a fee varied widely and was a result of individual negotiation of service contracts, see Def.'s Mem. in Opp'n at 16 n.29, undercuts its argument that it did not exercise discretion or control in conjunction with its ownership of separate accounts. ILIAC's argument that this case can be distinguished from Haddock IV by the requirement of notice is both factually questionable and legally inapt.

ILIAC next argues that, because it does not control the allocation of plan assets to the separate accounts, it cannot be a fiduciary with respect to receipt of revenue sharing payments because it lacks discretionary authority over the plan's assets. Def.'s Mem. in Opp'n at 17. As discussed above, ILIAC's authority to delete or substitute

[3] ILIAC argues that HSI provides "no evidence that this [surrender fee based on rejection of a change in contract] has ever happened, much less that it happened universally across all plans." Def.'s Mem. in Opp'n at 16 n.29.

plans from its menu constitutes sufficient control and authority to render ILIAC a fiduciary.[4]

For the purpose of class certification, the court finds that ILIAC's contractual right to delete and substitute mutual funds from its menu gave it discretion with respect to the administration of the plan sufficient to make it a fiduciary with respect to its allegedly inappropriate receipt of revenue in exchange for the inclusion of those funds in its menu. ILIAC's other arguments are more properly addressed on their merits at a later stage of this litigation.

b. Whether Revenue Payments Involved Plan Assets

ILIAC next argues that a plan-by-plan inquiry would be required to determine whether revenue sharing payments involved plan assets.[5] Def.'s Mem. in Opp'n at 20. HSI claims that the receipt of revenue sharing payments violates ERISA sections 406(b)(1) and (3), which prohibits a fiduciary from "deal[ing] with assets of the plan in his own interest or for his own account" and "receiv[ing] any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving assets of the plan." 29 U.S.C. § 1106(b)(1), (3). Only the first of these two

[4] In Charters—in a passage directly after the language ILIAC quotes which doubts that the issuance of variable annuity contracts is sufficient to confer fiduciary status—the court declined to resolve the question, finding that the defendant was a fiduciary regardless because, inter alia, it retained the right to substitute investment options in a manner similar to the one at issue in this case. Def.'s Mem. in Opp'n at 17 (citing Charters v. John Hancock Life Ins. Co., 583 F.Supp.2d 189, 197, 197-99 (D. Mass. 2008)).

[5] Under the heading of this argument, ILIAC also argues that revenue sharing payments are not plan assets as a matter of law. Def.'s Mem. in Opp'n at 20-21. This argument is misplaced, as is its reliance on Hecker, which held that revenue sharing payments were not plan assets when they were made by mutual funds to service providers that were neither the final arbiters of the funds' inclusion in the plans' menu nor the owners of the plan assets. See Hecker, 556 F.3d at 583-84. ILIAC's selective quotation implies that the Hecker court held that payments by mutual funds are not plan assets as a matter of statutory law. See Def.'s Mem. in Opp'n at 21. In reality, the cited passage explains that assets of funds which contain plan assets do not become plan assets in their entirety merely by virtue of the investment of plan assets. Hecker, 556 F.3d at 583-84.

provisions could reasonably—but not necessarily—be interpreted to require that the revenue sharing payments be plan assets; the second permits a more attenuated relationship between the alleged prohibited transaction and the assets of the plan.

The court in Haddock v. Nationwide Fin. Servs., Inc., 419 F. Supp. 2d 156 (D. Conn. 2006) ("Haddock I") defined plan assets to "include items a defendant holds or receives: (1) as a result of its status as a fiduciary or its exercise of fiduciary discretion or authority, and (2) at the expense of plan participants or beneficiaries." Id. at 170. As discussed above, under HSI's theory, ILIAC is a fiduciary with respect to the inclusion of funds in its menu, and uses its investment power amassed from the assets of the plans to arrange revenue sharing agreements. HSI alleges that the revenue sharing payments are made at the expense of the plans because this payment structure causes the funds to elevate their fees. See Compl. ¶ 103. ILIAC argues that, in order to show that these payments are at the expense of plan participants, HSI must prove whether and how much each plan's expense ratio increased by virtue of revenue sharing payments by any mutual fund included in that plan. See Def.'s Mem. in Opp'n at 21. The court rejects ILIAC's argument—that the question of whether revenue sharing payments from mutual funds to ILIAC were made at the expense of plans or beneficiaries necessarily implicates the question of the amount of each of the plans' losses. In other words, HSI has identified a question common to the class: whether ILIAC used the plans' assets held in the separate accounts in its own interest

or for its own account.[6] The amount may vary, but the issue (and answer) is common.

This reasoning also applies to ILIAC's argument that commonality is lacking because an individualized inquiry is required to determine whether the revenue sharing payments constituted excessive compensation with respect to each plan. See Def.'s Mem. in Opp'n at 24-25. If a transaction violates section 406(b), it violates ERISA without regard to the "reasonableness" of the compensation for services performed. See Haddock IV, 262 F.R.D. 97, 129-130 (D. Conn. 2009). Thus, whether such compensation is "excessive" would be irrelevant.

c. Whether There Were Intervening Direct Causes of Injury

ILIAC next argues that commonality is lacking because an individualized inquiry is required as to whether there was an intervening direct cause of any injury to each plan. See Mem. in Opp'n at 22. Essentially, ILIAC argues that plan fiduciaries who chose plans that included funds that made revenue sharing payments are direct intervening causes of any losses to plans resulting from those payments, thus absolving ILIAC of liability. Id. at 22-23. For this, ILIAC cites a case discussing the requirement that civil RICO plaintiffs prove reliance on defendants' misrepresentation. See id. at 22 (quoting McLaughlin v. American Tobacco Co., 522 F.3d 215, 226 (2d Cir. 2008), abrogated by Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. 639, 657-58 (2008) (holding first-party reliance not required; plaintiffs may show a direct relationship between defendants' misrepresentations and injury)). Section 406(b) of ERISA

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[6] The court notes that Haddock I discusses the definition of plan assets in a ruling on a motion for summary judgment. See Haddock I, 419 F. Supp. 2d 156 (D. Conn. 2009). Haddock IV addresses class certification and, on this question, notes only that the plaintiffs identified the common question of whether the defendant dealt with plan assets in its own interest or for its own account. Haddock IV, 262 F.R.D. 97, 117 (D. Conn. 2009).

conspicuously lacks a causation requirement. Compare 29 U.S.C. § 1106(a) ("[a] fiduciary with respect to a plan shall not cause the plan to engage in a transaction") (emphasis added) with 29 U.S.C. § 1106(b) ("a fiduciary with respect to a plan shall not deal with the assets of the plan in his own interest or for his own account"). Section 409 does require that a breach of fiduciary duty caused the loss to the plan upon which plaintiff sues. See 29 U.S.C. § 1109. HSI argues, in essence, that this discussion of injury is irrelevant because numerous courts have held that proof of injury is not required to prove liability for engaging in a prohibited transaction. See Pl.'s Reply at 4; see, e.g., Etter v. J. Pease Constr. Co., Inc., 963 F.2d 1005, 1010 (7th Cir. 1992); Raff v. Belstock, 933 F. Supp. 909, 916 (N.D. Cal. 1996); McDougall v. Donovan, 552 F. Supp. 1206, 1215 (N.D. Ill. 1982). Although different actors may have participated in different plans' choices, this would not destroy the commonality of proof of prohibited transactions, and therefore, the court rejects ILIAC's argument that intervening causes of the plans' choices destroys commonality.

d. Defenses and Counterclaims

ILIAC argues that its statute of limitations defense requires an inquiry into when each plan had actual knowledge of the facts necessary to make its claim, and that such individualized inquiry undermines commonality. See Mem. in Opp'n at 25-27. Courts have consistently held that a statute of limitations defense as to some class members does not defeat certification. See Jermyn v. Best Buy Stores, L.P., 256 F.R.D. 418, 430 (S.D.N.Y. 2009); Duprey v. Connecticut Dept. of Motor Vehicles, 191 F.R.D. 329, 340-41 (D. Conn. 2000); see also Brown v. Kelly, 609 F.3d 467, 483 (2d Cir. 2010) (noting that the existence of a defense that affects different class members differently does not

compel a finding that individual issues predominate). Moreover, in this case, the class is defined to include plans for which ILIAC has received revenue sharing payments in the six years prior to the date that HSI brought this case. Therefore, ILIAC's potential statute of limitations defense does not destroy commonality.

ILIAC's final argument against commonality is that its counterclaims against HSI for contribution, indemnity, and breach of fiduciary duty require individualized inquiry as against HSI, as would similar claims that it would likely pursue against other class members. See Def.'s Mem. in Opp'n at 27-28. For the reasons discussed below, those counterclaims survive only in a limited state: ILIAC may counterclaim for contribution and indemnity only to the extent that any liability established on Count One is established to be over and above the benefit ILIAC received from the revenue sharing payments. See infra at IV. However, any of these claims, if successfully brought and proved against any class member, would affect the apportionment of damages among co-fiduciaries, and not the fact of ILIAC's liability, which is assumed by claims for contribution and indemnity. See Haddock IV, 262 F.R.D. 97, 119 (finding counterclaims not unique to named plaintiffs and because derivative of and dependent on a finding of breach of fiduciary duty, unlikely to become the focus of the litigation). Even in the face of such claims, the class that HSI proposes is susceptible to the resolution of issues central to the validity of each class member's claim "in one stroke." Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2551, 2551 (2011). This consideration does not undermine the "capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." Id.

3. Typicality

Rule 23(a)(3) is satisfied if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Typicality "is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." Marisol A. v. Giuliani, 126 F.3d 372, 376 (2d Cir. 1997) (quoting In re Drexel Burnham Lambert Grp., Inc., 960 F.2d 285, 291 (2d Cir.1992)). Typicality is generally met where the plaintiff demonstrates that the same unlawful conduct was directed at both the named plaintiff and the proposed class. See Robidoux v. Celani, 987 F.2d 931, 936-37 (2d Cir. 1993). Here, HSI alleges that, by accepting revenue sharing payments from mutual funds in which plans invest through ILIAC's separate account, ILIAC engages in prohibited transactions with respect to the plans that invest through ILIAC's separate account. This satisfies typicality.[7]

4. Adequacy

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This generally requires plaintiffs to make a two-part showing: first, that the lead plaintiff's interests are not "antagonistic" to the other members' interests, and second, that the plaintiffs' attorneys are "qualified, experienced and able to conduct the litigation." Baffa v. Donaldson,

[7] In arguing against typicality, ILIAC rehashes its commonality argument about the statute of limitations. See Def.'s Mem. in Opp'n at 30; supra, p. 14. It also argues that HSI is atypical because the experience and qualifications of its sole shareholder is not common among other plan administrators, and because the process that HSI used in making purchasing decisions may not be similar to other plan administrators' decisions. See Def.'s Mem. in Opp'n at 29-30. These arguments in no way suggest that HSI's interests are antagonistic, or atypical, to those of other members.

Lufkin & Jenrette Sec. Corp., 222 F.3d 52, 60 (2d Cir. 2000). ILIAC does not contest the adequacy of HSI's counsel, and the court finds that HSI's attorneys have provided evidence that they are experienced in complex litigation including class actions on a variety of claims including claims brought pursuant to ERISA. See Summary of Firm Qualifications, Ex. 5 to Ex. F to Pl.'s Mem. in Support.

ILIAC argues, however, that HSI's interests are antagonistic to those of putative class members for two reasons: first, that ILIAC's theory, if proven, exposes plan trustees to liability for entering into contracts that contemplate revenue sharing, and second, that if ILIAC succeeds in showing that the revenue sharing payments are prohibited transactions, the plans will be forced to pay their fees to ILIAC in some way that is not illegal under ERISA. See Def.'s Mem. in Opp'n at 31-33. As to the first argument, if HSI proves that revenue sharing payments to ILIAC were prohibited transactions, surely the trustees of those plans would be in a better position vis-à-vis potential claims for breach of fiduciary duty if they are members of a class of plaintiffs who recover based on HSI's success than if they are merely co-fiduciaries with ILIAC but not parties to this case. But, of course, this is for the plans' fiduciaries to decide, and not for the defendant. The second argument deserves no comment.

ILIAC contends that HSI is "an inadequate representative with regard to the claim that ILIAC's purported failure to offer I-class shares harmed participants" because its administrator—the sole shareholder of HSI—"disclaimed any knowledge regarding I-class shares." Def.'s Mem. in Opp'n at 34. The court first notes that class representatives are not required to understand all legal detail of complex litigation. "[C]lass representative status may be properly denied where the class representatives

have so little knowledge of and involvement in the class action that they would be unwilling or unable to protect the interests of the class against the possibly competing interests of the attorneys." Baffa v. Donaldson, Lufkin & Jenrette Secs. Corp., 222 F.3d 52, 61 (2d Cir. 2000) (internal quotation omitted). Even if it were clear that HSI lacked knowledge of I-shares, there is no evidence that HSI has been unwilling or unable to protect class interests. Moreover, ILIAC's assertion that HSI "disclaimed any knowledge regarding I-shares," Def.'s Mem. in Opp'n at 34, belies the evidence it cites: a one-word response to a deposition question indicating that, at the time HSI made investment selections, its administrator did not know what an institutional share class of a mutual fund was. See Dep. of Regina Reardon, Ex. A to Def.'s Mem. in Opp'n at 246. Finally, the court notes that, once again, ILIAC is trying to have its cake and eat it, too, having argued at some length that HSI cannot satisfy the typicality requirement because of her greater-than-average familiarity with benefits law and ERISA. See Def.'s Mem. in Opp'n at 29-30. The court does not find that Reardon's deposition statement weakens HSI's adequacy as a class representative.

Under the heading of adequacy, ILIAC also argues that HSI is an inadequate class representative because the termination of the contractual relationship between HSI and ILIAC disables HSI from pursuing injunctive relief on behalf of the proposed class. See Def.'s Mem. in Opp'n at 33-34. ILIAC characterizes this as a question of HSI's standing to seek injunctive relief. Id. Because ILIAC does not question that HSI had capacity to seek injunctive relief when it first brought this suit, ILIAC's instant argument is more accurately considered to raise a question of whether the mootness of

HSI's claim for injunctive relief makes HSI an inadequate class representative.[8] See Haddock IV, 262 F.R.D. 97, 114-115 (D. Conn. 2009) (citing Comer v. Cisneros, 37 F.3d 775, 797-98 (2d Cir. 1994) and noting that the termination of the plaintiff plan's contract with the defendant raised the question of the mootness of that plaintiff's claim for injunctive relief and not the question of that plaintiff's standing).

Assuming that HSI may not pursue injunctive relief as the representative of a class that includes plaintiffs with valid claims for injunctive relief,[9] it is nonetheless inappropriate to deny class certification on this basis where, as here, the named plaintiff has standing to bring its other claims. See Selby v. Principal Mut. Life Ins. Co., 197 F.R.D. 48, 64 (S.D.N.Y. 2000); see also Martens v. Thomann, 273 F.3d 159, 173 n.10 (2d Cir. 2001) (noting in dicta that, where class representatives have individual standing, they may continue to represent a class even if their individual claims become moot). In such circumstances, the court may allow plaintiffs to identify a new named plaintiff who may seek injunctive relief on behalf of the class members entitled to it. Id.; see also 1 Newberg on Class Actions § 2.14 ("When mootness occurs as to injunctive . . . relief sought, the action will not be dismissed as long as the other claims for relief, such as for declaratory judgment, for damages, or for a prospective injunction, remain.") (footnotes omitted); 1 Newberg on Class Actions § 3.25 ("Potential conflicts relating to relief issues which would arise only if the plaintiffs succeed on common claims of liability

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[8] ILIAC does not contend that HSI lacks standing as a general matter. The court notes that neither party appears to question HSI's statutory or constitutional standing to bring its claim for non-injunctive relief.

[9] But cf. Charron v. Pinnacle Grp. NY LLC, 269 F.R.D. 221, 235 (S.D.N.Y. 2010) (where named plaintiffs had not resolved their grievances with defendants at the time they filed their lawsuit, the later resolution of their individual grievances neither deprived them of standing nor created a problem of mootness, and they were therefore adequate representatives of a class that remained aggrieved).

on behalf of the class will not bar a finding of adequacy and may be resolved, when the need arises, by the formation of subclasses at the relief stage.").

In this case, the fact that HSI is no longer in a position to benefit from any injunctive relief that may become available does not mean that HSI's interests are hostile to those of putative class members who may have valid claims for injunctive relief. To the contrary, common proof would entitle HSI and other putative class members to the remedies to which they are entitled—proof that the revenue sharing payments constitute prohibited transactions. While the court is inclined to find that the mootness of HSI's claim for injunctive relief does not preclude a finding of its adequacy as a class representative, it suggests that HSI identify and add an additional named plaintiff with unquestioned capacity to seek injunctive relief on behalf of the class within sixty days.

5. Rule 23(b) Requirements

a. Rule 23(b)(1)

In order to be certified as a class action, a class must not only meet all Rule 23(a) requirements, but it must also qualify under one of the three Rule 23(b) subdivisions. HSI seeks to certify a class pursuant to either Rule 23(b)(1) or 23(b)(3). Rule 23(b)(1)(A) covers cases in which multiple suits would create a risk of inconsistent adjudications or would possibly establish incompatible standards of conduct for the party opposing the class, and Rule 23(b)(1)(B) covers cases in which individual actions would, as a practical matter, conclude the interests of other members of the class or preclude their ability to protect their own interests. See Fed. R. Civ. P. 23 Advisory Committee's Note to 1966 amendment, subdivision (b)(1); see also Z.D. ex rel. J.D. v.

Grp. Health Co-op, No. C11-1119RSL, 2012 WL 1977962, at *6 (W.D. Wash. June 1, 2012) ("this subsection is particularly appropriate in cases charging breach of trust by a fiduciary against a large class of fiduciaries"). Courts apply Rule 23(b)(1)(A) restrictively, to classes in which there is a statutory obligation to treat class members alike. See Richards v. FleetBoston Fin. Corp., 238 F.R.D. 345, 353 (D. Conn. 2006). Courts, including this one, have noted that Rule 23(b)(1)(A) certification is particularly well-suited to certain ERISA class actions. See id.; In re Citigroup Pension Plan ERISA Litigation, 241 F.R.D. 172, 179 (S.D.N.Y. 2006) ("[t]he language of subdivision (b)(1)(A), addressing the risk of inconsistent adjudications, speaks directly to ERISA suits") (internal quotations omitted).

In Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2558 (2011), the Supreme Court noted that certification under Rule 23(b)(1) shares "the most traditional justifications for class treatment" with certification under Rule 23(b)(2), the provision at issue in the Wal-Mart case. The Court distinguished classes certified under these provisions as not requiring the procedural protections afforded by Rule 23(b)(3) because they seek "indivisible injunction[s] benefitting all [their] members at once." Id. With classes of plaintiffs with "individualized monetary claims," on the other hand, predominance and superiority are not self-evident. Id.; see also Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 621 (1998) (Rule 23(b)(3) was "framed for situations in which class-action treatment is not as clearly called for" (internal quotations omitted)). It has often been stated that Rule 23(b)(1) applies only to suits that seek solely or predominately injunctive or delcaratory relief, and does not apply to actions where compensatory damages claims are more than "incidental." See, e.g., Hecht v. United

Collection Bureau, Inc., No. 11-1327, 2012 WL 3538269 (2d Cir. Aug. 17, 2012); Oakley v. Verizon Communications Inc., No. 09 Civ. 9175(CM), 2012 WL 335657, *11 (S.D.N.Y. Feb. 1, 2012) (citing cases); Cashman v. Dolce Intern./Hardford, Inc., 225 F.R.D 73, (D. Conn. 2004); Petrolito v. Arrow Fin. Servs., LLC, 221 FRD 303, 313 (D. Conn. 2004); Abramovitz v. Ahern, 96 F.R.D. 208, 215 (D. Conn. 1982). The Dukes Court, however, did not address whether monetary damages incidental to "indivisible injunctions" are consistent with Rule 23(b)(2), and, by analogy, 23(b)(1). Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2558-59 (2011).

This case has some traits typical of those cases deemed ideal for certification pursuant to Rule 23(b)(1): it alleges breach of fiduciary duty, and a ruling in favor of HSI would effectively determine ILIAC's conduct with respect to other members of the proposed class. If this case were to be resolved in favor of HSI with a finding that revenue sharing payments by mutual funds to ILIAC constitute prohibited transactions under ERISA, any suit brought by another plan that concludes otherwise would impair ILIAC's ability to pursue a uniform course of conduct. Cf. Westman v. Textron, Inc., 151 F.R.D. 229, (D. Conn. 1993) ("The mere fact that the defendant may eventually be found liable to one member of the putative class but not another does not by itself create a risk of incompatible adjudications. However, whether defendant breached its fiduciary duty is a question common to all potential cases and could, if tried in separate actions, result in wholly inconsistent adjudications.") (internal citation omitted). On the other hand, this court recently ruled—in favor of HSI—that HSI's claims pursuant to ERISA section 502(a)(2) are not, as a matter of law, restricted to relief in equity, and it may permit recovery of damages at law. See Ruling Re Motion to Dismiss (Doc. No.

40). The court cannot say that HSI's claims for monetary relief are merely incidental to its claims for injunctive or declaratory relief.

Ultimately, the court is convinced that this case fits the Amchem Court's description of a case appropriately considered under Rule 23(b)(3. As HSI states, "the core relief sought in this case is disgorgement of all [revenue sharing payments]." Pl.'s Mem. in Reply at 4. Thus, if this class is to be certified, it should be under Rule 23(b)(3).

b. Rule 23(b)(3)

Unlike Rule 23(b)(2), Rule 23(b)(3) allows class members "the best notice that is practicable under the circumstances and to withdraw from the class at their option." Dukes, 131 S.Ct. at 2557. "To qualify for certification under Rule 23(b)(3), a class must meet two requirements beyond the Rule 23(a) prerequisites: Common questions must 'predominate over any questions affecting only individual members; and class resolution must be 'superior to other available methods for the fair and efficient adjudication of the controversy.'" Amchem, 521 U.S. at 615 (quoting Rule 23(b)(3)). The Rule is intended "to cover cases in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Id. (quoting Advisory Committee's Notes on Rule 23(b)(3)). Rule 23(b)(3) provides a nonexclusive list of factors for a court to consider when determining whether a class meets its predominance and superiority requirements:

> (A) the interests of members of the class in individually controlling the prosecution of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation

> of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed.R.Civ.P. 23(b)(3).

i. Predominance. The Rule 23(b)(3) predominance requirement "is satisfied if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." Myers v. Hertz Corp., 624 F.3d 537, 547 (2d Cir. 2010) (internal quotation marks and citation omitted); see also In re American Intern. Grp., Inc. Sec. Litig., No. 10-4401-cv, 2012 WL 3264048, at *7 (2d Cir. Aug. 13, 2012). The district court must determine what questions of law or fact are common to the members of the class. Id. at 548.

HSI argues that the question of whether the revenue sharing payments were prohibited transactions predominates. Pl.'s Mem. in Support at 33. ILIAC contends that this is "nothing more than a generic legal question," and that HSI cannot show that common issues predominate for the reasons that it argues against commonality. Def.'s Mem. in Opp'n at 37.

The court concludes that whether the revenue sharing payments constitute prohibited transactions poses both a legal and factual question that is common to the members of the proposed class. The payments are made by mutual funds to ILIAC, and thus the proof of their circumstances is not individual to class members, but rather is shared across all of the class members whose plans offered those funds. Moreover, because ILIAC offers only a few versions of ILIAC's MAP contracts that are at issue in this case, see Def.'s Mem. in Opp'n at 2, ("three MAP products pertinent to this

motion”), the terms of those contracts are part of the pool of common proof central to all putative class members’ claims. Therefore, the predominance requirement is satisfied.

ii. Superiority. Finally, HSI must demonstrate that a class action “is superior to other available methods for fairly and sufficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). Superiority is often satisfied where an individual class member’s claim would be too small to warrant bringing an individual suit, and a class action would save litigation costs by allowing the parties to efficiently assert their claims and defenses. See Amchem Prods., 117 U.S. at 617 (noting that “the Advisory Committee had dominantly in mind vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all”) (internal quotation omitted); Jermyn v. Best Buy Stores, L.P., 256 F.R.D. 418, 136–37 (S.D.N.Y. 2009).

HSI argues that, because class members’ potential recovery is small as compared to the cost of litigating the claims individually, class members have negligible interest in controlling claims individually. See Pl.’s Mem. in Support at 34-46. ILIAC calls this argument conclusory and “demonstrably false.” Def.’s Mem. in Opp’n at 38 (contending that ERISA’s fee-shifting provision “eviscerates” HSI’s “cost of litigating” argument).

The court agrees with HSI that the discretionary fee-shifting available under ERISA, see 29 U.S.C. § 1132(g)(1), does not compel the conclusion that a class is not superior. See Pl.’s Reply at 9. The evidence as to the total amount of revenue sharing

payments received by ILIAC[10] and the total number of potential class members—$315,700,000 and 15,234, respectively—does not establish the size of or variation in class members' potential recovery. See Interrogatory Responses, Ex.1 to Ex. F to Pl.'s Reply (Doc. No. 79-1) at 4, 5. It does, however, allow the court to do more than baldly speculate as to the potential range of recovery available to class members. ILIAC's assertion of the wide variation in plan sizes, see Def.'s Mem. in Opp'n at 39, supports superiority rather than undermining it,[11] as it suggests that there are, in fact, a significant number of putative class members whose potential recovery is smaller than the approximately $20,000 average obtained by dividing total revenue by potential class members. ILIAC also argues that the respective plans' administrators have a fiduciary duty to assert claims on behalf of injured plans, and that this shows their interest in individually controlling the prosecution of their respective actions. Id. at 38. The court fails to follow the asserted logical necessity. Thus, the court does not find evidence of

[10] ILIAC notes that some of that revenue is from plans and products that are not the subjects of this lawsuit. Id.

[11] ILIAC's citations—supporting its argument that the existence of some large plans within the class necessarily implies individual interest in controlling the litigation—are, at best, misleading. See Def.'s Mem. in Opp'n at 39. It cites Amchem for the proposition that, "when individual class members have large stakes in the outcome, their individual interests weigh against proceeding as a class." Id. The Amchem Court quoted the reporter of the Advisory Committee for the 1966 reform of the Federal Rules: "The interest in individual control can be high where the stake of each member bulks large and his will and ability to take care of himself are strong; the interest may be no more than theoretic where the individual stake is so small as to make a separate action impracticable." Amchem, 521 U.S. at 616 (quoting Kaplan, Continuing Work of the Civil Committee, 81 Harv L. Rev. 356, 391 (1967)) (emphasis added). The obvious alteration is from Amchem's comment about "each member" to ILIAC's construction implying any member. Two of the other three cases cited by ILIAC suffer from the same irrelevance to its point. See Def.'s Mem. in Opp'n at 39 (citing Cima v. WellPoint Health Networks, Inc., 250 F.R.D. 374, 384 (S.D. Ill. 2008); In re Arthur Treacher's Franchise Litig., 93 F.R.D. 590 (E.D. Pa. 1982)). ILIAC is left with offhand dicta in Kekich v. Travelers Indem. Co., 64 F.R.D. 660, 668 (W.D. Pa. 1974), in which the court, after finding that the plaintiff had not satisfied Rule 23(a), nor could he satisfy Rule 23(b)(2), found that Rule 23(b)(3) was inappropriate as the case failed to meet any of its criteria. Id.

class members' individual interest in controlling prosecution of this action in separate suits.

HSI also claims that ILIAC's principal place of business is in this District, making it a desirable forum in which to concentrate this litigation and that a class action will be easily manageable. Pl.'s Mem. in Support at 35-36. While neither of these factors provide strong support for the superiority of proceeding as a class, neither has ILIAC refuted them.

For the reasons discussed above, the court therefore finds that HSI's claims satisfy both the predominance and superiority requirements of Rule 23(b)(3).

6. Conclusion

For the reasons discussed above, the court finds that HSI has demonstrated that the requirements of Rule 23(a) and Rule 23(b)(3) are satisfied, and therefore **grants in part**, see supra, p.5 and n.1, HSI's Motion for Class Certification (Doc. No. 43).

## IV. MOTION TO DISMISS COUNTERCLAIMS

### A. Standard

Deciding a motion to dismiss pursuant to Rule 12(b)(6), the court takes the allegations of the claim as true, Hemi Grp, LLC v. City of N.Y., 130 S. Ct. 983, 986-87 (2010), and construes them in a manner most favorable to the non-movant, Fulton v. Goord, 591 F. 3d 37, 43 (2d Cir. 2009). The court must determine whether the allegations, so construed, would state a legally cognizable claim, entitling the non-movant to relief. See Bell Atl. Corp v. Twombly, 550 U.S. 544, 557 (2007) (interpreting Rule 12(b)(6), in accordance with Rule 8(a)(2), to require allegations with "enough heft to 'sho[w] that the pleader is entitled to relief'").

To survive a motion pursuant to Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp., 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 556).

The plausibility standard does not impose an across-the-board, heightened fact pleading standard. Boykin v. KeyCorp, 521 F.3d 202, 213 (2d Cir.2008). The plausibility standard does not "require[ ] a complaint to include specific evidence [or] factual allegations in addition to those required by Rule 8." Arista Records v. Doe 3, 604 F.3d 110, 119 (2d Cir.2010); see Erickson v. Pardus, 551 U.S. 89, 94 (2007) (holding that dismissal was inconsistent with the "liberal pleading standards set forth by Rule 8(a)(2)"). However, the plausibility standard does impose some burden to make factual allegations supporting a claim for relief. As the Iqbal court explained, it "does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement." Iqbal, 129 S.Ct. at 1949 (citations and internal quotations omitted). Under the Second Circuit's gloss, the plausibility standard is "flexible," obliging the plaintiff "to amplify a claim with some factual allegations in those contexts where such

amplification is needed to render the claim plausible." Boykin, 521 F.3d at 213 (citation omitted); accord Arista Records, 604 F.3d at 120.

B. Discussion

1. Availability of Indemnity and Contribution Claims Under ERISA

HSI first argues that the law is unsettled as to whether claims for contribution and indemnity are permissible under ERISA. See Pl.'s Mem. in Support of Mot. to Dismiss (Doc. No. 63-1) at 20. The Second Circuit expressly held that claims for contribution or indemnity against co-fiduciaries are available in Chemung Canal Trust Co. v. Sovran Bank/Maryland, 939 F.2d 12, 16 (2d Cir. 1991) ("even a breaching fiduciary should be entitled to the protection of contribution that has been traditionally granted fiduciary defendants under the equitable provisions of trust law"). Chemung rejects the idea that such a claim constitutes a new right of action under ERISA, calling it "a procedural device for equitably distributing responsibility for plaintiff's losses proportionally among those responsible for the losses." Id. at 15. Such a device "would have no financial impact on the recovery of plaintiffs, the intended beneficiaries of ERISA. They would continue to recover their full loss from any or all breaching fiduciaries, each of whom would be jointly and severally liable to the plaintiffs." Id. at 16.

HSI suggests that Chemung was abrogated by the Supreme Court in Mertens v. Hewitt Assocs., 503 U.S. 248, 255 (1993). See Pl.'s Mem. in Support of Mot. to Dismiss at 21. The Mertens Court held that courts' authority to develop a federal common law under ERISA does not extend to create new rights of action, and thus does not authorize suits for money damages against non-fiduciaries who knowingly participate in a fiduciaries' breach of trust. Mertens, 508 U.S. at 259. The Second Circuit has

recognized that Mertens forecloses judicially-created remedies not explicit in ERISA, see Gerosa v. Savasta & Co., Inc., 329 F.3d 317, 322 (2d Cir. 2003), but warned that its conclusion was "limited to ERISA's civil remedial provisions," and that it "continue[d] to carry out Congress's intent that we develop a federal common law of ERISA based on principles developed in evolution of the law of trusts . . . . We hold only that the limited text of ERISA's civil remedies is inconsistent with judicial discovery of new liabilities." Id. at 323 n.6.

In Haddock v. Nationwide Fin. Servs., Inc., 570 F. Supp. 2d 355 (D. Conn. 2008) ("Haddock III"), the court considered counterclaims for contribution, indemnification, and breach of fiduciary duty by a defendant investment advisor against plaintiff plan trustees who were suing for disgorgement of revenue sharing payments received by the defendant. Id. at 356, 357 ("[Defendant] . . . contends that it should be permitted to seek contribution or indemnification from the Trustees because the Trustees had the ultimate responsibility for purchasing annuity contracts and making changes to investment options, knew of the revenue sharing payments, and received cost-savings benefits from those revenue sharing payments. Nationwide also alleges that the Trustees breached their fiduciary duties to the plans by ratifying or being recklessly indifferent to those revenue sharing payments and therefore, if Nationwide is found to be a fiduciary of the Plans, it may seek damages from the Trustees, on behalf of the Plans.") Upon the plaintiffs' motion to dismiss the counterclaims, and after consideration of the same line of Supreme Court and Second Circuit precedent discussed above, the court distinguished Mertens on the grounds that: (1) Mertens dealt with "plaintiffs' remedies against third-party non-fiduciaries who participated in the

underlying breach, not a fiduciary's rights against his fellow fiduciaries for a breach of trust," and (2) under the common law of trusts, the rights to contribution and indemnification are procedural devices for distributing costs among culpable parties "regardless of whom the plaintiff chooses to sue directly for the breach of trust," and they are not additional rights of action. Id. at 360. This court finds the reasoning of Haddock persuasive that Chemung controls to permit claims for contribution and indemnity under ERISA.[12]

2. Whether ILIAC States Claims for Contribution or Indemnity

HSI next argues that, under the common law of trusts, ILIAC cannot recover for indemnification or contribution. See Pl.'s Mem. in Support of Mot. to Dismiss at 23-26. HSI cites the Restatement (Second) of Trusts, which provides that co-trustees who are liable to a beneficiary for breach of trust are entitled to contribution from one another, unless one is "substantially more at fault than the other," in which case the co-trustee more at fault is not entitled to contribution and the co-trustee less at fault is entitled to indemnity. See id. at 24 (citing Restatement (Second) of Trusts § 258(1)). HSI argues that ILIAC has not pleaded any facts that show or even suggest that HSI is at "equal or even comparable fault with respect to the revenue sharing" payments that ILIAC allegedly collected. Pl.'s Mem. in Support of Mot. to Dismiss at 25. HSI also argues that, because ILIAC received the benefit of the revenue sharing payment, HSI is entitled to indemnification from ILIAC to the extent of the benefit and any claim for contribution

[12] HSI also argues that these claims are only available to apportion liability among parties from whom a plaintiff could have recovered. See Pl.'s Mem. in Support of Mot. to Dismiss at 22. Where, as here, suit is brought on behalf of plans, the more appropriate consideration is whether suit could have been brought by or on behalf of the plans against the putative contributor or indemnifier. Thus, the court rejects HSI's contention that ILIAC's claims for contribution and indemnification defy this principle.

or indemnification by ILIAC is foreclosed. Id. (citing Restatement (Second) of Trusts § 258(1)(b) ("if [one co-trustee] receives a benefit from the breach of trust, the other is entitled to indemnity from him to the extent of the benefit; and for any further liability")).

ILIAC argues that a determination of relative fault would be required to find that its counterclaims fail to state an entitlement to relief, and that such a determination is necessarily a factual question inappropriately considered on the pleadings. See Def.'s Mem. in Opp'n to Mot. to Dismiss at 11-12. It also contends that the Restatement (Third) of Trusts alters section 258 of the Restatement (Second) by addressing co-trustees whose fault is unequal but not so disproportionate as to prevent contribution. See id. at 11 n.9 (citing Restatement (Third) of Trusts §102). Finally, ILIAC disputes that HSI has any "automatic right to indemnification" from ILIAC based on ILIAC's receipt of a benefit from its alleged breach, as HSI's right to indemnification is limited to the extent of any benefit ILIAC received, which is a question of fact. See id. at 13.

a. Restatements of Trusts

Section 258(1) of the Restatement (Second) of Trusts provides, in relevant part:

> [W]here two trustees are liable to the beneficiary for a breach of trust, each of them is entitled to contribution from the other, except that
>
> (a) if one of them is substantially more at fault than the other, he is not entitled to contribution from the other but the other is entitled to indemnity from him; or
>
> (b) if one of them receives a benefit from the breach of trust, the other is entitled to indemnity from him to the extent of the benefit; and for any further liability, if neither is more at fault than the other, each is entitled to contribution.

Restatement (Second) of Trusts § 258(1). Comment (b) notes that co-trustees equally at fault ordinarily have a right of contribution of one-half of the liability. See Comment

(b) to Restatement (Second) of Trusts § 258. Comment (d) further explains that when one co-trustee is substantially more at fault for a breach of trust:

> [A]lthough both are liable to the beneficiary for the breach of trust, the loss should ultimately be borne by the trustee who is more at fault. If, therefore, that trustee makes good the amount of the loss resulting from the breach of trust, he is not entitled to contribution from the other trustee; and, conversely, if the other trustee makes good the loss, he is entitled not merely to contribution but to indemnity from the trustee who is more at fault.
>
> In determining whether one trustee is so substantially more at fault that he should bear the whole of the loss resulting from a breach of trust, the following factors are to be considered: . . . (2) whether he intentionally committed a breach of trust and the other was at most guilty of negligence; . . . (4) whether he alone committed the breach of trust and the other is liable only because of an improper delegation, or failure to exercise reasonable care to prevent him from committing a breach of trust, or neglect to take proper steps to compel him to redress the breach of trust.

Comment (d) to Restatement (Second) of Trusts § 258 (citation omitted). Comment (e) distinguishes the case where "one trustee is not so far in greater fault that he is not entitled to contribution merely because he was more negligent than the other or more active than the other in the commission of the breach of trust," and explicitly points out that "[t]he mere fact that one of the trustees did not actively participate in the breach of trust does not necessarily put him in the position of being substantially less at fault." Comment (e) to Restatement (Second) of Trusts § 258. Finally, Comment (f) adds, "[w]here one of two trustees receives a benefit from the breach of trust, the other is entitled to indemnity from him to the extent of the benefit." Comment (f) to Restatement (Second) of Trusts § 258.

The Restatement (Third) of Trusts, published in relevant part in 2012, provides, in relevant part:

> (1) Except as otherwise provided in this Section, if two or more trustees are liable for a breach of trust, they are jointly and severally liable, with contribution rights and obligations between or among them reflecting their respective degrees of fault. . . .
>
> (3) A trustee who benefited personally from the breach is not entitled to contribution to the extent of that benefit.

Restatement (Third) of Trusts § 102. Comment (b)(1) is substantially similar to Comment (b) to section 258 of the Restatement (Second): both provide for one-half contribution by a co-trustee one-half at fault for a breach. See Comment (b)(1) to Restatement (Third) of Trusts § 102; Comment (b) to Restatement (Second) of Trusts § 258. Comment (b)(2) addresses disproportionate fault, explaining that "a trustee who is significantly more at fault is not entitled to contribution, and the trustee(s) significantly less at fault are entitled to a full indemnity." Comment (b)(2) to Restatement (Third) of Trusts § 102. The determination of sufficiently disproportionate fault "depends on the facts and circumstances." Id. The same factors as discussed in Comment (d) to section 258 of the Restatement (Second) are listed, with the addition that the list of factors is not exclusive. Id. Comment (b)(3) addresses the change between the two Restatements: "If the fault of the trustees who are liable for a breach of trust is not substantially equal, but not so disproportionate as to prevent contribution, the trustees' contribution obligations are proportionate to their respective degrees of fault." Comment (b)(3) to Restatement (Third) of Trusts § 102. The same factors are relevant to the determination of proportionate fault as to the determination of disproportionate fault. Id.

Based on the language of the Restatements and the Comments, the court rejects ILIAC's argument that the revisions have changed, rather than clarified, the principles laid out therein. See Mem. in Opp'n to Mot. to Dismiss at 11 n.9, 12 n.10; see also

Reporter's Note to Comment (b)(3) to Restatement (Third) of Trusts § 102 ("This Restatement adds the logically intermediate, but previously missing, fact pattern: trustees unequally at fault but not so disproportionately as to require that one trustee entirely bear the loss."); id. ("Section 102 and its comments largely continue (with some adaptation) the rule and commentary of Restatement Second, Trusts § 258.") (internal citation omitted). The relative liability of co-trustees remains a situation-specific determination, and there remains a right to contribution between co-trustees except: (1) insofar as the fault of one co-trustee is far in excess of the fault of the other; and (2) insofar as one co-trustee received the benefit of the breach.

b. Whether HSI is Entitled to Indemnity Because ILIAC Received the Benefit of the Breach

As discussed above, both the Second and Third Restatements of Trusts make clear that co-fiduciaries are entitled to indemnity to the extent that the other co-fiduciary has benefited personally from the breach. See Restatement (Third) of Trusts § 102(3); Restatement (Second) of Trusts § 258(1)(b). HSI argues that it has an automatic right to indemnification based on this principle. See Pl.'s Mem. in Support of Mot. to Dismiss at 25 n.11. ILIAC contends that HSI seeks remedies that are not limited to the amount of the revenue sharing payments, and therefore, if ILIAC faces liability beyond any benefit it received, it would be entitled to contribution and indemnity.

This court has already ruled—twice—on the nature of the liability HSI seeks to impose. Count One seeks to "restore to the Plans the losses they have suffered as a direct result" of ILIAC's receipt of revenue sharing payments. Ruling Re Motion to Dismiss (Doc. No. 40) at 10 (citing Compl. ¶ 108). Ruling on ILIAC's Motion to Dismiss, the court described Count One as seeking "compensation for losses to the plans that

result from ILIAC's alleged breach of fiduciary duty." See id. at 11. Therefore, the court concluded, the remedy sought is not equitable restitution. Id. The court's Ruling permitting a jury claim on Count One was based on its understanding that the claim therein sought damages beyond the amount of the revenue sharing payments, and the court declines to revisit that understanding a third time. HSI seeks compensation for losses beyond the extent of its entitlement to indemnity by ILIAC in Count One; should it recover all that it seeks, ILIAC's counterclaim would not be completely barred, but limited to the amount of the benefit ILIAC derived.

Count Two, brought pursuant to ERISA sections 409(a) and 502(a)(2), seeks disgorgement of ILIAC's profits from revenue sharing payments. See id. Count Two seeks "restitution to the plans in an amount representing the difference between the revenue sharing payments and other compensation it received, and the reasonable fair market value of any services provided by ING." Compl. ¶ 112. Because the liability that could be imposed by Count Two is limited to the amount of ILIAC's benefit from the breach, ILIAC may not seek contribution from or indemnification by HSI for any liability imposed under this Count. See Haddock III, 570 F. Supp. 2d 355 (D. Conn. 2008). The court concludes that any liability established under Count Two may not be the subject of a claim for contribution or indemnity by ILIAC.

c. Whether ILIAC's Proportionate Fault Bars ILIAC's Counterclaims

HSI argues that ILIAC's counterclaims, taken as true, show that ILIAC is significantly more at fault for any breach than HSI. See Pl.'s Mem. in Support at 25. ILIAC argues that this is a fact-intensive determination inappropriate for decision at this stage. See Def.'s Mem. in Opp'n to Mot. to Dismiss at 12-13. Because the court has

already determined that ILIAC is not entitled to contribution or indemnity for any liability established under Count Two, it considers these arguments only with respect to any liability established under Count One. Therefore, it must determine whether, as a matter of law, ILIAC is so disproportionately at fault for losses to the plans that resulted from ILIAC's alleged breach of fiduciary duty that ILIAC is not entitled to seek contribution. See Restatement (Third) of Trusts § 102(1).

The parties bring to the court's attention three cases addressing this issue. In Leimkuehler v. American United Life Ins. Co., No. 1:10-cv-00333-JMS-TAB, 2011 WL 1565887 (S.D. Ind. Apr. 25, 2011) ("Leimkuehler II"), the court addressed a motion to dismiss counterclaims brought by a defendant 401(k) administrator against a plaintiff plan trustee for contribution and indemnity in a case arising out of revenue sharing payments to the defendant by investment vehicles. Id. at *1. The court rejected the plaintiff's argument that the defendant was substantially more at fault, noting that the counterclaim alleged that the plaintiff had failed to defray reasonable expenses of administering the plan, and holding that it "cannot find as a matter of law that the [plaintiff] bears no responsibility for the amount and allocation of expenses that he now contends violates ERISA." Id. at *6 (noting that the plaintiff cited no cases in which a substantial fault determination had been made on a motion to dismiss).

In Haddock III, 570 F. Supp. 2d 355 (D. Conn. 2008), because the plaintiff's claims were limited to the payments received by the defendant—as in Count Two in this case—the court dismissed the defendant's counterclaims for indemnification and contribution because it was the sole beneficiary of the breach as so defined. See id. at 362-64.

In Phones Plus, the plaintiffs sued on the theory that revenue sharing payments received by the defendant violated ERISA. See Ruling on Plaintiff's Motion to Dismiss Counterclaims, Phones Plus, Inc. v. The Hartford Fin. Servs. Grp., Inc., No. 3:06cv1835(AVC) (Doc. No. 195, Sept. 30, 2008). The defendant made counterclaims for, inter alia, contribution and indemnity, which the plaintiffs moved to dismiss. The court found that the defendant had stated claims upon which relief could be granted and to which relative fault involved factual determinations based on the counterclaim's allegations that the plaintiff: "(1) knowingly participated in and/or knowingly concealed from Plan participants [defendant's] receipt and retention of fees from mutual fund families whose mutual funds were and are offered to Plan participants under the Contract and Agreement; (2) enabled [defendant] to commit any breach of any fiduciary duty that [defendant] committed; and (3) failed to make reasonable efforts to remedy any breach of fiduciary duty by [defendant]." Id. at 8. The court agreed with the defendant that "because determining relative degrees of fault is an issue of fact, dismissal on this basis, and at this stage of the proceedings, would not be appropriate." Id. at 8-9.

In the case at bar, ILIAC alleges that HSI: "knowingly participat[ed] in or knowingly conceal[ed] the receipt and retention of revenue from the mutual funds; enable[ed] another to commit breaches of fiduciary duty to the Plans; and failing to make reasonable efforts to remedy any breach of fiduciary duty committed." Answer/ Def.'s Counterclaim ¶ 29, at 25. (Doc No. 52). These allegations do not meet the Iqbal standard: they are conclusory. Therefore, the Motion to Dismiss the claim in Count One as to any amount of liability in excess of the benefit ILIAC received from the revenue

sharing payments is granted with right to replead if ILIAC can allege facts suggesting plausibly that HSI was not substantially less at fault than ILIAC as to any amount of liability found on Count One in excess of the benefit ILIAC received from the revenue sharing payments

d. Contribution and Indemnity "Under the Common Law"

ILIAC's third and fourth counterclaims allege that ILIAC is entitled to contribution and indemnity, respectively, "under the common law." Answer at 35, 39. In its Opposition to HSI's Motion to Dismiss, ILIAC clarifies that it intends to bring "state common law claims for contribution and indemnity." Opp'n to Mot. to Dismiss at 15. HSI argues that such claims are preempted by ERISA. As to the claim for contribution, the court need not reach the issue of preemption because, in general, Connecticut does not permit a claim for contribution between joint tortfeasors. See, e.g., Fox v. Fox, 168 Conn. 592, 595 (1975).

The common law of indemnification in Connecticut is almost as restrictive:

> Ordinarily there is no right of indemnity or contribution between joint tort-feasors. Where, however, one of the defendants is in control of the situation and his negligence alone is the direct immediate cause of the injury and the other defendant does not know of the fault, has no reason to anticipate it and may reasonably rely upon the former not to commit a wrong, it is only justice that the former should bear the burden of damages due to the injury. Under the circumstances described, we have distinguished between "active or primary negligence," and "passive or secondary negligence." Indemnity shifts the impact of liability from passive joint tortfeasors to active ones.

Crotta v. Home Depot, 249 Conn. 634, 642 (1999) (internal citations and quotations omitted). ILIAC's claim for indemnification is premised on a finding that ILIAC is liable for breach of fiduciary duty because it used plan assets to generate revenue sharing payments. See Ruling re Motion to Dismiss at 10 (discussing Count I). ILIAC's

allegations, that HSI failed to exercise prudence, care, vigilance, and failed to monitor, investigate, and inform itself, see Answer at 37-38, do not amount to a claim to indemnity under Connecticut law. Therefore, the court need not consider whether such a claim is preempted by ERISA.

3. Counterclaim for Breach of Fiduciary Duty

ILIAC's fifth and final counterclaim is brought on behalf of the plans for breach of fiduciary duty. ILIAC alleges that HSI was aware of ILIAC's receipt of revenue sharing payments and benefitted from ILIAC's provision of services in the form of lower fees "paid by HSI or the Plans' participants." Answer at 39-43. ILIAC claims that HSI breached its fiduciary duty to the plans by, in essence, failing to reasonably supervise, monitor, investigate, and disclose ILIAC's actions and transactions with respect to the plans, and by "knowingly participating in or knowingly concealing receipt and retention of revenue from the mutual funds," enabling ILIAC to breach its own fiduciary duty to the plans and failing to remedy ILIAC's breach of fiduciary duty. Id. at 41-42.

HSI first argues that ILIAC lacks standing to pursue claims on behalf of the plans because such standing is incompatible with the right to seek contribution. See Pl.'s Mem. in Support of Mot. to Dismiss at 26 (citing Duncan v. Santaniello, 900 F. Supp. 547, 556 (D. Mass. 1995). As the Haddock III court pointed out, the cited statement in Duncan, in context, meant only that the test for a party's standing to bring claims on behalf of a plan for breach of fiduciary duty did not determine that party's standing to bring a claim for contribution. See Haddock III, 570 F. Supp. 2d 355, 365 (D. Conn. 2008). Because ILIAC's counterclaim is premised on a finding that ILIAC is liable for

breach of fiduciary duty, it necessarily includes the condition upon which ILIAC would have standing to bring a claim on behalf of the plan. See id.

HSI also argues that ILIAC fails to allege an essential element of its cause of action for breach of fiduciary duty: loss to the plan as a result of the breach. See Pl.'s Mem. in Support of Mot. to Dismiss at 27. ILIAC argues that this counterclaim seeks only to hold HSI liable "for those losses that are traceable to HSI's own fiduciary breaches." Def.'s Mem. in Opp'n to Mot. to Dismiss at 18.

Section 409(a) of ERISA requires fiduciaries to "make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary." 29 U.S.C. § 1109(a). Civil liability for a violation of section 409 arises under section 502(a)(2), which empowers an ERISA fiduciary to bring a civil action "for appropriate relief," and under section 502(a)(3), which empowers a fiduciary to bring a civil action to obtain "appropriate equitable relief" for any ERISA violation. 29 U.S.C. 1132(a)(2), (3); see also Answer at 43 ("HSI is liable for breaching its fiduciary duty to the Plans to the extent that the Plans suffered any harm or losses or to the extent that any Plans' participants and beneficiaries were deprived of any assets or benefits to which they were entitled.").

As discussed extensively above, ILIAC's counterclaims are premised on a finding of ILIAC's liability—that is, they presume a finding that ILIAC breached a fiduciary duty to the plans with its revenue sharing arrangements and the imposition of liability on that basis. To the extent that ILIAC's fifth counterclaim alleges losses to the plan, it alleges that HSI caused those losses only insofar as HSI "knowingly participated in," "knowingly

concealed," "enable[ed]," and "fail[ed] to make reasonable efforts to remedy" ILIAC's receipt of revenue sharing payments. Answer at 43. ILIAC fails to identify any alleged losses to the plan other than the ones that, if this counterclaim would be considered by the jury, would necessarily have been proven to have resulted from ILIAC's breach of fiduciary duty. In short, ILIAC's allegation of losses due to HSI's breach do not meet the pleading standard set forth in Iqbal and Twombly. See Haddock III, 570 F. Supp. 2d at 365-66.

C. Conclusion

For the reasons discussed above, HSI's Motion to Dismiss HSI's Counterclaims (Doc. No. 63) is **GRANTED** as to ILIAC's counterclaims. The court grants ILIAC leave to replead claims purportedly asserted in Count One provided that such claims, as reasserted: (1) are limited to any liability established against ILIAC that exceeds any benefit ILIAC received from the revenue sharing payments; and (2) rest upon alleged facts plausibly suggesting that HSI was not so substantially less at fault than ILIAC that HSI would be entitled to indemnity from ILIAC under the Restatements.

## V. ILIAC's MOTION FOR LEAVE TO FILE A SUR-REPLY

ILIAC moves the court for leave to file a Sur-Reply in order to notify the court that HSI has taken what ILIAC views as inconsistent positions among its pleadings. See Def.'s Mot. for Leave (Doc. No. 80). HSI opposes the Motion. See Pl.'s Mem. in Opp'n to Mot. for Leave (Doc. No. 87). The court is well aware of the positions taken by both parties in their various and numerous pleadings, and suggests to ILIAC that it is not in an ideal position to raise any inconsistencies among them as problematic. The Motion for Leave to File is **DENIED**.

## VI. CONCLUSION

For the reasons set forth herein, HSI's Motion for Class Certification (Doc. No. 43) is **GRANTED IN PART**, HSI's Motion to Dismiss Counterclaims is, and ILIAC's Motion for Leave to File is **DENIED**.

**SO ORDERED.**

Dated at New Haven, Connecticut, this 26th day of September, 2012.

/s/ Janet C. Hall
Janet C. Hall
United States District Judge