UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

H&R Convention & Catering Corp., & Quinn Restaurant Corp.	:	
Plaintiffs,	:	Case No. 1:12-cv-01425-JBW-RER
-against-	:	
Marianna Somerstein, Stuart Somerstein, Somerstein Caterers of Lawrence, Inc. Pension Plan, Capital One, N.A., & Pension Benefit Guaranty Corp.	:	**SUPPLEMENTAL BRIEF IN SUPPORT OF RENEWED MOTION TO DISMISS**
Defendants.	:	

PRELIMINARY STATEMENT

1. Pending before this honorable Court is the Renewed Motion for Partial Dismissal ("**Motion**") by Defendants Somerstein Caterers of Lawrence, Inc. Pension Plan ("**Plan**") and its statutory trustee, the Pension Benefit Guaranty Corporation, a federal agency ("**PBGC**").[1] By that Motion, PBGC and the Plan ("**Movants**") moved for dismissal of certain of Plaintiffs' claims:

   1) Plaintiffs' claims that Plan fiduciaries breached their fiduciary duties, which claims must be dismissed because Plaintiffs lack statutory standing to prosecute these claims, which must be dismissed under Rule 12(b)(1) or 12(b)(6);[2]

   2) Plaintiffs' implied claim for writ of mandamus to the PBGC to "impose . . .

[1] ECF No. 68.

[2] *See* Memorandum of Law in Support of Renewed Motion for Partial Dismissal (ECF No. 68, "**Memorandum in Support**") at 9-12.

liability against the Defendants" for breach of fiduciary duty under ERISA,[3] which must be dismissed under Rule 12(b)(6);[4] and

3) Plaintiffs' claims of fraud against the Stuart and Marianna Somerstein, which Plaintiffs have not pled with the particularity required by Federal Rule of Civil Procedure 9(b), and which must be dismissed under Rule 12(b)(6) unless Plaintiffs amend the Complaint and plead fraud with the required particularity.[5]

2. This Court heard the Motion on April 9, 2013 ("**Hearing**").

3. From the bench, this Court requested clarification of Plaintiffs' claims.[6] Movants' counsel offered to provide the Court a table summarizing Plaintiffs' claims and prayers for relief as Movants' understanding them.[7] Movants submit that table herewith as Exhibit 1.

4. From the bench and by written order issued April 10, 2013 (ECF No. 93, the "**Briefing Order**"), this Court ordered Movants to submit a draft order precisely stating the relief requested. Movants will accordingly submit a proposed form of order.

5. From the bench, this Court also ordered the parties to provide supplemental briefing on certain issues. In the Briefing Order, this Court further ordered the parties to submit supplemental briefs addressing any topics that they believe will assist this Court in resolving the Motion. Movants therefore respectfully submit this Supplemental Brief in support of the Motion.

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3 Complaint ¶ 10.

4 *See* Memorandum in Support at 14-16.

5 *See* Memorandum in Support at 13-14.

6 Transcript at 40.

7 Transcript at 31.

I. Certain of Plaintiffs' ERISA claims would survive even if the Court grants all relief requested in the Motion.

6. If the Court grants all relief requested in the Motion, two of Plaintiffs' claims for relief under ERISA would survive. Plaintiffs would still have a claim:

> seeking an Order . . . declaring that that [*sic*] neither Quinn nor H&R shall be responsible for any . . . penalties under ERISA attributable to the misfeasance and/or malfeasance of the Somersteins and/or any other Defendant . . . .[8]

And Plaintiffs would still have a claim:

> seeking an Order . . . declaring that that [*sic*] neither Quinn nor H&R shall be responsible . . . for any funding requirements in connection with employees of SCL who participated in the Plan . . . .

The latter claim (the "**Plan Funding Apportionment Claim**") is governed by ERISA, which contains a comprehensive provisions governing liabilities for minimum funding requirements and specifies the limited circumstances under which liabilities are apportionable upon plan termination.[9]

II. Neither plaintiff has a claim for "contribution" that in any way that bears on resolution of the Motion.

7. As Movants argued in their Memorandum in Support, Plaintiffs' claims that Plan fiduciaries breached their fiduciary duties must be dismissed because neither Plaintiff has the requisite statutory standing under Title I of ERISA to prosecute those claims on behalf of the

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[8] Complaint ¶ 46.k. This claim is pending against PBGC. This Court has issued and order bearing on this claim with respect to penalties. Penalties under ERISA are assessed not only by PBGC, but also by the U.S. Department of Labor. *See, e.g.,* 29 U.S.C. § 1132(c). This Court therefore ordered that Plaintiffs must name the Department of Labor as a defendant to the extent Plaintiffs seek relief effective against the Department of Labor. Order, ECF No. 64, at 5.

[9] S*ee* 26 U.S.C. §§ 412, 430; 29 U.S.C. §§ 1082-83, 1362-70. Regarding the limited circumstances under which liabilities are apportionable upon plan termination, *see* 29 U.S.C. § 1364.

Plan.[10] Plaintiff H&R never had statutory standing. Plaintiff Quinn lost its statutory standing upon entry of the Termination Order, whereupon PBGC was appointed statutory trustee of the Plan and Quinn ceased to be a Plan fiduciary.

8. For the indisputable proposition that former fiduciaries do not have statutory standing under Title I, Movants cited, *inter alia*, *Chemung Canal Trust Co. v. Sovran Bank/Md.*, 939 F.2d 12 (2d Cir. 1991).[11]

9. Plaintiffs, through their counsel, have *admitted* that neither Plaintiff is within any of the categories of persons to whom ERISA grants statutory standing to assert a claim of fiduciary breach:

> MR. GARRY: . . . The PBG [*sic*] is correct that we do not fit, quote, the four classes of individuals that can bring the action. We can not disagree with that.[12]

10. But Plaintiffs refuse to concede the conclusion that necessarily follows therefrom—that Plaintiffs lack statutory standing to prosecute fiduciary breach claims on behalf of the Plan, and that the Motion must therefore be granted. Instead, Plaintiffs argued in their Opposition and in the Hearing that the Motion should be denied because:

> In *Chemung*, the Court held that rights to indemnity and contribution are integral aspects of that law [i.e., ERISA]. The decision in *Chemung* demonstrated that the Court favored apportioning liability in accordance with fault.

Opposition at 7. Careful consideration of *Chemung* illustrates why Plaintiffs' argument is inapposite.

11. In *Chemung*, a fiduciary of a pension plan brought a fiduciary breach action on

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[10] ERISA § 502(a)(2) (codified at 29 USC § 1132(a)(2)). For fuller discussion, see Memorandum in Support at 9-12.

[11] Memorandum in Support at 11 nn. 33-35.

[12] Transcript at 28.

behalf of the plan against a former fiduciary. The former fiduciary, in turn, counterclaimed and filed third party claims against other fiduciaries of the plan for (1) breach of fiduciary duties, and (2) contribution and indemnity for any liability he might have for fiduciary breach. Defendants to the former fiduciary's claims moved to dismiss on grounds that (1) under Section 502(a) of ERISA, the former fiduciary lacked statutory standing assert any claim on behalf of the plan for fiduciary breach, and (2) ERISA precludes claims for contribution and indemnity. The Western District of New York agreed and dismissed the former fiduciary's claims.[13] On appeal, the Second Circuit (1) affirmed the district court's decision on the fiduciary breach claims, holding that ERISA does not provide former fiduciaries statutory standing to sue on behalf of a plan, and (2) reversed the district court's holding that a fiduciary of an employee benefit plan who is subject to a claim for fiduciary breach under ERISA has no cause of action for contribution or indemnity against other fiduciaries.[14] The Second Circuit incorporated such a claim for contribution into the federal common law of ERISA.

12. The district court had relied "primarily on the methodology of *Cort v. Ash*, 422 U.S. 66, 95 S. Ct. 2080, 45 L.Ed.2d 26 (1975), for determining whether a private right of action should be implied from a statute." The Second Circuit declined to follow that methodology:

> [W]e agree with [the former fiduciary] that the *Cort v. Ash* methodology is an inappropriate tool for analyzing this case. In *Cort v. Ash*, the Supreme Court devised a four-part test to determine whether a right of action should be implied from a federal statute. If applied here, the *Cort v. Ash* test would cause an automatic dismissal of [the former fiduciary's] claims, because the first part of the test asks whether the party seeking the remedy . . . is a member of the class for whose benefit the legislation was intended . . ., and clearly . . . ERISA was enacted to protect plan participants and beneficiaries, not former fiduciaries . . . .

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[13] *Chemung Canal Trust Co. v. Sovran Bank/Maryland*, 753 F. Supp. 81 (W.D.N.Y. 1990).

[14] *Chemung*, 939 F.2d at 18.

> Here, we are not dealing with the usual "right of action", and it would be misleading to so characterize a defendant's right of contribution. A plaintiff who brings an action does not care whether the defendant has a right of contribution against others, as long as the plaintiff recovers the amount to which he is entitled. Contribution deals with allocating obligations among co-defendants and/or third parties. The "right of action" for contribution is no more than a procedural device for equitably distributing responsibility for plaintiff's losses proportionally among those responsible for the losses, and without regard to which particular persons plaintiff chose to sue in the first instance. The four tests of *Cort v. Ash* are not well-designed to ferret out congressional intent at this level of dispute resolution.[15]

13. The Second Circuit determined that, in ERISA, "congress never dealt with contribution expressly" but this gap did not indicate that Congress intended to preclude claims for contribution among fiduciaries:

> Congress's failure to include enforcement provisions to address the relationships among fiduciaries does not necessarily mean that congress intended to preclude such remedies. ERISA was designed specifically to provide redress for . . . the plan's participants and beneficiaries. . . . Its remedies do not purport to deal with allocating joint liabilities among fiduciaries, which is the essence of the problem facing us. Although this silence on the contribution issue might be argued to mean that ERISA allows only those claims that directly benefit the plan or a participant, and intentionally bars relief in all other situations, there is nothing but silence to support this conclusion.
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> A more likely inference is that when it came to remedies under ERISA, congress simply did not focus its attention beyond the welfare of the plan's participants and beneficiaries. It does not follow, however, that congress would have rejected contribution claims had the issue been expressly considered.[16]

14. The Second Circuit held federal courts were authorized to develop federal common law to fill such gaps in ERISA and, in so doing, were to be guided by the common law

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[15] *Id*. at 15-16.

[16] *Id*. at 18.

of trusts.[17] The Second Circuit then determined that a claim for contribution among fiduciaries in breach of their duties exists under the common law of trusts.[18] The Second Circuit thereupon concluded that "the traditional trust law right to contribution must also be recognized as a part of ERISA."[19] Recognizing this federal common law claim was just because:

> 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. There is no reason why a single fiduciary who is only partially responsible for a loss should bear its full brunt. Full responsibility should not depend on the fortuity of which fiduciary a plaintiff elects to sue.[20]

15. Turning now to the case at bar, Movants do not dispute that, if either Plaintiff is or becomes subject to any claim for fiduciary breach, it may, like the former fiduciary in *Chemung*, pursue a claim for contribution against any another Plan fiduciary whom they allege is also liable for the loss caused by that breach, and thereby seek appropriate allocation of liability. Any such claim would survive the Motion, just as, in *Chemung*, the former fiduciary's claim for contribution survived dismissal of the former fiduciary's claims for fiduciary breach. In *Chemung*, the Second Circuit unequivocally held that the former fiduciary did not have statutory standing to prosecute the plan's claim for fiduciary breach, as "[a] former fiduciary no longer has an interest in protecting a plan to which it is now a complete stranger," but allowed the former fiduciary's contribution claims to proceed.[21]

16. Plaintiffs argue that the Motion should be denied because dismissing their fiduciary breach claims for lack of statutory standing would somehow deny Plaintiffs their

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[17] *Id*. ("congress wanted courts to fill any gaps in the statute by looking to traditional trust law principles.").

[18] *Id*. at 16 ("We must next determine whether traditional trust law provides for a right of contribution among defaulting fiduciaries. Indisputably, it does.").

[19] *Id*.

[20] *Id*.

[21] *Id*. at 15.

purported claim for contribution.[22] But Plaintiffs have made no argument why that would happen in this case, though it did not in *Chemung*.

17. During the Hearing, in discussions of Plaintiffs' lack of statutory standing to prosecute fiduciary breach claims and of Plaintiff' purported claim[s] for "contribution," Plaintiffs' counsel repeatedly referenced PBGC's statutory liens against the Plaintiffs and PBGC's anticipated claims against the Plaintiffs.[23] Plaintiffs, in arguing that if the Motion is granted, they will be denied their claim for "contribution" are not describing a contribution claim—that is, a claim to allocate liability for loss to the Plan resulting from breaches of fiduciary duty by either or both Plaintiffs and another Plan fiduciary. Rather, by prosecuting alleged fiduciary breach claims on behalf of the Plan against the Somersteins and Capital One—with recoveries going to the Plaintiffs—a claim to offset Plaintiffs' liability to the Plan and PBGC under Title IV of ERISA (the "**Contemplated Contribution Claim**").[24] That is not a claim for contribution.

18. A fiduciary subject to a claim for fiduciary breach only has a claim for contribution against another fiduciary where both fiduciaries are liable, in full or in part, *for the same loss*. Contribution among fiduciaries liable for the same loss was the nature of the claim for contribution contemplated by the Second Circuit in *Chemung*. It is also nature of the claim for contribution under the common law of trusts, to which body of law the Second Circuit looked in *Chemung* in fashioning a federal common law claim for contribution.[25] And it is directly analogous to the claim for contribution under the law of torts, which enables a tortfeasor to effect

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[22] Transcript at 37-38.

[23] Transcript at 24-27, 32-33, 37-38.

[24] For description of these liabilities, *see* 26 U.S.C. §§ 412, 430; 29 U.S.C. §§ 1082-83, 1362-70.

[25] *See* Restatement (Third) of Trusts § 102(1) ("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.").

allocation between himself and another tortfeasor liable to the same plaintiff for the same injury.[26]

19. Nothing like the Contemplated Contribution Claim was recognized by the Second Circuit in *Chemung*, and no such claim has been recognized by any other court of the United States. Moreover, the Second Circuit's reasoning in *Chemung* would require any court following that reasoning to refuse to allow such a claim for "contribution." Expressly prerequisite to the Second Circuit's determination that it was empowered to fashion a federal common law claim under ERISA for contribution among fiduciaries liable for the same breach were (1) that Congress had not addressed the issue in ERISA, and (2) that ERISA evidenced no Congressional intent to deny such claims for contribution.[27] These prerequisites are not met such that this Court could fashion the federal common law remedy for "contribution" as contemplated by Plaintiffs. ERISA comprehensively addresses the issue of who is liable for minimum funding contributions to a defined benefit pension plan, and, where such a Plan is insured by PBGC under Title IV of ERISA, who is liable to PBGC for the unfunded benefit liabilities the plan upon plan termination.[28] ERISA also comprehensively addresses who has statutory standing to sue for fiduciary breach under Title I.[29] There is no colorable argument—and Plaintiffs have made no argument at all—that Congress left a relevant gap in ERISA and evinced no intent as to whether, or intended that, former fiduciaries, though not granted statutory standing under the specific and

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[26] *In re Agent Orange Product Liability Litigation*, 818 F.2d 204, 207 (2d Cir. 1987) ("Contribution is the proportionate sharing of liability among tortfeasors. Typically, a right to contribution is recognized when two or more persons *are liable to the same plaintiff for the same injury* and one of the joint tortfeasors has paid more than his fair share of the common liability. Contribution rests upon a finding of concurrent fault.") (emphases added) (internal quotation marks and citations omitted); *see also, e.g., Picard v. JPMorgan Chase & Co.*, 460 B.R. 84, 98 (S.D.N.Y. 2011) ("the lynchpin of New York's contribution provision is common liability for the same injury").

[27] *Chemung*, 939 F.2d at 16-18.

[28] 26 U.S.C. §§ 412, 430-32; 29 U.S.C. §§ 1082-85, 1362-70.

[29] ERISA § 502(a), 29 U.S.C. § 1132(a); *Chemung Canal Trust Co. v. Sovran Bank/Md.*, 939 F.2d 12, 14 (2d Cir. 1991).

detailed statutory standing provisions of ERISA, could prosecute claims for fiduciary breach on behalf of an employee benefit plan simply by incorrectly characterizing those claims as claims for "contribution" in order to offset their own statutory liabilities to the plan for minimum funding contributions, or to PBGC for unfunded benefit liabilities.

20. To the extent Plaintiffs are concerned about allocation of liabilities to the Plan for due and unpaid minimum funding contributions, Plaintiffs have a claim in this action seeking to delimit their liabilities—specifically, their claim:

> seeking an Order . . . declaring that that [*sic*] neither Quinn nor H&R shall be responsible . . . for any funding requirements in connection with employees of SCL who participated in the Plan . . . .[30]

That claim will be unaffected by the granting of the Motion.[31]

21. Also unaffected by the granting of the Motion will be Plaintiffs claims that the Somersteins breached their contractual obligations under the Closing Agreement to contribute funds to the Plan. Those claims will survive not only in this case, but as counterclaims Plaintiffs had asserted in the State Court Action before filing this case.

III. The Second Circuit's recent decision in *Long Island Head Start* highlights why this Court must follow *Chemung* and dismiss plaintiffs' fiduciary breach claims for lack statutory standing.

22. After Movants' Memorandum in Support and Reply, the Second Circuit issued a decision holding that a former plan fiduciary was a "fiduciary" for purposes of ERISA's statutory standing provisions such that the former fiduciary could prosecute a fiduciary breach

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[30] Complaint ¶ 46.k. This claim is pending against PBGC. This Court has issued and order bearing on this claim with respect to penalties. Penalties under ERISA are assessed not only by PBGC, but also by the U.S. Department of Labor. *See, e.g.,* 29 U.S.C. § 1132(c). This Court therefore ordered that Plaintiffs must name the Department of Labor as a defendant to the extent Plaintiffs seek relief effective against the Department of Labor. Order, ECF No. 64.

[31] *See* discussion of this Plan Funding Apportionment Claim, *supra*, part I.

claims on behalf of the plan. *See L.I. Head Start Child Development Services, Inc. v. Economic Opportunity Commission of Nassau County, Inc.*, 710 F.3d 57 (2d Cir. March 13, 2013).

23. *Head Start* involved a multiple-employer welfare benefits plan for employees of social service nonprofits. Plaintiff Head Start was a participating employer in the plan. Head Start contributed funds to the plan, as all participating employers were required to do. Plan assets were held in trust under a trust agreement to which all participating employers were party. Under the trust agreement, each participating employer was an administrator, and thus a fiduciary, of the plan, and each delegated fiduciary duties to its chief executive officer to act as a trustee, and thus also a fiduciary, under the direction of the employer (collectively, the "**Trustees**"). Plan governing documents required that the plan hold at least one million dollars of plan funds in reserve to ensure the plan's ability to meet its obligations, and required the plan, under the direction of the Trustees, and, in turn, the participating employers as plan administrators directing their respective Trustees ("**Administrators**"), to collect contributions from participating employers to maintain the required reserve.

24. When other participating employers proved delinquent in meeting their contribution obligations, Head Start withdrew from the plan, whereupon over half of all plan participants ceased to be plan participants.[32] Head Start demanded refund of its considerable share of the reserve. The Trustees refused. A Head Start employee, as representative of the class of plan participants, and Head Start sued the plan and its Trustees in the Eastern District of New York to obtain the demanded refund.

25. The district court found that the participating employers' respective contributions were segregated rather than pooled and held that ERISA required that the reserve funds

[32] *L.I. Head Start Child Development Services, Inc. v. Economic Opportunity Com'n of Nassau County, Inc.*, 634 F. Supp. 2d 290, 305 (E.D.N.Y. 2009) (Spatt, J.) ("***Head Start 2009***").

attributable to Head Start's past contributions be refunded to Head Start and then transferred by Head Start to a new health and welfare plan for the benefit of Head Start's employees who had formerly participated in the plan. "Any other result would create a windfall for the non-Head Start employees who would be using the funds contributed by Head Start and would violate the Trustees' fiduciary duty" to ensure that plan assets were used for the exclusive benefits of participants and their beneficiaries" associated with the portion of the reserve fund attributable to Head Start.[33] The district court awarded plaintiffs a judgment for $802,831.57.

26. Before that judgment, the Trustees had depleted the reserve fund, mainly by writing off the bad debt of other participating employers, and the plan had ceased operations. The plan was only able to satisfy a fraction of the judgment. The plaintiffs then filed a second action, this one against certain participating employers, as Administrators, and their CEOs, as Trustees, for breaching their fiduciary duties by, *inter alia*, (1) failing to enforce the participating employers' contractual obligations to make contributions to the plan, and (2) permitting the biggest deadbeat among the participating employers to continue participating in the plan.

27. One issue raised in the district court was whether Head Start, which had become a former fiduciary upon withdrawal from the plan, had statutory standing under ERISA to prosecute claims on behalf of the plan for fiduciary breach. The district court held (1) that Head Start's claims were, as ERISA requires, "asserted in a representative capacity pursuant to section 502(a)(2)" of ERISA on behalf of the plan as whole,[34] and (2) that Head Start did have statutory standing:

> L.I. Head Start achieved the right to have its contributions refunded from the Plan upon terminating its participation in [the

[33] *L.I. Head Start Child Development Services, Inc. v. Kearse*, 86 F. Supp. 2d 143, 151 (E.D.N.Y. 2000) (Spatt, J.) ("***Head Start 2000***").

[34] *Head Start 2009*, 634 F. Supp. 2d at 298-99.

> Plan]. However, the Plan at that time did not refund L.I. Head Start's funds, but rather dissipated them, at least in part, through breaches of duty by the Plan's other fiduciaries. However, under the defendants' interpretation of the statue, upon its withdrawal from the Plan, L.I. Head Start lost standing to enforce the duties of the other Plan fiduciaries. Thus, in the defendants' view, L.I. Head Start had no standing to sue to stop the dissipation of Plan funds to which L.I. Head Start had a vested right, because L.I. Head Start had withdrawn from the Plan—the act that gave L.I. Head Start a vested right to these funds. In the Court's view, this cannot have been the intent of Congress in establishing the rules for standing under these provisions of ERISA. Thus, the Court finds that L.I. Head Start does have standing to sue under ERISA § 502(a)(2).[35]

28. The district court awarded judgment for the plaintiffs on certain of their fiduciary breach claims.

29. On appeal of, *inter alia*, the district court's ruling on Head Start's statutory standing, and after more than a dozen years of litigation, the Second Circuit affirmed the district court finding that the plaintiffs brought their fiduciary breach claims in a representative capacity "on the Plan's behalf, and prayed for relief inuring to the Plan," which ERISA required, over defendants' argument that the finding was clearly erroneous because the plan's recoveries might ultimately be used to satisfy plaintiffs' first judgment.[36] The Second Circuit also rejected defendants' argument, based on *Chemung*, that Head Start, as a former fiduciary, did not have statutory standing. The Second Circuit distinguished *Chemung* on grounds that there, the former fiduciary's interests "were adverse to those of the plan," but Head Start "had a continuing interest in protecting the Plan assets, which consisted in part of the funds LIHS had contributed to the Plan during its participation."[37] The Second Circuit therefore concluded that Head Start

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[35] *L.I. Head Start Child Development Services, Inc. v. Economic Opportunity Com'n of Nassau County, Inc.*, No. CV 00–7394, 2010 WL 8816299, at *10-*11 (E.D.N.Y. May, 28 2010).

[36] *See L.I. Head Start Child Development Services, Inc. v. Economic Opportunity Commission of Nassau County, Inc.*, 710 F.3d 57, 65-66 (2d Cir. 2013) ("***Head Start***").

[37] *Id*. at 66.

still had "standing under ERISA § 502(a) as a fiduciary of the Plan."[38]

30. *Head Start* did not abrogate *Chemung*. It does not stand for the general proposition that a former fiduciary is a "fiduciary" for purposes of statutory standing under ERISA § 502(a). Rather, *Head Start* stands for a limited exception to the *Chemung* rule. The *Head Start* exception does not apply in the case at bar, which differs from *Head Start* in several critical respects:

31. First, Plaintiffs, unlike Head Start, do not assert their fiduciary breach claims "on the Plan's behalf" and "pray[] for relief inuring to the Plan," as ERISA requires.[39] Rather, each and every one of Plaintiffs' prayers for relief for fiduciary breach would inure either exclusively or duplicatively to themselves. *See* Exhibit 1.

32. Second, though upon Head Start's successful prosecution of fiduciary breach claims on behalf of the plan, the plan's recoveries might ultimately be used to satisfy Head Start's earlier judgment for refund of its past contributions, Head Start was still bound by fiduciary duty to transfer the recovered funds to a new health and welfare plan for the benefit of Head Start's employees who had participated in the plan. In that way, Head Start's interests were perfectly aligned with the interests of those participants, who joined them in their action through their class representative, and who themselves had statutory standing.[40] In the case at bar, Plaintiffs have no continuing fiduciary duty with respect to the handling of any of the prayed-for relief they may obtain through this action. If Plaintiffs' prayers for reliefs were granted, plaintiffs would get the money, and Plan participants and their beneficiaries, whose

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[38] *Id*.

[39] *Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 140, 142, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985); *Head Start*, 710 F.3d at 65-66; *Head Start 2009*, 634 F. Supp. 2d at 298.

[40] *Head Start 2009*, 634 F. Supp. 2d at 299.

benefits will be paid by PBGC pursuant to its statutory guaranty irrespective of any relief Plaintiffs for which Plaintiffs pray, would get *nothing*. Unsurprisingly, no participants join the Plaintiffs in this action.

33. Third, Head Start had made contributions the plan, whereas here, on information and belief, H&R has never made a contribution to the Plan, and Quinn has made none since its acquisition by H&R, despite Plaintiffs' joint and several liability for minimum finding contributions to the Plan under ERISA.[41]

34. Fourth and finally, in *Head Start*, there was nothing akin to the Termination Order, under which PBGC was appointed statutory trustee of the Plan, and all persons everywhere were required to turn over all assets of the Plan, including choses in action, to PBGC.

35. The distinctions between *Head Start* and the case at bar demonstrate why the *Head Start* exception cannot apply, and why the *Chemung* rule—that former fiduciaries lack statutory standing to prosecute fiduciary breach cases under ERISA—must apply. H&R does not plead or claim that it was ever a fiduciary. Quinn admits that it is a *former* fiduciary. Both Plaintiffs admit that they are outside all categories of persons to whom ERISA grants statutory standing. Plaintiffs do not assert claims on behalf of the Plan that would in any way benefit Plan participants or their beneficiaries. They are, and behave as, strangers to the plan. They are, like the former fiduciary in *Chemung*, adverse to the Plan, which they sued in this action while Quinn was a fiduciary. They seek to prosecute their fiduciary breach claims solely in their own interest, which is wholly inconsistent with the fiduciary duties Quinn once had.

[41] For description of these liabilities, *see* 26 U.S.C. §§ 412, 430; 29 U.S.C. §§ 1082-83.

IV. The question of whether the Somersteins are indispensable parties under Rule 19 of the Federal Rules of Civil Procedure does not bear on proper resolution of the Motion.

36. The Somersteins are defendants to certain of Plaintiffs' claims for breach of fiduciary duty, which claims will be dismissed if the Motion is granted. The Somersteins are also defendants to Plaintiff's claims for breach of contract. Those contract claims will be unaffected by the granting of the Motion. The Somersteins will therefore remain parties to this action if the Motion is granted. Therefore, the issue of whether the Somersteins are indispensable parties with respect to any claim that would remain if all claims against them were dismissed is not presented. The question does not bear on this Court's resolution of the Motion.

V. Jurisdiction

A. The question of whether this Court has subject matter jurisdiction does not bear on proper resolution of the Motion. This Court has federal question jurisdiction of this action, and will still have such jurisdiction if the Motion is granted.

37. This Court has federal question jurisdiction of this action. Plaintiffs' claims include numerous claims under ERISA, a federal statute.

38. If the Motion is granted, this Court will still have federal question jurisdiction of this action. The granting of the Motion will not affect at least two of Plaintiffs claims under ERISA.[42]

39. Because this Court will have federal question jurisdiction irrespective of whether the Motion is granted, the question of jurisdiction does not bear on proper resolution of the Motion.

B. This Court does not have diversity jurisdiction of any of Plaintiffs' claims.

[42] *See* part I, *supra*.

40. This honorable Court, being duly aware of the importance of determining its jurisdiction, irrespective of the Motion at bar, expressly requested, both during the Hearing and in the Briefing Order, briefing on whether this Court may exercise diversity jurisdiction over any claims in this action, and, if so, which claims.

41. Plaintiffs pled that this Court has not only federal question jurisdiction but also diversity jurisdiction of their action.[43] Plaintiffs were mistaken.

42. Diversity jurisdiction requires that diversity be complete—that is, no plaintiff may be a citizen of any state of which any defendant is also a citizen.[44] Complete diversity must be apparent from the pleadings.[45]

43. In this case, complete diversity was belied by the Complaint. Plaintiffs allege that they are both New York corporations, and that Defendant Somerstein Caterers of Lawrence, Inc. ("**SCL**") is also a New York corporation.

44. In the Hearing, Plaintiffs endeavored to complete diversity by dismissing their action against SCL.[46] The Court accordingly ordered dismissal.[47] Plaintiffs' dismissal of SCL did not achieve the complete diversity necessary to this Court's diversity jurisdiction of Plaintiffs' remaining claims.

45. Plaintiffs pled that each of the Somersteins is a "former resident of the State of New York" now residing in Costa Rica.[48] Plaintiffs did not plead that either of the Somersteins

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[43] Complaint ¶¶ 10-11.

[44] *See Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 373, 98 2396, 2402, 57 L.Ed.2d 274 (1978); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 2 L. Ed. 435 (1806); *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 68 (2d Cir.1990); *International Shipping Co. S.A. v. Hydra Offshore, Inc.*, 875 F.2d 388, 391 (2d Cir. 1989).

[45] *John Birch Soc'y v. National Broadcasting Co.*, 377 F.2d 194, 197 (2d Cir.1967); *Richmond v. IBM Corp.*, 919. 107, 108 (E.D.N.Y.1996).

[46] Transcript at 5-12, 15-17.

[47] ECF No. 93.

[48] *See* Complaint ¶¶ 3-4, 10-11.

has renounced United States citizenship.

46. A United States citizen domiciled abroad and a counterparty who is the citizen of any of the United States are not "citizens of different States" within the meaning of 28 U.S.C. § 1332(a)(1), because a foreign-domiciled American citizen has no domicile in any of the United States.[49] And a foreign domicile does not make an American citizen a "citizen[] or subject[] of a foreign state" within the meaning of 28 U.S.C. § 1332(a)(2).[50] Thus, "United States citizens who are domiciled abroad are neither citizens of any state of the United States nor citizens or subjects of a foreign state, and § 1332(a) does not provide that the courts have jurisdiction over a suit to which such persons are parties."[51]

47. This Courts lack of diversity jurisdiction of Plaintiffs' claims will be unaffected if the Court grants the Motion. Plaintiffs contract claims against the Somersteins will survive.

C. This Court may abstain from the exercise of jurisdiction over Plaintiffs' contract claims against the Somersteins, given Plaintiffs' identical claims pending in state court.

48. During the Hearing, this Court requested briefing on whether it may decline to exercise supplemental jurisdiction of Plaintiffs' claims against the Somersteins for breach of contract ("**Contract Claims**").

49. Movants assume that this Court has supplemental jurisdiction of the Contract Claims as "claims that are so related to claims in the action within such original jurisdiction that

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[49] *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 68-69 (2d Cir. 1990)

[50] *Universal Reinsurance Co. v. St. Paul Fire & Marine Ins. Co.*, 312 F.3d 82, 85 (2d Cir. 2002) ("[d]iversity jurisdiction exists under 28 U.S.C. § 1332(a)(2) where the matter is between 'citizens of a State and citizens or subjects of a foreign state'" but party who was a U.S. citizen domiciled in Bermuda "was neither and, therefore . . . his presence as a party negated diversity jurisdiction"); *Gestetner v. Congregation Merkaz*, 2004 WL 602786 (S.D.N.Y. 2004); *Jordan (berm.) Inv. Co. v. Hunter Green Invs.*, 205 F. Supp. 2d 243, 255 (S.D.N.Y. 2002) (inclusion of defendant "alleged to be a citizen of the United States and a resident of the United Kingdom, defeats diversity jurisdiction"); *Haggerty v. Pratt Institute*, 372 F. Supp. 760, 760-62 (E.D.N.Y. 1974).

[51] *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 68 (2d Cir. 1990).

they form part of the same case or controversy under Article III of the United States Constitution."[52] This Court may nonetheless decline to exercise supplemental jurisdiction if the Court finds "exceptional circumstances," and, therein, "compelling reasons for declining jurisdiction."[53]

50. Though this Court's determination of whether it should exercise supplemental jurisdiction of the Contract Claims does not bear on proper resolution of the Motion, and though the Somersteins have a greater interest in arguing that this Court should decline to exercise supplemental jurisdiction, Movants submit that there would seem to be, in this case, "exceptional circumstances" providing "compelling reasons' for this Court to decline to exercise supplemental jurisdiction over the Contract Claims. Plaintiffs brought claims substantially identical to their Contract Claims in the New York Supreme Court for Queens County, against the very same parties, before they filed this case. Specifically, they brought them as counterclaims against the Somersteins in *Somerstein v. H&R Conv. & Catering Corp.*, No. 26896/2011 (N.Y. Sup. Ct. Queens Cty.) ("**State Court Action**"). The Somersteins filed the State Court Action in 2011, asserting claims for H&R's nonpayment of debts on purchase money notes issued under stock sale agreements pursuant to which the Somersteins sold Quinn and an affiliate to H&R. The Contract Claims are pending in the State Court Action even as Plaintiffs duplicatively pursue them in this case. (Movants have submitted the docket sheet and what they understand to be all papers filed in the State Court Action.[54])

51. Plaintiffs seem content to pursue the Contract Claims in *both* the State Court Action and in this action, notwithstanding the resulting (1) waste of judicial resources,

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[52] 28 U.S.C. § 1367(a).

[53] 28 U.S.C. § 1367(c)(4).

[54] *See* ECF Nos. 86, 91.

(2) injustice of forcing the Somersteins to defend identical claims in two courts, (3) needless risk of duplicative or conflicting judgments, and (4) needless impediment to efficient and fair resolution of the larger set of disputes reflected in this case and the State Court Action. It appears that Plaintiffs seek to extract unduly favorable settlement terms by forcing the Somersteins to defend identical claims in two courts. Allowing Plaintiffs that undue leverage may impede settlement of this case.

52. Numerous federal district courts, including the Eastern and Southern Districts of New York, have, in similar circumstances, applied 28 U.S.C. § 1367(c)(4) and found the pendency of a party's identical or substantially similar claims in state court to be compelling reason for declining to exercise supplemental jurisdiction.[55] Circuit Courts of Appeal have affirmed such decisions, finding no abuse of discretion.[56] The Fifth Circuit has noted that "[a]djudicating state-law claims in federal court while identical claims are pending in state court would be a pointless waste of judicial resources."[57]

53. The New York Superior Court for Queens County, where Plaintiffs first elected to file their Contract Claims, and where they may choose to maintain those claims if this Court

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[55] *See Donohue v. Mangano*, 2012 U.S. Dist. LEXIS 117202, at *48-*53 (E.D.N.Y. Aug. 20, 2012) (Spatt, J.) (finding "compelling reason for declining supplemental jurisdiction under 28 U.S.C. § 1367(c)(4)" in "the existence of the parallel, ongoing state court proceeding"); *Pride Mobility Prods. Corp. v. Dylewski*, 2009 U.S. Dist. LEXIS 5530, at *26-*27 (M.D. Pa. Jan. 27, 2009) (declining to exercise supplemental jurisdiction over state law claims pursuant to 28 U.S.C. § 1367(d) based on the "compelling reason" that plaintiffs were parties to pending state court litigation involving "substantially similar claims"); *Truman Annex Master Prop. Owners' Ass'n v. United States*, 2007 U.S. Dist. LEXIS 78736, at *11-*16 (S.D. Fla. Oct. 23, 2007) (finding compelling reason to decline to exercise supplemental jurisdiction in plaintiffs' "very similar action" pending in state court); *Am. Dev. v. Int'l Union of Operating Eng'rs, Local 150*, 1998 U.S. Dist. LEXIS 7121, at *3-*11 (N.D. Ill. Apr. 27, 1998) (declining to exercise supplemental jurisdiction on grounds that "pendency of the identical counterclaims in state court is a compelling reason to decline jurisdiction"); *Philip Morris, Inc. v. Heinrich*, 1998 U.S. Dist. LEXIS 3258, at *5-*6 (S.D.N.Y. Mar. 16, 1998) ("compelling reasons exist for the Court to decline to exercise supplemental jurisdiction," including "another action in existence in a New Jersey state court, addressing the same claims").

[56] *Chungchi Che v. Mass. Bay Transp. Auth.*, 342 F.3d 31, 37 (1st Cir. 2003) (affirming district court's declining to exercise supplemental jurisdiction over state law employment discrimination claims where plaintiff asserted "similar claims of discrimination against the same employer" in two employment discrimination actions under state law pending in state court); *Hays Cty. Guardian v. Supple*, 969 F.2d 111, 125 (5th Cir. 1992).

[57] *Hays Cty. Guardian v. Supple*, 969 F.2d 111, 125 (5th Cir. 1992).

declines to exercise supplemental jurisdiction, is surely competent to resolve those claims as it adjudicates with the Somersteins' claims for H&R's breach of the same contracts.

VI. Whether any of Plaintiffs' claims are time-barred does not bear on resolution of the Motion.

54. In the Briefing Order, this honorable Court requested briefing on whether any of Plaintiffs' claims are barred by the relevant statute of limitations or laches, to the extent the parties believe such briefing would assist this Court in resolving the Motion. Movants are unaware of any way in which the issue of whether any of Plaintiffs' claims are time-barred bears on proper resolution of the Motion. Movants therefore take no position at this time on the application of the laches or any statute of limitations.

Respectfully submitted,

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Washington, D.C.

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