

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

SPEAR, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
FENKELL, et al.	:	NO. 13-02391

**RICHARD A. LLORET
U.S. MAGISTRATE JUDGE**

December 12, 2014

REPORT AND RECOMMENDATION¹

Plaintiffs and Third-Party Defendants have filed motions to dismiss contribution claims asserted by Stonehenge Financial Holdings, Inc., John Witten, Barry Gowdy, and Ronald D. Brooks (the “Stonehenge Parties”). To understand the contribution claims, it is necessary to start with the allegations against the Stonehenge Parties. The contribution claims were asserted in response to four causes of action in the Amended Complaint (Doc. No. 68):

- (1) knowing participation in prohibited transaction under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3) (Fourth Claim for Relief, Amended Complaint ¶¶ 182-84);
- (2) knowing participation in gratuitous transfers, in violation of ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3) (Fifth Claim for Relief, Amended Complaint ¶¶ 185-88);
- (3) aiding and abetting Fenkell in the breach of his corporate fiduciary duties (Twelfth Claim for Relief, Amended Complaint ¶¶ 237-244); and
- (4) a civil conspiracy with David B. Fenkell (Thirteenth Claim for Relief, Amended Complaint, ¶¶ 256-65).

The plaintiffs are Barbie Spear, in her capacity as trustee of the Alliance Holdings, Inc. Employee Stock Ownership Plan (the “ESOP”), Alliance Holdings, Inc.

¹ This case has been referred to me under 28 U.S.C. § 636(b). Doc. No. 183. Under 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b), I am submitting a report and recommendation regarding the motion to dismiss, which is a dispositive motion.

(“Alliance”), in its capacity as the Plan Administrator and a Named Fiduciary of the ESOP, AH Transition Corp. (“AH”) and A.H.I., Inc. (“AHI”). Doc. No. 68, at 1. The contribution claims are contained in Counterclaims and a Third-Party Complaint filed by the Stonehenge Parties. Doc. No. 88, at 59 (Counterclaims), 73 (Third-Party Complaint). The second count of the Counterclaims seeks contribution against plaintiff Alliance. Doc. No. 88, ¶ 292-93. The Third-Party Complaint seeks contribution against Barbie Spear, in her individual capacity, Kenneth Wanko, and Eric Lynn, all of whom were executives at Alliance. Doc. No. 88, ¶¶ 356-57. I will sometimes refer to the plaintiffs and the third-party defendants collectively as the “Alliance Parties,” given their community of interests. Where a need arises to distinguish between them, I will refer to them as plaintiffs or third-party defendants, as the case may be.

Alliance and third-party defendants Kenneth Wanko and Eric Lynn have moved to dismiss the contribution claims by the Stonehenge Parties. Doc. No. 152 (Motion to Dismiss by Alliance, Wanko, and Lynn). So has Third-Party Defendant Barbie Spear, in a separate motion. Doc. No. 153 (Motion to Dismiss by Spear). In their motion to dismiss,² the Alliance Parties argue that the Stonehenge Parties have not adequately stated a claim for contribution, under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Fowler v. UPMC Shadyside*, 578 F.3d 203 (3d Cir. 2009). Doc. No. 152; 152-1 (Alliance Parties’ Memorandum in

² I will address the motion of Alliance, Wanko and Lynn first. Doc. No. 152. Barbie Spear’s motion adopts the same arguments, and will be dealt with in summary fashion at the end of this Memorandum.

Support), at 8.³ The Alliance Parties also assert that ERISA does not authorize a claim for contribution by non-fiduciaries, such as the Stonehenge Parties. *Id.*; Doc. No. 152-1, at 14. Additionally, the plaintiffs argue that state-law contribution claims are not available for liability arising from ERISA violations. Doc. No. 152-1, at 16.

The Stonehenge Parties assert that their counterclaims and third-party claims for contribution contain sufficient detail to satisfy *Iqbal*, *Twombly* and *Fowler*. Doc. 161-1 (Stonehenge Parties' Memorandum in Opposition), at 19-29. They also contend that Federal common-law, under ERISA, permits contribution claims by non-fiduciaries facing liability arising out of ERISA. Doc. 161-1, at 29-33. The Stonehenge Parties argue that their state-law contribution claims are validly asserted against the Alliance Parties' state-law claims. Doc. No. 161-1, at 33-37.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) permits a court to dismiss all or part of an action for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A plaintiff's obligation to state the grounds of entitlement to relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. A complaint "does not need detailed factual allegations," but "factual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all of the allegations in the complaint are true (even if doubtful in fact)." *Id.* (citations omitted). This "simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of" the necessary element. *Id.* at 556.

³ Page references are to the pagination contained in document headers in the Court's ECF system, not the internal pagination assigned by the parties in the original documents.

The Court of Appeals has made clear that after *Iqbal* “conclusory or ‘bare-bones’ allegations will no longer survive a motion to dismiss: ‘threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.’ To prevent dismissal, a complaint must set out ‘sufficient factual matter’ to show that the claim is facially plausible.” *Fowler*, 578 F.3d at 210, *quoting Iqbal*, 556 U.S. at 678. In *Fowler* the Court of Appeals set forth a two part-analysis for reviewing motions to dismiss in light of *Twombly* and *Iqbal*:

First, the factual and legal elements of a claim should be separated. The District Court must accept all of the complaint’s well-pleaded facts as true, but may disregard any legal conclusions. Second, a District Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a “plausible claim for relief.”

Id. at 210-11, *quoting Iqbal*, 556 U.S. at 679. The Court explained that “a complaint must do more than allege the plaintiff’s entitlement to relief. A complaint has to ‘show’ such an entitlement with its facts.” *Id.* (*citing Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 234-35 (3d Cir. 2008) (“[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—‘that the pleader is entitled to relief.’”) *Iqbal*, 556 U.S. at 679, (*quoting Fed. R. Civ. P. 8(a)(2)*)). The evidence will be viewed in the light most favorable to the non-moving party. *See Big Apple BMW, Inc. v. BMW of N. Am., Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992).

DISCUSSION

1. Contribution Asserted in Response to ERISA Claims

A. *Contribution Under Federal Common Law*

The Stonehenge Parties are not fiduciaries, under ERISA. 29 U.S.C. § 1002(21); *see Confer v. Custom Eng'g Co.*, 952 F.2d 34, 36 (3d Cir. 1991) (“In determining who is a fiduciary under ERISA, courts consider whether a party has exercised discretionary authority or control over a plan's management, assets, or administration.”) Nor do they have any other recognized status under ERISA, such as participant or beneficiary. 29 U.S.C. § 1132(a)(3). Plaintiffs contend that ERISA does not permit contribution claims by non-fiduciaries, such as the Stonehenge Parties. Doc. No. 152-1, at 14. The Stonehenge Parties contend that Federal common-law, under ERISA, permits their contribution claims. Doc. 161-1, at 29-33.

The issue of whether a claim for contribution can be asserted by a party faced with ERISA liability has not been decided by the Third Circuit. *See Ruggieri v. Quaglia*, CIV. A. 07-CV-756, 2008 WL 5412058, *5, 6 (E.D. Pa. Dec. 24, 2008) (noting the Court of Appeals has not weighed in on the subject, and containing a helpful discussion of whether a claim for contribution may be brought by a fiduciary). The issue has divided courts throughout the country. *See In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 228 F.R.D. 541, 549-52 (S.D. Tex. 2005) (containing a thorough discussion of divergent approaches by different courts). Both parties refer to cases that support their desired result.⁴ None of the cases address the specific nuance involved here – a non-fiduciary

⁴ To some extent the cases talk past each other. As Magistrate Judge Rice observed in a footnote in the *Ruggieri* opinion, “Courts finding a right to contribution and indemnity under ERISA reason that although Congress did not expressly provide for contribution or indemnity under ERISA, courts are to develop a federal common law of rights and obligations under ERISA . . . Courts finding no right to contribution and indemnity under ERISA rely on the Supreme Court's unwillingness to recognize a federal common law right to contribution under federal discrimination and antitrust laws.” *See* 2008 WL 5412058, at *5 n. 6 (citations and internal quotations omitted).

seeking contribution when faced with a claim under *Harris Trust and Savings Bank v. Salomon Smith Barney*, 530 U.S. 238 (2000). I have found no cases deciding the issue.

In *Harris* the Supreme Court held that a fiduciary could pursue a claim against a non-fiduciary entity for knowingly participating in a transaction that was prohibited under ERISA. *Id.* at 241. The Court’s opinion rested on a careful reading of 29 U.S.C. § 1132(a)(3). *Id.* at 246. That statute provides that a civil action may be brought

by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of [ERISA Title I] or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations . . .

Id.; 29 U.S.C. § 1132(a)(3) (ERISA § 502(a)(3)). The Court reasoned that this section permitted an action by a defined class of individuals, “participant[s], beneficiar[ies], or fiduciar[ies],” to pursue “appropriate equitable relief” against any person, not just against a co-fiduciary. *Id.* at 246-47. The Court rejected the “alternative and intuitively appealing interpretation” of the statute proposed by the defendants, that absent an explicit duty imposed on them under ERISA § 406(a)(1), 29 U.S.C. § 1106(a)(1), they were not among the persons against whom Congress intended to authorize a cause of action. *Id.* at 245, 247. Section 406(a)(1) of ERISA provides only that a “fiduciary” is prohibited from participating in a set of explicitly defined transactions. 29 U.S.C. § 1106(a)(1).

The Court made it clear that ERISA did not permit “appropriate equitable relief *at large*” (emphasis in the original), but relief directed only at redressing violations or enforcing provisions of ERISA. *Id.* at 246-47. Contrasting the absence of a defined class of defendants with Congress’ care in defining and limiting the plaintiffs who may pursue the relief provided in the statute, the Court reasoned that Congress intended to leave open the class of people who could be sued, restricted only by the requirement that they

have knowingly participated in a prohibited transaction. *Id.* Notwithstanding this indication of Congressional intent, the Court instructed that

[i]n light of Congress' precision in these respects, we would ordinarily assume that Congress' failure to specify proper defendants in § 502(a)(3) was intentional But ERISA's " 'comprehensive and reticulated' " scheme warrants a cautious approach to inferring remedies not expressly authorized by the text In this case, however, § 502(I) resolves the matter—it compels the conclusion that defendant status under § 502(a)(3) may arise from duties imposed by § 502(a)(3) itself, and hence does not turn on whether the defendant is expressly subject to a duty under one of ERISA's substantive provisions (citations omitted).

Id. at 247. Section 502(I) of ERISA provides that the Secretary of Labor may assess a civil penalty against a "fiduciary or other person" who knowingly participates in a prohibited action, based on the amount "ordered by a court" to be paid as a result of the violation. 29 U.S.C. §§ 1132(I)(1)(B), (2)(B). The Court reasoned that Congress clearly contemplated a civil action by the Secretary against "other person[s]," despite the absence of an explicit duty imposed on such "other person[s]" under ERISA § 406(a)(1).

Id. at 248. The Court concluded that

if the Secretary may bring suit against an "other person" under subsection (a)(5), it follows that a participant, beneficiary, or fiduciary may bring suit against an "other person" under the similarly worded subsection (a)(3) (citation omitted).

Id. at 248-49.

The painstaking search for statutory language authorizing a remedy *against* non-fiduciaries in *Harris* casts a pallid light on the search for a correlative contribution or indemnity remedy *in favor* of a non-fiduciary sued under ERISA § 502(a)(3) (29 U.S.C. § 1132(a)(3)). The parties have not mentioned any statutory language from which such a right might arise, in contrast with the statutory language construed in *Harris*.

The Stonehenge Parties cite to several cases holding that a right of contribution exists under federal common law. Doc. No. 161-1, at 29-30. None of the cases held that

such a right of contribution can be asserted by a non-fiduciary. For instance, in *Cohen v. Baker*, 845 F. Supp. 289, 291 (E.D. Pa. 1994), the district court held that a fiduciary had a right of contribution against a co-fiduciary, under ERISA. The court reasoned that Congress wanted the courts to develop a federal common law under ERISA, citing to *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987)). Courts are to be “guided by the principles of traditional trust law” when developing ERISA common law. 846 F. Supp. at 291 (quoting *Chemung Canal Trust Co. v. Sovran Bank/Maryland*, 939 F.2d 12, 16 (2d Cir. 1991) (citing to *Firestone*, 489 U.S. at 110)). Since traditional trust law provided a right of contribution between co-fiduciaries, the court in *Cohen* concluded that such a right should be permitted by federal common law under ERISA. *Id.* (quoting *Chemung*, 939 F.2d at 16 (citing RESTATEMENT (SECOND) OF TRUSTS § 258 (1959))).

In *Chemung*, decided by the Second Circuit in 1991, the court used *Firestone’s* comment on the development of federal common law under ERISA to justify permitting a right of contribution between co-fiduciaries. 939 F.2d at 15-16. ERISA itself does not contain any provision for contribution. *Id.* At least two Courts of Appeal have disagreed with *Chemung*, while one seems to have agreed with its approach. *Compare Travelers Cas. & Sur. Co. of Am. v. IADA Servs., Inc.*, 497 F.3d 862, 866 (8th Cir. 2007) (no right of contribution) and *Kim v. Fujikawa*, 871 F.2d 1427, 1433 (9th Cir. 1989) (same) with *Alton Memorial Hospital v. Metropolitan Life Ins. Co.*, 656 F.2d 245, 250 (7th Cir. 1981) (assuming without deciding that rights of contribution and indemnity existed) and *Free v. Briody*, 732 F.2d 1331, 1336-37 (7th Cir. 1984) (implying a federal common law remedy of indemnification for an inactive fiduciary against his more culpable co-fiduciary because Congress “intended to protect trustees”); *but see Summers v. State St.*

Bank & Trust Co., 453 F.3d 404, 413 (7th Cir. 2006) (holding that whether ERISA defendants have a right contribution is unsettled, noting that *Alton Memorial Hospital* assumed such a right, but did not “actually discuss the question, which remains an open one in this circuit.”)

Judges within the Eastern District of Pennsylvania have differed on whether a contribution remedy should be implied under ERISA. *Compare Cohen*, 845 F. Supp. at 291 (following *Chemung* by implying a contribution remedy between co-fiduciaries) and *Site-Blauvelt Engineers, Inc. v. First Union Corp.*, 153 F. Supp. 2d 707, 709-10 (E.D. Pa. 2001) (same) with *Glaziers & Glassworkers Union Local 252 Annuity Fund v. Newbridge Sec., Inc.*, 823 F. Supp. 1191, 1194 (E.D. Pa. 1993) (refusing to imply a contribution remedy in favor of a fiduciary against a non-fiduciary).

My reading of the cases convinces me that *Firestone* and other Supreme Court cases do not support the result in *Chemung*, and that *Chemung's* rationale should not be extended to create a contribution remedy for non-fiduciaries. *Firestone* is hardly a manifesto for the creation of remedies not spelled out in ERISA. The narrow issue in *Firestone* was what standard – *de novo* or “arbitrary and capricious” – a district court should use when reviewing a plan administrator’s denial of benefits. 489 U.S. at 112. The question in *Firestone* was limited: granting that judicial review is provided for explicitly under ERISA, exactly how is that review to be exercised? ERISA contained no mention of the proper standard of review by the district court, although it provided for a suit by aggrieved parties to challenge a denial of benefits, according to *Firestone*. 489 U.S. at 108-09. The arbitrary and capricious standard, drawn from the Labor Management Relations Act, 1947 (LMRA), had been adopted by many courts because, like ERISA, LMRA imposed fiduciary duties on plan administrators, and Congress had expressed its

“general intent to incorporate much of LMRA fiduciary law into ERISA.” *Id.* at 109 (citation omitted). Nevertheless, the Court held that the involved reasons that compelled the adoption of the arbitrary and capricious standard under the language of LMRA did not apply to ERISA. *Id.* at 109-10 (citations omitted). The Court turned instead to principles of trust law that formed the background of both LMRA and ERISA to discern a standard of review. *Id.*

Explaining its use of the common law of trusts, the Court noted that Congress contemplated that the courts would develop a “federal common law of rights and obligations under ERISA-regulated plans.” *Id.* at 110 (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987)). Based on its review of trust law standards, the Court concluded that a *de novo*, and not an arbitrary and capricious standard should apply. *Id.* at 110-13. The Court used traditional trust law to answer a question about how the Court was to exercise its review over a cause of action explicitly created under ERISA. This setting is a far cry from the creation of a cause of action where the statute is silent.

Pilot Life, the origin of the quote from *Firestone* on federal common law, is instructive. There the Supreme Court refused to permit state law remedies to augment ERISA enforcement provisions. 481 U.S. at 54. Part of the Court’s rationale was that Congress clearly intended to permit federal common law, and not state law, to augment ERISA’s explicit provisions where necessary. 481 U.S. at 56. The Court was not encouraging federal courts to inaugurate a bold new era of federal common law remedies by its reference to Congress’ intent. Rather, the reference to federal common law was included as a reason to *limit* the profusion of remedies under ERISA. Particularly telling was the Court’s comment on the implication of ERISA’s civil enforcement scheme:

“The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted ... provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.”

Id. at 54 (quoting *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985) (emphasis in original)). The opinion in *Russell*, from which the quotation in *Pilot Life* was taken, continued:

[t]he assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a ‘comprehensive and reticulated statute.’

473 U.S. at 146 (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980)). In *Russell* the Court refused to imply a right of action not spelled out in ERISA, relying in part on its opinions in *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77 (1981) and *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981). *Russell*, 473 U.S. at 147.

The approach in *Harris* echoes the approach in *Firestone* and *Russell*. The Supreme Court went out of its way to note – for the third time - that ERISA does not authorize “‘appropriate equitable relief’ *at large*” (emphasis in the original), but relief directed only at redressing violations or enforcing provisions of ERISA. 530 U.S. at 246-47 (quoting *Peacock v. Thomas*, 516 U.S. 349, 353 (1996) (quoting *Mertens v. Hewitt Associates*, 508 U.S. 248, 253 (1993))). The careful parsing of statutory language in *Harris* provides content to the Court’s admonition that “ERISA's comprehensive and reticulated scheme warrants a cautious approach to inferring remedies not expressly authorized by the text[.]” *Id.* at 247 (citations and internal quotations omitted).

The Stonehenge Parties argue that “having implied the underlying liability in the first place, to now disavow any authority to allocate it on the theory that Congress has

not addressed the issue would be most unfair to those against whom damages are assessed.” Doc. No. 161-1, at 31 n. 14 (quoting *Musick, Peeler & Garrett v. Emp’rs Ins. Of Wausau*, 508 U.S. 286, 292 (1993) (providing a contribution right for a party facing liability under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b–5 of the Securities and Exchange Commission (a 10b–5 action))). This argument misapprehends the holding in *Musick*.⁵

In *Musick* the Court decided that a defendant facing a 10b-5 action could assert a claim for contribution, distinguishing the circumstances from those in *Northwest Airlines* and *Texas Industries*.⁶ In contrast to the causes of action in *Northwest Airlines* and *Texas Industries*, both of which were creatures of statute, the 10b-5 action was judicially implied. 508 U.S. at 290. The Court reasoned that, since the courts had created and nourished the 10b-5 action for decades, to “disavow any authority to

⁵ In response to the argument that contribution is not a remedy spelled out in ERISA, the Stonehenge Parties argue, in the same footnote, that “[c]ontribution is a procedural tool for sharing responsibility and not a remedy contemplated or rejected by Congress.” See Doc. 161-1, p. 31, n. 14 (citations omitted). Characterization of contribution as a remedy or procedural tool is a “red herring,” as the Third Circuit has admonished. See *Bowers v. Nat’l Collegiate Athletic Ass’n*, 346 F.3d 402, 420 (3d Cir. 2003). The Supreme Court has referred to contribution variously as a “right,” a “right of action,” a “cause of action,” and a “remedy.” *Id.*, citing to *Northwest Airlines*, *Texas Industries*, and *Musick*. Contribution cases are “unlike discrimination cases, in which the right at issue . . . is distinct from the remedy sought (monetary or injunctive relief).” *Id.* “[T]he key question before us is simply whether *Northwest Airlines/Texas Industries* or *Musick* should guide us . . .” *Id.* None of the three Supreme Court cases focused on the label under which a contribution claim is categorized, but on a particularized analysis of Congressional intent. *Id.*

⁶ In *Northwest Airlines* the Court held that an employer had no right to contribution against unions the employer alleged were joint participants in violations of the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964. 451 U.S. at 94-95. In *Texas Industries* the Court held that there was no right to contribution based on a violation of § 1 of the Sherman Act. 451 U.S. at 646.

allocate it on the theory that Congress has not addressed the issue would be most unfair to those against whom damages are assessed.” 508 U.S. at 292. Given the unusual pedigree of the 10b-5 action, the Supreme Court sought “to infer how the 1934 Congress would have addressed the issue had the 10b–5 action been included as an express provision in the 1934 Act.” *Id.* at 294. Because two very similar fraud provisions in the 1934 Securities Exchange Act had included a statutory right of contribution, the Court concluded that, had Congress itself created the 10b-5 cause of action, it would have included a right of contribution. *Id.* at 297.

By contrast, in *Northwest Airlines and Texas Industries*, the question was whether “Congress expressly or by clear implication envisioned a contribution right to accompany the substantive damages right created . . . or, failing that, whether Congress intended courts to have the power to alter or supplement the remedies enacted[.]” *Id.* at 291 (citations and internal quotations omitted). The underlying cause of action, in *Harris*, was defined by statute, not by judicial implication. *See* 530 U.S. at 246; 29 U.S.C. § 1132(a)(3) (ERISA § 502(a)(3)). At issue in *Harris* was whether Congress intended to include non-fiduciaries in the class of defendants against whom the statutorily created cause of action could be pursued. Because Congress expressly created the cause of action under ERISA, *Northwest Airlines and Texas Industries* provide the appropriate analytical framework in this case, not *Musick*.⁷

⁷ Even if I were to conclude that the remedy in *Harris* were an artifact of federal common law rather than a statutory construct, and that *Musick* should therefore apply, *Bowers* strongly suggests that no contribution remedy should be implied. In *Bowers* the Court of Appeals considered whether Temple University could assert a contribution claim when sued under Title II of the Americans with Disabilities Act (ADA) and section 504 of the Rehabilitation Act. 346 F.3d at 408. The Court concluded that the underlying cause of action for discrimination was an implied remedy, and that *Musick* should control the analysis of whether a contribution right should also be implied. *See id.* at

Northwest Airlines held that a right of contribution may be created if the intent of Congress “may fairly be inferred” from the statute, or if the cause of action has “become a part of the federal common law through the exercise of judicial power to fashion appropriate remedies for unlawful conduct.” 451 U.S. at 90 (citations omitted). The omission of a remedy from the text of a statute is not dispositive, if the legislation was “enacted for the special benefit of a class of which petitioner is a member.” *Id.* at 92. But as in *Northwest Airlines*, so in this case: the party seeking the right of contribution here, a non-fiduciary, “can scarcely lay claim to the status of ‘beneficiary’ whom Congress considered in need of protection.” *Id.* (citation omitted). Non-fiduciaries who participate knowingly in a transaction prohibited under ERISA are the antithesis of the class for whose “special benefit” ERISA was enacted.

Nor does the structure of ERISA suggest that such a right should be implied. Like the Equal Pay Act and Title VII, ERISA makes “express provision for private enforcement in certain carefully defined circumstances, and provide[s] for enforcement at the instance of the Federal government in other circumstances.” *Id.*, at 93; *see* 29 U.S.C. § 1132 (ERISA § 502). The Court in *Northwest Airlines* held that the “comprehensive character of the remedial scheme . . . strongly evidences an intent not to authorize additional remedies.” *Id.* at 93-94. The Court in *Russell* “relied directly on its decisions in *Northwest Airlines* and *Texas Industries* . . . as support for the strong presumption that Congress deliberately omitted unmentioned remedies from the

428-29. Nevertheless, the Court in *Bowers* held that, unlike the Securities Act of 1934, considered in *Musick*, examination of the language, structure and legislative history of the ADA and Title II revealed no Congressional intent to provide for a contribution right for those who violated the law, in part because ERISA violators were not a class the legislation especially sought to benefit. *Id.* at 430, 433-34. For reasons discussed below, I find that the language, structure and history of ERISA contain no indication of Congressional intent to provide a contribution remedy.

comprehensive legislative scheme set forth in ERISA.” *Travelers Cas*, 497 F.3d at 865 (citation omitted). ERISA’s legislative history does not contain any indication that Congress intended to provide a contribution remedy for those who knowingly violate the statute. *See Northwest Airlines*, 451 U.S. at 93-94.

The Court in *Northwest Airlines* recognized a judicial role in creating common law “in cases raising issues of uniquely federal concern, such as the definition of rights or duties of the United States,” or in admiralty, in which the Constitutional grant of general admiralty jurisdiction to the Federal courts changes their typical role as courts of limited jurisdiction. *Id.* at 95, 96. ERISA, like the Equal Pay Act and Title VII, is entirely a creature of statute. Pension benefits are not an area of “uniquely federal concern.” *Id.* at 95, 96. “The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.” *Id.* at 97. ERISA represents exactly such a scheme.

A few months after deciding *Northwest Airlines*, the Supreme Court applied its rationale to refuse to create a right of contribution for a defendant accused of a Sherman Act violation. *Texas Industries*, 541 U.S. at 647. *Texas Industries* teaches that even if federal common law is actively employed in some aspect of a statute’s implementation, this is not a warrant to create remedies that Congress omitted in its detailed enforcement scheme. Acknowledging the role of the common-law in giving shape to Sherman Act liability, the Court nevertheless found that, given Congress’ carefully “detailed and specific” enforcement procedures, *id.* at 643 (citations and internal quotation omitted), there was nothing to “suggest that Congress intended courts to have the power to alter or supplement the remedies enacted.” *Id.* at 645. The fact that

Congress anticipated a role for the common-law in the development of ERISA is no different from the context in *Texas Industries*, in which the Supreme Court rejected a contribution remedy under the Sherman Act.

Recognizing that the Third Circuit has not addressed the contribution issue under ERISA, the Stonehenge Parties point to several cases in which the Court of Appeals has applied federal common law to infer other causes of action under ERISA. *See Plucinski v. I.A.M. Nat'l Pension Fund*, 875 F.2d 1052, 1056 (3d Cir. 1989) (“We have . . . previously recognized several federal common law actions pursuant to ERISA”); *N.E. Dep't. of ILGWU Health and Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147, 157-159 (3d Cir. 1985) (recognizing federal common law cause of action for declaratory judgment action between ERISA welfare benefit funds); *Carl Colteryahn Dairy, Inc. v. Western Penn. Teamsters & Employers Pension Fund*, 847 F.2d 113, 122 (3d Cir. 1988) (two ERISA plans could litigate a dispute over ERISA benefits, even though “plans” are not among the plaintiffs listed in § 1132, because federal common law provided the basis for the suit).

While each of these cases is instructive, none of them deal with the specific issue before me now: whether a contribution right accrues to a putative ERISA violator under federal common law. The Supreme Court, in *Northwest Airlines* and *Texas Industries*, devoted considerable time and attention to this particular remedy. *N.E. Dep't. of ILGWU Health and Welfare Fund* and *Carl Colteryahn* do not apply either Supreme Court case. *Plucinski* relied upon *Northwest Airlines* for the proposition that Congress' intent was the critical issue in interpreting ERISA, but for no more. 875 F.2d at 1055. None of this is surprising: contribution was not an issue in the three Court of Appeals cases, none of them involved implication of a cause of action for a putative ERISA

violator. Nor did any of these cases look to *Russell*, which, in turn, relied explicitly on *Northwest Airlines* to deny an “extracontractual remedy” to a plan beneficiary because the remedy was not authorized by ERISA. 473 U.S. at 145, 147, n.15.

Where the Court of Appeals has applied *Russell*, *Northwest Airlines* and *Texas Industries*, the results are not helpful for the Stonehenge Parties. In *Painters of Philadelphia Dist. Council No. 21 Welfare Fund v. Price Waterhouse*, 879 F.2d 1146, 1152 (3d Cir. 1989), the Court of Appeals rejected an effort to imply a right of action under ERISA for professional malpractice in favor of a non-fiduciary, explaining that *Russell* “dictated” the result. The Court refused to consider an argument, first raised on appeal, that the remedy could be found under federal common law. *Id.* Similarly, in *Trenton v. Scott Paper Co.*, 832 F.2d 806, 810 (3d Cir. 1987), the Court, informed by *Russell*, refused to imply a cause of action in favor of employees where there was no remedy explicitly provided in ERISA. *Bowers*, discussed above, see footnote 5, *supra*, relied on *Russell*, as well as several other Supreme Court cases, in rejecting a contribution remedy in the context of a broad remedial statute that supplied no evidence of Congressional intent to provide such a remedy. 346 F.3d at 425-30.

Efforts to discern the existence of a federal common law contribution remedy under ERISA require a precise attention to statutory intent, guided by Supreme Court precedent, in particular *Russell*, *Northwest Airlines*, *Texas Industries* and *Musick*. See *Bowers*, 346 F.3d at 425-430; see, e.g., *Varity Corp. v. Howe*, 516 U.S. 489, 508-13 (1996) (distinguishing the holding in *Russell* and finding an equitable remedy for an individual plan beneficiary based on a painstaking evaluation of statutory language not considered in *Russell*). While the Third Circuit has identified federal common law causes of action arising in different contexts under ERISA, this is no indication the

Court would imply a remedy for contribution in favor of a non-fiduciary faced with a *Harris* claim. It is worth noting that the Second and Seventh Circuits – the two Courts of Appeal that earlier approved (or seemed to approve) a federal common law contribution remedy – more recently have expressed significant caution about implying civil remedies not provided in ERISA. See *Gerosa v. Savasta & Co.*, 329 F.3d 317, 322-23 (2d Cir. 2003) (Supreme Court opinions since *Chemung* “make[] evident that we are no longer free to fill in unwritten gaps in ERISA's civil remedies”); *Summers*, 453 F.3d at 413 (holding that whether ERISA defendants have a right of contribution is unsettled in the Seventh Circuit). In another context, the Seventh Circuit has commented on why contribution may not be desirable:

A right of contribution is not required to achieve either the compensatory or the deterrent objectives of the law. The first point is obvious, the second only a little less so. One or more of the defendants may get off scot-free because the plaintiff has collected the entire judgment from another defendant; that is true. But not knowing beforehand whom the plaintiff will go against, each potential defendant has an expectation of being the unlucky one, and that expectation performs the deterrent function. In general, then, all that a right of contribution does is add to the costs of litigation . . .

Anderson v. Griffin, 397 F.3d 515, 523-24 (7th Cir. 2005).

Harris did not *create* a remedy; ERISA did that. By careful statutory analysis, *Harris* defined the class of people against whom a statutorily created remedy may be asserted. *Firestone* was every bit as cautious when deciding what standard of review to apply to a *statutorily* created cause of action. Both *Northwest Airlines* and *Texas Industries*, which were relied upon by the Supreme Court when interpreting ERISA in *Russell*, explicitly rejected a contribution remedy in the context of statutes with comprehensive remedial schemes.

ERISA is such a statute. Its remedial scheme is broad, deep, and detailed. *See* 29 U.S.C.A. § 1132. ERISA does provide for some liability sharing measures for those exposed to obligations under the statute. *See* 29 U.S.C.A. § 1105(b)(1) (permitting certain risk allocation agreements between co-fiduciaries); § 1110(b)(1) (permitting fiduciaries to purchase certain types of liability insurance). Yet except for these narrow liability sharing mechanisms, ERISA generally prohibits risk sharing by fiduciaries. 29 U.S.C.A. § 1105(b)(2); 29 U.S.C.A. § 1110; *see Travelers Cas.*, 497 F.3d at 866. It seems unlikely that a Congress who so carefully limited the ability of fiduciaries to offload responsibility for violating ERISA would have casually extended a contribution remedy to non-fiduciaries who violate the act.

In light of the statutory language and structure, and my analysis of the case law, I recommend that the Alliance Parties' motion to dismiss the Stonehenge Parties' contribution claims be granted, insofar as they seek contribution for liability under the Fourth Claim for Relief, which arises under ERISA.

The parties have not focused their analysis on the Fifth Claim for Relief, which posits ERISA liability under a gratuitous transfer theory. Nevertheless, this theory would only be viable under an analysis similar to that in *Harris*. For the same reasons discussed above, I recommend that the motion to dismiss be granted as to the Fifth Claim for Relief.

B. Federal, Not State Law, Controls Contribution Claims Asserted in Response to ERISA Claims

Whether a contribution claim can be asserted in response to a claim under a federal statute is a matter of federal law. *Northwest Airlines*, 451 U.S. at 90–91; *see Poletto v. Consol. Rail Corp.*, 826 F.2d 1240, 1282 n.18 (3d Cir. 1987); *abrogated on*

other grounds by Kaiser Aluminum & Chem. Corp. v. Bonjorno, 492 U.S. 827 (1990). Federal, not state law, determines whether a contribution claim can be asserted under ERISA. *Travelers Cas. & Sur. Co. of Am. v. IADA Servs., Inc.*, 497 F.3d 862, 867 (8th Cir. 2007); *McDannold v. Star Bank, N.A.*, 261 F.3d 478, 485 (6th Cir. 2001); *Donovan v. Robbins*, 752 F.2d 1170, 1179 (7th Cir. 1985). The Stonehenge Parties do not dispute this proposition. Rather, they point out that their state law contribution claims can be asserted against state law causes of action. Doc. No. 161-1, at 33-37.

I recommend that the Stonehenge Parties' state law contribution claims, insofar as they respond to the Fourth and Fifth Claims for Relief, be dismissed.

2. State Law Contribution Claims Asserted In Response To State Law Liability Theories

The Stonehenge Parties argue that their state-law contribution claims are validly asserted against the Alliance Parties' state-law claims. Doc. No. 161-1, at 33-37. I agree.

A. State Law Aiding and Abetting and Conspiracy Claims

The Amended Complaint asserts that the Stonehenge Parties are liable for aiding and abetting Fenkell's breach of fiduciary duties (Twelfth Claim for Relief, ¶¶ 237-44) and for civil conspiracy (Fourteenth Claim for Relief, ¶¶256-65).

The Twelfth Claim for Relief alleges that the Stonehenge Parties, among others, aided and abetted Fenkell in the breach of his corporate fiduciary duties. *See* Amended Complaint, Docket No. 68 ¶¶ 237-44. The elements of such a claim are (1) a breach of duty by a fiduciary (2) knowledge of the breach and (3) substantial assistance or encouragement in effecting the breach. *See Pierce v. Rossetta Corp.*, CIV. A. 88-5873, 1992 WL 165817, at *8 (E.D. Pa. June 12, 1992); RESTATEMENT (SECOND) OF TORTS § 876(b) (1979) (one is liable who "knows that the other's conduct constitutes a breach of

duty and gives substantial assistance or encouragement to the other so to conduct himself”); see *Kelley v. Buckley*, 193 Ohio App. 3d 11, 36 (2011) (claim requires knowledge of a breach of duty and substantial assistance).

The Fourteenth Claim for Relief alleges a civil conspiracy involving the Stonehenge Parties and others. See Amended Complaint, Docket No. 68 ¶¶ 256-65. The elements of a civil conspiracy are (1) an agreement between two or more people (2) to do an unlawful act, (3) with malice, *i.e.*, an intent to injure. See *Skipworth by Williams v. Lead Indus. Ass'n, Inc.*, 547 Pa. 224, 235 (1997); see *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St. 3d 415, 419 (1995) (civil conspiracy is a “malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages.” (internal quotations and citations omitted)).

B. Choice Of Law

Before deciding whether state law contribution is available as a response to state law tort claims, I must decide which state law applies. Ms. Spear complains that the Stonehenge Parties have not made clear which state’s law controls on the issue of contribution. Doc. No. 153-1, at 16 n.4. The Alliance Parties conclude that the results would be the same under Pennsylvania or Ohio law. *Id.*; Doc. No. 152-1, at 18, n.3. The Stonehenge Parties assume Pennsylvania law applies. Doc. 161-1, at 35. Having considered the matter closely, I conclude that the two state’s contribution schemes would lead to different results. I also conclude that I should apply Pennsylvania’s contribution law to the case because the Commonwealth’s interests in this matter are more significant than Ohio’s.

A federal court exercising supplemental jurisdiction over a state law claim applies the choice-of-law rules of the forum’s state. See *Felder v. Casey*, 487 U.S. 131, 151

(1988); *Rohm & Haas Co. v. Adco Chem. Co.*, 689 F.2d 424, 429 (3d Cir. 1982); *McCoy v. Iberdrola Renewables, Inc.*, 760 F.3d 674 (7th Cir. 2014). Pennsylvania’s choice-of-law rules dictate which state’s law will govern the Stonehenge Parties’ claims. *See Rohm & Haas*, 689 F.2d at 429. The conflict-of-law analysis is two-fold: “the first part of the choice of law inquiry is best understood as determining if there is an actual or real conflict between the potentially applicable laws.” *Hammersmith v. TIG Ins. Co.*, 480 F.3d 220, 230 (3d Cir. 2007). If not, there is no conflict at all. *Id.* “If there are relevant differences between the laws, then the court should examine the governmental policies underlying each law, and classify the conflict as a “true,” “false,” or an “unprovided-for” situation.” *Id.* A “true conflict” exists if each jurisdiction’s policies would be harmed by application of the other jurisdiction’s rule. *Id.* at 229, 230. A court must undertake a “deeper” analysis if a “true conflict” is present.⁸ If only one jurisdiction’s policy will be harmed by application of the other jurisdiction’s rule, then a “false conflict” exists, and the court should apply the rule that does the least harm. *Id.* In an “unprovided-for” case, application of each jurisdiction’s rule will result in measurable harm to its own interests.⁹ *Id.*

(i) *Ohio’s Contribution Law*

Under Ohio law, “[t]here is no right of contribution in favor of any tortfeasor against whom an intentional tort claim has been alleged and established.” Ohio Rev. Code Ann. § 2307.25; *see Waldock v. Pittsburgh Nat. Bank*, 720 F. Supp. 610, 611 (N.D. Ohio 1988) (citing to predecessor statute); *Harmon v. Hamilton Cnty., Ohio*, 1:10-CV-

⁸ *Rosen v. Tesoro Petroleum Corp.*, 399 Pa.Super. 226 (1990) is an example of a “true conflict.” *Hammersmith*, 480 F.3d at 230.

⁹ *Miller v. Gay*, 323 Pa. Super. 466 (1983), discussed below, represents the so-called “unprovided for” case mentioned in *Hammersmith*. 480 F.3d at 230.

911-HJW, 2011 WL 6091786, *4 (S.D. Ohio Dec. 7, 2011) (assuming without deciding that the breach of a statutory duty under 42 U.S.C. § 1983 could implicate a right of contribution under Ohio law, except for the fact that it involves intentional wrongdoing). The complaint charges the Stonehenge Parties with aiding and abetting a breach of fiduciary duty, and conspiracy to breach fiduciary duties. If these theories of liability amount to intentional torts under Ohio law, they cannot be the basis of a contribution claim.

The Stonehenge Parties cite to *Nuveen Mun. Trust v. WithumSmith Brown, P.C.*, 692 F.3d 283 (3d Cir. 2012) for the proposition that aiding and abetting is an intentional tort. Neither aiding and abetting nor conspiracy are “stand alone” torts. Both are methods of attributing culpability for conduct of another. In both cases the true question is whether the underlying wrong – in this case, breach of fiduciary duty - is a tort. *Nuveen* does not help the analysis here, since it dealt with common law fraud, clearly a tort.

Under Ohio law it appears that a breach of fiduciary duty claim is classified as a tort. *See Crosby v. Beam*, 83 Ohio App. 3d 501, 509 (1992) (4-year tort, not 6-year contract, statute of limitations applied to breach of fiduciary duty claim). The Restatement of Torts takes the same position, and that one who “knowingly assists a fiduciary in committing a breach of trust is himself guilty of tortious conduct . . .” RESTATEMENT OF TORTS (SECOND) (1979) §§ 874, 876, cmt. c.; *see S & K Sales Co. v. Nike, Inc.*, 816 F.2d 843, 848 (2d Cir. 1987) (referring to the “tort of participation in a breach of fiduciary duty” and holding that intent to injure is not an essential element of the tort: the factfinder is required to find only that “the third party knew of the breach of duty and participated in it”) (citations omitted); *but cf. Mar-Cone Appliance Parts Co. v.*

Mangan, 879 F. Supp. 2d 344, 376-78 (W.D.N.Y. 2012) (breach of fiduciary duty between majority and minority shareholders does not sound in tort at all, so that contribution is simply unavailable, regardless of intentionality (construing New York law)); *Giordano v. Morgan*, 554 N.E.2d 810, 814 (1990) (under Illinois law breach of fiduciary duty is not a species of tort, but is “controlled by the substantive laws of agency, contract and equity[.]” so that contribution is not available), citing *Kinzer v. City of Chicago*, 539 N.E. 2d 1216, 1220 (Ill. 1989). While *Mar-Cone* and *Giordano* demonstrate that there are reasons to question whether a breach of fiduciary duty should be classified as a tort within the meaning of the contribution statute, I conclude that Ohio law, consistent with the Restatement, would treat the claim as a tort.

The question then becomes whether such claims involve “intentional torts” for which contribution is prohibited. The term “intentional” can mean different things in different statutes. In the criminal law, the distinction between “general intent” and “specific intent” is well-known, albeit “esoteric.” See *Carter v. United States*, 530 U.S. 255, 267-70 (2000) (discussing the differences between the two concepts). “General intent” means an intent to do some act which the statute proscribes. *Id.* at 268. “Specific intent” means more. *Id.* at 267. For instance, to be guilty of bank robbery one must not only take money from a bank by force, but “intend permanently to deprive the bank of its possession of the money.” *Carter*, 530 U.S. at 268. The Supreme Court pointed out in *Carter* that where a “general intent requirement suffices to separate wrongful from ‘otherwise innocent’ conduct,” a “specific intent” element is not necessary. *Id.*

Ohio law presumes that a statute requires only general intent unless a specific intent requirement is spelled out. See *State v. Guerrieri*, 252 N.E.2d 179, 181 (Ohio Ct. App. 1969). Ohio interprets its contribution statute to “mean precisely what it says, *i.e.*,

that intentional tortfeasors causing a plaintiff's harm cannot recover contribution[.]” *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 196 F.3d 617, 622 (6th Cir. 1999) (interpreting predecessor statute to Ohio Rev. Code Ann. § 2307.25). In this instance no specific intent requirement is alluded to in the contribution statute, nor do concerns about distinguishing prohibited and “otherwise innocent” conduct suggest such a requirement is needed. I conclude that the Ohio contribution statute means that when a tortfeasor intends to commit the act proscribed, he has no contribution remedy. There need be no specific intent to injure to exclude a tortfeasor from contribution. This conclusion is buttressed by results in other jurisdictions. *See Barbagallo v. Marcum LLP*, 11-CV-1358, 2012 WL 1664238 (E.D.N.Y. May 11, 2012) (aiding and abetting a breach of fiduciary duty is an intentional tort for which no right of contribution exists); *Appley v. West*, 929 F.2d 1176, 1180 (7th Cir. 1991) (breach of fiduciary duty is an intentional tort for which no right of contribution exists). Parenthetically, neither does it seem there is a specific intent requirement for a claim that one aided a breach of fiduciary duty. *See, e.g., S & K Sales Co.*, 816 F.2d at 848 (intent to injure is not an essential element of the tort; defendant merely has to intend to participate in the breach of fiduciary duty). Thus, if the Stonehenge Parties aided a breach of fiduciary duty, or conspired to commit one, they would not be allowed contribution under Ohio’s statute.

(ii) *Pennsylvania’s Contribution Law*

Pennsylvania law provides that a “right of contribution exists among joint tortfeasors.” 42 Pa. Cons. Stat. Ann. § 8324(a). “[J]oint tort-feasors’ means two or more persons jointly or severally liable in tort for the same injury to persons or property[.]” 42 Pa. Cons. Stat. Ann. § 8322. The right of contribution arises when a “joint tortfeasor has discharged the common liability or paid more than his *pro rata* share.” *Swartz v.*

Sunderland, 169 A.2d 289, 291 (Pa. 1961). Notably absent is any explicit exclusion of intentional tortfeasors from the definition of “joint tort-feasors.”

A number of federal courts have held that there is no right of contribution, under Pennsylvania law, in favor of one who commits an intentional tort. *See Britt v. May Department Stores Company*, CIV. A. 94-3112, 1994 WL 585930 (E.D. Pa. Oct. 14, 1994), *citing In re One Meridian Plaza Fire Litigation*, 820 F. Supp. 1492, 1496 (E.D. Pa. 1993); *Cook v. Spithogianis*, 765 F.Supp. 217, 220 (M.D. Pa. 1991); *Wilder v. Williams*, CIV. A. 87-1043, 1989 WL 159591 (W.D. Pa. June 7, 1989); *Canavin v. Naik*, 648 F. Supp. 268, 269 (E.D. Pa. 1986) (principle is “well-settled” under Pennsylvania law); *Cage v. New York Cent. R. Co.*, 276 F. Supp. 778, 789 (W.D. Pa. 1967) (holding there is no right of contribution under Pennsylvania law for one who commits a “willful and wanton” act).

Certainly this was the rule in Pennsylvania under *Goldman v. Mitchell-Fletcher Co.*, 141 A. 231, 233-34 (Pa. 1928) (providing for contribution among joint tortfeasors, but not for those who have committed an intentional wrong). Pennsylvania passed a contribution statute in 1951. *See* Joseph P. Work, *Contribution – Wilful Tortfeasors – Common Law and Under Uniform Contribution Among Tortfeasors Act*, 62 DICK. L. REV. 262, 263 (1958). This statute “in effect” confirmed the Pennsylvania Supreme Court’s decision in *Goldman*. *See, e.g., Fisher v. Diehl*, 40 A.2d 912, 916 (Pa. Super. 1945) (discussing statute in a negligence action).

After *Goldman*, and faced with a common law rule in the majority of states that prevented contribution even among negligent tortfeasors, the National Conference of Commissioners on Uniform State Laws recommended the Uniform Contribution Among Tortfeasors Act in 1939. 9 U.L.A. 156; Work, *supra*, at 263-64. Pennsylvania adopted its

version of this act in 1951. Act of July 19, 1951 (P.L. 1130), § 2 (12 P.L. § 2083) (Reenacted at 42 Pa. Cons. Stat. Ann. § 8324 (1976), effective 1978). One Court of Common Pleas opinion concluded that the language of the Uniform Act adopted in 1951 allowed a contribution remedy for intentional tortfeasors. *See Brenneis v. Marley*, 5 Pa. D. & C. 2d 20, 23-24 (Pa. Com. Pl. 1956) (holding that the language of the statute did more than merely adopt the rule of *Goldman*, but went beyond it, by making no distinction between intentional and negligent tortfeasors).

“The National Conference of Commissioners, noting the lack of enthusiasm for the adoption of the Uniform Act of 1939,” proposed revised language in 1955, including specific language excluding contribution for intentional torts. *Work, supra*, at 265. In doing so they acknowledged that the 1939 Act “was silent on the matter,” and explained the policy reasons for adopting language excluding intentional, as well as willful and wanton, torts. *Id.* The revised act was adopted by at least 11 jurisdictions, including Ohio. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. § 23, Reporter’s Note (2000). Significantly, Pennsylvania was not among them. *Id.* Pennsylvania re-enacted its version of the UCATA in 1976 without adding language excluding intentional tortfeasors. Act of July 9, 1976, P.L. 586, No. 142, § 2, effective June 27, 1978; 42 Pa. Cons. Stat. Ann. § 8324.

In *Svetz for Svetz v. Land Tool Co.*, 513 A.2d 403 (Pa. Super. 1986) the Superior Court determined that one responsible in strict liability could recover from a negligent tortfeasor because “[t]he statutory language does not limit the right of contribution to tortfeasors who have been guilty of negligence. Contribution is available whenever two or more persons are jointly or severally liable in tort, irrespective of the theory by which tort liability is imposed.” *Id.* at 355. It is true that *Svetz* involved strict liability and

negligence theories, and the equitable arguments at the root of its decision do not necessarily translate to a case involving an intentional wrong-doer. It is easy to be indifferent to an intentional tortfeasor's desire to off-load some of the cost of his wrongdoing onto the shoulders of a negligent or strictly liable tort-feasor. Nevertheless, the *Svetz* court's remarks about the statute's language are (1) grammatically accurate and (2) consistent with the logic that animated *Brenneis*. 5 Pa. D. & C.2d at 23-24.

Nor is *Svetz* an outlier. In *McMeekin v. Harry M. Stevens, Inc.*, 365 Pa. Super. 580, 585-88 (1987) the Superior Court expanded on the principle discussed in *Svetz*, holding that the legislature clearly limited application of comparative negligence principles to cases involving negligent tortfeasors. In doing so the court in *McMeekin* contrasted the language of the Comparative Negligence Act, which covered only "all actions brought to recover damages for negligence[.]" with the language of the UCATA, which "does not limit the right of contribution to tortfeasors who have been guilty of negligence." *Id.*, at 587 (quoting *Svetz*, 355 Pa.Super. at 238-39). As in *Svetz*, the case involved strict liability and negligent theories, not an intentional tort, but the insistence on careful interpretation of, and adherence to, the UCATA's actual language cannot be ignored. As Judge Yohn noted in *Alexander v. Hargrove*, No. 93-5510, 1994 WL 444728 *4 (E.D. Pa. August 16, 1994), the contribution statute "does not expressly limit its applicability to torts based on negligence."

A neighboring jurisdiction with an almost identically-worded contribution statute¹⁰ has held that intentional wrongdoers are not excluded under the statutory

¹⁰ "For the purpose of this act the term 'joint tortfeasors' means two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them.' Section 2(1) provides, 'The right of contribution exists among joint tortfeasors.'" Judson, 17 N.J. at 89, quoting

language. See *Judson v. Peoples Bank & Trust Co. of Westfield*, 110 A.2d 24, 35 (N.J. 1954), holding modified on other grounds by *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 666 A.2d 146 (1995). In passing, the New Jersey Supreme Court noted the National Commissioner's comment on their draft legislation, which made it clear that the statutory language

does not, in any way, qualify the creation of this right by confining it to joint tortfeasors in any narrower sense than that indicated in Section 1. Nor does it confine contribution to merely negligent tortfeasors or to those in any other way inadvertently harming others. It permits contribution among all tortfeasors whom the injured person could hold liable jointly and severally for the same damage or injury to his person or property. 9 U.L.A. 158 (internal quotations omitted).

17 N.J. at 90. While the understanding of the National Commissioners is not binding on the Pennsylvania legislature, it does bolster the idea that the language of the Pennsylvania contribution statute was not intended to exclude intentional torts.

Cage, decided in 1967, contained a thorough analysis and concluded that were an appellate court in Pennsylvania to consider the issue, it would decide that an intentional tortfeasor has no right of contribution. 276 F. Supp. at 788-89. Nevertheless, *Cage* was decided before *Svetz*, and *Cage* did not cite to or discuss the holding in *Brenneis*. Neither did *Cage* consider the implications of the difference between the original UCATA, adopted by Pennsylvania, and the revised UCATA, which contained explicit language excluding intentional tortfeasors from a right of contribution. Nor did *Cage* consider the significance of the National Commissioner's comments to their 1939 draft legislation, adopted by Pennsylvania, to the effect that the statute's language does not

sections 1 and 2(1) of the Uniform Act, adopted verbatim by the New Jersey Legislature at N.J.S.A. 2A:53—1, 2.

“confine contribution to merely negligent tortfeasors or to those in any other way inadvertently harming others.” *See Judson*, 17 N.J. at 90 (citing 9 U.L.A. 158).

Other than *Alexander*, none of the federal cases cited above¹¹ grapple with the Pennsylvania contribution statute’s language. By contrast, Pennsylvania appellate courts seem acutely sensitive to the language of the statute. *Brenneis* concluded that the statute’s language provided a contribution remedy for intentional tortfeasors. Given the statute’s language and history, I conclude that Pennsylvania appellate courts would agree with the opinion in *Brenneis* and hold that the contribution statute permits a contribution remedy for intentional tortfeasors.

(iii) *An Analysis of Contacts and Interests Favors Application of Pennsylvania’s Contribution Scheme.*

Since Ohio would provide the Stonehenge Parties with no right of contribution, but Pennsylvania would, I must determine if the situation amounts to a “true conflict,” a “false conflict,” or an “unprovided for situation” under *Hammersmith*, 480 F.3d at 230. If a “true conflict” exists, I must weigh on a “qualitative scale” the contacts between the parties and the two states, taking into account the relationship of these contacts with the “policies and interests underlying the [particular] issue.” *Id.* at 231.

According to the Amended Complaint, the ESOP was administered within the Eastern District of Pennsylvania. *See* Amended Complaint, Doc. No. 68, ¶ 9; *see also* 29 U.S.C. § 1132(e)(2) (providing that “[w]here an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be

¹¹ *Britt*, CIV. A. 94-3112, 1994 WL 585930; *In re One Meridian Plaza Fire Litigation*, 820 F. Supp. 1492; *Cook*, 765 F.Supp. 217; *Wilder v. Williams*, CIV. A. 87-1043, 1989 WL 159591; *Canavin*, 648 F. Supp. 268.

found, and process may be served in any other district where a defendant resides or may be found.”) Alliance Holdings is a Pennsylvania corporation and sponsored the ESOP since 1995. *Id.* ¶ 11. Defendant Fenkell was both a corporate officer of Alliance and a trustee of the Alliance ESOP. *Id.* ¶ 29. DBF Consulting is a Pennsylvania-based LLC, whose sole owner and employee is David Fenkell. *Id.* ¶ 39. By contrast, Stonehenge Financial Holdings is an Ohio corporation. *Id.* ¶ 33. SLAMS is an Ohio LLC created by Lianne Sefcovic and operated together with her husband, Paul. *Id.* ¶¶ 49, 50. SLMRS is also incorporated under Ohio law. *Id.* ¶ 51. John P. Witten, Barry Gowdy and Ronald D. Brooks formed Stonehenge in 1999 and were employees of Stonehenge from 1999 to 2011. *Id.* ¶¶ 34, 37.

Pennsylvania has a policy of permitting contribution among tortfeasors, no matter the theory of liability. Ohio has expressed a policy interest in preventing a contribution claim by an intentional tortfeasor. The consequence of applying Pennsylvania law would be to permit contribution in favor of an Ohio corporation against a Pennsylvania corporation, even though Ohio law, if applied, would prevent that contribution. Such a result seems to pose no harm to Pennsylvania’s policy regarding contribution. By contrast, the consequence of applying Ohio’s law would be to prevent an Ohio corporation from asserting a claim for contribution against a Pennsylvania corporation, notwithstanding the fact that a similarly situated Pennsylvania corporation would be able to recover contribution.

Two cases are particularly helpful in deciding the choice-of-law issue. In *Miller v. Gay*, 323 Pa. Super. 466 (1983), a Delaware passenger sued a Pennsylvania driver in Pennsylvania, as a result of a car accident that occurred in Delaware. *Id.* at 470. The Delaware plaintiff would have been permitted recovery if the court applied

Pennsylvania’s “guest protecting policy,” while application of Delaware’s “host-protecting” policy would have benefitted the Pennsylvania driver. *Id.* *Miller* held that “[u]nder these circumstances we believe neither state seems to have a significant relationship as to the issue of guest vs. host protection.” *Id.* The court then sought a neutral principle as a basis for decision, and concluded that “inhabitants of a state (here Delaware) should not be accorded rights not given them by their home states, just because a visitor from a state offering higher protection decides to visit there.” *Id.* at 472. The court applied the law of Delaware, the plaintiff’s domicile. *Id.* at 473.

Garcia v. Plaza Oldsmobile Ltd., 421 F.3d 216 (3d Cir. 2005) involved a New York driver, in a car rented and registered in New York, who caused an accident in Pennsylvania involving a Pennsylvania car and driver. *Id.* at 218. Under New York law, the car rental company was vicariously liable for the driver’s negligence. *Id.* Under Pennsylvania law, the Pennsylvania resident could not recover against the car rental company. *Id.* The Court of Appeals held the circumstances represented a “false conflict,” because Pennsylvania had no significant interest in limiting recovery by its own citizen or limiting the liability of a New York corporation. *Id.* at 219, 223. By contrast, New York had an interest in protecting people injured by New York cars driven by New York drivers, whether the injured parties were New Yorkers or not. *Id.* at 221-22.

Miller held that “[t]he weight of the contacts is to be measured qualitatively rather than quantitatively,” 323 Pa. Super. at 470 (citation omitted). In this case Pennsylvania has an interest in ensuring that joint tortfeasors have a contribution remedy against each other. As with New York’s vicarious liability policy in *Garcia*, Pennsylvania’s legitimate interest in assuring a contribution remedy between joint tortfeasors does not by its terms or logic apply only where the rule benefits

Pennsylvanians. Such a rule is a risk spreading device that operates without regard to the particular home state, or state of mind, of a given tortfeasor. *See Svetz*, 513 A2.d at 406-07.

By contrast, Ohio's rule, because it singles out intentional wrong-doers for exclusion, by its nature is designed to (1) avoid having a court provide a remedy for an intentional wrong-doer, and (2) deter intentional wrong-doing. *See Waldock v. Pittsburgh Nat. Bank*, 720 F. Supp. 610, 611 (N.D. Ohio 1988). Where a foreign jurisdiction—here a federal district court in Pennsylvania— conducts proceedings, the first goal is not implicated. Ohio has no interest in saving foreign courts the distress of providing a contribution remedy to intentional tortfeasors. As for the second goal, deterrence requires awareness. The deterrent effect, on out-of-state residents, of Ohio's exclusion of intentional wrongdoers from a contribution remedy must be undetectably low.

I conclude that the rationale in *Garcia* should control the conflict of law issue in this case. The gravamen of the wrongs alleged in the Twelfth and Fourteenth Causes of Action is a breach of corporate fiduciary duty. The state law causes of action for aiding and abetting and conspiracy against the Stonehenge Parties are dependent upon the underlying breach of trust claim against Fenkell, in which Pennsylvania clearly has the most significant interest. The law applicable to contribution claims is ordinarily the same law that controls the underlying cause of action. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 173 (1971). Only where some other state's law has a "greater interest" in the particular issue of contribution will the rule vary. *Id.* cmt. a. The participation of non-fiduciaries in the breach, and the question whether such non-fiduciaries might have a contribution remedy if liable, seems subordinate to the more

fundamental issues in the case. No other jurisdiction's interests appear to be "greater" than Pennsylvania's, at least at this juncture. I conclude that Pennsylvania's contribution scheme should apply to the state law claims in this case. *See Garcia*, 421 F.3d at 219, 223.

Even if I were to treat this as a so-called "unprovided for" case, as in *Miller*, the approach in *Miller* was to search for a less obvious but still neutral principle upon which to decide the choice-of-law question.¹² Such a search would lead to a deeper consideration of the nature of the case in its entirety, and would lead me back to the conclusion that Pennsylvania has the more fundamental interest in the governance of breach of trust claims arising from the activities of a Pennsylvania citizen (Fenkell) and a Pennsylvania corporate entity (Alliance) doing business in Pennsylvania and elsewhere. Given the plutoid nature of Ohio's contribution scheme to the overall dispute in this case, application of Pennsylvania's contribution scheme is appropriate.

C. The Adequacy of the Stonehenge Parties' Pleadings

I conclude that Pennsylvania law applies, and that the Stonehenge Parties may assert a contribution claim under state law in response to the state law causes of action alleged in the Complaint. The question then becomes whether the Stonehenge Parties

¹² Selecting the law of the claimant's domicile, as a device for ensuring against the kind of forum shopping obviously at work in *Miller*, would not be effective here, since the party claiming the right of contribution had no choice about the forum. *Cf. Miller*, 323 Pa. Super. at 470 (ultimately applying law of plaintiff's domicile to resolve conflict issue). Neither would selecting a forum based on physical contacts with the events under review. The fiduciary who allegedly breached his trust would have done so in Pennsylvania, while the Stonehenge Parties presumably aided and abetted and conspired in the breach of trust while ensconced in Ohio. Both jurisdictions have physical "contacts" with the transactions at the root of the case. Those physical contacts have only accidental intersections with the larger context of this case, involving complex financial transactions conducted in multiple jurisdictions. This is not a car accident that happened one evening at a country road in either Ohio or Pennsylvania.

have adequately alleged such a claim. The Alliance Parties raise several objections to the Stonehenge Parties' pleadings (Doc. 152, at 2):

1. That the Stonehenge Parties have not adequately alleged they are joint tortfeasors with Alliance, Wanko or Lynn;
2. That the contribution claims cannot be asserted against "Alliance," since it cannot be liable in tort for the alleged breach of fiduciary duty owed to itself;
3. That the Stonehenge parties have not alleged a theory under which Wanko or Lynn could be liable to Alliance for the injuries alleged in the Amended Complaint.

The Alliance Parties' first argument is that the Stonehenge Parties must admit they are tortfeasors before they can make a claim for contribution against joint tortfeasors. Doc. 152-1, at 17. The Stonehenge Parties maintain they are entitled to plead in the alternative. Doc. 161-1, at 37. Of course, they are. *See Indep. Enterprises Inc. v. Pittsburgh Water & Sewer Auth.*, 103 F.3d 1165, 1175 (3d Cir. 1997) (Rule 8 permits the pleading of inconsistent claims); Fed. R. Civ. Pro. 8(d)(2) (permitting claims to be pled "hypothetically or in the alternative"); *Alper v. Alzheimer & Gray*, 257 F.3d 680, 687 (7th Cir. 2001) (contribution may be pled in the alternative). This argument is meritless.

As for Alliance's second argument, the Stonehenge Parties agree that to the extent the state law claims in the Amended Complaint "are brought only on behalf of Alliance Holdings, Inc., and not any of the other Alliance entities . . . a claim for contribution cannot be asserted against the party who suffered the harm." Doc. 161-1, at 37 n.18. The Stonehenge Parties point out that it was unclear from the First Amended Complaint which "Alliance" entity brought the state law claims. *Id.* The Stonehenge Parties continue to maintain that Alliance "knew of and participated in the actions it now alleges were wrongful[.]" *Id.*

I agree with the parties that Stonehenge cannot maintain a contribution claim against Alliance Holdings, Inc. for the alleged breaches of fiduciary duty committed by Fenkell against Alliance Holdings, Inc. Because parties with multiple capacities have cropped up as an issue in this case, I will briefly discuss the lack of clarity mentioned by the Stonehenge Parties. The First Amended Complaint identifies “Alliance Holdings, Inc. (“Alliance”), in its capacity as the Plan Administrator and a Named Fiduciary of the Alliance ESOP” as a plaintiff. Doc. 68, at 1. The Twelfth Claim for Relief identifies “Alliance and its shareholders” as the parties injured by the Stonehenge Parties’ conduct in aiding and abetting Fenkell’s breach of the “corporate fiduciary duties he owed to Alliance.” Doc. 68, ¶¶ 238, 242-43. A description of the breaches of corporate fiduciary duty is contained in the Ninth and Tenth claims for relief. *Id.* ¶ 238. These claims for relief describe Fenkell’s alleged misrepresentations, designed to deceive Alliance into paying him “excess compensation and into entering into the Employment Agreement and Amendment to the Employment Agreement.” *Id.* ¶ 211. These two documents are attached as Exhibits 6 and 7 to the First Amended Complaint. Doc. No. 68-6, 68-7. These agreements are between Fenkell and “Alliance Holdings, Inc.” There is no mention in the agreements of “Alliance Holdings, Inc. (‘Alliance’), in its capacity as the Plan Administrator and a Named Fiduciary of the Alliance ESOP.”

It is clear that “Alliance,” as the term is defined in the First Amended Complaint, is restricted to “Alliance Holdings, Inc. (“Alliance”), in its capacity as the Plan Administrator and a Named Fiduciary of the Alliance ESOP.” It also seems clear that the Twelfth and Fourteenth Claims for Relief seek to assert claims against Alliance’s former corporate officer, Fenkell, that do not depend upon Alliance’s ERISA status as a “Plan Administrator and a Named Fiduciary of the Alliance ESOP.” The Stonehenge Parties

mentioned this potential discrepancy in their pleadings. Doc. 88, at 59 n. 1. Stonehenge phrased its contribution claim as a counterclaim, believing that Alliance Holdings, Inc., in its own capacity and not as a Plan Administrator, was asserting a claim as plaintiff. *Id.* Stonehenge has not sought a clarification of Alliance Holdings, Inc.'s status, or of what difference it would make in this litigation, by motion.

I will not hazard an opinion on the subject at this juncture. It suffices to note that Stonehenge has acknowledged that it cannot assert a claim for contribution against Alliance Holdings, Inc., since Alliance Holdings, Inc. cannot be a joint tortfeasor against itself. Doc. No. 161-1, at 37, n. 18. I therefore recommend that Count 2 of the Counterclaims be dismissed. Doc. No. 88, ¶ 292-93.

In their third point on this subject, the Alliance Parties claim that the Stonehenge Parties have not alleged a theory under which Wanko or Lynn could be held liable. The Alliance Parties contend that the Stonehenge Parties have “conspicuously fail[ed] to allege that Wanko or Lynn had any involvement with the Stonehenge Contracts or the DBF Consulting kickbacks. . .” Doc. No. 152-1, at 10.

To the contrary, the Stonehenge Parties have alleged that “[a]t all times relevant to this Third-Party Complaint,” Wanko was an officer and employee of Alliance, a “party in interest” of the ESOP, and a fiduciary under ERISA, and that as such he exercised “discretionary authority or . . . control” over the ESOP and its assets. Doc. No. 88, ¶¶ 339-40. As for Lynn, the allegations of ¶¶ 340-41 of the Third-Party Complaint allege much the same. The pleading also alleges that the Stonehenge agreements were well known to Lynn and Wanko, and that the two corporate officers knowingly participated in Fenkell’s breaches (if any). Doc. No. 88, ¶ 346. Alliance mentions the dates of employment of Wanko and Lynn as a reason to question the plausibility of the Third-

Party Complaint, Doc. No. 152-1, at 10. But this is a matter outside the pleadings, as footnote 1 of the Alliance Parties' motion indicates by citing to a web address for the information. *Id.* The allegations of the Third-Party Complaint for contribution against Wanko and Lynn set out 'sufficient factual matter' to show that the claim is facially plausible." *Fowler*, 578 F.3d at 210, *quoting Iqbal*, 556 U.S. at 678.

I recommend that the motion to dismiss the third-party claim for contribution from Wanko and Lynn (Count 2, Doc. No. 88, ¶ 356-57) be denied as to the Twelfth and Fourteenth Claims for Relief, arising under state law.

3. The Stonehenge Parties' Contribution Claims Against Barbie Spear

Barbie Spear makes many of the same arguments as Alliance, Wanko and Lynn in support of her motion to dismiss the Amended Third-Party Complaint. Doc. Nos. 153-1; 162. For the reasons outlined above, I conclude that the Stonehenge Parties cannot assert a contribution remedy in response to the ERISA claims. Therefore, the contribution claims against Spear, insofar as they respond to the Fourth and Fifth Claims for Relief, both of which arise under ERISA, must be dismissed. *See* Doc. No. 88, ¶¶ 356-57.

With respect to the state law contribution claims asserted in response to the Twelfth and Fourteenth Claims for Relief, which sound in state law, Ms. Spear argues that Pennsylvania state law provides no contribution remedy for intentional torts. Doc. No. 153-1; Doc. No. 162, at 13. I have explained why I disagree. Ms. Spear has not argued that the claim for contribution is otherwise deficient.

I recommend that Ms. Spear's motion to dismiss the contribution claim, insofar as the claim responds to the Twelfth and Fourteenth Claims for Relief in the First Amended Complaint, be denied.

RECOMMENDATION

I recommend that an order be entered as follows:

1. The Alliance Parties' Motion to Dismiss (Doc. No. 152) the Second Count of the Stonehenge Parties Counterclaims (Doc. No. 88, ¶¶ 292-93) is **GRANTED**.
2. The Alliance Parties' Motion to Dismiss (Doc. No. 152) the Second Count of the Stonehenge Parties' Third-Party Complaint (Doc. No. 88, ¶¶ 356-57) is

GRANTED in part, and **DENIED** in part, as follows:

- a. The Motion to Dismiss is **GRANTED** insofar as the Second Count of the Stonehenge Parties' Third-Party Complaint asserts a contribution claim as to the Fourth and Fifth Claims for Relief in the Amended Complaint (Doc. No. 68, ¶¶ 182-88), which arise under federal law.
 - b. The Motion to Dismiss is **DENIED** insofar as the Second Count of the Stonehenge Parties' Third-Party Complaint asserts a contribution claim as to the Twelfth and Fourteenth Claims for Relief in the Amended Complaint (Doc. No. 68, ¶¶ 237-44; 256-65), which arise under Pennsylvania law.
3. Barbie Spear's Motion to Dismiss (Doc. No. 153) the Second Count of the Stonehenge Parties' Third-Party Complaint (Doc. No. 88, ¶¶ 356-57) is

GRANTED in part, and **DENIED** in part, as follows:

- a. The Motion to Dismiss is **GRANTED** insofar as the Second Count of the Stonehenge Parties' Third-Party Complaint asserts a contribution claim as to the Fourth and Fifth Claims for Relief in the Amended Complaint (Doc. No. 68, ¶¶ 182-88), which arise under federal law.

b. The Motion to Dismiss is **DENIED** insofar as the Second Count of the Stonehenge Parties' Third-Party Complaint asserts a contribution claim as to the Twelfth and Fourteenth Claims for Relief in the Amended Complaint (Doc. No. 68, ¶¶ 237-44; 256-65), which arise under Pennsylvania law.

BY THE COURT:

/s/ Richard A. Lloret _____
RICHARD A. LLORET
U.S. MAGISTRATE JUDGE