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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PERRI EDEL,

Plaintiff,

v.

SCHERING-PLOUGH GROUP
BENEFITS PLAN, et al.,

Defendants.

NO. C11-2778 TEH

ORDER GRANTING IN PART
AND DENYING IN PART
PLAINTIFF'S MOTION TO
DISMISS COUNTERCLAIM

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This matter comes before the Court on Plaintiff Perri Edel's motion to dismiss the counterclaim filed by Defendant Schering-Plough Group Benefits Plan ("the Plan") and Life Insurance Company of North America ("LINA") (collectively, "Counterclaimants"). Upon careful consideration of the parties' written submissions, the Court finds oral argument to be unnecessary and now VACATES the hearing scheduled for November 28, 2011, at 10:00 AM. As discussed below, the motion is GRANTED as to the Plan and DENIED as to LINA.

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In her complaint, Edel alleges that she was formerly employed by Defendant Schering-Plough Corporation, which has since merged with Defendant Merck & Co., Inc. She contends that she received disability benefits under the Plan from November 11, 2005, through November 10, 2008, at which time Defendants improperly terminated her benefits. The complaint alleges that LINA "insures disability benefits under the Plan and also acts as the decision-maker for disability benefit claims." Compl. ¶ 5.

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Counterclaimants allege that, under the policy at issue, disability benefits are to be reduced "by the amount that an employee or any of their dependents receive as Other Income Benefits, including Social Security disability benefits." Countercl. ¶ 12. They contend that

1 Edel was approved for Social Security disability benefits in May 2008, and that such benefits
2 were paid retroactive to October 2005. LINA and Edel allegedly entered into a written
3 agreement in March 2006 in which LINA agreed not to reduce disability benefit payments to
4 reflect Edel’s potential future Social Security benefits, and Edel agreed to “reimburse the full
5 amount of any overpayment within 30 days after receiving the award for Social Security
6 disability benefits.” *Id.* ¶ 9 (internal quotation marks omitted). Counterclaimants contend
7 that Edel is obligated to reimburse them over \$59,000 under that agreement, as well as under
8 the terms of the policy and Plan.

9 In their opposition to Edel’s motion to dismiss, Counterclaimants cited several cases –
10 including two from this district – in which similar counterclaims were held to be valid. *See,*
11 *e.g., Cusson v. Liberty Life Assurance Co.*, 592 F.3d 215, 230-32 (1st Cir. 2010); *Dillard’s*
12 *Inc. v. Liberty Life Assurance Co.*, 456 F.3d 894, 900-01 (8th Cir. 2006); *Mayhew v.*
13 *Hartford Life & Accident Ins. Co.*, Case No. C11-2908 SC, 2011 U.S. Dist. LEXIS 122286,
14 at *5-21 (N.D. Cal. Oct. 21, 2011); *Mertens v. Permanente Med. Grp. Long Term Disability*
15 *Plan*, Case No. C10-1457 RS, 2010 U.S. Dist. LEXIS 131085, at *9-15 (N.D. Cal. Dec. 10,
16 2010); *DeBenedictis v. Hartford Life & Accident Ins. Co.*, 701 F. Supp. 2d 1113, 1133-35
17 (D. Ariz. 2010). Edel failed to acknowledge, let alone rebut, any of these cases in her reply.
18 The Court finds the reasoning in such cases to be persuasive and therefore concludes that
19 Counterclaimants have stated a valid claim for relief.

20 However, as in *Mertens*, Counterclaimants here have cited “no controlling authority
21 for the proposition that an ERISA-governed plan can be its own fiduciary or that, as a plan
22 (and not a participant, beneficiary or fiduciary), it should have the right to bring a claim
23 under ERISA § 502(a).” 2010 U.S. Dist. LEXIS 131085, at *8; *but see Mullins v. Prudential*
24 *Ins. Co.*, Case No. 3:09-CV-371-S, 2010 U.S. Dist. LEXIS 113530, at *23-28 (W.D. Ky.
25 Oct. 22, 2010) (deciding, under Sixth Circuit authority, that a plan may have standing to
26 bring an ERISA claim as a fiduciary). In the absence of such authority, the Court agrees with
27 the *Mertens* court that the Plan itself cannot bring the asserted counterclaim. Accordingly,
28 the motion to dismiss is GRANTED as to the Plan.

1 As to LINA, Edel has herself alleged that the company administers disability benefits
2 under the Plan and “acts as the decision-maker for disability benefit claims.” Compl. ¶ 5; *see*
3 *also* Answer to Countercl. ¶ 3 (admitting that LINA “served as claims administrator for the
4 Plan”). “When an insurance company administers claims for an employee welfare benefit
5 plan and has authority to grant or deny the claims, the company is an ERISA ‘fiduciary’
6 under 29 U.S.C. § 1002(21)(A)(iii).” *Aetna Life Ins. Co. v. Bayona*, 223 F.3d 1030, 1033
7 (9th Cir. 2000) (citation omitted). A fiduciary under this section has standing to bring a civil
8 action under 29 U.S.C. § 1132(a)(3), and the motion to dismiss is therefore DENIED as to
9 LINA.

10 IT IS FURTHER ORDERED that the case management conference scheduled for
11 November 28, 2011, at 10:00 AM is CONTINUED to **January 30, 2012, at 1:30 PM**. The
12 parties shall meet and confer and file a joint case management conference statement on or
13 before **January 23, 2012**.

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15 **IT IS SO ORDERED.**

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17 Dated: 11/22/11



THELTON E. HENDERSON, JUDGE
UNITED STATES DISTRICT COURT