EXHIBIT A

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

ALBERT R. CHAVIES and THOMAS HOLLAND on behalf of themselves, individually, and on behalf of all others similarly situated, and on behalf of the CHE Plans, Plaintiffs, v. CATHOLIC HEALTH EAST, a Pennsylvania Non-profit Corporation, ANTHONY CAMORATTO, an individual, CLAYTON FITZHUGH, an individual, and JOHN and JANE DOES, each an individual, 1-20, Defendants.	Civil Action No. 13-1645

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT
OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

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Defendants Catholic Health East, Anthony Camoratto, and Clayton Fitzhugh (collectively "Defendants") submit this Memorandum of Law in further support of their Motion to Dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), or, in the alternative, Rule 56.[1]

I. INTRODUCTION

Plaintiffs offer a hodgepodge of arguments to avoid dismissal, none of which should long detain the Court. First, application of the church plan exemption is a jurisdictional issue that can and should be adjudicated under Rule 12(b)(1). *See Koval v. Wash. Cnty. Redevelopment Auth.*, 574 F.3d 238, 244 (3d Cir. 2009). And because Defendants filed a factual challenge to jurisdiction, Plaintiffs shoulder the burden of *now* offering competing facts supporting jurisdiction and cannot defer the jurisdictional challenge with the vaguest allusions to needed discovery.[2] Second, Plaintiffs' arguments about the scope of the church plan exemption ignore statutory text and settled law and call upon the Court to determine whether Catholic dogma is legitimate and/or sincerely held in violation of constitutional limits on this Court's authority. Contrary to Plaintiffs' strained interpretation, the church plan exemption readily encompasses organizations, such as Catholic Health East, that are not churches but are controlled by or associated with a church. Lastly, Plaintiffs' constitutional challenge runs headlong into *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), which, on similar facts, found no violation of the Establishment Clause.

[1] Defendants properly gave Plaintiffs notice that they were also seeking judgment under Rule 12(b)(6) and, in the alternative, Rule 56 in their opening brief. (Defs.' Mot. to Dismiss at 4 n.4, 18 n.14.)

[2] Plaintiffs have failed to present any affidavits or declarations, or even statements in their briefs, that show specific reasons why they cannot present facts essential to their opposition as required under Rule 56(d). Thus, should the Court convert this motion to a motion for summary judgment, Plaintiffs are not entitled to discovery before the Court decides the motion. (*See* Defendants' Opposition to Plaintiffs' Motion to Strike ("Defs.' Opp.") at 8-9.)

II. ARGUMENT

A. Whether the CHE Plan is a Church Plan is a Jurisdictional Question Properly Considered Under Rule 12(b)(1).

Contrary to Plaintiffs' argument, whether the CHE Plan is a church plan is a jurisdictional question properly considered under Rule 12(b)(1). ERISA's coverage provision excludes church plans and governmental plans from Section 1001-1191c of ERISA – the very provisions on which Plaintiffs' claims are based. 29 U.S.C. § 1003(b). ERISA also has a specific subject matter jurisdictional provision that provides that "the district courts. . . shall have exclusive jurisdiction of civil actions *under this subchapter*." 29 U.S.C. § 1132(e) (emphasis added). Thus, by its terms, ERISA does not confer jurisdiction over claims against church plans or governmental plans. In fact, the Third Circuit – in a case cited by Plaintiffs – specifically affirmed dismissal of ERISA claims pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction because the plan at issue was a governmental plan excluded from ERISA's coverage. *See Koval*, 574 F.3d at 241, 244.[3] Defendants here are asking this Court to do precisely what the district court and Third Circuit did in *Koval*.

B. Plaintiffs' Statutory Construction is Inconsistent with the Text of ERISA, the Legislative History, and Congressional Intent.

Plaintiffs' statutory construction is inconsistent with plain statutory language and legislative history, and runs counter to the findings of every court and administrative agency that has applied the statute in like circumstances. At bottom, ERISA was amended in 1980 to accommodate the very circumstances present here, *i.e.*, the church plan exemption was

[3] The Third Circuit explained in *Koval*:

> The [defendant] moved to dismiss the suit under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, arguing that its benefit plan was a "governmental plan," exempted from ERISA by 29 U.S.C. § 1003(b)(1) . . . . The [appellee's] benefit plan is a "Governmental Plan" exempt from ERISA under 29 U.S.C. § 1003(b)(1), and therefore the District Court correctly ruled that it did not have subject matter jurisdiction over Koval's claims.

Koval, 574 F. 3d at 241, 244.

broadened to cover individuals doing the biblically mandated work of the Church, although not directly in its employ. The fact that Catholic Health East pursues that mission on a large scale and has secular competitors in no way impairs the application or the exemption, nor should it.[4]

Without belaboring points made previously, Section 1002 of ERISA, 29 U.S.C. § 1002(33), defines "church plan" as a "plan established or maintained . . . by a church or by a convention or association of churches, which is exempt from tax under section 501 of title 26." 29 U.S.C. § 1002(33)(A). ERISA further describes the types of organizations that can establish church plans and those "employee[s] of a church" eligible to participate in such plans. *See id.* at (33). Specifically, it defines "[e]mployee of a church" as including "an employee of an organization . . . which *is controlled by or associated with a church*." *Id.* at 33(C)(ii)(II) (emphasis added). And an organization is "associated with" the church if it is a "civil law corporation" that shares "religious bonds and convictions" with the church. *Id.* at (33)(C)(iv). As a matter of law, therefore, the church itself is "deemed the employer of any individual" who is employed by an organization that is controlled by or associated with a church. *Id.* at (33)(C)(iii). Thus, if an individual is an employee of an organization "controlled by" or "associated with" a church, he is deemed an employee of a church and that entity can sponsor a church plan.[5]

The statutory definition of "associated with," requiring only that the "civil law corporation" share "religious bonds and convictions," is obviously not difficult to establish and

[4] The United States Conference of Catholic Bishops ("USCCB") represents that there are 629 Catholic hospitals in the United States, accounting for 12.6% of the community hospitals in the United States; those hospitals care for one in six hospital patients in the United States. *See* http://www.usccb.org/about/media-relations/statistics/health-care-social-service.cfm (last visited Sept. 3, 2013). Thus, the Catholic Church represents one of the largest health care providers in the United States. Of note, the USCCB includes Catholic Health East hospitals as Catholic hospitals in its statistics. *See id.* (citing Catholic Health Association of the United States, Catholic Health Care Statistics 2012).

[5] *See Catholic Charities of Me., Inc. v. Portland*, 304 F. Supp. 2d 77, 86 (D. Me. 2004); *Okerman v. Life Ins. Co. of N. Am.*, No. 00-0186, 2001 WL 36203082, at *4 (E.D. Cal. Dec. 24, 2001).

abundantly satisfied here. 29 U.S.C. § (33)(C)(iv). More to the point, an entity certainly does not need to be a place of religious observance to sponsor a church plan (although Catholic Health East is such a place. (*See, e.g.*, Defs.' Mot. to Dismiss, Ex. C (Affidavit of Sister Angela Fellin).) Catholic Health East's pursuit of Catholic and biblical objectives, particularly the scripture-based goal of healing, as set forth in the undisputed proofs before the Court and specifically endorsed by Congress, conclusively establishes the application of the exception.

The legislative history to which Plaintiffs point expressly recognizes the very facts and circumstances presented here. When the "controlled by" or "associated with" language was added to ERISA in 1980, the bill's sponsors recognized that the language would expand the exemption to church "agencies"[6] – including organizations "associated with" a church whose employees perform its vital "*work of disseminating religious instruction and caring for the sick, needy and underprivileged.*" *See* 124 Cong. Rec. 12106-08 (May 2, 1978) (Rep. Conable) (emphasis added).[7] That is precisely what Catholic Health East is and does.

C. Plaintiffs Present No Evidence Showing that the CHE Plan does not Fall Under the Church Plan Exemption.

Having failed to offer any evidence challenging Catholic Health East's proffer and content to dismiss the Defendants' evidence as "one-sided,"[8] Plaintiffs waived all challenges to the evidence which must be accepted as uncontested. (*See* Defs.' Opp. to Mot. to Strike at 7-9).

1. Plaintiffs Failed to Present any Evidence Contradicting the Proof Offered by Catholic Health East.

As set forth in Defendants' brief in Opposition to the Motion to Strike, the Court can, and

[6] Treas. Reg. § 1.414(e)-1(d)(2) defines a "church agency" as an organization that is exempt from tax under IRC § 501 and either controlled by or associated with a church. 26 C.F.R. § 1.414(e)-1(d)(2).

[7] *See also* 125 Cong. Rec. 10052 (May 7, 1979) (Sen. Talmedge) ("Church agencies are essential to the churches' mission. They care for the sick and needy and disseminate religious instruction. They are, in fact, part of the churches.").

[8] At the risk of stating the obvious, "[v]irtually all evidence is prejudicial or it is not material." *Carter v. Hewitt*, 617 F.2d 961, 972 n.14 (3d Cir. 1980).

indeed should, properly now consider the affidavits and evidence attached to Catholic Health East's Motion to Dismiss. (*See* Defs.' Opp. to Mot. to Strike at 7-8.) Mindful of the evidence properly before the Court, "the plaintiff has the burden of responding to the facts so stated." *Hammond v. Bausman*, No. 11-2666, 2011 WL 4590501, at *1 (E.D. Pa. Sept. 30, 2011) (citation omitted). That said, a plaintiff cannot simply make a conclusory response or rely upon the allegations in the complaint. *Id.* If a plaintiff fails to "*meet and controvert the defendant's factual assertions by affidavits or other sworn proofs, then the district court must determine whether it has subject matter jurisdiction based upon the factual context presented by the defendant*." *Int'l Ass'n of Machinists*, 673 F.2d at 711-12 (emphasis added).

Here, Plaintiffs failed to offer any opposing facts choosing instead to rely upon unsupported conclusions in their Complaint and a vague suggestion that unspecified discovery is somehow necessary. Their argument falls woefully short under any standard.

D. Plaintiffs Fail to Articulate any Valid Reason why this Court Should Deny Defendants' Motion to Dismiss.

Without cognizable evidence, Plaintiffs challenge the interpretation and significance of Catholic Health East's proofs. As just explained, having failed to offer any competing evidence rebutting the declarations now in the record, Plaintiffs waived all challenges to Catholic Health East's evidence. *Supra* at II.C. Nevertheless, should the Court review the declarations and accompanying materials, Plaintiffs' characterizations are wide of the mark and certainly no impediment to the dismissal of the lawsuit. The evidence readily demonstrates that Catholic Health East is associated with the Church, particularly when considered next to Congress's finding that "agencies" do the healing work of denominations like the Catholic Church. Once the Court determines that Catholic Health East is associated with the Roman Catholic Church, it need not reach the question of control under 29 U.S.C. § 1002(33)(C)(i).

1. The Court Should Refrain From Examining the Sincerity of Catholic Doctrine.

Plaintiffs offer no facts speaking to whether Catholic Health East is associated with the Catholic Church, despite the fact that they shoulder the burden of now proving subject matter jurisdiction. Instead, they are content to flail at the likely incontrovertible conclusion that Catholic Health East "shares common religious bonds and convictions" with the Roman Catholic Church. Indeed, they argue that if a religious nonprofit institution provides service as part of its religious mission that a secular entity also provides (such as biblically-mandated delivery of health care or education, for example), then the religious provider cannot share common bonds or convictions with the church. The fact that secular care providers abound says nothing about whether Catholic Health East shares the requisite ties to the Catholic Church. As one court held:

> While providing humanitarian services may be a secular activity, it is not necessarily so. Plaintiffs suggest that only "direct inculcation of religious doctrine or support of religion" qualifies as religious activity. *This argument fails to recognize that while providing humanitarian services may be a secular activity, for Christians, this type of activity is so motivated by their faith and part of their Christian identity that it must be considered a religious activity.*

Spencer v. World Vision, Inc., 570 F. Supp. 2d 1279, 1286 (W.D. Wa. 2008) (emphasis added), *aff'd*, 633 F.3d 723 (9th Cir. 2010), *aff'd* 633 F.3d 723 (9th Cir. 2011).[9]

Plaintiffs next challenge the means by which the Holy See and the USCCB operate their health care ministries. As previously explained, the controverted practices and policies are based on and consistent with Catholic dogma:

- Catholic Health East and its employees must follow the Ethical and Religious Directives

[9] *See also LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 229 (3d Cir. 2007) (performing secular activities does not destroy an organization's religious character); *O'Leary v. Social Sec. Bd.*, 153 F.2d 704, 705-06 (3d Cir. 1946) (recognizing that cemetery was "part of the temporalities of this great church," even though there were also non-religious burial grounds); *Saeemodarae v. Mercy Health Servs.*, 456 F. Supp. 2d 1021, 1038 (N.D. Iowa 2006) (not all of Catholic hospital's activities must be religious for it to be able to assert religious organization exemption to Title VII); *Lown v. Salvation Army, Inc.*, 393 F. Supp. 2d 223, 250-51 (S.D.N.Y. 2005) (inability of religious organization to predict whether secular courts would recognize the potential religious significance of providing secular services may impact how they carry out their religious missions).

promulgated by the USCCB in accordance with Catholic teachings. (Defs.' Mem. at 12-15; Persico Aff. ¶¶ 72-75.)

- The USCCB, through the Ethical and Religious Directives, and the Pope, through encyclicals, declarations and decrees, instruct Catholic health care providers that they should not discriminate against non-Catholics in hiring or the provision of health care. (Defs.' Mem. at 12-14; Persico Aff. ¶¶ 79-84.)
- The Catholic Church, and not the IRS, decides which entities are included in its tax exemption. *See* The [USCCB] Group Ruling on Exemption from Federal Income Tax and *The Official Catholic Directory*, *available at* http://nccbuscc.org/bishops/dfi/exemptionruling.htm (last visited Aug. 19, 2013). Catholic Health East denies that it failed to properly disclose a bond offering in its 1997 application, but regardless, the Catholic Church has continued to allow Catholic Health East to be listed in the Official Catholic Directory and included in the group ruling in the sixteen years since its application. (Persico Aff. ¶ 107, Ex. 19.)

These facts remain undisputed. Nevertheless, Plaintiffs argue that these Catholic publications do not *truly* reflect Catholic doctrine and the Court should disregard them. (Pls.' Opp. at 17-18.) That issue is not for this Court's adjudication, given constitutional constraints. The means by which the Catholic Church interprets its doctrine, *i.e.*, the importance of healing to Catholic dogma, is not a proper subject for judicial review.[10]

[10] *Hernandez v. Graham*, 490 U.S. 680, 699 (1989) (courts should not judge the "centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds" because it risks excessive entanglement with religion); *see also Askew v. Tr. of Gen. Assembly of the Church of the Lord Jesus Christ of the Apostolic Faith, Inc.*, 684 F.3d 413, 418 (3d Cir. 2012) ("Civil court review of doctrinal matters inhibits the free exercise of religion and usurps the power of religious authorities to resolve intrachurch matters purely of ecclesiastical concern. And it improperly cloaks the State with authority to intervene on behalf of groups espousing particular doctrinal beliefs." (internal quotation marks and citations omitted)); *Amos*, 483 U.S. at 343 (Brennan, J. concurring) ("determining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs."); *LeBoon*, 503 F.3d at 230 (refusing to determine whether defendant was a Jewish community center or religious center, because "to engage in such analysis would risk precisely the sort of state entanglement with religion that the Supreme Court has repeatedly warned against."); *Little v. Wuerl*, 929 F.2d 944, 949 (3d Cir. 1991) (declining to apply Title VII prohibition on religious discrimination to Catholic school, because it would require inquiry into school's religious mission). If the Court somehow reaches the issue, the law and facts presented further compel the conclusion that the Roman Catholic Church "controls" Catholic Health East. Entirely undisputed and ignored by Plaintiffs, Catholic Health East is a civil law corporation that has incorporated into its articles of incorporation and bylaws the duty to abide the precepts of the Catholic Church and, in particular, the Ethical and Religious Directives. (*See* Persico Aff., Ex. 3, Art. IV; Ex. 4, Art. I; Ex. 12, Art. IV; Ex. 13, Sect. 2.02.) Catholic Health East's governing documents also provide that public juridic persons – entities acting in the name of the Church – ultimately oversee its Board of Directors and all of its operations. (Defs.' Mem. at 16.) The public juridic persons answer to the Bishops and Archbishops in whose dioceses they operate and to the Holy See. (Persico Aff. ¶¶ 33-39, 54-63.) These facts are undisputed and, that said, the Church controls the public juridic persons which, in turn, control Catholic Health East. Undaunted, Plaintiffs submit purported admissions by the Catholic Church that public juridic persons are not controlled by the Church. (Pls.' Opp. at 16-17.) By presenting these affidavits as evidence against Catholic Health East, Plaintiffs

E. Plaintiffs' Establishment Clause Analysis is Directly Contradicted by Controlling Precedent.

There is no constitutional violation. Plaintiffs cavalierly ignore the well-established principle that "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Amos*, 483 U.S. at 334 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 673 (1970)). Indeed, *Texas Monthly Inc. v. Bullock*, 489 U.S. 1 (1989), a plurality decision by the Supreme Court on which Plaintiffs heavily rely, specifically reaffirmed this principle: "[W]e in no way suggest that all benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause." 489 U.S. at 332 n. 8. Against this backdrop, each aspect of Plaintiffs' argument runs afoul of *Amos*, unanimously holding that the application of a legislative exemption to the nonprofit activities of religious organizations "is in no way questionable under the *Lemon* analysis." *Amos*, 483 U.S. at 335.

As to the purpose prong, Plaintiffs posit that the Court should focus on the activities of Catholic Health East to find a valid secular purpose, rather than on Congress's intent in passing the exemption. The Establishment Clause has never been interpreted in that manner. The fact that the church plan exemption might extend to a religious organization that has made certain of its books and records public does not mean that Congress' goal is constitutionally infirm. "*Lemon*'s 'purpose' requirement aims at preventing the relevant government decision maker – in

effectively concede that Catholic Health East shares a sufficiently close relationship with the Catholic Church that the statements of Church officials can be considered party admissions here. In any event, the tender of an expert report from another litigation cannot be considered in this suit. *See Morrissey v. Luzerne Cnty. Cmty. Coll.*, 117 F. App'x 809, 815 (3d Cir. 2004) (rejecting argument that district court should have taken judicial notice of testimony from other case because facts adjudicated in other cases are not "generally known within the jurisdiction of the trial court, or [] capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.").

this case, Congress – from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." *Id.* at 335. Indeed, "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Id.* That is precisely the case here.

Plaintiffs' argument that the church plan exemption impermissibly benefits religious organizations without providing benefits to nonreligious organizations is also misplaced. In *Amos*, the Supreme Court specifically rejected the district court's reliance on Title VII's special treatment of religious organizations as a basis for finding the exemption unconstitutional. *Id.* at 338 (The Court "has never indicated that statutes that give special consideration to religious groups are *per se* invalid."). Likewise, as quoted above, the *Texas Monthly* Court rejected the notion that "all benefits conferred exclusively on religious organizations . . . on account of their religious beliefs are forbidden by the Establishment Clause." 489 U.S. at 332, n. 8. As explained previously, "a plausible secular purpose" can readily be discerned from ERISA's legislative history. This is all that is necessary to satisfy *Lemon's* purpose prong. *See Mueller v. Allen*, 463 U.S. 388, 394-395 (1983).

As to the effects prong, Plaintiffs argue that the church plan exemption "relieves no significant burden on religious practice." (Pls.' Opp. at 21.) While the church plan exemption reduces a significant burden on religion as applied to Catholic Health East, as explained in *Amos*, courts must review deferentially the claim of a religious organization that a challenged exemption alleviates significant government interference with the fulfillment of its religious mission. 483 U.S. at 336 ("[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider

religious."). This Court should refuse Plaintiffs' invitation to engage in the sort of interference that Congress may constitutionally seek to avoid.[11]

Plaintiffs overstate the harm to third-party interests that the church plan exemption supposedly creates in a vain effort to advance an equal protection argument. Here again, the rigorous scrutiny that Plaintiffs advocate runs contrary to *Amos*. Rejecting arguments that Title VII gives less protection to employees of religious employers than employees of secular employers and puts secular employers at a disadvantage vis-à-vis religious employers, the *Amos* Court held that only rational basis scrutiny applies. *Amos*, 483 U.S. at 338-339 ("The proper inquiry is whether Congress has chosen a rational classification to further a legitimate end . . . . [A]s applied to the nonprofit activities of religious employers, § 702 is rationally related to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions."). The church plan exemption readily passes muster under this deferential standard.[12]

The church plan exemption also passes *Lemon*'s entanglement prong. It is ridiculous for Plaintiffs to suggest that the overwhelming evidence submitted by Catholic Health East in response to the baseless allegations asserted by Plaintiffs in this litigation is proof that the church plan exemption causes greater religious entanglement.

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[11] *See LeBoon*, 503 F.3d at 230 ("We also decline LeBoon's invitation to hold that the LJCC is a center for Jewish culture rather than religion for the reasons explained by the Magistrate Judge, namely, because to engage in such an analysis would risk precisely the sort of state entanglement in religion that the Supreme Court has repeatedly warned against.") (citing *Amos*, 483 U.S. at 343 (Brennan, J., concurring)).

[12] There is another, perhaps even more fundamental reason Plaintiffs' argument fails under *Lemon*'s effects prong. As explained in the opening brief – and as Plaintiffs leave unanswered – "[f]or a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Amos*, 483 U.S. at 337. As a result, "[a] law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose." *Id*. That is the point of the type of regulatory exemptions challenged in *Amos* and here: they lessen regulatory burdens that could otherwise significantly interfere with the ability of religious groups to advance their mission. And that effect, as *Amos* teaches, is constitutional.

Dated: September 6, 2013

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