EXHIBIT A

UNITED STATES DISTRICT COURT
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 CAMARATTO, an individual CLAYTON FITZHUGH, an individual, and JOHN and JANE DOES, each an individual, 1-20,

Defendants.

Civil Action No. 13-1645

CLASS ACTION

PLAINTIFFS' SUR-REPLY IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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I. INTRODUCTION

Defendants use both their Reply in Support of their Motion to Dismiss, D.E. #44 ("MTD Reply"), and Opposition to Plaintiffs' Motion to Strike, D.E. #33 ("Motion to Strike Opposition"), to make new arguments, none of which change the inescapable conclusion that this Court has subject matter jurisdiction. First, pursuant to 28 U.S.C. § 1331, federal courts generally have jurisdiction over actions "arising under" federal law, and contrary to Defendants' new arguments, nothing in ERISA's jurisdictional provision makes coverage a jurisdictional requirement. Second, even if this Court were to determine that the CHE Plan is not covered by ERISA, it would retain jurisdiction over the entire dispute because Plaintiffs' right to recover would then turn on whether the exemption of a non-church entity from ERISA violates the Establishment Clause of the Constitution.

II. ARGUMENT

A. Whether the CHE Plan is covered under ERISA is not a jurisdictional question.

As an initial matter, it is significant that Defendants dedicate only half of a page in their MTD Reply to jurisdictional issues, yet use four pages of their Motion to Strike Opposition to assert new jurisdictional arguments to support the motion to dismiss. By including this argument in briefing on Plaintiffs' motion to strike (*see* p. 2 - 6 of Motion to Strike Opposition) Defendants improperly attempt to evade the page limitations applicable to their MTD Reply. Ultimately, Defendants' jurisdictional arguments, regardless of where they are advanced, lack merit.

Defendants' new arguments rest on authority that is contrary to U.S. Supreme Court and Third Circuit precedent. Both courts recently have reaffirmed that coverage is not jurisdictional, and clarified that earlier decisions suggesting otherwise have no precedential effect. For example, Defendants argue for the first time that the jurisdictional provision at ERISA § 502(e)

requires federal courts to first determine that a plan is covered under ERISA *before* it has jurisdiction to hear an ERISA claim. MTD Reply at 2. Not only is Defendants' contention contrary to the plain text of ERISA § 502(e), but the Supreme Court rejected this precise argument when it clarified that "[where] Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 515 (2006). In *Arbaugh*, the Supreme Court examined Title VII's jurisdictional and coverage provisions (which defines a covered "employer" as one that employs at least 15 employees) and held that because Title VII's jurisdictional provision does not explicitly mention the 15-employee requirement, such requirement is not jurisdictional. *Id*. at 514-5. The Court held that when a factual requirement appears in a separate provision of a statute that "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts," that requirement relates to the substantive adequacy of the claim and not to jurisdiction. *Id*. at 515 (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982)).

ERISA's jurisdictional provision is almost identical to that found in Title VII. *Compare* ERISA 502(e) ("[T]he district courts . . . shall have exclusive jurisdiction of civil actions under this title") with 42 U.S.C. § 2000(e)-5(f)(3) (providing district courts "shall have jurisdiction of actions brought under this subchapter."). Moreover, ERISA's coverage provision, like Title VII's, is contained in a separate section that does not refer in any way to jurisdiction. The Supreme Court holding in *Arbaugh* – that coverage questions are not jurisdictional – therefore applies equally to ERISA coverage issues.

Defendants' own authorities contradict their reasoning. In one of those cases, *Animal Science Prods., Inc. v. China Minmetals Corp.,* [1] the Third Circuit warned that courts should be leery of "drive-by jurisdictional rulings" where courts are "'less than meticulous' in distinguishing between substantive merits and jurisdiction." 654 F.3d 462, 466-67 (3d Cir. 2011) (citing *Arbaugh*, 546 U.S. at 511). Indeed, the primary case on which Defendants rely, *Koval v. Washington Cnty. Redevelopment Auth*., 574 F.3d 238 (3d Cir. 2009), is one such "drive-by jurisdictional" decision[2] which the Supreme Court emphasized should be given "no precedential effect" when considering whether a federal court has authority to adjudicate a dispute. *See Animal Science*, 654 F.3d at 466-67 (citing *Arbaugh*, 546 U.S. at 511). *Koval* contains no discussion of the appropriateness of deciding the coverage issue under Rule 12(b)(1), and the *Koval* court's reasoning makes clear that the court dismissed the complaint for failure to state a claim, not for lack of subject matter jurisdiction. 574 F.3d at 241.[3] Even if *Koval* held that ERISA coverage is jurisdictional (which it did not), such a holding would contradict binding Supreme Court and Third Circuit authority and should be disregarded. *See Animal Science,* 654 F.3d at 468 n.6 (citing subsequently overruled decisions which improperly characterized a statutory limitation as jurisdictional).

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[1] Defendants' reliance on *Animal Science* is misplaced. In that case, the appellate court determined that the coverage issue was not jurisdictional. *See id*. at 468-69 (remanding for review of the coverage issue under a Rule 12(b)(6) standard). The footnote that Defendants cite only points out that analysis under Rule 12(b)(1) is different than under Rule 12(b)(6).

[2] Indeed, *Koval* is less than meticulous in its use of the term "jurisdiction": the decision first correctly acknowledged that the district court had jurisdiction over the action under 28 U.S.C. § 1331 and ERISA § 502(a)(1)(B) because plaintiffs asserted ERISA claims, 574 F.3d at 241, but then appeared to dismiss the case (incorrectly) for lack of subject matter jurisdiction based on its finding that the plan in question was an exempt governmental plan.

[3] For these same reasons, the Defendants' cited decisions at page 5 n.4 of their Motion to Strike Opposition are in conflict with *Arbaugh*, and are therefore incorrect, to the extent that they hold that coverage is jurisdictional.

Henglein v. Informal Plan for Plan Shutdown Benefits for Salaried Employees, on the other hand, expressly addressed the question of whether ERISA coverage is jurisdictional, noting – as Defendants themselves point out – that the viability of a claim and jurisdiction are "separate matters, and they should not be confused." 974 F.2d 391, 397 (3d Cir. 1992). Defendants' contention that *Henglein* addressed the viability of the plaintiff's benefit claim as opposed to the viability of coverage is unsupported by even the most cursory reading of the decision. *Henglein* focused on coverage (whether an ERISA plan existed), not the viability of the claim for benefits, and the appellate court chastised the lower court for dismissing the case for lack of subject matter jurisdiction when it should have treated coverage as a merits question. *Id*. at 398.

B. The plain text and legislative history of ERISA demonstrate that the CHE Plan is not a Church Plan

In their Reply, Defendants also for the first time raise the argument that the legislative history supports their faulty interpretation of Section 3(33). MTD Reply at 4. This argument is wholly unpersuasive, as the particular legislative history cited by Defendants merely explains why Congress allowed church agency employees to participate in plans *established by churches* even though they were not employees of the church. None of the language that Defendants cite states that Congress intended to allow a corporate organization, even one that shares common bonds and convictions with a church, to establish its own Church Plan.

Similarly, for the first time in the MTD Reply, Defendants rely on ERISA's statutory language in an attempt to support their interpretation of Section 3(33). MTD Reply at 3. As Defendants point out, ERISA deems employees of a corporation that shares common bonds and convictions with a church to be employees of the church and the church to be their employer, but Defendants cannot point to any statutory language that then regards the corporate employer as a church. Because ERISA requires that a Church Plan must be established by a church, the

absence of language deeming the corporate employer to be a church defeats Defendants' argument that CHE can establish a valid Church Plan. ERISA § 3(33)(A).

Finally, even if the Court were to entertain Defendants' expansive interpretation of a Church Plan for purposes of this 12(b)(1) motion and find that the CHE Plan is exempt, their motion still would fail. This Court would still have federal question subject matter jurisdiction over this entire dispute because Plaintiffs claim that the application of the Church Plan exemption to a hospital conglomerate like CHE is unconstitutional. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). Defendants do not even address the Supreme Court's decision in *Steel Co.*, much less refute Plaintiffs' argument that *Steel Co*. alone is dispositive. *See* section IV.A.3 of Plaintiffs' Mem. of Law in Opp'n to Defs.' Mot. to Dismiss, D.E. #38. Instead, they argue in a footnote that Plaintiffs' interpretation of the Establishment Clause of the Constitution is wrong. However, the parties' disagreement as to the correct interpretation of the Constitutional issue does not change the unavoidable reality that this Court has federal jurisdiction to adjudicate Plaintiffs' Constitutional claim (Count VIII).

C. Plaintiffs need not present competing factual evidence because jurisdiction does not turn on factual issues

Defendants' new authority arguing that Plaintiffs have the burden of controverting the Defendants' factual evidence is inapposite because here, unlike in the cases Defendants cite, jurisdiction does not turn on any factual issues. In fact, Defendants' cited cases clearly recognize that a burden to controvert factual evidence at the motion to dismiss stage arises, if at all, where federal jurisdiction is dependent on the existence of certain facts. For example, in *Int'l Ass'n of Machinists & Aerospace Workers v. N.W. Airlines, Inc.*, 673 F.2d 700 (3d Cir. 1982), the statute gave jurisdiction to the federal court only if the dispute was not a "minor dispute." Thus, the sole reason the court required the plaintiffs to meet and controvert the defendants' evidence was

that jurisdiction only existed if the court first found that the dispute was not "minor." *Id*. at 710. Similarly, in *Hammond v. Bausman*, the court recognized the general rule that "the district court, when reviewing a motion to dismiss for lack of subject matter jurisdiction, 'must accept as true the allegations contained in the plaintiff's complaint, *except to the extent federal jurisdiction is dependent on certain facts.*'" No. 11-2666, 2011 WL 4590501, at *1 (E.D. Pa. Sept. 30, 2011) (emphasis added); *see also Haydo v. Amerikohl Mining, Inc*., 830 F.2d 494, 495-96 (3d Cir. 1987) (rejecting defendant's argument that their conduct is not covered by the statue because "the allegations of the complaint are considered as true so that the disposition of the motion is purely a legal determination.").

Moreover, both these cases cite *Mortensen v. First Federal Savings and Loan Association*, which dictates that factual challenges to jurisdiction cannot be adjudicated until plaintiffs have had a chance to take jurisdictional discovery. 549 F.2d 884, 892 n.17 (3d Cir. 1977). As discussed in Plaintiffs' Reply in Support of their Motion to Strike at 4-5, whether Plaintiffs have carried a factual burden will be evaluated *if* the Court first decides that there are factual prerequisites to jurisdiction and, if so, *after* Plaintiffs have the opportunity to take jurisdictional discovery on those factual issues. *Toys "R" Us, Inc. v. Step Two*, 318 F.3d 446, 456 (3d Cir. 2003).

D. Plaintiffs' complaint focuses on the application of ERISA's church plan exemption to CHE, a hospital conglomerate

Defendants bury their argument that CHE is controlled by the Roman Catholic Church ("RCC") at the end of a footnote relating to a completely different issue, apparently recognizing that this argument has no merit. *See* MTD Reply at 7 n.10. Defendants do not deny that CHE is governed by a board of directors that is not appointed by the RCC, the Diocesan archbishops or the congregations of the Sisters Religious that originally founded CHE, nor do they deny that the

Board has independent fiduciary duties to the corporation. Although Defendants repeat their argument that CHE is controlled by the RCC because the Articles of Incorporation state that CHE should abide by the precepts of the RCC, they do not explain how this constitutes control by the RCC. Similarly, Defendants repeat their conclusory argument that the public juridic person has ultimate control over CHE, but do not dispute that CHE's Articles of Incorporation only give the public juridic person the right to receive an annual report and to request a meeting with the Board – neither of which constitutes control. Defendants do not explain how the public juridic person is controlled by the RCC, but rather urge the Court to ignore the *sworn* statements of RCC leaders that the RCC has no control over public juridic persons under civil law. Ex. D, D.E. #39-4, and Ex. E, D.E. #39-5 to Pls.' Mem. of Law in Opp'n to Defs.' Mot. to Dismiss.

Defendants' argument that CHE is "associated with" the RCC is equally without merit. The cases Defendants cite are irrelevant to determining whether CHE is associated with the RCC because they do not examine whether the organization in question shares common bonds and convictions with a church. All but one of the cases interprets Title VII's exemption for religious organizations, which simply requires a finding that the organization is religious and does not examine whether the organization shares common bonds and convictions with a particular church. *See LeBoon v. Lancaster Jewish Cmty.Ctr.Ass'n,* 503 F.3d 217 (3d Cir. 2007)[4]; *Spencer v. World Vision, Inc*., 570 F. Supp. 2d 1279 (W.D. Wash. 2008); *Saeemodarae v. Mercy Health Servs*., 456 F. Supp. 2d 1021 (N.D. Iowa); *Lown v. Salvation Army, Inc.*, 393 F. Supp. 2d 223 (S.D.N.Y. 2005). Similarly inapplicable is *O'Leary v. Social Sec. Bd.*, 153 F.2d 704 (3d Cir.

[4] To the extent Defendants argue in their MTD Reply that the Free Exercise Clause prohibits the Court from scrutinizing the claim that CHE is controlled by and associated with the RCC, such argument is contrary to Supreme Court precedent. *See Hernandez v. Comm'r*, 490 U.S. 680, 699-700 (1989) (scrutinizing religious non-profit's claimed religious views); *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 305-06 (1985) (same).

1946), which examined whether a cemetery association was organized and operated for an exclusive religious purpose.

E. Plaintiffs' Establishment Clause analysis is consistent with controlling precedent.

Defendants' assertion that Plaintiffs' constitutional argument runs afoul of *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987) is based on a dual misreading of Supreme Court authority and Plaintiffs' argument. *Amos* does not hold that any accommodation of religion is acceptable; rather, it acknowledges just the opposite – that at some point, accommodation may devolve into the unlawful fostering of religion. 483 U.S. at 334-5. Similarly, *Texas Monthly v. Bullock*, which cites *Amos*, recognizes that not all benefits conferred upon religious groups are forbidden by the Establishment Clause, but holds that benefits conferred upon religious groups that do not "remov[e] a significant state-imposed deterrent" to religious exercise and impose substantial burdens on non-beneficiaries are an unconstitutional endorsement of religion. 489 U.S. 1, 14-15 (1989).

Defendants' argument that application of the Church Plan exemption to CHE serves a valid secular purpose is based on a misstatement of that prong of the *Lemon* test. While Plaintiffs dispute that the *Lemon* test is applicable, even under the *Lemon* analysis, an exemption serves a valid secular purpose if it applies broadly to nonreligious as well as religious organizations or if it is necessary to avoid entanglement. Here, Defendants' interpretation of the exemption applies only to organizations that claim a religious affiliation and exemption of hospital conglomerates like CHE is not necessary to avoid entanglement.[5] Thus, this

[5] Tellingly, Defendants offer no support for the argument that application of the exemption to CHE serves the valid purpose of avoiding entanglement resulting from examination of a church's confidential books and records. Simultaneously, Defendants argue that the Court must

interpretation results in an impermissible endorsement of religion. *See Texas Monthly*, 489 U.S. at 17.

Defendants also misapprehend Plaintiffs' arguments. Plaintiffs are not, as Defendants contend, advancing an equal protection argument, nor are they overstating the harm to third parties created by the Church Plan exemption. Harm to third parties is a critical inquiry in a religious accommodation challenge. *Cutter v. Wilkinson*, 544 U.S. 709, 720-22 (2005); *Texas Monthly*, 489 U.S. at 14-15; *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 708-09 (1985). Defendants state that Plaintiffs have not answered the argument that for a law to have forbidden "effects" under the *Lemon* test, the government itself must advance religion through its own activities and influence. MTD Reply at 10, n.12. Plaintiffs do not agree that the *Lemon* test applies here, but even under the *Lemon* test, extension of the Church Plan exemption to CHE is unconstitutional. The exemption at issue in *Texas Monthly* "ha[d] the purpose [and] effect of sponsoring" religion because it did not "remov[e] a significant state-imposed deterrent to the free exercise of religion." 489 U.S. at 14-17. Similarly, the Church Plan exemption, as applied to CHE, has the purpose and effect of sponsoring religion because requiring CHE – a corporate entity – to fund its pension plan and comply with ERISA does not impose any burden on the hospital conglomerate's purported exercise of religion.

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defer to its claim that the Church Plan exemption alleviates significant government interference with CHE's religious mission, without articulating how funding the CHE pension plan interferes with any such religious mission. As a result, there is no proof to which this Court can defer.

III. CONCLUSION

Because this Court has subject matter jurisdiction over all of Plaintiffs' claims, Defendants' motion to dismiss should be denied in its entirety.

DATED: October 11, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2013, a true and correct copy of Plaintiffs' Sur-Reply in Opposition to Defendants' Motion to Dismiss has been filed electronically using the ECF system, which in turn will send a Notice of Electronic Filing to all registered counsel.

Dated: October 11, 2013

/s/ Tracey Hale
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