

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LAURENCE KAPLAN, on behalf of :
himself, individually, and on behalf of all : Civil Action No. 13-2941 (MAS)(TJB)
others similarly situated, :

Plaintiff, : Honorable Michael A. Shipp
v. : United States District Judge
:

SAINT PETER’S HEALTHCARE : Motion Returnable:
SYSTEM, RONALD C. RAK, an : November 18, 2013
individual, SUSAN BALLESTERO, an :
individual, GARRICK STOLDT, an : Oral Argument Requested
individual, and JOHN and JANE DOES, :
each an individual, 1-20, :
: (Electronically Filed Document)
Defendants. :

**DEFENDANTS’ REPLY MEMORANDUM OF LAW IN
FURTHER SUPPORT OF THEIR MOTION TO DISMISS
PURSUANT TO FED. R. CIV. P. 12(B)(1) AND 12(B)(6)**

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PRELIMINARY STATEMENT

Plaintiff believes that employees of a hospital controlled by and associated with the Church are indistinguishable from employees of secular nonprofit hospitals and should be within ERISA.¹ Congress has determined otherwise, excluding such hospitals in ERISA's church plan exclusion ("Exclusion"). Plaintiff ignores the statutory language, selectively misreads its legislative history, and proclaims that the Department of Labor, the Internal Revenue Service, and every federal court to interpret the Exclusion have been unanimously mistaken for more than 20 years. Plaintiff also ignores or willfully misreads Saint Peter's governing documents. Saint Peter's and its Plan Committee are both controlled by the Church through the Bishop and associated with the Church through its obedience to the ERDs. Saint Peter's employees are therefore church employees, its Plan falls within ERISA's Exclusion, and this Court lacks subject matter jurisdiction over the ERISA claims.

Plaintiff's claim that the Exclusion violates the Establishment Clause also lacks merit. The Exclusion satisfies the test of *Amos* and *Lemon* for accommodations to religion, serving a secular purpose, avoiding entanglement, and not endorsing or subsidizing religious doctrine.

¹ Unless otherwise indicated, Defendants will utilize the terms as previously defined in their initial brief. Saint Peter's initial Memorandum of Law is cited as "Br." and Plaintiff's Opposition as "Pl. Br."

ARGUMENT

I. THE COURT LACKS JURISDICTION OVER PLAINTIFF'S STATUTORY CLAIMS UNDER ERISA

Under *Koval v. Washington County Redevelopment Authority*, 574 F.3d 238 (3d Cir. 2009), a court lacks subject matter jurisdiction over an ERISA complaint when, as here, the defendant's benefit plan falls within an express statutory exception to ERISA. *Koval* is controlling precedent in this Circuit.²

Koval meets the requirements of *Steel Co.* and *Arbaugh* that a statute must refer to jurisdiction for a dismissal on jurisdictional grounds, as opposed to failure to state a claim. ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1), provides exclusive jurisdiction of civil actions brought by a participant or beneficiary. In turn, § 4(b)(2), 29 U.S.C. § 1003(b)(2), provides that "the provisions of this title" do not apply to a church plan as defined in the statute. The "provisions of this title" include the provisions conferring jurisdiction on the district court. While the jurisdictional provisions are a separate section of ERISA, that section is subject to and incorporates by reference § 4(b)(2)'s blanket exclusion from the statute. *Cf. Animal Sci. Prods., Inc.*, 654 F.3d at 466-68 (no jurisdictional issue when statutory

² Decided after *Arbaugh v. Y & H. Corp.*, 546 U.S. 500 (2006), and *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), *Koval* is consistent with those decisions' general language about the distinction between lack of subject matter jurisdiction and failure to state a claim for relief. *Cf. Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 466-68 (3d Cir. 2011) (overruling pre-*Arbaugh* decisions dismissing for lack of jurisdiction).

language is silent as to jurisdiction).³

Plaintiff tries to distinguish *Koval* by arguing that it dealt with an exclusion from ERISA that was apparent on the face of the complaint, while here the Exclusion depends on facts not apparent from the Complaint. Pl. Br. at 6-8. That argument lacks merit. (*See* Opp. to Motion to Strike at 4-8). The Third Circuit and this Court have held repeatedly that lack of subject matter jurisdiction can be challenged factually at any time, including before an answer is filed.⁴

II. THE SAINT PETER’S PLAN IS A CHURCH PLAN

A. A Plan Maintained By A Nonprofit Organization Whose Employees Are Church Employees Is A Church Plan

“Church” is not defined in ERISA. Plaintiff asserts that a “church” is

³ Plaintiff’s invocation of *Henglein v. Informal Plan*, 974 F.2d 391 (3d Cir. 1992) and two district court cases that follow it is unavailing. *Henglein* held that the question of whether or not an employee benefit plan exists is a merits issue, not jurisdiction. *Id.* at 397-98. *Henglein* was decided 17 years before *Koval*, which limits it. More importantly, *Henglein*, unlike *Koval*, did not deal with an express statutory exclusion from ERISA. This case does.

Russell v. Catholic Healthcare Partners Employee Long Term Disability Plan, 2013 U.S. Dist. LEXIS 117961 (S.D. Ohio Aug. 20, 2013) did not reach the jurisdictional issue because the district court found that “plaintiff provides no evidence to support the assertion that the Plan is a church plan.” *Id.* at *6. *Daft v. Advest, Inc.*, 658 F.3d 583 (6th Cir. 2011), cited in *Russell*, does not deal with an express exclusion from ERISA coverage.

⁴ *See CNA v. United States*, 535 F.3d 132, 145-46 (3d Cir. 2008); *Berardi v. Swanson Mem’l Lodge No. 48 of Fraternal Order of Police*, 920 F.2d 198, 200 (3d Cir. 1990); *see also D.G. v. Somerset Hills Sch. Dist.*, 559 F. Supp. 2d 484, 491 (D.N.J. 2008); Fed. R. Civ. P. 12(h)(3). *Berardi* expressly rejects the reasoning of *Mortensen v. First Federal Savings & Loan Ass’n*, 549 F.2d 884 (3d Cir. 1977), on which Plaintiff relies. *Berardi*, 920 F.2d at 200.

limited to an organization whose primary function is to provide religious worship and whose principal employees are clergy. Since a nonprofit healthcare system like Saint Peter's falls outside this self-chosen definition, Plaintiff argues, the Plan cannot be a church plan. His argument is actually a policy argument that the retirement plans of church-owned nonprofit institutions should not be exempt because their employees do the same work as their counterparts in lay-owned organizations. Congress, however, disagreed. ERISA § 3(33) and its legislative history demonstrate that Congress intended a "church plan" to include plans of any nonprofit entity whose employees fall within the definition of church employees. Plaintiff argues to the contrary only by selectively omitting legislative history.

Plaintiff quotes Representative Conable's statement that the 1980 amendment retains the basic definition of a church plan. 124 Cong. Rec. 12107 (1978). Pl. Br. at 12. But he omits and ignores what comes immediately thereafter:

The bill achieves this result by retaining the basic definition of church plan as a plan established and maintained for its employees by a church The term "employee," however, is redefined to include: . . . second, an employee of an organization which is exempt from tax and which is controlled or associated with the church Under the bill, an organization is "associated" with a church if it shares common religious bonds and convictions with a church.

For purposes of section 414(e), all such employees are deemed to be employed by the denomination. [Emphasis added].

Id. The definition of church employee is expanded to include the employees of an organization controlled by or associated with a church, and a plan that covers

church employees is a church plan, thereby satisfying Rep. Conable's objective of bringing within the church plan exception those church agencies furthering the church's work "of disseminating religious instruction and caring for the sick, needy and underprivileged." 124 Cong. Rec. at 12107; *see also* 125 Cong. Rec. 10052 (1979) (Sen. Talmadge).⁵

Congress had excellent reasons for relieving church controlled schools, hospitals and welfare agencies from the burdens of ERISA. Both sponsors of the amendment described the work of church agencies in education, healthcare and welfare as an essential part of churches' charitable mission.⁶ Plaintiff, as a matter of policy, would confine the Exclusion strictly to institutions of religious worship. Congress disagreed and extended the Exclusion to those church-controlled or church-associated nonprofit organizations that perform the charitable works of religion.

That is the uniform construction of § 3(33) by both the IRS and the DOL. The two agencies disagree on an inessential point: the IRS requires that a plan's administrative committee be church-controlled; the DOL does not. Pl. Br. at 16.

⁵ Plaintiff uses the same selective omission with the remarks of Senator Talmadge, quoting his statement that the definition of "church plan" remains unchanged while ignoring his immediately following statements that "all employees are deemed to be employed by the denomination" and that the definition of employee is expanded. *See* 125 Cong. Rec. 10052 (1979).

⁶ 125 Cong. Rec. 10052 (1979) (Sen. Talmadge); 124 Cong. Rec. 12107 (1978) (Rep. Conable).

Here, the Plan is operated and maintained by a church-controlled administrative committee. (Stoldt Cert. ¶¶ 19-23). More importantly, both the IRS and DOL have consistently recognized that the Exclusion applies to a plan maintained for employees of a nonprofit organization who are church employees. Br. at 20-21.

Every district court considering the issue has held that church-controlled or associated nonprofit hospitals fall within the Exclusion. Both courts of appeals that have addressed the issue have accepted that the Exclusion would apply if control or association were proven. *See Chronister v. Baptist Health*, 442 F.3d 648, 653 (8th Cir. 2006); *Lown v. Continental Cas. Co.*, 238 F.3d 543, 547-48 (4th Cir. 2000) (A plan of a corporation “associated with a church can still qualify as a church plan.”). This Court should not conclude that these decisions were unanimously mistaken.

B. Saint Peter’s Is Controlled By The Roman Catholic Church

Though neither ERISA nor the legislative history of § 3(33) define “control,” the term is well understood as a matter of both federal and New Jersey corporate law. SEC regulations define “control” as “the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.” 17 C.F.R. § 240.12b-2, *followed in Gould v. Am.-Hawaiian S.S. Co.*, 535 F.2d 761, 779 (3d Cir. 1976). New Jersey has defined

control of a closely held corporation as “the power to dictate” the corporation’s affairs. *Muellenberg v. Bikon Corp.*, 669 A.2d 1382, 1386-87 (N.J. 1996) (majority ownership); *accord Hill Dredging Co. v. Risley*, 114 A.2d 697, 713 (N.J. 1955) (same). New Jersey’s lower courts have described a “control premium” as “the added amount an investor is willing to pay for **the privilege of directly influencing the corporation’s affairs.**” *Casey v. Brennan*, 780 A.2d 553, 571 (N.J. App. Div. 2001), *aff’d* 801 A.2d 245 (N.J. 2002) (emphasis added)(citations omitted). The IRS defines control under § 3(33) to include the power to appoint a majority of officers or directors. 26 C.F.R. § 1.414(e)-1(d)(2); *followed in Lown*, 238 F.3d at 547. Control, in sum, is the power to direct management of a corporation, or to directly influence management by the appointment of the governing body and other officers.

There is no question the Church, through the Bishop, controls Saint Peter’s:

- The Bishop is Saint Peter’s sole Member, with veto power over any action of the Board.
- He appoints all but two members of the Board, and the election of their successors by the Board is subject to his approval.
- Members of the Board serve at his pleasure. *See* N.J.S.A. 15A:6-6 (members may remove trustees without cause if bylaws so provide).
- He also has the authority to appoint and remove, in his discretion and at his pleasure, Saint Peter’s Chair and Vice Chair of the Board, its President and Chief Executive Officer, Treasurer and Chief Financial Officer, Secretary, and Assistant Secretary. (Stoldt. Cert. ¶¶ 4-10).

The Bishop's authority as sole Member of Saint Peter's gives him the right and power not only to influence, but to direct the actions of the Corporation by the selection of its officers and directors and by his outright veto over the Board.

There is no contradiction in Saint Peter's governing documents, as Plaintiff argues. Pl. Br. at 20. Since the Bishop is Saint Peter's sole Member, and since election of Board members is "subject to the approval of the Member" (Stoldt Cert., Ex. B, Art. IV § 2), he controls the membership of the Board. The Board's control of the Corporation's affairs is subject to the Bishop's power to veto any Board action. (*Id.*, Art. III § 2(e)). The Bylaws are therefore consistent that the composition and actions of the Board are subject to the authority of the Bishop.

Nor are the declarations of Saint Peter's employees submitted by Plaintiff relevant to the issue of control. All declarants are former employees of Saint Peter's University Hospital, a subsidiary of Saint Peter's, in such areas as food services (Kaplan Dec.), human resources (Pardo Dec., Radomsky Dec.), or billing (Mosley Dec.). None sat on the Board or reported to it. None is in any position to know the relationship between the Bishop, the Board, and the senior officers of Saint Peter's. Nor, for the reasons set forth in Saint Peter's Brief, is there any legal significance to prior statements that the Plan is subject to ERISA. Br. at 31-33.

The statements on Saint Peter's IRS Form 990 do not demonstrate lack of control. Under New Jersey's Nonprofit Corporation Act, it is the Certificate of

Incorporation and the bylaws that establish the relationship between the members, trustees and officers of a nonprofit corporation. *See, e.g.*, N.J.S.A. 15A:6-1 (power of board); 15A:6-3 (election and term of board members), 15A:6-5 (vacancies), 15A:6-6 (removal of board members), 15A:6-16 (removal of officers). To be sure, Saint Peter's 2011 Form 990 states, as check box answers to questions, that Saint Peter's has no members and that no members have the right to elect board members. (Bunch Dec., Ex. K, Sec. VI, Questions 6 & 7a). Those statements are inaccurate, and Saint Peter's is in the process of filing an amended Form 990 that will accurately reflect the governing documents. (Stoldt Reply Cert. ¶ 3).

The IRS, with which the Form 990 was filed, has recognized that Saint Peter's is controlled by the Church. On August 14, 2013, the IRS issued a private letter ruling that the Plan is a church plan. (Stoldt Supp. Cert., Ex. A). This ruling concludes that both Saint Peter's and its Plan are controlled by the Church through the Bishop, and that Saint Peter's is associated with the Church. (*Id.* ¶ 5, Ex. A).

C. Saint Peter's Is Associated With The Roman Catholic Church

Plaintiff argues that Saint Peter's is not Catholic enough to be associated with the Church because it employs non-Catholics, provides non-denominational worship space, and offers patients spiritual advisors of their choice. Pl. Br. at 23-26. These actions are all consistent with the non-discrimination requirements of

the ERDs. (Br. at 27-28; Fell Cert. ¶¶ 24-28; Stoldt Cert. ¶¶ 26-31).⁷ Moreover, the Free Exercise Clause precludes this Court from determining that Saint Peter’s does not adhere sufficiently to Catholic doctrine.⁸ Br. at 28-29.

Plaintiff concedes by silence that Saint Peter’s follows the distinctively Catholic teaching of the ERDs with respect to issues of reproductive health. (Fell Cert. ¶ 27; Stewart Cert. ¶ 5; Stoldt Cert., Ex. G, Directive 70). This sets it apart from secular nonprofit hospitals, which are required by New Jersey law to make facilities available for elective abortions. *See Doe v. Bridgeton Hosp. Ass’n*, 366 A.2d 641 (N.J. 1976). Adherence to the ERDs on reproductive health is sufficient to demonstrate that Saint Peter’s shares “common religious bonds and convictions” with the Church. ERISA § 3(33)(c)(iv).

D. Saint Peter’s Plan Is Maintained By An Entity Controlled By And Associated With The Roman Catholic Church

ERISA provides two alternative bases for the Exclusion: that the employing entity is controlled by or associated with a church, § 3(33)(c)(ii), or that the plan itself is maintained by a controlled or affiliated entity, § 3(33)(c)(i). Because the

⁷ It is not relevant that the head of the Pastoral Care Department in the 1990s was not a Catholic, as this is also consistent with the ERDs. (Fell Reply Cert. ¶ 3).

⁸ Neither *Hernandez v. Comm’r*, 490 U.S. 680 (1989) nor *Tony & Susan Alamo Found. v. Sec. of Labor*, 471 U.S. 290 (1985), cited by Plaintiff, allow courts to determine that an individual does not sufficiently or sincerely adhere to religious teachings. Both hold that federal taxes or regulations do not violate the Free Exercise Clause by substantial interference with religious beliefs.

two are alternatives, *Catholic Charities of M v. City of Portland*, 304 F. Supp. 2d 77, 85-86 (D. Me. 2004), held that the plan of a church-controlled organization was excluded under subsection (c)(ii) even though it was maintained by an independent organization that did not satisfy (c)(i). *Accord Rinehart v. Life Ins. Co. of N. Am.*, 2009 U.S. Dist. LEXIS 32864, at *10-11 (W.D. Wa. 2009); *Friend v. Ancillia Sys., Inc.*, 68 F. Supp. 2d 969, 973 (N.D Ill. 1999). As stated above, Saint Peter's qualifies for the Exclusion because it satisfies (c)(ii). It also satisfies (c)(i).

Plaintiff's reading of § 3(33)(c)(i) is incorrect. It provides that a plan:

. . . established and maintained by a church . . . **includes** a plan maintained by an organization . . . the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church. (Emphasis added).

To qualify, a plan need not be maintained by a church in Plaintiff's narrow, sacerdotal sense. It includes one maintained by an organization controlled by a church, for the employees of a church. Because Saint Peter's is controlled by the Church, its employees are church employees under § 3(33)(c)(ii).

The Plan is maintained by the Plan Committee of Saint Peter's Board. (Stoldt Cert. ¶ 20). The Plan Committee appointed by the Bishop is designated in the Plan as the Plan's Administrator. (*Id.*, Ex. E, Arts. 1.10, 1.40 & 8.01). There is one Plan Committee, not two as Plaintiff seems to think. Pl. Br. at 28. Whether it is the Plan Committee or Saint Peter's itself that "maintains" the Plan, as Plaintiff

argues (Pl. Br. at 29), is immaterial. Both are organizations controlled by the Bishop. The Plan satisfies § 3(33)(c)(i) and 3(33)(c)(ii).

III. THE EXCLUSION DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

Plaintiff cites no authority for the proposition that the test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) is no longer the Third Circuit test for excessive government accommodation of religion. The decisions on which he relies to create an alternative test are inapplicable; all involve direct government support for religious observance. *See McCreary County, Ky. v. ACLU*, 545 U.S. 844 (2005) (courthouse display of Ten Commandments); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (school-sponsored prayer at school sports events); *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (tax exemption confined to religious publications); *Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (statute requiring employers to accommodate employees' refusal to work on the Sabbath).

The secular purpose of the Exclusion is clear from the legislative history: to relieve church-controlled schools, hospitals and other charitable agencies from the burden of ERISA compliance. *See* 124 Cong. Rec. 12107 (1978); 125 Cong. Rec. 10052 (1979). It is a legitimate secular purpose "to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987) (exemption from Title VII for church employees performing non-

religious functions). Unlike the tax exemption for publications in *Texas Monthly*, that mission is driven by religious belief but not linked to the promulgation of particular religious doctrine. As the ERDs require, Saint Peter's charitable mission is to provide care and respect to all without discrimination and without imposing its own religious views on those it cares for.

Citing two Free Exercise Clause decisions, Plaintiff argues that church-controlled entities could be subjected to ERISA without infringing the Free Exercise Clause. See *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378 (1990) (sales tax); *Tony & Susan Alamo Found.*, 471 U.S. at 305. That assertion does not support his Establishment Clause claim. "It is well established, too, that the 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 (internal citations and quotation marks omitted). Instead, the government is allowed "to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause." *Cutter v. Wilkinson*, 544 U.S. 709, 713-14 (2005). Congress may go farther than the Free Exercise Clause as long as it does not directly promote religious doctrine or observance.

DOL regulations prohibit an ERISA Fiduciary from making investment decisions on any basis other than economic interest. 29 C.F.R. § 2509.08-1; Br. at 37. Plaintiff tries to finesse this prohibition away by citing language in the

regulation that allows fiduciaries to choose among equivalent investments. Pl. Br. at 37 (*citing* 29 C.F.R. § 2509.08-1). But he can give no assurance that investments prohibited by the Church's Investment Guidelines will always have equally lucrative equivalents. The Exclusion avoids excessive entanglement with religion by leaving Saint Peter's free to invest its funds in accord with Church teaching, without having to consider whether it also satisfies ERISA.

The third party harm prohibited by the Establishment Clause is the compelled support of someone else's religion. *See Texas Monthly*, 489 U.S. at 8-9 (Establishment Clause prohibits "compelling nonadherents to support the practices or proselytizing of favored religious organizations . . ."). That is not present here. The Exclusion does not impose any legal obligation on third parties, unlike the Sabbath-observance statute in *Thornton*. *See* 472 U.S. at 709-10. It does not compel non-believers to subsidize the preaching of religious doctrine, unlike the tax exemption for religious publications in *Texas Monthly*. *See* 489 U.S. at 14-15.

Nor, finally, does the church plan exemption create entanglement with religious beliefs. It is Plaintiff who has raised the issue that Saint Peter's is not sincerely Catholic, or Catholic enough, to be associated with the Church. But the Free Exercise Clause prohibits the courts from questioning whether Saint Peter's adheres to the tenets of its faith. *See* Br. at 28-29. The issue of whether Saint Peter's is controlled by the Church can be resolved through neutral principles of

corporation law. *See* 26 C.F.R. § 1.414(e)-1(d)(2) (control includes appointment of majority of directors); *compare Hall v. US Able Life*, 774 F. Supp. 2d 953, 959-61 (E.D. Ark. 2011) (sole member appointed majority of directors); *Catholic Charities of Me.*, 304 F. Supp. 2d at 85 (same); *with Lown*, 238 F.3d at 547-48 (no control where church did not appoint board majority).

To conclude, this case is governed by *Amos*. Without directly endorsing religious doctrine or practice, Congress has chosen to spare church-controlled nonprofit entities the burden of compliance with ERISA, and to avoid potential entanglement with religious principles governing their work. The Exclusion effects a more complete separation between government and religion. *See Amos*, 483 U.S. at 339. It does not violate the Establishment Clause as a matter of law.

CONCLUSION

For the foregoing reasons, and those stated in Saint Peter's initial Brief, the Court should dismiss the Complaint in its entirety with prejudice.

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LAURENCE KAPLAN, on behalf of :
himself, individually, and on behalf of all : Civil Action No. 13-2941 (MAS) (TJB)
others similarly situated, :

Plaintiff, : Honorable Michael A. Shipp
v. : United States District Judge
:

SAINT PETER’S HEALTHCARE :
SYSTEM, RONALD C. RAK, an : **REPLY CERTIFICATION**
individual, SUSAN BALLESTERO, an : **OF GARRICK STOLDT**
individual, GARRICK STOLDT, an :
individual, and JOHN and JANE DOES, : (Electronically Filed Document)
each an individual, 1-20, :

Defendants. :

GARRICK STOLDT hereby certifies as follows:

1. I am Vice President and Chief Financial Officer of Saint Peter’s Healthcare System, Inc. (“Saint Peter’s” or “the Corporation”), and a defendant herein. I submitted a prior certification in this matter, executed on August 12, 2013, and a Supplemental Certification executed on August 28, 2013. I submit this Reply Certification in further support of Defendants’ Motion to Dismiss the

Complaint to address an inconsistency pointed out by plaintiff between my prior Certification and Saint Peter's IRS Form 990, filed earlier this year with the Internal Revenue Service.

2. My prior Certification set forth the corporate structure of the Corporation and powers of the Bishop of the Diocese of Metuchen (the "Bishop"). Among other things, it noted that the sole member of the Corporation is the Bishop (*Cert.* at ¶ 4); that the Bishop appoints all members of the Board of Governors except two (*Cert.* at ¶ 9); that the Bishop has the power to remove any and all Governors of the Board, and the Trustees of the Corporation's subsidiaries; and that the Bishop has the power to veto any action by the Corporation or its Board. (*Cert.* at ¶ 7). All of these statements were supported by citations to the Corporation's governing documents, either its Certificate of Incorporation or its By-laws.

3. I am advised that plaintiff's Brief alleges an inconsistency between my prior Certification on the one hand and answers provided on Saint Peter's 2011 IRS Form 990 with respect to its governing structure. In particular, the Brief points out that in Part VI, answers to questions 6, 7a and 7b indicated that the Corporation did not have members, that the Corporation did not have members who had the power to elect or appoint one or more members of the governing

body, and did not have governance decisions reserved to or subject to approval by members. Upon review of this form, I have determined that these boxes were checked incorrectly because they are inconsistent with Saint Peter's governing documents. As set forth in my prior Certification, Saint Peter's Certificate of Incorporation and Article III, Section 1 of its By-laws expressly state that the Bishop of Metuchen is Saint Peter's sole corporate member, with the powers set forth in the By-laws. Article III, Section 2(a) of the By-laws provides that the Bishop has the power to remove any and all members of Saint Peter's Board of Governors or its subsidiaries' Board of Trustees at any time in his sole discretion. Article III, Section 2(b) provides that the Bishop appoints and removes, *inter alia*, the Chair of the Board and the CEO in his sole discretion. Article III, Section 1(c) and (d) provide that the Bishop appoints and removes the Executive Directors of Saint Peter's subsidiaries at any time, for any reason, in his sole discretion, and that he may directly exercise the powers of Saint Peter's over any subsidiary in his sole discretion. Article III, Section 2(e) gives the Bishop the power to veto any action of the Board of Governors. Article IV, Section 2 provides that the annual election or re-election of members of the Board of Governors by the Board is "subject to the approval of the Member," i.e. the Bishop. The Certificate of Incorporation and By-laws are Saint Peter's authoritative governing documents. (*Stoldt Cert.*, Exh. A

and B). It follows that the answers to Questions 6, 7a and 7b on the 2011 Form 990 were inaccurate insofar as they stated that Saint Peter's does not have a member, does not have a member with authority to appoint members of the governing body, or that the decisions of the governing body were not subject to approval by a Member. I have therefore directed that Saint Peter's file an amended Form 990 that accurately reflects its governance and organizational structure.

4. The 2011 Form 990 with supporting schedules consists of 61 pages and was prepared by our accountants, WithumSmith+Brown, P.C. The Governance Section, Part VI, contains a series of questions seeking 'Yes' or 'No' answers by completion of x's in the appropriate box. Pages 3-6 of IRS Form 990 contain a series of approximately 118 questions, including subparts, seeking yes or no answers. These three boxes were inadvertently checked incorrectly. The corporate structure and powers of the Bishop are correctly stated in my prior Certification, which also attaches the underlying governing documents. There can be no dispute about these powers and structure.

5. The Brief also argues that the statement contained in Schedule O of the 2011 Form 990 containing the Community Benefit statement is somehow inconsistent with my prior Certification. This is not the case. That Community Benefit statement points to control of Saint Peter's University Hospital, a

subsidiary of the Corporation, resting with its Board of Trustees, which is comprised of independent civil leaders and other prominent members of the community. (*Bunch Decl.*, Exh. K at p. 30). The Board of Trustees of the Hospital, of course, controls its affairs subject to the Bishop's powers of appointment, the Bishop's power to remove any and all Trustees, and the Bishop's power to exercise the power of the Corporation with respect to the Corporation's subsidiaries. *See Stoldt Cert.* ¶¶ 7 and 10, Exh. B, By-laws, Article III, Section 2.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on October 14, 2013.



GARRICK STOLDT

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Attorneys for Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LAURENCE KAPLAN, on behalf of :
himself, individually, and on behalf of all : Civil Action No. 13-2941 (MAS)(TJB)
others similarly situated, :

Plaintiff, : Honorable Michael A. Shipp
v. : United States District Judge
:

SAINT PETER’S HEALTHCARE :
SYSTEM, RONALD C. RAK, an : **REPLY CERTIFICATION OF**
individual, SUSAN BALLESTERO, an : **MONSIGNOR JOHN FELL**
individual, GARRICK STOLDT, an :
individual, and JOHN and JANE DOES, : (Electronically Filed Document)
each an individual, 1-20, :

Defendants. :

Monsignor John Fell hereby certifies as follows:

1. I am currently the Episcopal Vicar for the Healthcare Apostolate for Saint Peter’s Healthcare System, Inc. I previously submitted a Certification in this case dated August 8, 2013. I submit this Reply Certification in further support of Defendants’ Motion to Dismiss the Complaint to clarify an issue raised by plaintiff with respect to the Pastoral Care Department. This issue illustrates plaintiff’s

misunderstanding of the Ethical and Religious Directives for Catholic Health Care Services (the “ERDs”).

2. In paragraph 22 of my Certification, I pointed out that the Pastoral Care Department works to insure that patients of Saint Peter’s have access to spiritual care regardless of faith. I also noted that in keeping with the ERDs (in particular, Directive 22), the director of the Pastoral Care Department is Catholic. (Certification of Monsignor John Fell, ¶ 22). That statement is accurate.

3. The Plaintiff has filed two certifications to the effect that a prior director of the Pastoral Care Department, to their recollection, was not Catholic. (Declaration of Laurence Kaplan, ¶ 24; Declaration of Bruce Pardo, ¶ 14). During the 1990s, James DeVries, a Minister of the Reformed Church, was Director of Pastoral Services. This is not inconsistent with the ERDs. For the sake of appropriate ecumenical and interfaith relations, the ERDs permit the appointment of non-Catholic members to the pastoral care staff of Catholic healthcare institutions. While the Director of the Pastoral Care Department is usually Catholic, the ERDs provide for an exception to this norm. (Certification of Garrick Stoldt, Ex. G, Directive 22).

I certify under penalty of perjury that the foregoing is true and correct.

Executed on October 12th, 2013.


MONSIGNOR JOHN FELL

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and Garrick Stoldt*

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LAURENCE KAPLAN, on behalf of :
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SAINT PETER'S HEALTHCARE :
SYSTEM, RONALD C. RAK, an : **CERTIFICATION OF SERVICE**
individual, SUSAN BALLESTERO, an :
individual, GARRICK STOLDT, an : (Electronically Filed Document)
individual, and JOHN and JANE DOES, :
each an individual, 1-20, :

Defendants. :

JEFFREY J. GREENBAUM, of full age, certifies that on the 15th day of
October 2013, I caused a copy of the foregoing Reply Memorandum of Law, Reply
Certification of Garrick Stoldt, and Reply Certification of Monsignor John Fell, all

in further support of Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P.
12(b)(1) and 12(b)(6), to be served via CM/ECF on all counsel of record.

I certify under penalty of perjury that the foregoing is true and correct.

s/ Jeffrey J. Greenbaum
JEFFREY J. GREENBAUM

Dated: October 15, 2013