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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

STARLA ROLLINS on behalf of herself, individually, and on behalf of all others similarly situated,

Plaintiff,

v.

DIGNITY HEALTH, a California Non-profit Corporation, HERBERT J. VALLIER, an individual, the members of the Dignity Retirement Committee, and JOHN and JANE DOES, each an individual, 1-20,

Defendants.

No. 13-CV-1450 TEH

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Date: November 4, 2013
Time: 10:00 am
Courtroom: 12, 19th Floor
Judge: Hon. Thelton E. Henderson

Complaint Filed: April 1, 2013
Trial Date: N/A

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Statutes

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I. STATEMENT OF ISSUES

Whether Plaintiff's Class Action Complaint ("Complaint" or "Comp."), Dkt. 1, pleaded sufficient factual matter, accepted as true, to state a plausible claim that: (1) the Dignity Pension Plan ("Plan") is covered by the Employee Retirement Income Security Act ("ERISA"), and is not an exempt "church plan;" and (2) even if exempt, such exemption is unconstitutional under the Establishment Clause, U.S. CONST. amend. I, and therefore void.[1]

II. INTRODUCTION

Conspicuously absent from the 1,900+ extraneous pages proffered by Defendants is any church that established any pension plan or accepts responsibility for the pensions of Dignity's 60,000 hospital employees. This case concerns Defendants' failure to fund and administer the Plan in accordance with ERISA, including underfunding the Plan by over $1.2 billion, Comp. ¶¶ 1, 3, based on their erroneous contention that the Plan is exempt from ERISA as a "church plan."

ERISA defines a "church plan" as one "*established and maintained* . . . for its employees . . . by *a church* or by a convention or association of churches."[2] 29 U.S.C. § 1002(33)(A) (2011) (emphasis added). In 1980, the statute was amended to provide that employees of an organization controlled by or associated with a church ("associated organization") could be included in that church's plan. Defendants rely on a number of private letter rulings from regulatory agencies that misconstrued this amendment by conflating who could be *in* a church plan with who could *establish and maintain* a church plan; specifically, they erred in finding that because an associated organization's employees could be included in a church plan, the associated organization itself could establish and maintain its own plan, with no church responsible for the pensions.

Although some courts followed this departure from the statute, it is misguided under the plain wording of the statute, completely at odds with the legislative history, and entitled to no deference. Because the statute requires a *church* to establish a "church plan," and because the definition of who can be *included in* a church plan did not change who can *establish and maintain*

[1] Defendants are Dignity Health ("Dignity"), the members of the Dignity Retirement Committee (labeled by Defendants as the "Dignity Board of Directors' Retirement Plans Subcommittee"), and individual defendants (collectively, "Defendants").

[2] As this case involves no "convention or association" of churches, Plaintiff refers only to "church."

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a church plan, the Plan could be a "church plan" only if it was established and maintained by a church. However, the parties do not dispute that Dignity—which is not a church—established the Plan.[3] This ends the inquiry. Dignity's indignation at Plaintiff's description of the statute is feigned, as Dignity supported Plaintiff's interpretation before another court. *See infra* at 7.

However, even if Dignity could survive this inquiry, the Plan still is not exempt because the well-pleaded facts demonstrate that Dignity is not, in fact, associated with any church. Defendants' attempt to litigate the merits of this inquiry is premature; yet even their improperly proffered documents do not demonstrate any such association. Indeed, Dignity's Bylaws make clear Dignity is not associated with the Catholic Church, *see* Declaration of Bernita McTernan, Dkt. 44 (attaching McTernan Exhibits ("McTernan Ex.") A-I), at Ex. I § 3.3, and the Archbishop of San Francisco has stated that Dignity "will not be recognized as Catholic." *Id.* Ex. B at 3.[4]

If Defendants' erroneous interpretation of the statute were accepted, the exemption would be an unconstitutional accommodation as applied to Dignity. The exemption harms Plan participants, economically disadvantages Dignity's competitors, and relieves no genuine burden on a religious practice. Comp. ¶ 163. Dignity is not a church, nor funded by a church, and it has no relevant confidential religious books and records implicated by ERISA. Comp. ¶¶ 3, 47, 52.

Because the Plan is not a "church plan" and because Defendants do not challenge Plaintiff's well-pleaded allegations of ERISA violations, Defendants' Motion should be denied.

III. FACTS

Dignity operates a healthcare conglomerate and provides retirement benefits for 60,000 employees through the Plan. Comp. ¶¶ 1, 3. Dignity established and maintains the Plan. *Id.* ¶ 56; MTD 9. Neither Dignity nor any of its hospitals is a church. Comp. ¶ 3; MTD 4-9, 11-12. Yet Dignity does not administer or fund the Plan in accordance with ERISA; rather it evades ERISA's protections for plan participants by claiming the Plan is an exempt "church plan." Comp. ¶ 3.

Dignity is not controlled by any church, *Id.* ¶ 78, and Dignity does not argue otherwise.

[3] Dignity concedes hospital systems like itself are "non-Church Entities." *E.g.*, Notice of Motion and Motion to Dismiss with Supporting Memorandum ("Motion" or "MTD"), Dkt. 41, at 2, 11-12.

[4] Plaintiff does not concede the truth of matters asserted in Defendants' Exhibits, but cites them to show that Defendants' own admissions raise disputed facts.

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Dignity does not share common religious bonds and convictions with a church, *id.* ¶¶ 4-5, 79; its operations and management are not bound by the Roman Catholic Church ("RCC") and it deliberately abrogates RCC convictions when doing so is in its economic interest. *Id.* ¶¶ 5, 80-81.

IV. LEGAL STANDARD

A complaint need only present "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). A court should deny a motion to dismiss if a complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Moreover, "[s]pecific facts are not necessary"; a complaint "need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citation omitted). Finally, because Defendants' proffered documents were not incorporated by reference in the Complaint and are not judicially noticeable,[5] the Court should consider only the facts pleaded in Plaintiff's Complaint.[6]

Defendants' alternative argument under Fed. R. Civ. P. 12(b)(1) is simply mistaken. Jurisdiction exists pursuant to 28 U.S.C. § 1331 for all counts because "'the right of [Plaintiff] to recover under [her] complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (citation omitted). First, if the church plan exemption is unconstitutional as applied to Dignity, and therefore void (Count VIII), the Court has jurisdiction over the ERISA violations (Counts I-VII). Second, Plaintiff will prevail on Counts I through VII if the church plan exemption is given the construction set forth in Plaintiff's Complaint. *See infra* § V.A.1. Third, even if Plaintiff prevails neither on the statutory construction nor on the constitutional claim, the Court still has jurisdiction to determine merits-related arguments

[5] Judicial notice of Defendants' Exhibits, Appendices, and Declarations is improper under Fed. R. Evid. 201 because: (1) Defendants rely on the truth of factual assertions in their documents; (2) Defendants present a distorted sample of documents; (3) the facts contained in such documents are subject to reasonable dispute; and (4) such documents are not "sources whose accuracy cannot reasonably be questioned." *See, e.g.*, *Lee v. City of L.A.*, 250 F.3d 668, 690 (9th Cir. 2001); *see also* Plaintiffs' Opposition to Defendant's Request for Judicial Notice ("RJN Opp.").

[6] Conversion of the MTD to a Rule 56 motion is premature because the parties have not conducted discovery. *Inlandboatmens Union of Pac. v. Dutra Grp.*, 279 F.3d 1075, 1083 (9th Cir. 2002).

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regarding control by, and association with, a church, as "[j]urisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover." *Steel Co.*, 523 U.S. at 118 n.7; *see also Leeson v. Transamerica Disability Income Plan*, 671 F.3d 969, 971 (9th Cir. 2012) (whether employee was participant in ERISA plan "is a substantive element of his claim, not a prerequisite for subject matter jurisdiction").[7]

V. ARGUMENT

A. The Dignity Plan is not Exempt as a Church Plan Under ERISA.

1. Only churches can establish church plans.

a. The statute so provides.

ERISA coverage should be construed "liberally" to provide "maximum" protections for workers, and "exemptions should be confined to their narrow purpose." S. Rep. No. 93-127 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4854; *see also Olsen v. Lake Country, Inc.*, 955 F.2d 203, 206 (4th Cir. 1991) (exceptions to remedial statutes are to be narrowly construed) (citing *De Luz Ranchos Inv., Ltd. v. Coldwell Banker & Co.*, 608 F.2d 1297, 1302 (9th Cir. 1979)). The narrow exemption for church plans in 29 U.S.C. § 1002(33) contains four sections: Section A is the key provision. It defines who may "establish[] and maintain[]" a church plan for employees of a church. Section B excludes certain plans based on who is in the plan. Section C provides: (i) an organization other than the church can "maintain" a church plan in limited circumstances; (ii) the term "employee of a church" includes employees of organizations controlled by or associated with the church; [8] (iii) if such employees are included in a church plan, then that church is deemed their employer; (iv) "associated with a church" means "shares common religious bonds and convictions with that church;" and (v) specific rules apply when employees leave church plans. Section D provides a church limited opportunities to cure noncompliance with these requirements.

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[7] Cases that had held the existence of an ERISA plan to be jurisdictional were abrogated by *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006). *See also Leeson*, 671 F.3d at 971 ("to the extent our prior cases . . . hold otherwise, they have 'no precedential effect' because they are precisely the type of 'drive-by jurisdictional rulings' the Supreme Court has since rejected.") (citing *Arbaugh*).

[8] The virtually verbatim Internal Revenue Code ("IRC") definition contains a helpful heading, "Employee defined," further clarifying that the section defines only who can be included *in* church plans, not who can *establish* church plans. 26 U.S.C. § 414(e)(3)(B) (2011).

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Pursuant to Section A, only a church can establish a church plan.[9] Defendants erroneously conflate the Section C definition of who can be *included as an employee in* a church plan (employees of both a church and its associated organizations) with the Section A definition of who can *establish* a church plan (only a church). They then wrongly conclude that the associated organization (which even they term a "Non-Church Entity") can establish its own church plan. MTD 11-12. But the plain language of the statute does not support Defendants' position.

"Deeming" a church the employer of an associated organization's employees does not mean the associated organization is deemed a church or the church is deemed to have established the associated organization's plan. Put simply, if Employee A works for Associated Organization B, and Church C is deemed Employee A's employer, Organization B is not deemed a church.[10] The whole point of deeming Employee A an employee of Church C, and of deeming Church C her employer, is so Employee A can be a participant in *Church C's* church plan. A defined benefit church plan is still an "employee pension benefit plan" as defined by ERISA and must comply with various tax-qualification requirements in the IRC. ERISA and the IRC require such plans be sponsored by an employer *and* for the benefit of the employer's employees. 29 U.S.C. § 1002(2); 26 U.S.C. § 401(a) (2011). Thus if a church plan covers employees of that church's associated organization, it is necessary that the organization's employees be deemed employees of that church *and* that that church be their deemed employer. Subsection (C)(iii) implements this.

Assuming Dignity is "associated with" the RCC (which is disputed), the statute provides:

- A Catholic Church could establish a church plan, 29 U.S.C. § 1002(33)(A);
- If it did, it could include employees of Dignity in that plan;
- In that case, the term "employee of a church" would be deemed to include Dignity's employees, 29 U.S.C. § 1002(33)(C)(ii)(II); and
- Likewise, that Catholic Church would be deemed the employer of Dignity's employees, 29 U.S.C. § 1002(33)(C)(iii).

[9] *Spiritual Outreach Society v. Comm'r*, 927 F.2d 335, 338 (8th Cir. 1991), outlines the 14 IRS criteria for a "church."

[10] If an associated organization were deemed a church, the phrase "**or** an organization" in subsection (C)(v) would be superfluous—"church" would already include that organization.

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Nowhere does the statute allow Dignity to establish its own church plan. Defendants rewrite the statute to create a two-pronged test that bypasses Section A, claiming: a plan qualifies as a church plan if it is (i) sponsored by a nonprofit, that (ii) is controlled by or associated with a church. MTD 12. No such test exists, and for good reason. When a church determines whether to include in its church plan the employees of its controlled or associated organization, that church directly determines the extent of the common religious bonds and convictions of the organization, as that church is accountable and responsible for the church plan. This operates as a check on organizations wishing to be exempt under ERISA but having no church willing to be accountable or responsible for the pensions of those organizations' employees.

Under Defendants' departure from the statute, determination of common religious bonds and convictions is divorced from any church's decision to include Dignity's employees in its church plan. Instead, the allegation of common religious bonds and convictions is made by Dignity, which must allege a one-sided version of common religious bonds and convictions, authenticated by no church accountable for the Plan (because no such church exists). Insulating any church from pension liability, Defendants' version removes the "church" from the church plan exemption. If Congress had intended the statute to mean that an associated organization could establish its own Church Plan, it could have simply defined a Church Plan as a plan "established and maintained by a church, a convention or association of churches, *or an organization controlled by or associated with a church*." Alternatively, it could have defined a "church" as including entities controlled by or associated with a church. Congress, however, did neither.

Non-precedential district court cases cannot change the statute. *See generally Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 354, 357, 371-72 (S.D.N.Y. 2010) (noting phenomenon of "unwitting perpetuation of error" and refusing to adopt interpretation of the Martin Act "perpetuated from opinion to opinion with little second-guessing" despite being "unsupported by the Martin Act's plain language [and] its legislative design"). Only two Circuit Courts have evaluated the church plan exemption; neither relied upon a determination of whether a non-church organization could establish a church plan and both held the plan at issue was *not* a church plan. *See Chronister v. Baptist Health*, 442 F.3d 648, 651-53 (8th Cir. 2006) (concluding Baptist Health

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was not "controlled by or associated with" a church, and avoiding statutory analysis of whether a non-church entity could establish a church plan); *Lown v. Cont'l Cas. Co.*, 238 F.3d 543, 547-48 (4th Cir. 2001) (relying on absence of control and association to find no church plan status).

Finally, Dignity, through its St. Joseph's hospital officers, coordinated with its plan insurer to argue in another federal court that: (i) under the statute, the hospital, not being a church, could never establish a church plan; (ii) U.S. Department of Labor ("DOL") opinion letters were misguided and not binding on the court; and (iii) the church plan exemption must be narrowly construed. Reply Mem. in Supp. of Def.'s Mot. for Summ. J., *Okerman v. Life Ins. Co. of N. Am.*, No. 00-0186, at 4-6 (E.D. Cal. Dec. 24, 2001) (attached as Ex. P1 to Declaration of Matthew Gerend in Support of Plaintiff's Opposition to Motion to Dismiss ("Gerend Decl.")); Decl. of Debbie Murrillo in Supp. of Def.'s Mot. for Summ. J., *Okerman v. Life Ins. Co. of N. Am.*, No. 00-0186 (E.D. Cal. Oct. 22, 2001) (Catholic Healthcare West ("CHW")-employed Director of Human Resources at St. Joseph's) (Gerend Decl. Ex. P2).[11] That the court disagreed does not change the statute's plain meaning or Dignity's concession on the issues.

b. Legislative history so indicates.

Under ERISA as adopted in 1974, church plans had to be "established and maintained" by a church and the participants of church plans were basically limited to church employees.[12] As an accommodation, pre-existing church plans that already included employees of church-related organizations were permitted to continue until the end of 1982. *See* H.R. Rep. No. 93-1280 (1974), 1974 U.S.C.C.A.N. 5038, *5044. This restrictive definition—that church plans be established and maintained by a church and that their participants, with the limited exception for preexisting plans, be church employees—was consistent with the underlying purpose of the exemption: that the "examination of books and records that may be required in any particular case as part of the careful and responsible administration of the [pension] insurance system might be regarded as an unjustified invasion of the confidential relationship that is believed to be appropriate with regard to

[11] In *Welsh v. Ascension Health*, 2009 WL 1444431 (N.D. Fla. May 21, 2009), another hospital argued because it was not a church, it could not establish a church plan. *Id.* at *7 n.11.

[12] The full text of the 1974 definition of "church plan," Pub. L. No. 93-406, § 3(33), 88 Stat. 829 (1974), is attached as Ex. P3 to the Gerend Decl.

churches and their religious activities." S. Rep. 93-383 (1973), 1974 U.S.C.C.A.N. 4889, 4965.

The primary purpose of the 1980 amendment was to permit all church plans, not merely those existing in 1974, to include employees of church-related entities indefinitely. Comp. ¶¶ 29-36. The official summaries of the 1980 statute makes this clear:

- "The present law definition of the term 'church plan' is continued . . . so that a church plan which covers the employees of a church agency generally would be exempt from the provisions of ERISA. 126 Cong. Rec. 19,599 (1980) (official summary); and
- "The bill would permit a church plan to cover employees of a tax-exempt agency controlled by or affiliated with a church . . . ." 126 Cong. Rec. 20,208 (1980).

The balance of legislative history is equally clear. The bill's sponsors explained that absent amendment, "churches must by 1982 divide their plans into two parts, one covering employees of the church and one covering employees of church agencies." 124 Cong. Rec. 12,107 (1978) (Rep. Conable). *See generally* 124 Cong. Rec. 12,106-108 (1978) (Rep. Conable's summary of the bill); 124 Cong. Rec. 16,522-23 (1978) (Sen. Talmadge's summary of the bill). Nothing in the legislative history suggests that a church affiliate could create its own church plan to cover its own employees (and thereby remove church accountability from the provision of pensions).

c. The regulatory agency letters are misguided.

Defendants rely heavily on Internal Revenue Service ("IRS") private letter rulings and DOL advisory opinions. *See* MTD 2, 9, 13-14 n.25. Federal courts give deference to formal agency interpretations where there is an "express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984).[13] However, where agency interpretations "do not purport to carry the force of law and were not adopted after notice and comment [rulemaking], they are not entitled to the level of deference provided for in *Chevron*." *Sacora v. Thomas*, 628 F.3d 1059, 1066 (9th Cir. 2010) (citation and quotation marks omitted).[14] As for *informal* agency interpretations, such as the

[13] This deference is limited. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2169 (2012) (no deference under *Chevron* to DOL interpretation which was "quite unpersuasive," "lacks the hallmarks of thorough consideration," and "inconsistent" with the statute at issue).

[14] The IRS letters cited by Defendants are "based upon" the requesting organization's "statements" or "representations," Appendix to MTD ("Appx."), Dkt. 45, at A334, A340, A346, A350, A355,

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letters here, deference is limited to where the agency's "thoroughness" and "the validity of its reasoning" "give it power to persuade." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

The letters here lack any "power to persuade" and therefore are *not* entitled to deference. They simply do not track the plain language of the statute as explained above, which makes clear that only churches can "establish" church plans. Moreover, they were prepared in very informal, non-adversary circumstances, and as the Court will note, successive letters simply repeat earlier ones virtually verbatim. *See Shin v. Holder*, 607 F.3d 1213, 1219 (9th Cir. 2010) (declining to give deference to "conclusory" agency interpretation that "lacks any meaningful analysis" and "does not comport with a plain reading of the statute"). Recognizing the limitations of such letters, the courts routinely refuse to defer to them. *E.g.*, *Thornton v. Graphic Commc'ns Conf.*, 566 F.3d 597, 615-16 (6th Cir. 2009) (no deference to IRS letter given informal nature and absence of rationale explaining conclusions); *Welsh*, 2009 WL 1444431, at *7 n.11 (letters "may not be used or cited as legal precedent"); *Tupper v. United States*, 134 F.3d 444, 448 (1st Cir. 1998) (IRS General Counsel Memoranda "are not authority in this court."). Finally, Defendants concede no agency letter exists for the Plan and instead submit only letters that addressed CHW *prior to* Dignity's significant corporate reorganization. MTD 9. These letters are of no persuasive value.

2. Even if a non-church entity could establish a church plan, Dignity cannot.

Even if the Court finds that a non-church entity could establish and maintain a church plan, Dignity may not because it is not "controlled by" or "associated" with a church. First, Defendants do not argue that Dignity is "controlled by" any church, *compare* Comp. ¶ 77, *with* MTD 12-17; nor could they, as Dignity's Bylaws explicitly state Dignity is "not subject . . . to the ecclesial authority of the Roman Catholic Church." McTernan Ex. I § 3.3. Second, Plaintiff has pleaded facts sufficient to support a plausible inference that Dignity is not "associated" with any church. *See* Comp. ¶¶ 5, 37-52, 79-82. Further analysis of this inherently factual issue is inappropriate on a

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and recent letters make clear they "may not be used or cited by others as precedent." *Id*. at A336, A356; *see also* IRS Gen. Couns. Mem. 39,007 (July 1, 1983) (Appx. at A332) ("This document is not to be relied upon or otherwise cited as precedent by taxpayers."). The DOL letters adopted the IRS analysis, *see* Comp. ¶ 36, are "based on [the requesting organization's] representations" and are limited by ERISA Procedure 76-1, Section 10, which provides "[o]nly the parties described in the request for opinion may rely on the opinion." 41 Fed. Reg. 36281-36283 (Aug. 27, 1976).

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motion to dismiss. *See, e.g.*, *Torres v. Bella Vista Hosp., Inc.*, 523 F. Supp. 2d 123, 135 (D.P.R. 2007) (whether the plan was a church plan "should be presented in a format better designed for a full airing of the issues"); *accord Sylvester v. Providence Healthcare Risk Managers, LLC*, 2005 WL 3940177, at *3 (S.D. W. Va. Oct. 27, 2005), . Defendants cite no case that engaged in this inquiry on a Rule 12(b)(6) motion.[15] Regardless, Defendants' improperly submitted documents do not reduce the plausibility of Plaintiff's inference that Dignity is not associated with the RCC.

a. Absent control by a church, courts decline to find a church plan exemption for healthcare conglomerates.

The *only* two Circuit Courts that evaluated 29 U.S.C. § 1002(33) held that plans sponsored by a healthcare conglomerate were *not* "church plans" based on facts similar to those alleged here. *See Lown*, 238 F.3d at 548 (Baptist Healthcare not associated with a Baptist church because (1) State Baptist Convention "played no role in the governance of Baptist Healthcare," (2) Baptist Healthcare did not "receive[] any support from" the Convention; and (3) "no denominational requirement existed for anybody affiliated with Baptist Healthcare.");[16] *Chronister*, 442 F.3d at 652-53 (Baptist Health not associated with a Baptist church *despite* facts that: (1) "Baptist Health requires its CEO, its board of directors, and its chaplains to be members of Baptist churches"; (2) "Baptist Health's management is instructed to follow religious principles"; (3) "under Baptist doctrine, operating a facility for health care is part of the healing ministry of the church"; and (4) "if Baptist principles and secular medicine conflict, Baptist principles control.").[17] *See also Coleman v. Pikeville United Methodist Hosp., Inc.*, 2008 WL 819038, at *3 (E.D. Ky. Mar. 25, 2008), ; *Polk v. Dubuis Health Sys.*, 2007 WL 2890262, at *3 (W.D. La. Sept. 28, 2007), .

Unable to distinguish these cases, Defendants instead cite inapposite district court cases in

[15] In *Thorkelson v. Publ'g House of Evangelical Lutheran Church in Am.*, 764 F. Supp. 2d 1119 (D. Minn. 2011), concerning the official publishing company of the Evangelical Lutheran Church in America, all parties conceded control and association. *Id.* at 1123-25.

[16] *Lown* did not rely on Baptist Health's "best efforts" to comply with ERISA. *Contra* MTD 14 n.26. Rather, *Lown* evaluated the relationship between Baptist Health and the Convention and concluded there was no control by, or association with, a Baptist church. 238 F.3d at 548.

[17] *Chronister* noted that Baptist Health "severed its ties" to the State Convention in 1966, but the court used this phrase to denote that the "Convention no longer controls Baptist Health." *Id.* at 652. The RCC does not control Dignity, and Defendants do not argue otherwise.

which: (1) all parties conceded the existence of control or association;[18] (2) courts relied on facts not present here;[19] or (3) courts relied on broad policy statements regarding purported religious convictions without evaluating actual practices.[20] Moreover, the vast majority of these cases concluded that the church plan exemption applied where the plan sponsor was "controlled by" a church,[21] and here Defendants do not argue that Dignity is controlled by a church.

b. Dignity is not "associated with" any church.

Turning to disputed facts, Defendants describe historical relationships between religious orders and certain hospitals, none of which speaks to whether Dignity is currently associated with a church. Defendants omit that (1) Dignity's Bylaws disclaim any such association, McTernan Ex. I § 3.3; (2) the Archbishop of San Francisco declared that Dignity's name "will not suggest a direct association with the Catholic Church" and that Dignity "will not be recognized as Catholic," *Id.* Ex. B at 3;[22] and (3) the Phoenix Diocese, within which Dignity operates, has officially stated Dignity "was reorganized from being a Catholic corporation (Catholic Healthcare West) to being a secular one (Dignity Health)."[23] *Diocese of Phoenix Statement* (Oct. 18, 2012), *available at* www.

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[18] *See Rinehart v. Life Ins. Co. of N. Am.*, 2009 WL 995715, at *1, 4 (W.D. Wash. Apr. 14, 2009); *Catholic Charities of Me., Inc. v. City of Portland*, 304 F. Supp. 2d 77, 85-86 (D. Me. 2004).

[19] *Catholic Charities of Me.*, 304 F. Supp. 2d at 85 (Catholic Charities was "an organization of the Diocese of Portland" that received annual "financial assistance" from Diocese); *Hall v. USAble Life*, 774 F. Supp. 2d 953, 959-61 (E.D. Ark. 2011) ("sole member of SBHealthcare" was religious order, Mother Superior was board chair, and "remainder of the board members were sisters"); *Friend v. Ancilla Sys. Inc.*, 68 F. Supp. 2d 969, 971 (N.D. Ill. 1999) (religious order appointed board and board "must obtain prior approval from the [order] on all major decisions"); *Ward v. Unum Life Ins. Co. of Am.*, 2010 WL 4337821, at *2 (E.D. Wis. Oct. 25, 2010), (sisters made up half of board). *Okerman v. Life Ins. Co. of N. Am.*, WL 36203082 (E.D. Cal. Dec. 24, 2001), was based largely on CHW's corporate structure, *id.*, at *4, which no longer exists. MTD 6-8.

[20] *See Okerman*, 2001 WL 36203082, at *4 (declaration that hospital was "operated . . . consistent with the Church's religious bonds and convictions"); *Rinehart*, 2009 WL 995715, at *3 (general mission statements); *Hall*, 774 F. Supp. 2d at 959-61; *Ward*, 2010 WL 4337821, at *2.

[21] *E.g.*, *Thorkelson*, 764 F. Supp. 2d at 1125; *Rinehart*, 2009 WL 995715, *5; *Friend*, 68 F. Supp. 2d at 972; *Hall*, 774 F. Supp. 2d at 959-61.

[22] Defendants' discussion of this document is misleading, MTD 8, as the Archbishop found only that the corporate restructure isolated the *Sponsor*, *not* Dignity, from scandal. *See* McTernan Ex. B.

[23] Plaintiff disputes Dignity's predecessor CHW was "associated with" the RCC under ERISA even before Dignity's restructuring as a concededly secular entity in January 2012. *See* Comp. ¶¶ 4, 37-52, 79-82. This dispute is an additional reason why Defendants' MTD should be denied.

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diocesephoenix.org/news.php?newsmonth=201210&story=863743707 (Gerend Decl. Ex. P4).[24]

Under ERISA, an organization is "associated" with a church only if it "shares common religious bonds *and* convictions with that church." 29 U.S.C. § 1002(33)(C)(iv) (emphasis added). A "conviction" is a strong belief, but a "bond" is a binding element or force. *Compare* Webster's Third New International Dictionary of the English Language 499 (1986) (defining "conviction" to mean "a strong persuasion or belief"), *with id*. at 250 (defining "bond" to mean "an agreement binding one or more parties" or "a uniting or binding element or force"). A belief comes from within; a bond is an external limitation. *See Health Cost Control v. Fuxan*, 1997 WL 725440, at *2 (E.D. La. Nov. 17, 1997) ("The ordinary dictionary meaning of 'bonds' and 'convictions' implies a link that is much stronger and pervasive than just 'any'—*i.e.*, a singular—religious connection.").

(i) No common bonds with any church.

To meet the statutory definition, Dignity cannot simply claim common "bonds" with the Catholic *religion* or with all *Catholics*. "Common bond" has been interpreted in federal financial contexts to require an actual church. *See* 12 C.F.R. § 701 (2013), App. B, Ch. 2, ¶ III.A.3 (despite Lutheran Church hierarchy in America, a common bond does not exist for "All Lutherans in the United States," which is too broadly defined, but can exist between "Members of St. John's Methodist Church and St. Luke's Methodist Church"). Dignity claims common bonds with the entire RCC, or in other words, all Catholics as opposed to a distinct legal entity. MTD 13-17; *see Spiritual Outreach Soc'y*, 927 F.2d at 338 (church must have a "distinct legal existence"). Even if it were possible, Dignity does not share common bonds with the RCC.

Dignity is not controlled, owned, operated, or funded by the RCC. Comp. ¶¶ 5, 78. Dignity is governed by an independent board and an independent executive committee. *Id.* ¶¶ 44-45. Its employees are not required to be Catholic, and it offers patients spiritual advisors of their choice.[25]

[24] Plaintiff cites this statement not for the truth of the matters asserted therein, but to reveal admissions that demonstrate disputes as to whether Dignity is "associated with" the RCC.

[25] Legal common bonds cannot exist between a church of one faith and a group not sharing that faith. *See* 12 C.F.R. § 701, App. B (no common bonds between two churches "not of the same denomination"). Dignity operates numerous facilities with no claimed religious ties, Comp. ¶ 5, along with at least one Methodist Hospital. Vespremi Ex. H at 4. Thus Dignity, a heterogeneous conglomerate, cannot claim common bonds with the RCC.

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Id. ¶ 5. Thus, the key factors relevant to the "association" inquiry are absent,[26] as there is no binding force between the RCC and Dignity. *See, e.g.*, *Lown*, 238 F.3d at 548 (no "association" because Baptist Convention "played no role in the governance of Baptist Healthcare" and Baptist Healthcare did not "receive[] any support from" the Convention) (emphasis added); *Coleman*, 2008 WL 819038, at *3 ("[T]he record is absent of any "evidence that the Methodist church controls or exerts influence in any way in the governance of the Hospital") (emphasis added); *Chronister*, 442 F.3d at 652-53; *Polk*, 2007 WL 2890262, at *3 ("no evidence that a denominational requirement exists for any employee or customer"). Facing this, Defendants ignore their Bylaws, mischaracterize documents, and relate an improper, conflicting governance structure.

Mission Integrity Committee ("Mission Comm."): This is a General Committee without any authority to govern. McTernan Ex. I §§ 10.1(b), 10.3(f)(4). It may monitor certain activities and offer *non-binding* recommendations, but it "shall not exercise the authority of the Board." *Id.* It has no authority to ensure compliance with a mission. *Contra* MTD 16, 18. It cannot share, through any approval right, the Board's fiduciary role of appointing Retirement Sub-Committee ("Sub-Comm.") members. McTernan Ex. I § 10.1(a) (only committees comprised exclusively of Directors can act for the Board); Cal. Corp. Code § 5210 ("all corporate powers shall be exercised under the ultimate direction of the board"). *See also Kennerson v. Burbank Amusement Co.*, 260 P.2d 823, 833 (Cal. Ct. App. 1953) (attempted delegation of control over corporate affairs is void); *Communist Party of the U.S. v. 522 Valencia, Inc.*, 35 Cal. App. 4th 980, 995 (Cal. Ct. App. 1995).

Sponsorship Council and Sponsors: Despite various references, MTD 15-17, Defendants do not assert that this Council possesses any authority or plays any role in Dignity's governance. That the Council may appoint a *minority* of members on the Mission Comm. (which itself has no authority) is of no consequence. Defendants' contention that the Council "must approve any substantive changes to the Statement of Common Values and application of the ERDs," MTD 16,

[26] *See, e.g.*, *Lown*, 238 F.3d 548 ("[T]hree factors bear primary consideration: 1) whether the religious institution plays any official role in the governance of the organization; 2) whether the organization receives assistance from the religious institution; and 3) whether a denominational requirement exists for any employee or patient/customer of the organization."); *accord Chronister*, 442 F.3d at 653 (adopting *Lown* factors); *Hall*, 774 F. Supp. 2d at 958 (same).

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is contrary to Dignity's governing documents and applicable law.[27] Although 2 seats on the 10-14 member Dignity Board are reserved for members of the Sponsors, MTD 16, these members "serve in an individual capacity and not as a representative of a Sponsor." McTernan Ex. I § 7.2. Thus the Sponsors are unrepresented on the Board and have no role in Dignity governance. *See Polk*, 2007 WL 2890262, at *3 (plan not a church plan because it was "sponsored and administered by Dubuis; the Dubuis Governing Board 'autonomously' conducts the operations of Dubuis; seven of the ten members on the Dubuis Governing Board are lay people; and only half of those ten members are actually elected by Christus, the entity whose sole members are Sisters").

Even if the facts were as Defendants characterize, they at best support a weak, disputed inference that Dignity retains a tenuous connection to the *Sponsors*, entities which do not claim to be Churches. A tenuous connection with the Sponsors does not demonstrate any bond with the RCC. Defendants' Civil L.R. 3-16 certification confirms that no church has "(i) a financial interest (of any kind) in the subject matter in controversy or in a party to the proceeding; or (ii) any other kind of interest that could be substantially affected by the outcome of the proceeding." Dkt. 46.

(ii) No common convictions with any church.

Dignity's Bylaws make clear that Dignity expressly does *not* share one of the most fundamental convictions of the RCC: the belief in the authority of the RCC. McTernan Ex. I § 3.3 (Dignity is "not subject . . . to the ecclesial authority of the [RCC]"). This should end the inquiry.

Defendants instead trumpet Dignity's dedication to "healing" as evidence of Dignity's common convictions with the RCC, MTD 4-5, 15-16, but "healing" is unquestionably the central mission of *every* legitimate healthcare facility, regardless of any purported association with a church. *See Chronister*, 442 F.3d at 652-53 (finding no common convictions despite the fact that "under Baptist doctrine, operating a facility for health care is part of the healing ministry of the church"). Plaintiff does not contest Dignity's dedication to healing, but rather Dignity's purported

[27] Delegation to the Sponsorship Council to "approve" or veto Board acts, other than amendment or repeal of Dignity articles or bylaws, would be void. McTernan Ex. I §§ 6.1, 7.1; Cal. Corp. Code §§ 5132(c)(4), 5210; *see supra* at 13. The "Governance Matrix" reflects that Sponsors may "veto" changes to the SVC, McTernan Ex. I, Art. VI Governance Matrix ("Gov. Matrix"), but the Bylaw cited to support this reflects only that Sponsors may veto non-binding Mission Comm. recommendations. *Id.* § 10.3(f)(4)(v).

common convictions with a church.[28] On this inquiry, Dignity fails, as it abrogates RCC convictions when economically expedient:

- Although the RCC requires that its healthcare employees, *as a condition of employment*, agree that their services be animated by the Gospel of Jesus Christ, Dignity specifically informs prospective employees that Catholic faith is not a factor in the hiring process. Comp. ¶ 80;
- Dignity healthcare facilities perform elective, contraceptive sterilization procedures even though these procedures are contrary to RCC teaching. *Id.* ¶ 5;[29]
- Dignity provides non-denominational chapels and offers its patients contact with spiritual advisors who have religious convictions very different from those of the RCC. *Id.* ¶ 81; and
- Dignity targets for acquisition healthcare facilities with no claimed ties to any religion. Notwithstanding Dignity's self-serving characterizations of its "Statement of Common Values," these facilities have never purported to adhere to the moral and doctrinal teaching of the RCC, and Dignity continues to operate these facilities in such fashion. *Id.* ¶ 81.

Defendants notably do not dispute these facts, *see* MTD 2, but rather provide the Court with a laundry list of documents and committees that superficially appear religious. *See id.* at 15-17. But these documents and committees do not establish common convictions with the RCC:

Dignity's Proffered Policy and Mission Statements: Defendants cite mission or policy statements with which Dignity purportedly complies, MTD 15-17, but whether Dignity follows these policies is disputed. That Dignity's "Mission" purports to be a "healing ministry based on the life and works of Jesus," MTD 15, does not demonstrate common convictions with the RCC, as a wide array of Christian denominations, including Protestants, follow the life and works of Jesus; yet it cannot be said that they all share common religious convictions.

Defendants rely on the purported applicability of the *Ethical and Religious Directives of Catholic Health Care* ("ERDs"), MTD 5-7, 14-17, yet Dignity's Bylaws make clear that Dignity is "not subject to the [ERDs]." McTernan Ex. I § 3.3. Only a subset of Dignity hospitals purport to follow the ERDs, *id.*, and whether they are followed is disputed. Moreover, the ERDs address only

[28] Defendants' emphasis on Dignity's charitable work fails. *See* MTD 17. Federal law has long *required* (i) *all* hospitals receiving Medicare payments to treat the indigent; and (ii) *all* non-profit hospitals to provide a community benefit. *E.g.*, 42 U.S.C. § 1395dd, *et seq.* (2011); 26 U.S.C. § 501(r) (2011). Moreover, Dignity did not make $10.5 billion in 2012 revenue serving the poor *gratis*, but by charging market rates for healthcare, like other hospitals. Comp. ¶¶ 6, 37, 46, 52.

[29] Defendants admit the RCC views these procedures this way. McTernan Ex. C at 17-20.

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a subset of RCC convictions—those related to "the Church's teaching about the dignity of the human person" and "certain moral issues that face Catholic health care today." *See* Declaration of Roberta H. Vespremi, Dkt. 43 (attaching Vespremi Exhibits ("Vespremi Ex.") A-N), at Ex. E at 4;[30] *cf. Fuxan*, 1997 WL 725440, at *2. They do not require adoption of fundamental RCC doctrine, such as baptism, Holy Communion, confession, or the role of the Pope.

Defendants attempt to gloss over the fact that Dignity and its community hospitals do not follow the ERDs by emphasizing a Statement of Common Values ("SCV"). But contrary to their characterization, MTD 5, the SCV is not "substantially similar" to, and does not "mirror," the ERDs. This characterization described only an earlier iteration of the SCV. Vespremi Ex. G at 24-25. The rewritten SCV contains no reference to the Catholic Church or Jesus Christ. *Id.* Ex. I. Defendants' untested assertion that the "terms" of the SCV are "consistent with Catholic moral teachings," MTD 16, is plainly inconsistent with the fact that the SCV permits contraceptive sterilization procedures that the RCC regards as intrinsically immoral. *Id.* at 5; Comp. ¶ 5.

Defendants next cite purported "Standards for Mission Integration," but do not contend this document governs Dignity. As this document seems at most a statement of future aspirations, *see* McTernan Ex. A (Letter from McTernan), it says nothing as to whether Dignity presently shares common convictions with the RCC.[31] It does not provide that the "principles addressed by the ERDs . . . apply equally to the community and Catholic-sponsored hospitals," MTD 15, nor could it, as Dignity's Bylaws make clear the ERDs do not apply to its community hospitals. McTernan Ex. I § 3.3. Finally, responsibility for these purported "standards" lies with the Mission Comm., which has no authority and can only make non-binding recommendations. *See supra* at 13.

Bylaws: Dignity's Bylaws do not "command" that Dignity operate "within the tradition of the Catholic faith," MTD 15, but rather make clear that Dignity is "not subject to" the ERDs or the "ecclesial authority" of the RCC. McTernan Ex. I § 3.3.

[30] Defendants cite two cases where hospitals purported to follow ERDs, MTD 14 (*Rinehart*), 14 n.27 (*Hall*), but in neither were the ERDs determinative, as the parties conceded control and association in *Rinehart*, *see supra* n.18, and the *Hall* court relied on facts not present here regarding a common bond with the RCC. *Supra* n.19.

[31] For this reason, the Court should disregard purported facts for which the Standards for Mission Integrity are cited as the sole support. *See* MTD 15, 16.

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Education and Training: That certain executives are encouraged to *understand* elements of faith by attending a "Ministry Leadership Formation program," MTD 15-16, Vespremi Ex. G at 12-15, in no way evidences that these leaders "lead consistent with Catholic teaching" or otherwise *follow* RCC convictions in the management of Dignity. *See Chronister*, 442 F.3d at 653 (no common convictions despite that Baptist Health "requires all management employees to attend a seminar entitled 'Spiritual Dimensions of Leadership' as part of their employment").

Official Catholic Directory ("OCD"): Dignity is not listed in the OCD, nor could it be, as it rejects the authority of the RCC. That the Sponsors and 23 of Dignity's 39 hospitals are listed in the OCD, MTD 4, 16, does not evidence common convictions between Dignity and the RCC.[32]

Sponsors: Defendants attempt to demonstrate common convictions with the RCC through Dignity's tenuous relation with its Sponsors, MTD 15-17, the women religious members of which are required to take vows of poverty, chastity and obedience. Clearly Dignity, acting through its Board and Officers, does not share the common religious convictions of poverty or obedience. Indeed in 2010, Dignity's President and CEO received $5.1 million in total compensation, its CFO, $2.9 million, and its COO, $2.3 million. Comp. ¶ 46.

The Court May Evaluate *Dignity's* affairs: Ultimately, Defendants cherry pick facts from non-public documents that superficially support their preferred inferences but ask the Court to ignore inconsistent facts because "the Court should not weigh in on the internal affairs of the Church." MTD 15, 17. But the Court need not evaluate internal affairs of any *church*; rather it must evaluate the affairs of Dignity, which Defendants concede is not a church. And it is *Dignity*, not the Plaintiff, that asks the Court to evaluate its purported bonds and convictions as it claims an

[32] The OCD lists entities that may join the RCC group income tax exemption. *See* The United States Conference of Catholic Bishops Group Ruling on Exemption from Federal Income Tax and *The Official Catholic Directory* (2002), *available at* http://nccbuscc.org/bishops /dfiexemptionruling.htm (last visited July 25, 2013) (Gerend Decl. Ex. P5). The IRS standard for inclusion in the OCD is lower than the ERISA standard for control or association. *Id.* § C (Any charitable institution "operated . . . in connection with the [RCC] in the United States" can qualify; no requirement for common bonds and convictions). Moreover, (i) applicants provide their own facts, and Plaintiff disputes the proffered facts; (ii) organizations "in which control is shared 50-50 between Catholic and non-Catholic entities" are ineligible, and Dignity does not argue the RCC shares control; and (iii) the listing determinations predate Dignity's corporate restructure. *Id.* § C.

association with a church to evade ERISA. Defendants' insistence that the Court prefer their purported inferences is inappropriate.

3. The Plan does not qualify for the pension board exception.

Dignity also argues that the Plan is a church plan because it is administered by an internal committee of Dignity, relying on the "pension board" clarification in section (C)(i) of the church plan definition. MTD 17-18 (citing 29 U.S.C. § 1002(33)(C)(i)); *see* 126 Cong. Rec. 20,245 (1980) (amendment "clarified" that a "pension board" can maintain a plan).[33] This provision applies only if: (i) the plan is "established" by a church; (ii) the plan is "maintained by an organization" (iii) "the principal purpose or function" of the organization is "the administration or funding of a plan," (iv) the organization is "controlled by or associated with" a church; and (v) substantially all plan participants are church employees. Comp. ¶¶ 32-34, 85-86. The Plan fails all five requirements.

First, as has been seen, the Plan was not established by a church. The statutory language requires that the plan still be "established" by a church, and the legislative history confirms this:

> Mr. Talmadge: Mr. President, I understood that many church plans are maintained by separately incorporated organizations called pension boards. These boards have historically been considered by church denominations as parts of their church. May I ask whether the bill would enable a church pension board to maintain a church plan?
>
> Mr. Long: Yes. I concur that a pension board that provides pension or welfare benefits for persons carrying out the work of the church and without whom the church could not function is part of the church and is engaged in the functions of the church . . . . The bill recognizes the status of a church plan maintained by a pension board by providing that a plan maintained by an organization, whether separately incorporated or not, the principal purpose of which is the administration or funding of a plan . . . for the employees of a church, is a church plan, provided such organization is controlled by or associated with the church.

126 Cong. Rec. 20,245 (1980) .

Second, even if a non-church entity could establish the Plan, the Sub-Comm. is not an "organization" that "maintains" it. If such an internal committee can qualify as an "organization," this would swallow the rule—even a committee of one person who claims a common religious bond with a church could maintain an exempt church plan covering thousands of non-church

[33] Typical pension boards include the Rabbinical Pension Board and the Board of Pensions of the Lutheran Church in America. 125 Cong. Rec. 10,054 (1979).

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employees. Moreover, "maintaining" a Plan is different than administering it. To maintain a plan "simply means to 'continue' a plan." *Anderson v. UNUM Provident Corp.*, 369 F.3d 1257, 1265 (11th Cir. 2004) (citation omitted). To continue a plan, an entity must have authority to modify or terminate it. *See Hightower v. Tex. Hosp. Ass'n*, 65 F.3d 443, 449 (5th Cir. 1995); *see also Anderson*, 369 F.3d at 1267. Defendants bypass the "maintained by" requirement and argue only that the Sub-Comm. "*administers*" the Plan. MTD 16-18. There is no delegation to the Sub-Comm. to maintain the Plan. The Sub-Comm., with no power to continue, amend or terminate the Plan, does not maintain it. The Plan confirms Dignity maintains it. *E.g.*, McTernan Ex. G § 9.04(b) ("*this Plan* or any other defined benefit plan *maintained by the Employer*") (emphasis supplied); *Id.* § 9.05(e)(2) (same); *Id.* §§ 12.01, 13.01 (Board has "the authority to amend and terminate the Plan"); McTernan Ex. H, ¶ 4 (same); Comp. ¶¶ 19, 53, 75.

Third, the Sub-Comm. is merely a non-juridical subset of Dignity. Dignity's principal purpose is the provision of healthcare, not running pension plans. The Sub-Comm. has *some* administrative functions, but Dignity's Board determines all administrative issues when a "deadlock or other situation . . . prevents agreement" by the Sub-Comm. McTernan Ex. G § 11.07. At most, the Sub-Comm. shares Plan administration with the Board. *Id* § 11.01.

Fourth, the Sub-Comm., which Dignity labels a "Non-Church Entity," is not controlled by or associated with a church. As has been seen, Dignity is not controlled by or associated with a church. Dignity, which explicitly is not subject to the ecclesial authority of the RCC, McTernan Ex. I § 3.3, cannot nominate a small subset of its employees to be subject to that authority. These employees, who act wholly within the course and scope of their employment with Dignity and who are not separately compensated for their service as members of the Sub-Comm., cannot have a status distinct from their corporate employer. Moreover, the Sub-Comm. must discharge its fiduciary duties under the Plan "solely in the interest of the Participants," not in any purported interest of any church or religious mission. *Id.* § 11.02 (emphasis added). Thus, the Sub-Comm. is not controlled by any church, but rather is controlled by the Plan, the best interests of the Participants, *and the Board*, which through a Board Committee appoints the Sub-Comm. and must retain ultimate direction over it. *Id.*; Cal. Corp. Code § 5210; McTernan Ex. I §§ 10.1(a), 10.2(b);

McTernan Ex. H §11.06. The Mission Comm. has no authority over the Sub-Comm. *See supra* at 13. Even if it did, "approving" members does not provide "control" over the Sub-Comm. Finally, a requirement to be "mindful" of Judeo-Christian philosophy or RCC teachings, MTD 18, does not entail a requirement to *follow* such philosophy or teachings—it simply requires awareness. *Id.*

Fifth, the Dignity employees are not deemed church employees, given Dignity is not controlled by or associated with a church. *See supra* § V.A.2.

B. A Dignity Exemption Would Violate the Establishment Clause.

The Establishment Clause compels Congress not to favor "religious adherents collectively over nonadherents." *Bd. of Educ. v. Grumet*, 512 U.S. 687, 696 (1994); *Tex. Monthly v. Bullock*, 489 U.S. 1, 27 (1989) (Blackmun, J., concurring) ("[G]overnment may not favor religious belief over disbelief").[34] In scrutinizing an accommodation that applies only to religious organizations, the Supreme Court analyzes whether the accommodation:

(a) Comports with a valid secular purpose for which the exemption was enacted, *see Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000);

(b) Relieves a significant government burden on genuine religious practice, *see Tex. Monthly*, 489 U.S. at 15;

(c) Takes adequate account of harm to third parties, *see id.*; *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 708-09 (1985); *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005); and

(d) Produces less state entanglement with religion than denial of exemption, *Tex. Monthly*, 489 U.S. at 20.

A Dignity exemption fails this accommodation analysis, which Defendants largely ignore, relying instead on the *Lemon v. Kurtzman*, 403 U.S. 602 (1971), test, which is not compelled in challenges to religious accommodations. *See, e.g.*, *Cutter*, 544 U.S. at 717-18 (declining to apply *Lemon* in religious accommodation case); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (deciding Establishment Clause claim with no reference to *Lemon*). Under the focused Supreme Court accommodation cases, and under *Lemon*, Plaintiff has adequately pled that extension of the church plan exemption to Dignity violates the Establishment

[34] Defendants' emphasis on the absence of preference for one religion over another or a particular religious view is misplaced, because here preference for religion *over non-religion* is at issue.

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Clause.[35]

1. A Dignity exemption comports with no valid secular purpose.

Congress enacted the church plan exemption to avoid "examination of books and records and unjustified invasion of the confidential relationship . . . with regard to churches and their religious activities."[36] This purpose has no application to Dignity because, unlike a church, Dignity has no confidential books and records to shield from government scrutiny. *See Santa Fe*, 530 U.S. at 309 (accommodation "not necessary to further any of [the stated] purposes"); Comp. ¶¶ 52, 65. Dignity participates in Medicare and Medicaid and issues tax exempt bonds, and thus already purports to disclose all material financial records and relationships. *Id.* ¶ 52.

Moreover, "implementation of the statute" reveals an impermissible purpose of fostering professed religion. *See, e.g.*, *McCreary Cnty. v. ACLU*, 545 U.S. 844, 862 (2005); *Santa Fe*, 530 U.S. at 314-15.[37] Implementation brings the breadth and effect of an exemption within the evaluation of its purpose. Because implementation of a Dignity exemption economically advances Dignity over other non-profit hospitals solely on the basis of its claimed religious affiliation, Comp. ¶¶ 152, 163(B), a Dignity exemption "lacks sufficient breadth to pass scrutiny under the Establishment Clause." *Tex. Monthly*, 489 U.S. at 14; *Thornton*, 472 U.S. at 707-08. The breadth of exemptions was crucial in cases finding a legitimate purpose, as "benefits derived by religious organizations flowed to a large number of nonreligious groups as well." *Tex. Monthly*, 489 U.S. at

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[35] While a "facial" constitutional challenge may in some cases be subject only to legal issues, *see Cutter*, 544 U.S. at 725 (noting distinction), the as-applied challenge here "is not a pure question of law, but rather depends on a determination of factual matters." *See MacDonald v. Grace Church Seattle*, 457 F.3d 1079, 1086 (9th Cir. 2006).

[36] S. Rep. No. 93-383 (1973) , *reprinted in* 1974 U.S.C.C.A.N. 4889, 4965. An exemption for government plans, for a different purpose, is irrelevant. *See, e.g., Rose v. Long Island R.R. Pension Plan*, 828 F.2d 910, 914 (2d Cir. 1987) (describing government plan exemption purpose); *Tex. Monthly*, 489 U.S. at 14 n.4 ("that Texas granted other sales tax exemptions [] for *different* purposes does not rescue the exemption for religious periodicals from invalidation").

[37] The *Tex. Monthly* exemption "[had] the purpose [and] effect of sponsoring" religion because it did not "remov[e] a significant state-imposed deterrent to the free exercise of religion." *Id.* at 14-17 . *See also Freedom From Religion Found., Inc. v. Geithner*, 715 F. Supp. 2d 1051, 1066 (E.D. Cal. 2010) (invalidating religious exemption under *Tex. Monthly*), *aff'd in part and rev'd in part on other grounds*, 644 F.3d 836 (9th Cir. 2011); *Gospel Missions of Am. v. Bennett*, 951 F. Supp. 1429, 1447-48 (C.D. Cal. 1997) (same).

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11 (citing, *e.g.*, *Mueller v. Allen*, 463 U.S. 388 (1983)).[38] Had those exemptions been "confined to religious organizations, they could not have appeared other than as state sponsorship of religion; if that were so, [the Supreme Court] would not have hesitated to strike them down for lacking a secular purpose and effect." *Id.* at 11.[39] Thus, a Dignity exemption, as implemented, lacks a secular purpose. *See also Lemon*, 403 U.S. at 612.

2. A Dignity exemption relieves no significant burden on religious practice.

An exemption exclusively for religion must alleviate a significant, *state-imposed* interference with religious exercise. *Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 613 n.59 (1989) ("accommodation of religion, in order to be permitted under the Establishment Clause, must lift 'an identifiable burden *on the exercise of religion*'") (emphasis in original). ERISA, however, imposes no meaningful burden on any Dignity religious practice. Comp. ¶¶ 9-10, 163(C). Thus a Dignity exemption removes no "significant state-imposed deterrent to the free exercise of religion." *Tex. Monthly*, 489 U.S. at 15; *Thornton*, 472 U.S. at 707. Indeed, that Dignity elects ERISA coverage for its disability plan—which covers substantially identical employees—confirms that ERISA compliance does not significantly burden any Dignity religious practice. Comp. ¶ 65; *see Robinson v. Metro. Life Ins. Co.*, 2013 WL 1281868 (E.D. Cal. Mar. 27, 2013). In addition, Dignity committed to fund the Plan in the amount ERISA requires. (McTernan Ex. G. § 6.01 (citing parallel section of IRC)). It cannot claim ERISA funding deters its religious exercise when it contractually committed to it.

ERISA is materially indistinguishable from the array of neutral enactments that do not significantly burden religious exercise when applied to commercial activities. *See Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 392-97 (even "substantial administrative burdens . . . do not rise to a constitutionally significant level"); *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 305-06 (1985) (Fair Labor Standards Act applies to religiously

[38] *Walz v. Tax Commission of City of N.Y.*, 397 U.S. 664, 672-73 (1970), upheld an exemption that applied to all nonprofits, not just churches. (exemption "has not singled out . . . churches as such").
[39] *Silo v. CHW Medical Foundation*, 27 Cal. 4th 1097 (Cal. Ct. App. 2002), concerned *religious speech*, RCC legal control was undisputed, and Dignity's corporate structure has since materially changed. Comp. ¶ 78. *Mayweathers v. Newland*, 314 F.3d 1062 (9th Cir. 2002), is also inapposite, as RLUIPA restricts substantial government infringement on the exercise of religion.

affiliated business).[40] Dignity, however, claims it underfunds the Plan as part of a Catholic calculation to serve the poor instead, MTD 21, and that ERISA compliance would limit this purpose. But whether Dignity uses the $1.2 billion in Plan underfunding to serve the poor, pay multi-million dollar executive bonuses, or for some other purpose, is not yet proven. In any event, the Supreme Court has rejected the argument that religious exercise is burdened just because a neutral law decreases funds available for religious purposes. *See, e.g.*, *Jimmy Swaggart Ministries*, 493 U.S. at 391. Moreover, a Dignity exemption is not mandated by the Free Exercise Clause. *See Alamo Found.*, 471 U.S. at 294, 299-303 (religious organization that competes with commercial businesses by "entering the economic arena and trafficking in the marketplace" cannot claim a Free Exercise exemption to "standards Congress has prescribed for the benefit of employees"); *cf. Wallace v. Jaffree*, 472 U.S. 38, 82 (1985) (O'Connor, J., concurring) ("[J]udicial deference to all legislation that purports to facilitate the free exercise of religion would completely vitiate the Establishment Clause.").

Defendants' reliance on *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos* ("*Amos*"), 483 U.S. 327 (1987) and *Hosanna-Tabor* is misplaced. *Amos* held simply that a Latter-Day Saints ("LDS") gymnasium "run by" and "intimately connected to the Church financially and in matters of management" could discriminate in employment based on LDS status. 483 U.S. at 327, 332. Dignity is not run by the RCC and is not intimately connected to it financially or in matters of management. Comp. ¶¶ 5-6; 47, 78. Moreover, ERISA requires no "intrusive inquiry into religious belief." *See Amos*, 483 U.S. at 339, 342.[41] *Amos* addressed a law that directly regulated the ability to hire based on religion; ERISA does not regulate Dignity's claimed religious activity of providing healthcare.

Hosanna-Tabor also held that a church could hire and fire ministers based on their faith—

[40] *See also Lemon*, 403 U.S. at 614 ("Fire inspections, building and zoning regulations, and state requirement under compulsory school-attendance laws are examples of necessary and permissible contacts" that do not impermissibly burden religious exercise.).

[41] *Pieszak v. Glendale Adventist Medical Center*, 112 F. Supp. 2d 970 (C.D. Cal. 2000), MTD 22, is inapposite. Plaintiff nowhere submits that Dignity's healthcare work makes it presumptively non-religious, and *Pieszak* concerned employment discrimination by religious institutions, not neutral pension protections.

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including a teacher at a church school who was commissioned as a minister and, according to the church, "fired for a religious reason." 132 S. Ct. at 701. Federal employment protections in that setting would impermissibly "interfere[] with the internal governance of [a] church." *Id.* at 706. In contrast, Dignity is not a church, Comp. ¶ 49, does not claim to be, and ERISA creates no genuine burden on any Dignity religious practice, Comp. ¶¶ 9-10, 49, 65, 163(C).[42]

3. A Dignity exemption gives no consideration to third party harms.

An "accommodation must be measured so that it does not override other significant interests" and must take account of harm it causes third parties. *Cutter*, 544 U.S. at 720-22; *Tex. Monthly*, 489 U.S. at 14-15; *Thornton*, 472 U.S. at 708-09. The *Cutter*, *Texas Monthly* and *Thornton* line of cases reflects the long-standing recognition that courts should rigorously scrutinize religious liberty exemptions that harm third parties. As Thomas Jefferson argued over 200 years ago, "[I]t does me no injury for my neighbor to say there are twenty gods, or no god," because "[i]t neither picks my pocket nor breaks my leg."[43] Defendants would use the church plan exemption to "pick the pockets" of pensioners of $1.2 billion, which the Establishment Clause will not allow.

A Dignity exemption harms workers by denying them crucial ERISA protections, including PBGC insurance, where no church is accountable for the pensions, Dignity assures that religion is not a factor in employment, and pensions are a key part of employment compensation. *Id.*; Comp. ¶¶ 2, 5(A), 24, 110, 116, 120, 123, 133, 137, 163.[44] A Dignity exemption also harms competitors—other non-profit hospitals (*e.g.*, Cedars-Sinai Hospital)—giving Dignity a competitive advantage because it can divert cash that otherwise would fund the Plan to its competitive growth strategy. Comp. ¶¶ 40-42, 152, 163(B). A Dignity exemption gives no consideration to the unjustified harm

[42] *Spencer v. World Vision, Inc.*, 633 F.3d 723, 724 (9th Cir. 2010), confirmed a religious institution may hire and fire based on religious status if the institution "does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts."

[43] Thomas Jefferson, Notes on the State of Virginia 159 (William Peden ed., 1955) (quoted in Daniel Keating, *Bankruptcy, Tithing, and the Pocket-Picking Paradigm of Free Exercise*, 1996 U. Ill. L. Rev. 1041, 1041 (1996)).

[44] The *Hosanna-Tabor* "ministerial exception" imposed no burden on third parties because it applied only to *ministers*, 132 S. Ct. at 706, and *Amos* involved no harm to competitors.

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to competitors or pensioners, the *extent* of which the Court must weigh. *See Cutter*, 544 U.S. at 720-21; *Tex. Monthly*, 489 U.S. at 14-17; *Thornton*, 472 U.S. at 708-10; *Alamo Found.*, 471 U.S. at 299 (unfair "advantage over their competitors" is significant factor, even where competitors not parties to suit). These harms demonstrate the impermissible effect of extending the church plan exemption to Dignity. *See Tex. Monthly*, 489 U.S. at 20; *Lemon*, 403 U.S. at 612.

4. A Dignity exemption causes greater entanglement than ERISA compliance.

A Dignity exemption requires courts and agencies to examine unilateral religious "convictions" of a non-church entity and determine if they are "shared" with a church, in the absence of any actual church responsible for the pensions. Comp. ¶¶ 31, 49. This *creates* entanglement between government and putative religious beliefs. *See Tex. Monthly*, 489 U.S. at 20 (government determination whether periodicals contain sufficient religious content creates entanglement); *Lemon*, 403 U.S. at 620 (invalidating law calling for "state inspection and evaluation of the religious content of a religious organization"). Defendants' 1,900+ pages of documents proffered to support alleged religious convictions is a preview of the mandated Court review, which Defendants seek in order to qualify for the exemption.

ERISA compliance requires *zero* entanglement with religion for Dignity because it has no relevant confidential books, records or relationships, and instead purports to disclose already all of its material financial information and relationships, and already elects ERISA treatment for its disability plans. *See* Comp. ¶¶ 47, 52, 65, 78. As a Dignity exemption "produces greater state entanglement with religion than the denial of an exemption," it fails the Establishment Clause entanglement analysis. *See Tex. Monthly*, 489 U.S. at 20; *see also Lemon*, 403 U.S. at 602.

VI. CONCLUSION

Plaintiff has properly pled that the Plan is not an exempt church plan, and that even if it were found to be so, such an exemption as applied to Dignity would violate the Establishment Clause and be void. Defendants have not challenged Plaintiff's well-pleaded allegations of ERISA violations, including underfunding the Plan by $1.2 billion and depriving employees of critical pension protections and insurance. For all of the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendants' Motion in its entirety.

DATED August 16, 2013.

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CERTIFICATE OF SERVICE

I, Lynn L. Sarko, hereby certify that on August 16, 2013, a true copy of the above document was served on the Defendants, through their counsel of record, via ECF.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

STARLA ROLLINS on behalf of herself, individually, and on behalf of all others similarly situated,

Plaintiff,

v.

DIGNITY HEALTH, a California Non-profit Corporation, HERBERT J. VALLIER, an individual, the members of the Dignity Retirement Committee, and JOHN and JANE DOES, each an individual, 1-20,

Defendants.

No. 13-CV-1450 TEH

[PROPOSED] ORDER DENYING DEFENDANTS' MOTION TO DISMISS

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This Matter came before the Court on the Motion to Dismiss ("Motion") (Dkt. No. 41) filed by defendants Dignity Health, Herbert J. Vallier, and the Dignity Board of Directors' Retirement Plans Sub-Committee (collectively, "Defendants"). The Court has fully considered Defendants' Motion, including Plaintiff's Opposition to Defendant's Motion to Dismiss, any reply thereto, and the parties' oral arguments.

The Court concludes it has federal question jurisdiction of this matter pursuant to 28 U.S.C. § 1331. All the claims asserted are federal claims arising under the Employee Retirement Income Security Act ("ERISA") or the Establishment Clause, U.S. Const. amend. I, or both. No state law claims are presented, and the federal claims are not "so insubstantial, implausible, foreclosed by prior decisions of the Supreme Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998).

The Court also concludes the Dignity Pension Plan is not exempt from ERISA. A "church plan" under ERISA must be established by a church or a convention or association of churches, 29 U.S.C. § 1002(33), and Defendants admit that Dignity Health is not a church or a convention or association of churches. *See, e.g.*, Motion 2, 11-12. Even if a non-church entity could establish a "church plan," Plaintiff has alleged sufficient factual matter, accepted as true, to state a plausible claim that Dignity is not controlled by, or associated with, a church. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Defendants' Motion to Dismiss as to Rule 12(b)(6), or alternatively as to Rule 12(b)(1), is therefore DENIED.

IT IS SO ORDERED.

Dated this ___ day of _____, 2013.

_____
THE HONORABLE THELTON E. HENDERSON
UNITED STATES DISTRICT JUDGE