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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 Dignity Retirement Committee, and JOHN and JANE DOES, each an individual, 1-20,

Defendants.

CASE NO. 13-C-1450 TEH

DEFENDANTS' REPLY TO OPPOSITION TO MOTION TO DISMISS

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

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I. PLAINTIFF DISTORTS, AND SELECTIVELY OMITS, KEY STATUTORY LANGUAGE AND LEGISLATIVE HISTORY.

No law supports plaintiff's radical position that only a place of worship can establish a church plan. Resting as it does on distortions of both the plain language of the statute and its legislative history, plaintiff's position would, if accepted, invalidate 30 years of court, DOL, and IRS rulings, and the corollary church plan status of thousands of faith-based organizations, including hospital systems and universities. As a matter of law, plaintiff fails to state a claim upon which relief can be granted; faith-based non-profits can establish church plans. Moreover, plaintiff concedes (by not challenging) that the ERISA church plan exemption passes the *Lemon* test. Instead, plaintiff manufactures her own, customized Establishment Clause test that misapplies Supreme Court precedent and focuses on irrelevant concerns.

A. The 1980 Amendment Of ERISA's Church Plan Definition Refutes Plaintiff's Position That Only Churches Can Establish Church Plans.

Without citing authority (there is none), plaintiff divorces the provisions comprising ERISA's church plan definition from one another, dividing them into four isolated segments. Opp. at 4-6. In doing so, she disingenuously omits cross-references within each provision that require the definition be read as a whole. Plaintiff contends that subsection (A), alone, "defines who may 'establish[] and maintain[]' a church plan for employees of a church." Opp. at 4:16-18. In making that reduction, she conspicuously ignores text, highlighted for convenience, added by 1980 amendment to the statute: "The term 'church plan' means a plan established and maintained (*to the extent required in clause (ii) of subparagraph (B)*) for its employees (or their beneficiaries) by a church or by a convention or association of churches…." 29 U.S.C. § 1002(33)(A).

The incorporated clause (B)(ii)—which excludes from church plans those not maintained predominantly for "church employees"—itself cross-references subsection (C), which added entirely new language to the statute defining a "church employee." Specifically, subsection (C)(ii) recognizes that employees of even "*civil law corporations*" can be "church employees" who participate in church plans so long as the "organization … is exempt from tax under section 501 of Title 26 and … is controlled by or *associated with a church*…." 29 U.S.C. § 1002(33)(C)(ii)(II) (emphasis added);

Treas. Reg. § 1.414(e)-1(d)(2) ("church agency" is "associated with" organization). Thus, reading the statute's language as a whole, Dignity's Plan is a church plan because Dignity is "associated with" the Roman Catholic Church on the basis that Dignity "shares common religious bonds and convictions with that church." 29 U.S.C. § 1002(33)(C)(iv).[1] *See* Section II, *infra*.

B. Legislative History, Including That Quoted By Plaintiff, Demonstrates Congressional Intent To Broaden ERISA's Church Plan Definition.

Plaintiff misconstrues legislative history to argue that Congress did not intend to permit religious non-profits to opt out of ERISA. In support, plaintiff quotes a Congressional Record excerpt: "The bill would permit a church plan to cover employees of a tax-exempt agency controlled by or affiliated with a church…." Opp. at 8:7-8, quoting 126 Cong. Rec. 20,208 (1980). Her opposition then isolates a portion of the Record that explains 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.'" Opp. at 8:9-12, quoting 124 Cong. Rec. 12,107 (1978) (Rep. Conable). Plaintiff omits the *very next sentence*, which makes clear that church agencies are within the ambit of the church plan exemption: "***Present law fails to recognize that the church agencies are parts of the church in its work of*** disseminating religious instruction and ***caring for the sick, needy, and underprivileged.***" 124 Cong. Rec. 12,107 (emphasis added). By omitting this sentence, plaintiff finds support for her argument that "dedication to 'healing' cannot evidence common convictions with the R[oman] C[atholic] C[hurch]," because healing is allegedly central to all healthcare facilities. Opp. at 14:19-22. The legislative history that plaintiff omits demonstrates that Congress disagreed with plaintiff's position when it expanded the church plan definition to allow church-affiliated organizations that care "for the sick, needy, and underprivileged" to fall within the definition of a church plan. Dignity is just such an entity. *Henderson v. Graham*, 490 U.S. 680, 699 (1989) (courts should not judge the "centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds").

[1] A redline showing the modifications to the church plan definition effected by the 1980 amendments is attached as Exhibit A.

C. Ninth Circuit Authority Permits Dignity To Rely On Its Plan-Specific Private Letter Rulings.

Plaintiff argues that the four private letter rulings ("PLRs") obtained by Dignity relating to the Plan should be entitled to *no deference* because they were purportedly "very informal" and "lack any 'power to persuade.'" Opp. at 9:3-8. The Ninth Circuit disagrees. Dignity is entitled to rely on a PLR issued to it specifically. *Lucky Stores, Inc. v. CIR*, 153 F.3d 964, 966 n.5 (9th Cir. 1988) (holding, in the context of reliance on a PLR not specific to the plan at issue, that "taxpayers ***other than those to whom such rulings or memoranda were issued*** are not entitled to rely on them") (emphasis added). Further, the Ninth Circuit has repeatedly recognized that Revenue Rulings "constitute a body of experience and informed judgment to which [courts] may look for guidance." *McDaniel v. Chevron Corp.*, 203 F.3d 1099, 1112 (9th Cir. 2000), *citing Lucky Stores*, 153 F.3d at 966 n.4; *Bluetooth SIG Inc. v. U.S.*, 611 F.3d 617 (9th Cir. 2010) (same). While plaintiff states that she "disputes" that Dignity provided full and accurate information to the IRS in connection with PLRs finding the Plan a church plan (Opp. at 17, n.32), she points to no plausible contrary factual allegation, making her "dispute" insufficient to survive Dignity's motion. *In re Century Aluminum Co. Secs. Litig.*, 704 F.3d 1119, 1121-23 (9th Cir. 2013), *amended by* No. 11-15599, 2013 WL 1633094 (9th Cir. Apr. 17, 2013).

Plaintiff also argues that Dignity's PLRs are irrelevant for the additional reason that Dignity has since reorganized. Opp. at 9:14-16. Putting aside that the IRS gave then-Catholic Healthcare West ("CHW") three of its four favorable PLRs after CHW acquired different community hospitals to expand its mission (Dkt. No. 45-A at 338-56), CHW entered into its reorganization (and renamed itself Dignity) to conform its structure to the directives that the Church promulgated to govern Catholic healthcare ministries. *See* Section II.B., *infra*. If anything, the restructuring underscores Dignity's common bonds and values with the Church.

II. DIGNITY IS "ASSOCIATED WITH" THE CATHOLIC CHURCH WITHIN THE MEANING OF ERISA.

Plaintiff repeatedly references *Lown* and *Chronister*, two cases in which courts confirmed the ERISA-governed status of insured long-term disability plans for which the *sponsoring hospitals*

themselves exercised their statutory option to be governed as ERISA plans, rather than as church plans. In addition, "Baptist Health severed its ties to the Arkansas Baptist State Convention after 1966…." *Chronister v. Baptist Health*, 442 F.3d 648, 652 (8th Cir. 2006). The court held that, as "Baptist churches are not hierarchically governed[,] it would be inaccurate to ascribe Baptist Health's generally religious outlook to a specific Baptist Church or association of Baptist churches given their disaffiliation with the Arkansas Baptist State Convention." *Id.* at 653. Similarly, in *Lown*, "Baptist Healthcare and the South Carolina Baptist Convention ended their affiliation in 1993 [and] … [plaintiff] Lown points to no factor indicating that Baptist Healthcare consulted with the South Carolina Baptist Convention on any matter." *Lown v. Continental Cas. Co.*, 238 F.3d 543, 548 (4th Cir. 2001).

Lown and *Chronister* could not be further from the facts here. Dignity intentionally maintains its pension Plan as a church plan rather than an ERISA plan, consulted with the Church in connection with every acquisition of non-Catholic healthcare facilities, and worked with the Church to achieve a corporate restructuring that embraced evolving Catholic views on cooperation while maintaining the Sponsoring Orders' ability to fulfill their healing ministry. *See, e.g.*, Dkt. No. 44-7 at 1 ("The Plan is intended to be, and has been since its establishment, a Church Plan…."); Dkt. No. 44-2 (*nihil obstat* regarding Dignity restructuring); Dkt. No. 43-6 at 2 (Archbishop of San Francisco's letter discussing his months-long dialogue with CHW/Dignity regarding the restructuring); Dkt. No. 43-7 at 24 (local bishops consulted in affiliations with community hospitals, which adhere to Statement of Common Values ("SCV")).[2] As set forth below, plaintiff has failed to point to plausible facts that Dignity does not "share[] common religious bonds and convictions with [the Catholic] church" as required by the statute itself. § 1002(33)(C)(iv).

A. Dignity Shares Common Bonds And Convictions With The Catholic Church.

Plaintiff contends that "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." Opp. at 14:9-11. This non-starter is just posturing, not well-pled fact.

[2] While plaintiff makes evidentiary objections to certain documents before the Court, she does not seek conversion of the motion to one under Rule 56. Opp. at 3, n.6. Defendants separately address plaintiff's erroneous objections in their Response re Request for Judicial Notice.

Contrary to plaintiff's unsupported contention, the women religious Sponsors *are* part and parcel with the Church. Courts routinely hold that hospital systems associated with Orders of women religious are "associated with" the Church within the meaning of ERISA's church plan definition. *Okerman v. Life Ins. Co. of N. Am.*, No. CIV-S-00-0186, 2001 WL 36203082, at **3-4 (E.D. Cal. Dec. 24, 2001) (plan held to be a church plan because hospital within Dignity's system sponsored by six Orders of women religious was "operated in a manner consistent with the Church's religious bonds and convictions").[3] The DOL agrees. DOL Opinion Letter 96-13A (plans associated with a religious order were church plans).

1. Dignity's Bylaws, Statement Of Common Values, And Standards For Mission Integration Demonstrate That It Shares Common Bonds And Convictions With The Church And Its Ethical & Religious Directives.

Partially quoting from Dignity's Bylaws, plaintiff asserts that the "Bylaws explicitly state Dignity is 'not subject … to the ecclesial authority of the Roman Catholic Church.'" Opp. at 9:21-22. This incomplete sentence, found in the article governing Dignity's healing ministry, distinguishes, in essentially only one respect, Dignity's community hospitals from its Catholic hospitals. Dkt. No. 44-9 ¶ 3.3. The paragraph in which it is contained reads in full:

> 3.3. Ethical and Religious Directives; Statement of Common Values. In striving to fulfill its healing ministry, this Corporation's Health Facilities shall follow the Statement of Common Values, as amended from time to time. In striving to fulfill the Catholic healthcare mission of the Catholic Sponsored Health Facilities, such Catholic Sponsored Health Facilities are bound by the Ethical and Religious Directives for Catholic Health Care Services, as approved and amended by the United States Conference of Catholic Bishops form time to time and applied or promulgated by the local Bishop. The Corporation and the Health Facilities which are not Catholic Sponsored are not subject to the Ethical and Religious Directives for Catholic Health Care Services or to the ecclesial authority of the Roman Catholic Church.

[3] *See also Ward v. Unum Life Ins. Co. of Am.*, No. 09-C-431, 2010 WL 4337821, at *2 (E.D. Wis. Oct. 25, 2010) (where the Sisters of the Sorrowful Mother played a "key role" in the organization, court found organization "at least 'associated with a church'"); *Welsh v. Ascension Health*, No. 3:08cv348, 2009 WL 1444431 (N.D. Fl. May 21, 2009) (plan considered church plan where sponsors were several religious orders affiliated with the Church); *Rinehart v. Life Ins. Co. of N. Am.*, No. C08-5486, 2009 WL 995715, at *4 (W.D. Wash. Apr. 14, 2009) (same, the Sisters of Providence); *Taylor v. Sisters of St. Francis Health Servs., Inc. Ltd.*, No. 1:05-CV-0671, 2006 WL 2457202, at *1 (S.D. Ind. Aug. 23, 2006) (same, The Eastern Province of the Sisters of St. Francis of Perpetual Adoration); *Harclerode v. The Sisters of Mercy of Independence*, No. 79-4022, 1981 WL 394149, at *1 (D. Kan. Nov. 3, 1981) (same, Sisters of Mercy).

Id. With respect to Dignity itself, the same Article requires the corporation to "follow the mission and values of the healing ministry, which are intended to apply to all of its activities and operations." *Id.* ¶ 3.2. The Bylaws define the healing ministry as "based on the life and works of Jesus," which includes the requirement that Dignity "serve and advocate for those sisters and brothers who are poor and disenfranchised." *Id.* ¶¶ 3.1-3.2. *See Spencer v. World Vision, Inc.*, 570 F. Supp. 2d 1279 (W.D. Wash. 2008), *aff'd en banc*, 633 F.3d 733 (9th Cir. 2010 & 2011), *cert. denied*, 132 S. Ct. 96 (2011) ("while providing humanitarian services may be a secular activity, for Christians, this type of activity is so motivated by their faith and part of their Christian identity that it must be considered a religious activity").

Plaintiff also speculates that the Mission Integrity Committee "has no authority" and that the Mission Integration Standards seem "at most a statement of future aspirations." Opp. at 16:15-22. As evidenced by the Mission Integrity Committee's charter, the Committee has substantial power, including the authority to "[e]valuate and resolve management, operational and patient care issues that impact conformity with the mission and values of the healing ministry in the operations of Dignity Health and its Health Facilities, Subsidiaries and Affiliates." Dkt. No. 44-4 at 3. The charter affords the Committee "direct access to Dignity Health's personnel and documents, and … authority to conduct any investigation into any matters appropriate to fulfilling its responsibilities." *Id.* at 2. As the Charter references the Mission Integration Standards, it is evident that those standards are in place, not just "aspirational."

While Dignity updated the structure of the SCV for readability in 2012, the substance remains the same. Dkt. No. 43-7. And the speculative contention (Opp. at 16:7-10) that the SCV does not contain extensive provisions parallel to the Ethical and Religious Directives for Catholic Health Care Services ("ERDs") is refuted simply by reviewing the two documents. *Compare, e.g.*, Dkt. No. 43-9 at p. 2 ¶ 3 with Dkt. No. 43-5 at Directive 1; Dkt. No. 43-9 at p. 1 ¶ 6 with Dkt. No. 43-5 at Directive 2; Dkt. No. 43-9 at p. 1 ¶ 2 and p. 2 ¶¶ 2, 4 to Dkt. No. 43-5, Directive 3.

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2. Dignity Has Consistently Adhered To Its Catholicity.[4]

Plaintiff's contention (Opp. at 7:4-14) that "Dignity, through its St. Joseph's hospital officers" argued that "the hospital, not being a church, could never establish a church plan" in *Okerman*, *supra*, flatly mischaracterizes the *Okerman* record. Neither Dignity nor St. Joseph's were parties to that case. *Id.* The Debbie Murrillo declaration submitted by plaintiff contradicts Ms. Murrillo's later deposition testimony in that case where she testified that Church-affiliated religious orders sponsored St. Joseph's. Diller Decl., Ex. A.[5] The district court disregarded the Murrillo declaration and instead relied on the declaration of Donald Wiley, St. Joseph's President. Mr. Wiley averred that St. Joseph's "has been operated in a manner consistent with the shared common religious bonds and convictions with the Roman Catholic Church…." *Id.*, Ex. B. On that basis, the Eastern District of California held that the plan at issue was a church plan. *Id.*, Ex. C (Order) at 9 ("individuals whose employment is with St. Joseph's constitute employees of an organization which is controlled by, or associated with, the Church within the meaning of § 1002(33)(C)(ii)(II). Therefore, the Church is deemed the employer of these individuals for purposes of the church plan definition.").

3. No Plausibly Alleged Fact Overcomes The Governing Documents.

Plaintiff asserts that she "has pleaded sufficiently to support a plausible inference that Dignity is not 'associated' with any church," making only conclusory allegations: Dignity 1) is big and provides care in 16 states, 2) does not adhere to Catholic convictions "when it is in [Dignity's] economic interest to do so," 3) offers services without regard to religious affiliation, and 4) maintains a Board, management members, and employee population comprised predominantly of lay people. Opp. at 9:22-24, citing Comp. ¶¶ 5, 37-52 and 79-82. Plaintiff's contentions do not establish any plausible inference that Dignity is not associated with the Catholic Church.

[4] That Dignity has exercised its statutory option to have certain welfare plans governed by ERISA (Opp. 22:13-15) shows nothing more than it has evaluated those plans for which compliance with ERISA would cause an undue burden and those that ERISA compliance would not impede Dignity's ability to fulfill its mission.

[5] Defendants respectfully request that the Court take judicial notice of Exhibits A-C to the Diller Decl. as records of other court proceedings relevant to plaintiff's opposition argument. Fed. R. Evid. 201; *Reed v. Wong*, No. C-11-4921 TEH PR, 2012 WL 1945607, at *1 n. 1 (N.D. Cal. May 30, 2012) (granting request for judicial notice of documents filed in another court).

Dignity Is Big (Opp. at 9:22-24, Comp. ¶ 5). The only respect in which Dignity's size is relevant directly supports its common bonds and convictions with the Church: last year alone Dignity's ministry provided $1.2 billion in charitable community benefits, including $600 million through the community hospitals through which Dignity greatly expanded its mission of serving the poor as provided in the ERDs and SCV. Dkt. No. 43-G, K, and L.

Direct Sterilizations (Opp. at 15:1-6). The record contradicts plaintiff's offensive allegation that Dignity is not Catholic enough because it elected to affiliate with community hospitals for "economic" benefit, rather than in furtherance of the Sponsors' healing ministry. With approval from the appropriate Church authorities, Dignity entered into agreements with community hospitals in order to permit the Sponsors to continue and further their healing ministry in light of changing religious demographics and the ever-evolving circumstances of healthcare and its delivery. Def. Mem. at III.A. In the words of one theologian consulted in Dignity's reorganization, "the Apostolic Signatura noted … *'Ecclesia vivit in mundo'*—'The Church lives in the world'—even though the Church does not agree with some of the 'World's' provisions governing Catholic ministry." Dkt. No. 44-3 at 2. Dignity re-considered and renewed these relationships in the restructuring effective 2012 in consultation with the Church. Dkt. No. 43-6.

Medical Treatment of Non-Catholics (Opp. 12:23). Plaintiff does not even address defendants' briefing that a core principle of Catholic healthcare ministry is to extend God's healing presence to all, regardless of faith, based on the sacredness of every human life. *See* Def. Mem. at 3:2-6; Dkt. No. 43-5 at 6-7. Dignity's provision of healthcare to all demonstrates its common bonds and convictions with the Church. *Id.*

Lay Board Members and Employees (Opp. 12:22-23). The ERDs explicitly contemplate that religious communities will be "joined in the Church's health care mission by many men and women who are not Catholic." Dkt. No. 43-5 at 7. Nothing in Church doctrine dictates that all or even a majority of Dignity's officers, directors, and staff adhere to Catholicism. Moreover, ERISA's church plan definition reads in the disjunctive, to include an organization "controlled by ***or*** associated with a church" (§ 1002(33)(C)(ii)(II)) (emphasis added)), making the Sponsor's control over the purely corporate functions of the Board unnecessary to meet the "associated with" definition. While the

Sponsors no longer predominate on Dignity's Board, they maintain the power to ensure Dignity's compliance with their Catholic mission through the Sponsorship Council's canonical reserved rights and rights noted in the Bylaws, including rights over changes in the SCV, Mission Integration Standards and application of the ERDs.[6] The Sponsors' oversight of the goals and implementation of their mission ensures Dignity's continued adherence to the convictions of the Church.[7]

B. Dignity Restructured Its Governance To Conform To The Updated ERDs.

As detailed in defendants' opening memorandum, Dignity restructured itself to ensure that its ministry continued to conform to modified ERDs. Def. Mem. at III.A.3. Plaintiff distorts the import and terms of Archbishop Niederauer's *nihil obstat* regarding the restructuring. Opp. at 11, n.22. The revisions to the ERDs direct that "[d]iocesan bishops and other church authorities should be involved as [community] partnerships are developed," and require that "partnerships sponsored by religious institutes of pontifical right," like the Orders of the Sponsorship Council, obtain the diocesan bishop's *nihil obstat*. Dkt. No. 43-5 at 36. Dignity adhered to that directive, demonstrating common bonds with—if not control by—the Church. The Archbishop, like the theological, ethics and canon law experts he consulted, concluded that Dignity's governance restructure appropriately respects the moral teaching of the Roman Catholic Church. Dkt. No. 44-2 at 2.

Plaintiff mischaracterizes the *nihil obstat* when she asserts that "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.'" Opp. at 11:11-12. As Archbishop Niederauer explained, he considered this condition important to "diminish any potential for scandal or misunderstanding." *Id.* at 3. That effort to minimize religious scandal is precisely what the revisions

[6] Without reference to any plausibly alleged factual contention, plaintiff also states that she "disputes" that Dignity adheres to its policy and mission statements (Opp. at 15:16-17) or that the Catholic hospitals that form part of Dignity's healthcare system comply with the ERDs. Opp. at 15:24. "To survive a motion to dismiss, a complaint must contain 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); *In re Century Aluminum Co. Secs. Litig., supra.* Plaintiff's "dispute" does not even articulate an alternate competing factual allegation.

[7] Plaintiff wrongly asserts that the Sponsorship Council's reserved rights contradict Dignity's governing documents and California law. Opp. at 14, n.27. The Mission Integrity Committee may propose changes to the SCV, subject to the Council's right to veto the proposal, in which case the changes would never be considered by the Board. Dkt. No. 44-10 at §10.3(f)(4)(v). Nothing about this right runs afoul of Dignity's Governance Matrix or the law.

to the ERDs contemplate. Def. Mem. at III.A.3. Conformance to the ERDs shows the Archbishop's—and Dignity's—common bonds and convictions with the Church.

C. The Constitution Precludes The Court From Examining The Propriety Of The Archbishop's Determination.

Principles of judicial neutrality and church autonomy permit civil courts to hear only disputes that can be determined on the basis of neutral principles. *Jones v. Wolf*, 443 U.S. 595, 602 (1979). "Disputes regarding matters of church discipline are not the proper subject of a civil court inquiry." *Ammons v. North Pacific Union Conference of Seventh-Day Adventist*, 139 F.3d 903 (9th Cir. 1998), *citing Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713 (1976). Where a claim involves "core issues of ecclesiastical concern, the potential for government entanglement in religious matters prevents judicial review." *Basich v. Bd. of Pensions of the ELCA*, 540 N.W.2d 82 (Minn. App. 1995). This includes any dispute between Dignity and the Archbishop of Phoenix regarding Mercy Gilbert. Opp. at 7:7-13; *Milivojevich*, 426 U.S. at 713.

Plaintiff repeatedly asks the Court to find Dignity is not sufficiently Catholic and fails to share common bonds and convictions with the Church because some of its facilities perform direct sterilizations. Opp. at 9:17-18:2. The U.S. Council of Catholic Bishops assessed that same issue in 2008 and revised the ERDs' directives on the collaboration between Catholic hospitals and community hospitals. The updated ERDs direct that the bishop of the organization's domicile determine the continued Catholicity of the healthcare provider in his own judgment. Dkts. No. 44-2 at 1-2; 43-5 at 36 (Directive 68). Under this directive, Archbishop Niederauer consulted with theologians and the bishops of all dioceses in which Dignity has healthcare facilities. Dkts. No. 44-2 at 2; 43-6 at 2. Frank Morissey, Canon Law Professor Emeritus, informed the Archbishop that he considered the restructuring "in conformity with Canon Law provisions … [and it] presents a very reasonable compromise, respecting Catholic principles, while allowing the hospitals involved to continue their mission in today's world." Dkt. No. 44-3 at 3. Similarly, consultant Peter Cataldo told the Archbishop that "the great good preserved by this transaction and the prevention of significant harm to the Sponsors' ministry justifies any remote mediate material cooperation[8] that may occur."

[8] *See* Def. Mem. at 6:13-7:14 regarding the Catholic concept of cooperation.

Id. at 8. The Archbishop issued a *nihil obstat* (*i.e.*, a statement of no moral or doctrinal objection) to Dignity, as required by Directive 68, with stipulated conditions, including, for example, that the restated bylaws "***be modified to clearly establish that Catholic moral teaching will be the basis for defining moral terms that are used in the Statement of Common Values.***" Dkt. No. 44-2 at 3-4 (emphasis added). To the extent plaintiff requests the Court revisit the conclusions of the Archbishop, Dignity respectfully submits that the Court lacks subject matter jurisdiction to do so under the principles of neutrality and the autonomy doctrine.

III. THE RETIREMENT PLANS SUB-COMMITTEE ALSO SQUARELY FALLS WITHIN THE ENTITIES THAT MAY MAINTAIN A CHURCH PLAN.

Plaintiff's final contention that the Sub-Committee is not associated with the Church fails for the same reasons as the argument fails as to Dignity. In addition, plaintiff's position contradicts her own complaint when she asserts that "'maintaining' a Plan is different than administering it." Opp. at 19:1. Contrary to her strained argument that maintains "means to 'continue' a plan" (*id.* at 19:1-2), plaintiff's complaint admits that to "maintain" a pension plan is the same as the "day-to-day management" of the plan. Comp. ¶ 29. Plaintiff's straw argument that the Retirement Plans Sub-Committee that administers the Plan "is merely a non-juridical subset of Dignity" conflicts with the plain language of the statute—set out in defendants' opening memorandum. The statute defines church plans as plans administered by "a civil law corporation ***or otherwise.***" Because the Retirement Plans Sub-Committee administers a plan that provides benefits to "church employees" (as broadly defined by the statute), its activities provide an independent basis to confirm the Plan's church plan status. Def. Mem. at 11:16-12:13, 17:24-27, quoting § 1002(33)(C)(i).

IV. ERISA'S CHURCH PLAN EXEMPTION AS APPLIED TO DIGNITY FULLY COMPORTS WITH THE ESTABLISHMENT CLAUSE.

Plaintiff's opposition ignores, and thereby concedes, many of Dignity's *Lemon*-based arguments in support of its motion to dismiss Count VIII. Plaintiff's opposition disregards Supreme Court and Ninth Circuit precedents, while misconstruing others, to make up a new Establishment Clause "test" that she claims to satisfy. Plaintiff's Establishment Clause claim fails as a matter of law.

A. Because Plaintiff Does Not Respond To Dignity's *Lemon*-Test Arguments, She Concedes Their Merit.

First, plaintiff offers no authority to dispute that in the Ninth Circuit, the *Lemon* test remains the benchmark to determine whether governmental activity violates the Establishment Clause. *See* Def. Mem. at 20 *citing Access Fund v. U.S. Dep't of Agric.*, 499 F.3d 1036, 1042-43 (9th Cir. 2007) (discussing continued vitality of the *Lemon* test and concluding it remains the benchmark). Indeed, plaintiff's own cited cases use the *Lemon* test.[9]

Second, by discarding the *Lemon* test, plaintiff essentially concedes that the church-plan exemption as applied to Dignity passes the *Lemon* test. *See* Def. Mem. at 19:18-23:11. Plaintiff does not dispute that Congress had a secular legislative purpose in enacting the church plan exemption. She does not explain how Dignity's exemption impermissibly advances religion. She neglects to respond to Dignity's showing that most of her allegations are irrelevant to Establishment Clause concerns. *See id.* at 23:12-25:20. And she does not dispute her failure to allege any actual harm—*i.e.*, that she has any basis to believe she will receive anything less than all benefits to which she is entitled.

B. Plaintiff's Invented Establishment Clause Test Is Without Merit.

Making no real attempt to dispute Dignity's arguments that the church-plan exemption as applied to Dignity passes the *Lemon* test, plaintiff makes up her own test—which, predictably, the church-plan exemption flunks. *See* Opp. at 20:11-22. Plaintiff's four-prong test purports to rely on four Supreme Court precedents: *Texas Monthly, supra, Santa Fe I.S.D., supra, Caldor, supra,* and *Cutter, supra*. *See id*. None of these cases, however, apply plaintiff's revisionist Establishment Clause analysis—and all are distinguishable in important respects.

First, Dignity has already distinguished *Texas Monthly*—detailing both the narrow holding of the plurality opinion and the inapplicability of that opinion to plaintiff's allegations. *See* Def. Mem. at

[9] In three of the cases, the Supreme Court not only cited *Lemon*, but relied, at least in part, on the *Lemon* test to analyze the government activity at issue. *See Texas Monthly v. Bullock*, 489 U.S. 1, 9 (1989); *Santa Fe ISD v. Doe*, 530 U.S. 290, 314-15 (2000); *Estate of Thornton v. Caldor*, 472 U.S. 703, 708-10 (1985). In *Cutter v. Wilkinson*, 544 U.S. 709 (2005), which actually rejected an Establishment Clause challenge, Justice Ginsburg's opinion for a unanimous court noted that although the Sixth Circuit in that case had applied the *Lemon* test, the Supreme Court "resolve[d] [the] case on other grounds." 544 U.S. at 717 n.6.

24:17-27. Plaintiff never explains how the subsidy at issue in *Texas Monthly*, in the form of a tax exemption, is analogous to an exemption from a regulatory scheme such as ERISA.[10]

Second, plaintiff cites *Santa Fe* for the proposition that an accommodation must "comport[] with a valid secular purpose for which the exemption was enacted[.]" The cited statement, however, refers to a school district's approval of a religious invocation before certain school-sponsored events and the district's proffered secular reasons for approving that message. *See Santa Fe*, 530 U.S. at 309. *Santa Fe* says nothing about religious exemptions from regulatory schemes and thus has no application here.

Third (and fourth), the laws at issue in *Cutter* and *Caldor* on which plaintiff relies to emphasize potential harm to third parties were not statutory exemptions from a regulatory scheme, as here. They were laws that, by their very nature, imposed burdens on third parties to accommodate religion. *See Cutter*, 544 U.S. at 715 (statute impermissibly required government officials to show that any limits placed on inmate's religious exercise satisfy strict scrutiny); *Caldor*, 472 U.S. at 709 (statute impermissibly imposed absolute duty on employers to conform their business practices to their employees' religious practices by observing each employee's designated Sabbath). A statutory exemption from a regulatory scheme does not implicate the same concerns about third-party harm that animated the decisions in *Cutter* and *Caldor*.

C. <u>In Applying Her Flawed Test, Plaintiff Focuses On Irrelevant Considerations</u>.

Like the allegations of her complaint, plaintiff's opposition largely focuses on considerations irrelevant to the Establishment Clause. First, her argument that Dignity's church-plan exemption has no valid secular purpose is undercut by her own assertions about the exemption. According to plaintiff, a secular purpose is lacking because "Dignity has no confidential books and records to shield from government scrutiny," and because the exemption "economically advances" Dignity over other non-profit hospitals (according to plaintiff) on the basis of religion. Opp. at 21:3-18. Even assuming these odd assertions were true, neither one indicates anything *other* than a secular purpose.

[10] Moreover, the subsidy in *Texas Monthly* offended the Establishment Clause precisely because, unlike here, it exclusively subsidized a religious practice—the publication and spread of religious messages. *See Texas Monthly*, 489 U.S. at 5.

Next, to support her argument that Dignity's exemption relieves no significant burden on any religious practice, plaintiff states that exempting Dignity is not required by the Free Exercise Clause. Opp. at 23:7. But whether Dignity's exemption is *required* by the Free Exercise Clause is irrelevant. The Supreme Court has long held that "the limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987), *quoting Walz v. Tax Comm'n*, 397 U.S. 664, 667 (1970).

Oddly, in an Establishment Clause case, plaintiff herself gives short shrift to Dignity's religious mission and convictions. *See* Opp. at 23:1-4. She not only balks at the possibility that Dignity's religious mission of providing medical care to the underprivileged could be adversely affected by ERISA's pension funding requirements, but she also gives no consideration to ERISA's many other provisions that could affect Dignity's ability to carry out its mission.[11] *See Amos*, 489 U.S. at 336 (it is a significant burden to predict which activities a secular court will consider religious).[12]

D. *Amos* Controls This Case And Requires Dismissal Of Count VIII.

Crucially, plaintiff's arguments does not alter the conclusion that the Supreme Court's decision in *Amos* controls this case and requires dismissal of Count VIII. Def. Mem. at 19:8-23:11. Like the gymnasium in *Amos*, Dignity is a non-profit civil corporation and is associated with a religious organization—the Catholic Church. *See* 483 U.S. at 330. Also, like the gymnasium, Dignity exists to pursue a religious mission--the healing ministry of Jesus. *See* Def. Mem. at 4:10-

[11] Some authorities suggest that ERISA fiduciaries cannot use socially responsible investment criteria to exclude profitable investments from a plan. *See, e.g., ERISA Fiduciary Law* 501-14 (Susan P. Serota & Frederick A Brodie eds., BNA 2d ed. 2006); 29 C.F.R. §2509.08-1. In *Basich*, 540 N.W.2d at 84-86, the court relied upon the First Amendment in rejecting a challenge to plan investments based on religious doctrine, holding that resolving such claims would impermissibly entangle the court in reviewing church doctrine and policy.

[12] In (unsuccessfully) attempting to distinguish this case from *Amos*, plaintiff contends that "Dignity is not run by the R[oman] C[atholic] C[hurch] and is not intimately connected to it financially or in matters of management." Opp. at 23:18-19. But to reach plaintiff's constitutional challenge, the Court would first have to find that Dignity's Plan is a church plan—which requires finding an association with the Church. Thus, by this assertion, plaintiff oddly self-defeats her narrow as-applied challenge, a position she takes care to avoid elsewhere, and Dignity and the Court are left wondering exactly what plaintiff is arguing. See Opp. at 21 n.35; Comp. ¶ 163.

9:26. The statutory exemption at issue here, like the one in *Amos*, exempts certain activities of religious organizations from a generally applicable legislative enactment. *See Amos*, 483 U.S. at 329-30.

Both exemptions affect non-adherents. *See id.* at 330. Whereas the *Amos* exemption allowed employers to discriminate against non-adherents for religious reasons, the church-plan exemption merely removes from federal regulation a religious employer's pension plan. *See id.* at 329-31. There are a number of reasons Congress could have reasonably concluded that ERISA might impermissibly interfere with religious activity. *See id.* at 335-36 (citing "[f]ear of potential liability" as possibly "affect[ing] the way an organization carried out … its religious mission."). And plaintiff does not allege that Dignity's exemption has the primary effect of advancing religion.[13] As in *Amos*, "the statute effectuates a more complete separation" between government and religion (*id.* at 339) and does not violate the Establishment Clause as a matter of law.

V. CONCLUSION.

For the reasons stated above and in defendants' opening brief, defendants respectfully request the Court dismiss plaintiff's complaint with prejudice.

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[13] Plaintiff argues the opposite—that the exemption relieves Dignity of no "genuine" religious burden because, according to plaintiff, Dignity has no religious mission.

EXHIBIT A

Comparison Of 29 U.S.C. § 1002(33)(a) Before And After 1980 Amendment

(33) (a) the term "church plan" means~~(i)~~ a plan established and maintained (to the extent required in clause (ii) of subparagraph (b)) for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under ~~section 501 of the internal revenue code of 1954, //26 usc 501.// or (ii) aplan described in subparagraph (c)~~section 501 of title 26.
(b) the term "church plan" ~~(notwithstanding the provisions of subparagraph (a))~~ does not include a plan~~—~~,--
(i) which is established and maintained primarily for the benefit of employees (or their beneficiaries) of such church or convention or association of churches who are employed in connection with one or more unrelated trades or businesses (within the meaning of ~~section 513 of the internal revenue code of 1954), //26 usc 513.//~~section 513 of title 26), or
(ii) ~~which is a plan maintained by more than one employer, if one or more of the employers~~if less than substantially all of the individuals included in the plan are individuals described in subparagraph (a) or in clause (ii) of subparagraph (c) (or their beneficiaries).
~~in the plan is not a church (or a convention or association of churches) which is exempt from tax under section 501 of the internal revenue code of 1954.~~

(c) ~~notwithstanding the provisions of subparagraph (b) (ii), a plan in existence of january 1, 1974, shall be treated as a "church plan" if it is~~for purposes of this paragraph--
(i) a plan established and maintained ~~by a church or convention or association of churches for its employees and employees of one of more agencies of such church (or convention or association) for the employees of such church (or convention or association) and the employees of one or more agencies or such church (or convention or association), and if such church (or convention or association) and each such agency is exempt form tax under section 501 of the internal revenue code of 1954. the first sentence of this subparagraph shall not apply to any plan maintained for employees of an agency with respect to which the plan was not maintained on january 1, 1974. the first sentence to this subparagraph shall not apply with respect to any plan for any plan year beginning after december 31, 1982.~~for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, 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 or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.
(ii) the term employee of a church or a convention or association of churches includes--
(i) a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, regardless of the source of his compensation;
(ii) an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 of title 26 and which is controlled by or associated with a church or a convention or association of churches; and
(iii) an individual described in clause (v).
(iii) a church or a convention or association of churches which is exempt from tax under section 501 of title 26 shall be deemed the employer of any individual included as an employee under clause (ii).
(iv) an organization, whether a civil law corporation or otherwise, is associated with a church or a convention or association of churches if it shares common religious bonds and convictions with that church or convention or association of churches.
(v) if an employee who is included in a church plan separates from the service of a church or a convention or association of churches or an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 of title 26and which

is controlled by or associated with a church or a convention or association of churches, the church plan shall not fail to meet the requirements of this paragraph merely because the plan--
(i) retains the employee's accrued benefit or account for the payment of benefits to the employee or his beneficiaries pursuant to the terms of the plan; or
(ii) receives contributions on the employee's behalf after the employee's separation from such service, but only for a period of 5 years after such separation, unless the employee is disabled (within the meaning of the disability provisions of the church plan or, if there are no such provisions in the church plan, within the meaning of section 72(m)(7) of title 26) at the time of such separation from service.

(d)(i) if a plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of title 26 fails to meet one or more of the requirements of this paragraph and corrects its failure to meet such requirements within the correction period, the plan shall be deemed to meet the requirements of this paragraph for the year in which the correction was made and for all prior years.

(ii) if a correction is not made within the correction period, the plan shall be deemed not to meet the requirements of this paragraph beginning with the date on which the earliest failure to meet one or more of such requirements occurred.

(iii) for purposes of this subparagraph, the term "correction period" means--

(i) the period ending 270 days after the date of mailing by the secretary of the treasury of a notice of default with respect to the plan's failure to meet one or more of the requirements of this paragraph; or

(ii) any period set by a court of competent jurisdiction after a final determination that the plan fails to meet such requirements, or, if the court does not specify such period, any reasonable period determined by the secretary of the treasury on the basis of all the facts and circumstances, but in any event not less than 270 days after the determination has become final; or

(iii) any additional period which the secretary of the treasury determines is reasonable or necessary for the correction of the default, whichever has the latest ending date.