UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BRUCE BOWEN and CHERYL MUELLER, individually, and on behalf of all others similarly situated, and on behalf of the Wheaton Franciscan System Retirement Plan,

Plaintiffs,

v.

WHEATON FRANCISCAN SERVICES, INC., D/B/A WHEATON FRANCISCAN HEALTHCARE, an Illinois Non-Profit Corporation, OPERATIONS COMMITTEE OF THE BOARD OF DIRECTORS OF WHEATON FRANCISCAN SERVICES, INC., JOHN and JANE DOES 1-20, MEMBERS OF THE OPERATIONS COMMITTEE, ASCENSION HEALTH, a Missouri Non-Profit Corporation, ASCENSION HEALTH ALLIANCE, D/B/A ASCENSION, a Missouri Non-Profit Corporation, ASCENSION HEALTH PENSION COMMITTEE, JOHN and JANE DOES 21-40, MEMBERS OF THE ASCENSION HEALTH PENSION COMMITTEE, each an individual, and JOHN and JANE DOES 41-60, each an individual,

Defendants.

Case No.

CLASS ACTION COMPLAINT

CLAIM OF UNCONSTITUTIONALITY

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Plaintiffs Bruce Bowen and Cheryl Mueller, individually and on behalf of all those similarly situated, as well as on behalf of the Wheaton Franciscan System Retirement Plan ("Wheaton Franciscan Plan" or simply the "Plan"), as defined herein, by and through their attorneys, hereby allege as follows:

I. INTRODUCTION

1. Defendant Wheaton Franciscan Services Inc., d/b/a Wheaton Franciscan Healthcare, by and through its subsidiaries and/or affiliates ("Wheaton Franciscan" or "Defendant"), from 1983 until early 2016 operated a hospital conglomerate in Illinois, Colorado, Iowa, and Wisconsin and provided healthcare and health-related services in the communities it served. From at least February 1984, Wheaton Franciscan was designated as the "sponsor" of the defined benefit plan for Wheaton Franciscan employees.

2. On or about March 1, 2016, Ascension Health, the largest non-profit healthcare system in the United States, acquired Wheaton Franciscan. Ascension Health was designated as the "sponsor" of the Wheaton Franciscan retirement plan.

3. This case concerns whether Wheaton Franciscan violated the Employee Retirement Income Security Act of 1974, as amended ("ERISA") by maintaining its defined benefit pension plan as a "church plan." The Wheaton Franciscan Plan does not meet the definition of a "Church Plan" under ERISA because neither Wheaton Franciscan nor Ascension Health is a church or a convention or association of churches and because the Wheaton Franciscan Plan was not established by a church or a convention or association of churches. *See Stapleton v. Advocate Health Care Network & Subsidiaries*, 817 F.3d 517 (7th Cir. 2016); *Kaplan v. Saint Peter's Healthcare Sys.*, 810 F.3d 175 (3d Cir. 2015).

4. Defendants Wheaton Franciscan and Ascension Health have maintained the Plan in violation of ERISA's protections, to the detriment of over 17,000 former Wheaton Franciscan employees who are being harmed in the following ways:

A. The Plan is significantly underfunded and Defendants Wheaton Franciscan and Ascension failed and continue to fail to fund the Plan in accordance with ERISA, in violation of ERISA section 302, 29 U.S.C. § 1082;

B. Participants do not receive notices of Plan amendments which materially reduce their future accruals and other information material to their retirement benefits, in violation of ERISA section 204(h), 104, 103, 101, 105, 29 U.S.C. §§ 1054(h), 1024, 1023, 1021, 1135;

C. Participants who have worked at least three but less than five years are denied retirement benefits entirely, in violation of ERISA sections 203(a)(2) and (f)(2), 29 U.S.C. §§ 1053(a)(2) and (f)(2);

D. The Plan document was amended in 2013 to reduce the accrued benefits of Plan participants, in violation of ERISA section 204(g), 29 U.S.C. §§ 1054(g). These illegal cutbacks caused participants approximately $28.5 million in the value of lost benefits.

E. Since June 30, 2008, all Plan participants have received less benefits than they are entitled to because the Plan has reduced the interest credit applicable to account balances, in violation of ERISA's anti-backloading provisions found at ERISA section 204(b), 29 U.S.C. §§ 1054(b). Plaintiff estimates that the unlawful reductions of the interest credit cost Plan participants approximately $100 million.

5. As its name implies, ERISA was crafted to protect employee retirement funds. A comprehensive history of ERISA put it this way:

> Employees should not participate in a pension plan for many years only to lose their pension . . . because their plan did not have the funds to meet its obligations. The major reforms in ERISA—fiduciary standards of conduct, minimum vesting and funding standards, and a government-run insurance program—aimed to ensure that long-service employees actually received the benefits their retirement plan promised.

James Wooten, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 3 (U. Cal. 2004).

6. This class action is brought on behalf of all participants and beneficiaries of the defined benefit pension plans that are established, maintained, administered and/or sponsored by Wheaton Franciscan (or its successors) Services Inc., Wheaton Franciscan's affiliates and/or by Wheaton Franciscan's committees, and operated as or claimed to be "church plans," including the Wheaton Franciscan System Retirement Plan (the "Class").

7. Wheaton Franciscan and Ascension Health are non-profit healthcare conglomerates, not unlike other non-profit healthcare conglomerates with which they compete in their commercial healthcare activities. Wheaton Franciscan and Ascension Health are not owned or operated by a church and do not receive funding from a church. No denominational requirement exists for Wheaton Franciscan and Ascension Health employees. Indeed, both Wheaton Franciscan and Ascension Health tell prospective employees that any choice of faith, or lack thereof, is not a factor in the recruiting and hiring of employees. In choosing to recruit and hire from the population at large, Wheaton Franciscan and Ascension Health must also be willing to accept neutral, generally applicable regulations, such as ERISA, imposed to protect those employees' legitimate interests. Moreover, both Ascension Health, and Wheaton Franciscan prior to its dissolution, owned and/or operated numerous healthcare facilities and

health-related services including some that claim to be secular and have no relationship with any church.

8. Wheaton Franciscan may claim that it was permitted to establish its own Church Plan under ERISA, even though it is not a church, because it is an organization "controlled by" or "associated with" a church, within the meaning of ERISA. Even if ERISA permitted such non-church entities to establish Church Plans, which it does not, neither Wheaton Franciscan nor Ascension Health is controlled by a church. Moreover, Wheaton Franciscan and Ascension Health are not associated with a church within the meaning of ERISA because they do not, as ERISA requires, "share common religious bonds and convictions" with a church.

9. If Wheaton Franciscan and/or Ascension Health, non-church organizations, could themselves establish Church Plans, which Plaintiffs dispute, the Court would be required to evaluate many levels of evidence to determine whether Wheaton Franciscan and/or Ascension Health share common "religious bonds and convictions" with a church.

10. Moreover, if the Court weighed all this evidence and determined for any reason that the Wheaton Franciscan Plan fell within the scope of the Church Plan exemption, the Church Plan exemption would then be, as applied to Wheaton Franciscan and Ascension Health, an unconstitutional accommodation under the Establishment Clause of the First Amendment.

11. Wheaton Franciscan and Ascension Health claim, in effect, that the participants in its defined benefit pension plans must be exempted from ERISA protections, and Wheaton Franciscan and Ascension Health must be relieved of their ERISA financial obligations, because Wheaton Franciscan and Ascension Health claim certain religious beliefs. The Establishment Clause, however, does not allow such an economic preference for Wheaton Franciscan and Ascension Health and burden-shifting to former Wheaton Franciscan employees. Extension of

the Church Plan exemption to Wheaton Franciscan and Ascension Health would be unconstitutional under Supreme Court law because it: (A) is not necessary to further the stated purposes of the exemption; (B) harms Wheaton Franciscan workers; (C) puts Wheaton Franciscan and Ascension Health competitors at an economic disadvantage; (D) relieves Wheaton Franciscan and Ascension Health of no genuine religious burden created by ERISA; and (E) creates more government entanglement with alleged religious beliefs than compliance with ERISA creates.

12. Wheaton Franciscan and Ascension Health's claims of Church Plan status for the Wheaton Franciscan Plan fail under both ERISA and the First Amendment. Plaintiffs seek an Order requiring Defendants Ascension Health and the Ascension Health Pension Committee, as the current Plan sponsor and administrator, to comply with ERISA and afford the Class all the protections of ERISA with respect to the Wheaton Franciscan Plan, as well as an Order finding that the Church Plan exemption, as claimed by Wheaton Franciscan and Ascension Health, is unconstitutional because it violates the Establishment Clause of the First Amendment.

II. JURISDICTION AND VENUE

13. **Subject Matter Jurisdiction.** This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this is a civil action arising under the laws of the United States and pursuant to 29 U.S.C. § 1132(e)(1), which provides for federal jurisdiction of actions brought under Title I of ERISA.

14. **Personal Jurisdiction.** This Court has personal jurisdiction over all Defendants because ERISA provides for nationwide service of process. ERISA section 502(e)(2), 29 U.S.C. § 1132(e)(2). All of the Defendants are either residents of the United States or subject to service in the United States, and the Court therefore has personal jurisdiction over them. The Court also has personal jurisdiction over them pursuant to Federal Rule of Civil Procedure 4(k)(1)(A)

because they would all be subject to a court of general jurisdiction in Illinois as a result of Defendant Wheaton Franciscan being headquartered in, transacting business in, and/or having significant contacts with this District.

15. **Venue.** Venue is proper in this district pursuant to ERISA section 502(e)(2), 29 U.S.C. § 1132(e)(2), because (a) until March 2016 the Plan was administered in this District, (b) some or all of the violations of ERISA took place in this District, and/or (c) Defendant Wheaton Franciscan may be found in this District.

16. Venue is also proper in this District pursuant to 28 U.S.C. § 1391 because Defendants Wheaton Franciscan and Ascension Health systematically and continuously do business in this District, and because a substantial part of the events or omissions giving rise to the claims asserted herein occurred within this District.

III. PARTIES

A. Plaintiffs

17. **Plaintiff Bruce Bowen.** Plaintiff Bowen was an employee of Wheaton Franciscan from 1998 until April 4, 2014. Plaintiff Bowen is a vested participant in the Wheaton Franciscan System Retirement Plan, which was maintained by Wheaton Franciscan until February 29, 2016 and by Ascension Health thereafter, and he is therefore eligible for pension benefits under the Plan. Additionally and alternatively, Plaintiff Bowen has a colorable claim to benefits under the Wheaton Franciscan Plan and is a participant within the meaning of ERISA section 3(7), 29 U.S.C. § 1002(7), and is therefore entitled to maintain an action with respect to the Wheaton Franciscan Plan pursuant to ERISA sections 502(a)(1)(A) and (B), (a)(2), (a)(3), and (c)(1) and (3), 29 U.S.C. §§ 1132(a)(1)(A) and (B), (a)(2), (a)(3), and (c)(1) and (3).

18. **Plaintiff Cheryl Mueller.** Plaintiff Mueller was an employee of Wheaton Franciscan for over 47 years, from 1968 until her retirement on July 1, 2015. Plaintiff Mueller is

a vested participant in the Wheaton Franciscan System Retirement Plan, which was maintained by Wheaton Franciscan until February 29, 2016 and by Ascension Health thereafter, and she is therefore eligible for pension benefits under the Plan. Additionally and alternatively, Plaintiff Mueller has a colorable claim to benefits under the Wheaton Franciscan Plan and is a participant within the meaning of ERISA section 3(7), 29 U.S.C. § 1002(7), and is therefore entitled to maintain an action with respect to the Wheaton Franciscan Plan pursuant to ERISA sections 502(a)(1)(A) and (B), (a)(2), (a)(3), and (c)(1) and (3), 29 U.S.C. §§ 1132(a)(1)(A) and (B), (a)(2), (a)(3), and (c)(1) and (3).

B. Defendants

19. As discussed below, all the Defendants are ERISA fiduciaries.

20. **Defendant Wheaton Franciscan Services, Inc., d/b/a Wheaton Franciscan Healthcare ("Wheaton Franciscan").** Defendant Wheaton Franciscan is a 501(c)(3) non-profit corporation organized under, and governed by, Illinois law. Wheaton Franciscan was formally incorporated in 1983 with corporate offices in Wheaton, Illinois and Glendale, Wisconsin. Prior to its recent dissolution, Wheaton Franciscan employed over 17,000 associates at more than 100 sites in Wisconsin, Iowa, Illinois, and Colorado, including 14 hospital campuses, three transitional and extended care facilities, two home health agencies, nearly 3,000 physicians, 70 clinic sites with more than 500 employed physicians, and a housing division known as Franciscan Ministries. On October 29, 2015, Wheaton Franciscan began the process of transferring ownership and sponsorship of all its entities to four regional and national healthcare organizations during the first quarter of 2016. From approximately 1983 to February 29, 2016, Defendant Wheaton Franciscan was the employer responsible for maintaining the Wheaton Franciscan Plan and was designated as the "sponsor" of the Wheaton Franciscan Plan by the terms of the instrument under which the Wheaton Franciscan Plan was operated. Accordingly,

from approximately 1983 until February 29, 2016, Defendant Wheaton Franciscan was the plan sponsor of the Wheaton Franciscan Plan within the meaning of ERISA section 3(16)(B), 29 U.S.C. §1002(16)(B). Defendant Wheaton Franciscan is also a fiduciary of the Wheaton Franciscan Plan within the meaning of ERISA section 3(21)(A), 29 U.S.C. § 1002(21)(A).

21. **Defendant Operations Committee of the Board of Directors of Wheaton Franciscan Services, Inc. ("Wheaton Franciscan Operations Committee")** and John and Jane Does 1-20, Members of the Wheaton Franciscan Operations Committee (the "Operations Committee Defendants"). From at least February 17, 1989 until February 29, 2016, the Operations Committee of the Board of Directors of Wheaton Franciscan Services, Inc. was designated as the "plan administrator" of the Wheaton Franciscan Plan by the terms of the instrument under which the Wheaton Franciscan Plan was operated, and within the meaning of ERISA section 3(16)(A), 29 U.S.C. §1002(16)(A). Defendants John and Jane Does 1-20 are individuals who, through discovery, are found to be members of the Operations Committee. These individuals will be added by name as Defendants in this action upon motion by Plaintiffs at an appropriate time. The Operations Committee Defendants were also fiduciaries of the Wheaton Franciscan Plan within the meaning of ERISA section 3(21)(A), 29 U.S.C. § 1002(21)(A).

22. **Defendant Ascension Health.** Defendant Ascension Health is a Missouri non-profit corporation headquartered in St. Louis, Missouri. Ascension Health is the largest non-profit healthcare system in the United States. Approximately 160,000 associates and 36,000 aligned providers serve in 2,000 sites of care – including 137 hospitals and more than 30 senior living facilities – in 24 states and the District of Columbia. In addition to healthcare delivery, Ascension subsidiaries provide a variety of services and solutions including physician practice

management, venture capital investing, investment management, biomedical engineering, clinical care management, information services, risk management, and contracting through Ascension's own group purchasing organization. Effective March 1, 2016, Wheaton Franciscan's Southeast Wisconsin operations and related corporate services became a part of Ascension Health. From March 1, 2016 to the present, Defendant Ascension Health has been designated as the "sponsor" of the Wheaton Franciscan Plan by the terms of the instrument under which the Wheaton Franciscan Plan is operated, and has been named as the plan sponsor of the Wheaton Franciscan Plan within the meaning of ERISA section 3(16)(B), 29 U.S.C. §1002(16)(B). Defendant Ascension Health is also a fiduciary of the Wheaton Franciscan Plan within the meaning of ERISA section 3(21)(A), 29 U.S.C. § 1002(21)(A).

23. **Defendant Ascension Health Alliance, d/b/a Ascension.** Defendant Ascension Health Alliance is a Missouri non-profit corporation headquartered in St. Louis, Missouri. Ascension Health Alliance is a parent holding company resulting from internal reorganization of Ascension Health in 2011. As the sole corporate member of Defendant Ascension Health, Ascension Health Alliance has retained certain reserved powers over Ascension Health. These reserved powers permit Ascension Health Alliance to, among others, (i) approve the articles of incorporation and bylaws of Ascension Health, (ii) appoint or remove members of the Board of Trustees of Ascension Health, (iii) approve the sale, transfer or substantial change in use of all or substantially all of the assets of Ascension Health, (iv) approve the merger, dissolution or consolidation of Ascension Health, (v) approve the capital allocation plan for Ascension Health and (vi) approve the incurrence of debt by Ascension Health. On information and belief, Defendant Ascension Health Alliance's responsibilities include fiduciary oversight of the Wheaton Franciscan Plan, including managing and exerting discretionary authority or control

over the assets of the Wheaton Franciscan Plan. Therefore, Defendant Ascension Health Alliance is a fiduciary of the Plan within the meaning of ERISA.

24. **Defendants Ascension Health Pension Committee and John and Jane Does 21-40, Members of the Ascension Health Pension Committee (the "Ascension Pension Committee Defendants").** From March 1, 2016 to the present, the Ascension Health Pension Committee has been designated as the "plan administrator" of the Wheaton Franciscan Plan by the terms of the instrument under which the Wheaton Franciscan Plan is operated, and has been named as the plan administrator of the Wheaton Franciscan Plan within the meaning of ERISA section 3(16)(A), 29 U.S.C. §1002(16)(A). Defendants John and Jane Does 21-40 are individuals who, through discovery, are found to be members of the Ascension Health Pension Committee. These individuals will be added by name as Defendants in this action upon motion by Plaintiffs at an appropriate time. The Ascension Pension Committee Defendants are also fiduciaries of the Wheaton Franciscan Plan within the meaning of ERISA section 3(21)(A), 29 U.S.C. § 1002(21)(A).

25. **Defendants John and Jane Does 41-60.** Defendants John and Jane Does 41-60 are individuals who, through discovery, are found to have fiduciary responsibilities with respect to the Wheaton Franciscan Plan and are fiduciaries within the meaning of ERISA. These individuals will be added by name as Defendants in this action upon motion by Plaintiffs at an appropriate time.

26. John and Jane Does 1-20, members of the Wheaton Franciscan Operations Committee; John and Jane Does 21-40, members of the Ascension Health Pension Committee; and John and Jane Does 41-60, are collectively referred to herein as the "Individual Defendants."

27. The "Administrator Defendants" refers to the Wheaton Franciscan Board Benefit Plans Operations Committee and the Ascension Health Pension Committee.

IV. THE BACKGROUND OF THE CHURCH PLAN EXEMPTION

A. The Adoption of ERISA

28. Following years of study and debate, and broad bipartisan support, Congress adopted ERISA in 1974, and the statute was signed into law by President Ford on Labor Day of that year. Among the factors that led to the enactment of ERISA were the widely publicized failures of certain defined benefit pension plans, especially the plan for employees of Studebaker Corporation, an automobile manufacturing company, which defaulted on its pension obligations in 1965. *See generally* John Langbein, et al., PENSION AND EMPLOYEE BENEFIT LAW 78-83 (2010).

29. As originally adopted in 1974, and today, ERISA protects the retirement savings of pension plan participants in a variety of ways. As to participants in traditional defined benefit pension plans, such as the Plans at issue here, ERISA mandates, among other things, that such plans be currently funded and actuarially sound, that participants' accruing benefits vest pursuant to certain defined schedules, that the administrators of the plans report certain information to participants and to government regulators, that the fiduciary duties of prudence, diversification, loyalty, and so on apply to those who manage the plans, and that the benefits promised by the plans be guaranteed, up to certain limits, by the Pension Benefit Guaranty Corporation ("PBGC"). *See, e.g.*, ERISA §§ 303, 203, 101-106, 404-406, 409, 4007, 4022, 29 U.S.C. §§ 1083, 1053, 1021-1026, 1104-1106, 1109, 1307, and 1322.

30. ERISA centers on pension plans, particularly defined benefit pension plans, as is reflected in the very title of the Act, which addresses "retirement income security." However, ERISA also subjects to federal regulation defined contribution pension plans (such as 401(k)

plans) and welfare plans, which provide health care, disability, severance and related non-retirement benefits. ERISA §§ 3(34) and (1), 29 U.S.C. §§ 1002(34) and (1).

B. The Scope of the Church Plan Exemption in 1974

31. As adopted in 1974, ERISA provided an exemption from compliance for certain plans, in particular governmental plans and church plans. Plans that met the statutory definitions were exempt from all of ERISA's substantive protections for participants. ERISA § 4(b)(2), 29 U.S.C. § 1003(b)(2) (exemption from Title I of ERISA); ERISA § 4021(b)(3), 29 U.S.C. § 1321(b)(3) (exemption from Title IV of ERISA).

32. ERISA defined a "Church Plan" as a plan "established and maintained for its employees by a church or by a convention or associations of churches."[1]

33. Under the 1974 legislation, although a Church Plan was required to be established and maintained by a church, it could also include employees of certain pre-existing agencies of such church, but only until 1982. ERISA § 3(33)(C) (1974), 29 U.S.C. § 1002(33)(C) (1974) (current version as amended at 29 U.S.C. § 1002(33) (West 2013)). Thus, under the 1974 legislation, a pension plan that was not established and maintained by a church could not be a Church Plan. *Id.*

C. The Changes to the Church Plan Exemption in 1980

34. Church groups had two major concerns about the definition of "Church Plan" in ERISA as adopted in 1974. The first, and far more important, concern was that Church Plans after 1982 could not include the lay employees of agencies of a church. The second concern that arose in the church community after 1974 was more technical. Under the 1974 statute, all

[1] ERISA § 3(33)(A), 29 U.S.C. § 1002(33)(A). ERISA is codified in both the labor and tax provisions of the United States Code, titles 29 and 26 respectively. Many ERISA provisions appear in both titles. For example, the essentially identical definition of Church Plan in the Internal Revenue Code ("IRC") is found at 26 U.S.C. § 414(e).

Church Plans, single-employer or multiemployer, had to be "established and maintained" by a church or a convention/association of churches. This ignored the role of the churches' financial services organizations in the day-to-day management of the pension plans. In other words, although Church Plans were "established" by a church, in practice they were often "maintained" and/or "administered" by a separate financial services organization of the church, usually incorporated and typically called a church "pension board."

35. These two concerns ultimately were addressed when ERISA was amended in 1980 in various respects, including a change in the definition of "Church Plan." Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), P.L. No. 96-364. The amended definition is current law.

36. As to the first concern (regarding lay employees of agencies of a church), Congress included a new definition of "employee" in subsection (C)(ii)(II) of section 3(33) of ERISA. 29 U.S.C. § 1002(33)(C)(ii)(II) (1980) (current version at 29 U.S.C. § 1002(33)(C)(ii)(II) (West 2013)). As amended, an "employee" of a church or a convention/association of churches includes an employee of an organization "which is controlled by or associated with a church or a convention or association of churches." *Id.* The phrase "associated with" is then defined in ERISA section 3(33)(C)(iv) to include only those organizations that "share[] common religious bonds and convictions with that church or convention or association of churches." 29 U.S.C. § 1002(33)(C)(iv) (1980) (current version at 29 U.S.C. § 1002(33)(C)(iv) (West 2013)). Although this new definition of "employee" permitted a "Church Plan" to include among its participants employees of organizations controlled by or associated with the church, convention, or association of churches, it remains the case that a plan covering such "employees" cannot qualify as a "Church Plan" unless it was

"established by" the church, convention, or association of churches. ERISA § 3(33)(A), 29 U.S.C. § 1002(33)(A) (West 2013).

37. Two appellate cases have recently concluded that the statutory language in ERISA section 3(33)(A), 29 U.S.C. § 1002(33)(A) is clear—only a church can establish a church plan, that the legislative history underscores this conclusion and that any agency decisions that reach a different conclusion—private letter rulings obtained without input from plan participants—are entitled to no deference. *See Stapleton v. Advocate Health Care Network & Subsidiaries*, 817 F.3d 517 (7th Cir. 2016); *Kaplan v. Saint Peter's Healthcare Sys*, 810 F.3d 175 (3d Cir. 2015).

38. As to the second concern (regarding plans "maintained by" a separate church pension board), the 1980 amendments spoke to the issue as follows:

> A plan established and maintained 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.

ERISA § 3(33)(C)(i) (1980), 29 U.S.C. § 1002(33)(C)(i) (1980) (emphasis added) (current version at 29 U.S.C. § 1002(33)(C)(i) (West 2013)). Accordingly, under this provision, a plan "established" by a church or by a convention or association of churches could retain its "Church Plan" status even if the plan was "maintained by" a distinct organization, so long as (1) "the principal purpose or function of [the organization] is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits" and (2) the organization is "controlled by or associated with" the church or convention or association of churches. *Id.*

39. This church "pension board" clarification, however, has no bearing on plans that were not "established" by a church or by a convention or association of churches. Thus, a plan "established" by an organization "controlled by or associated with" a church is not a "church plan" because it was not "established" by a church or by a convention or association of churches. *See Stapleton*, 2016 WL 1055784, at *11 ("[T]he plain language of (33)(C) merely adds an alternative meaning to one of the subsection (33)(A)'s two elements—'maintain' element—but does not change the fact that a plan must still be established by a church."); *Kaplan*, 810 F.3d at 183 ("The plain terms of ERISA only make these exemptions available to plans established in the first instance by churches.").

40. In the alternative, this "pension board" clarification has no bearing on plans that were not "maintained" by a church pension board. Thus, even if a plan were "established" by a church, and even if it were "maintained by" an organization "controlled by or associated with" a church, such as a school, hospital, or publishing company, it still would not be a "Church Plan" if the principal purpose of the organization was other than the administration or funding of the plan. In such plans, the plan is "maintained" by the school, hospital or publishing company, and usually through the human resources department of such entity. It is not maintained by a church pension board: No "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" maintains the plan. *Compare with* ERISA § 3(33)(C)(i), 29 U.S.C. § 1002(33)(C)(i) (1980) (current version at 29 U.S.C. § 1002(33)(C)(i) (West 2013)).

41. The requirements for Church Plan status under ERISA, both as originally adopted in 1974 and as amended in 1980, are, as explained above, very clear. And there is no tension between the legislative history of the 1980 amendment and the amendment itself: the Congress

enacted exactly what it wanted to enact. Fundamental to the scheme, both as originally adopted and as fine-tuned in 1980, was that neither an "affiliate" of a church (using the 1974 language) nor "an organization controlled by or associated with" a church (using the 1980 language) could itself establish a Church Plan. Its employees could be *included* in a Church Plan, but if it sponsored its own plan, that was not a Church Plan. With respect to "pension boards," the 1980 legislation simply clarified the long standing practice that churches could use their own financial organizations to manage their Church Plans.

42. Unfortunately, in 1983, in response to a request for a private ruling, the Internal Revenue Service ("IRS") issued a short General Counsel Memorandum that misunderstood the statutory framework. The author incorrectly relied on the "pension board" clarification to conclude that a non-church entity could sponsor its own Church Plan as long as the plan was managed by some "organization" that was controlled by or associated with a church. This, of course, is not what the statute says, nor what Congress intended. In any event, this mistake was then repeated, often in verbatim language, in subsequent IRS determinations and, after 1990, in Department of Labor ("DOL") determinations. Under the relevant law, these private rulings may only be relied upon by the parties thereto, within the narrow confines of the specific facts then disclosed to the agencies, and are not binding on this Court in any event. Moreover, the IRS and DOL interpretations of the statutory framework, as expressed in these private rulings, are not entitled to judicial deference because the rulings are conclusory, inconsistent, and lack meaningful analysis. *See Stapleton*, 817 F.3d at 531.("[T]he IRS letter rulings are not persuasive and we owe them no deference.").

V. WHEATON FRANCISCAN AND ASCENSION HEALTH

A. Wheaton Franciscan's Operations

43. Wheaton Franciscan is a 501(c)(3) non-for-profit corporation organized under, and governed by, Illinois law. Wheaton Franciscan was incorporated in 1983. It has corporate services offices in Wheaton, Illinois and Glendale, Wisconsin.

44. Wheaton Franciscan's subsidiaries provide general healthcare services to residents within their geographic locations including inpatient, outpatient, emergency room, physician, long-term care, and other related services; as well as affordable housing for low-income families and the elderly.

45. As of its 2015 fiscal year end, Wheaton Franciscan and its affiliates employed more than 17,000 people at more than 100 sites in Wisconsin, Iowa, Illinois, and Colorado including 14 hospital campuses, three transitional and extended care facilities, two home health agencies, nearly 3,000 physicians, 70 clinic sites with more than 500 employed physicians, and a housing division known as Franciscan Ministries that operates independent and assisted living and other housing facilities.

46. As of its 2015 fiscal year end, Wheaton Franciscan had approximately $2.4 billion in assets and annual operating revenues of approximately $1.8 billion.

47. On October 29, 2015, the Wheaton Franciscan Sisters announced their intention to transfer ownership of all Wheaton Franciscan facilities to four national or regional organizations during the first quarter of 2016.

48. Effective March 1, 2016, Wheaton Franciscan's Southeast Wisconsin region, which includes eight hospital campuses in Milwaukee, Waukesha, and Racine Counties, Wheaton Franciscan Medical Group, a network of outpatient centers, three transitional and extended care facilities, Home Health, and Hospice, joined Ascension Wisconsin, a subsidiary of

Defendant Ascension Health. The entities continue to be referred to as Wheaton Franciscan Healthcare.

49. Effective May 1, 2016, Wheaton Franciscan's Iowa region, which includes three hospitals in Waterloo, Cedar Falls, and Oelwein, and Covenant Clinic with more than 130 primary care and specialty providers, joined Mercy Health Network, an integrated system of hospitals and other health and patient care facilities based in Des Moines, Iowa.

50. Effective March 1, 2016, Wheaton Franciscan's Marianjoy Rehabilitation Hospital, a 127 private room hospital in Wheaton, Illinois with inpatient, subacute, and outpatient sites and physician clinics located throughout the Chicago area, became part of Northwestern Medicine, based in the Chicago area, which is a collaboration between Northwestern Memorial HealthCare and Northwestern University Feinberg School of Medicine.

51. On April 4, 2016, Mercy Housing, Inc., an affordable housing nonprofit based in Denver, Colorado, announced that it had begun the transfer of the ownership and management of 33 properties owned by Wheaton Franciscan's housing division, Franciscan Ministries.

52. As of its 2015 fiscal year end, Wheaton Franciscan also owned numerous for-profit subsidiaries, including Wheaton Franciscan Holdings, Inc., Wheaton Franciscan Provider Network, Inc., Wheaton Franciscan Enterprises, Inc., Wheaton Franciscan Medical Group – Sussex, Franklin Medical Office Building, LLC, and Wheaton Franciscan Healthcare Network LLC.

53. As of its 2015 fiscal year end, Wheaton Franciscan had interests in, or signature or other authority over, financial accounts in such foreign tax-havens as the Cayman Islands, including its wholly owned subsidiary Wheaton Franciscan Insurance Company, a Cayman

Islands/BWI insurance corporation formed to provide comprehensive professional and general liability insurance.

54. While Wheaton Franciscan had a policy of treating certain patients regardless of their ability to pay, Wheaton Franciscan's direct and indirect costs of charity care (the cost of free or discounted health services provided to persons who cannot afford to pay) fell from $49,483,000 in 2014 to $34,472,000 in 2015.

55. Like other large non-profit hospital systems, Wheaton Franciscan relied upon revenue bonds to raise money. As of its 2015 fiscal year end, Wheaton Franciscan also had significant sums invested in, among other things, fixed-income securities and equity securities.

56. The principal purpose or function of Wheaton Franciscan was not the administration or funding of a plan or program for the provision of retirement or welfare benefits, or both, for the employees of a church or a convention or association of churches.

57. The Wheaton Franciscan Operations Committee is an internal committee of Wheaton Franciscan and therefore is not itself an organization.

58. The executive leadership of Wheaton Franciscan is comprised of lay people. Executive Officers of Wheaton Franciscan received compensation in line with executive officers of other hospital systems. For example, in 2013, the Wheaton Franciscan Chief Executive Officer received reportable compensation of $2,716,469.

59. Wheaton Franciscan is not a church.

60. Wheaton Franciscan is not a convention or association of churches.

61. Wheaton Franciscan is not owned by a church.

62. Wheaton Franciscan does not receive funding from any church.

63. Wheaton Franciscan does not claim that any church has any liability for Wheaton Franciscan's debts or obligations.

64. The governance of Wheaton Franciscan, including the management of Wheaton Franciscan's affairs, is vested in Wheaton Franciscan's Board of Directors, not any church.

65. Wheaton Franciscan's Board of Directors approves Wheaton Franciscan's strategic plan and monitors results.

66. The majority of the Board of Director members are lay people.

67. Wheaton Franciscan specifically chooses not to impose any denominational requirement on its employees.

68. Wheaton Franciscan had no denominational requirement for its patients and/or clients.

69. Wheaton Franciscan is required and has elected to comply with a broad array of elaborate state and federal regulations and reporting requirements, including health and safety, Medicare and Medicaid, fraud and abuse, tax, anti-trust, environmental and labor laws, among others.

70. In addition, Wheaton Franciscan purports to disclose, and not keep confidential, its own highly complex financial records. Wheaton Franciscan makes public its consolidated financial statements, which describe Wheaton Franciscan's representations as to its own highly complex operations and financial affairs. Wheaton Franciscan's financial information is regularly disclosed to the rating agencies and the public when tax-exempt revenue bonds are issued.

B. Ascension Health's Operations

71. Defendant Ascension Health Alliance is a Missouri not-for-profit corporation operating in 24 states and the District of Columbia. It is the sole corporate member and parent

organization of Defendant Ascension Health, which is the nation's largest non-profit health system. Ascension Health owns and operates 2,500 sites of care, including 142 hospitals and more than 30 senior care facilities. At the end of fiscal year 2015, Ascension Health Alliance had approximately $30.96 million in assets, and operating revenues of approximately $20.54 billion. Defendant Ascension Health Alliance employs approximately 160,000 employees.

72. The entity that is now known as Ascension Health began in 1999 when two health systems merged to form the hospital conglomerate Ascension Health. Over the course of a little more than a decade, Ascension Health grew exponentially – expanding to include more than 2,500 locations in 24 states and the District of Columbia.

73. In addition to the expansion of its nationwide hospital network, Ascension Health branched out to form numerous subsidiaries, including a registered investment advisor, an offshore captive insurance company, an internal audit company, a healthcare equipment service provider, a network medical device security company, an ultrasound repair company, a venture capital fund, and an acquisitive, for-profit joint venture with a private equity firm.[2]

74. By 2011, Ascension Health had grown so far beyond its origins that it went through an internal reorganization, creating a new parent corporation on September 13, 2011: Ascension Health Alliance. Ascension Health Alliance began operations on January 1, 2012. Many of the subsidiaries which were part of Ascension Health are now subsidiaries of Ascension Health Alliance. Ascension Health Alliance is the parent and only corporate member of Ascension Health. Most of the top executives from Ascension Health are now the top executives

[2] Specifically, Ascension Health's other subsidiaries include the following organizations: Ascension Health Care Network, AH Holdings, LLC, Ascension Health Alliance Global Mission, Clinical Holdings Corporation, Ascension Health Ventures, LLC, CHIMCO, The Resource and Supply Management Group, LLC, Ascension Health Information Services ("AHIS"), CHAN Healthcare, Ascension Health Insurance, Ltd. ("AHIL"), Edessa Insurance Company, Ltd., and Ascension Health Leadership Academy, LLC.

in the same capacity at Ascension Health Alliance. The former Chief Operating Officer of Ascension Health is now serving as its CEO as well as Executive Vice President at Ascension Health Alliance.

75. Like other large non-profit hospital systems, Ascension Health relies upon revenue bonds to raise money, and it has significant sums invested in, among other things, fixed-income securities, equity securities, and hedge funds. Indeed, Ascension Health prioritizes its obligations to bondholders over its purported religious and charitable mission to serve the poor and vulnerable. As explained in more detail, *infra*, Ascension Health closed down the only hospital that existed in one of Detroit's poorest neighborhoods for one basic reason: to repay Ascension Health's bond obligations.

76. Ascension Health also owns two captive insurance companies, one incorporated in the Cayman Islands and another in Bermuda: Ascension Health Insurance, Ltd. ("AHIL"), and Edessa Insurance Company, Ltd. AHIL originated as a wholly-owned captive insurance company within Ascension Health, incorporated in 1986. With the acquisition of the Alexian Brothers Health System in 2012, Ascension Health gained their captive insurance company, Edessa Insurance, as well.

77. Ascension Health entered the venture capital world in 2001 when it created Ascension Health Ventures ("AHV") with a commitment of $125 million to finance for-profit healthcare companies. AHV is a limited partnership that offers its partners the ability to earn venture-level financial returns while providing early insight to future healthcare developments. AHV has invested in companies such as the following: Impulse Monitoring, which provides intraoperative neurophysiological monitoring; Interventional Spine, an early stage developer of a spinal device platform enabling percutaneous approaches for spinal fusion; Isto Technologies, an

early stage developer of orthobiologic products for sports medicine and spinal therapy applications; Millennium Pharmacy Systems, which provides pharmaceutical management services to the long-term care industry; and United Surgical Partners, which operates ambulatory and short-stay surgical facilities in the United States and owns private hospitals in Europe. In January 2013, AHV closed on its third venture capital fund, bringing its total capital under management to $550 million. This third fund, CHV III, will invest in healthcare firms that specialize in information technology, medical devices, and diagnostic services. Two of the partners in CHV III are Intermountain Healthcare of Salt Lake City and Decatur Memorial Hospital of Decatur, Illinois. Intermountain Healthcare began with a donation of 15 hospitals from the Church of Jesus Christ of Latter-day Saints, and Decatur Memorial is a secular hospital.

78. In 2004, after having invested in the company, Ascension Health became the first and largest customer of Accretive Health Inc., one of the nation's largest medical debt collection firms. As of 2012, Ascension Health held a 7% interest in Accretive, which started as primarily a consultant to Ascension and went public in 2010. Sixty percent of Accretive's revenue in 2009 came from Ascension Health hospitals. Accretive, utilizes heavy-handed tactics that include stationing bill collectors in hospital emergency rooms, using rewards to incentivize collection, and threatening to fire collectors who don't meet collection quotas. These practices led to an investigation by the Minnesota Attorney General and an eventual settlement resulting in a $2.5 million fine and Accretive being banned from the state of Minnesota for two years. Accretive's practices have also been challenged in court in Illinois, New York, Oregon, Michigan, California, Vermont, Florida, and Tennessee. Ascension Health, however, just signed a new five-year contract with Accretive worth up to $1.7 billion.

79. Ascension Health ties how much capital it allocates to each subsidiary, in part, to its profitability. In 2007, Ascension Health closed Riverview Hospital, which was part of the St. John Providence Health System. The third hospital Ascension Health had shut down in Detroit in the past ten years, Riverview Hospital was in one of Detroit's poorest neighborhoods. In fact, Riverview Hospital was the only hospital that remained in Detroit's impoverished east side, a neighborhood where thirty-four percent of the population lives below the poverty line and infant mortality is more than double the national average. Riverview, with nearly 50% of its patients uninsured or on Medicaid and 42% on Medicare, lost $16 million in 2006, and its chief of staff was told that the hospital could not afford to spend $5,000 on its annual community health-and-immunization fair. That same year, St. John spent $9 million in design and architecture fees related to its new construction projects, one of which was a new $224 million, state-of-the-art hospital in the affluent Detroit suburb of Novi. Ascension Health executives convinced local regulators to approve the new construction with the argument that the new facility's profits would help ensure the continued existence of hospitals within Detroit's city limits by subsidizing the losses from the inner city hospitals. Instead, however, St. John shut down Riverview Hospital and left a bare-bones emergency room in place for twelve months; this facility closed permanently in June 2008. In September 2008, the Novi hospital opened, with private rooms that feature flat-screen televisions and large windows so that patients can enjoy views of the campus's lush grounds. Ascension Health and its agents defended the decision to close Riverview by asserting that Ascension Health's more profitable operations should not be used to subsidize struggling hospitals, and that the closure was justified in order to repay bondholders.

80. In February 2011, Ascension Health turned heads in the non-profit healthcare world by creating an acquisitive, equity-based, for-profit healthcare system, Ascension Health

Care Network ("AHCN"). AHCN is a joint venture between Ascension Health and private equity firm Oak Hill Capital Partners. In March 2012, Resource and Supply Management Group, LLC, a subsidiary of Ascension Health Alliance, announced that it had formed a Group Purchasing Organization ("GPO"). A GPO represents a number of organizations, acting as the contracting agent for all its participants, leveraging the combined volume of purchases to secure lower prices and better total value in areas ranging from supplies to professional services to utilities. In addition to serving the hospitals that already comprise Ascension Health, RSMG will also make its services available to other healthcare entities, hospitals and health systems.

81. In March 2012, Ascension Health Alliance's subsidiary, CHIMCO, registered with the SEC as an investment adviser so that it could manage the assets of non-Ascension clients in addition to Ascension's assets. As of July 31, 2012, CHIMCO managed approximately $23 billion in assets, of which approximately $18 billion belongs to Ascension. On further information and belief, Ascension Health's pension plans comprise roughly $6 billion, or approximately 25%, of CHIMCO's assets under management. CHIMCO uses its significant assets under management – a fair percentage of which, on information and belief, include the assets of Ascension Health's pension plans – to attract outside investors to its investment advisory practice.

82. That same month, Ascension Health entered into a partnership with Narayana Hrudayalaya Hospitals of India to build a $2 billion for-profit "health city" in the Grand Cayman Islands. Ascension Health claims that this is not a medical tourism facility but is instead designed to care for the poor people in the Caribbean and South America. Residents of the Cayman Islands, however, enjoy a standard of living equivalent to that of Switzerland. To promote the HealthCity, Ascension Health and Narayana play up the pleasant weather and

world-class shopping, restaurants, and accommodations of the Cayman Islands. The HealthCity will be run for profit and is strategically located only an hour's flight away from the United States.

83. The Executive Officers of Ascension Health and Ascension Health Alliance receive compensation in line with executive officers of other hospital systems. For example, in 2013, Ascension Health's President and Chief Executive Officer Robert J. Henkel, who also serves as a Senior Vice President of Ascension Health Alliance, received reportable compensation of $4.38 million, and Ascension Health Alliance's President and Chief Executive Officer Anthony R. Tersigni received reportable compensation of $14.25 million.

84. The principal purpose or function of Ascension Health is not the administration or funding of a plan or program for the provision of retirement or welfare benefits, or both, for the employees of a church or a convention or association of churches.

85. The Ascension Health Pension Committee is an internal committee of Ascension Health and therefore is not itself an organization.

86. Ascension Health is not a church.

87. Ascension Health is not a convention or association of churches.

88. Ascension Health is not owned by a church.

89. Ascension Health does not receive funding from any church.

90. Ascension Health does not claim that any church has any liability for Ascension Health's debts or obligations.

91. The governance of Ascension Health, including the management of Ascension Health's affairs, is vested in Ascension Health and Ascension Health Alliance's Board of Directors and/or Board of Trustees, not any church.

92. Ascension Health specifically chooses not to impose any denominational requirement on its employees.

93. Ascension Health has no denominational requirement for its patients and/or clients.

94. Ascension Health is required and has elected to comply with a broad array of elaborate state and federal regulations and reporting requirements, including health and safety, Medicare and Medicaid, fraud and abuse, tax, anti-trust, environmental and labor laws, among others.

95. In addition, Ascension Health purports to disclose, and not keep confidential, its own highly complex financial records. Ascension Health makes public its consolidated financial statements, which describe Ascension Health's representations as to its own highly complex operations and financial affairs. Ascension Health's financial information is regularly disclosed to the rating agencies and the public when tax-exempt revenue bonds are issued.

96. Ascension Health is not owned by the Catholic Church. Ascension Health does not receive funding from the Catholic Church.

97. Ascension Health specifically does not limit employment to those of the Catholic faith, but instead hires employees without any reference to creed or religion. Ascension Health does not impose its beliefs or religious practices on its clients/patients. In fact, Ascension Health offers contact with the ministers, rabbis, or spiritual leaders of their patients' choosing. In some of its hospitals, Ascension Health provides interfaith chapels, as many airports do.

98. Ascension Health purports to disclose, and not keep confidential, its own highly complex financial records. For example, Ascension Health is required and in some cases has voluntarily elected to comply with a broad array of elaborate state and federal regulations and

reporting requirements, including Medicare and Medicaid. In addition, Ascension Health makes public its consolidated financial statements, which describe Ascension Health's representations as to its own highly complex operations and financial affairs. Finally, Ascension Health's financial information is regularly disclosed to the rating agencies and the public when tax-exempt revenue bonds are issued.

99. On February 29, 2016, Ascension Health paid off five sets of Wheaton Franciscan bonds issued between 2006 and 2015 totaling $665.3 million.

100. Effective March 1, 2016, Wheaton Franciscan's Southeast Wisconsin region, which includes eight hospital campuses in Milwaukee, Waukesha, and Racine Counties, Wheaton Franciscan Medical Group, a network of outpatient centers, three transitional and extended care facilities, Home Health, and Hospice, joined Ascension Wisconsin, a subsidiary of Ascension Health.

C. The Wheaton Franciscan Plan

101. Effective July 1, 1984, Wheaton Franciscan Services Inc. became the Plan Sponsor of Franciscan Sisters Pension Plan for Employees of Operated Institutions and amended and restated the Plan in its entirety as the Wheaton Franciscan Services, Inc. Plan

102. On or about July 1, 1984, Wheaton Franciscan Services became the employer of the employees who participated in the Wheaton Franciscan Services, Inc. Pension Plan.

103. The Wheaton Franciscan Services, Inc. Pension Plan was not established by a church, or convention or association of churches.

104. From 1983 through February 29, 2016, Wheaton Franciscan maintained the Wheaton Franciscan Inc. Pension Plan, which was renamed the Wheaton Franciscan System Retirement Plan in 1995 ("Wheaton Franciscan Plan").

105. From 1983 through February 29, 2016, Wheaton Franciscan had the power to continue the Wheaton Franciscan Plan.

106. From 1983 through February 29, 2016, Wheaton Franciscan had the power to amend the Wheaton Franciscan Plan.

107. From 1983 through February 29, 2016, Wheaton Franciscan had the power to terminate the Wheaton Franciscan Plan.

108. Effective January 1, 1995, the Wheaton Franciscan Services, Inc. Pension Plan was renamed the Wheaton Franciscan System Retirement Plan, however its authority to continue, amend, terminate the Plan remains intact.

109. Effective February 29, 2016, active participation in the Wheaton Franciscan Plan ceased for the following entities: of Wheaton Franciscan Services, Inc., Marianjoy, Inc., Marianjoy Rehabilitation Hospital and Clinics, Inc., Rehabilitation Medicine Clinic, Inc. d/b/a Marianjoy Medical Group, Villa St. Francis, Inc., Our Lady of the Angels Motherhouse, Inc. and Franciscan Ministries, Inc., WFH-Iowa, Inc., Covenant Medical Center, Inc., Sartori Memorial Hospital, Inc., Mercy Hospital of Franciscan Sisters, Inc., and all Iowa employers listed under "Iowa Clinics:" on Appendix B of the Plan document ceased.

110. On February 29, 2016, and the Plan was amended to provide a special contribution for employees of certain of those entities.

111. On February 29, 2016 Wheaton Franciscan Services Inc. transferred its southeastern Wisconsin hospital operations to Ascension.

112. On or about February 29, 2016, employees of the southeastern Wisconsin operations of Wheaton Franciscan Services Inc. became employees of Ascension.

On March 1, 2016, Ascension Health became the Plan Sponsor of the Wheaton Franciscan System Retirement Plan.

113. From March 1, 2016 through the present, Ascension Health has acted as the plan sponsor and administrator. Ascension Health is the plan sponsor that maintains the Wheaton Franciscan System Retirement Plan.

114. From March 1, 2016 through the present, Ascension Health has the power to continue the Wheaton Franciscan System Retirement Plan.

115. From March 1, 2016 through the present, Ascension Health has the power to amend the Wheaton Franciscan System Retirement Plan.

116. From March 1, 2016 through the present, Ascension Health has the power to terminate the Wheaton Franciscan System Retirement Plan.

117. No church has the power to continue, amend, or terminate the Wheaton Franciscan System Retirement Plan.

118. No church has any role in the administration of the Wheaton Franciscan System Retirement Plan.

119. The Wheaton Franciscan System Retirement Plan is a non-contributory defined benefit pension plan that Wheaton Franciscan and Ascension Health regard as a "Church Plan;" the Plan provides retirement benefits for substantially all of the employees formerly employed by Wheaton Franciscan and now employed, in part, by Ascension Health.

120. As of the end of fiscal year 2015, Wheaton Franciscan reported the Plan to be underfunded by $134.5 million because the Plan's benefit obligation was $923 million and the fair value of the Plan's assets was $788.5 million. However, due to the significant additional

pension liability required to correct the claims alleged, the Plan is likely underfunded by an additional $130 million.

1. The Wheaton Franciscan Plan Meets the Definition of an ERISA Defined Benefit Plan

121. The Wheaton Franciscan Plan is a plan, fund, or program that was established or maintained by Wheaton Franciscan, and as of March 1, 2016, by Ascension Health, and which, by its express terms and surrounding circumstances, provides retirement income to employees and/or results in the deferral of income by employees to the termination of their employment or beyond.

122. The Wheaton Franciscan Plan meets the definition of an "employee pension benefit plan" within the meaning of ERISA section 3(2)(A), 29 U.S.C. § 1002(2)(A).

123. The Wheaton Franciscan Plan does not provide for individual accounts for each participant and does not provide benefits based solely upon the amount contributed to a participants' account. As such, the Wheaton Franciscan Plan is a defined benefit plan within the meaning of ERISA section 3(35), 29 U.S.C. § 1002(35), and is not an individual account plan or "defined contribution plan" within the meaning of ERISA section 3(34), 29 U.S.C. § 1002(34).

124. The Wheaton Franciscan Plan is a cash balance plan because it computes accrued benefits by reference to hypothetical account balances or equivalent amounts.

a. Vesting Requirements

125. As a cash balance plan, the Wheaton Franciscan Plan is required to comply with the special rules for cash balance plans, including but not limited to ERISA section 203(f)(2), 29 U.S.C. § 1053(f)(2), which requires that any employee who has completed at least three years of service has a non-forfeitable right to 100 percent of the employee's accrued benefit derived from

employer contributions. In other words, the maximum vesting period allowable for a cash balance plan is three years.

126. Section 2.44 of the Plan defines "Vesting Service" to mean "the number of years of a Participant's employment with the Employers for which he is given credit [. . .] for the purpose of determining his eligibility for benefits (or vesting)."

127. Section 4.06 of the Plan provides that "[i]f a Participant whose Attained Age is at least 50 and who has been credited with at least 5 years of Vesting Service Terminated Employment for any reason other than death, he shall be entitled to retire early hereunder. If such a Participant retires early, he shall be entitled to his Accrued Benefit in any form elected under Article V as of his Early Retirement Date."

128. Section 4.08 of the Plan states that "[i]f the employment of a Participant is terminated prior to Attained Age 50 or prior to being credited with 5 years of Vesting Service, for any reason other than death, such Participant shall cease to be an active Participant of the Plan. [. . .] If a Participant Terminates Employment without have any vested interest, then such Participant will be deemed to forfeit any benefit under this Plan."

129. The Wheaton Franciscan Plan is being and has been operated in violation of ERISA sections 203(a)(2) and 203(f)(2) because it requires participants to complete five years of vesting service to be vested in their benefits under the Plan.

b. Participant Account Balances

130. Section 4.01 of the Plan provides that each participant has an accumulated account balance that is the sum of their starting account balance and certain Annual Adjustments.

131. With respect to the Annual Adjustments, Section 4.01(b)(i) of the Plan provides that each eligible participant shall receive a benefit credit based on the participant's total compensation. The benefit credit is equal to "the sum of the benefit percentage as determined in

accordance with [schedules provided in the Plan] times Compensation plus, if any, the benefit percentage times Compensation in excess of 50% of the Social Security Taxable Wage Base."

132. Pursuant to the schedules provided in the Plan, the benefit percentage increases based on a participant's years of benefit service.

133. For all employees for each Plan Year beginning on and after January 1, 1995 and prior to January 1, 2009, as well as employees who satisfy the "Rule of 80" on December 31, 2008 for each Plan Year beginning on and after January 1, 2009, the applicable benefit percentage is determined based on the following schedule, from Section 4.01(b)(i)(A) of the Plan:

Years of Benefit Service	**Benefit Percentage**	**Benefit Percentage for Compensation in Excess of 50% of the Social Security Taxable Wage Base**
Less than 1	0%	0%
1 through 5	3%	3%
6 through 10	4%	4%
11 through 15	5%	4.3%
16 through 20	6%	4.3%
21 through 25	7%	4.3%
26 or more	8%	4.3%

134. For all employees for each Plan Year beginning on and after January 1, 2009, the applicable benefit percentage is determined based on the following schedule, from Section 4.01(b)(i)(B) of the Plan:

Years of Benefit Service	**Benefit Percentage**	**Benefit Percentage for Compensation in Excess of 50% of the Social Security Taxable Wage Base**
Less than 1	0%	0%
1 through 5	3%	3%
6 through 10	4%	4%
11 or more	5% or, if greater, the	4.3%

	highest Benefit Percentage credited to the Employee on 12/31/2008 or earlier under the schedule described in (A) above	

135. Section 4.01(b)(ii) of the Plan also provides that each Plan year a participant's account balance receives an interest credit that is the product of the participant's account balance as of the first day of the Plan year and an interest credit specified in the following schedule:

Plan Year	**Interest Credit**
1995	6.9%
1996-2002	7.0%
2003-2008	6.5%
2009-2014	One year constant to maturity U.S. Treasury Bill Rate as of the close of business on the first business day of November preceding the Plan Year of credit.
2015	1%
2016	1%
2017 and Subsequent Plan Years	One year constant to maturity U.S. Treasury Bill Rate for the month of August preceding the Plan Year of credit

136. The following schedule reflects the applicable interest credit rate for Plan years 2009-2014:

Plan Year	**Interest Credit** **(**One year constant to maturity U.S. Treasury Bill Rate as of the close of business on the first business day of November preceding the Plan Year of credit.)
2009	1.31%
2010	0.38%
2011	0.22%
2012	0.13%
2013	0.18%
2014	0.10%

Source: Daily Treasury Yield Curve Rates available at https://www.treasury.gov/resource-center/data-chart-center/interest-rates/Pages/TextView.aspx?data=yieldYear&year=2016

137. The dramatic reduction in the interest credit rate for beginning on June 30, 2008, coupled with the benefit percentage schedule, caused the Plan to award benefits to employees in later years of service at a rate disproportionately higher than the rate for employees in earlier years of service, in violation of ERISA's anti-backloading requirements.

138. ERISA defines the universe of permissible benefit-accrual rates by requiring defined benefit plans to satisfy one of three rules designed to prevent backloading. ERISA section 204(b), 29 U.S.C. § 1054(b).

139. The three rules contained in this anti-backloading provision are known as the 3% rule, the fractional rule, and the 133 1/3% rule.

140. The 3% rule prescribes a minimum percentage of the total retirement benefit that must be accrued in any given year. ERISA section 204(b)(1)(A), 29 U.S.C. § 1054(b)(1)(A).

141. Based on the Plan's schedules for benefit percentages (Section 4.01(b)(i)) and interest credits (Section 4.01(b)(ii)), any participant who worked from 1996 to 2016 and would have been 65 (eligible to retire) in 2020 or after would have earned less than 3% of her total retirement benefit in 2009 to 2014 because the interest credit was too low to meet ERISA section 204(b)(1)(A), 29 U.S.C. § 1054(b)(1)(A).

142. As such, the Plan did not meet the 3% rule found in ERISA section 204(b)(1)(A), 29 U.S.C. § 1054(b)(1)(A) for at least Plan years 2009 to 2014.

143. The fractional rule is a pro rata rule under which in any given year, the employee's accrued benefit is proportionate to the number of years of service as compared with the number of total years of service appropriate to the normal retirement age. ERISA section 204(b)(1)(C), 29 U.S.C. § 1054(b)(1)(C).

144. Any participant, like Bowen, who worked from 1999 to 2013 had benefit accruals that did not meet the factional rule because his benefit accruals were not distributed in a straight line method, meaning the accrual in any given year was the same as the accrual in every other year:

1999	7.74%
2000	7.23%
2001	6.76%
2002	6.31%
2003	7.51%
2004	7.05%
2005	6.62%
2006	6.22%
2007	5.84%
2008	6.85%
2009	5.27%
2010	5.06%
2011	5.02%
2012	5.01%
2013	6.00%

145. Accordingly, the Plan did not meet the fractional rule found in ERISA section 204(b)(1)(C), 29 U.S.C. § 1054(b)(1)(C) since 1995.

146. The 133 1/3% rule permits the use of any accrual formula as long as the accrual rate for a given year of service does not vary beyond a specified percentage from the accrual rate of any other year under the plan. Specifically, the rate of benefit accrual in any future year may not be more than one-third greater than the rate in the current year. 29 U.S.C. § 1054(b).

147. From 2003 to June 30, 2008, the interest credit was 6.5%.

148. Effective June 30, 2008, the interest credit was reduced to 3.5%. Such reduction cost participants $49.2 million in retirement benefits.

149. In 2009, the Plan again reduced the interest credit from 3.5% to the "One year constant to maturity U.S. Treasury Bill Rate as of the close of business on the first business day of November preceding the Plan Year of credit."

150. The change to the interest credit resulted in the Plan's benefit accrual provisions found in Section 4.01 failing the 133 1/3% rule found in ERISA section 204(b)(1)(B), 29 U.S.C. § 1054(b)(1)(B).

151. As such, the Plan's interest credits from June 30, 2008 to the present (as set forth in paragraph 4.01(b)(ii)) violated the ERISA section 204(b), 29 U.S.C. § 1054(b), because such interest credits were too low to meet ERISA's anti-backloading requirements.

152. The illegal reduction of the interest credit rate applicable to participant account balances for Plan year 2009 and subsequent years caused a significant reduction in the rate of benefit accrual.

153. Plaintiff Bowen was injured as a result of the reduction in the interest credit starting in 2009 and all following years because his final account balance upon retirement was approximately $15,000 less than it would have been without the illegal amendments.

c. Participant Account Balances

154. ERISA section 204(h)(1) provides that "[a]n applicable pension plan may not be amended so as to provide for a significant reduction in the rate of future benefit accrual unless the plan administrator provides . . . notice . . . to each applicable individual." 29 U.S.C. 1054(h)(1). Such notice must "be provided within a reasonable time before the effective date of the plan amendment" and must "be written in a manner calculated to be understood by the average plan participant and shall provide sufficient information (as determined in accordance with regulations prescribed by the Secretary of the treasury) to allow applicable individuals to understand the effect of the plan amendment." 29 U.S.C. 1054(h)(2) & (3).

155. ERISA section 204(h)(6)(A) further provides that "[i]n the case of any egregious failure to meet any requirement of this subsection with respect to any plan amendment, the provisions of the applicable pension plan shall be applied as if such plan amendment entitled all applicable individuals to the greater of (i) the benefits to which they would have been entitled without regard to such amendment, or (ii) the benefits under the plan with regard to such amendment." 29 U.S.C. 1054(h)(6)(A)(i) & (ii). A failure is considered "egregious" if it "is within the control of the plan sponsor and is (i) an intentional failure (including any failure to promptly provide the required notice or information after the plan administrator discovers an unintentional failure to meet the requirements of this subsection), (ii) a failure to provide most of the individuals with most of the information they are entitled to receive under this subsection, or (iii) a failure which is determined to be egregious under regulations prescribed by the Secretary of the Treasury." 29 U.S.C. § 1054(h)(6)(B)(i)-(iii).

156. ERISA section 204(h) notice must be provided at least 45 days before the effective date of any section 204(h) amendment. 26 C.F.R. § 54.4980F-1 at Q&A 9 (regulations prescribed by the Secretary of the Treasury).

157. ERISA section 204(h) notice "must include sufficient information to allow applicable individuals to understand the effect of the plan amendment" and "must be written in a manner calculated to be understood by the average plan participant and to apprise the applicable individual of the significance of the notice." 26 C.F.R. § 54.4980F-1 at Q&A 11(a)(1) & (2).

158. Where an amendment reduces the rate of future benefit accrual, section 204(h) notice "must include a description of the benefit or allocation formula prior to the amendment, a description of the benefit or allocation formula under the plan as amended, and the effective date of the amendment. 26 C.F.R. § 54.4980F-1 at Q&A 11(a)(3).

159. ERISA section 204(h) notice must also include sufficient information for a participant to determine the approximate magnitude of the expected reduction in their benefit. 26 C.F.R. § 54.4980F-1 at Q&A 11(a)(4)(i). If the magnitude of the reduction for each participant is not reasonably apparent from the description of the amendment, further information is required in the form of additional narrative information. 26 C.F.R. § 54.4980F-1 at Q&A 11(a)(4)(i). The requirement may be deemed satisfied if the notice includes one or more illustrative examples showing the approximate magnitude of the reduction in the examples, or by providing a statement to each applicable individual projecting what that individual's future benefits are reasonably expected to be at various future dates and what that individual's future benefits would have been under the terms of the plan as in effect before the section 204(h) amendment. 26 C.F.R. § 54.4980F-1 at Q&A 11(a)(4)(ii).

160. A failure to meet the section 204(h) notice requirements is "egregious" "if a failure to provide required notice is within the control of the plan sponsor and is either an intentional failure or a failure, whether or not intentional, to provide most of the individuals with most of the information they are entitled to receive." 26 C.F.R. § 54.4980F-1 at Q&A 14.

161. Plaintiffs Bowen and Mueller and, on information and belief, the members of the Class were provided untimely and insufficient notice of the reduction in the rate of future benefit accrual.

162. By letter dated December 30, 2008, Wheaton Franciscan notified Plan participants that "[w]e will be making the following changes to our retirement benefits program effective January 1, 2009."

163. With respect to the reduction in future benefit accrual, the notice states: "We are reducing the guaranteed interest credit to 1.31% for 2009. In October, we communicated the

guaranteed interest credit would be 3.5% for 2009. According to the pension plan, we are required to credit at least the one-year Treasury bill rate as of the close of business on the first day of November that precedes the plan year of credit. In previous years, we were able to provide more than the minimum requirement. Because of the losses our pension plan sustained and the economic forecast, the plan can only afford to credit the minimum required rate for 2009."

164. A Q&A document released at "approximately the same time" as the letter to Plan participants states that if a participant wants to see the impact the Plan changes will have on their benefit, they will be able to run personal benefit projections at future ages, but only for the new benefits, on a reprogrammed pension website available "later this spring."

165. Plan participants were not provided notice of the Plan amendment 45 days prior to the effective date of the amendment. 26 C.F.R. § 54.4980F-1 at Q&A 9.

166. Plan participants were not provided sufficient information to allow them to understand the effect of the Plan amendment. 26 C.F.R. § 54.4980F-1 at Q&A 11(a)(1) & (2).

167. The notice did not include sufficient information for participants to determine the approximate magnitude of the expected reduction in their benefits. 26 C.F.R. § 54.4980F-1 at Q&A 11(a)(4)(i).

168. The notice did not include additional narrative information or one or more illustrative examples showing the approximate magnitude of the reduction, and participants were not provided a timely statement comparing their future benefits pre and post amendment. 26 C.F.R. § 54.4980F-1 at Q&A 11(a)(4)(ii).

169. Because the failure to adequately notify Plan participants of the interest credit reduction was egregious and in violation of ERISA section 204(h), 29 U.S.C. § 1054(h),

Plaintiffs and the members of the Class are entitled to the greater of (i) the benefits to which they would have been entitled without regard to such amendment, or (ii) the benefits under the plan with regard to such amendment. 29 U.S.C. 1054(h)(6)(A)(i) & (ii)..

170. For example, as a result of the 2009 Amendment that reduced the interest credit rate, Plaintiff Bowen's final account balance was approximately $15,000 less than it would have been. Because Plaintiff Bowen was not provided adequate notice of the interest credit reduction, under ERISA section 204(h), 29 U.S.C. § 1054(h), he is entitled to the benefits to which he would have been entitled without regard to the 2009 Amendment.

d. Accrued Benefits

171. Section 2.03 of the Plan defines "Accrued Benefit" as "a single life annuity payable at (1) an Early Retirement Date, (2) Normal Retirement Date, or (3) Late Retirement Date. As of any date, a Participant's "Accrued Benefit" shall be the Actuarial Equivalent of the Account Balance under Section 4.01 but not less than the amount in Section 4.03, plus the Actuarial Equivalent of the Savings Account in Section 4.02, subject to the minimum benefits in Appendices D and E and the Benefit Limits in Section 4.13."

172. Under Section 2.03 of the Plan, the term "Actuarial Equivalent or Actuarially Equivalent" is the participant's monthly benefit of equivalent value computed using an 8% annual interest rate and the 1983 Group Annuity Mortality Table for Females (for calculations of accrued benefits between January 1, 1995 and June 30, 2013).

173. Effective July 1, 2013, the Plan sponsor amended Section 2.03 of the Plan to lower the interest rate under the definition of Actuarial Equivalent for determining the annuity benefits on cash balance accounts.

174. Under such amendment of section 2.03 of the Plan, to convert a participant's account balance under Section 4.01 of the Plan into a monthly benefit of equivalent value is

computed using a 4% annual interest rate for distributions on or after July 1, 2013, and a 2% annual interest rate was used for distributions on or after July 1, 2014.

175. All other factors being equal, using a lower interest rate to convert a participant's account balance to a monthly benefit impermissibly reduces the participant's "accrued benefit" under the Plan.

176. Participants who were offered distributions of their account balances in the form of a monthly benefit of equivalent value on or after July 1, 2013 were offered an accrued benefit less than the accrued benefit prior to the amendment.

177. This reduction in accrued benefits constitutes an unlawful cutback under ERISA section 204(g)(1) & (2), which provides that "[t]he accrued benefit of a participant under a plan may not be decr eased by an amendment of the plan," including "a plan amendment which has the effect of-- (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or (B) eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment . . ." 29 U.S.C. § 1054(g)(1) & (2).

178. For example, as a result of the unlawful amendment, Plaintiff Bowen's monthly benefit was reduced by approximately $261 per month, which is an impermissible cutback of roughly 26% in violation of ERISA section 204(g)(1)&(2), 29 U.S.C. § 1054(g)(1) & (2).

179. Similarly, as a result of the unlawful amendment, Plaintiff Mueller's monthly benefit was reduced by approximately $112 per month, which is an impermissible cutback of roughly 26% in violation of ERISA section 204(g)(1)&(2), 29 U.S.C. § 1054(g)(1) & (2).

2. The Defendants Meet the Definition of ERISA Fiduciaries

a. Nature of Fiduciary Status

180. Every ERISA plan must have one or more "named fiduciaries." ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1). The person named as the "administrator" in the plan

instrument is automatically a named fiduciary and, in the absence of such a designation, the plan sponsor is the administrator. ERISA § 3(16)(A), 29 U.S.C. § 1002(16)(A).

181. ERISA treats as fiduciaries not only persons explicitly named as fiduciaries under section 402(a)(1), 29 U.S.C. § 1102(a)(1), but also any other persons who in fact perform fiduciary functions. Thus, a person is a fiduciary to the extent "(i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." ERISA section 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i).

182. Each of the Defendants was a fiduciary with respect to the Plan and owed fiduciary duties to the Plan and its participants and beneficiaries under ERISA in the manner and to the extent set forth in the Plan's documents and/or through their conduct.

183. As fiduciaries, Defendants were required by ERISA section 404(a)(1), 29 U.S.C. § 1104(a)(1), to manage and administer the Plan and the Plan's investments solely in the interest of the Plan's participants and beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

184. Plaintiffs do not allege that each Defendant was a fiduciary with respect to all aspects of the Plan's management and administration. Rather, as set forth below, Defendants were fiduciaries to the extent of the specific fiduciary discretion and authority assigned to or

exercised by each of them, and, as further set forth below, the claims against each Defendant are based on such specific discretion and authority.

185. ERISA permits fiduciary functions to be delegated to insiders without an automatic violation of the rules against prohibited transactions, ERISA section 408(c)(3), 29 U.S.C. § 1108(c)(3), but insider fiduciaries, like external fiduciaries, must act solely in the interest of participants and beneficiaries, not in the interest of the plan sponsor.

b. Defendants Are Each ERISA Fiduciaries

186. **Defendant Wheaton Franciscan.** Defendant Wheaton Franciscan was the employer responsible for maintaining the Wheaton Franciscan Plan until February 29, 2016, and was, therefore, the plan sponsor of the Wheaton Franciscan Plan within the meaning of ERISA section 3(16)(B), 29 U.S.C. § 1002(16)(B). From July 1, 1984 until February 29, 2016, Defendant Wheaton Franciscan was designated as the plan sponsor by the terms of the instrument under which the Wheaton Franciscan Plan was operated.

187. Upon information and belief, Defendant Wheaton Franciscan's responsibilities included fiduciary oversight of the Wheaton Franciscan Plan. Upon information and belief, Defendant Wheaton Franciscan, by and through its board of directors, had the responsibility to appoint, and hence to monitor and remove, the members of the Wheaton Franciscan Operations Committee and other fiduciaries of the Plan.

188. Defendant Wheaton Franciscan is a fiduciary with respect to the Wheaton Franciscan Plan within the meaning of ERISA section 3(21)(A), 29 U.S.C. § 1002(21)(A), because it exercises discretionary authority or discretionary control respecting management of the Wheaton Franciscan Plan, exercises authority and control respecting management or disposition of the Wheaton Franciscan Plan's assets, and/or has discretionary authority or discretionary responsibility in the administration of the Wheaton Franciscan Plan.

189. **Wheaton Plans Operation Committee Defendants.** From at least February 17, 1989 until February 29, 2016, the Operations Committee of the Board of Directors of Wheaton Franciscan Services, Inc. ("Operations Committee") was designated as the "plan administrator" of the Wheaton Franciscan Plan. The Operations Committee operated, controlled and administered the Wheaton Franciscan Plan within the meaning of ERISA section 3(16)(A), 29 U.S.C. §1002(16)(A).

190. The Operations Committee Defendants were fiduciaries with respect to the Plan within the meaning of ERISA section 3(21)(A)(iii), 29 U.S.C. § 1002(21)(A)(iii), because the Plan Administrator, by the very nature of the position, has discretionary authority or responsibility in the administration of the Plans.

191. **Defendant Ascension Health.** Since March 1, 2016, Defendant Ascension Health has been the employer responsible for maintaining the Wheaton Franciscan Plan and is, therefore, the plan sponsor of the Wheaton Franciscan Plan within the meaning of ERISA section 3(16)(B), 29 U.S.C. § 1002(16)(B). Since March 1, 2016, Defendant Wheaton Franciscan has also been designated as the plan sponsor by the terms of the instrument under which the Wheaton Franciscan Plan was operated.

192. Upon information and belief, since March 1, 2016, Defendant Ascension Health's responsibilities included fiduciary oversight of the Wheaton Franciscan Plan. Upon information and belief, Defendant Ascension Health, by and through its board of directors, has the responsibility to appoint, and hence to monitor and remove, the members of the Ascension Health Pension Committee and other fiduciaries of the Plan.

193. Defendant Ascension Health is a fiduciary with respect to the Wheaton Franciscan Plan within the meaning of ERISA section 3(21)(A), 29 U.S.C. § 1002(21)(A),

because it exercises discretionary authority or discretionary control respecting management of the Wheaton Franciscan Plan, exercises authority and control respecting management or disposition of the Wheaton Franciscan Plan's assets, and/or has discretionary authority or discretionary responsibility in the administration of the Wheaton Franciscan Plan.

194. **Defendant Ascension Health Alliance, d/b/a Ascension.** As the sole corporate member of Defendant Ascension Health, Ascension Health Alliance has retained certain reserved powers over Ascension Health. These reserved powers permit Ascension Health Alliance to, among others, (i) approve the articles of incorporation and bylaws of Ascension Health, (ii) appoint or remove members of the Board of Trustees of Ascension Health, (iii) approve the sale, transfer or substantial change in use of all or substantially all of the assets of Ascension Health, (iv) approve the merger, dissolution or consolidation of Ascension Health, (v) approve the capital allocation plan for Ascension Health and (vi) approve the incurrence of debt by Ascension Health. On information and belief, Defendant Ascension Health Alliance's responsibilities include fiduciary oversight of the Wheaton Franciscan Plan, including managing and exerting discretionary authority or control over the assets of the Wheaton Franciscan Plan. Therefore, Defendant Ascension Health Alliance is a fiduciary of the Plan within the meaning of ERISA.

195. Defendant Ascension Health Alliance is also a fiduciary with respect to the Wheaton Franciscan Plan within the meaning of ERISA section 3(21)(A), 29 U.S.C. § 1002(21)(A), because it exercises discretionary authority or discretionary control respecting management of the Wheaton Franciscan Plan, exercises authority and control respecting management or disposition of the Wheaton Franciscan Plan's assets, and/or has discretionary authority or discretionary responsibility in the administration of the Wheaton Franciscan Plan.

196. **Ascension Pension Committee Defendants.** From March 1, 2016 to the present, the Ascension Health Pension Committee has been designated as the "plan administrator" of the Wheaton Franciscan Plan by the terms of the instrument under which the Wheaton Franciscan Plan is operated, and has been the named plan administrator of the Wheaton Franciscan Plan within the meaning of ERISA section 3(16)(A), 29 U.S.C. §1002(16)(A). Defendants John and Jane Does 21-40 are individuals who, through discovery, are found to be members of the Ascension Health Pension Committee. These individuals will be added by name as Defendants in this action upon motion by Plaintiffs at an appropriate time.

197. The Ascension Pension Committee Defendants are fiduciaries with respect to the Plan within the meaning of ERISA section 3(21)(A)(iii), 29 U.S.C. § 1002(21)(A)(iii), because the Plan Administrator, by the very nature of the position, has discretionary authority or responsibility in the administration of the Plans.

198. **Defendants John and Jane Does 41-60.** Defendants John and Jane Does 41-60 are individuals who, through discovery, are found to have fiduciary responsibilities with respect to the Wheaton Franciscan Plan and are fiduciaries within the meaning of ERISA. These individuals will be added by name as Defendants in this action upon motion by Plaintiffs at an appropriate time.

199. The Operations Committee of the Board of Directors of Wheaton Franciscan Services, Inc. (John and Jane Does 1-20), the Ascension Pension Committee Defendants (John and Jane Does 21-41), and John and Jane Does 41-60 are fiduciaries with respect to the Wheaton Franciscan Plan within the meaning of ERISA section 3(21)(A), 29 U.S.C. § 1002(21)(A), because they exercise discretionary authority or discretionary control respecting management of the Wheaton Franciscan Plan, exercise authority and control respecting management or

disposition of the Wheaton Franciscan Plan's assets, and/or have discretionary authority or discretionary responsibility in the administration of the Wheaton Franciscan Plan.

200. Plaintiffs reserve the right to amend this Complaint to name other or additional Defendants once they have had the opportunity to conduct discovery on these issues.

201. Although Wheaton Franciscan maintained that the Wheaton Franciscan Plan was exempt from ERISA coverage as a Church Plan, at the same time, Wheaton Franciscan claimed ERISA status for its health and welfare plans, including its medical plan, dental plan, long term disability plan, short term disability plan, life insurance plan, vision benefit plan, flexible spending plans, and others.

202. Similarly, although Ascension Health maintains that the Wheaton Franciscan Plan is exempt from ERISA coverage as a Church Plan, at the same time, Ascension Health claims ERISA status for certain of its other benefit plans, including a TSA savings plan, 401(k) savings plan, welfare benefit plans, and others.

203. Compliance with ERISA thus creates no undue, genuine burden on any religious practice of Wheaton Franciscan or Ascension Health, as evidenced by Wheaton Franciscan and Ascension Health's claimed compliance with ERISA for their other benefit plans.

3. The Wheaton Franciscan Plan Is Not a Church Plan

204. Wheaton Franciscan and Ascension Health claim that the Wheaton Franciscan Plan is a Church Plan under ERISA section 3(33), 29 U.S.C. § 1002(33), and the analogous section of the IRC, and therefore exempt from ERISA's coverage under ERISA section 4(b)(2), 29 U.S.C. § 1003(b)(2).

a. Only Two Types of Plans May Qualify as a Church Plan and the Wheaton Franciscan Plan is Neither

205. Under section 3(33) of ERISA, 29 U.S.C. § 1002(33), only the following two types of plans may qualify as a Church Plan:

- First, under section 3(33)(A) of ERISA, 29 U.S.C. § 1002(33)(A), a plan *established and maintained* by a church or by a convention or association of churches, can qualify under certain circumstances and subject to the restrictions of section 3(33)(B) of ERISA, 29 U.S.C. § 1002(33)(B); and

- Second, under section 3(33)(C)(i) of ERISA, 29 U.S.C. § 1002(33)(C)(i), a plan *established* by a church or by a convention or association of churches that is *maintained* by an organization, *the principal purpose or function of which* is the administration or funding of a retirement plan, if such organization is controlled by or associated with a church or convention or association of churches, can qualify under certain circumstances and subject to the restrictions of section 3(33)(B) of ERISA, 29 U.S.C. § 1002(33)(B).

Both types of plans must be "established" by a church or by a convention or association of churches in order to qualify as a "Church Plan."

206. Although other portions of ERISA section 3(33)(C) address, among other matters, who can be *participants* in a Church Plan—in other words, which employees can be in a Church Plan, etc.—these other portions of ERISA section 3(33)(C) do not add any other type of *plan* that can be a Church Plan. 29 U.S.C. § 1002(33)(C). The only two types of plans that can qualify as a Church Plan are those described in ERISA section 3(33)(A) and in section 3(33)(C)(i). 29 U.S.C. §§ 3(33)(A) and (C)(i). The Wheaton Franciscan Plan does not qualify as a Church Plan under either ERISA section 3(33)(A) or (C)(i), 29 U.S.C. §§ 3(33)(A) or (C)(i).

207. First, under ERISA section 3(33)(A), "[t]he term "church plan" means a plan established and maintained for its employees by a church or by a convention or association of churches which is exempt from tax under section 501 of title 26." ERISA § 3(33)(A), 29 U.S.C. § 1002(33)(A). A straightforward reading of this section is that a church plan "means," and

therefore by definition, *must be* "a plan established . . . by a church or convention or association of churches."

208. The Wheaton Franciscan Plan at issue here is not a Church Plan as defined in ERISA section 3(33)(A), 29 U.S.C. § 1002(33)(A), because the Wheaton Franciscan Plan was established, maintained, administered and/or sponsored by Wheaton Franciscan, and since March 1, 2016, Ascension Health, for their own, or their affiliates' own, employees. Because neither Wheaton Franciscan, Ascension Health nor their affiliates are a church or a convention or association of churches, the Wheaton Franciscan Plan was not "established and maintained by" a church or by a convention or association of churches and was not maintained for employees of any church or convention or association of churches. That is the end of the inquiry under ERISA section 3(33)(A), 29 U.S.C. § 1002(33)(A).

209. Second, under ERISA section 3(33)(C)(i), a Church Plan also includes a plan "established" by a church or by a convention or association of churches that is "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." ERISA section 3(33)(C)(i), 29 U.S.C. § 1002(33)(C)(i).

210. The Wheaton Franciscan Plan is not a Church Plan as defined in ERISA section 3(33)(C)(i), 29 U.S.C. § 1002(33)(C)(i), because the Wheaton Franciscan Plan was not "established" by a church or by a convention or association of churches. The Wheaton Franciscan Plan also does not qualify as a "Church Plan" under section 3(33)(C)(i) because it is not and has never been maintained by any entity whose principal purpose or function is the

administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both. This ends any argument that the Wheaton Franciscan Plan could be a Church Plan under ERISA section 3(33)(C)(i), 29 U.S.C. § 1002(33)(C)(i).

211. In the alternative, to the extent that Wheaton Franciscan and/or Ascension Health claims that the Wheaton Franciscan Plan qualifies as a "Church Plan" under section 3(33)(C)(i) because it is "maintained" by an entity within Wheaton Franciscan or Ascension Health, other than Wheaton Franciscan or Ascension Health, whose principal purpose or function is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, the claim fails because the only entity with the power to "maintain" the Wheaton Franciscan Plan, which includes the power to continue and/or terminate the Plan, was Wheaton Franciscan, or, as of March 1, 2016, Ascension Health. The claim also fails because if all that is required for a plan to qualify as a church plan is that it meet section C's requirement that it be maintained by a church-associated organization, there would be no purpose for section A, which defines a church plan as one *established* and maintained by a church. This ends any argument that the Wheaton Franciscan Plan could be a Church Plan under ERISA section 3(33)(C)(i), 29 U.S.C. § 1002(33)(C)(i), because it is maintained by an entity other than Wheaton Franciscan or, since March 1, 2016, Ascension Health.

212. However, even if the Wheaton Franciscan Plan had been "established" by a church and even if the principal purpose or function of Wheaton Franciscan or Ascension Health was the administration or funding of the Wheaton Franciscan Plan (instead of running a hospital conglomerate), the Wheaton Franciscan Plan still would not qualify as a Church Plan under ERISA section 3(33)(C)(i), 29 U.S.C. § 1002(33)(C)(i), because the principal purpose of the Plan is not to provide retirement or welfare benefits *to employees of a church or convention or*

association of churches. For example, the thousands of participants in the Wheaton Franciscan Plan worked for Wheaton Franciscan, and since March 1, 2016 Ascension Health, both non-profit hospital conglomerates. Neither Wheaton Franciscan nor Ascension Health is a church or convention or association of churches and their employees are not employees of a church or convention or association of churches within the meaning of ERISA.

213. Under ERISA section 3(33)(C)(ii), 29 U.S.C. § 1002(33)(C)(ii), however, an employee of a tax exempt organization that is controlled by or associated with a church or a convention or association of churches also may be considered an employee of a church. But this part of the definition merely explains which employees a church plan may cover *once a valid church plan is established*. The Wheaton Franciscan Plan also fails this part of the definition, because neither Wheaton Franciscan nor Ascension Health is controlled by or associated with a church or convention or association of churches within the meaning of ERISA.

214. Wheaton Franciscan is a non-profit corporation under Illinois law.

215. Wheaton Franciscan is or was governed by its board of directors.

216. Wheaton Franciscan's board of directors was required to act in the best interests of Wheaton Franciscan at all times, this includes avoiding conflicts of interest, and also avoiding situations that create a reasonable appearance of a conflict of interest.

217. Wheaton Franciscan's board of directors owed fiduciary duties to the non-profit corporation.

218. Wheaton Franciscan is not controlled by a church or convention or association of churches.

219. Wheaton Franciscan is not operated by a church.

220. In addition, Wheaton Franciscan is not "associated with" a church or convention or association of churches within the meaning of ERISA. Under ERISA section 3(33)(C)(iv), 29 U.S.C. § 1002(33)(C)(iv), an organization "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." Wheaton Franciscan does not share common religious bonds and convictions with a church or association of churches.

221. For example, Wheaton Franciscan tells prospective employees that religious affiliation is not a factor in the recruiting and hiring of Wheaton Franciscan employees. In choosing to recruit and hire from the population at large, Wheaton Franciscan must also be willing to accept generally applicable, neutral regulations, such as ERISA, which protect those employees' legitimate interests.

222. In addition, Wheaton Franciscan has a practice of partnering and affiliating with hospitals that claim no religious affiliation. In choosing to compete in the commercial arena of healthcare services and to embark upon a business plan that includes healthcare facilities with no claimed ties to any particular religion, or to religion generally, Wheaton Franciscan must be willing to accept neutral regulations, such as ERISA, imposed to protect its employees' legitimate interests.

223. Wheaton Franciscan provides non-denominational chapels and encourages its clients to seek the faith of their own choosing.

224. Ascension Health is a non-profit corporation under Missouri law.

225. Ascension Health is governed by its Board of Directors.

226. Ascension Health's Board of Directors was required to act in the best interests of Ascension Health at all times, this includes avoiding conflicts of interest, and also avoiding situations that create a reasonable appearance of a conflict of interest.

227. Ascension Health's Board of Directors owes fiduciary duties to the non-profit corporation.

228. Ascension Health is not controlled by a church or convention or association of churches.

229. Ascension Health is not operated by a church.

230. In addition, Ascension Health is not "associated with" a church or convention or association of churches within the meaning of ERISA. Under ERISA section 3(33)(C)(iv), 29 U.S.C. § 1002(33)(C)(iv), an organization "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." Ascension Health does not share common religious bonds and convictions with a church or association of churches.

231. For example, Ascension Health tells prospective employees that religious affiliation is not a factor in the recruiting and hiring of Ascension Health employees. In choosing to recruit and hire from the population at large, Ascension Health must also be willing to accept generally applicable, neutral regulations, such as ERISA, which protect those employees' legitimate interests.

232. In addition, Ascension Health has a practice of partnering and affiliating with hospitals that claim no religious affiliation. In choosing to compete in the commercial arena of healthcare services and to embark upon a business plan that includes healthcare facilities with no claimed ties to any particular religion -- or to religion generally -- Ascension Health must be

willing to accept neutral regulations, such as ERISA, imposed to protect its employees' legitimate interests.

233. Ascension Health provides non-denominational chapels and encourages its clients to seek the faith of their own choosing.

234. The Wheaton Franciscan Plan further fails to satisfy the requirements of ERISA section 3(33)(C)(i) because this section requires the organization that maintains the Plan to be "controlled by or associated with" a church or convention or association of churches within the meaning of ERISA. 29 U.S.C. § 1002(33)(C)(i). Thus, even if (1) a church had "established" the Wheaton Franciscan Plan (which it did not), (2) the principal purpose or function of Wheaton Franciscan and/or Ascension Health was the administration or funding of the Wheaton Franciscan Plan (instead of running a hospital conglomerate), and (3) Wheaton Franciscan and Ascension Health's employees were employees of a church or convention or association of churches (which they are not), the Wheaton Franciscan Plan still would not qualify as a Church Plan under ERISA section 3(33)(C)(i) because—for the reasons outlined above—neither Wheaton Franciscan nor Ascension Health is *controlled by or associated with* a church or convention or association of churches within the meaning of ERISA. *See* 29 U.S.C. § 1002(33)(C)(i), (iv).

235. Finally, even if Wheaton Franciscan and/or Ascension Health were "controlled by or associated with" a church, and thus their employees were deemed "employees" of a church under ERISA section 3(33)(C)(ii)(2), and even if the Wheaton Franciscan Plan was "maintained by" either a church or a "pension board" satisfying the requirements of ERISA section 3(33)(C)(i), the Wheaton Franciscan Plan still would not be a "Church Plan" because all "Church Plans" must be "established" by a church or by a convention or association of churches. 29

U.S.C. §§ 1002(33)(A), (C)(i). Although a church may be deemed an "employer" of the employees of an organization that it "controls" or with which it is "associated," *see* ERISA § 3(33)(C)(iii), 29 U.S.C. § 1002(33)(C)(iii), nothing in ERISA provides that the church may be deemed to have "established" a retirement plan that was in fact established by the "controlled" or "associated" organization. Accordingly, because no church established the Wheaton Franciscan Plan, the Plan cannot be a "Church Plan" within the meaning of ERISA.

b. Even if the Wheaton Franciscan Plan Could Otherwise Qualify as a Church Plan under ERISA Sections 3(33)(A) or (C)(i), it is Excluded From Church Plan Status under ERISA Section 3(33)(B)(ii)

236. Under ERISA section 3(33)(B)(ii), 29 U.S.C. § 1002(33)(B)(ii), a plan is specifically excluded from Church Plan status if less than substantially all of the plan participants are members of the clergy or employed by an organization controlled by or associated with a church or convention or association of churches. In this case, there are approximately 17,000 participants in the Wheaton Franciscan Plan, and very nearly all of them are non-clergy healthcare workers.

237. If the approximately 17,000 participants in the Wheaton Franciscan Plan do not work for an organization that is controlled by or associated with a church or convention or association of churches, then even if the Wheaton Franciscan Plan could otherwise qualify as a Church Plan under ERISA sections 3(33)(A) or (C)(i), it still would be foreclosed from Church Plan status under section 3(33)(B)(ii), 29 U.S.C. § 1002(33)(B)(ii).

238. As set forth above, neither Wheaton Franciscan nor Ascension Health is controlled by a church or convention or association of churches, nor do they share common religious bonds and convictions with a church or convention or association of churches, within the meaning of ERISA section 3(33)(C)(iv).

c. Even if the Wheaton Franciscan Plan Could Otherwise Qualify as a Church Plan under ERISA, the Church Plan Exemption, as Claimed By Wheaton Franciscan and Ascension Health, Violates the Establishment Clause of the First Amendment of the Constitution, and is Therefore Void and Ineffective

239. The Church Plan exemption is an accommodation for *churches* that establish and maintain pension plans, and it allows such plans to be exempt from ERISA.

240. The Establishment Clause guards against the establishment of religion by the government. The government "establishes religion" when, among other activities, it privileges those with religious beliefs (*e.g.*, exempts them from neutral regulations) at the expense of nonadherents and/or while imposing legal and other burdens on nonmembers. Extension of the Church Plan exemption to Wheaton Franciscan and Ascension Health, both non-church entities, privileges Wheaton Franciscan and Ascension Health for their claimed faith at the expense of their employees, who are told that their faith is not relevant to their employment, yet who are then denied the benefit of insured, funded pensions, as well as many other important ERISA protections. Similarly, Wheaton Franciscan and Ascension Health, both non-church entities, have a privileged economic advantage over their competitors in the commercial arena they have chosen, based solely on Wheaton Franciscan and Ascension Health's claimed religious beliefs. This too is prohibited by the Establishment Clause. Simply put, when government provides a regulatory exemption "exclusively to religious organizations that is not required by the Free Exercise Clause and that . . . burdens nonbeneficiaries," it has endorsed religion in violation of the Establishment Clause. *See, e.g., Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 15, 18 n.8 (1989) (plurality opinion).

241. As set forth in more detail below in Count XIII , the extension of the Church Plan accommodation to Wheaton Franciscan and Ascension Health, which are not churches, violates the Establishment Clause because it is not necessary to further the stated purposes of the

exemption, harms Wheaton Franciscan and Ascension Health workers, puts Wheaton Franciscan and Ascension Health competitors at an economic disadvantage, relieves Wheaton Franciscan and Ascension Health of no genuine religious burden created by ERISA, and creates more government entanglement with alleged religious beliefs than compliance with ERISA creates. Accordingly, the Church Plan exemption, as claimed by Wheaton Franciscan and Ascension Health, is void and ineffective.

VI. CLASS ALLEGATIONS

242. Plaintiffs bring this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and the following class of persons similarly situated: all participants or beneficiaries of the Wheaton Franciscan Retirement Plan

243. Excluded from the Class are any high-level executives at Wheaton Franciscan or Ascension Health or any employees who have responsibility or involvement in the administration of the Plan, or who are subsequently determined to be fiduciaries of the Wheaton Franciscan Plan, including the Individual Defendants.

A. Numerosity

244. The exact number of Class members is unknown to Plaintiffs at this time, but may be readily determined from records maintained by Wheaton Franciscan and/or Ascension Health. Wheaton Franciscan employed approximately 17,000 individuals. Upon information and belief, many, if not all, of those persons are likely members of the Class, and thus the Class is so numerous that joinder of all members is impracticable.

B. Commonality

245. The issues regarding liability in this case present common questions of law and fact, with answers that are common to all members of the Class, including (1) whether the Plan is exempt from ERISA as a Church Plan, and, if not, (2) whether the fiduciaries of the Plan have

failed to administer and failed to enforce the funding obligations of the Plan in accordance with ERISA.

246. The issues regarding the relief are also common to the members of the Class as the relief will consist of (1) a declaration that the Plan is an ERISA covered plan; (2) an order requiring that the Plan comply with the administration and enforce the funding obligations of the Plan in accordance with ERISA; and (3) an order requiring Wheaton Franciscan and Ascension Health to pay civil penalties to the Class, in the same statutory daily amount for each member of the Class.

C. Typicality

247. Plaintiffs' claims are typical of the claims of the other members of the Class because their claims arise from the same event, practice and/or course of conduct, namely Defendants' failure to maintain the Plan in accordance with ERISA. Plaintiffs' claims are also typical because all Class members are similarly affected by Defendant's wrongful conduct.

248. Plaintiffs' claims are also typical of the claims of the other members of the Class because, to the extent Plaintiffs seek equitable relief, it will affect all Class members equally. Specifically, the equitable relief sought consists primarily of (i) a declaration that the Wheaton Franciscan Plan is not a Church Plan; and (ii) a declaration that the Wheaton Franciscan Plan is an ERISA covered plan that must comply with the administration and funding requirements of ERISA. In addition, to the extent Plaintiffs seek monetary relief, it is for civil fines to the Class in the same statutory daily amount for each member of the Class.

249. Wheaton Franciscan and Ascension Health do not have any defenses unique to Plaintiffs' claims that would make Plaintiffs' claims atypical of the remainder of the Class.

D. Adequacy

250. Plaintiffs will fairly and adequately represent and protect the interests of all members of the Class.

251. Plaintiffs do not have any interests antagonistic to or in conflict with the interests of the Class.

252. Defendants have no unique defenses against the Plaintiffs that would interfere with Plaintiffs' representation of the Class.

253. Plaintiffs have engaged counsel with extensive experience prosecuting class actions in general and ERISA class actions in particular.

E. Rule 23(b)(1) Requirements

254. The requirements of Rule 23(b)(1)(A) are satisfied because prosecution of separate actions by the members of the Class would create a risk of establishing incompatible standards of conduct for Defendants.

255. The requirements of Rule 23(b)(1)(B) are satisfied because adjudications of these claims by individual members of the Class would, as a practical matter, be dispositive of the interests of the other members not parties to the actions, or substantially impair or impede the ability of other members of the Class to protect their interests.

F. Rule 23(b)(2) Requirements

256. Class action status is also warranted under Rule 23(b)(2) because Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive, declaratory, or other appropriate equitable relief with respect to the Class as a whole.

G. Rule 23(b)(3) Requirements

257. If the Class is not certified under Rule 23(b)(1) or (b)(2), then certification under (b)(3) is appropriate because questions of law or fact common to members of the Class predominate over any questions affecting only individual members. The common issues of law or fact that predominate over any questions affecting only individual members include: (1) whether the Plan is exempt from ERISA as a Church Plan, and, if not, (2) whether the fiduciaries of the Plan have failed to administer and fund the Plan in accordance with ERISA, and (3) whether the Church Plan exemption, as claimed by Wheaton Franciscan and Ascension Health, violates the Establishment Clause of the First Amendment. A class action is superior to the other available methods for the fair and efficient adjudication of this controversy because:

A. Individual Class members do not have an interest in controlling the prosecution of these claims in individual actions rather than a class action because the equitable relief sought by any Class member will either inure to the benefit of the Plan or affect each class member equally;

B. Individual Class members also do not have an interest in controlling the prosecution of these claims because the monetary relief that they could seek in any individual action is identical to the relief that is being sought on their behalf herein;

C. This litigation is properly concentrated in this forum, which is where Defendant Wheaton Franciscan is headquartered; and

D. There are no difficulties managing this case as a class action.

VII. CAUSES OF ACTION

COUNT I
(Claim for Equitable Relief Pursuant to ERISA Sections 502(a)(2) and 502(a)(3) Against All Defendants)

258. Plaintiffs repeat and re-allege the allegations contained in all foregoing paragraphs herein.

259. ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), authorizes a participant or beneficiary to bring a civil action to obtain "appropriate equitable relief ... to enforce any provisions of this title." Pursuant to this provision, 28 U.S.C. §§ 2201 and 2202, and Federal Rule of Civil Procedure 57, Plaintiffs seek declaratory relief that the Wheaton Franciscan Plan is not a Church Plan within the meaning of ERISA section 3(33), 29 U.S.C. § 1002(33), and thus is subject to the provisions of Title I and Title IV of ERISA.

260. ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), also authorizes a participant or beneficiary to bring a civil action "(A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." Pursuant to these provisions, Plaintiffs seek orders directing the Wheaton Franciscan Plan's current sponsor and administrator, Ascension Health and the Ascension Health Pension Committee, to bring the Wheaton Franciscan Plan into compliance with ERISA.

261. ERISA section 502(a)(2), 29 U.S.C. § 1132(2), authorizes a participant or beneficiary to bring a civil action for appropriate relief under 29 U.S.C. § 1109(a), against a fiduciary "who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries" and the fiduciary "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to

such other equitable or remedial relief as the court may deem appropriate." Because the operation of the Plan as a non-ERISA plan was a breach of Defendants' fiduciary duties, the Defendants breached their fiduciary duties and Plaintiffs also seek Plan-wide equitable and remedial relief under ERISA section 502(a)(2).

262. As the Wheaton Franciscan Plan is not a Church Plan within the meaning of ERISA section 3(33), 29 U.S.C. § 1002(33), and meets the definition of a pension plan under ERISA section 3(2), 29 U.S.C. § 1002(2), the Wheaton Franciscan Plan should be declared to be an ERISA-covered pension plan, and the Wheaton Franciscan Plan's sponsor and administrator should be ordered to bring the Wheaton Franciscan Plan into compliance with ERISA, including by remedying the violations set forth below.

COUNT II - Vesting Claims
(Violation of ERISA Section 203 and for Equitable Relief Pursuant to ERISA Sections 502(a)(3) and 502(a)(2) Against Defendants Wheaton Franciscan Services Inc., Ascension Health, the Administrator Defendants, and the Individual Defendants)

263. Plaintiffs incorporate and re-allege by reference the foregoing paragraphs as if fully set forth herein.

264. ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), authorizes a participant or beneficiary to bring a civil action "(A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan."

265. The Wheaton Franciscan Plan violates ERISA sections 203(a)(2) and (f)(2), 29 U.S.C. §§ 1053(a)(2) and (f)(2), because it is a cash balance plan and may not require a participant to complete more than three years of service to become fully vested in her benefits under the Plan.

266. Pursuant to ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), Plaintiffs seek an order that all participants in the Wheaton Franciscan Plan who have completed three years of service are fully vested in their accrued benefits under that plan.

267. Pursuant to ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), Plaintiffs seek an order requiring the Plan administrator to furnish all participants in the Wheaton Franciscan Plan with a benefit statement that is compliant with ERISA and that states their vested retirement benefit based on a three year vesting period.

268. Pursuant to ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), Plaintiffs seek an order directing the Wheaton Franciscan Plan's sponsor and administrator to retroactively amend and/or reform the Wheaton Franciscan Plan to comply with ERISA section 203(f)(2), 29 U.S.C. §1053(f)(2), which requires that any employee who has completed at least three years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions.

269. Pursuant to ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), Plaintiffs seek an order requiring the Plan sponsor to contribute additional funding to the Wheaton Franciscan Plan, as required by ERISA section 302, 29 U.S.C. §§ 1052, to cover the additional Plan liabilities resulting from the accrued benefits owed to all participants who have completed three years of service but less than five years of service and therefore to date have not been considered to be fully vested in their accrued benefits under the Wheaton Franciscan Plan.

270. The Plan administrators, Wheaton Franciscan Operations Committee. and Ascension Health Pension Committee, have violated ERISA section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), to the extent they have followed Plan documents that are inconsistent with ERISA.

271. As such Wheaton Franciscan Services Inc. and Ascension Health are personally liable for any losses to the Plan under ERISA section 502(a)(2), 29 U.S.C. § 1132(a)(2) or to participants individually under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3) for all losses or to provide appropriate equitable relief to remedy their violations of ERISA section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

272. Plaintiffs also seek to disgorge any ill-gotten, gains or cost savings received by the Defendants as a result of the impermissible vesting schedule pursuant to ERISA sections 502(a)(2), 29 U.S.C. § 1132(a)(2) and ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3).

COUNT III – Backloading Violations
(Claim for Violation of ERISA Section 204(b) for Equitable Relief Pursuant to ERISA Sections 502(a)(3) and 502(a)(2) Against Defendants Wheaton Franciscan Services Inc., Ascension Health, the Administrator Defendants, and the Individual Defendants)

273. Plaintiffs incorporate and re-allege by reference the foregoing paragraphs as if fully set forth herein.

274. ERISA section 204(b) provides that, with certain exceptions not applicable here, a defined benefit plan satisfies ERISA's benefit accrual requirements if it meets one of three requirements. The first is where "the accrued benefit to which each participant is entitled upon his separation from the service is not less than—(i) 3 percent of the normal retirement benefit to which he would be entitled at the normal retirement age if he commenced participation at the earliest possible entry age under the plan and served continuously until the earlier of age 65 or the normal retirement age specified under the plan, multiplied by (ii) the number of years (not in excess of 33 ⅓) of his participation in the plan." 29 U.S.C. § 1054(b)(1)(A). The second is where "the accrued benefit payable at the normal retirement age is equal to the normal retirement benefit and the annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at normal retirement age under the plan for any later plan year is

not more than 133 ⅓ percent of the annual rate at which he can accrue benefits for any plan year beginning on or after such particular plan year and before such later plan year." 29 U.S.C. § 1054(b)(1)(B). The third is where "the accrued benefit to which any participant is entitled upon his separation from the service is not less than a fraction of the annual benefit commencing at normal retirement age to which he would be entitled under the plan as in effect on the date of his separation if he continued to earn annually until normal retirement age the same rate of compensation upon which his normal retirement benefit would be computed under the plan, determined as if he had attained normal retirement age on the date any such determination is made (but taking into account no more than the 10 years of service immediately preceding his separation from service). Such fraction shall be a fraction, not exceeding 1, the numerator of which is the total number of his years of participation in the plan (as of the date of his separation from the service) and the denominator of which is the total number of years he would have participated in the plan if he separated from the service at the normal retirement age." 29 U.S.C. § 1054(b)(1)(C).

275. As set forth above, since at least 2009, the Plan did not meet the 3% rule in ERISA section 204(b)(1)(A), 29 U.S.C. § 1054(b)(1)(A).

276. As set forth above, since at least 1995, the Plan did not meet the fractional rule in ERISA section 204(b)(1)(C), 29 U.S.C. § 1054(b)(1)(C).

277. From 2003 to June 29, 2008, the interest credit was 6.5%.

278. Effective June 30, 2008, the interest credit was reduced to 3.5%.

279. In 2009, the Plan again reduced the interest credit from 3.5% to the "One year constant to maturity U.S. Treasury Bill Rate as of the close of business on the first business day of November preceding the Plan Year of credit."

280. The reduction of the interest credit to below 6.5% resulted in the Plan's benefit accrual provisions found in Section 4.01 failing the 133 1/3% rule found in ERISA section 204(b)(1)(B), 29 U.S.C. § 1054(b)(1)(B).

281. As such, the Plan's interest credit from June 30, 2008 to the present (as set forth in paragraph 4.01(b)(ii)) violated the ERISA section 204(b), 29 U.S.C. § 1054(b), because such interest credits were too low for the Plan to meet any of the options for ERISA's anti-backloading requirement.

282. The reduction of the interest credit rate applicable to participant account balances beginning on June 30, 2008 and in all subsequent years caused a significant reduction in the rate of benefit accrual for all participants in the Plan during the period June 30, 2008 to the present.

283. The interest credit reduction to 3.5% cost participants $49.2 million in retirement benefits.

284. The further interest credit reduction to the one year Treasury Bill rate cost participants at least another $50 million in retirement benefits.

285. In sum, since approximately June 30, 2008, the Wheaton Franciscan Plan is being and has been operated in violation of ERISA section 204(b), 29 U.S.C. § 1054(b), because it does not meet any of ERISA's anti-backloading requirements.

286. ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), authorizes a participant or beneficiary to bring a civil action "(A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan."

287. Pursuant to ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), Plaintiffs seek an order declaring the amendments to the Plan which reduced the interest credit from 2009 to the present to be violations of ERISA's anti-backloading requirements of ERISA § 204(b), 29 U.S.C. § 1054(b) and thus ineffectual.

288. Pursuant to ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), Plaintiffs seek an order requiring the Plan to be reformed, retroactively and prospectively, such that the interest credit on or after 2009 are high enough to ensure the Plan is in compliance with the anti-backloading requirements of ERISA section 204(b), 29 U.S.C. § 1054(b).

289. Pursuant to ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), Plaintiffs seek an order requiring the Ascension Pension Committee Defendants to furnish all participants in the Wheaton Franciscan Plan with a benefit statement that provides an account balance that is calculated based on an interest credit (for the period 2009 to the present) high enough to ensure the Plan meets the anit-backloading requirements, which would be between 3.5% to 4%.

290. To the extent the members of the Class have received a distribution amount that is less than it should have been because the Plan was not in compliance with ERISA's anti-backloading requirements, there has been an unlawful forfeiture of benefits to which participants are entitled.

291. Pursuant to ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), Plaintiffs seek an order requiring the Plan sponsor to pay all participants who received a distribution anytime on or June 30, 2008 the additional benefit amount they are entitled to based on the required higher interest credit necessary for the Plan to comply with ERISA section 204(b), plus interest.

292. On information and belief, the value of the additional benefits owed to participants to remedy the unlawful reductions to the interest credit, which violated ERISA's backloading requirements, total approximately $100 million.

293. The Plan administrators have violated ERISA section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), to the extent they have followed Plan documents that are inconsistent with ERISA. Pursuant to sections 404(a)(1)(D) and 502(a)(3), 29 U.S.C. §§ 1104(a)(1)(D) and 1132(a)(3), Plaintiffs seek an order requiring the Administrator Defendants to calculate the account balance distribution amount that Plaintiffs and other members of the Class would have received under the Plan document retroactively amended to comply with ERISA and to pay to participants the additional monies to which they are entitled.

294. As such the Administrator Defendants are personally liable for any losses to the Plan under ERISA section 502(a)(2), 29 U.S.C. § 1132(a)(2) or to participants individually under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3) for all losses or to provide appropriate equitable relief to remedy their violations of ERISA section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). Pursuant to ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), Plaintiffs seek an order requiring Ascension Health to contribute additional funding to the Wheaton Franciscan Plan, as required by ERISA section 302, 29 U.S.C. §§ 1052, to cover the additional Plan liabilities resulting from correcting the impermissibly low interest credit applied from June 30, 2008 to the present.

295. Plaintiffs also seek to disgorge any ill-gotten, gains or cost savings received by the Defendants as a result of the impermissible reduction of the interest credit pursuant to ERISA sections 502(a)(2), 29 U.S.C. § 1132(a)(2) and ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3).

COUNT IV – Notice of Reductions in Accrued Benefits Violations (Claim for Violation of ERISA Section 204(h) for Equitable Relief Pursuant to ERISA Sections 502(a)(3) and 502(a)(2) Against Defendants Wheaton Franciscan Services, Inc., Ascension Health, the Administrator Defendants, and the Individual Defendants)

296. Plaintiffs incorporate and re-allege by reference the foregoing paragraphs as if fully set forth herein.

297. ERISA section 204(h) provides that "[a]n applicable pension plan may not be amended so as to provide for a significant reduction in the rate of future benefit accrual unless the plan administrator provides . . . notice . . . to each applicable individual." 29 U.S.C. § 1054(h)(1). Such notice must "be provided within a reasonable time before the effective date of the plan amendment" and must "be written in a manner calculated to be understood by the average plan participant and shall provide sufficient information (as determined in accordance with regulations prescribed by the Secretary of the treasury) to allow applicable individuals to understand the effect of the plan amendment." 29 U.S.C. § 1054(h)(2) & (3).

298. ERISA section 204(h) further provides that "[i]n the case of any egregious failure to meet any requirement of this subsection with respect to any plan amendment, the provisions of the applicable pension plan shall be applied as if such plan amendment entitled all applicable individuals to the greater of (i) the benefits to which they would have been entitled without regard to such amendment, or (ii) the benefits under the plan with regard to such amendment." 29 U.S.C. 1054(h)(6)(A)(i)-(ii). A failure is considered "egregious" if it "is within the control of the plan sponsor and is (i) an intentional failure (including any failure to promptly provide the required notice or information after the plan administrator discovers an unintentional failure to meet the requirements of this subsection), (ii) a failure to provide most of the individuals with most of the information they are entitled to receive under this subsection, or (iii) a failure which

is determined to be egregious under regulations prescribed by the Secretary of the Treasury." 29 U.S.C. § 1054(h)(6)(B)(i)-(iii).

299. ERISA section 204(h) notice must be provided at least 45 days before the effective date of any section 204(h) amendment. 26 C.F.R. § 54.4980F-1 at Q&A 9.

300. ERISA section 204(h) notice "must include sufficient information to allow applicable individuals to understand the effect of the plan amendment" and "must be written in a manner calculated to be understood by the average plan participant and to apprise the applicable individual of the significance of the notice." 26 C.F.R. § 54.4980F-1 at Q&A 11(a)(1) & (2).

301. Where an amendment reduces the rate of future benefit accrual, section 204(h) notice "must include a description of the benefit or allocation formula prior to the amendment, a description of the benefit or allocation formula under the plan as amended, and the effective date of the amendment. 26 C.F.R. § 54.4980F-1 at Q&A 11(a)(3).

302. ERISA section 204(h) notice must also include sufficient information for a participant to determine the approximate magnitude of the expected reduction in their benefit. 26 C.F.R. § 54.4980F-1 at Q&A 11(a)(4)(i). If the magnitude of the reduction for each participant is not reasonably apparent from the description of the amendment, further information is required in the form of additional narrative information. 26 C.F.R. § 54.4980F-1 at Q&A 11(a)(4)(i). The requirement may be deemed satisfied if the notice includes one or more illustrative examples showing the approximate magnitude of the reduction in the examples, or by providing a statement to each applicable individual projecting what that individual's future benefits are reasonably expected to be at various future dates and what that individual's future benefits would have been under the terms of the plan as in effect before the ERISA section 204(h) amendment. 26 C.F.R. § 54.4980F-1 at Q&A 11(a)(4)(ii).

303. Plaintiffs Bowen and Mueller and, on information and belief, the members of the Class were provided untimely and insufficient notice of the reduction in the rate of future benefit accrual. They received notice of the Plan amendment days before the amendment became effective, and they were not provided sufficient information to allow them to understand how the amendment would reduce their future benefits. 26 C.F.R. § 54.4980F-1 at Q&A 9, 11.

304. The failure to adequately notify Plan participants of the interest credit reduction was egregious and in violation of ERISA section 204(h). As a result, participants are entitled to receive the greater of the benefits to which they would have been entitled without regard to the 2009 Amendment, or the benefits under the Plan with regard to the 2009 Amendment. 29 U.S.C. 1054(h)(6)(A)(i)-(ii).

305. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), authorizes a participant or beneficiary to bring a civil action "(A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan."

306. Pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), Plaintiffs seek an order directing the Wheaton Franciscan Plan's sponsor and administrator to retroactively amend the Plan to return the interest credit rate applicable to participant account balances to the pre-amendment rates.

307. Pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), Plaintiffs seek an order requiring the Ascension Pension Committee Defendants to furnish all participants in the Wheaton Franciscan Plan with a benefit statement that is compliant with ERISA and that

provides an account balance that is calculated in accordance with the retroactive Plan amendments and ERISA.

308. To the extent the members of the Class have received a distribution amount that is less than it should have been because the Plan applied a lower interest credit rate than they would have been entitled to prior to the Plan amendment, there has been an unlawful forfeiture of benefits to which participants are entitled.

309. The Plan administrators have violated ERISA section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), to the extent they have followed Plan documents that are inconsistent with ERISA. Pursuant to §§ 404(a)(1)(D) and 502(a)(3), 29 U.S.C. §§ 1104(a)(1)(D) and 1132(a)(3), Plaintiffs seek an order requiring the Administrator Defendants to calculate the account balance distribution amount that Plaintiffs and other members of the Class would have received under the Plan document retroactively amended to comply with ERISA and to pay to participants any additional monies to which they are entitled.

310. As such Wheaton Franciscan Services Inc. and Ascension Health are personally liable for any losses to the Plan under ERISA section 502(a)(2), 29 U.S.C. § 1132(a)(2) or to participants individually under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3) for all losses or to provide appropriate equitable relief to remedy their violations of ERISA section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

311. Pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), Plaintiffs seek an order requiring Wheaton Franciscan Services, Inc. and Ascension Health to contribute additional funding to the Wheaton Franciscan Plan, as required by ERISA § 302, 29 U.S.C. §§ 1052, to cover the additional Plan liabilities resulting from the additional benefits owed to participants

who were offered and elected to receive a distribution of their account balance that was less than it should have been because it was calculated using incorrect interest credit rates.

312. Plaintiffs also seek to disgorge any ill-gotten, gains or cost savings received by the Defendants as a result of the impermissible reduction of the accrual rate pursuant to ERISA sections 502(a)(2), 29 U.S.C. § 1132(a)(2) and ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3).

COUNT V – Cutback Claims
(Claim for Violation of ERISA § 204(g) and for Equitable Relief Pursuant to ERISA Sections 502(a)(3) and § 502(a)(2) Against Defendants Wheaton Franciscan Services Inc., Ascension Health, the Administrator Defendants and the Individual Defendants)

313. Plaintiffs incorporate and re-allege by reference the foregoing paragraphs as if fully set forth herein.

314. ERISA § 204(g)(1) & (2) provides that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan," including "a plan amendment which has the effect of-- (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or (B) eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment . . ." 29 U.S.C. § 1054(g)(1) & (2).

315. Section 4.04 of the Plan provides that "[i]f a Participant remains in the employ of an Employer until his Normal Retirement Age, he shall be entitled to retire and receive his Accrued Benefit in any form elected under Article V as of his Normal Retirement Date."

316. Section 2.03 of the Plan defines "Accrued Benefit" as "a single life annuity payable at (1) an Early Retirement Date, (2) Normal Retirement Date, or (3) Late Retirement Date. As of any date, a Participant's "Accrued Benefit" shall be the Actuarial Equivalent of the Account Balance under Section 4.01 but not less than the amount in Section 4.03, plus the

Actuarial Equivalent of the Savings Account in Section 4.02, subject to the minimum benefits in Appendices D and E and the Benefit Limits in Section 4.13."

317. Under Section 2.03 of the Plan, the term "Actuarial Equivalent or Actuarially Equivalent" is the participant's monthly benefit of equivalent value computed using an 8% annual interest rate and the 1983 Group Annuity Mortality Table for Females (for calculations of accrued benefits between January 1, 1995 and June 30, 2013).

318. Effective July 1, 2013, the Plan sponsor amended Section 2.03 of the Plan to lower the interest rate under the definition of Actuarial Equivalent for determining the annuity benefits on cash balance accounts.

319. Under such amendment of section 2.03 of the Plan, to convert a participant's account balance under Section 4.01 of the Plan into the Participant's accrued benefit, a participant's monthly benefit of equivalent value is computed using a 4% annual interest rate (for distributions on or after July 1, 2013), and a 2% annual interest rate was used for distributions on or after July 1, 2014.

320. All other factors being equal, using a lower interest rate to convert a participant's account balance to monthly benefit results in a monthly benefit and thus impermissibly reduces the participant's "accrued benefit" under the Plan.

321. Participants who were offered distributions of their account balances in the form of a monthly benefit of equivalent value on or after July 1, 2013, including Plaintiffs Bowen and Mueller, received less than they would have received prior to the two amendments which reduced the interest rate to 4% in 2013 and 2% in 2014 for determining the actuarial equivalent for the monthly benefit. This reduction in accrued benefits constitutes an unlawful cutback under ERISA section 204(g), 29 U.S.C. § 1054(g).

322. ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), authorizes a participant or beneficiary to bring a civil action "(A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan."

323. Pursuant to ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), Plaintiffs seek an order directing the Wheaton Franciscan Plan's sponsor and administrator to retroactively reform the Wheaton Franciscan Plan to make clear that all participants who were in the Plan prior to July 1, 2013 are entitled to have their monthly benefit of equivalent value calculated using an 8% interest rate.

324. Pursuant to ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), Plaintiffs seek an order requiring the Ascension Pension Committee Defendants to furnish all participants who were in the Wheaton Franciscan Plan prior to July 1, 2013 with a benefit statement that reflects their monthly benefit of equivalent value using an 8% interest rate.

325. To the extent the members of the Class have received a distribution amount that is less than it should have been because it was calculated using an incorrect interest rate, there has been an unlawful forfeiture of benefits to which participants are entitled.

326. Plaintiffs seek an order requiring the Plan to pay all participants who received a distribution in the form of a monthly benefit on or after July 1, 2013 the additional benefits they are owed based on an 8% actuarial equivalence rate both retroactively (with interest) and prospectively.

327. The Plan administrators have violated ERISA section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), to the extent they have followed Plan documents that are inconsistent with

ERISA. Pursuant to ERISA sections 404(a)(1)(D) and 502(a)(3), 29 U.S.C. §§ 1104(a)(1)(D) and 1132(a)(3), Plaintiffs seek an order requiring the Administrator Defendants to calculate the distribution amount that Plaintiffs Bowen and Mueller and other members of the Class would have received under the Plan document retroactively reformed to comply with ERISA and to pay to participants the additional monies to which they are entitled.

328. As such Wheaton Franciscan Services Inc. and Ascension Health are personally liable for any losses to the Plan under ERISA section 502(a)(2), 29 U.S.C. § 1132(a)(2) or to participants individually under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3) for all losses or to provide appropriate equitable relief to remedy their violations of ERISA section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

329. Plaintiffs also seek to disgorge any ill-gotten, gains or cost savings received by the Defendants as a result of the impermissible reduction of the actuarial equivalence rate under ERISA sections 502(a)(2), 29 U.S.C. § 1132(a)(2) and ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3).

330. Pursuant to ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), Plaintiffs seek an order requiring Ascension Health to contribute additional funding to the Wheaton Franciscan Plan, as required by ERISA section 302, 29 U.S.C. §§ 1052, to cover the additional Plan liabilities resulting from the additional benefits owed to participants who received a distribution amount that was less than it should have been because the Plan did not use an 8% interest rate to determine their monthly benefit of equivalent value.

COUNT VI
(Claim for Violation of Reporting and Disclosure Provisions Against the Current and Former Plan Sponsors and Administrators)

331. Plaintiffs incorporate and re-allege by reference the foregoing paragraphs as if fully set forth herein.

1. Summary Plan Descriptions

332. At no time have the current or former Plan administrators provided Plaintiffs or any member of the Class with a Summary Plan Description with respect to the Wheaton Franciscan Plan that meets the requirements of ERISA section 102, 29 U.S.C. § 1022, and the regulations promulgated thereunder.

333. Because on information and belief the Wheaton Franciscan Operations Committee was the Plan Administrator of the Plan from 1983 until February 29, 2016, it violated ERISA section 104, 29 U.S.C. § 1024, by failing to provide Plaintiffs and members of the Class with adequate Summary Plan Descriptions.

334. Because the Ascension Health Pension Committee was the Plan Administrator of the Plan from March 1, 2016 to the present, it violated ERISA section 104, 29 U.S.C. § 1024, by failing to provide Plaintiffs and members of the Class with adequate Summary Plan Descriptions.

2. Annual Reports

335. At no time have the current or former Plan administrators filed an annual report with respect to the Wheaton Franciscan Plan with the Secretary of Labor in compliance with ERISA section 103, 29 U.S.C. § 1023, nor have they filed a Form 5500 and associated schedules and attachments, which the Secretary has approved as an alternative method of compliance with ERISA section 103, 29 U.S.C. § 1023.

336. Because on information and belief the Wheaton Franciscan Operations Committee was the Plan Administrator of the Plan from 1983 until February 29, 2016, Wheaton Franciscan violated ERISA section 104(a), 29 U.S.C. § 1024(a), by failing to file annual reports with respect to the Wheaton Franciscan Plan with the Secretary of Labor in compliance with ERISA section 103, 29 U.S.C. § 1023, or Form 5500s and associated schedules and attachments,

which the Secretary has approved as an alternate method of compliance with ERISA section 103, 29 U.S.C. § 1023.

337. Because the Ascension Health Pension Committee was the Plan Administrator of the Plan from March 1, 2016 to the present, the Ascension Health Pension Committee has violated ERISA section 104(a), 29 U.S.C. § 1024(a), by failing to file annual reports with respect to the Wheaton Franciscan Plan with the Secretary of Labor in compliance with ERISA section 103, 29 U.S.C. § 1023, or Form 5500s and associated schedules and attachments, which the Secretary has approved as an alternate method of compliance with ERISA section 103, 29 U.S.C. § 1023.

3. Summary Annual Reports

338. At no time have the current or former Plan administrators furnished Plaintiffs or any member of the Class with Summary Annual Reports with respect to the Wheaton Franciscan Plan in compliance with ERISA section 104(b)(3) and regulations promulgated thereunder. 29 U.S.C. § 1024(b)(3).

339. Because on information and belief the Wheaton Franciscan Operations Committee was the Plan Administrator of the Plan from 1983 until February 29, 2016, the Wheaton Franciscan Operations Committee has violated ERISA section 104(b)(3), 29 U.S.C. § 1024(b)(3), by failing to furnish Plaintiffs or any member of the Class with Summary Annual Reports with respect to the Wheaton Franciscan Plan in compliance with ERISA section 104(b)(3) and the regulations promulgated thereunder. 29 U.S.C. § 1024(b)(3).

340. Because the Ascension Health Pension Committee was the Plan Administrator of the Plan from March 1, 2016 to the present, the Ascension Health Pension Committee has violated ERISA section 104(b)(3), 29 U.S.C. § 1024(b)(3), by failing to furnish Plaintiffs or any member of the Class with Summary Annual Reports with respect to the Wheaton Franciscan

Plan in compliance with ERISA section 104(b)(3) and the regulations promulgated thereunder. 29 U.S.C. § 1024(b)(3).

4. Notification of Failure to Meet Minimum Funding

341. At no time have the current or former Plan administrators furnished Plaintiffs or any member of the Class with Notices with respect to the Wheaton Franciscan Plan pursuant to ERISA section 101(d)(1), 29 U.S.C. § 1021(d)(1), informing them that the Plan sponsor had failed to make payments required to comply with ERISA section 302, 29 U.S.C. § 1082, with respect to the Wheaton Franciscan Plan.

342. From 1983 until February 29, 2016, Defendant Wheaton Franciscan was the employer that established and/or maintained the Wheaton Franciscan Plan.

343. From March 1, 2016 to the present, Defendant Ascension Health has been the employer that established and/or maintained the Wheaton Franciscan Plan.

344. At no time have the Defendants Wheaton Franciscan or Ascension Health funded the Wheaton Franciscan Plan in accordance with ERISA section 302, 29 U.S.C. § 1082.

345. As the employer maintaining the Wheaton Franciscan Plan from 1983 until February 29, 2016, Defendant Wheaton Franciscan has violated ERISA section 302, 29 U.S.C. § 1082, by failing to fund the Wheaton Franciscan Plan. Wheaton Franciscan is liable for its own violations of ERISA section 101(d)(1), 29 U.S.C. § 1021(d)(1), and as such may be required by the Court to pay Plaintiffs and each class member up to $110 per day (as permitted by 29 C.F.R. § 2575.502(c)(3)) for each day that Defendant Wheaton Franciscan failed to provide Plaintiffs and each Class member with the notice required by ERISA section 101(d)(1), 29 U.S.C. § 1021(d)(1).

346. As the employer maintaining the Wheaton Franciscan Plan from March 1, 2016 through the present, Defendant Ascension Health has violated ERISA section 302, 29 U.S.C. §

1082, by failing to fund the Wheaton Franciscan Plan. Ascension Health is liable for its own violations of ERISA section 101(d)(1), 29 U.S.C. § 1021(d)(1), and as such may be required by the Court to pay Plaintiffs and each class member up to $110 per day (as permitted by 29 C.F.R. § 2575.502(c)(3)) for each day that Defendant Ascension Health failed to provide Plaintiffs and each Class member with the notice required by ERISA section 101(d)(1), 29 U.S.C. § 1021(d)(1).

5. Funding Notices

347. At no time has the current or former Plan administrator furnished Plaintiffs or any member of the Class with a Funding Notice with respect to the Wheaton Franciscan Plan pursuant to ERISA section 101(f), 29 U.S.C. § 1021(f).

348. Because on information and belief the Wheaton Franciscan Operations Committee was the Plan Administrator of the Plan from 1983 until February 29, 2016, the Wheaton Franciscan Operations Committee has violated ERISA section 101(f) by failing to provide each participant and beneficiary of the Wheaton Franciscan Plan with the Funding Notice required by ERISA section 101(f), and as such may be required by the Court to pay Plaintiffs and each Class member up to $110 per day (as permitted by ERISA section 502(c)(1), 29 U.S.C. § 1132(c)(1), amended by 29 C.F.R. § 2575.502c-1) for each day that Defendant has failed to provide Plaintiffs and each Class member with the notice required by ERISA section 101(f), 29 U.S.C. § 1021(f).

349. Because the Ascension Health Pension Committee was the Plan Administrator of the Plan from March 1, 2016 to the present, the Ascension Health Pension Committee has violated ERISA section 101(f) by failing to provide each participant and beneficiary of the Wheaton Franciscan Plan with the Funding Notice required by ERISA section 101(f), and as such may be required by the Court to pay Plaintiffs and each Class member up to $110 per day

(as permitted by ERISA section 502(c)(1), 29 U.S.C. § 1132(c)(1), amended by 29 C.F.R. § 2575.502c-1) for each day that Defendant has failed to provide Plaintiffs and each Class member with the notice required by ERISA section 101(f), 29 U.S.C. § 1021(f).

6. Pension Benefit Statements

350. At no time has the current or former Plan administrator furnished Plaintiffs or any member of the Class with a Pension Benefit Statement with respect to the Wheaton Franciscan Plan pursuant to ERISA section 105(a)(1), 29 U.S.C. § 1025(a)(1).

351. Because on information and belief the Wheaton Franciscan Operations Committee was the Plan Administrator of the Plan from 1983 until February 29, 2016, the Wheaton Franciscan Operations Committee has violated ERISA section 105(a)(1) and as such may be required by the Court to pay Plaintiffs and each Class member up to $110 per day (as permitted by ERISA section 502(c)(1), 29 U.S.C. § 1132(c)(1), amended by 29 C.F.R. § 2575.502c-1) for each day that Defendant has failed to provide Plaintiffs and each Class member with the Pension Benefit Statements required by ERISA § 105(a)(1), 29 U.S.C. § 1025(a)(1).

352. Because the Ascension Health Pension Committee was the Plan Administrator of the Plan from March 1, 2016 to the present, the Ascension Health Pension Committee has violated ERISA section 105(a)(1) and as such may be required by the Court to pay Plaintiffs and each Class member up to $110 per day (as permitted by ERISA section 502(c)(1), 29 U.S.C. § 1132(c)(1), amended by 29 C.F.R. § 2575.502c-1) for each day that Defendant has failed to provide Plaintiffs and each Class member with the Pension Benefit Statements required by ERISA § 105(a)(1), 29 U.S.C. § 1025(a)(1).

COUNT VII
(Claim for Failure to Provide Minimum Funding Against Defendants Wheaton Franciscan Services Inc. and Ascension Health)

353. Plaintiffs incorporate and re-allege by reference to the foregoing paragraphs as if fully set forth herein.

354. ERISA section 302, 29 U.S.C. § 1082, establishes minimum funding standards for defined benefit plans that require employers to make minimum contributions to their plans so that each plan will have assets available to fund plan benefits if the employer maintaining the plan is unable to pay benefits out of its general assets.

355. Until February 29, 2016, Wheaton Franciscan was responsible for making the contributions that should have been made pursuant to ERISA section 302, 29 U.S.C. § 1082, at a level commensurate with that which would be required under ERISA.

356. Since March 1, 2016, Ascension Health has been responsible for making the contributions that should have been made pursuant to ERISA section 302, 29 U.S.C. § 1082, at a level commensurate with that which would be required under ERISA.

357. At all relevant times, Wheaton Franciscan and Ascension Health have failed to make contributions in satisfaction of the minimum funding standards of ERISA section 302, 29 U.S.C. § 1082.

358. By failing to make the required contributions to the Wheaton Franciscan Plan, either in whole or in partial satisfaction of the minimum funding requirements established by ERISA section 302, Defendants Wheaton Franciscan and Ascension Health have violated ERISA section 302, 29 U.S.C. § 1082.

COUNT VIII
(Claim for Failure to Establish the Plan Pursuant to a Written Instrument Meeting the Requirements of ERISA Section 402 Against Defendants Wheaton Franciscan Services Inc. and Ascension Health)

359. Plaintiffs incorporate and re-allege by reference to the foregoing paragraphs as if fully set forth herein.

360. ERISA section 402, 29 U.S.C. § 1102, provides that every plan will be established pursuant to a written instrument which will provide, among other things, "for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan" and will "provide a procedure for establishing and carrying out a funding policy and method constituent with the objectives of the plan and the requirements of [Title I of ERISA]."

361. Upon information and belief, although the benefits provided by the Wheaton Franciscan Plan were described to Plan participants in various written communications, the Wheaton Franciscan Plan has never been established pursuant to a written instrument meeting the requirements of ERISA section 402, 29 U.S.C. § 1102.

362. Defendants Wheaton Franciscan and Ascension Health violated section 402 by failing to promulgate written instruments in compliance with ERISA section 402 to govern the Wheaton Franciscan Plan's operations and administration. 29 U.S.C. § 1102.

COUNT IX
(Claim for Failure to Establish a Trust Meeting the Requirements of ERISA Section 403 Against Defendants Wheaton Franciscan and Ascension Health)

363. Plaintiffs incorporate and re-allege by reference to the foregoing paragraphs as if fully set forth herein.

364. ERISA section 403, 29 U.S.C. § 1103, provides, subject to certain exceptions not applicable here, that all assets of an employee benefit plan shall be held in trust by one or more

trustees, that the trustees shall be either named in the trust instrument or in the plan instrument described in section 402(a), 29 U.S.C. § 1102(a), or appointed by a person who is a named fiduciary.

365. Although the Wheaton Franciscan Plan's assets have been held in trust, the trust does not meet and has never met the requirements of ERISA section 403, 29 U.S.C. § 1103.

366. Defendants Wheaton Franciscan and Ascension Health violated section 403 by failing to put the Wheaton Franciscan Plan's assets in trust in compliance with ERISA section 403, 29 U.S.C. § 1103.

COUNT X

(Claim for Clarification of Future Benefits Under ERISA Sections 502(a)(1)(B) and 502(a)(3) Against Defendant Ascension Health and Ascension Health Pension Committee)

367. Plaintiffs incorporate and re-allege by reference to the foregoing paragraphs as if fully set forth herein.

368. ERISA section 502(a)(1)(B), 29 U.S.C. § 1102(a)(1)(B), provides, in part, that a participant or beneficiary may bring a civil action to "clarify his rights to future benefits under the terms of the plan."

369. Plaintiffs and members of the class have not been provided ERISA-compliant benefit statements.

370. Pursuant to ERISA sections 502(a)(1)(B) and 502(a)(3), 29 U.S.C. §§ 1132(a)(1)(B), 1132(a)(3), once the Plan are made compliant with ERISA, Plaintiffs seek to clarify their rights under the terms of the Plan and to require Defendants Ascension Health and Ascension Health Pension Committee to provide Plaintiffs and the Class with ERISA-compliant benefit statements.

COUNT XI
(Claim for Civil Money Penalties Pursuant to ERISA Section 502(a)(1)(A) Against Defendants Wheaton Franciscan and Ascension Health)

371. Plaintiffs incorporate and re-allege by reference to the foregoing paragraphs as if fully set forth herein.

372. ERISA section 502(a)(1)(A), 29 U.S.C. § 1132(a)(1)(A), provides that a participant may bring a civil action for the relief provided in ERISA section 502(c), 29 U.S.C. § 1132(c).

373. ERISA section 502(c)(3), 29 U.S.C. § 1132(c)(3), as provided in 29 C.F.R. § 2575.502c-3, provides that an employer maintaining a plan who fails to meet the notice requirement of ERISA section 101(d), 29 U.S.C. § 1021(d), with respect to any participant and beneficiary may be liable for up to $110 per day from the date of such failure.

374. ERISA section 502(c)(3), 29 U.S.C. § 1132(c)(3), as provided in 29 C.F.R. § 2575.502c-3, provides that an administrator of a defined benefit pension plan who fails to meet the notice requirement of ERISA section 101(f), 29 U.S.C. § 1021(f), with respect to any participant and beneficiary may be liable for up to $110 per day from the date of such failure.

375. ERISA section 502(c)(3), 29 U.S.C. § 1132(c)(3), as provided in 29 C.F.R. § 2575.502c-3, provides that an administrator of a defined benefit pension plan who fails to provide a Pension Benefit Statement at least once every three years to a participant with a nonforfeitable accrued benefit who is employed by the employer maintaining the plan at the time the statement is to be furnished as required by ERISA section 105(a), 29 U.S.C. § 1025(a), may be liable for up to $110 per day from the date of such failure.

376. Because Defendants Wheaton Franciscan and Ascension Health, as the employer, have failed to give the notices required by ERISA section 101(d), 29 U.S.C. § 1021(d), as set forth in Count IV Subpart D, Defendants Wheaton Franciscan and Ascension Health are liable to

Plaintiffs and each member of the Class in an amount up to $110 per day from the date of such failures until such time that notices are given and the statement is provided, as the Court, in its discretion, may order.

377. Because Defendants Wheaton Franciscan Operations Committee and Ascension Health Pension Committee, as Plan Administrators of the Plan, have failed to give the notices required by ERISA section 101(f), 29 U.S.C. § 1021 (f), and the Pension Benefit Statements required by ERISA section 105(a), 29 U.S.C. § 1025(a), as set forth in Count VI, Defendants Wheaton Franciscan Operations Committee and Ascension Health Pension Committee are liable to the Plaintiffs and each member of the Class in an amount up to $110 per day from the date of such failures until such time that notices are given and the statements are provided, as the Court, in its discretion, may order.

COUNT XII

(Claim for Breach of Fiduciary Duty Against All Defendants)

378. Plaintiffs incorporate and re-allege by reference to the foregoing paragraphs as if fully set forth herein.

379. Plaintiffs bring this Count XII for breach of fiduciary duty pursuant to ERISA section 502(a)(2), 29 U.S.C. § 1132(a)(2).

1. Breach of the Duty of Prudence and Loyalty

380. This sub-Count alleges fiduciary breach against all Defendants.

381. ERISA section 404(a)(1), 29 U.S.C. § 1104(a)(1), provides in pertinent part that a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –

a) for the exclusive purpose of:

(i) providing benefits to participants and beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(b) with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims . . . [and]

(c) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this [title I of ERISA] and title IV.

382. As fiduciaries with respect to the Wheaton Franciscan Plan, Defendants had the authority to enforce each provision of ERISA alleged to have been violated in the foregoing paragraphs pursuant to ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3). Having the authority to enforce the provisions of ERISA at those respective times, ERISA sections 404(a)(1)(A)-(D), 29 U.S.C. §§ 1104(a)(1)(A)-(D), imposed on Defendant the respective duty to enforce those provisions in the interest of the participants and beneficiaries of the Wheaton Franciscan Plan during the times that each was a fiduciary of the Wheaton Franciscan Plan.

383. Defendants have never enforced any of the provisions of ERISA set forth in Counts I-IX with respect to the Wheaton Franciscan Plan.

384. By failing to enforce the provisions of ERISA set forth in Counts I-IX, Defendants breached the fiduciary duties that they owed to Plaintiffs and the Class.

385. The failure of Defendants to enforce the funding obligations owed to the Plan has resulted in a loss to the Wheaton Franciscan Plan equal to the foregone funding and earnings thereon, and has profited Defendants Wheaton Franciscan, Ascension Health, and Ascension Health Alliance, by providing them the use of the money owed to the Wheaton Franciscan Plan for their general business purposes.

2. Prohibited Transactions

386. This sub-Count alleges violations on behalf of all Defendants.

387. ERISA section 406(a)(1)(B), 29 U.S.C. § 1106(a)(1)(B), prohibits a fiduciary with respect to a plan from directly or indirectly causing a plan to extend credit to a party in interest, as defined in ERISA section 3(14), 29 U.S.C. § 1002(14), if he or she knows or should know that such transaction constitutes an extension of credit to a party in interest.

388. ERISA section 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D), prohibits a fiduciary with respect to a plan from directly or indirectly causing a plan to use assets for the benefit of a party in interest if he or she knows or should know that such transaction constitutes a use of plan assets for the benefit of a party in interest.

389. ERISA section 406(b)(1), 29 U.S.C. § 1106(b)(1), prohibits the use of plan assets by a fiduciary with respect to a plan for his or her own interest or for his or her own account.

390. As fiduciaries with respect to the Plan and, with respect to Wheaton Franciscan and Ascension Health, as an employer of employees covered by the Plan, the Defendants at all relevant times were parties in interest with respect to the Wheaton Franciscan Plan pursuant to ERISA sections 3(14)(A) and (C), 29 U.S.C. §§ 1002(14)(A) and (C).

391. By failing to enforce the funding obligations created by ERISA and owed to the Plan, Defendants extended credit from the Wheaton Franciscan Plan to Wheaton Franciscan and Ascension Health in violation of ERISA section 406(a)(1)(B), 29 U.S.C. § 1106(a)(1)(B), when Defendants knew or should have known that their failure to enforce the funding obligation constituted such an extension of credit.

392. By failing to enforce the funding obligations created by ERISA and owed to the Wheaton Franciscan Plan, Defendants used the Wheaton Franciscan Plan's assets for Wheaton Franciscan and Ascension Health's own benefit, when Defendants knew or should have known

that their failure to enforce the funding obligations constituted such a use of Wheaton Franciscan Plan's assets, in violation of ERISA section 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D).

393. By failing to enforce the funding obligations created by ERISA and owed to the Wheaton Franciscan Plan, Defendants used the Wheaton Franciscan Plan's assets in Wheaton Franciscan, Ascension Health, and Ascension Health Alliance's interests in violation of ERISA section 406(b)(1), 29 U.S.C. § 1106(b)(1).

394. The failure of Defendants to enforce the funding obligations owed to the Wheaton Franciscan Plan has resulted in a loss to the Wheaton Franciscan Plan equal to the foregone funding and earnings thereon.

395. The failure of Defendants to enforce the funding obligations owed to the Wheaton Franciscan Plan has profited Defendants Wheaton Franciscan, Ascension Health, and Ascension Health Alliance by providing them the use of money owed to the Wheaton Franciscan Plan for their general business purposes.

3. Failure to Monitor Fiduciaries

396. This sub-Count alleges fiduciary breach against Defendant Wheaton Franciscan, and Ascension Health.

397. As alleged above, during the Class Period, Defendant Wheaton Franciscan and Ascension Health were named fiduciaries pursuant to ERISA section 402(a)(1), 29 U.S.C. § 1102(a)(1), or de facto fiduciaries within the meaning of ERISA section 3(21)(A), 29 U.S.C. § 1002(21)(A), or both. Thus, they were bound by the duties of loyalty, exclusive purpose, and prudence.

398. The scope of the fiduciary responsibilities of Wheaton Franciscan and Ascension Health included the responsibility to appoint, and remove, and thus, monitor the performance of other fiduciaries.

399. Under ERISA, a monitoring fiduciary must ensure that the monitored fiduciaries perform their fiduciary obligations, including those with respect to the investment and holding of plan assets, and must take prompt and effective action to protect the plan and participants when they are not.

400. The monitoring duty further requires that appointing fiduciaries have procedures in place so that they may review and evaluate, on an ongoing basis, whether the "hands-on" fiduciaries are doing an adequate job (for example, by requiring periodic reports on their work and the plan's performance, and by ensuring that they have a prudent process for obtaining the information and resources they need). In the absence of a sensible process for monitoring their appointees, the appointing fiduciaries would have no basis for prudently concluding that their appointees were faithfully and effectively performing their obligations to plan participants or for deciding whether to retain or remove them.

401. Furthermore, a monitoring fiduciary must provide the monitored fiduciaries with the complete and accurate information in their possession that they know or reasonably should know that the monitored fiduciaries must have in order to prudently manage the plan and the plan assets, or that may have an extreme impact on the plan and the fiduciaries' investment decisions regarding the plan.

402. Defendants Wheaton Franciscan, Ascension Health, and Ascension Health Alliance breached their fiduciary monitoring duties by, among other things: (a) failing to appoint persons who would run the Plan as an ERISA plan; (b) failing to ensure that the monitored fiduciaries appreciated the true extent of not running the Plan as an ERISA Plan; (c) to the extent any appointee lacked such information, failing to provide complete and accurate information to all of their appointees such that they could make sufficiently informed fiduciary

decisions with respect to the Plan; and (d) failing to remove appointees whose performance was inadequate in that they continued to run the Plan as a non-ERISA Plan, and who breached their fiduciary duties under ERISA.

403. The failure of Defendants to enforce the funding obligations owed to the Plan has resulted in a loss to the Wheaton Franciscan Plan equal to the foregone funding and earnings thereon, and profited Defendants Wheaton Franciscan, Ascension Health, and Ascension Health Alliance by providing them the use of money owed to the Wheaton Franciscan Plan for their general business purposes.

4. Co-Fiduciary Liability

404. This sub-Count alleges co-fiduciary liability against all Defendants.

405. As alleged above, all Defendants were named fiduciaries pursuant to ERISA section 402(a)(1), 29 U.S.C. § 1102(a)(1), or de facto fiduciaries within the meaning of ERISA section 3(21)(A), 29 U.S.C. § 1002(21)(A), or both. Thus, they were bound by the duties of loyalty, exclusive purpose, and prudence.

406. ERISA section 405(a), 29 U.S.C. § 1105, imposes liability on a fiduciary, in addition to any liability which he may have under any other provision, for a breach of fiduciary responsibility of another fiduciary with respect to the same plan if he knows of a breach and fails to remedy it, knowingly participates in a breach, or enables a breach. Defendants breached all three provisions.

407. **Knowledge of a Breach and Failure to Remedy.** ERISA section 405(a)(3), 29 U.S.C. § 1105(a)(3), imposes co-fiduciary liability on a fiduciary for a fiduciary breach by another fiduciary if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach. Each of the Defendants knew

of the breaches by the other fiduciaries and made no efforts, much less reasonable ones, to remedy those breaches.

408. Because Defendants knew that the Plan was not being run as an ERISA Plan, Defendants knew that the other Defendants were breaching their duties by not complying with ERISA. Yet, they failed to undertake any effort to remedy these breaches.

409. **Knowing Participation in a Breach.** ERISA section 405(a)(1), 29 U.S.C. § 1105(a)(1), imposes liability on a fiduciary for a breach of fiduciary responsibility by another fiduciary with respect to the same plan if he knowingly participates in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach. Wheaton Franciscan, Ascension Health, and Ascension Health Alliance knowingly participated in the fiduciary breaches of the other Defendants in that they benefited from the Plan not being run as an ERISA Plan.

410. **Enabling a Breach.** ERISA section 405(a)(2), 29 U.S.C. § 1105(a)(2), imposes liability on a fiduciary if, by failing to comply with ERISA section 404(a)(1), 29 U.S.C. §1104(a)(1), in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled another fiduciary to commit a breach.

411. The failure of Defendants Wheaton Franciscan, Ascension Health, and Ascension Health Alliance to monitor the Individual Defendants enabled those Individual Defendants to breach their duties.

412. As a direct and proximate result of the breaches of fiduciary duties alleged herein, the Plan is currently underfunded, meaning that the Plan does not have sufficient assets to pay all accrued benefits it has promised to its participants and beneficiaries and is legally obligated to pay under ERISA.

413. The failure of Defendants to enforce the funding obligations owed to the Plan has resulted in a loss to the Wheaton Franciscan Plan equal to the foregone funding and earnings thereon, and profited Defendants Wheaton Franciscan, Ascension Health, and Ascension Health Alliance by providing them the use of money owed to the Wheaton Franciscan Plan for their general business purposes.

COUNT XIII
(Claim for Declaratory Relief That the Church Plan Exemption Violates the Establishment Clause of the First Amendment of the Constitution, and Is Therefore Void and Ineffective)

414. Plaintiffs incorporate and re-allege by reference to the foregoing paragraphs as if fully set forth herein.

415. The ERISA Church Plan exemption is an accommodation that exempts churches and associations of churches, under certain circumstances, from compliance with ERISA.

416. The ERISA Church Plan exemption, as claimed by Wheaton Franciscan and Ascension Health, is an attempt to extend the accommodation beyond churches and associations of churches, to Wheaton Franciscan and Ascension Health—non-profit hospital conglomerates that have chosen to compete with commercial businesses, including other non-profits as well as for-profits, by entering the economic arena and trafficking in the marketplace. Extension of the Church Plan exemption to Wheaton Franciscan and Ascension Health violates the Establishment Clause because it (A) is not necessary to further the stated purposes of the exemption, (B) harms Wheaton Franciscan and Ascension Health workers, (C) puts Wheaton Franciscan and Ascension Health competitors at an economic disadvantage, (D) relieves Wheaton Franciscan and Ascension Health of no genuine religious burden created by ERISA, and (E) creates more government entanglement with alleged religious beliefs than compliance with ERISA creates.

A. **Not Necessary to Further Stated Purpose.** Congress enacted the Church Plan exemption to avoid "examination of books and records . . . an unjustified invasion of

the confidential relationship with regard to churches and their religious activities."[3] This purpose has no application to Wheaton Franciscan and Ascension Health, which are neither run by nor intimately connected to any church financially. And, unlike a church, Wheaton Franciscan and Ascension Health have *no confidential books and records* to shield from government scrutiny. Wheaton Franciscan and Ascension Health already purport to disclose all material financial records and relationships when they seek Medicare and Medicaid reimbursements and issues tax exempt bonds.

B. **Harms Workers.** Employers, including Wheaton Franciscan and Ascension Health, are not legally required to provide pensions; instead, they choose to provide pensions in order to reap tax rewards and attract and retain employees in a competitive labor market. Wheaton Franciscan and Ascension Health tell prospective employees that any choice of faith, or lack thereof, is not a factor in the recruiting and hiring of Wheaton Franciscan and Ascension Health employees. Thus, as a practical matter, and by Wheaton Franciscan and Ascension Health's own design, their pension plan participants include people of a vast number of divergent faiths, as well as those who belong to no faith. In choosing to recruit and hire from the public at large, Wheaton Franciscan and Ascension Health must be willing to accept neutral regulations, such as ERISA, imposed to protect those employees' legitimate interests. To be constitutional, an accommodation such as the Church Plan exemption must not impose burdens on non-adherents without due consideration of their interests. The Church Plan exemption, as claimed by Wheaton Franciscan and Ascension Health, places its tens of thousands of longtime employees' justified reliance on their pension benefits at great risk, including

[3] S. Rep. No. 93-383 (1972), *reprinted in* 1974 U.S.C.C.A.N. 4889, 4965.

because the Plan is uninsured and, upon information and belief, underfunded. In addition, Wheaton Franciscan and Ascension Health fail to provide the multitude of other ERISA protections designed to safeguard their employees' pensions. The Church Plan exemption, as claimed by Wheaton Franciscan and Ascension Health, provides no consideration of the harm that it causes to Wheaton Franciscan and Ascension Health's employees.

C. **Puts Wheaton Franciscan and Ascension Health's Competitors at an Economic Disadvantage.** Wheaton Franciscan and Ascension Health's commercial rivals face material disadvantages in their competition with Wheaton Franciscan and Ascension Health because the rivals must use their current assets to fully fund, insure (through premiums to the PBGC), and administer their pension plans, as well as providing other ERISA protections. In claiming that the Wheaton Franciscan Plan is an exempt Church Plan, Wheaton Franciscan and Ascension Health enjoy a material competitive advantage because they are able to divert significant cash, which otherwise would be required to fund, insure (through premiums to the PBGC), and administer the Wheaton Franciscan Plan, to their competitive growth strategy. To be constitutional, an accommodation such as the Church Plan exemption must take adequate account of harm to nonbeneficiaries. The Church Plan exemption, as applied by Wheaton Franciscan and Ascension Health, provides no consideration of the disadvantage it creates for Wheaton Franciscan and Ascension Health's competitors.

D. **Relieves No Genuine Religious Burden Imposed by ERISA.** An exemption exclusively for religion must alleviate a significant, *state-imposed* interference with religious exercise. The Church Plan exemption, as claimed by Wheaton Franciscan

and Ascension Health, responds to no genuine burden created by ERISA on any of Wheaton Franciscan and Ascension Health's religious practices. ERISA is materially indistinguishable from the array of neutral Congressional enactments that do not significantly burden religious exercise when applied to commercial activities. Moreover, Wheaton Franciscan and Ascension Health maintain multiple separate ERISA-governed plans, which further evidences that ERISA creates no undue burden on any genuine religious practice of Wheaton Franciscan and Ascension Health.

E. **Creates Government Entanglement with Alleged Religious Beliefs.** A Wheaton Franciscan/Ascension Health 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 claiming responsibility for the pensions. This *creates* entanglement between government and putative religious beliefs. ERISA compliance, on the other hand, requires zero entanglement with religion for Wheaton Franciscan and Ascension Health because ERISA is a neutral statute that regulates pension protections and Wheaton Franciscan and Ascension Health have no relevant confidential books, records or relationships. Thus, an extension of the Church Plan exemption to Wheaton Franciscan and Ascension Health produces state entanglement with alleged religious beliefs while compliance with ERISA creates no meaningful state entanglement with alleged religious beliefs.

417. Plaintiffs seek a declaration by the Court that the Church Plan exemption, as claimed by Wheaton Franciscan and Ascension Health, is an unconstitutional accommodation under the Establishment Clause of the First Amendment, and is therefore void and ineffective.

VIII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that judgment be entered against the Defendants on all claims and request that the Court award the following relief:

A. Declaring that the Wheaton Franciscan Plan is an employee pension benefit plan within the meaning of ERISA section 3(2), 29 U.S.C. § 1002(2), a defined benefit pension plan within the meaning of ERISA section 3(35), 29 U.S.C. § 1002(35), and not a Church Plan within the definition of ERISA section 3(33), 29 U.S.C. § 1002(33).

B. Ordering Ascension Health to reform the Wheaton Franciscan Plan to bring it into compliance with ERISA and to have the Wheaton Franciscan Plan comply with ERISA, including as follows:

1. Revising the Plan's documents to reflect that the Plan is a defined benefit plan regulated by ERISA;

2. Requiring Ascension Health to fund the Wheaton Franciscan Plan in accordance with ERISA's funding requirements, disclose required information to the Wheaton Franciscan Plan's participants, and beneficiaries, and otherwise comply with all other reporting, vesting, and funding requirements of Parts 1, 2 and 3 of Title I of ERISA, 29 U.S.C. §§ 1021-31, 1051-61, 1081-85;

3. Reforming the Wheaton Franciscan Plan to comply with ERISA's vesting and accrual requirements and providing benefits in the form of a qualified joint and survivor annuity;

4. Requiring the adoption of instruments governing the Wheaton Franciscan Plan that comply with ERISA section 402, 29 U.S.C. § 1102;

5. Requiring Ascension Health and the Ascension Pension Committee to comply with ERISA reporting and disclosure requirements, including by filing Form

5500 reports, distributing ERISA-compliant Summary Plan Descriptions, Summary Annual Reports, and ERISA-compliant Participant Benefit Statements, and providing Notices of the Wheaton Franciscan Plan's funding status and deficiencies;

6. Requiring clarification of rights to future benefits pursuant to ERISA section 502(a)(1)(B), 29 U.S.C. § 1102(a)(1)(B);

7. Requiring the establishment of a trust in compliance with ERISA section 403, 29 U.S.C. § 1103;

8. Requiring Defendants, as fiduciaries of the Plans, to make the Wheaton Franciscan Plan whole for any losses and disgorge any profits Wheaton Franciscan and Ascension Health accumulated as a result of fiduciary breaches;

9. Appointing an Independent Fiduciary to hold the Wheaton Franciscan Plan's assets in trust, to manage and administer the Wheaton Franciscan Plan and its assets, and to enforce the terms of ERISA;

10. Requiring Wheaton Franciscan Services Inc., Ascension Health and the Administrator Defendants to pay civil money penalties of up to $110 per day to Plaintiffs and each Class member for each day they failed to inform Plaintiffs and each Class member of their failure to properly fund the Plan;

11. Requiring Wheaton Franciscan and Ascension Health to pay civil money penalties of up to $110 per day to Plaintiffs and each Class member for each day they failed to provide Plaintiffs and each Class member with a Funding Notice; and

12. Requiring Wheaton Franciscan and Ascension Health to pay civil money penalties of up to $110 per day to Plaintiffs and each Class member for each day they

failed to provide a benefit statement under ERISA section 105(a)(1)(B), 29 U.S.C. § 1025(a)(1)(B).

C. Ordering declaratory and injunctive relief as necessary and appropriate, including enjoining the Defendants from further violating the duties, responsibilities, and obligations imposed on them by ERISA with respect to the Wheaton Franciscan Plan;

D. Declaring, with respect to Count XIII, that the Church Plan exemption, as claimed by Wheaton Franciscan and Ascension Health, is an unconstitutional accommodation under the Establishment Clause of the First Amendment, and is therefore void and ineffective;

E. Awarding to Plaintiffs attorneys' fees and expenses as provided by the common fund doctrine, ERISA section 502(g), 29 U.S.C. § 1132(g), and/or other applicable doctrine;

F. Awarding to Plaintiffs taxable costs pursuant to ERISA section 502(g), 29 U.S.C. § 1132(g), 28 U.S.C. § 1920, and other applicable law;

G. Awarding to Plaintiffs pre-judgment interest on any amounts awarded pursuant to law; and

H. Awarding, declaring or otherwise providing Plaintiffs and the Class all relief under ERISA section 502(a), 29 U.S.C. § 1132(a), or any other applicable law, that the Court deems proper.

DATED this 28th day of June, 2016.

/s/ Carol V. Gilden

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