UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(BALTIMORE DIVISION)

ARLENE HODGES,
8003 Belton Circle
Mechanicsville, Virginia 23116,
on behalf of herself, individually, and on behalf of all others similarly situated, and on behalf of the BON SECOURS Plan,

CAROLYN MILLER,
1333 North Woodyear Street
Baltimore, Maryland 21217,
on behalf of herself, individually, and on behalf of all others similarly situated, and on behalf of the BON SECOURS Plan,

GARY T. BROWN,
908 Bold Street
Portsmouth, Virginia 23701,
on behalf of himself, individually, and on behalf of all others similarly situated, and on behalf of the BON SECOURS Plan,

Plaintiffs,

v.

BON SECOURS HEALTH SYSTEM, INC., a Maryland Non-profit Corporation, BON SECOURS, INC., a Maryland Non-profit Corporation, The BENEFIT PLAN ADMINISTRATIVE COMMITTEE, *all located at* 1505 Marriottsville Road Marriottsville, MD 21104-Howard County, JOHN and JANE DOES 1-20, members of the Benefit Plan Administrative Committee, each an individual, and JOHN and JANE DOES 21-40, each an individual,

Defendants.

Civil No. 1:16-cv-01079-RDB

SECOND CONSOLIDATED AMENDED CLASS ACTION COMPLAINT

CLAIM OF UNCONSTITUTIONALITY

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Plaintiffs Arlene Hodges, Carolyn Miller and Gary T. Brown, individually, on behalf of all those similarly situated, and on behalf of the Bon Secours Plans (as defined herein), by and through their attorneys and upon information and belief, hereby allege as follows:

I. INTRODUCTION

1. Defendant Bon Secours Health Systems, Inc., by and through its subsidiaries and/or affiliates ("Bon Secours"), operates a healthcare conglomerate in six states and provides healthcare services in the communities it serves. This case concerns whether Bon Secours properly maintains its pension plans under the Employee Retirement Income Security Act ("ERISA"). As demonstrated herein, Bon Secours fails to do so, to the detriment of its over 22,000 employees who deserve better.

2. 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).

3. This class action is brought on behalf of all participants and beneficiaries of seven Bon Secours Pension Plans that purport to be Church Plans, (collectively referred to as the "Bon Secours Plans" or simply the "Plans").[1]

[1] According to the 2014 Consolidated Financial Statements, Bon Secours administers eight pension plans for its employees, seven of which it claims are "church plans." *See* 2014 Consolidated Financial Statements at 33 ("Seven of the System's eight defined benefit plans are deemed church plans under the Internal Revenue Code."). Upon information and belief, the seven "church plans" are: Employee's Retirement Plan of Bon Secours, Baltimore, Health Corporation, Inc.; St. Frances Xavier Pension Plan;

4. The Bon Secours Plans are defined benefit pension plans that are established, maintained, administered, and sponsored by Bon Secours.

5. Bon Secours is violating numerous provisions of ERISA—including, on information and belief, underfunding and failing to insure the Bon Secours Plans—while erroneously claiming that the Plans are exempt from ERISA's protections because they are "Church Plans." But the Bon Secours Plans do not meet the definition of a Church Plan under ERISA for three distinct reasons. First, a Church Plan must be established by a church or a convention or association of churches. The Bon Secours Plans were established by Bon Secours, which is a healthcare system, not a church (or a convention or association of churches). *See Stapleton v. Advocate Health Care Network & Subsidiaries*, 817 F.3d 517 (7th Cir. 2016); *Rollins v. Dignity Health*, 830 F.3d 900, (9th Cir. 2016); *Kaplan v. Saint Peter's Healthcare Sys*., 810 F.3d 175 (3d Cir. 2015). That should be the end of the inquiry under ERISA, resulting in a clear finding that the Bon Secours Plans are not Church Plans.

6. Second, even if a non-church entity such as Bon Secours were able to establish its own Church Plans, the Bon Secours Plans still would not qualify as Church Plans because the statute requires that a Church Plan be *maintained* by either a church (or a convention or association of churches) or an entity controlled by or associated with a church whose *principal purpose or function* is the administration or

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Retirement Plan of Maryview Hospital; Employees Retirement Plan of St. Mary's Hospital; The Richmond Community Hospital Defined Benefit Pension Plan; Memorial Regional Medical Center Pension Plan; and the Retirement Plan of Bon Secours Hampton Roads. *See* http://www.pensionrights.org/sites/default/files/docs/listing_of_pbgc_church_plan_refunds_1991_-2005.pdf. Other public documents indicate that Bon Secours had at one time as many as eleven church plans. Accordingly, some plans may have merged and the names changed.

funding of a retirement plan. Bon Secours maintains the Plans. The principal purpose or function of Bon Secours is providing healthcare, not administering, or funding retirement benefits.

7. Third, even if the Plans were established and maintained by proper entities, the Plans still would not qualify as Church Plans because substantially all of the participants in the Plans are *not* employed by either a church or an organization that is controlled by or associated with a church within the meaning of ERISA. Bon Secours is not controlled by a church, as the evidence will show. Moreover, Bon Secours is not associated with a church within the meaning of ERISA because it does not, as ERISA requires, "share common religious bonds and convictions" with a church.

8. Bon Secours is a non-profit healthcare conglomerate, not unlike other non-profit healthcare conglomerates with which Bon Secours competes in its commercial healthcare activities. Bon Secours is not owned or operated by a church and does not receive funding from a church. No denominational requirement exists for Bon Secours employees. Indeed, Bon Secours tells prospective employees that any choice of faith, or lack thereof, is not a factor in the recruiting and hiring of Bon Secours employees. In choosing to recruit and hire from the population at large, Bon Secours must also be willing to accept neutral, generally applicable regulations, such as ERISA, imposed to protect those employees' legitimate interests.

9. If Bon Secours, a non-church organization, could itself establish and maintain a Church Plan, which Plaintiffs dispute, the Court would be required to evaluate many levels of evidence to determine whether Bon Secours shares common "religious bonds and convictions" with a church.

10. Moreover, even if the Court determined that the Bon Secours Plans fall within the scope of the Church Plan exemption, ERISA still would apply because application of the exemption to the Bon Secours Plans would be an unconstitutional accommodation under the Establishment Clause of the First

Amendment. Bon Secours claims, in effect, that the participants in its defined benefit pension plans must be exempted from ERISA protections, and Bon Secours must be relieved of its ERISA financial obligations, because Bon Secours claims certain religious beliefs. The Establishment Clause, however, does not allow such an economic preference for Bon Secours and burden-shifting to Bon Secours employees. Extension of the Church Plan exemption to Bon Secours would be unconstitutional under Supreme Court law because it: (A) is not necessary to further the stated purposes of the exemption; (B) harms Bon Secours workers; (C) puts Bon Secours's competitors at an economic disadvantage; (D) relieves Bon Secours of no genuine religious burden created by ERISA; and (E) creates more government entanglement with alleged religious beliefs than compliance with ERISA creates.

11. Bon Secours's claim of Church Plan status for its defined benefit pension plans fails under both ERISA and the First Amendment. Plaintiffs seek an Order requiring Bon Secours to comply with ERISA and afford the Class all of ERISA's protections, with respect to Bon Secours's defined benefit pension plans, as well as an Order finding that the Church Plan exemption, as claimed by Bon Secours, is unconstitutional because it violates the Establishment Clause of the First Amendment.

II. JURISDICTION AND VENUE

12. **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.

13. **Personal Jurisdiction.** This Court has personal jurisdiction over all Defendants because ERISA provides for nationwide service of process. ERISA § 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 Fed. R. Civ. P. 4(k)(1)(A) because they would all be subject to a court of general jurisdiction in Maryland as a result of Defendant Bon Secours transacting business in, and/or having significant contacts with this District.

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

15. Venue is also proper in this District pursuant to 28 U.S.C. § 1391 because Defendant Bon Secours systematically and continuously does 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

16. **Plaintiff Arlene Hodges** was an employee of Bon Secours from 1992 to 2003 and from 2011 to 2014. She worked in management as an administrative supervisor from 1992 to 2003 and as a home health nurse from 2011 to 2014. Plaintiff Hodges is a participant in the Memorial Regional Medical Center Pension Plan ("Memorial Regional Plan"), a pension plan maintained by Bon Secours, because she is or will become eligible for pension benefits under the Memorial Regional Plan to be paid at normal retirement age. Additionally and alternatively, Plaintiff Hodges has a colorable claim to benefits under a pension plan maintained by Bon Secours 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 Bon Secours Plans pursuant to ERISA §§ 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). As alleged below, Plaintiff Hodges

and the Class are harmed by Defendants' failure to comply with the administration and funding requirements of ERISA, including, *inter alia*, (1) the denial of government mandated pension insurance provided by the Pension Board Guaranty Corporation (commonly referred to as "PBGC") which would pay the Class members' benefits if the Plans did not have adequate funds to do so; and (2) the failure to provide required notices and disclosures concerning the Plan and their rights under the Plan, including information on Plan funding levels, vesting terms, calculation of benefits, individual accrued benefits and available pension benefit options (including whether the plans provide for different levels of joint and several annuities should the participant die before his/her spouse, lump sum payments and other types of payment options), without which Plaintiff Hodges and the Class cannot adequately prepare for their retirement.

17. **Plaintiff Carolyn Miller** was an employee of Bon Secours from July 1990 until January 2014 at Bon Secours Hospital in Baltimore, Maryland. She first worked as a unit secretary, then in the EKG/stress test department, and thereafter in the EEG department as a Cardiac/EEG technician. Plaintiff Miller is a participant in the Employees' Retirement Plan of Bon Secours, Baltimore, Health Corporation, Inc. ("Baltimore Plan"), a pension plan maintained by Bon Secours because she is or will become eligible for pension benefits under the Baltimore Plan to be paid at normal retirement age. Additionally and alternatively, Plaintiff Miller has a colorable claim to benefits under a pension plan maintained by Bon Secours 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 Bon Secours Plans pursuant to ERISA §§ 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). As alleged below, Plaintiff Miller and the Class are harmed by Defendants' failure to comply with the administration and funding requirements of ERISA, including,

inter alia, (1) the denial of government mandated pension insurance provided by the Pension Board Guaranty Corporation (commonly referred to as "PBGC") which would pay the Class members' benefits if the Plans did not have adequate funds to do so; and (2) the failure to provide required notices and disclosures concerning the Plan and their rights under the Plan, including information on funding levels, vesting terms, calculation of benefits, and available pension benefit options (including whether the plans provide for different levels of joint and several annuities should the participant die before his/her spouse, lump sum payments and other types of payment options), without which Plaintiff Miller and the Class cannot adequately prepare for their retirement.

18. **Plaintiff Gary T. Brown** was an employee of Bon Secours from 2001 to 2011. He worked as a security guard at Bon Secours' Maryview Medical Center in Portsmouth, Virginia until his position was outsourced in 2011. Following his layoff from Bon Secours, Plaintiff Brown secured a security guard position as an independent contractor at the same facility where he worked as an employee. He continues to work as an independent contractor security guard at Maryview Medical Center to this day. Employees of Maryview Medical Center participated in Bon Secours' Retirement Plan of Bon Secours Hampton Roads ("Hampton Roads Plan"). Plaintiff Brown has completed at least three but not five years of vesting service in the Hampton Roads Plan. Because the Hampton Roads Plan is a cash balance plan, all participants in the plan must become fully vested in their accrued benefits after 3 years of service. See ERISA § 203(f)(2). 29 U.S.C. § 1053(f)(2). Accordingly, Plaintiff Brown is a vested participant in a pension plan maintained by Bon Secours and is entitled to an accrued pension benefit under the Hampton Roads Plan. Upon information and belief, pursuant to ERISA's vesting requirements, Plaintiff Brown's accrued Hampton Roads Plan benefit is in excess of $1,000. Nonetheless, the Plan has unlawfully determined that Plaintiff Brown has no vested pension benefit

because he has not reached five years of vested service. Additionally and alternatively, Plaintiff Brown has a colorable claim to benefits under a pension plan maintained by Bon Secours 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 Bon Secours Plans pursuant to ERISA §§ 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). As alleged below, Plaintiff Brown and the Class are harmed by Defendants' failure to comply with the administration and funding requirements of ERISA, including, *inter alia*, (1) the total loss of accrued pension benefits for all participants who have completed at least 3 but less than 5 years of service due to Defendants' failure to operate the Hampton Roads Plan in compliance with ERISA's vesting requirements for a cash balance plan; (2) the denial of government mandated pension insurance provided by the Pension Board Guaranty Corporation (commonly referred to as "PBGC") which would pay the Class members' benefits if the Plans did not have adequate funds to do so; and (3) the failure to provide required notices and disclosures concerning the Plan and their rights under the Plan, including information on funding levels, vesting terms, calculation of benefits, and available pension benefit options (including whether the plans provide for different levels of joint and several annuities should the participant die before his/her spouse, lump sum payments and other types of payment options), without which participants cannot adequately prepare for their retirement.

B. Defendants

19. **Defendants Bon Secours Health Systems, Inc., its Member (Bon Secours, Inc.) and Subsidiaries** ("Bon Secours"). Defendant Bon Secours is a 501(c)(3) non-profit corporation organized under, and governed by, Maryland law, whose only member is Bon Secours, Inc. (BSI), a Maryland nonprofit, nonstock corporation with "no healthcare operations." *See* 2015 Consolidated Financial

Statements at 7. Bon Secours Health Systems, Inc. and BSI constitute a single employer or integrated enterprise, as they share common ownership and financial control, and share common management or common directors and boards. Bon Secours is headquartered in Marriottsville, Maryland. Bon Secours operates in Kentucky, Florida, Maryland, New York, South Carolina, and Virginia and owns, manages, or joint ventures 19 acute-care hospitals, one psychiatric hospital, five nursing care facilities, four assisted living facilities, and 14 home care and hospice services. In 2015, Bon Secours had approximately $3.3 billion in assets, annual operating revenues of approximately $3.4 billion, and operating income of $115 million. Bon Secours employs more than 22,000 people.

20. **Defendant Benefit Plan Administrative Committee** and **Defendants John and Jane Does 1-20**, **Members of the Benefit Plan Administrative Committee** (the "Committee"). The Committee is an unincorporated association, which, upon information and belief, is the Plan Administrator and fiduciary of the Bon Secours Plans. Defendants John and Jane Does 1-20 are individuals who, through discovery, are found to be members of the Committee. These individuals will be added by name as Defendants in this action upon motion by Plaintiffs at an appropriate time. Should a Plan Administrator separate from the Committee be identified for one or more of the Bon Secours Plans at issue, it shall be named as a Defendant in this action upon motion by Plaintiffs.

21. **Defendants John and Jane Does 21-40**. Defendants John and Jane Does 21-40 are individuals who, through discovery, are found to have fiduciary responsibilities with respect to the Bon Secours Plans 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.

22. Defendant members of the Committee and John and Jane Does 21-40 are collectively referred to herein as the "Individual Defendants."

IV. THE BACKGROUND OF THE CHURCH PLAN EXEMPTION

A. The Adoption of ERISA

23. 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) ("The Studebaker Incident").

24. 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 plan 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. *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, 1322.

25. 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

26. 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).

27. 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."[2]

28. 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). 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

29. Church groups had two major concerns about the definition of "Church Plans" 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 Church Plans, single-employer or multiemployer, had to be "established and maintained" by a church or a convention/association of

[2] ERISA § 3(33)(A), 29 U.S.C. § 1002(33)(A) (1974). 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 is found at 26 U.S.C. § 414(e).

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."

30. 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.

31. 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 § 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).

32. 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*.

33. This church "pension board" clarification 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 would not be a "Church Plan" because it was not "established" by a church or by a convention or association of churches. *See* ERISA § 3(33)(A), 29 U.S.C. § 1002(33)(A).

34. Further, 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)).

35. 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 "agency" 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. The employees of an organization controlled by or associated with a church could be included in a Church Plan, but if such an organization 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 maintain their Church Plans.

36. 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.[3] In any event, this mistake was then repeated, often copied word-for-word from the erroneous IRS General Counsel Memorandum, in subsequent IRS private letter rulings and, after 1990, in Department of Labor determinations. Under the relevant law, these private rulings are not binding on this Court. 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.

V. BON SECOURS

A. Bon Secours's Operations

37. Bon Secours was formed in 1983. It is a 501(c)(3) non-profit corporation organized under, and governed by, Maryland law. Bon Secours is headquartered in Marriottsville, Maryland. Bon Secours operates in Kentucky, Florida, Maryland, New York, South Carolina, and Virginia, and owns, manages, or joint ventures 19 acute-care hospitals, one psychiatric hospital, five nursing care facilities, four assisted living facilities, and 14 home care and hospice services. Bon Secours employs more than 22,000 people.

38. The principle purpose or function of Bon Secours 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.

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[3] An ERISA scholar, Norman Stein, analyzed the IRS General Counsel Memorandum in a recent article and concurred:

> The IRS position is almost certainly wrong. The position is based on a barely credible construction of the statutory language and the statutory structure, rendering the primary definition of church plan superfluous. Moreover, the IRS position implements a major policy decision – exempting non-church plans from ERISA – that Congress never considered.

39. The principal purpose of Bon Secours is the provision of healthcare through owning, leasing, or operating health care facilities and service providers.

40. Bon Secours is not a church or a convention or association of churches.

41. Bon Secours has never been a convention or association of churches.

42. Bon Secours does not claim, and has never claimed, to be a church or a convention or association of churches.

43. For example, Bon Secours annually files or filed with the IRS a Form 990 or 990-EZ, Return of Organization Exempt from Income Tax. These forms were submitted to the IRS under penalty of perjury.

44. Schedule A to Form 990 and Form 990-EZ requires the filing organization to declare the reason for its public charity status. The first option for claiming public charity status is that the organization is "[a] church, convention of churches, or association of churches . . . ."

45. Year after year, including in their most recent Form 990 filings, Bon Secours did not check the box on Schedule A to claim status as "[a] church, convention of churches, or association of churches . . . ." Instead, Bon Secours claims public charity status as "[a] hospital or a cooperative hospital service organization . . . ."

46. Moreover, Bon Secours is not owned by a church.

47. Bon Secours is not funded by a church.

48. Bon Secours does not claim that a church has any liability for Bon Secours's debts or obligations.

49. No church dictates how Bon Secours allocates its resources.

50. No church approves Bon Secours's financial transactions.

51. Like other large non-profit hospital systems, Bon Secours 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.

52. In addition, Bon Secours engages in for-profit business ventures in its ever-expanding effort to generate revenue. Bon Secours is a part owner of the for-profit Innovation Institute. The Innovation Institute invests in a variety of for-profit companies, including the acquisition of firms in information technologies, healthcare construction, healthcare staffing and medical office design and equipment. Bon Secours, along with its business partners, receives pro-rata profits derived from the commercial activities of the companies in which Innovation Institute invests.

53. Bon Secours participates in other business ventures not expected of a church. For example, in 2012, Bon Secours agreed to pay $6.4 million to sponsor the Washington Redskins Training Camp in Richmond, Virginia, helping to attract and keep the football team's training camp in Richmond. In exchange for bankrolling the Redskins' Richmond training camp, Bon Secours secured a 60 year lease from the city for six city-owned acres of land (for just $5,000 a year) to be used – after the healthcare conglomerate secures zoning variances from residential to commercial– to build a 90,000-square-foot nursing school.

54. Bon Secours also paid $6.4 million for the naming rights of the 15,000-plus seat music venue formerly called the Bi-Lo Center, voicing no objection to controversial acts such as Gucci Mane,[4]

[4] Performer Gucci Mane has had multiple legal issues, including (but not limited to) being charged with murder, battery, several incidents of aggravated assault with a deadly weapon, cocaine possession, marijuana possession, carrying a concealed weapon, possession of a firearm by a convicted felon. He was released from prison most recently on May 26, 2016. *See* https://en.wikipedia.org/wiki/Gucci_Mane#Legal_issues.

Katt Williams,[5] Five Finger Death Punch, Blink 182, Trick Daddy,[6] Big Kuntry King, Coolio,[7] and WWE Smackdown performing under their name.

55. In addition, the Roman Catholic Archdiocese of Baltimore required Bon Secours to pay nearly $900,000 for church property that the hospital conglomerate intended to convert into a primary health center.

56. Bon Secours purports to disclose, and not keep confidential, its own highly complex financial records. For example, Bon Secours 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, Bon Secours makes public its consolidated financial statements, which describe Bon Secours's representations as to its own highly complex operations and financial affairs. Finally, Bon Secours's financial information is regularly disclosed to the rating agencies and the public when tax-exempt revenue bonds are issued.

57. As of August 31, 2015, Bon Secours had approximately $3.3 billion in assets and annual operating revenues of approximately $3.4 billion.

58. Executive Officers of Bon Secours receive compensation in line with executive officers of other hospital systems that do not claim they satisfy ERISA's Church Plan exception. For example, in

[5] Similarly, Katt Williams has had numerous arrests, including several recent arrests. He was arrested in April 2016 for battery, in July 2016 on suspicion of battery, and in September 2016 on a charge of second-degree criminal damage to property. *See* https://en.wikipedia.org/wiki/Katt_Williams.

[6] Performer Trick Daddy has pled guilty to multiple drug and gun charges, including possession of cocaine and marijuana, carrying a concealed weapon, and possession of a firearm by a convicted felon. "Trick Daddy Arrested on Cocaine, Gun Charges". Billboard. Apr. 4, 2014; "Trick Daddy Arrested in Florida After Caught With Guns And Drugs – XXL." Xxlmag.com. Apr. 4, 2014.

[7] Performer Coolio was convicted in 1998 of being an accessory to robbery and causing bodily injury. "Rap Artist Is Fined In Theft in Germany." New York Times. Dec.4, 1998.

2013, the Bon Secours President and Chief Executive Officer received reportable compensation of $1.755 million.

59. Additionally, no church has any role in the governance of Bon Secours.

60. Bon Secours acts by and through its Board of Directors. Of the seventeen individuals on the Board, fourteen are lay people.

61. No church elects the members of Bon Secours's Board of Directors. The Board is appointed by the sole Member of the corporation, which is Bon Secours, Inc. (BSI) as delineated in its Articles of Incorporation (which state that the corporation is a membership corporation in which BSI is its sole member, and has the exclusive power to appoint a Board of Directors). BSI and Bon Secours Health Systems, Inc. constitute a single employer or integrated enterprise, as they share common ownership and financial control, and share common management or common directors and boards.

62. Furthermore, Bon Secours specifically chooses not to impose any denominational requirement on its employees, and hires employees and medical staff of all religions and faiths. In hiring employees and medical staff, Bon Secours does not give preference to applicants of a particular religion. Employees of Bon Secours are not required to sign or abide by a statement of faith or religious beliefs.

63. Bon Secours has no denominational requirement for its patients and/or clients. Bon Secours does not focus on the needs of, market to, or target a particular religious population, and does not have a mission to serve patients of a particular religion.

B. The Bon Secours Plans

64. The Bon Secours Plans are non-contributory defined benefit pension plans covering substantially all of Bon Secours's employees.

65. Bon Secours claims the Bon Secours Plans are exempt from ERISA as Church Plans.

66. However, the Bon Secours Plans were not established by any church or convention or association of churches. No church (or convention or association of churches) committed to provide benefits through the Bon Secours Plan and no church (or convention or association of churches) designed, adopted, enacted, or otherwise took the legal or logistical steps necessary to bring the Bon Secours Plans into existence.

67. Rather, on information and belief, the Bon Secours Plans were established by Bon Secours. Bon Secours committed to provide benefits through the Bon Secours Plans and designed, adopted, enacted, and otherwise took the legal and logistical steps necessary to bring the Plans into existence.

68. Bon Secours maintains the Bon Secours Plans. Bon Secours sponsors the Plans. Bon Secours is the employer in relation to the Plans. Bon Secours is responsible for funding the Plans. Bon Secours has the power to continue, amend, and terminate the Plans. No church (or convention or association of churches) has any role in the maintenance and/or administration of the Bon Secours Plans; and no church sponsors, funds, or possesses the power to continue, amend, or terminate the plans.

69. As reported in Bon Secours 2015 Audited Financial Statements, the Bon Secours Plans together are currently underfunded by about $390 million, with projected benefit obligations of $1,037,121,000 and assets of $647,027,000 for the Plans. In other words the Plans were 62.4% funded as reported in Bon Secours's Audited Financial Statements.

70. Because ERISA funding ratios allow for the use of a higher discount rate than that used in the Audited Financial Statements, approximately 6% for 2015, and for use of the accumulated benefit obligations instead of projected benefit obligations, when an ERISA discount rate and the accumulated

benefit obligations are used, the Bon Secours Plans are still underfunded on an ERISA basis (FTAP[8] ratio).

71. In other words the Bon Secours Plans are underfunded at approximately 79% funded on an ERISA basis (i.e., the Funding Target Attainment Ratio, FTAP) and 62% funded as reported in Bon Secours's Audited Financial Statements.

72. According to public filings, the funded status of the single defined benefit plan sponsored by Bon Secours and in compliance with ERISA is 119.46% funded on an ERISA basis (FTAP). See Liberty Health System Pension Plan Form 5500 for Plan Year 2015.

73. Because the one ERISA plan is 119.46% funded on an FTAP basis, the seven Bon Secours Plans operated as church plans are together underfunded on an ERISA (FTAP) basis, and in fact even less that 79% funded on an ERISA (FTAP) basis.

74. The Bon Secours 2015 Audited Financial Statements states that "For the defined benefit plans deemed to be church plans under the Internal Revenue Code, the System's funding policy is to make contributions to fund the annual service costs of the plans plus a 15 year amortization of the unfunded Accumulated Benefit Obligation."

75. Based on the above disclosure, the funded status of each of the Bon Scours Plans operated as church plans is the same because the sponsor uses a uniform funding policy for each based on amortizing the unfunded liabilities over 15 years, meaning that each of the 7 Bon Secours Plans

[8] FTAP refers to the Funding Target Attainment Percentage as set forth in 29 U.S.C. §1083(c)(4) where the funding shortfall of a plan is defined as "for any plan year is the excess (if any) of— (A) the funding target of the plan for the plan year, over (B) the value of plan assets of the plan (as reduced under subsection (f)(4)(B)) for the plan year which are held by the plan on the valuation date." 29 U.S.C. 1083(c)(4)

operated as church plans are underfunded, each with an ERISA/FTAP funding ratio of approximately 79% or less.

1. **The Bon Secours Plans Meet the Definition of an ERISA Defined Benefit Plan**

76. The Bon Secours Plans are plans, funds, or programs that were established or maintained by Bon Secours which provide retirement income to employees. As such, each of the Bon Secours Plans meet the definition of an "employee pension benefit plan" within the meaning of ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A).

77. The Bon Secours Plans do not provide for an individual account for each participant and do not provide benefits based solely upon the amount contributed to a participant's account. As such, the Bon Secours Plans are defined benefit plans within the meaning of ERISA § 3(35), 29 U.S.C. § 1002(35), and are not individual account plans or "defined contribution plans" within the meaning of ERISA § 3(34), 29 U.S.C. § 1002(34).

78. As an employer establishing and/or maintaining the Bon Secours Plans, Defendant Bon Secours is and has been the Plan Sponsor of the Bon Secours Plans within the meaning of ERISA section 3(16)(B), 29 U.S.C. § 1002(16)(B).

79. The Hampton Roads Plan, and all other Bon Secours cash balance church plans, are cash balance plans because they compute accrued benefits by reference to hypothetical account balances or equivalent amounts.

80. The Hampton Roads Plan, and upon information and belief all other Bon Secours cash balance church plans, require participants have at least 5 years of vesting service to be fully vested in their accrued benefits under the Plan.

81. The Hampton Roads Plan, and all other Bon Secours cash balance church plans, violate ERISA sections 203(a)(2) and (f)(2), 29 U.S.C. §§ 1053(a)(2) and (f)(2), because they are cash balance plans and may not require a participant to complete more than three years of service to become fully vested in her benefits under the Plan.

82. The Hampton Roads Plan, and all other Bon Secours cash balance church plans, are being and have been operated in violation of ERISA §§ 203(a)(2) and 203(f)(2) because they require participants to complete five years of vesting service to be vested in their benefits under the Plans.

83. As a result, all participants who have at least three but less than five years of vesting service, are unlawfully being denied their entire accrued pension benefits by the Defendants due their failure to operate each of the Bon Secours Plan in compliance with ERISA's requirements.

2. **The Defendants Meet the Definition of ERISA Fiduciaries**

a. Nature of Fiduciary Status

84. 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 sponsor is the administrator and a fiduciary. ERISA § 3(16)(A), 29 U.S.C. § 1002(16)(A).

85. ERISA treats as fiduciaries not only persons explicitly named as fiduciaries under § 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 § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i).

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

87. As fiduciaries, Defendants were required by ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), to manage and administer the Plans and the Plans' investments solely in the interest of the Plans' 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.

88. Plaintiffs do not allege that each Defendant was necessarily a fiduciary with respect to all aspects of the Plans' 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, to the extent discovery in this matter establishes that such discretion and authority were limited, the claims against each Defendant are based on such specific discretion and authority.

89. ERISA permits fiduciary functions to be delegated to insiders without an automatic violation of the rules against prohibited transactions, ERISA § 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

90. **Defendant Bon Secours**. Bon Secours is the employer responsible for maintaining the Bon Secours Plans and is, therefore, the plan sponsor of the Bon Secours Plans within the meaning of ERISA § 3(16)(B), 29 U.S.C. § 1002(16)(B).

91. In the absence of a Plan administrator specifically designated in or pursuant to an instrument governing the Plans, the plan sponsor of the Bon Secours Plans is the Plan administrator under ERISA section 3(16)(A)(ii), 29 U.S.C. § 1002(16)(A)(ii). Thus, in the alternative to the individuals or entities identified herein as Plan administrators, Bon Secours is a Plan Administrator Defendant within the meaning of ERISA section 3(16)(A), 29 U.S.C. § 1002(16)(A), as well as a named fiduciary within the meaning of ERISA section 402, 29 U.S.C. § 1102.

92. Upon information and belief, Defendant Bon Secours's responsibilities include fiduciary oversight of the Bon Secours Plans. Upon information and belief, Defendant Bon Secours has the responsibility to appoint, and hence to monitor and remove, the members of the Committee. No church (or convention or association of churches) sponsors, funds, or possesses the authority to amend or terminate the Bon Secours Plans.

93. Defendant Bon Secours is a fiduciary with respect to the Bon Secours Plans within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), because it exercises discretionary authority or discretionary control respecting management of the Bon Secours Plans, exercises authority and control respecting management or disposition of the Bon Secours Plans' assets, and/or has discretionary authority or discretionary responsibility in the administration of the Bon Secours Plans. No church (or convention or association of churches) has any role in the administration of the Bon Secours Plans.

94. **Committee Defendants**. To the extent the Defendant Committee was appointed to administer the Bon Secours Plans and that delegation was sufficient to meet the requirements of ERISA section 402, 29 U.S.C. § 1102, the Defendant Committee and Defendants John and Jane Does 1-20, as members of the Committee, are fiduciaries with respect to the Bon Secours Plans. The Defendant Committee and Defendants John and Jane Does 1-20 also are and have been fiduciaries with respect to the Bon Secours Plans 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 Plan.

95. **The Defendant Committee and Defendants John and Jane Does 1-20** are also fiduciaries with respect to the Bon Secours Plans within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), because they exercise discretionary authority or discretionary control respecting management of the Bon Secours Plans, exercise authority and control respecting management or disposition of the Bon Secours Plans' assets, and/or have discretionary authority or discretionary responsibility in the administration of the Bon Secours Plans.

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

3. **Bon Secours Maintains Other Plans that Purport to Follow ERISA**

97. Although Bon Secours contends that the Bon Secours Plans are exempt from ERISA coverage as Church Plans, it claims ERISA status for its 401(k) plan and welfare benefit plans. It also claims ERISA status for one of its eight defined benefit pension plans, the Retirement Plan of Bon Secours Health System, Inc., and files a Form 5500 for this plan.

98. Compliance with ERISA creates no undue, genuine burden on any religious practice of Bon Secours, as evidenced by Bon Secours's claimed compliance with ERISA for its 401(k) plan, welfare benefit plans, and one defined benefit pension plan.

4. **The Bon Secours Plans Are Not Church Plans**

99. Bon Secours claims that the Bon Secours Plans are Church Plans under ERISA § 3(33), 29 U.S.C. § 1002(33), and the analogous section of the Internal Revenue Code ("IRC"), 26 U.S.C. § 414(e), and are therefore exempt from ERISA's coverage under ERISA § 4(b)(2), 29 U.S.C. § 1003(b)(2).

a. A Church Plan Must Be Established by a Church, and Bon Secours Is Not a Church.

100. Under § 3(33)(A) of ERISA, 29 U.S.C. § 1002(33)(A), a Church Plan is "a plan established and maintained . . . for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of Title 26." 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."

101. The Plans are not Church Plans because they were not established by a church or convention or association of churches.

102. The Bon Secours Plans were established by Bon Secours. Bon Secours was not a church or a convention or association of churches when the Bon Secours Plans were established, nor did it claim to be. For example, IRS Form 990 asks the filing organization to state whether it is, inter alia, a church, a school, a hospital, or an organization operated for the benefit of publicly supported

organizations. Year after year, Bon Secours did not identify itself on Form 990 as a church or a convention or association of churches. Thus, by Bon Secours's own sworn statements to the IRS, Bon Secours is not, and was not, a church or convention or association of churches. Accordingly, the Bon Secours Plans were not established by a church or by a convention or association of churches.

103. Although 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 Church Plans, etc.—and who can maintain Church Plans, these portions of ERISA section 3(33)(C) do not change the plain requirement of section 3(33)(A) that a Church Plan must be established by a church.

b. Only Two Types of Entities May Maintain Church Plans, and Bon Secours is Neither Type

104. Two subparts of section 3(33) of ERISA, 29 U.S.C. § 1002(33), address which entities may maintain Church Plans:

A. First, under section 3(33)(A) of ERISA, 29 U.S.C. § 1002(33)(A), a Church Plan may be maintained *by a church or by a convention or association of churches*; and

B. Second, under section 3(33)(C)(i) of ERISA, 29 U.S.C. § 1002(33)(C)(i), a Church Plan may be 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.

As noted above, both types of plans must first be "established" by a church or by a convention or association of churches in order to qualify as "Church Plans."

105. The only two types of entities that may "maintain" Church Plans are those described in ERISA sections 3(33)(A) and (C)(i), 29 U.S.C. § 1002(33)(A), (C)(i). As detailed above, the Plans are maintained by Bon Secours. Accordingly, the Bon Secours Plans are not maintained by either type of entity.

106. First, the Plans are not maintained by a church or convention or association of churches, as described in ERISA section 3(33)(A), 29 U.S.C. § 1002(33)(A). Bon Secours is not a church or a convention or association of churches.

107. Second, the Plans are not maintained by an entity described in ERISA section 3(33)(C)(i). The Plans are not maintained by any entity whose principal purpose or function is the administration of funding of a plan or program for the provision of retirement benefits or welfare benefits, or both. 29 U.S.C. § 1002(33)(C)(i). Bon Secours is a nonprofit hospital conglomerate whose principal purpose is the provision of healthcare through owning, leasing, or operating health care facilities and service providers in Illinois. This ends any argument that the Plan could be a Church Plan under ERISA section 3(33)(C)(i), 29 U.S.C. § 1002(33)(C)(i),

108. To the extent that Bon Secours claims that any of the Plans is "maintained" by a committee or other entity within Bon Secours, the claim fails. *See* 29 U.S.C. § 1002(33)(C)(i). The only entity with the power to "maintain" the Plans, which includes the power to continue, amend, and/or terminate the Plans, is Bon Secours. Only Bon Secours has the power to amend and continue the Plans. Only Bon Secours has the power to terminate the Plans.

109. Even if Defendants claim that the Plan Administrator, to the extent that it is separate from Bon Secours, maintains the Plans, the Plans still would not be maintained by an entity meeting the requirements of ERISA section 3(33)(C)(i), 29 U.S.C. § 1002(33)(C)(i) for two reasons: (i) the Plan

Administrator is not an "organization" within the meaning of section 3(33)(C)(i), and (ii) the Plan Administrator is not "controlled by or associated with a church or a convention or association of churches" within the meaning of ERISA, as required by section 3(33)(C)(i).

110. Thus, any argument that the Plans are maintained by an entity described in ERISA section 3(33)(C)(i), 29 U.S.C. § 1002(33)(C)(i), fails.

c. A Church Plan Must Be Maintained For the Employees of a Church or a Convention or Association of Churches

111. Even if the Plans had been "established" by a church, and even if they were maintained by a proper entity under either section 3(33)(A) or 3(33)(C)(i), the Plans still would not qualify as Church Plans because they are not maintained for the *employees of any church or convention or association of churches.* 29 U.S.C. § 1002(33)(A), (C)(i).

112. Many thousands of participants in the Plans work for Bon Secours. Bon Secours is not a church or convention or association of churches. And their current and former employees are not and were not employees of a church or convention or association of churches within the meaning of ERISA.

113. 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. This part of the definition merely explains which employees a Church Plan may cover *once a valid Church Plan is established*. The Bon Secours Plans fail this part of the definition because Bon Secours is not controlled by or associated with a church or convention of churches within the meaning of ERISA..

114. Bon Secours is not controlled by a church or convention or association of churches.

115. Bon Secours is not owned or operated by a church and does not receive funding from a church. No church dictates how Bon Secours allocates its resources. The members of the Board of

Directors of Bon Secours are not elected by a church—they are appointed by the sole member of the corporation, which is Bon Secours. Bon Secours does not claim that any church is liable for its debts or obligations.

116. In addition, Bon Secours 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." Bon Secours does not share common religious bonds and convictions with a church or association of churches within the meaning of ERISA.

117. The only two Circuit Courts that have interpreted "association" within the meaning of ERISA have applied an objective, three-factor test, which evaluates: "1) whether the religious institution plays any official role in the governance of the organization; 2) whether the organization receives assistance from the religious institution; and 3) whether a denominational requirement exists for any employee or patient/customer of the organization." *See Lown v. Cont'l Cas. Co.*, 238 F.3d 543, 548 (4th Cir. 2001); *Chronister v. Baptist Health*, 442 F.3d 648, 653 (8th Cir. 2006).

118. Bon Secours is not operated by any church and no church plays any official role in its governance.

119. Bon Secours does not receive any funding from any church.

120. Bon Secours does not tell prospective employees that religious affiliation is a factor in the recruiting and hiring of Bon Secours employees. Bon Secours does not require that the members of its governing Board of Directors, or the boards of its facilities, be members of a particular religion or

church. Bon Secours admits patients of all religions and faiths to its facilities. Bon Secours does not require employees and medical staff to sign or abide by a statement of faith or religious beliefs.

d. Even *if* the Bon Secours Plans Could Otherwise Qualify as Church Plans under ERISA §§ 3(33)(A) or (C)(i), they are Excluded From Church Plan Status under ERISA § 3(33)(B)(ii)

121. Under ERISA § 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 employed by a church or convention or association of churches, 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 22,000 participants in the Bon Secours Plans, and very nearly all of them are non-clergy healthcare workers.

122. If the approximately 22,000 participants in the Bon Secours Plans 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 Bon Secours Plans could otherwise qualify as Church Plans under ERISA §§ 3(33)(A) or (C)(i), they still would be foreclosed from Church Plan status under section 3(33)(B)(ii), 29 U.S.C. § 1002(33)(B)(ii).

123. As set forth above, Bon Secours is not controlled by a church or convention or association of churches, nor does it share common religious bonds and convictions with a church or convention or association of churches.

e. Even if the Bon Secours Plans Could Otherwise Qualify as Church Plans under ERISA, the Church Plan Exemption, as Claimed By Bon Secours, Violates the Establishment Clause of the First Amendment of the Constitution, and is Therefore Void and Ineffective

124. 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.

125. 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)—when an accommodation is not necessary to alleviate a substantial burden on religious exercise—at the expense of nonadherents and/or while imposing legal and other burdens on nonmembers. Extension of the Church Plan exemption to Bon Secours, a non-church entity, privileges Bon Secours for its claimed faith even though ERISA—a neutral, generally applicable statute—does not impose any burden on any religious exercise of Bon Secours. And this privilege is provided at the expense of its 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, Bon Secours, a non-church entity, has a privileged economic advantage over its competitors in the commercial arena it has chosen, based solely on Bon Secours'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 to alleviate a substantial burden on religious exercise and that burdens nonbeneficiaries, it has endorsed religion in violation of the Establishment Clause.

126. As set forth in more detail below in Count XI, the extension of the Church Plan accommodation to Bon Secours, which is not a church, violates the Establishment Clause because it is not necessary to further the stated purposes of the exemption, harms Bon Secours workers, puts Bon

Secours competitors at an economic disadvantage, relieves Bon Secours 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 Bon Secours, is void and ineffective.

VI. CLASS ALLEGATIONS

127. 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 all Bon Secours Pension Plans that purport to be Church Plans, as described in this Second Consolidated Amended Complaint.

128. Excluded from the Class are any high-level executives at Bon Secours or any employees who have responsibility or involvement in the administration of the Plans, or who are subsequently determined to be fiduciaries of the Bon Secours Plans, including the Individual Defendants.

A. Numerosity

129. The exact number of Class members is unknown to Plaintiffs at this time, but may be readily determined from records maintained by Bon Secours. Bon Secours currently employs approximately 22,000 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

130. 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 Plans are exempt from

ERISA as Church Plans, and, if not, (2) whether the fiduciaries of the Plans have failed to administer and failed to enforce the funding obligations of the Plans in accordance with ERISA.

131. 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 Plans are ERISA covered plans; (2) an order requiring that the Plans comply with the administration and funding requirements of ERISA; and (3) an order requiring Bon Secours to pay civil penalties to the Class, in the same statutory daily amount for each member of the Class.

C. Typicality

132. 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 Plans in accordance with ERISA. Plaintiffs' claims are also typical because all Class members are similarly affected by Defendants' wrongful conduct.

133. 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 Bon Secours Plans are not Church Plans; and (ii) a declaration that the Bon Secours Plans are ERISA covered plans; and (iii) declaratory, injunctive, or other appropriate relief requiring the Bon Secours Plans to 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.

134. Bon Secours does not have any defenses unique to Plaintiffs' claims that would make Plaintiffs' claims atypical of the remainder of the Class.

D. Adequacy

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

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

137. Defendant Bon Secours and the Individual Defendants have no unique defenses against Plaintiffs that would interfere with Plaintiffs' representation of the Class.

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

E. Rule 23(b)(1) Requirements

139. 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.

140. 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

141. 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

142. 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 Plans are exempt from ERISA as Church Plans, and, if not, (2) whether the fiduciaries of the Plans have failed to administer and fund the Plans in accordance with ERISA, and (3) whether the Church Plan exemption, as claimed by Bon Secours, 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 Plans 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. There is no other litigation begun by any other Class members concerning the issues raised in this litigation;

D. This litigation is properly concentrated in this forum, which is where Defendant Bon Secours maintains its headquarters; and

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

VII. CAUSES OF ACTION

COUNT I
(Claim for Equitable Relief Pursuant to ERISA §§ 502(a)(2) and 502(a)(3) Against Defendants Bon Secours, Defendant Committee and John and Jane Does 1-20, the Committee Member Defendants, or in the Alternative, the Plans' Administrator)

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

144. ERISA § 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 Bon Secours Plans are not Church Plans within the meaning of ERISA § 3(33), 29 U.S.C. § 1002(33), and thus are subject to the provisions of Title I and Title IV of ERISA.

145. ERISA § 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 Defendants to bring the Bon Secours Plans into compliance with ERISA.

146. ERISA § 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 Plans as non-ERISA plans 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 § 502(a)(2).

147. As the Bon Secours Plans are not Church Plans within the meaning of ERISA § 3(33), 29 U.S.C. § 1002(33), and meet the definition of a pension plan under ERISA § 3(2), 29 U.S.C. § 1002(2), the Bon Secours Plans should be declared to be ERISA-covered pension plans, and the Bon Secours Plans' sponsor and administrator should be ordered to bring the Bon Secours Plans into compliance with ERISA, including but not limited to, retroactively amending and/or reforming the Hampton Roads Plan, and all other Bon Secours cash balance church plans, 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. Compliance with ERISA will also remedy, *inter alia,* the ERISA violations set forth below.

COUNT II
(Claim for Violation of Reporting and Disclosure Provisions Against Defendant Committee and John and Jane Does 1-20, the Committee Member Defendants)

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

1. **Summary Plan Descriptions**

149. At no time has the Committee or its members provided Plaintiffs or any member of the Class with a Summary Plan Description with respect to the Bon Secours Plans that meets the requirements of ERISA § 102, 29 U.S.C. § 1022, and the regulations promulgated thereunder.

150. Because the Committee has been the Plan Administrator of the Plans at all relevant times, it violated ERISA § 104, 29 U.S.C. § 1024, by failing to provide Plaintiffs and members of the Class with adequate Summary Plan Descriptions.

2. **Annual Reports**

151. At no time has an annual report with respect to the Bon Secours Plan been filed with the Secretary of Labor in compliance with ERISA § 103, 29 U.S.C. § 1023, nor has it filed a Form 5500 and associated schedules and attachments, which the Secretary has approved as an alternative method of compliance with ERISA § 103, 29 U.S.C. § 1023.

152. Because the Committee has been the Plan Administrator of the Bon Secours Plans at all relevant times, the Committee Defendants have violated ERISA § 104(a), 29 U.S.C. § 1024(a), by failing to file annual reports with respect to the Bon Secours Plans with the Secretary of Labor in compliance with ERISA § 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 § 103, 29 U.S.C. § 1023.

3. **Summary Annual Reports**

153. At no time has the Committee or its members furnished Plaintiffs or any member of the Class with a Summary Annual Report with respect to the Bon Secours Plans in compliance with ERISA § 104(b)(3) and regulations promulgated thereunder. 29 U.S.C. § 1024(b)(3).

154. Because the Committee has been the Plan Administrator of the Bon Secours Plans at all relevant times, the Committee Defendants have violated ERISA § 104(b)(3), 29 U.S.C. § 1024(b)(3), by failing to furnish Plaintiffs or any member of the Class with a Summary Annual Report with respect to

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

4. **Notification of Failure to Meet Minimum Funding**

155. At no time has Defendant Bon Secours furnished Plaintiffs or any member of the Class with a Notice with respect to the Bon Secours Plans pursuant to ERISA § 101(d)(1), 29 U.S.C. § 1021(d)(1), informing them that Bon Secours had failed to make payments required to comply with ERISA § 302, 29 U.S.C. § 1082, with respect to the Bon Secours Plans.

156. Defendant Bon Secours has been the employer that established and/or maintained the Bon Secours Plans.

157. Defendant Bon Secours is not funding the Bon Secours Plans in accordance with ERISA § 302, 29 U.S.C. § 1082.

158. As the employer maintaining the Bon Secours Plans, Defendant Bon Secours has violated ERISA § 302, 29 U.S.C. § 1082, by failing to fund the Bon Secours Plans, and 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 502(c)(3), 29 U.S.C. § 1132(c)(3), *amended by* 29 C.F.R. § 2575.502c-3) for each day that Defendant Bon Secours has failed to provide Plaintiffs and each Class member with the notice required by ERISA § 101(d)(1), 29 U.S.C. § 1021(d)(1).

5. **Funding Notices**

159. At no time has the Committee or its members furnished Plaintiffs or any member of the Class with a Funding Notice with respect to the Bon Secours Plans pursuant to ERISA § 101(f), 29 U.S.C. § 1021(f).

160. Because the Committee has been the Plan Administrator of the Bon Secours Plans at all relevant times, it has violated ERISA § 101(f) by failing to provide each participant and beneficiary of the Bon Secours Plans with the Funding Notice required by ERISA § 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 § 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 § 101(f). 29 U.S.C. § 1021(f).

6. Pension Benefit Statements

161. At no time has the Defendant Plan Administrator furnished Plaintiffs, or, on information and belief, any member of the Class with a Pension Benefit Statement with respect to the Bon Secours Plans pursuant to ERISA section 105(a)(1), 29 U.S.C. § 1025(a)(1).

162. Because the Defendant Plan Administrator has been plan administrator of the Bon Secours Plans at all relevant times, the Defendant Plan Administrator 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 the Plan Administrator has failed to provide Plaintiffs and each Class member with the Pension Benefit Statements required by ERISA section 105(a)(1). 29 U.S.C. § 1025(a)(1).

COUNT III
(Claim for Failure to Provide Minimum Funding, Including by Failing to Comply with ERISA Funding Rules, Against Defendant Bon Secours)

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

164. ERISA § 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.

165. Bon Secours was responsible for making the contributions that should have been made pursuant to ERISA § 302, 29 U.S.C. § 1082, at a level commensurate with that which would be required under ERISA.

166. Bon Secours has failed to establish, implement, or enforce a funding policy consistent with the requirements of ERISA §§ 302 and 303, 29 U.S.C. §§ 1082 and 1083.

167. Since at least 2011, Bon Secours has also failed to make contributions in satisfaction of the minimum funding standards of ERISA § 302, 29 U.S.C. § 1082. Bon Secours's own accounting statements indicate that the Plans are underfunded. However, as Defendants have failed to disclose to plan participants ERISA-required information regarding the funded status of the plan – calculated according to ERISA-mandated assumptions and principles – Plaintiffs lack information regarding the full extent to which the Plans are underfunded.

168. By failing to make the required contributions to the Bon Secours Plans, either in whole or in partial satisfaction of the minimum funding requirements established by ERISA § 302, Defendant Bon Secours has violated ERISA § 302. 29 U.S.C. § 1082.

COUNT IV
(Claim for Failure to Establish the Plan Pursuant to a Written Instrument Meeting the Requirements of ERISA § 402 Against Defendant Bon Secours)

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

170. ERISA § 402, 29 U.S.C. § 1102, provides that every plan will be established and maintained 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]."

171. Although the benefits provided by the Bon Secours Plans were described to the employees and retirees of Bon Secours (and/or its affiliates and subsidiaries) in various written communications, the Bon Secours Plans have never been established or maintained pursuant to a written instrument meeting the requirements of ERISA § 402, 29 U.S.C. § 1102.

172. Defendant Bon Secours violated section 402 by failing to promulgate written instruments in compliance with ERISA § 402 to govern the Bon Secours Plans' operations and administration. 29 U.S.C. § 1102.

COUNT V
(Claim for Failure to Establish a Trust Meeting the Requirements of ERISA Section 403 Against Defendant Bon Secours)

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

174. 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 ERISA section 402(a) or appointed by a person who is a named fiduciary.

175. The Bon Secours Plans' assets have not been held in a trust that meets the requirements of ERISA section 403, 29 U.S.C. § 1103.

176. Defendants violated section 403 by failing to put the Bon Secours Plans' assets in trust in compliance with ERISA section 403. *See* 29 U.S.C. § 1103.

COUNT VI
(Claim for Clarification of Future Benefits Under ERISA §§ 502(a)(1)(B) and 502(a)(3) Against Defendant Bon Secours)

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

178. ERISA § 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."

179. Pursuant to ERISA §§ 502(a)(1)(B), (3), 29 U.S.C. §§ 1132(a)(1)(B), (3), once the Plan is made compliant with ERISA, Plaintiffs seek to clarify their rights under the terms of the Plan and to require Defendant Bon Secours to provide Plaintiffs and the Class ERISA-compliant benefit statements.

COUNT VII
(Claim for Civil Money Penalty Pursuant to ERISA § 502(a)(1)(A) Against Defendant Bon Secours, Defendant Committee, and John and Jane Does 1-20, the Committee Member Defendants)

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

181. ERISA § 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 § 502(c), 29 U.S.C. § 1132(c).

182. ERISA § 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 § 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.

183. ERISA § 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 § 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.

184. ERISA § 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 § 105(a), 29 U.S.C. § 1025(a), may be liable for up to $110 per day from the date of such failure.

185. Because Defendant Bon Secours, as the employer, has failed to give the notices required by ERISA § 101(d), 29 U.S.C. § 1021(d), as set forth in Count II Subpart 4, Defendant Bon Secours is

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.

186. Because the Committee, as Plan Administrator of the Plan, has failed to give the notices required by ERISA § 101(f), 29 U.S.C. § 1021 (f), and the Pension Benefit Statement required by ERISA § 105(a), 29 U.S.C. § 1025(a), as set forth in Count II Subparts 5 through 6, the Committee and the Committee Member Defendants 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.

COUNT VIII
(Claim for Breach of Fiduciary Duty Against All Defendants)

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

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

1. **Breach of the Duty of Prudence and Loyalty – Against All Defendants**

189. ERISA § 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.

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

191. Defendants have never enforced any of the provisions of ERISA set forth in Counts I-IV with respect to the Bon Secours Plans.

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

193. The failure of Defendants to enforce the funding obligations owed to the Plans has resulted in a loss to the Bon Secours Plans equal to the foregone funding and earnings thereon, and profited Defendant Bon Secours by providing it the use of the money owed to the Bon Secours Plans for its general business purposes.

2. **Prohibited Transactions – Against All Defendants**

194. ERISA § 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 § 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.

195. ERISA § 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.

196. ERISA § 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.

197. As fiduciaries with respect to the Plan and, with respect to Bon Secours, as an employer of employees covered by the Plan, the Defendants at all relevant times were parties in interest with respect to the Bon Secours Plans pursuant to ERISA §§ 3(14)(A) and (C), 29 U.S.C. §§ 1002(14)(A) and (C).

198. By failing to enforce the funding obligations created by ERISA and owed to the Plans, Defendants extended credit from the Bon Secours Plans to Bon Secours in violation of ERISA § 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.

199. By failing to enforce the funding obligations created by ERISA and owed to the Bon Secours Plans, Defendants used Bon Secours Plan assets for Bon Secours's own benefit, when

Defendants knew or should have known that their failure to enforce the funding obligations constituted such a use of Bon Secours Plan assets, in violation of ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D).

200. By failing to enforce the funding obligations created by ERISA and owed to the Bon Secours Plans, Defendants used Bon Secours Plan assets in Bon Secours's interest in violation of ERISA § 406(b)(1), 29 U.S.C. § 1106(b)(1).

201. The failure of Defendants to enforce the funding obligations owed to the Bon Secours Plans has resulted in a loss to the Bon Secours Plans equal to the foregone funding and earnings thereon.

202. The failure of Defendants to enforce the funding obligations owed to the Bon Secours Plans has profited Defendant Bon Secours by providing it the use of money owed to the Bon Secours Plans for its general business purposes.

COUNT IX
(Claim for Breach of Fiduciary Duty to Monitor Performance of Other Fiduciaries Against the Monitoring Defendants)

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

204. During the Class Period, the Defendant Bon Secours was a named fiduciary pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), or both. Thus, it was bound by the duties of loyalty, exclusive purpose, and prudence set forth in ERISA sections 404(a)(1)(A) and (b), 29 U.S.C. § 1104(a)(1)(A), (B), including the duty to monitor the performance of other fiduciaries which they had the responsibility to appoint and remove.

205. The scope of the fiduciary responsibilities of Bon Secours included the responsibility to appoint and remove, and thus, monitor the performance of other fiduciaries.

206. 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, making sure a plan is adequately funded under ERISA, and providing ERISA-required notices and disclosures, and must take prompt and effective action to protect the plan and participants when they are not.

207. 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.

208. 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.

209. Defendant Bon Secours breached its fiduciary monitoring duties by, among other things: (a) failing to appoint persons who would run the Plans as ERISA plans; (b) failing to ensure that the monitored fiduciaries appreciated the true extent of not running the Plans as ERISA plans; (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 Plans; (d) failing to appoint persons who would provide ERISA-required notices and disclosures;

(e) failing to appoint persons who would ensure that the Plans were adequately funded in accordance with ERISA; and (f) failing to remove appointees whose performance was inadequate in that they continued to run the Plans as non-ERISA plans, and who breached their fiduciary duties under ERISA.

210. The failure of Defendants to enforce the funding obligations owed to the Plans has resulted in a loss to the Bon Secours Plans equal to the foregone funding and earnings thereon, and profited Defendant Bon Secours by providing it the use of money owed to the Bon Secours Plans for its general business purposes.

COUNT X
(Claim for Co-Fiduciary Liability Against All Defendants)

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

212. This Count alleges co-fiduciary liability against all Defendants.

213. 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.

214. ERISA section 405(a), 29 U.S.C. § 1105(a), 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.

215. **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, including but not limited to the other Defendants, and made no efforts to remedy those breaches.

216. Because Defendants knew that the Plans were not being run as ERISA plans, Defendants knew that the other fiduciaries, including but not limited to the other Defendants, were breaching their duties by not complying with ERISA. Defendants failed to undertake any effort to remedy these breaches, and thus they are each liable for the breaches.

217. **Knowing Participation in a Breach.** ERISA section 405(a)(1), 29 U.S.C. § 1105(a)(1), imposes liability on a fiduciary for breach of fiduciary responsibility of another fiduciary with respect to the same plan if they participate knowingly in, or knowingly undertake to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach.

218. All Defendants knew the respective failures of the other fiduciaries, including but not limited to each other Defendants, in failing to comply with the provisions of ERISA as alleged above. Each Defendant knew that the Plans were not being operated, maintained, or administered as ERISA Plans; that the Plans did not comply with ERISA's minimum funding requirements and were under-funded; that participants and beneficiaries in the Plans were not receiving ERISA-required notices and disclosures; that Bon Secours was not paying premiums to the PBGC to insure the Plans; and/or that the written instrument and trust agreement for the Bon Secours Plans did not comply with ERISA. Defendants knowingly participated in such actions or omissions of each other fiduciary, knowing that such acts or omissions were breaches of ERISA's requirements.

219. **Enabling a Breach.** ERISA § 405(a)(2), 29 U.S.C. § 1105(a)(2), imposes liability on a fiduciary if by failing to comply with ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), in the administration

of the specific responsibilities which give rise to their status as a fiduciary, they have enabled another fiduciary to commit a breach.

220. Each of the Defendants failed to, among other things: (1) take action to operate, maintain, and/or administer the Plans as ERISA plans; (2) ensure that ERISA-required notices and disclosures were provided, PBGC insurance premiums were paid, the written instruments governing the Plans and their associated trusts complied with ERISA, and the Plans complied with ERISA minimum-funding requirements and were not under-funded; (3) report out to the other fiduciaries that such violations of ERISA were occurring; and (4) take any remedial action to bring the Plans into compliance with ERISA. By virtue of these failures, each fiduciary Defendant enabled the other fiduciaries to commit a breach.

221. The failure of Bon Secours to monitor the fiduciaries to whom they had the power to delegate responsibilities, and whom they had the power to appoint and/or remove, enabled each of those fiduciaries to breach their duties.

222. Bon Secours's under-funding of the Bon Secours Plans, failure to provide notices of under-funding, and failure to demand that the Plan Administrator provide funding notices or that the Bon Secours Plans be operated in accordance with ERISA enabled the other Defendants to commit breaches.

223. As a direct and proximate result of the breaches of fiduciary and co-fiduciary duties alleged herein, the Plans are currently underfunded, meaning that the Plans do not have sufficient assets to pay all accrued benefits each has promised to its participants and beneficiaries and is legally obligated to pay under ERISA.

224. The failure of Defendants to enforce the funding obligations owed to the Plans has resulted in a loss to the Bon Secours Plans equal to the foregone funding and earnings thereon, and

profited Defendants by providing them the use of money owed to Bon Secours Plans for their general business purposes.

225. Pursuant to ERISA sections 409, 502(a)(2)-(3), 29 U.S.C. §§ 1109, 1132(a)(2)-(3), all Defendants are liable to restore the losses to the Plans, which are the result of their breaches of fiduciary duties alleged in this Count, and to provide other equitable relief as appropriate.

COUNT XI
(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)

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

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

228. The ERISA Church Plan exemption, as claimed by Bon Secours, is an attempt to extend the accommodation beyond churches and associations of churches, to Bon Secours—a non-profit hospital conglomerate that has 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 Bon Secours violates the Establishment Clause because it (A) is not necessary to further the stated purposes of the exemption, (B) harms Bon Secours workers, (C) puts Bon Secours competitors at an economic disadvantage, (D) relieves Bon Secours 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."[9] This purpose has no application to Bon Secours, which is neither run by nor intimately connected to any church financially. And, unlike a church, Bon Secours has no confidential books and records to shield from government scrutiny. Bon Secours already purports to disclose all material financial records and relationships when it seeks Medicare and Medicaid reimbursements and issues tax exempt bonds.

B. Harms Workers

Employers, including Bon Secours, 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. Bon Secours tells prospective employees that any choice of faith, or lack thereof, is not a factor in the recruiting and hiring of Bon Secours employees. Thus, as a practical matter, and by Bon Secours's own design, its 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, Bon Secours 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 Bon Secours, places its tens of thousands of longtime employees' justified reliance on their pension benefits at great risk, including because the

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

Plans are uninsured and underfunded by $390 million. In addition, Bon Secours fails to provide the multitude of other ERISA protections designed to safeguard its employees' pensions. The Church Plan exemption, as claimed by Bon Secours, provides no consideration of the harm that it causes to Bon Secours's employees.

C. Puts Bon Secours's Competitors at an Economic Disadvantage

Bon Secours's commercial rivals face material disadvantages in their competition with Bon Secours 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 Bon Secours Plans are exempt Church Plans, Bon Secours enjoys a material competitive advantage because it is able to divert significant cash, which otherwise would be required to fund, insure (through premiums to the PBGC), and administer the Bon Secours Plans, to its 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 Bon Secours, provides no consideration of the disadvantage it creates for Bon Secours'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 Bon Secours, responds to no genuine burden created by ERISA on any of Bon Secours'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, Bon Secours maintains multiple separate ERISA-governed plans, which further evidences that ERISA creates no undue burden on any genuine religious practice of Bon Secours.

E. Creates Government Entanglement with Alleged Religious Beliefs

A Bon Secours exemption requires courts and agencies to examine unilateral religious "convictions" of a non-church entity and determine if they are "shared" with a church, in the absence of any actual church responsible for the pensions. This *creates* entanglement between government and putative religious beliefs. ERISA compliance, on the other hand, requires *zero* entanglement with religion for Bon Secours because ERISA is a neutral statute that regulates pension protections and Bon Secours has no relevant confidential books, records or relationships. Thus, an extension of the Church Plan exemption to Bon Secours produces state entanglement with alleged religious beliefs while compliance with ERISA creates no meaningful state entanglement with alleged religious beliefs.

229. Plaintiffs seek a declaration by the Court that the Church Plan exemption, as claimed by Bon Secours, 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 requests that the Court award the following relief:

A. Declaring that the Bon Secours Plans are employee pension benefit plans within the meaning of ERISA § 3(2), 29 U.S.C. § 1002(2), are defined benefit pension plans within the meaning of ERISA § 3(35), 29 U.S.C. § 1002(35), and are not Church Plans within the definition of ERISA § 3(33), 29 U.S.C. § 1002(33).

B. Ordering Bon Secours and the other Defendants to reform the Bon Secours Plans to bring them into compliance with ERISA and to have the Bon Secours Plans comply with ERISA, including as follows:

1. Revising the Plan documents to reflect that the Plans are defined benefit plans regulated by ERISA.

2. Requiring Bon Secours to fund the Bon Secours Plans in accordance with ERISA's funding requirements, disclose required information to the Bon Secours Plans, 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 Bon Secours Plans 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 Bon Secours Plans that complies with ERISA § 402, 29 U.S.C. § 1102.

5. Requiring Defendants 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 Notice of the Bon Secours Plans' funding status and deficiencies.

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

7. Requiring the establishment of Trusts for the Bon Secours Plans in compliance with ERISA § 403, 29 U.S.C. § 1103.

C. Requiring Bon Secours, as a fiduciary of the Plans, to make the Bon Secours Plans whole for any losses and disgorge any Bon Secours profits accumulated as a result of its fiduciary breaches.

D. Requiring Defendants, as fiduciaries and co-fiduciaries of the Bon Secours Plans, to make the Plans whole for any losses to the Plans and to provide other equitable relief as appropriate.

E. Appointing an Independent Fiduciary to hold the Bon Secours Plans' assets in trust, to manage and administer the Bon Secours Plans and their assets, and to enforce the terms of ERISA.

F. Requiring Bon Secours to pay a civil money penalty of up to $110 per day to Plaintiffs and each Class member for each day it failed to inform Plaintiffs and each Class member of its failure to properly fund the Plans.

G. Requiring Bon Secours to pay a civil money penalty of up to $110 per day to Plaintiffs and each Class member for each day it failed to provide Plaintiffs and each Class member with a Funding Notice.

H. Requiring Bon Secours and/or Defendant Benefit Plan Administrative Committee and Defendants John and Jane Does 1-20, Members of Benefit Plan Administrative Committee to pay a civil money penalty of up to $110 per day to Plaintiffs and each Class member for each day it failed to provide a benefit statement under ERISA § 105(a)(1)(B), 29 U.S.C. § 1025(a)(1)(B).

I. 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 Bon Secours Plans.

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

K. Declaring, with respect to Count XI, that the Church Plan exemption, as claimed by Bon Secours, is an unconstitutional accommodation under the Establishment Clause of the First Amendment, and is therefore void and ineffective.

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

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

N. Awarding to Plaintiffs pre-judgment interest on any amounts awarded pursuant to law.

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

DATED: January 13, 2017. /s/ R. Joseph Barton

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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2017, I electronically filed *Plaintiffs' Second Consolidated Amended Class Action Complaint* with the Clerk of the Court using the ECF system, which in turn sent notice to all counsel of record.

Dated: January 13, 2017

/s/R. Joseph Barton
R. Joseph Barton