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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

STARLA ROLLINS on behalf of herself, individually, and on behalf of all others similarly situated, Plaintiff, v. DIGNITY HEALTH, a California Non-profit Corporation, HERBERT J. VALLIER, an individual, the members of the Dignity Retirement Committee, and JOHN and JANE DOES, each an individual, 1-20, Defendants.	No. 13-CV-1450 TEH PLAINTIFF'S NOTICE OF MOTION, MOTION FOR CLASS CERTIFICATION PURSUANT TO FED. R. CIV. P. 23, AND SUPPORTING MEMORANDUM Date: December 1, 2014 Time: 10:00 a.m. Ctrm: Courtroom 12, 19th Floor Judge: Hon. Thelton E. Henderson

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NOTICE OF MOTION AND MOTION FOR CLASS CERTIFICATION

Please take notice that on December 1, 2014, at 10:00 a.m., or as soon thereafter as counsel may be heard, in the courtroom of the Honorable Thelton E. Henderson, United States District Judge for the Northern District of California, located at the United States Courthouse, 450 Golden Gate Avenue, San Francisco, California 94102, Plaintiff Starla Rollins will and hereby does move the Court under Fed. R. Civ. P. 23 for an order certifying the class described below and appointing her counsel as class counsel.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In this litigation, Plaintiff claims that the Dignity Health Pension Plan (the "Plan"), a defined benefit pension plan sponsored by Defendant Dignity Health ("Dignity"), is, like other private sector pension plans, subject to federal regulation pursuant to the Employee Retirement Income Security Act ("ERISA"). Class Action Complaint ("Compl.") ¶¶ 3, 11, and 12, ECF No. 1. As the Court itself has explained, ERISA was enacted "to ensure that employees actually receive the benefits they are promised by establishing, among other requirements, minimum funding standards and disclosure obligations for employee benefits plans." *Rollins v. Dignity Health*, --- F. Supp.2d ---, No. 13-1450, 2013 WL 6512682, at *1 (N.D. Cal. Dec. 12, 2013) ("MTD Order"). However, Dignity, and other Plan fiduciaries (collectively "Defendants"), have failed to administer and fund the Plan in conformance with ERISA—and thus have deprived Plan participants of these critical protections—based on the erroneous contention that the Plan is exempt from ERISA as a "church plan."

This motion for class certification comes to the Court after it has already resolved the threshold issue presented: the Plan is not—and was never—a church plan. After previously holding that a church plan must be established by a church as a matter of statutory construction, MTD Order at *7, the Court recently granted Plaintiff's Motion for Partial Summary Judgment, ECF No. 91, concluding that that there was no genuine dispute that the Plan was not established by a church and thus granting the requested declaratory judgment that the Plan "is not a church plan

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as defined by ERISA, and is therefore not exempt from ERISA." *Rollins v. Dignity Health*, --- F. Supp. 2d ---, No. 13-1450, 2014 WL 3613096, at *6 (N.D. Cal. July 22, 2014) ("MPSJ Order").

The proposed class easily meets the requirements for certification. Indeed, class certification is particularly appropriate here. The proposed class is composed only of participants and beneficiaries of the Plan and: (1) the threshold determination that the Plan is not a church plan is a plan-wide (and thus class-wide) determination; (2) the alleged ERISA violations and fiduciary breaches relate to plan-wide conduct stemming from the erroneous treatment of the Plan as a church plan; and (3) these violations can be redressed through plan-wide relief that would inure to the benefit of all Plan participants and beneficiaries.

II. PROPOSED CLASS

The proposed class (the "Class") is simply: All persons who were participants in or beneficiaries of the Dignity Health Pension Plan on or after the date of the filing of the Complaint. *See* Compl. ¶ 89.[1] Although the Complaint brought claims on behalf of participants and beneficiaries of all "defined benefit pension plans maintained by Dignity and operated as or claimed to be 'Church Plans' under ERISA", Defendants' verified response to Plaintiff's Interrogatory No.8 states that the Plan is the only qualified defined benefit church plan within the scope of the complaint. *See* Declaration of Matthew Gerend in Support of Motion for Class Certification ("Gerend Decl."), Ex. A (Defs' Supp. Resp. to Pl's First Interrogatories) at 15-16.[2]

III. ARGUMENT

The Complaint is in eight counts. As noted above, the Court has already granted summary judgment on a subset of Count I, granting declaratory judgment that the Plan is not a church plan. MPSJ Order at *6. Count VIII, the alternative claim under the Establishment Clause, is moot given

[1] As is typical, excluded from the Class are "any high-level executives at Dignity or any employees who have responsibility or involvement in the administration of the Plan, or who are subsequently determined to be fiduciaries of one or more of the Dignity Plans, including the Individual Defendants." Compl. ¶ 89. This limited group of people can easily be identified through discovery.

[2] Although there are a number of other defined benefit church plans sponsored by Dignity, these plans cover high-level executives and other highly compensated employees, *see* Gerend Decl., Ex. A, at 15-16, and thus do not fall within the scope of the plans addressed in Plaintiff's Complaint.

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the Court's decision that the Plan is not a church plan. Plaintiff is not pursuing Count V. This leaves the remainder of Count I as well as Counts II – IV, VI, and VII.

The remainder of Count I, along with Counts II – IV, are now pending before the Court in Plaintiff's Motion for Permanent Injunction and Partial Judgment (the "Injunction Motion"), ECF No. 180. Because the undisputed facts demonstrate that Defendants have failed to comply with the substantive requirements of ERISA, including ERISA's reporting and disclosure requirements (Count II), minimum funding requirements (Count III), and requirements for written plan instruments (Count IV), the Injunction Motion seeks summary judgment on Counts II through IV and a permanent injunction directing Defendants to operate, maintain, fund, and administer the Plan in conformance with all provisions of ERISA (Count I). Counts VI (statutory penalties) and VII (breach of fiduciary duty) will be litigated in the balance of the case. All of the counts are suitable for certification under Rule 23(a) and all three provisions of Rule 23(b).

A. Plaintiff Satisfies the Requirements of Rule 23(a)

1. The Class Is Ascertainable

Although Rule 23 does not specifically require that a class be "ascertainable," this Court has noted that "courts have held that the rule implies this requirement." *Herrera* v. *LCS Fin. Servs. Corp.*, 274 F.R.D. 666, 672 (N.D. Cal. 2011). A class is ascertainable if "its members can be ascertained by reference to objective criteria." *Id.* The Class here is plainly ascertainable. The Class consists of people who were "participants or beneficiaries" of the Plan as of a date certain, namely the date the Complaint was filed, April 1, 2013. "Participant" and "beneficiary" are technical terms defined by ERISA. ERISA § 3(7)-(8), 29 U.S.C. § 1002(7)-(8). One either was or was not a participant or beneficiary of the Plan on a given date. The administrators of the Plan not only have this information, they have to have it in order to administer plan, send notices, pay benefits, etc. Thus, the Class is ascertainable.

2. The Class Is Sufficiently Numerous

A proposed class must be so numerous that joinder of all members of the class is impracticable. Fed. R. Civ. P. 23(a)(1). This requirement is easily met here: Dignity employs approximately 60,000 individuals dispersed across at least 16 states, *see* Compl. ¶¶ 39, 91; Answer

¶¶39, 91, ECF No. 86, most of whom are members of the Class.

3. Common Questions of Law and Fact Exist

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." In *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the Supreme Court addressed the commonality requirement in detail. It explained that this requirement entails both a common question and, equally important, a common answer. As the Court put it, each common question "must be of such a nature that it is capable of classwide resolution. . . . What matters to class certification . . . is not the raising of common questions—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart*, 131 S. Ct. at 2551 (internal quotation marks omitted) (emphasis in original). *See also Spalding* v. *City of Oakland*, No. 11-2867, 2012 WL 994644 (N.D. Cal. Mar. 23, 2012) (this Court's discussion of the *Wal-Mart* analysis).

Here, the key common questions are (i) whether the Plan is exempt from ERISA as a church plan; (ii) whether Dignity and the fiduciaries of the Plan have failed to administer and fund the Plan in accordance with ERISA; (iii) whether the fiduciaries have breached their fiduciary duties; and (iv) whether Defendants are liable for penalties. Not only do these questions have common answers, the Court has already answered one of them: the Plan is not exempt from ERISA as a church plan and thus Plaintiff has already received a declaratory judgment to that effect.

As to the other issues, the Injunction Motion now pending before the Court seeks partial summary judgment and entry of a permanent injunction as to Counts I – IV, dealing with Defendants' failures to comply with ERISA, including reporting and disclosure requirements, minimum funding requirements, and the requirements for written plan instruments. Plaintiff trusts that the Court will find the motion well-taken, but for present purposes all that matters is that the motion seeks a common answer to each of the common questions presented by these three counts. For example, the obligation to file annual reports with the Department of Labor, which Defendants admit they have not complied with, is a plan-wide obligation and thus affects all Plan participants and beneficiaries equally. Defendants have also admitted that they have not provided *any* Plan

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participant with required disclosures. *See* Gerend Decl. Ex. B (Defs' Supp. Resps. Req. for Adm.); *id.* Ex. C (Verification of Defs.' Supp. Resps. Req. for Adm.). These admissions thus provide common answers to each of the questions posed by Count II.

Similarly, because the determinations as to how to fund a defined benefit pension plan are made at a plan-wide level, the questions posed in Count III regarding Defendants' failures to comply with ERISA minimum funding requirements can only be answered with common answers. Moreover, because the same written instrument governs the Plan for all Plan participants and beneficiaries, the question posed in Count IV regarding an improper written instrument may only be answered in a manner that is common to the class. And because the requested injunction requiring Defendants to fund and administer the plan in conformance with ERISA will apply to all Plan participants equally, the common questions posed by the remainder of Count I can only be answered with common answers.

Likewise, with respect to the penalties (Count VI) and fiduciary breach (Count VII) claims, which will be litigated later in the case, both the questions presented and the answers provided in the litigation will be common to all Class members.[3] As to Count VI, Defendants made plan-wide decisions to not provide ERISA-required disclosures, Gerend Decl. Exs. 2 & 3, and whether they reasonably believed they did not need to comply with ERISA and whether they otherwise failed to act in good faith can only be answered on a plan-wide basis. Compl. ¶¶ 140-145. And the amount of the penalties will not involve any information specific to a particular Class member. *See Pierce v. Visteon Corp.*, No. 05-1325, 2013 WL 3225832, at *22 (S.D. Ind. June 25, 2013) (ERISA penalty of $1,852,500 allocated pro rata among class members, amounting to $2,500 each).

As to Count VII, ERISA specifically provides that in actions for breach of fiduciary duty, the fiduciaries must "make good to such plan any losses to the plan resulting from each such breach." ERISA § 409(a), 29 U.S.C. § 1109(a). In a typical case, and certainly in a case involving a defined benefit plan, this means that the breaching fiduciaries must pay into the plan – not to any

[3] ERISA permits participants in certain circumstances to assert individual benefit claims, *see* ERISA § 503, 29 U.S.C. § 1133 (claims procedure), but no such claims are presented in this case.

particular participant – the loss suffered by the plan as a whole. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 (1985) (recovery for a violation of § 409 inures to the benefit of the plan as a whole).

In short, in the language of *Wal-Mart*, the commonality requirement is satisfied because all these common questions are "capable of classwide resolution"; they have "common answers." In fact, they have *only* common answers.

4. Plaintiff's Claims Are Typical

As this Court has explained, "Rule 23(a)(3) requires named class members' claims to be reasonably co-extensive with those of absent class members; they need not be substantially identical. The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Spalding*, 2012 WL 994644, at *3 (quotations and citations omitted). Many courts have noted that the commonality and typicality inquiries tend to merge into one another. 3B J. Moore & J. Kennedy, *Moore's Federal Practice* ¶ 23.23[6] (3d ed. 2013); 7 C. Wright & A. Miller, *Federal Practice & Procedure* § 1764 (1972); *see also Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, n.13 (1982) (commonality and typicality serve as "guideposts" to determine efficiency of class action mechanism and fairness of representation); *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) (same).

The declaratory relief Plaintiff has already received in Count I applies to all participants and beneficiates equally; it could hardly do otherwise. As to the remainder of Count I and Counts II – IV, which are the subject of the pending Injunction Motion, Plaintiff's claims are not only typical of other Class members, they are essentially identical to them. And the same is true of Counts VI and VII. Just as they involve common answers to common questions, Plaintiff's claims are typical of those of other Class members.

5. The Proposed Class Representative Is Adequate

Rule 23(a)(4) requires that a proposed class representative fairly and adequately protect the interests of the class. Adequacy of representation involves two inquiries: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the

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named plaintiffs and their counsel prosecute the action vigorously on behalf of the class." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998).

Plaintiff and Plaintiff's counsel do not have any actual or potential conflicts with the other Class members. Plaintiff has already demonstrated her commitment to "prosecute the action vigorously," and, as she explains in her declaration filed herewith, *see* Declaration of Starla Rollins ("Rollins Dec."), she will do so with due regard for her duties as a class representative. Rollins Dec. ¶¶ 10-12. As is explained more fully below in the section devoted to the appointment of class counsel, Plaintiff's lawyers are very experienced in pension plan litigation such as this and will prosecute the action vigorously to its completion.

B. The Class Satisfies the Requirements of Rule 23(b)

Plaintiff moves the Court to certify the Class under Rule 23(b)(1) and/or (b)(2). Alternatively, in the event the Court declines to certify the Class under Rules 23(b)(1) or (b)(2), the Class may be certified under Rule 23(b)(3).[4] As described above, there are six counts remaining at issue in the case and, as set forth below, each of the three provisions of Rule 23(b) authorizes certification as to each of these counts. In fact, this case is unusual – unusually straightforward – with respect to Rule 23(b). Unlike many ERISA class actions, which involve plans such as 401(k) plans, in which each participant makes his own investment decisions, this case involves a traditional defined benefit pension plan. In such "DB" plans, and in this Plan, the participants do not make any investment decisions. Compl. ¶ 57. With this as background, Plaintiff reviews the three requirements of Rule 23(b) in sequence; all of them authorize certification in this case.

1. ERISA Actions Such as this Are Commonly Certified Under Rule 23(b)(1)

Rule 23(b)(1) authorizes certification when "prosecuting separate actions by or against individual class members would create a risk of: (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the

[4] "When either subsection (b)(1) or (b)(2) is applicable …, (b)(3) should not be used, so as to avoid unnecessary inconsistencies and compromises in future litigation." *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1175 (8th Cir. 1995) (citing 7A Charles A. Wright et al., *Federal Practice and Procedure* § 1772, at 425 (1986)).

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party opposing the class," or "(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b)(1). Subsection (A) "considers possible prejudice to the defendants," while subsection (B) "looks to possible prejudice to the putative class members." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 453 (S.D.N.Y. 2004) (internal citation omitted).

The requirements of subsection (A) are met because failure to certify the Class could lead to multiple conflicting judgments as to whether the Plan is a church plan or whether it must comply with ERISA (Count I), whether Defendants' operation of the Plan violates ERISA as set out in Counts II – IV, and whether Defendants are liable for penalties (Count VI) or breach of fiduciary duty (Count VII). Obviously, if the Plan were held to be a church plan in one adjudication, but not in another, or if the Defendants were held to be violating ERISA in one lawsuit, but not another, the Plan would be faced with "incompatible standards of conduct."

The requirements of subsection (B) are also met because the lawsuit will determine whether Defendants owe ERISA-imposed duties to all of the Class members collectively or to none of them at all. In the words of the rule, this lawsuit necessarily will be "dispositive of the interests of the other [class] members."

2. The Class May Also Be Certified Under Rule 23(b)(2)

Rule 23(b)(2) permits certification when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). As the Supreme Court recently clarified, "[t]he key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Wal-Mart*, 131 S. Ct. at 2557 (internal citation and quotations marks omitted). Thus, certification of a (b)(2) class is warranted "when a single injunction or declaratory judgment would provide relief to each member of the class." *Id.*

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What *Wal-Mart* describes is precisely this case. The conduct at issue, operating a plan as though it were a church plan when it is not, "can be enjoined or declared unlawful only as to all of the class members or as to none of them." The requirements for Rule 23(b)(2) certification are plainly met.

It is true that Plaintiff also seeks monetary relief on behalf of the Plan (Count VII) and the Class (Count VI), but that relief is incidental to, and flows automatically from, the plan-wide injunctive and declaratory relief. Such monetary relief, calculated without reference to individual circumstances, is permissible in a (b)(2) class action. *Wal-Mart*, 131 S. Ct. at 2557-59; s*ee also Johnson v. Meriter Health Servs. Emp. Ret. Plan*, 702 F.3d 364, 372 (7th Cir. 2012) (monetary relief is incidental under 23(b)(2) where "the calculation of monetary relief will be mechanical, formulaic").

3. Alternatively, Rule 23(b)(3) Certification Is Appropriate

This case also meets the requirements of subsection (b)(3), which allows certification of a class when the court finds that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The rule continues with four factors the Court may consider on these issues: "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." *Id.*

All of these factors militate in favor of certification. Once again, because the Plan at issue is a traditional defined benefit pension plan, the ERISA violations necessarily occurred on a plan-wide basis. There is no real occasion for the weighing and balancing of individual factors versus class-wide factors, as contemplated by subsection (b)(3), because there are no individual factors. With respect to predominance, as has been explained above with respect to commonality, the common questions are, in effect, the only questions. They not only "predominate" over individual questions, there are no individual questions. Thus this aspect of subsection (b)(3) is easily met.

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The proposed class also satisfies the superiority requirement. No other class actions concerning the Plan are pending, so there is no issue of other plaintiffs' ability to litigate their own claims, or the preference for one forum over another. There are also no issues presented as to difficulties in managing the action. Although this is a large case, it is of a piece with many large pension plan cases litigated successfully as class actions in the district courts. Thus, the requirements of subsection (b)(3) are also met.

C. Plaintiff's Counsel Should Be Appointed as Class Counsel

Plaintiff also respectfully urges the Court to appoint her counsel as class counsel pursuant to Fed. R. Civ. P. 23(g). The relevant factors are: "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." *Id.*

Each of these factors militates in favor of appointing Keller Rohrback L.L.P. and Cohen Milstein Sellers & Toll, PLLC as class counsel in this case. As the Complaint in this case reflects, they have done substantial work in identifying or investigating the potential claims in this action. As the firms' resumes indicate, *see* Gerend Decl. Exs. D & E, both firms have substantial experience in pension plan class action litigation, and in many cases they have worked, and are working, together representing plaintiffs in pension plan litigation. The firms also have the resources to litigate this case to a successful conclusion. Together they have well over 100 lawyers, practicing out of seven offices. As they have in many other cases, they will commit the time and resources necessary to litigate this case to a conclusion.

IV. CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully urges the Court to grant her Motion for Class Certification and to appoint her counsel as counsel for the Class.

DATED October 27, 2014.

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CERTIFICATE OF SERVICE

I, Lynn L. Sarko, hereby certify that on October 27, 2014, a true copy of the above document was served on the Defendants, through their counsel of record, via ECF.

/s/ *Lynn L. Sarko*
Lynn L. Sarko

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