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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

STARLA ROLLINS and PATRICIA WILSON, on behalf of themselves, individually, on behalf of all others similarly situated, and on behalf of the Dignity Plan,

Plaintiffs,

v.

DIGNITY HEALTH, a California Non-profit Corporation, HERBERT J. VALLIER, an individual, DARRYL ROBINSON, an individual the Dignity Health Retirement Plans Subcommittee, and JOHN and JANE DOES, each an individual, 1-20,

Defendants.

Case No. 13-CV-1450 JST

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Date: March 22, 2018
Time: 2:00 p.m.
Courtroom: 9
Judge: Hon. Jon S. Tigar

Trial Date: None Set

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I. INTRODUCTION

This case concerns an attempt by a multi-billion-dollar hospital system, Dignity Health ("Dignity"), to claim a narrow exemption from the Employee Retirement Income Security Act ("ERISA") for church plans. Dignity's erroneous treatment of the Dignity Health Pension Plan (the "Plan") as a church plan has deprived Plaintiffs and more than 101,000 current and former Dignity employees of key ERISA safeguards, which Congress enacted following failures of several pension plans[1] "to ensure that employees will not be left empty-handed once employers have guaranteed them … benefits." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996). These safeguards include required disclosures, fiduciary responsibilities, funding and vesting standards, and benefit insurance through the Pension Benefit Guaranty Corporation ("PBGC"). *E.g.*, 29 U.S.C. §§ 1021-26, 1053, 1083, 1104-06, 1109, 1307, 1322. Plaintiffs seek to enforce ERISA and, thus, attain the security in retirement to which they are entitled.

The Supreme Court recently addressed a threshold question regarding the statutory church plan definition. It emphasized that the key to the church plan exemption is not the "one-time, historical event" of who "establish[ed]" a plan but instead whether a plan is "maintain[ed]" by a permissible entity, as "it is the entity *maintaining* the plan that has the primary ongoing responsibility (and potential liability) to plan participants." *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1661 (2017). Only two types of entities may "maintain" a church plan: (i) a church, 29 U.S.C. § 1002(33)(A); or (ii) an organization controlled by or associated with a church whose "principal purpose or function" is "the administration or funding" of benefit plans for church employees (hereinafter "principal-purpose organization"), *id.* § 1002(33)(C)(i).

The Plan does not satisfy this standard. It is maintained by Dignity. Dignity is not a church and its principal purpose is providing healthcare, not funding or administering benefit plans for church employees. Much of Defendants' Motion to Dismiss and Memorandum ("Motion" or "Mot."), ECF No. 249, argues that Dignity has connections to the Catholic Church. This is unavailing. Although *employees* of a hospital "controlled by or associated with" a church

[1] *See* 29 U.S.C. § 1001(a); S. Rep. No. 93-127, *reprinted in* 1974 U.S.C.C.A.N. 4838, 4844-47 (1973); S. Rep. No. 93-383, *reprinted in* 1974 U.S.C.C.A.N. 4889, 4891-903 (1973).

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may be *included as participants* in a church plan, *see* 29 U.S.C. § 1002(33)(C)(ii)(II), (iii), a hospital may not *maintain* its own "church plan" because it is neither a church nor a principal-purpose organization, *id.* § 1002(33)(A), (C)(i). This issue is dispositive.

Dignity argues that the Retirement Plans Subcommittee of the Human Resources and Compensation Committee of the Dignity Board (the "Subcommittee") *administers* the Plan and is therefore a principal-purpose organization. This conflates two concepts—maintain and administer—and reflects a fundamental misreading of the statute. Defendants assume the exemption is available to plans sponsored by hospital systems and trivialize the "maintained" requirement. But the statute and legislative history make clear that Congress did *not* envision stand-alone church plans sponsored by hospitals, and as *Advocate* explained, the entity that *maintains* a plan is the key to the exemption. *Advocate*'s narrow holding—that plans maintained by denominational pension boards and other principal-purpose organizations need not be established by a church—does not extend the exemption to plans sponsored by hospitals. Indeed, *Advocate* declined to consider whether a hospital system like Dignity could "maintain" its own church plan, through an internal committee or otherwise, 137 S. Ct. at 1657 n.2, 1658 n.3.

The Tenth Circuit's recent opinion in *Medina v. Catholic Health Initiatives*, 877 F.3d 1213, 1220 (10th Cir. 2017), on which Defendants heavily rely, contains numerous legal errors: among other things, it assumed its conclusion, ignored *Advocate*'s discussion of the meaning of "maintained," and otherwise refused to consider the meaning of terms within the context of ERISA. It also relied on inapposite facts, including that authority over plan "maintenance" had been delegated to the hospital system's internal committee. No such delegation exists here.

Yet even if the Plan were maintained by a principal-purpose organization, Dignity concedes it is not "controlled by" any church. And its claim of being "associated with" the Catholic Church is foreclosed by multiple official statements to the contrary, including the statement of the Archbishop of San Francisco that Dignity "will not be recognized as Catholic." *See* Am. Compl. ("AC") ¶ 9(D), ECF No. 243. Dignity also fails to satisfy any of the standards for association adopted by Courts of Appeals that have considered the issue. Plaintiffs plausibly allege these and other reasons why the Plan does not qualify as an ERISA-exempt church plan

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or, alternatively, why application of the exemption violates the Establishment Clause.

Defendants' failure to comply with ERISA's funding requirements warrants emphasis. Prior to ERISA, many employers made inadequate or delayed contributions and then denied responsibility to pay benefits from corporate assets if plans fell on hard times. *See supra* note 1. Congress thereafter required contributions to fund current and *future* benefit obligations in order "[t]o increase the chances that employers will be able to honor their benefits commitments[.]" *Lockheed Corp.*, 517 U.S. at 887. Dignity has defied Congressional intent by underfunding the Plan by over a *billion* dollars. The riskiness of such underfunding is not mere conjecture. Participants of other underfunded plans operated as church plans have faced significant reductions to accrued benefits.[2]

Finally, although state and common law protections cannot make up for the loss of ERISA protections, Plaintiffs assert, out of an abundance of caution, breach of contract and breach of trust claims as alternative means of requiring Defendants to fund the Plan.

II. STATEMENT OF ISSUES

1. Have Plaintiffs pleaded sufficient facts, accepted as true, to state plausible claims that:
   a) The Plan is not a church plan because: (i) it is not "maintained" by a proper entity; or (ii) neither Dignity nor the Subcommittee is "controlled by or associated with" a church;
   b) Application of the exemption to the Plan violates the Establishment Clause; and
   c) In the alternative, (i) Dignity breached its contractual obligation to fund the Plan and Plaintiffs are entitled to specific performance thereof; (ii) Dignity was unjustly enriched; and (iii) the Subcommittee breached its state and common law fiduciary duties?
2. Does the Court have subject matter jurisdiction over Plaintiffs' state law claims?
3. Have Plaintiffs plausibly alleged injury-in-fact with respect to their state law claims?

III. BACKGROUND

Dignity is a California non-profit corporation that operates 39 hospitals in California, Arizona, and Nevada and over 400 other healthcare facilities in 22 states. AC ¶ 37. Dignity is the

[2] *See* Karin Price Mueller, *Bamboozled: How Catholic Hospitals Get Away with Letting Pensions Go Broke*, NJ.com (Nov. 28, 2016), https://goo.gl/7TGIkA; Claire Hughes, *Retirees of Former Schenectady Hospital Face Pension Loss*, Times Union (Jan. 29, 2017), https://goo.gl/QwjVMf.

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fifth largest healthcare system in the country. *Id.* ¶ 38. Dignity was formerly known as Catholic Healthcare West ("CHW"), but changed its name as part of a 2012 corporate reorganization. *See id.* ¶ 9(D). In 2016 Dignity had $17 billion in assets and $12.6 billion in revenues. *Id.* ¶ 37. Dignity is not owned, operated, or funded by any church, *id.* ¶¶ 49-52, and it is governed by a self-perpetuating Board of Directors and managed by lay executives, *id.* ¶¶ 46-48, 54.

Plaintiff Rollins is a former Dignity employee of over 25 years. *Id.* ¶ 19. Plaintiff Wilson has been employed by Dignity since the hospital at which she works was acquired by Dignity in 1999. *Id.* ¶ 20. Both Plaintiffs are vested participants in the Plan, *Id.* ¶¶ 19-20, a defined benefit pension plan that provides benefits for Dignity's current and former employees. *Id.* ¶¶ 39, 61.

Dignity sponsors, is responsible for funding, and has the sole authority to amend and terminate the Plan. *Id.* ¶¶ 61, 69-75. The named Plan administrator is the Subcommittee. *Id.* ¶¶ 24, 95-100. Dignity initially operated the Plan subject to ERISA, but in 1992 passed a retroactive resolution to treat it as a church plan. *Id.* ¶¶ 72-73. Defendants do not comply with ERISA's requirements. *Id.* ¶¶ 64-65, 74-78, 106-21, 171-265, 275. Despite Dignity's promises to make contributions to the Plan's trust that are sufficient to fund *all* accrued benefits, *id.* ¶¶ 75-77, 280-82, *accord* Ex.[3] 13 § 6.01, in 2016 the Plan held assets sufficient to fund only 72% of accrued benefits. AC ¶ 76. It remained underfunded by $1.5 billion in 2017.[4]

IV. LEGAL STANDARDS

A court denies a Rule 12(b)(6) motion if the complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). "Specific facts are not necessary"; a complaint "need only 'give the defendant fair notice of what the … claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citation omitted).

"[A] district court may not consider any material beyond the pleadings in ruling on a

[3] "Ex." refers to exhibits attached to the Declaration of Elizabeth Meckenstock in Support of Defendants' Motion ("Meckenstock Declaration" or "Meckenstock Decl."), ECF No. 249-1, and, unless otherwise stated, citations are to ECF page numbers.

[4] Dignity Health and Subordinate Corporations, Consolidated Financial Statements as of and for the Years Ended June 30, 2017 and 2016 ("Fin. Stmt.") at 28, https://goo.gl/49nfBz.

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Rule 12(b)(6) motion." *Lee v. City of Los Angeles*, 250 F. 3d 668, 688 (9th Cir. 2001) (citation omitted). Defendants' Motion relies on multiple documents that do not fall within the limited exemptions to this rule: they were not incorporated in the AC by reference and are not "matters of public record" that are judicially noticeable. *Contra id*. at 688-689 (citation omitted). *See also* Pls.' Opp'n to Defs.' Req. for Judicial Notice. Yet even if they were judicially noticeable, "a court may take judicial notice of documents only for their existence, not the truth of the contents therein." *Rollins v. Dignity Health* ("2013 MTD Order"), 19 F. Supp. 3d 909, 912 n.2 (N.D. Cal. 2013), *rev'd on other grounds*. *Accord Lee*, 250 F.3d at 690.

V. ARGUMENT

A. The Plan Is Not a Church Plan Because It Is Not Maintained by a Permissible Entity.

1. Only Two Types of Entities May Maintain a Church Plan.

"Church plan" is defined in 29 U.S.C. § 1002(33). As originally enacted in 1974, subparagraph 33(A) provided that "[t]he term 'church plan' means … a plan established and maintained … for its employees … by a church or by a convention or association of churches[.]"[5] Thus, as originally enacted, a church plan had to be "maintained" by a church.

In 1980 Congress amended the statute to accommodate congregational denominations that often set up separate pension boards to maintain their benefit plans. *See, e.g.*, 126 Cong. Rec. 23,049 (1980) (definition "clarified to include plans maintained by a pension board maintained by a church"); *Stenographic Transcript of Hearings Before the Comm. on Fin., U.S. S., Exec. Sess.*, 96th Cong. 40 (June 12, 1980) (statement of Sen. Talmadge) (definition would now "include church plans which rather than being maintained directly by a church are instead maintained by a pension board maintained by a church"). To accomplish this, Congress retained the original language in subparagraph 33(A) but added the following new subparagraph 33(C)(i):

> A plan established and maintained for its employees … by a church … ***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 … for the employees of a church …, ***if such organization is controlled by or associated with a church***[.]

[5] As used herein, "church" includes "a convention or association of churches."

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Id. § 1002(33)(C)(i) (emphasis added).

These provisions remain the same today, and no other provision in the definition addresses who may "maintain" a church plan. Thus, only two types of entities may "maintain" a church plan: (1) churches, pursuant to subparagraph 33(A); or (2) entities described in subparagraph 33(C)(i), i.e., principal-purpose organizations.

In 1980 Congress also amended the statute to provide that the *employees* of *any* "organization controlled by or associated with a church" would be deemed employees of a church and thus, under the statutory rubric, could *participate* in a church plan. *Id.* § 1002(33)(C)(ii)(II), (iii). These subparagraphs permanently extended a provision, set to expire in 1982, that had permitted a church to include employees of its associated hospitals and other agencies in its church plan. *See* Pub. L. No. 93-406, § 3(33)(C), 88 Stat. 829 (1974). As the sponsors of the 1980 amendment explained, subparagraphs 33(C)(ii)(II) and (iii) "permit[ted] a church to continue after 1982 to provide benefits for employees of organizations controlled by or associated with the church." *E.g.*, 124 Cong. Rec. 10,464, 11,103, 16,518-19 (1978); 125 Cong. Rec. 1356, 10,042 (1979). Critically, however, Congress did *not* provide that these organizations can themselves *maintain* a church plan; only churches and principal-purpose organizations can do that. Thus, employees of a hospital, if it is "controlled by or associated with a church," may be included in a church plan, but that hospital cannot itself *maintain* a church plan.[6]

2. Dignity, and No Other Entity, Maintains the Plan.

a. Dignity "Has the Primary Ongoing Responsibility" to Plan Participants.

An entity maintains a plan where it "has the primary ongoing responsibility (and potential liability) to plan participants." *Advocate*, 137 S. Ct. at 1661. In other words, "maintain" means to commit to, and have the ultimate responsibility for, providing benefits. *See also Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 12 (1987) (employer did not "maintain" a plan because it did

[6] Congress did not envision stand-alone church plans maintained by hospitals; it emphasized the need for *one* plan for church and agency employees. *See, e.g., Hr'gs Before the Subcomm. on Private Pension Plans & Emp. Fringe Benefits of the Comm. on Fin.* ("*Subcomm. Hr'gs*"), 96th Cong. 365 (Dec. 4-5, 1979) ("one plan for both church and agency employees is critical"); 125 Cong. Rec. 10,052 ("Ministers and lay employees have a unique need to be covered by one plan.").

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not "assume[] … responsibility to pay benefits on a regular basis").

Dignity is the entity committing to provide benefits through the Plan, which is, after all, named after Dignity, *see* Ex. 13. *See also Anderson v. UNUM Provident Corp.*, 369 F.3d 1257, 1266 (11th Cir. 2004) (considering whether plan was named after company). "Dignity offers participation in the Plan to eligible employees." Defs.' Answer Pl.'s Compl. ("Answer") ¶ 58, ECF No. 86.[7] Dignity decides which affiliates may participate in the Plan, Ex. 13 §§ 1.19, 15.02, and must approve an affiliate's decision to cease participation in the Plan, *id.* § 15.04. The restatement, which details the benefits to which employees are entitled, was executed by Dignity. Ex. 13 at 804; *see also* Ex. 8 at 261.

A key element of maintaining a plan is possessing the "power to modify" the plan (i.e., to amend the plan terms). *Anderson*, 369 F.3d at 1265-67. This authority is important because it entails the authority to "arrang[e] to finance the benefits" and to ensure there will be "the necessary administrative support" and "procedure for disbursing benefits." *Id.* at 1265. *See also Golden Gate Rest. Ass'n v. City & Cty. of S.F.*, 546 F.3d 639, 653-54 (9th Cir. 2008) (relevant factors in determining which entity "established or maintained" a plan include control over whether the plan will continue, control over plan eligibility and the "kind and level" of benefits, and authority to make promises to participants). Here, Dignity, through its Board, has the authority to amend the Plan, and any amendment is binding on all Dignity affiliates. Ex. 13 §§ 11.05(a), 12.01, 12.02. Dignity has amended and restated the Plan numerous times. *See* Ex. 8 at 141, 261, 517-628; Ex. 13 at 677, 804, 1128-38. *See also Anderson*, 369 F.3d at 1267 (renewal of obligations is evidence that employer "maintained" plan). Plan amendments are made under the heading "Corporation Action of Dignity Health Amending the [Plan]." *E.g.*, Ex. 13 at 1128-38. Dignity decided to treat the Plan as a "church plan." AC ¶¶ 72-73; Mot. 8.

Another key factor is financing or arranging to finance benefits. *See Anderson*, 369 F.3d

[7] Documents previously submitted by Defendants further indicate that Dignity maintains the Plan. In a 1993 letter to the IRS on behalf of Dignity (then CHW), counsel expressly stated that "CHW established and *maintains*" the Plan. *See* ECF No. 117-1 at DIGNITY00006802 (emphasis added). The 1995 Settlement Agreement between the PBGC and CHW refunding previously paid PBGC premiums includes a recital stating that "Catholic Healthcare West is the employer *maintaining*" the Plan. *See* ECF No. 117-7 at DIGNITY00008537 (emphasis added).

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at 1265; *Fort Halifax*, 482 U.S. at 9 (obligation to "monitor[] the availability of funds for benefit payments"). Dignity is responsible for funding the Plan, AC ¶75, Ex. 13 § 6.01, and the Investment Committee of its Board is responsible for the Plan funding policy, Ex. 13 § 11.18.

Logically, maintaining a plan must also entail the authority to *stop* offering benefits, i.e., to terminate the plan. *See Hightower v. Tex. Hosp. Ass'n*, 65 F.3d 443, 449 (5th Cir. 1995). Dignity, through its Board, may terminate the Plan at any time, Ex. 13 §§ 11.05(a), 13.01, the Plan automatically terminates if Dignity ceases to participate, *id.* § 15.04, and any surplus in Plan assets (after all benefits are paid) will be distributed to Dignity, *id.* § 13.03. *Medina* baldly asserted that *Hightower* "does not define 'maintain' in the way [plaintiff] proposes," 877 F.3d at 1225 n.3, but *Hightower* holds that an employer's decision to terminate rather than continue a plan meant the employer "maintained" the plan, 65 F.3d at 449.

Defendants' contention that these standards "make[] no sense in light of the statutory scheme and … *Advocate*," Mot. 13, ignores that *Advocate* affirmed the "primary ongoing responsibility (and potential liability)" standard in the course of explaining the importance under ERISA of the entity "maintaining" a plan. 137 S. Ct. at 1658-61.

b. The Subcommittee Does Not Maintain the Plan.

Defendants argue that the Plan is "maintained" by the Plan *administrator*, the Subcommittee. Mot. 10-17. Not so. The Subcommittee has not committed to provide benefits; it did not execute the Plan restatements; it does not have authority to amend the Plan; it does not fund the Plan or control the Plan funding policy; and it cannot terminate the Plan. AC ¶¶ 98-99, 128, *see also supra* pp 6-8. Although the Subcommittee, like most plan administrators, is designated as the "Plan Administrator" and has "full power" to "administer the Plan and to interpret, construe, and apply" Plan language, Mot. 8 (quoting Ex. 8 § 11.08), the Subcommittee is implementing the Plan terms *designed and adopted by Dignity*, and it performs these duties "on behalf of" Dignity. Ex. 8 § 11.08; Ex. 13 § 11.08. In fact, whether the Plan is even administered by the Subcommittee is in doubt. *See* Ex. 12 at 673 ("Willis Towers Watson has been the plan administrator since the inception of the Plan[.]").

Defendants' position that the Plan is "maintained" by the Subcommittee because it is

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supposedly *administered* by the Subcommittee, *see* Mot. 11, 13-17, is contrary to the meaning of "maintained" as used throughout ERISA. *Contra Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992) ("[I]dentical terms within an Act bear the same meaning."). Both case law, *see supra* pp 6-8, and the text of ERISA confirm that "maintained" and "administer" have distinct meanings. *Compare* 29 U.S.C. § 1002(16)(B) (defining "plan sponsor" as entity that "established or maintained" plan), *with id.* § 1002(16)(A) (defining plan "administrator"). Although the sponsor is the default administrator, *id.* §1002(16)(A)(ii), it may designate a *different* "administrator" without losing its status as the entity that "established or maintained" the plan, *id.* § 1002(16)(A)(i). *See also Stalp v. Excellus Health Plan, Inc.*, 2012 WL 3637257, at *1-2 (D. Neb. Aug. 22, 2012) (plan administered by insurance company was "maintained" by employer that paid premiums); *In re Consol. Litig. Concerning Int'l Harvester's Disposition of Wis. Steel*, 681 F. Supp. 512, 518 (N.D. Ill. 1988) ("maintaining a plan is not defined[,]" but "choice of words suggests someone with more responsibility" than to "simply administer[]").

Although *Medina* relied on "ordinary usage" to conclude that "maintained" means merely to administer—i.e., to "care[] for the plan for purposes of operational productivity," 877 F.3d at 1226 (citation omitted); *see also id.* at 1225-26, it contradicted—indeed entirely ignored—the Supreme Court's reminder that "maintained" requires the "primary ongoing responsibility (and potential liability) to plan participants." *Advocate*, 137 S. Ct. at 1661. *Medina* also ignored that statutory terms must be defined in context, *see Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (refusing to define statutory term "in isolation" and instead applying "'cardinal rule'" that statutory text "'be read in context'") (citation omitted), and that, in the ERISA context, "maintained" and "administered" have distinct meanings.[8]

c. Subparagraph 33(C)(i) Does Not Redefine "Maintained" to Mean Administered.

Defendants note that a principal-purpose organization need only have a principal purpose of "administration *or* funding" of plans, Mot. 11, 14 (quoting 29 U.S.C. § 1002(33)(C)(i)). But

[8] *Medina* attempted to find support for its acontextual reliance on dictionary definitions by noting that *Anderson* also cited dictionary definitions. *Medina*, 877 F.3d at 1225 n.3 (citing *Anderson*, 369 F.3d at 1265). But *Anderson* went on to analyze the meaning of "maintained" *in the context of ERISA*. *See supra* pp. 7-8.

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Defendants conflate two distinct clauses of subparagraph 33(C)(i). The first clause of subparagraph 33(C)(i) ("A plan established and maintained … by a church … includes a plan maintained by an organization") contains a sufficient condition: a plan qualifies as a church plan if it is "maintained" by a specified type of organization. The second clause ("the principal purpose or function of which is the administration or funding of a plan") is a restrictive clause describing the type of organization that, pursuant to the first clause, can maintain a church plan. As *Advocate* explained, "everything after the word 'organization' in [subparagraph 33(C)(i)] is just a (long-winded) description of a particular kind of church-associated entity—which this opinion will call a 'principal-purpose organization.'" 137 S. Ct. at 1656. Accordingly, although an *organization* can qualify as a "principal-purpose organization" if its principal purpose is the "funding *or* administration" of benefit plans, a *plan* will not qualify as a church plan unless it is "maintained" by a principal-purpose organization. Defendants cannot take the words "administration or funding" from the second clause (describing a type of entity) and import them into the first clause (describing a church plan) as a stand-in for the "maintained" requirement.

Indeed, if Congress intended to permit all plans *administered or funded* by a principal-purpose organization to qualify as church plans, it would have written "a plan established and maintained … by a church … includes a plan ~~maintained~~ *administered or funded* by" a principal-purpose organization. But that is not what Congress wrote. *See, e.g.*, *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1235 (2014) (where "drafters did not adopt" the "obvious alternative," "the natural implication is that they did not intend" that alternative).

Accordingly, Plaintiffs' position is not that "or" in the second clause of subparagraph 33(C)(i) is not disjunctive or that the Subcommittee lacks the sufficient "*principal purpose*" of administering the Plan. *Contra* Mot. 14-15. Instead, the dispositive issue is that the Plan is "maintained" by Dignity and not the Subcommittee. *See Hanshaw v. Life Ins. Co. of N. Am.*, 2014 WL 5439253, at *8 (W.D. Ky. Oct. 24, 2014) (relying on fact that hospital that maintained the plan, as opposed to the plan administrator, did not satisfy subparagraph 33(C)(i) because its "principal purpose is the provision of healthcare, not the administration of a benefits plan").

Finally, possessing the *authority* to amend, arrange for the funding of, or terminate a

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plan, and making an *ongoing commitment* to provide benefits through that plan, does not mean an administrative organization would have a *principal* "purpose or function" other than the administration of benefit plans. *Contra* Mot. 14, 16. Administration would remain the principal ongoing activity, or "main job," of the organization. *See Advocate*, 137 S. Ct. at 1657. Were it otherwise, the very plans described by the Supreme Court in *Advocate*—i.e., plans both established and maintained by denominational pension boards, *id.* at 1662, and thus plans for which the pension boards necessarily committed to pay benefits and possessed authority over plan terms and funding—would not comply with the principal-purpose requirement.

d. Defendants' "Settlor" Arguments Fail.

"Employers or other plan sponsors are generally free … to adopt, modify, or terminate" benefit plans, and "[w]hen employers undertake those actions, they do not act as fiduciaries, but are analogous to the settlors of a trust." *Lockheed Corp.*, 517 U.S. at 890 (citations omitted). These so-called "settlor" functions are distinct from fiduciary actions *including administration*. *See, e.g., id.* (distinguishing between settlor act of plan design and fiduciary act of administration); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 443-44 (1999) (same). Contrary to Defendants' assertions, however, *see* Mot. 14, this distinction proves *Plaintiffs'* point.

ERISA codifies these settlor functions possessed by a plan sponsor using the words "*established or maintained*." The "plan sponsor" is the entity that "established or maintained" the plan. 29 U.S.C. § 1002(16)(B). Conversely, the plan *administrator* can be a different entity. *See supra* p. 9 (citing 29 U.S.C. § 1002(16)(A)(i)). ERISA treats administration as a fiduciary function, 29 U.S.C. § 1002(21)(A)(iii), but not maintenance, *see id.* § 1002(21). As noted above, cases interpreting ERISA also make clear that "maintained" entails the settlor authority over plan design. *See, e.g., Golden Gate*, 546 F.3d at 653-54.

Defendants' suggestion that a single entity cannot both possess settlor authority and administer a plan, Mot. 15, is belied by the statute, *see* 29 U.S.C. § 1002(16)(A)(ii) (sponsor is default administrator), and the authority they cite, *see Pegram v. Herdrich*, 530 U.S. 211, 225-28 (2000) (single entity can wear "two hats," i.e., a fiduciary and settlor hat, and fiduciary duties apply only "to the extent" it engages in fiduciary functions such as plan administration). Thus,

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contrary to Defendants' assertion, Mot. 15, a single entity that is both an administrator and settlor could amend or terminate a plan (i.e., exercise settlor authority) without being subject to fiduciary duties. *See Pegram*, 530 U.S. at 226-27 (citing *Lockheed Corp.*, 517 U.S. at 887).

Defendants also suggest that only an employer can possess settlor authority. *See* Mot. 15. This, of course, is true with respect to a typical ERISA plan. ERISA governs "*employee* benefit plans," which are plans "established or *maintained*" by an employer for its employees, 29 U.S.C. § 1002(1), (2), (3), (6), (7), and ERISA defines a "plan sponsor" as the "employer" that "established or *maintained*" the plan, *id.* § 1002(16)(B). The statutory church plan definition was crafted within this employer-employee framework. A church plan is one "established and maintained … *for its employees* … by a church." *Id.* § 1002(33)(A).

The amendments to allow church plans to cover employees of organizations "controlled by or associated with a church" retained this employer-employee relationship: "[t]he term *employee of a church* … includes … an employee of an organization … which is controlled by or associated with a church," *id.* § 1002(33)(C)(ii)(II), and "[a] church … *shall be deemed the employer* of any individual included as an employee under clause (ii)," *id.* § 1002(33)(C)(iii) (emphasis added). Thus, even if a church plan covers employees of a church-associated hospital, "the employer," under the statute, is the church—*and not the hospital*. Likewise, subparagraph 33(C)(i) recognizes that the "church" is the employer that "established and maintained" the plan for its employees: "A plan established and maintained for its employees … by a church … includes a plan maintained by [a principal-purpose organization] … for the employees of a church[.]" *Id.* § 1002(33)(C)(i). Thus, in all church plans, the "employer" is the church.

This framework necessarily implies that a principal-purpose organization, which is not itself an employer, can maintain a plan because such a plan will be considered "established and maintained" by a church (the employer) for its employees (including deemed employees). But it also means that if a plan is not maintained by a principal-purpose organization (or by a church directly), it will not be deemed to be maintained by a church and thus will not be a church plan.

Defendants' related suggestion that a principal-purpose organization lacks the "business operations" or "source of funds" necessary to fund a plan, Mot. 15, is unavailing. For one thing,

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an entity maintaining a plan need only arrange for funding of benefits *from some source*. *See supra* pp. 7-8. Moreover, Congress plainly recognized that denominational pension boards that were the motivation for subparagraph 33(C)(i) *did* pay and arrange for the funding of benefits.[9]

e. The Distinction Between "Maintained" and "Administered" Is Consistent with *Advocate* and Congressional Intent.

Defendants' "settlor" arguments are based on the assumption that Congress intended hospitals to be able to sponsor their own church plans through internal benefits committees. *See* Mot. 15-16. *Medina* similarly assumed its conclusion: it reasoned that under plaintiffs' view, "virtually no plan administered by a benefits committee or similar organization could qualify for the church-plan exemption." 877 F.3d at 1226. But nothing in the statutory text or legislative history indicates that Congress had such an intent. Instead, the language of the statute and the legislative history reflects a narrow attempt by Congress to accomplish two things: (i) to allow church employees and employees of church-associated hospitals and other organizations to be covered by a *single* plan, *see supra* note 6; and (ii) to expand the church plan exemption to accommodate not only churches but also religious denominations that used distinct pension boards to maintain the denominational church plans. *See supra* p. 5.

Advocate did *not* "validate"—much less declare that Congress' "purpose" was to "permit"—church plans established or sponsored by hospitals. *Contra* Mot. 15. Instead, it addressed a narrow question of statutory construction and held that a plan "maintained" by a principal-purpose organization need not be established by a church. *Advocate*, 137 S. Ct. at 1658-61. Its discussion of Congress's purpose was limited to whether Congress intended all church plans to be "established" by a church. *Id.* at 1661. It did not resolve what Congress intended in enacting subparagraph 33(C)(i), but merely recognized two alternative "narratives" set forth by the parties and that, even under plaintiffs' narrative, Congress did not intend to require plans maintained by denominational pension boards to be established by churches. *Id.* at

[9] *See, e.g.*, 126 Cong. Rec. 20,245 (pension board "provides pension or welfare benefits for persons carrying out the work of the church"); 124 Cong. Rec. 12,107 ("pension boards" were a "funding media" for church plans and managed the "funds set aside for retirement purposes"). Indeed, many "pension boards" arranged for the financing of benefits through endowments. 125 Cong. Rec. 10,056; *Subcomm. Hr'gs*, 96th Cong. at 387, 414-16, 426-27, 442, 460, 478-79.

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1661-62.[10] The Supreme Court did not deviate from the limited Congressional purpose reflected in the text and legislative history regarding which entities could maintain a church plan.

This does not render *Advocate* an "empty letter." *Contra* Mot. 16. Defendants' argument is based on a faulty premise that the entity that established a plan forever "holds the settlor functions." *Id.* Of course, even if this were true, plans both established and maintained by pension boards and other principal-purpose organizations would find relief in *Advocate*. *See* 137 S. Ct. at 1662. But Defendants' premise is mistaken. Plan sponsorship—and thus settlor control—can be transferred between entities. *See* 29 U.S.C. § 1002(16)(B) (plan sponsor is entity that "established *or* maintained" plan); *Blaw Knox Ret. Income Plan v. White Consol. Indus., Inc.*, 998 F.2d 1185, 1191 (3d Cir. 1993) (sale of business entailed transfer of plan sponsorship). Indeed, *Advocate* invoked this concept in concluding that the entity that maintains a plan is more important than the entity that established it. 137 S. Ct. at 1661 (citing *Rose v. Long Island R.R. Pension Plan*, 828 F.2d 910, 920 (2d Cir. 1987)). Thus, a principal-purpose organization can possess settlor control (and thus maintain) a plan that was established by a different entity. But no such transfer of settlor authority has occurred here: Dignity maintains the Plan.

3. Dignity Is Neither a Church nor a Principal-Purpose Organization.

Defendants admit that Dignity is not a church, Answer ¶ 76, *see also* AC ¶¶ 56-58.[11] Dignity's principal purpose is the provision of healthcare, not the administration or funding of benefit plans. AC ¶¶ 44-45, 127. Because Dignity maintains the Plan and is neither a church nor a principal-purpose organization, the Plan is not a church plan. 29 U.S.C. § 1002(33)(A), (C)(i).

Defendants' bald assertion that the Plan would qualify as a church plan even if it were maintained by Dignity, Mot. 17 n.14, would render the "maintained" requirement superfluous. *Contra Bennett v. Spear*, 520 U.S. 154, 173 (1997). Defendants cite subparagraphs 33(C)(ii)(II) and (iii), but these provisions address only which employees may be *covered* by a church plan, *see supra* pp. 6, 12; they do not eliminate the "maintained" requirement. This Court already

[10] *Advocate* concluded that the Congressional floor statements spoke "at best indirectly to the precise question here." 137 S. Ct. at 1661. Unlike with respect to the "established issue," the legislative materials directly address the questions raised here. *See supra* pp. 5-6.

[11] *See also* Hr'g Tr. Mots. Partial Summ. J. 16, June 16, 2014, ECF No. 170.

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rejected a similar argument. *See* 2013 MTD Order, 19 F. Supp. 3d at 915 ("Section C(ii) merely explains which employees a church plan may cover …. It does nothing more.").

4. Even If the Subcommittee "Maintained" the Plan, It Cannot Qualify as a Principal-Purpose "Organization."

Subparagraph 33(C)(i) also requires that the principal-purpose entity that maintains a plan be an "organization." 29 U.S.C. § 1002(33)(C)(i). The Subcommittee is not. The Subcommittee is a *sub*committee of the Dignity Board, whose members are appointed by the Human Resources and Compensation Committee of the Dignity Board, Mot. 9; Ex. 9 at 633, Ex. 13 § 11.06. Its expenses are paid by Dignity, Ex. 13 § 11.14., and its members are indemnified by Dignity, *id.* § 11.10. *See also* AC ¶¶ 24, 93(A), 128.

Defendants emphasize that a principal-purpose organization need not be a "civil law corporation." Mot. 11-12 (quoting 29 U.S.C. § 1002(33)(C)(i)). But the problem is not that the Subcommittee is unincorporated; it's that the Subcommittee is not an "organization" distinct from Dignity, and Dignity does not have a principal purpose of plan funding or administration. *Advocate* declined to consider whether "hospitals' internal benefits committees" qualify as principal-purpose organizations. 137 S. Ct. at 1658 n.3.

Defendants note that the statute does not define "organization," Mot. 11, and rely on *Medina*'s use of dictionary definitions to argue that a subcommittee satisfies the ordinary meaning of the term. Mot. 12. However, Defendants and *Medina* ignore the context. *See, e.g.*, *Hibbs*, 542 U.S. at 101. The subcommittee at issue here (and in *Medina*) is not a random committee; it is an internal subcommittee created by an entity that cannot itself maintain a church plan. Congress distinguished between church-associated, *principal-purpose* organizations (which may maintain church plans) and *other* church-associated organizations (which may not maintain church plans but whose *employees* may participate in a church plan). *See supra* pp. 5-6. To permit *any* church-associated entity to maintain its own ERISA-exempt church plan by creating an internal subcommittee to serve as a principal-purpose organization would eviscerate the distinction Congress made between subparagraphs 33(C)(i) and 33(C)(ii)(II) & (iii), *contra Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014), and would render the principal-purpose

clause superfluous, *contra Bennett*, 520 U.S. at 173.

Thus, as Judge Henderson concluded, the "statute does not say that the organization may have a subcommittee who deals with plan administration"; the "organization itself" must have such "principal purpose." *See* 2013 MTD Order, 19 F. Supp. 3d at 914; *see also Kaplan v. Saint Peter's Healthcare Sys.*, 810 F.3d 175, 183 n.8 (3d Cir. 2015), *rev'd on other grounds*. Because Dignity lacks the proper principal purpose, it may not maintain a church plan.

That employers' "internal benefits committees frequently *administer*" plans, Mot. 12 (emphasis added), is irrelevant. Unlike with respect to "maintained" under subparagraph 33(C)(i), whether a plan *administered* through an employer's internal committee is deemed administered by the employer versus the committee has no bearing on whether it is administered by a permissible entity. Nothing prohibits a hospital or other employer from *administering* its plans; indeed, the sponsor is the *default* administrator. 29 U.S.C. § 1002(16)(A)(ii). Likewise, a committee can be an administrator—and thus may be sued in such capacity, Mot. 12 n.7—because unlike a principal-purpose "organization," an *administrator* may be a "person," 29 U.S.C. § 1002(16)(A)(i), which is broadly defined, *id.* § 1002(9). The statute must be construed to give meaning to Congress's decision to use "organization" in subparagraph 33(C)(i) rather than "person" as it did with respect to an administrator. *See, e.g.*, *Loughrin*, 134 S. Ct. at 2390.

Of course, none of this would "forbid" a church plan from being *administered* by an internal committee. *Contra* Mot. 12. n.8. In concluding that "[n]o authority compels us to bar organizations from constituting subsidiary committees to administer their church plans," Mot. 16 (quoting *Medina*, 877 F.3d at 1227), *Medina* conflated "maintained" and "administered" and failed to realize that if a church uses an internal committee to *administer* its benefit plans, the church would still be the entity that "maintained" such plans and, consistent with subparagraph 33(A), the plans would qualify as church plans; Subparagraph 33(C)(i) would be unnecessary. Defendants' suggestion that Congress had internal committees in mind when it added subparagraph 33(C)(i), Mot. 12, is belied by the legislative history, which makes clear that Congress passed subparagraph 33(C)(i) to accommodate religious denominations that, *instead of maintaining plans internally*, used pension boards to maintain their plans. *See supra* p. 5.

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Finally, *Thorkelson v. Publ'g House of Evangelical Lutheran Church in Am.*, 764 F. Supp. 2d 1119, 1127 (D. Minn. 2011), is unpersuasive: it merely paraphrased the definition before concluding, *without analysis*, that it was "clear" that the plan was a church plan because it was "administered" by a committee whose "sole purpose is to administer the [p]lan." *Id.*

5. The Informal Position of the IRS Is Neither Controlling nor Persuasive.

Defendants rely, Mot. 11, 13, on an informal IRS General Counsel Memorandum ("GCM") and other IRS private letter rulings ("PLRs"), but the statutory interpretation reflected therein is not entitled to deference because it was not arrived at through "a formal adjudication or notice-and-comment rulemaking," *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000), and was not intended to be binding on third parties.[12] *United States v. Mead Corp.*, 533 U.S. 218, 233 (2001). It also is not "entitled to respect" because it lacks "power to persuade." *Christensen*, 529 U.S. at 587 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

The agency opinions on which Defendants rely are entirely devoid of reasoning: they assume without explanation that "maintain" means "administer" and that an internal committee can qualify as an organization. *See, e.g.*, IRS GCM 39,007, 1983 WL 197946, at *5 (Nov. 2, 1982); IRS PLR 201319036, 2013 WL 1928485 (Feb. 8, 2013). Notably, although the Supreme Court recognized that the IRS "believe[s]" that an "internal benefits committee of a church-affiliated non-profit" qualifies as a principal-purpose organization, *Advocate*, 137 S. Ct. at 1657, it did not adopt this interpretation, *id.* n.2, 1658 n.3, and with respect to the "established" issue, it engaged in its own *de novo* interpretation without reliance on the IRS or DOL. *Id.* at 1658-63.

Dignity's reliance on PLRs that addressed the Plan, Mot. 8, 13, is unavailing. For one thing, the IRS has not issued a PLR regarding the Plan since the 2012 corporate reorganization. Although Dignity requested a new PLR, Defendants reported to the Ninth Circuit and the Supreme Court that "[t]he IRS has advised that it is *declining to review the request* in light of this *litigation*."[13] In any event, a taxpayer may rely on a PLR only *vis-à-vis* the *IRS* and only with

[12] The GCM "is not to be relied upon or otherwise cited as precedent by taxpayers." IRS GCM 39,007, 1983 WL 197946, at *6 (Nov. 2, 1982). *See also Blue Lake Rancheria v. United States*, 653 F.3d 1112, 1119 (9th Cir. 2011); 26 U.S.C. § 6110(k)(3).

[13] Br. of Defs.-Appellants 8 n.4, *Rollins v. Dignity Health*, No. 15-15351 (9th Cir. 2015), ECF

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respect to the *tax status* of a plan. Rev. Proc. 2017-1, §§ 2.01, 11.03; Rev. Proc. 2011-44, § 2. A PLR is not a defense to claims by plan participants to enforce ERISA.

B. The Plan Is Not a Church Plan Because Plaintiffs Plausibly Allege That Neither Dignity nor the Subcommittee Is "Controlled by or Associated with" a Church.

Even if the Plan was "maintained" by the Subcommittee and the Subcommittee was a principal-purpose "organization," the Plan would qualify as a church plan only if the Subcommittee was also "controlled by or associated with" a church. 29 U.S.C. § 1002(33)(C)(i). Moreover, Dignity employees may be covered by a church plan only if Dignity is "controlled by or associated with" a church. *Id.* § 1002(33)(C)(ii)(II), (iii). Defendants concede the absence of control. Mot. 17-18. Official statements from the Catholic Church, as well as the alleged facts, make clear that neither Dignity nor its Subcommittee is "associated with" a church.[14]

1. Official Statements Are Clear: Dignity Is Not Associated with the Catholic Church.

An entity is "associated with" a church if it "shares common religious bonds and convictions with that church." 29 U.S.C. § 1002(33)(C)(iv). Although Dignity purports to share convictions of the Catholic Church and have historical ties to religious orders, *see* Mot. 4-7, 19-20, official statements make clear that, at least since its corporate reorganization in 2012, Dignity does not share common "bonds" necessary to be "associated with" the Catholic Church.[15] Dignity's current Bylaws state that Dignity is "not subject … to the ecclesial authority of the Roman Catholic Church." Ex. 1 § 3.3. In 2011 the Archbishop of San Francisco, Most Reverend George Niederauer, issued a *nihil obstat* to the congregations that sponsor certain hospitals within the Dignity system responding to their inquiry regarding whether it would be appropriate for the congregations to continue to participate in these hospitals. *See* Ex. 11. This statement of non-objection was *conditioned* on the facts that, following the reorganization, Dignity's name

No. 16-1; *accord* Pet. for a Writ of Cert. 10 n.7, *Dignity Health v. Rollins*, No. 16-258 (2016).

[14] Defendants ignore another basis why the Plan is not a church plan: the inclusion of more than an insubstantial number of employees of affiliates that are either for profit or not "controlled by or associated with" any church. *See* AC ¶ 145 (citing 29 U.S.C. § 1002(33)(B)(ii)).

[15] *See* Webster's Third New Int'l Dictionary 250 (1986) ("bond" means "an agreement binding one or more parties" or "a uniting or binding element or force"). *Cf.* 12 C.F.R. § 701, App. B, Ch. 2, ¶ III.A.3 ("common bond[]" does not exist for "All Lutherans in the United States (too broadly defined)").

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"*will not suggest a direct association* with the Catholic Church" and Dignity "*will not be recognized as Catholic*." *Id.* at 3 (emphasis added). In early 2012 Archbishop Neiderauer further confirmed that Dignity is "a secular nonprofit … governed by a self-perpetuating board." ECF No. 122-9 at 8217. Similarly, the Diocese of Phoenix issued a statement recognizing that the corporation was "reorganized from being a Catholic corporation (Catholic Healthcare West) to being a secular one (Dignity Health)." ECF No. 59-4. In conjunction with the reorganization, Archbishop Niederauer obtained a statement from two Catholic moral theologians concluding that Dignity "will not be Catholic" and that its name "will not create associations with the Roman Catholic Church or its apostolic works," ECF No. 124-1 at 8361; *see also* AC ¶ 9(D).

Defendants argue that these statements are either "irrelevant" or "invite … entanglement in issues of religious belief and doctrine." Mot. 27. But Defendants' religiosity and orthodoxy arguments are misplaced and erroneous. *See infra* pp. 25-26. The official statements do not address whether Dignity is religious or whether it complies with Catholic doctrine; they are statements that Dignity is not associated with the Catholic Church. In the same vein, the Catholic Health Association of the United States explained to the Ninth Circuit—ostensibly on Dignity's behalf—that in order to *avoid* improper entanglement in religion, "[t]he decision about what is or is not Catholic is reserved to Church leaders" and may not be "self-designated by the actor." Br. *Amici Curiae* 26-27, *Rollins v. Dignity Health*, No. 15-15351 (9th Cir. 2015), ECF No. 27.

Defendants also distort these official statements. *See* Mot. 27. For example, the *nihil obstat* does not say "*Dignity Health* would continue to 'comply with Catholic moral teaching,'" Mot. 27 (citing Ex. 11) (emphasis added), but instead states that the *sponsors* of certain hospitals in the Dignity system concluded that the restructuring—pursuant to which Dignity would not be Catholic— "would be the best and most achievable option … for complying with Catholic moral teaching." Ex. 11. at 668. Defendants assert that the "Archbishop further agreed with expert theologians that the restructuring 'appropriately respects the moral teaching of the Roman Catholic Church,'" Mot. 27 (citing Ex. 11), ignoring that the sentence they quote was referring only to "the authority, role and responsibilities *of the Sponsors.*" Ex. 11 at 669 (emphasis added). Defendants' suggestion that "the very involvement of these authorities … underscores that

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[Dignity] 'shares common religious bonds and convictions' with the Catholic Church," Mot. 27 (citation omitted), ignores both the substance of the statements and that the *nihil obstat* was sought by, and issued to, the *sponsors*, not Dignity itself. *See* Ex. 11. Defendants cannot rebut these official statements with a self-serving article written by the vice chair of Dignity's Board *after* this litigation commenced. *See* Mot. 7-8 (quoting Ex. 7).

Defendants cite, Mot. 19, 26-28, then-Judge Breyer's *en banc* opinion (of an equally divided court) in *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383, 398-99 (1st Cir. 1985), arguing it found "a religious affiliation," Mot. 27, even though the Archbishop of San Juan stated the university was "not a Catholic University," *id.* at 28 (quoting original panel decision, 793 F.2d at 387). But the main focus of the opinion was not the factual question of control,[16] but rather the legal question of whether the jurisdiction of the National Labor Relations Board ("NLRB") under the National Labor Relations Act ("NLRA") extended to a religious university that was not "completely religious." 793 F.2d at 401-03 (applying *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 504-07 (1979)). Here, the statutory standard is not whether Dignity is religious (or "completely religious") but rather whether Dignity is "associated" *with the Catholic Church*. The Archbishop's opinion on this subject is critical, if not decisive.[17]

2. Dignity Fails to Satisfy Even *Medina*'s "Broad" Standard for Association.

Defendants rely on *Medina*'s assertion that the standard for association is "broad," Mot. 17 (quoting 877 F.3d at 1224), but *Medina*'s actual analysis makes clear that Dignity does not qualify. *Medina* concluded that Catholic Health Initiative's ("CHI") "connection to the Roman

[16] Judge Breyer did not address the Archbishop's statement and concluded that control existed based on evidence that does not exist here. *See Universidad*, 793 F.2d at 399-401.

[17] Defendants seem to suggest that *Catholic Bishop* and *Universidad* should be applied to grant Dignity an *extra-statutory* exemption from ERISA even if Dignity were not "associated with" the Catholic Church. *See* Mot. 19 n.16, 28 & n.25. But the reasoning of these cases was specific to Congressional intent underlying the NLRA, *see Catholic Bishop*, 440 U.S. at 504-07, and the constitutional concerns were unique to religious schools (because of the instrumental role schools play in religious instruction) and the nature of NLRB inquiries into employment decisions and the terms and "condition[s] of employment" (which cover "'nearly everything that goes on in the schools'"), *id.* at 502-04 (citation omitted). These opinions provide no basis to conclude that all purportedly religious *hospitals* must be exempted *from ERISA*, which requires no entangling inquiries and imposes no religious burden, *see infra* pp. 27-29.

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Catholic Church is a function of Roman Catholic canon law" because CHI "is the civil-law counterpart of a canon-law public juridic person" ("PJP"). 877 F.3d at 1222-23 (describing the relationship between CHI and its PJP, including that CHI's corporate purpose is "'exclusively for the benefit of'" the PJP and that "[t]he same people serve as Trustees of CHI and members of" the PJP) (citation omitted). Dignity does not claim to be a civil-law counterpart of a PJP. Its "primary purpose is to provide health care services," not to benefit any PJP. Ex. 2 Art. II. The corporation has no members. *Id.* Art. IV. Its Board is not composed of the members of any PJP; directors are elected by the Board. *See* Ex. 1 § 7.4. Indeed, although two of Dignity's director positions are reserved for women religious from congregations that sponsor certain Dignity hospitals, these directors "shall serve in an individual capacity and not as a representative of a Sponsor or Sponsors." *Id.* § 7.2. *Medina* also relied on CHI's inclusion in the Official Catholic Directory ("OCD"). 877 F.3d at 1223. *Dignity is not listed in the OCD. See* Ex. 10.

3. Dignity Is Not Associated with a Church Pursuant to any Circuit Authority.

The Fourth and Eighth Circuits evaluate association based upon whether (1) the church "plays any official role in the governance of the organization"; (2) "the organization receives assistance from" the church; and (3) "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). *Accord Walsh v. Mut. of Omaha Ins. Co.*, 2016 WL 5076197, at *3 (E.D. Mo. Sept. 20, 2016).

Defendants note that *Medina* declined to apply *Lown* and *Chronister*, Mot. 20-21, but this is unavailing for two reasons. First, *Medina* concluded that *Lown* and *Chronister* apply only if an organization is "formally disaffiliated" from the church. *Medina*, 877 F.3d at 1223-24. Dignity *has* formally disaffiliated from the Catholic Church. *See supra* pp. 18-20. Second, *Medina*'s reliance on disaffiliation as a basis to distinguish *Lown* and *Chronister* defies common sense. If an organization disaffiliated from a church, that church would obviously not be involved in the organization's governance or be providing the organization with funding. In other words, *Medina* purports to limit the *Lown* and *Chronister* test to circumstances in which it would never be satisfied. The more reasonable interpretation is that *Lown* and *Chronister* set forth an objective

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standard that applies in all cases and that, in light of the disaffiliation, it was not satisfied.

Medina also questioned the derivation of these factors, Mot. 22, but these factors give effect to Congress's limited intent: Congress adopted subparagraphs 33(C)(ii) and (iii) because church-associated organizations were closely related to, and financially dependent upon, churches. *See, e.g.*, 125 Cong. Rec. 10,052; *Subcomm. Hr'gs*, *supra*, at 364-65 (Because many church-associated entities "are very small and rely on contributions to meet operating expenses," they "may be unable to incur the increased costs of providing" ERISA-compliant benefits); 124 Cong. Rec. 12,107 ("Plan contributions for churches and agencies are generally dependent upon tithes and offerings. There is virtually no way to pass on higher plan costs to the consumer as businesses can."); *see also Advocate*, 137 S. Ct. at 1663 (Sotomayor, J., concurring) (hospital systems "bear little resemblance" to the organizations "Congress considered when enacting the 1980 amendment"). Because Congress never envisioned extending the exemption to multi-billion dollar corporations that are financially independent from churches, Dignity's failure to satisfy the *Lown* and *Chronister* factors should be dispositive.

a. The Catholic Church Does Not Play an "Official Role" in Governance.

Dignity is not owned or operated by a church; it is a non-profit corporation governed by its self-perpetuating board of directors. AC ¶¶ 37, 45-54; *see also* Ex. 1 § 7.1, 7.4. Although two director positions (out of 9-13) are reserved for women religious (one of which also sits on the Executive Committee), Mot. 23 n.19 (citing Ex. 1 §§ 7.2, 10.2(a)), these directors "serve in an individual capacity and not as a representative of a Sponsor or Sponsors." Ex. 1 § 7.2.

Defendants rely on certain reserved rights purportedly possessed by either the sponsors of certain Dignity hospitals, *see id.* Art. IV (defining "Sponsors") or the "Sponsorship Council" (comprised of women religious from the Sponsors, *id.* § 12.2) to argue that these entities play an "'official role' in Dignity Health," Mot. 22-23. But *Lown* and *Chronister* require a role in corporate *governance*. Here, corporate governance is vested in the Board, not in the Sponsors or Sponsorship Council. Ex. 1 § 7.1. Limited "reserved rights," of questionable validity,[18] do not

[18] The Sponsors are not corporate members of Dignity, *see* Ex. 1 Art. V, and thus delegation to the Sponsors of rights to "approve" or veto Board acts, *see* Ex. 1 §§ 6.1, 7.1, other than

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demonstrate a role in Dignity's governance. Although the "Governance Matrix" attached to Dignity's Bylaws suggests that the Sponsorship Council may "veto" changes to a "Statement of Common Values," Ex. 1 at 37, the Bylaw incorporated into the Matrix reflects only that the Sponsorship Council may veto non-binding *recommendations* made by a Board committee. *Id.* § 10.3(f)(4)(v). The Sponsors may approve the sale, mortgage, or encumbrance of property *of the hospitals they sponsor*, *id.* at 40, and may approve certain other decisions with respect to such hospitals, *id.* § 12.1; *id.* at 40, but this does not demonstrate an official role in the governance of *Dignity*. Moreover, Defendants do not claim an association with these Sponsors; they claim an association with the Catholic Church itself. *E.g.*, Mot. 17, 19-20. Canon lawyers and Bishops have admitted that such entities are distinct from the Catholic Church as a matter of civil law.[19]

Defendants' argument with respect to the Subcommittee is even more convoluted: they argue that the "Sponsorship Council" has "an official role" in "pension administration" and the "appointment" of Subcommittee members by virtue of its "representation on the Mission Integrity Committee" ("MIC"). Mot. 23. But the Sponsorship Council's "role" in the MIC is limited to the appointment of 3 out of 7 members, Ex. 1 § 10.3(f)(2), and although the MIC may "review and monitor … Pension administration," *id.* § 10.3(f)(4)(iii)(b), the Bylaws are clear that it "shall advise management and the Board, but shall not exercise any authority of the Board," *id.* § 10.3(f)(4)(i). Moreover, the cited Bylaw does *not* state that the MIC appoints Subcommittee members, *contra* Mot. 23; other documents show that Subcommittee members are appointed by the HR and Compensation Committee of the Dignity Board "subject to the approval of" the three

amendment or repeal of Dignity articles or bylaws, would be void. *See* Cal. Corp. Code §§ 5132(c)(4), 5210 (except with respect to approval by members, "all corporate powers shall be exercised under the ultimate direction of the board"). *See also Communist Party of the U.S. v. 522 Valencia, Inc.*, 35 Cal. App. 4th 980, 994-95 (Cal. Ct. App. 1995).

[19] A canon lawyer explained on behalf of the Archbishop of Portland that the hierarchical relationship between the Vatican and a diocese "does not destroy the true legal autonomy of a diocese as its own separate public juridic person, with its own rights and duties and property, apart from the [Vatican]." Decl. of Nicholas P. Cafardi ¶ 40, *In re Roman Catholic Archbishop of Portland*, No. 04-3292 (Bankr. D. Or. Sept. 19, 2005), ECF No. 288. As a priest and canon lawyer explained on behalf of the Bishop of San Diego, "[n]otwithstanding popular perception of the Catholic Church, the Church is not a monolith operating like a corporation from the top down[.]" Decl. of Msgr. Steven Callahan, J.C.L. ¶ 6, *In re Roman Catholic Bishop of San Diego*, No. 07-939 (Bankr. S.D. Cal. Aug. 27, 2007), ECF No. 1109.

members of the MIC who are elected by the Sponsorship Council. Ex. 9 at 633; Ex. 13 § 11.06. The MIC members appointed by the Sponsorship Council need not be Catholic Officials, and even if they were, their "approval" of the Subcommittee's members does not demonstrate that the Catholic Church plays an official role in the governance of the Subcommittee.

b. The Catholic Church Does Not Provide Ongoing Financial Assistance.

Dignity does not receive funding from any church, and no church claims any liability for Dignity's debts or obligations. AC ¶¶ 51-52. No church provides financial assistance to the Subcommittee; the Subcommittee's costs of administering the Plan are paid by either Dignity or the Plan trust. *See* Ex. 13 § 11.14. Defendants' sole response is to argue that assistance was provided in the form of the "contribution of at least 23 hospitals and related property." Mot. 24. These unsubstantiated factual assertions cannot rebut Plaintiffs' allegations.[20] Yet even if religious orders did transfer facilities to Dignity in some form, no church provides Dignity with *ongoing* financial assistance. *See Chronister*, 442 F.3d at 653 (Baptist Health did not receive ongoing "financial support" from any church); *Walsh*, 2016 WL 5076197, at *3 ("no evidence that SLU or its hospital receives financial support from the Catholic Church"). Defendants make *no* attempt to argue that the Subcommittee receives *financial* assistance from a church; they merely repeat their assertions about the Sponsors acting "through" the MIC. Mot. 24-25.

c. There Are No Denominational Requirements.

Neither Dignity's employees and patients, nor the Subcommittee members, are required to be Catholic. AC ¶¶ 9(B), 59; Ex. 9; Ex. 13 § 11.06. Defendants do not argue otherwise. Instead, they criticize *Lown* and *Chronister* because the Catholic Church does not impose denominational requirements. Mot. 25. But *Lown* and *Chronister* do not require an entity to satisfy *all* three factors and thus do not require an organization to discriminate against anyone. *Contra* Mot. 25. Instead, courts evaluate these factors, including whether an organization serves a particular faith, to determine whether, on balance, an organization is associated with a church.

[20] Discovery is required to test *inter alia* whether the hospitals were started by the orders (as opposed to distinct corporate entities) and the nature of the acquisition by Dignity. Whether "members of the Roman Catholic faith" contributed financing for buildings, Mot. 24, proves nothing regarding whether the Catholic Church provides financial assistance.

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Defendants cite *Univ. of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002), but that case did not address *association* with a church; instead, it reached the inapposite conclusion that being ecumenical did not make an entity less *religious*. *Id.* at 1345-46.

4. Defendants Cannot Unilaterally Create an Association.

Defendants argue that an organization's unilateral claim of association with a church—offered to obtain an ERISA exemption—is beyond judicial review, even if the church disclaims any association. *See, e.g.*, Mot. 21. No authority supports this position. A church or principal-purpose organization may "opt in" to ERISA coverage, Mot. 21 n.17 (citation omitted); 26 U.S.C. § 410(d), but an employer may not opt *out* of ERISA unless it qualifies for an exemption.

Moreover, whether Dignity or the Subcommittee "holds [themselves] out as religious," have a religious mission, or comply with Catholic religious doctrine, Mot. 19-20, *see also id.* 5-9, does not mean that Dignity is "associated with" the Catholic Church. *See Chronister*, 442 F.3d at 652-53 (*no* association even though (1) Baptist Health requires its CEO and board of directors "to be members of Baptist churches"; (2) "management is instructed to follow religious principles"; (3) "under Baptist doctrine, operating a facility for health care is part of the healing ministry of the church"; and (4) "if Baptist principles and secular medicine conflict, Baptist principles control"); *Walsh*, 2016 WL 5076197, at *2 (SLU not "associated with" church even though "SLU identifies itself as a Catholic University" and its "bylaws require it to be motivated by Judeo-Christian values and guided by Jesuit traditions").

5. Defendants' "Religious Orthodoxy" Arguments Are Misplaced.

Defendants cite cases addressing evaluations of *religiosity*.[21] But Plaintiffs do not challenge whether or to what extent Dignity is *religious*. *Great Falls* recognized that tests of *religiosity* may involve impermissible evaluations of religious motive, beliefs, and mission, 278 F.3d at 1344, but it did not hold that a court cannot "measure degrees of association." *Contra* Mot. 26. Association can be determined based on neutral, objective facts such as statements of the church, involvement in governance, and provision of financial support.

[21] *See* Mot. 18-19, 26-28 (citing *Catholic Bishop*, 440 U.S. at 502; *Mitchell v. Helms*, 530 U.S. 793, 828 (2000); *Great Falls*, 278 F.3d at 1340, 1342-45; *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 343, 345 (1987)).

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Defendants cite *Overall v. Ascension*, 23 F. Supp. 3d 816, 832 (E.D. Mich. 2014), and the district court opinion in *Medina v. Catholic Health Initiatives*, 147 F. Supp. 3d 1190, 1202 (D. Colo. 2015), for the premise that arguments regarding "religious orthodoxy" are prohibited, Mot. 19 (citation omitted), but *Medina* relied exclusively on *Overall*, which erroneously relied on cases regarding judicial interference in *internal church* disputes regarding whether a church properly interpreted church doctrine. 23 F. Supp. 3d at 832 (citing, *e.g.*, *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976)). Likewise, *Jones v. Wolf*, 443 U.S. 595, 602 (1979), addressed an internal church property dispute. This action is not an internal church dispute and does not require inquiry into whether a church improperly interpreted its doctrine. *See Gen. Council on Fin. & Admin. of United Methodist Church v. Super. Ct. of Cal.*, 439 U.S. 1355, 1372-73 (1978) (constraints on "interchurch disputes" "are not applicable to purely secular disputes" involving "a religious affiliated organization[] in which … statutory violations are alleged) (Rehnquist, Circuit Justice, in chambers).

Defendants argue that the government cannot "require religious organizations, in order to receive the exemption's benefits, to adopt a particular structure." Mot. 18-19 (quoting *Medina*, 877 F.3d at 1233-34); *see also* Mot. 23 n.20. But courts have long recognized that, although "one religious denomination cannot be officially preferred over another," *Larson v. Valente*, 456 U.S. 228, 244 (1982), a distinction does not violate this principal of neutrality if it is "based on organizational form and purpose, and not religious belief or denomination." *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 273 (D.C. Cir. 2014) (*vacated on other grounds sub nom Zubik v. Burwell*, 136 S. Ct. 1557 (2016)). For example, "tax advantages that have long been available to houses of worship, but not other types of religious organizations," "have not been thought to violate the Establishment Clause." *Id*. n.29. Accordingly, the Ninth Circuit rejected a similar argument on appeal in this case. *See Rollins v. Dignity Health*, 830 F.3d 900, 912 (9th Cir. 2016), *rev'd on other grounds* (citing *Priests for Life*, 772 F.3d at 273).[22]

[22] *Medina* erroneously relied on *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012), which "does not stand for [the] proposition that the First Amendment precludes application of a law simply because it may affect different types of religious institutions differently." *Priests for Life*, 772 F.3d at 274 (addressing *Hosanna-Tabor*).

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C. Defendants' Reliance on Subparagraph 33(D) Is Misplaced.

Defendants reference a statutory provision that enables a church plan to correct failures to satisfy certain statutory requirements within 270 days after a court makes a final determination that the plan fails to meet such requirements. Mot. 8. n.4 (citing 29 U.S.C. § 1002(33)(D)). That provision addresses only technical violations by plans that satisfy the basic definition: the subject of subparagraph 33(D) is "a plan *established and maintained for its employees … by a church*," not *any* plan. *See Bennett*, 520 U.S. at 173.[23] A plan that fails to satisfy the basic requirement of being "maintained" by a church or principal-purpose organization is beyond the scope of subparagraph 33(D). Even if applicable, it would apply only *after* the Court rules that the Plan is not a church plan, and thus Plaintiffs' claims are unquestionably "ripe." *Contra* Mot. 8 n.4.

D. Application of the Exemption to the Plan Would Violate the Establishment Clause.

Advocate did not consider, implicitly or explicitly, the constitutionality of the church plan exemption, *contra* Mot. 28-29, and Defendants' reliance on the "constitutional doubt" doctrine is misplaced. Plaintiffs challenge the *application* of the exemption to hospital systems like Dignity. *Advocate*'s narrow conclusion—that a church plan need not be established by a church—does not mean the exemption is available to such hospital systems. Accordingly, the district court in the *Advocate* case recently rejected this same argument on remand. *See* Order 3, *Stapleton v. Advocate Health*, No. 14-1873 (N.D. Ill.), ECF No. 143.

Application of the church plan exemption lacks a secular purpose and has a primary effect of advancing religion. *Contra Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). The government may not favor "religious adherents collectively over nonadherents." *Bd. of Educ. v. Grumet*, 512 U.S. 687, 696 (1994). This does not mean Congress may never accommodate religion. Congress may exempt religious entities from laws that (i) create excessive government entanglement in religion, *Amos*, 483 U.S. at 335; or (ii) impose substantial burdens on religious exercise. *See Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005). However, where, as here, Congress

[23] A properly maintained plan could make corrections if, for example, it included too many impermissible employees in violation of subparagraph 33(B). *See* 124 Cong. Rec. 12,108 (listing an "example" of a violation subject to the correction provision as "the coverage of an impermissible number of individuals who are not" church employees).

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exempts only religious entities from a generally applicable law (ERISA) that does *not* create excessive religious entanglement or impose substantial religious burdens, the exemption has the improper purpose and effect of favoring religious adherents over nonadherents. *See, e.g.*, *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 15 (1989) (plurality opinion) (subsidy exclusively for religious organizations that "cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion … cannot but 'conve[y] a message of endorsement'") (citation omitted); *Wallace v. Jaffree*, 472 U.S. 38, 59 (1985).

Application of the church plan exemption does not relieve Dignity of substantial religious burdens or eliminate government entanglement in religion. ERISA is indistinguishable from an array of neutral laws that do not burden religious exercise when applied to commercial activities. *See, e.g.*, *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 391-94 (1990) (even "substantial administrative burdens … do not rise to a constitutionally significant level"; applying generally applicable tax to sale of religious materials). Although ERISA requires disclosures, record keeping and inspection provisions that "apply only to commercial activities undertaken with a 'business purpose,' ... have no impact on petitioners' own evangelical activities." *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 305 (1985) (applying Fair Labor Standards Act to religiously affiliated commercial activities). Even if funding and insurance requirements "decrease[] the amount of money [Dignity] has to spend on its religious activities, any such burden is not constitutionally significant." *Jimmy Swaggart*, 493 U.S. at 391.

Although the church plan exemption was enacted to avoid "examinations of books and records" that "might be regarded as an unjustified invasion of the confidential relationship … with regard to churches and their religious activities," S. Rep. No. 93-383, *reprinted in* 1974 U.S.C.C.A.N. 4889, 4965, the relevant question in this as-applied challenge is whether *application* of the exemption comports with that purpose. *See Bowen v. Kendrick*, 487 U.S. 589, 602, 621 (1988) (remanding for evaluation of whether application demonstrated impermissible purpose); *McCreary Cty. v. ACLU*, 545 U.S. 844, 862 (2005) ("'[I]mplementation of the statute'" can reveal impermissible purpose.) (citation omitted). Dignity is not a church; it is a hospital system that competes in a regulated marketplace and already discloses its financial

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records and relationships in detail. AC ¶¶ 60, 271. *See also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000) (policy "not necessary to further any of [the stated secular] purposes"). *Medina* ignored the distinction between facial and as-applied challenges. 877 F.3d at 1231-32.

Defendants make *no* attempt to argue that ERISA would burden Dignity's religious exercise. In fact, Dignity chooses to comply with ERISA with respect to many other plans. AC ¶ 104. *Medina* asserted that government entanglement "would likely occur" absent an exemption, Mot. 30 (quoting 877 F.3d at 1234), but the *only* purported ERISA-imposed entanglement it identified was a limitation on socially responsible investment policies, 877 F.3d at 1233. Dignity does not claim any such burden here, and even it if did, *Medina* was mistaken: ERISA does not prohibit screening morally objectionable investments as long as alternative investments are expected to perform on par with screened investments. 29 C.F.R. § 2509.2015-01 (2015); *see also* 80 Fed. Reg. 65135-01 (Oct. 26, 2015). Moreover, because this standard is compelled by the duty to act solely in the interest of the plan's participants, *id*., which is also required by the Plan documents here, Ex. 13 § 11.02, application of ERISA would not impose any *new burden*.

Medina, like Defendants here, Mot. 29-30, attacked a straw man, citing *Amos* for the general premise that government may accommodate religion. But *Amos* addressed the "alleviat[ion of] *significant governmental interference* with the ability of religious organizations to define and carry out their religious missions": the ability to hire and fire employees who share or violate their religious beliefs. 483 U.S. at 335 (emphasis added). *Amos* does not permit an *unnecessary* religious accommodation, i.e., it does not permit an exemption exclusive to religious entities from a generally applicable law that imposes *no* substantial religious burden and causes *no* religious entanglement.[24] By unnecessarily exempting Dignity, but not its secular competitors, from the obligations to pay PBGC premiums and ERISA minimum contributions, the government has impermissibly favored religious adherents over nonadherents.

[24] That there is "'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels," *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) (citation omitted), simply means the government may alleviate substantial religious burdens even if an accommodation is not *required* by the Free Exercise Clause. "At some point, accommodation may devolve into 'an unlawful fostering of religion.'" *Cutter*, 544 U.S. at 714 (citation omitted).

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A religious accommodation also impermissibly advances religion if it is imposed at the expense of non-adherents. *See, e.g.*, *Tex. Monthly*, 489 U.S. at 15; *Cutter*, 544 U.S. at 720 (citing *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985)). The burden of the church plan exemption is imposed on Dignity's employees, who are denied all ERISA protections. *See, e.g.*, *United States v. Lee*, 455 U.S. 252, 261 (1982) ("[A]n exemption from social security taxes [for] an employer … impose[s] the employer's religious faith on the employees."). Application of the exemption also impermissibly favors Dignity over competing hospitals. AC ¶¶ 148, 275.

Application of the exemption also impermissibly "produce[s] greater state entanglement with religion than the denial of an exemption." *Tex. Monthly*, 489 U.S. at 20; *see also Lemon*, 403 U.S. at 620. ERISA compliance requires *zero* entanglement with religion, whereas the exemption requires courts to ensure that Dignity is "associated with" a church, which requires inquiry into "common religious bonds and convictions." 29 U.S.C. § 1002(33)(C)(iv). *Medina*'s comparison of "long-term, continuing monitoring" under ERISA with the "time-delimited analysis" of whether a plan is a church plan, 877 F.3d at 1233, ignores both that evaluation of church plan status requires ongoing review to account for changes to corporate governance and relationships, and that *only* the church plan analysis, and *not* ERISA monitoring, requires entangling inquiries *into religion*. *See Tex. Monthly*, 489 U.S. at 7, 20 (determination of eligibility for exemption fostered entanglement).

Finally, Defendants cite *Overall*, which erroneously dismissed a constitutional challenge based on a lack of Article III standing. Mot. 30. But Defendants do not argue that Plaintiffs lack standing, and even if they did, the unconstitutional application of the church plan exemption deprives Plaintiffs of ERISA protections, which *ipso facto* constitutes injury-in-fact. In *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547-48 (2016), the Supreme Court reaffirmed that "intangible injuries can nevertheless be concrete," that "Congress is well positioned to identify intangible harms that meet minimum Article III requirements," and that where a statutory protection exists to protect "'some concrete interest,'" the violation of that statutory right is sufficient and a plaintiff "need not allege any *additional* harm beyond the one Congress has identified." *Id.* at 1549 (citation omitted). Because ERISA protects Plaintiffs' concrete interests in the security of

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their pensions, *see Lockheed Corp.*, 517 U.S. at 887, deprivation of these protections constitutes injury-in-fact. *See also Cigna Corp. v. Amara*, 563 U.S. 421, 444 (2011) ("actual harm" may consist of "loss of a right protected by ERISA"). Defendants' underfunding of the Plan has created an additional injury: a substantial risk of Plan default. *See infra* pp. 34-36.

E. Plaintiffs Plausibly Allege Alternative State Law Claims.

Even if the Plan qualified as a church plan and even if the application of the exemption were constitutional, Plaintiffs have stated three alternative state law claims to require Defendants to sufficiently fund the Plan. *See* AC ¶¶ 277-93 (breach of contract and specific performance); *id.* ¶¶ 294-307 (unjust enrichment); *id.* ¶¶ 308-21 (breach of common law fiduciary duties).

1. This Court Has Jurisdiction over Plaintiffs' Alternative Claims.

Defendants argue that the Court should decline to exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367 based on the mistaken notion that the "alternative" federal and state law claims cannot be litigated concurrently. Mot. 30 (citing *Smith v. OSF HealthCare Sys.*, 2017 WL 6021625, at *1 (S.D. Ill. Dec. 5, 2017). *Smith*—which considered these issues *sua sponte* and without asking for briefing—reasoned that state law claims would be preempted if ERISA applies and, conversely, that there would be no original jurisdiction if ERISA does not apply. 2017 WL 6021625, at *4. But unless and until the court concludes that ERISA applies, pre-emption would not bar the litigation of alternative state law claims. *See* 29 U.S.C. § 1144(a) (state claims preempted "*insofar* as they … relate to any … *plan* … *not exempt*" from ERISA) (emphasis added). Because the question of whether ERISA applies is not jurisdictional,[25] and because Plaintiffs assert claims under ERISA and the First Amendment, *see* AC ¶¶ 171-276, this Court has original jurisdiction, *see* AC ¶ 14. If the Court ultimately dismisses all federal claims, it may, at that time, decline to exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367(c)(3). But no such dismissal has occurred. Notably, in *Mousa v. Harris*, 2013 WL 6185526, at *5 (N.D. Cal. Nov. 26, 2013), the court had *dismissed* all federal claims. *Id.*

Smith also did not address jurisdiction under the Class Action Fairness Act ("CAFA").

[25] *See, e.g.*, *Daft v. Advest, Inc.*, 658 F.3d 583, 589-91 (6th Cir. 2011) (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 511 (2006)); *see also Leeson v. Transamerica Disability Income Plan*, 671 F.3d 969, 971 (9th Cir. 2012).

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Because Plaintiffs allege CAFA jurisdiction, AC ¶ 15, there will be jurisdiction over the state law claims even if the ERISA claims are dismissed. Defendants purport to assert a factual attack on CAFA jurisdiction, arguing the "local controversy" exception, *see* 28 U.S.C. § 1332(d)(4), is triggered based on their submission of a declaration and report purporting to show that more than two-thirds of Plan participants reside in California. *See* Mot. 31-32 (citing Meckenstock Decl. ¶¶ 14-17). But because Defendants do not dispute that the basic requirements for jurisdiction under § 1332(d)(2) are satisfied, *see* Mot. 31-32, and because § 1332(d)(4) sets out an *exception* to the exercise of jurisdiction, *see Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1024 (9th Cir. 2007), Defendants, as the objecting party, bear the burden of proving the exception applies. *Id.*; *Perez v. Nidek Co.*, 657 F. Supp. 2d 1156, 1162 (S.D. Cal. 2009), *aff'd*, 711 F.3d 1109 (9th Cir. 2013).

Defendants do not satisfy their burden. The Meckenstock Declaration does not address the residences of participants at (or even around) the time the AC was filed. Although it asserts that the tallies on which it relies were prepared by the Plan "recordkeeper," Meckenstock Decl. ¶ 14, they were not. The report from which these tallies were derived states that "Willis Towers Watson does not currently provide retiree administration services for the Plan and as such, we are not the source of record for retiree address data." Ex. 12 at 673. The report includes a critical disclaimer: "The retiree address data … was verified to be correct at the time the employee retired" but "[s]ubsequent address changes are not reflected in our data." *Id.* Because the Plan has existed since 1989 and thus covers participants who retired many years, if not decades, ago, and because Defendants' tallies are close to the two-thirds threshold,[26] Defendants have not demonstrated that more than two thirds of class members resided in California when the AC was filed. *See Morongo Band of Mission Indians v. Cal. St. Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988) (citizenship determined at time of complaint). Their failure to submit competent evidence supporting the "local controversy" exception precludes dismissal on this basis.[27]

[26] Depending on the treatment of missing addresses, Defendants' numbers show that between 68.9 and 71.35 percent of addresses are California addresses. *See* Mot. 31; Ex. 12 at 674-75.

[27] If Defendants pursue this exception, some discovery will be necessary before this issue can be resolved. *See, e.g., St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989) ("Discovery is necessary … if it is possible that the plaintiff can demonstrate the requisite jurisdictional facts

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Defendants' alternative argument pursuant to 28 U.S.C. § 1332(d)(3) is not compelling. Regardless of percentages, this case involves the rights of over 20,000 class members residing outside of California, *see* Ex. 12 at 674-75, and thus involves a matter of national or interstate interest. In any event, this Court has jurisdiction pursuant to 28 U.S.C. § 1367, and judicial economy warrants concurrent litigation of the related state and federal claims in one forum.

2. Plaintiffs Have Standing to Assert Their State Law Claims.[28]

a. Plaintiffs Have Plausibly Alleged (and Have Suffered) Injuries-in-Fact.

Defendants deprived Plaintiffs of their contractual and common law rights to having their pensions supported by assets held in trust. The "actual" deprivation of these rights is "concrete" (i.e., underfunding of $1.5 billion is "real" and not "abstract") and "particularized" (i.e., it affects Plaintiff's own pensions in a "personal" way). *See, e.g., Spokeo*, 136 S. Ct. at 1547-48. Courts have "long permitted" suits to redress intangible injuries recognized at common law, *id.* at 1549, including claims for breach of a contractual duty. *See, e.g., id.* (citing *Tenn. Elec. Power Co. v. TVA*, 306 U.S. 118, 137-38 (1939) ("right invaded … aris[es] out of contract")); *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 404 (2d Cir. 2011). Defendants cite *Rudgayzer v. Yahoo! Inc.*, 2012 WL 5471149 (N.D. Cal. Nov. 9, 2012), but *Rudgayzer* addressed a claim for nominal damages, not specific performance. *Id.* at *6. And another opinion recently reached the opposite conclusion. *See In re Facebook Priv. Litig.*, 192 F. Supp. 3d 1053, 1060-62 (N.D. Cal. 2016).

"Actual harm" also may consist of "the loss of a right protected by ERISA or its trust-law antecedents." *Cigna*, 563 U.S. at 444. "[P]rinciples of trust law" should be employed "when determining the nature and extent of a … beneficiary's interest for purposes of an Article III standing analysis." *Scanlan v. Eisenberg*, 669 F.3d 838, 843 (7th Cir. 2012). "[A] beneficiary has

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if afforded that opportunity."). Although the Parties initiated a cooperative investigation into the current state-by-state population of the proposed class, Counsel for Defendants recently notified Plaintiffs that, in light of the discovery stay ordered by the Court, ECF No. 255, Defendants wish to "defer consideration of this issue until such time as the Court (if ever) rules that such additional fact-finding is necessary."

[28] Defendants assert a *facial* challenge as to whether Plaintiffs "allege" an injury-in-fact. Mot. 32. Therefore, the Court must "assume [plaintiff's] [factual] allegations to be true and draw all reasonable inferences in [their] favor." *Doe v. Holy See*, 557 F.3d 1066, 1073 (9th Cir. 2009) (citation omitted).

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an equitable interest in the trust property," and thus has standing to redress injuries to her interest in the trust property without having to "plead facts indicating that the diminution in the trust assets had, or will ever have, a probable adverse impact on … distributions." *Id.* at 843, 847.

Plaintiffs have suffered an additional constitutionally cognizable injury caused by Defendants' underfunding of the Plan: the "substantial risk" that the Plan will be unable to pay all of their accrued benefits. AC ¶¶ 292, 303, 319. *See also Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) ("allegation of future injury may suffice if … there is a substantial risk that the harm will occur.") (citation omitted). As of 2016, the Plan held assets sufficient to fund only 72% of already-accrued benefits. AC ¶¶ 76, 289-90. The present value of the Plan's already-accrued benefit liabilities exceeds the present value of Plan's assets by $1.5 billion. Fin. Stmt. 28. Courts have recognized that participants have Article III standing where, as here, misconduct caused a pension plan to hold assets "insufficient" to pay accrued benefits (even if it had not defaulted). *See, e.g.*, *Adedipe v. U.S. Bank, N.A.*, 62 F. Supp. 3d 879, 891, 894 (D. Minn. 2014) (citing *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 255 (2008)).

Defendants cite cases that held that pension plan participants lacked standing, Mot. 33, 35-36, but those courts concluded there was no substantial risk because the plans remained *overfunded*, ERISA-protected, and guaranteed by the PBGC. *See, e.g.*, *Perelman v. Perelman*, 793 F.3d 368, 375 (3d Cir. 2015); *David v. Alphin*, 704 F.3d 327, 337-38 (4th Cir. 2013); *Harley v. Minn. Mining & Mfg. Co.*, 284 F.3d 901, 906 (8th Cir. 2002). Here the Plan is at far greater risk because it is substantially underfunded, unprotected by ERISA's funding requirements, and uninsured by the PBGC.[29] Although the plan in *Lee v. Verizon Commun., Inc.*, 837 F.3d 523 (5th Cir. 2016), was underfunded, *Lee* relied on the employers' obligation *under ERISA* to "cover underfunding" and the fact that "the PBGC provides statutorily-defined protection" of benefits. *Id.* at 545-46. *See also* Mot. 35 (citing *Hughes*, 525 U.S. at 440 (addressing employer funding obligations *under ERISA*)). Neither protection applies unless Plaintiffs *prevail* on their

[29] *Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc.*, 465 F.3d 1123 (9th Cir. 2006), is inapposite: it addressed a prescription benefit plan that was overcharged for drugs; the alleged overcharges did not influence participants' payments and there was no claim that the overcharges created a risk that the plan would not pay claims in the future. *Id.* at 1124-26.

ERISA claims, in which case the state law claims—and this standing challenge—would be moot.

Notably, *Slack v. International Union of Operating Engineers*, 2014 WL 4090383, at *11 (N.D. Cal. Aug. 19, 2014), recognized that a participant may "'sue trustees for their failure to collect contributions when the participant faces a risk of non-payment of his pension,'" *id.* (citation omitted), and concluded that plaintiffs *had* pleaded injury-in-fact because defendant's alleged breach, which caused the plan to be 67% funded, "'enhanced' a risk of default." *Id.* at *15. Here, Defendants caused the Plan to be 72% funded. AC ¶¶ 76, 289-90. Although *Slack* questioned whether plaintiffs, on the merits, could demonstrate that a $50 million loss represented a "material risk," 2014 WL 4090383, at *15, Defendants cannot credibly argue that underfunding the Plan by $1.5 *billion* did not materially increase the risk of default.

Moreover, because Dignity denies any *obligation* to make contributions sufficient to fund all accrued benefits, under ERISA or otherwise, *see* Mot. 36-37, whether Dignity is *able* "to make up the shortfall," Mot. 35-36, does not alleviate the risk. Defendants' reliance on the recent or current financial state of Dignity, Mot. 36, also ignores the long-term nature of retirement plans and the fact that even financially sound corporations fall on hard times.

b. Plaintiffs' Injuries Are "Individualized."

Defendants cite *Hughes* for its description of a defined benefit plan, but ignore the Supreme Court's subsequent explanation that misconduct affects an individual's defined benefit if "it creates or enhances the risk of default by the entire plan." *LaRue*, 552 U.S. at 255. Their assertion that Plaintiffs have "no … interest in, the assets of the plan," Mot. 33, is contrary to trust law. *See Scanlan*, 669 F.3d at 847; *Steinhart v. Cty. of Los Angeles*, 223 P.3d 57, 72 (Cal. 2010) ("trust beneficiaries hold 'the equitable estate or beneficial interest in' property held in trust") (citation omitted). They cite *Saks v. Damon Raike & Co.*, 7 Cal. App. 4th 419, 427 (Cal. Ct. App. 1992), which states a "trust beneficiary has no legal title or ownership interest in the trust assets," *id.* But regardless of whether beneficiaries have *legal* title to trust assets, they have an *equitable* interest in trust assets, *e.g.*, *Steinhart*, 223 P.3d at 72, and may sue for "enforcement of the trust[] according to its terms" and for breach of trust, *Saks*, 7 Cal. App. 4th. at 427-29.

Although courts have distinguished between claims for damages (which require personal

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monetary loss) and claims for equitable relief (for which the violation of a legal obligation *ipso facto* constitutes injury-in-fact), Mot. 34, Plaintiffs' state law claims do not seek recovery of personal monetary losses; they seek to enforce Dignity's ongoing funding obligations. "[T]he fact that … relief takes the form of a money payment does not remove it from the category of traditionally equitable relief." *Cigna*, 563 U.S. at 441. *See also infra* pp. 39-40 (addressing specific performance). Plaintiffs may seek equitable relief—including that which involves money—without showing personal financial loss. *See, e.g., Pender v. Bank of Am. Corp.*, 788 F.3d 354, 366 (4th Cir. 2015) ("requiring a plaintiff seeking an accounting for profits to demonstrate a financial loss would allow those with obligations under ERISA to profit from their ERISA violations"); *Johnson v. Couturier*, 2006 WL 2943160, at *3 (E.D. Cal. Oct. 13, 2006).

Plaintiffs do not assert claims "on behalf of the trust." *Contra* Mot. 34-35. They seek to enforce their own contractual rights. AC ¶¶ 277-93. Although a beneficiary cannot sue for breach of trust that "does not involve any violation of duty to him," *Glanton*, 465 F.3d at 1126 n.2 (citation omitted), a beneficiary *may* sue "to enforce the duties of the trustee to him or to … obtain redress for a breach of the trustee's duties to him," *Restatement (Second) of Trusts* § 214(1) (1959), *accord In re Estate of Giraldin*, 290 P.3d 199, 205 (Cal. 2012).

That the relief sought requires payment into the trust, Mot. 34, does not change the fact that Plaintiffs seek to vindicate their own rights under contract and trust law. Cases regarding the scope of a statutory ERISA remedy, *see Paulsen v. CNF Inc.*, 559 F.3d 1061 (9th Cir. 2009) (addressing 29 U.S.C. § 1109), have no bearing on Plaintiffs' standing to assert state law claims. Defendants cite *Impress Commun. v. Unumprovident Corp.*, 335 F. Supp. 2d 1053, 1059 (C.D. Cal. 2003), but that case did not address an existing breach but instead was based on speculation that an insurance company did not, in the future, intend to provide coverage. *Id.* at 1055-56, 1058-59. *Palmason v. Weyerhaeuser Co.*, 2013 WL 4511361 (W.D. Wash. Aug. 23, 2013), is inapposite: the investment losses did not cause the plan to be underfunded, *see id.* at *8-9, and thus had not "create[d] or enhance[d] the risk of default," *id.* at *3 (citation omitted).

3. Plaintiffs State a Claim for Breach of Contract.

Defendants do not deny that Dignity was contractually obligated to "contribute to the

Plan an amount which is sufficient on an actuarial basis to provide for the retirement benefits and other benefits provided under the Plan." Ex. 13 § 6.01; AC ¶ 280. Instead, they argue that Dignity was not obligated to "fully fund[]" the Plan. Mot. 36-38. Although it is unclear what Defendants mean by "fully fund," it is clear they misunderstand the contract's actual terms.

Defendants argue that "the Plan has been funded to provide the benefits due." Mot. 37. But the Plan requires contributions sufficient "on an actuarial basis to provide for" *all* retirement benefits "under the Plan." Ex. 13 § 6.01. Because employees accrue *future* benefits through *current* work, the benefits "under the plan" are not merely those *currently due*, but all future benefits that have already been accrued. *See, e.g.*, Ex. 13 § 1.01 (defining "Accrued Benefit"); *id.* Art. IV, IV-A, IV-B, IV-C, IV-D (detailing formulas for accrual of future benefits). Moreover, "actuarial basis" refers to the concept that as employees, through current work, accrue future benefits, Dignity must make current contributions that would be sufficient, based on actuarial assumptions (e.g., projected investment growth, employee mortality, etc.; *see, e.g.*, Ex. 13 App. A), to pay accrued benefits in the future. If Dignity was merely required to pay benefits currently due, there would be no need for actuarial calculations and the "actuarial basis" language would be superfluous. *Contra Brandwein v. Butler*, 161 Cal. Rptr. 3d 728, 747 (Cal. Ct. App. 2013). Indeed, Defendants' position is contrary to the notion of a pension plan backed by a trust. Ex. 13 § 1.47 ("'Trust Fund' means the assets held … to provide the benefits under the Plan.").

Defendants note that "underfunding occurs 'by failing to contribute the actuarially-determined amounts of employer contributions that were due to the retirement system during that period,'" Mot. 37 (quoting *McGuigan v. City of San Diego*, 107 Cal. Rptr. 3d 554, 560 (Cal. Ct. App. 2010)), but that is *precisely* what is alleged here. *See, e.g.*, AC ¶¶ 287-89.

Defendants criticize Plaintiffs for relying on *Dignity's financial statement*, Mot. 37, which reported the "funded status" of the Plan as negative $1.775 billion in 2016 and negative $1.532 billion in 2017. Fin. Stmt. 28 (Plan's "benefit obligation" exceeded the "fair value of plan assets" by $1.5 billion). Defendants' suggestion that these are "accounting figures[] rather than actuarial figures," Mot. 37, is belied by the statement itself, which indicates that the "benefit obligation" was calculated using "actuarial valuations." *See* Fin. Stmt. 27 (describing actuarial

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valuations); *id.* at 28 (noting actuarial adjustments to the benefit obligation). Defendants cite *Palmason*, which discussed the standard for funding *under ERISA*, 2013 WL 4511361, at *8, but these contract claims are not based on ERISA's funding standards and, even if they were, Plaintiffs' reliance on Defendants' own financial statements—the *only* publicly available information regarding the funded status of the Plan—is sufficient to provide Defendants fair notice of the grounds upon which the claims rest. *Erickson*, 551 U.S. at 93.[30] Moreover, *Palmason* addressed a Rule 12(b)(1) *factual attack* on jurisdiction, *id.* at *1; conversely, here the Court is restricted to the face of the pleadings and must draw inferences in Plaintiffs' favor.

Defendants next rely on the Subcommittee's discretion to interpret the Plan. Mot. 37-38. But any such discretion is limited by the express Plan terms, *see supra* p. 57 (citing Ex. 13 § 6.01). The Investment Committee of Dignity's Board, and *not* the Subcommittee, has discretion to determine the Plan funding policy, *id.* § 6.01, but in doing so it must "bear[] in mind both the short-run and *long-run* needs and goals of the Plan," *id.* § 11.18 (emphasis added). In any event, a court will not defer to an "unreasonable" interpretation of a plan document. *Lix v. Edwards*, 147 Cal. Rptr. 294, 298 (Cal. Ct. App. 1978) (declining to adopt interpretation). It is not reasonable to interpret an obligation to contribute amounts "sufficient on an actuarial basis to provide for the retirement benefits," Ex. 13 § 6.01, as requiring the contribution of only 3 out of every 4 dollars necessary to fund already-accrued benefits. *See, e.g.*, AC ¶¶ 289-90.

Even if the Plan did not expressly require contributions sufficient to fund all accrued benefits, Defendants' failure to make such contributions violates the covenant of good faith and fair dealing that is "implied by law in every contract." *Thrifty Payless, Inc. v. Americana at Brand, LLC*, 160 Cal. Rptr. 3d 718, 729 (Cal. Ct. App. 2013) (citation omitted). Because Dignity does not have an express right to *underfund* the Plan, any exercise of discretion with respect to funding is subject to the covenant. *See, e.g., Gabana Gulf Distrib., Ltd. v. GAP Int'l Sales, Inc.*, 2008 WL 111223, at *7-8 (N.D. Cal. Jan. 9, 2008); *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 826 P.2d 710, 726 (Cal. 1992). The covenant "functions as a *supplement* to the

[30] Plaintiffs in *Palmason* had access to ERISA funding calculations, *see* 2013 WL 4511361, at *8-9. Dignity does not report the Plan's funded status under ERISA. *See* AC ¶¶ 179-88.

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express contractual covenants[] to prevent a contracting party from engaging in conduct which … frustrates the other party's rights to the benefits of the contract" and to ensure that each party does "everything the contract presupposes the party will do to accomplish the agreement's purposes." *Thrifty Payless*, 160 Cal. Rptr. 3d at 729-30 (citations omitted). Dignity has frustrated the purpose of the Plan by interpreting its obligation to require funding of only three quarters of already accrued benefits. AC ¶ 289; *see also id.* ¶ 290.[31]

4. Plaintiffs Are Entitled to Specific Performance.

Defendants next argue that specific performance is impermissible because the obligation to be enforced is financial. Mot. 38-39. However, although *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 211 (2002), recognized that "specific performance of a past due monetary obligation[] was not *typically* available in equity," it also explained that exceptions exist where specific performance was sought "to prevent future losses that … were incalculable" or "to enforce an obligor's duty to make future monthly payments[] after the obligor had consistently refused to make past payments[.]" *Id.* (emphasis added) (citation omitted). Courts have recognized that employees may sue for specific performance to enforce an employer's ongoing obligations under an employee benefit plan. *See, e.g., S. Cal. Lumber Indus. Ret. Fund v. Aspen Interiors, Inc.*, 2008 WL 11338770, at *2 (C.D. Cal. June 11, 2008) (permitting equitable relief to enforce employer's obligation to make ongoing fringe benefit contributions).[32]

Other cases cited by Defendants merely referenced *Great-West* in dicta before identifying circumstances in which equitable relief can be monetary, *Gabriel v. Alaska Elec. Pension Fund*, 773 F.3d 945, 956 (9th Cir. 2014), or addressed the inapposite scenario in which a plaintiff sought to enforce a past obligation to pay plaintiff a specific amount, *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 319 F. Supp. 2d 1040, 1051 (C.D. Cal. 2003). *Fox v. McCormick*, 20 F. Supp. 3d 133 (D.D.C. 2013), did not address specific performance of an ongoing funding

[31] Contrary to Defendants' assertion, Mot. 37-38, under ERISA, *all* employers are "required to contribute to a plan whenever the plan's liabilities exceed its assets," *Perelman*, 793 F.3d at 374, and underfunding is required to be restored within a prescribed time. 29 U.S.C. § 1083.

[32] *See also Cipala v. Lincoln Tech. Inst.*, 843 A.2d 1069, 1074 (N.J. 2004); *Munchak Corp. v. Caldwell*, 265 S.E.2d 654, 657 (N.C. Ct. App. 1980) (obligation to fund pension plan); *Faunce v. Am. Can Co.*, 407 A.2d 733, 737 (Me. 1979).

obligation, but rather relief related to past delinquent contributions. *Id.* at 143-44.

Defendants also cite *Canova v. Trustees of Imperial Irrigation District Employee Pension Plan*, 59 Cal. Rptr. 3d 587 (Cal. Ct. App. 2007), for the general notion that specific performance is not available where legal remedies are adequate. Mot. 39. But plaintiffs in *Canova* sought money owed to individuals stemming from alleged miscalculations of amounts to be deposited into individual retirement accounts. *Id.* at 590-91. This case does not address individual retirement accounts; Plaintiffs are participants in a defined benefit plan who have a right to have their accrued benefits secured by assets held in trust. Violation of this right cannot be remedied through a one-time payment of money damages to Plaintiffs; it requires Dignity to honor its ongoing funding obligation until Plaintiffs have received all of their benefits in retirement.

5. Plaintiffs May Alternatively Allege Unjust Enrichment.

By keeping funds Dignity promised to pay to the Plan while benefiting from the labor of Plaintiffs and the Class, Dignity was unjustly enriched. AC ¶¶ 294-307. Plaintiffs stated a claim for unjust enrichment in the alternative, i.e., to the extent there is no contractual relationship. AC ¶ 295. Unless the Court rules, as a matter of law, that the Plan documents constitute contracts governing the funding of the Plan, it should not dismiss this alternative claim. *See, e.g.*, *Longest v. Green Tree Servicing LLC*, 74 F. Supp. 3d 1289, 1302 (C.D. Cal. 2015).

6. Plaintiffs Plausibly Allege That the Subcommittee Breached Its Fiduciary Duties.

Trust law imposes a duty to "take reasonable steps … to take and keep control of … trust property." *Cal. Valley Miwok Tribe v. Cal. Gambling Control Comm'n*, 180 Cal. Rptr. 3d 499, 517 (Cal. Ct. App. 2014) (citing Cal. Probate Code § 16006). Pursuant to this duty, if "the [trust] settlor retains possession of trust assets, 'the trustee must hold the settlor to [its] obligation'" to place such assets in trust. *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 572 n.13 (1985) (citation omitted). The Subcommittee breached this duty. AC ¶¶ 308-21. Defendants respond by repeating their flawed arguments about harm and the nature of the funding obligation. Mot. 40. For the reasons addressed above, these arguments are meritless.

VI. CONCLUSION

Defendants' Motion to Dismiss should be denied in its entirety.

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CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which in turn sent notice to all counsel of record.

/s/ Matthew M. Gerend
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