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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, and 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.

No. 13-C-1450 JST

DEFENDANTS' REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS

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

Complaint Filed: April 1, 2013
Trial Date: None Set

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I. INTRODUCTION

Plaintiffs' Opposition fails to establish that they can state a claim. This case was originally focused on whether an actual church must establish a church plan, the narrow statutory interpretation issue that the Supreme Court decided against Plaintiffs. *Advocate Health Care Network v. Stapleton*, 137 S.Ct. 1652 (2017). The remaining issues in this case are much less complex and can be resolved on this motion based upon the Plaintiffs' allegations and judicially noticeable facts. *See Medina v. Catholic Health Initiatives*, 877 F.3d 1213 (10th Circ. 2017) (resolving similar issues against the Plaintiffs). Plaintiffs have no serious response to the Tenth Circuit's decision in *Medina* except to urge the Court to reject its rationale on every point. However, the Tenth Circuit's analysis was thoughtful and deserves respect as the sole on-point Circuit Court decision. *See Charles v. Lundren & Associates*, P.C., 119 F.3d 739, 742 (9th Cir. 1997) (deciding on the basis of the Seventh Circuit's recent "cogent analysis" of the issue).

Plaintiffs first argue that the Plan is not properly maintained as a church plan because the Sub-Committee does not have the power to modify, terminate or fund the Plan. However, Plaintiffs' arguments are not supported by the authorities they cite, the language of the statutory exemption itself, or the legislative history of the provision. *Medina*, 877 F.3d at 1224-26 (holding there is no reason "[to] require principal purpose organizations to be organizations independent of the parent entity, endowed with the power to terminate benefit plans"). Likewise, the Internal Revenue Service ("IRS") has consistently interpreted the exemption just as Defendants do over four decades and has issued hundreds of private letter rulings ("PLRs") on the subject (including four approving of Dignity Health's plan structure).[1]

[1] The IRS has not issued a fifth PLR ruling regarding the Plan because of this pending litigation. But the IRS has issued four prior rulings approving maintenance of the Plan by the Sub-Committee. Moreover, those PLRs are issued with the express intent that Dignity Health, the Sub-Committee and the Plan will rely on them. *See, e.g.*, *Lucky Stores, Inc. & Subsidiaries v. Comm'r*, 153 F.3d 964, 966 n.5 (9th Cir. 1998) ("Taxpayers *other* than those to whom such rulings or memoranda were issued are not entitled to rely on them.") (emphasis added). The Supreme Court in *Advocate* did not have to defer to the analysis of the IRS, having independently reviewed the statute and reached the same conclusion as the IRS did. The *Advocate* Court did, however, set forth in some detail the substantial role of the IRS in the drafting and interpretation of the church plan amendments, the IRS's interpretation of the statute and the "hundreds" of

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Plaintiffs' second argument, that neither Dignity Health nor the Sub-Committee is associated with the Catholic Church, also fails. Plaintiffs seek to impose a narrow "control" standard, and refuse to acknowledge the very broad alternative statutory definition of "associated with a church" – a definition embracing any organization that "shares common religious bonds and convictions" with a church. 29 U.S.C. §1002(33)(C)(iv). They also misread the *nihil obstat* and misapply the highly criticized decisions in *Lown* and *Chronister*, in which no defendant was even arguing that its retirement plan was a church plan. *See id*. at § 1002(33)(C)(i); *Medina*, 877 F.3d at 1224-25 (rejecting *Lown* and *Chronister*). Plaintiffs' allegations and judicially noticeable documents (which are not disputed) amply establish the direct association of Dignity Health and the Sub-Committee with the Catholic Church. (Motion, 4-9, 17-28).

Plaintiffs alternatively argue that application of the exemption to hospital systems like Dignity Health would violate the Establishment Clause of the Constitution. Plaintiffs argue that the *Advocate* Court did not implicitly reject their "as applied" argument, but that is incorrect. The "as applied" argument was necessarily rejected when the Court squarely held that the church plan exemption applies to hospitals systems such as Dignity Health. *Advocate*, 137 S.Ct. at 1663. Moreover, the Tenth Circuit expressly rejected this argument in *Medina*. *Medina*, 877 F.3d 1230, 1233-34.

Finally, Plaintiffs' new and alternative state law claims also fail for a variety of reasons. However, the Court need not reach those claims because the federal claims fail and there is no reason for it to exercise supplemental jurisdiction over the state law claims.

II. <u>THE PLAN IS PROPERLY MAINTAINED AS A CHURCH PLAN.</u>

A. <u>*Advocate* Does Not Support Plaintiffs' Argument.</u>

Plaintiffs, seeking support for their argument in the *Advocate* decision, point to the Court's statement that "[i]t is the entity *maintaining* the plan that has the primary ongoing responsibility (and potential liability) to plan participants." *Advocate*, 137 S.Ct. at 1661. However, as an initial matter, the Court expressly stated that it was not deciding the maintenance

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PLRs and opinion letters reflecting its interpretation issued since 1982. *Advocate*, 137 S.Ct. at 1657.

issue. *Id*. at 1257, n.2, 1258, n.3. In addition, nothing in the *Advocate* decision establishes that maintenance of a plan involves more than plan administration or even implies that the maintaining organization must have any of the plan amendment, termination, funding, financing or other powers that Plaintiffs claim are required.[2]

Finally, contrary to Plaintiffs' argument, there is no basis to conclude that Dignity Health is the entity with the primary ongoing responsibility and potential liability to plan participants. Even under ERISA, the cases holding that plan administrators have ongoing responsibility and potential liability to plan participants are too numerous to cite. Indeed, in the Ninth Circuit prior to 2011, *only* the plan or plan administrator could be liable with respect to a claim for benefits under 29 U.S.C. § 1132(a)(1)(B). *Cyr v. Reliance Standard Life Ins. Co*., 642 F.3d 1202, 1205-7 (9th Cir. 2011) (*citing Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 246-47 (2000)) (overruling prior cases). In the Ninth Circuit, "ongoing responsibility" to plan participants and "potential liability" for benefits is based on whether the defendant is a fiduciary. *Spinedex Physical Therapy USA Inc. v. United Healthcare of Arizona, Inc.*, 770 F.3d 1282, 1298 (9th Cir. 2014). Accordingly, the employer/plan sponsor is ordinarily not a proper defendant because the employer and plan sponsor are not ordinarily fiduciaries. *See, e.g., Holland v. Bank of Am.*, 673 F. Supp. 1511, 1518 (S.D. Cal. 1987) (claim for benefits proper only against the plan or a plan fiduciary, not employer).

A fiduciary is a person or entity "that 'exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets ... [or] has any discretionary authority or discretionary responsibility in the administration of such plan.'"[3] *Id*. (citing 29 U.S.C. § 1002(21)(A)). Here, the Sub-Committee is precisely such an entity. Indeed, Plaintiffs concede

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[2] *Advocate* cites to the amicus brief of the United States. As noted in *Advocate*, the government agrees with Defendants and has issued hundreds of PLRs and opinion letters which hold that the "internal benefits committee of a church-affiliated nonprofit" may be the principal purpose organization that maintains a church plan. *Advocate*, 137 S.Ct. at 1657.

[3] More than one entity can have ongoing responsibility and potential liability to plan participants. Thus, even under Plaintiffs' interpretation, the Sub-Committee satisfies the church plan exemption so long as it has the principal purpose of administering the plan.

1 the point by suing the Sub-Committee for breach of fiduciary duty. See Motion, 8-9 (describing
2 Sub-Committee's discretionary authority); (AC, ¶¶ 24, 215-230; 239-247) (claims against Sub-
3 Committee). Thus, the Sub-Committee, the named Plan Administrator and a "named fiduciary"[4],
4 is precisely the type of entity that the Supreme Court in *Advocate* (while not deciding the issue)
5 had in mind.

6 **B. The Statutory Language Does Not Support Plaintiffs' Argument.**

7 The Supreme Court's decision in *Advocate* will be remembered for its common sense
8 statutory interpretation and rejection of "goal-defying" and "text-defying" statutory construction.
9 *Advocate*, 137 S.Ct. at 1662; *see also Americans for Clean Energy v. EPA*, 864 F.3d 691, 710
10 (D.C. Cir. 2017) (citing *Advocate*). Here, that is precisely what Plaintiffs propose. Plaintiffs'
11 interpretation – that the statute's inclusion of the phrase "maintained by an organization" creates
12 substantial other un-expressed requirements for a principal purpose organization beyond the
13 obligation of "administration or funding of a plan" – is another text-defying misadventure.

14 As *Medina* observed, the word "maintained" is used both in ERISA and throughout
15 federal law in ways that could not possibly conform to Plaintiffs' proffered definition. *Medina*,
16 877 F.3d at 1225 ("Medina's view that 'maintain' must include the power to terminate or modify
17 is contrary to the term's ordinary usage, as evidenced by dictionaries and by its frequent use in the
18 U.S. Code."); *see Taniguchi v. Kan. Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012) ("[w]hen a term
19 goes undefined in a statute, we give the term its ordinary meaning"). Thus, "when ERISA says
20 that a church plan includes a plan 'maintained' by a principal-purpose organization, 29 U.S.C. §
21 1002(33)(C), it simply means the principal-purpose organization that, as Black's says, 'cares for
22 the plan for purposes of operational productivity.'" *Medina*, 877 F.3d at 1226 (citation omitted).

23 Plaintiffs' argument that identical terms within an act *must* bear the same meaning is also
24 wrong as a matter of law. *See Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561, 575-
25

26 [4] "Every employee benefit plan . . . shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the
27 plan." 29 U.S.C. § 1102(a)(1). ERISA's "named fiduciary' requirement "enable[s] employees and other interested persons to ascertain the person or persons responsible for operating the plan."
28 29 C.F.R. § 2509.75-5 at FR-3.

576 (2005) ("[P]rinciples of statutory construction are not so rigid. Although we presume that the same term has the same meaning when it occurs here and there in a single statute . . . [w]e also understand that [m]ost words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section.")

Plaintiffs' interpretation is contrary to the plain language of the statute, is not supported by any other authority, and is contrary to the legislative history. Plaintiffs argue that the church plan exemption breaks down into a "maintenance" requirement, which they refer to as a "sufficient condition," and a requirement that the organization maintaining the plan have "administration or funding" of the plan as its principal purpose, which Plaintiffs refer to as a "restrictive clause." (Opp. at 9-10). This reading, which needlessly complicates the straightforward statutory language, is wholly lacking in support..

To qualify for the exemption, the plan must be "maintained by an organization, whether a civil law corporation or otherwise, the principal purpose of which is the administration or funding of a plan . . . for the provision of retirement benefits . . . ." 29 U.S.C. § 1002(33). As the Supreme Court stated, the natural reading of this language is that the "main job of such an entity, as the statute explains, is to fund or manage a benefit plan . . . ." *Advocate*, 137 S.Ct. at 1656-57. If the principal purpose of the entity maintaining the plan can be *either* funding or plan administration, then the statute itself provides no basis at all to contend that there is a further "maintenance" requirement that includes numerous important and traditionally settlor responsibilities. There is no textual support for this contention, and Rollins admitted in her brief in the Supreme Court that "administered" is "closely related to 'maintained.'" *Advocate*, 2017 WL 656675 (U.S.), 43 (Brief for Respondent, U.S., 2017).

As the Tenth Circuit stated, "Medina's arguments are . . . contrary to common sense. 'A textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored.'" *Medina*, 877 F.3d at 1226 (citation omitted). "If we accept Medina's view of the statute, virtually no plan administered by a benefits committee or similar organization could qualify for the church-plan exemption. Medina would only allow the exemption for wholly

independent bodies, constituted with the principal purpose of administering or funding a retirement plan and endowed with the power to modify or terminate that plan." *Id.* After noting that Plaintiffs' approach separates the religiously associated employer from its pension plan, and then gives the independent administrative body the power to terminate that plan, the court concluded that "[t]here may be some organization out there that is structured like that, but it is certainly not the most intuitive way to do it. And it is not clear what the advantage of such a structure would be, or why Congress would have required it." *Id.* at 1227.

Likewise, Plaintiffs' interpretation is contrary to the legislative history of the church plan exemption. Senator Talmadge, one of the sponsors of the amendment, described the intent without any reference to Plaintiffs' proposed additional requirements:

> A plan or program funded or administered through a pension board, whether a civil law corporation or otherwise, will be considered a church plan, provided the principal purpose or function of the pension board is the administration or funding of a plan or program for the provision of retirement or welfare benefits for the employees of a church.

124 Cong. Rec. 16,523 (1978). The purpose of the legislation was to provide that a plan established by a church-associated nonprofit would qualify as a church plan if the plan was administered through an entity that was associated with the church. Plaintiffs' interpretation would defeat that purpose.

C. <u>No Case Holds That "Maintaining" A Plan Requires The Power To Modify, Terminate Or Fund The Plan.</u>

Plaintiffs claim that the entity maintaining the plan must have the powers normally associated with the settlor under ERISA. But no case stands for that proposition. Plaintiffs' cases concern unrelated parts of ERISA dealing primarily with the question whether there is a "welfare benefit plan" that preempts state law claims. *See* 29 U.S.C. 1002(1) (definition of welfare benefit plan as a program "established *or* maintained for the purpose of providing . . . medical" and other non-pension benefits) (emphasis added). For example, Plaintiffs cite *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 12 (1987) for the proposition that an "employer did not 'maintain' a plan because it did not 'assume[] . . . responsibility to pay benefits on a regular schedule.'" (Opp. at 6:23-7:1.) That is not what *Fort Halifax* said. In *Fort Halifax*, the Court considered whether a

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Maine statute that required a one-time severance payment constituted an employee welfare benefit plan under the "established or maintained" requirement in 29 U.S.C. § 1002(1). The Court found that it did not, because the statute did not require the creation of a benefit program with an ongoing administrative mechanism. In the course of that decision, the Court found that the Maine statute "neither establishes, nor requires an employer to maintain an employee benefit *plan,*" among other things, because the employer assumes "no responsibility to pay benefits on a regular basis, and thus faces no periodic demands on its assets that create a need for financial coordination and control." 482 U.S. at 12 (emphasis original). *Fort Halifax* made no effort to distinguish between "establishing" and "maintaining" a plan because that distinction was not relevant.[5]

Plaintiffs also cite *Anderson v. Unum Provident Corp.*, 369 F.3d 1257 (11th Cir. 2004),[6] for the proposition that "maintenance" involves the power to modify the plan, and to finance or arrange to finance the benefits. (Opp. at 7:10-8:1). But *Anderson* found that "maintain" could mean many things including, for example, performing "all the administrative functions associated with maintenance of the plan," exactly the functions of the Sub-Committee under the Plan.[7]

Thus, *Anderson* fully supports Dignity Health's argument that the Sub-Committee maintains the Plan by performing "all the administrative functions associated with maintenance of the plan." Similarly, *Hightower v. Tex. Hosp. Ass'n*, 65 F.3d 443 (5th Cir. 1995) does not support

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[5] Nor does *Fort Halifax* stand for the proposition that "maintenance" involves "an obligation to monitor[] the availability of funds for benefit payments." (Opp. at 8:1-2.) The reference to monitoring the availability of funds is simply one of numerous tasks identified by the Court as the "administrative realities of employee benefit plans." 482 U.S. at 9.

[6] *Anderson* also shows that Plaintiffs' interpretation of "maintenance" is dead wrong. Financing of benefits, for example, is related to "establishment" of a plan, not maintenance as Plaintiffs claim. *Anderson* cited to *Donovan v. Dillingham*, 688 F.2d 1367, 1371 (11th Cir. 1982), for the proposition that "the acts that are relevant to determining whether an employer has *established* an ERISA plan" include "financing or arranging to finance or fund the intended benefits . . ." (emphasis added).

[7] Plaintiffs' suggestion (Opp. at 8) that there is some question about this because a third party administrator performs tasks is a non-starter. Large pension plans are complex administrative operations in which the authority vested in the committee that functions as the Plan Administrator is delegated to a variety of entities under the supervision of the Plan Administrator. This delegation does not alter the authority or responsibility of the Plan Administrator.

Plaintiffs' theory that "maintain" requires authority to terminate the plan. In *Hightower*, the court found that when a private foundation assumed control over a government pension plan pursuant to a lease, the government no longer maintained the plan. *Hightower*, 65 F.3d at 449. The court did not say that terminating the plan constituted maintenance, much less that maintenance requires the authority to terminate the plan. *See Medina*, 877 F.3d at 1225, n. 3 (noting that *Anderson* and *Hightower* do not support Plaintiffs' argument).[8]

Plaintiffs cite no authority for the proposition that a retirement plan cannot be maintained by an organization that "administers" the plan, as the statute plainly says, unless it also has the power to amend or terminate the plan or the obligation to fund benefits. Plaintiffs just made those requirements up. *Medina*, 877 F.3d at 1225, n. 3 ("*Medina thus points to no authority explaining why 'maintaining' a plan necessarily includes the power to modify or terminate it*.") (emphasis added).

D. <u>The Subcommittee is An Organization Whose Principal Purpose is Administration of the Plan.</u>

Plaintiffs provide no support for their argument that the Sub-Committee cannot maintain the Plan because the Sub-Committee is not distinct from Dignity Health. As an initial matter, that is not true. The Sub-Committee is an organization distinct from Dignity Health and is identified as the Plan Administrator. Indeed, Plaintiffs have separately named the Sub-Committee as a Defendant. (AC, ¶¶ 24, 215-230; 239-247) (claims against Sub-Committee).[9] Moreover, if ERISA applied, the Sub-Committee, as Plan Administrator, would be a proper defendant in a claim for breach of fiduciary duty. *See Spinedex,* 770 F.3d at 1298 ("proper defendants . . . include . . . formally designated plan administrators").

Plaintiffs purport to make a statutory interpretation argument based upon comparing two

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[8] *Golden Gate Restaurant Ass'n. v. City and County of San Francisco*, 546 F.3d 639, 653-54 (9th Cir. 2008) is irrelevant. The Ninth Circuit found, among other things, that the city ordinance did not require the *establishment or maintenance* of an employee welfare benefit plan. *Id.*

[9] Paragraph 24 of the Amended Complaint states that "[t]he Retirement Committee is the person specifically designated as the 'administrator' by the terms of the instrument under which the Dignity Plan is operated, as provided in ERISA section 3(16)(A)(i), 29 U.S.C. § 1002(3)(16)(A)(i)."

subsections of the church plan statute, but this argument too makes no sense. (Opp., 15:25-16:1.) Section (33)(C)(i) allows a principal purpose organization to maintain a church plan. Sections 33(C)(ii)(II) and (iii) deem the employees of a nonprofit associated with the church to be employees of a church and the church to be their employer. There is no inconsistency between these provisions if the principal purpose organization is an internal benefits committee of the nonprofit that is the designated plan administrator. Nor do Plaintiffs cite any authority for that proposition. To the contrary, *Medina* squarely rejected Plaintiffs' argument. *Medina*, 877 F.2d at 1224-27 (finding that Medina's arguments are "contrary to common sense").

III. DIGNITY HEALTH AND THE SUBCOMMITTEE ARE ASSOCIATED WITH THE CATHOLIC CHURCH.

Plaintiffs' Opposition rejects the discrete statutory "association" standard and insists that church "control" is necessary to qualify as a church plan. To that end, Plaintiffs misleadingly focus on allegations related only to church control. Plaintiffs also misread key authorities that impose constitutional limits on the "association" inquiry. As set forth in the Motion, Plaintiffs' allegations and judicially noticeable documents clearly establish that Dignity Health and the Sub-Committee are "associated with" the Catholic Church. *See* 29 U.S.C. § 1102(33)(C)(iv) ("[a]n organization . . . is associated with a church . . . if it shares common religious bonds and convictions with that church . . .").

The Oxford English Dictionary defines "bond" as "[a] force or feeling that unites people; a shared emotion or interest" and "conviction" as "a firmly held belief or opinion."[10] It defines "share" as to "possess (a view or quality) in common with others."[11] This case involves a nonprofit hospital system, founded and sponsored by Congregations of Women Religious[12] who

[10] https://en.oxforddictionaries.com/definition/bond; https://en.oxforddictionaries.com/definition/conviction. Plaintiffs' citation to the Federal Credit Union regulations are completely irrelevant. (Opp. at 18 n.15.)

[11] https://en.oxforddictionaries.com/definition/share.

[12] The Sponsoring Congregations are "religious orders [that] are an integral part of the Church by virtue of the religious and healthcare ministries they perform." *Okerman v. Life Ins. Co. of N. Am.*, 2001 WL 36203082, at *4 n. 2 (E.D. Cal. Dec. 24, 2001); *Universidad*, 793 F.2d at 400. Dignity Health is associated with the Sponsoring Congregations, and the Sponsoring Congregations are "an integral part of the Church." Therefore, Dignity Health is associated with the Church. *See Medina*, 877 F.3d at 1227.

contributed 23 hospitals to the system and retain a continuing role delineated in the company's bylaws, which also commit the company and its personnel to "continuing the healing ministry based on the life and works of Jesus." The shared bonds and convictions are plain to see. There is no need to troll through Dignity Health's or the Sub-Committee's religious beliefs to "discover" them. *See Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) (rejecting inquiry into alleged sectarian nature of school as "unnecessary but also offensive" because "it is well established, in numerous other contexts, that courts should refrain from trolling through a person's religious beliefs").

Plaintiffs pay only lip service to the broad definition of "associated with a church," and disregard the extensive law establishing clear constitutional limits on any such inquiry. *See N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979) (declaring unconstitutional agency practice of examining whether a school is "completely religious" or merely "religiously associated" to determine jurisdiction); *Universidad Cent. De Bayamon v. N.L.R.B.*, 793 F.2d 383, 398-99 (1st Cir. 1985) (*en banc* opinion of Judge Breyer); *University of Great Falls v. N.L.R.B.*, 278 F.3d 1335, 1344 (D.C. Cir. 2002) (inquiry limited to existence of "bona fide" association).

Plaintiffs mistakenly dismiss these cases as purportedly related to "religiosity" and not association with a church. (Opp. at 20 and 25.) But these cases relate directly to any analysis that requires the Court to evaluate association. As noted in the Motion, *Catholic Bishop, Great Falls,* and *Bayamon* addressed and rejected a test for NLRB jurisdiction which was based upon examining whether a school was "completely religious" versus merely "religiously *associated.*" Thus, association with a church was the very question at issue in these cases, and the NLRB tests that the courts repeatedly rejected bear striking similarity to the test Plaintiffs contend applies here. *See Great Falls*, 278 F.3d at 1340 (noting that the NLRB considered such issues as whether the curriculum emphasized the Catholic faith, whether the board of trustees was required to establish practices consistent with the Catholic religion, the existence of a denominational requirement for employees, and the religious background of students).[13]

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[13] Plaintiffs cannot state a claim based upon their allegation "on information and belief" that the "Plan covers more than an insubstantial number of employees that work for subsidiaries that are

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A. **The *Nihil Obstat* Is Not An Official Statement That Dignity Health is Not Associated With The Catholic Church.**

Plaintiffs focus mainly on the *nihil obstat*, which Plaintiffs referred to in the Amended Complaint, but did not include as an exhibit. Defendants requested judicial notice of the document because the *nihil obstat* confirms Dignity Health's association with the Church. Apparently, Plaintiffs think this document is a "gotcha" but that is because they have only paid superficial attention to a few self-servingly selected words in the document without looking at other parts of the document or attempting to understand its purpose.

Plaintiffs declare, without any authority, that the *nihil obstat* contains "official statements" that "at least since its corporate reorganization in 2012, Dignity does not share common 'bonds' necessary to be 'associated with the Catholic Church.'"[14] (Opp., 18:15-17). Aside from misstating the legal standard, which requires the sharing of common "*religious* bonds and convictions," *see* 29 U.S.C. § 1102(33)(C)(iv) (emphasis added), Plaintiffs cite to the Webster's dictionary definition of "bond" as an "agreement binding one or more parties" or a "uniting or binding element of force." (Opp., 18, n. 15.) This has no application to the issue of shared common religious bonds and convictions and instead improperly invokes an irrelevant "control" paradigm. No agreement with a church is necessary, merely *sharing* common religious bonds and convictions is sufficient.

In the *nihil obstat*, the Archbishop of San Francisco approved of Dignity Health's reorganization but conditioned that approval on an agreement that Dignity's name "will not suggest a direct association with the Catholic Church" and that "[i]n accord with Canon 216, the

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not controlled by or associated with a church." (AC, ¶ 145.) Plaintiffs allege that Dignity Health employs 60,000 employees, and there are approximately 80,000 plan participants including retirees. (AC, ¶ 39.) Dignity Health employees are deemed employees of the church. 29 U.S.C. § 1002(33)(C)(ii)(II). Moreover, the Plan makes clear that it does not include employees working for subsidiaries that are not associated with a church. RJN, Ex. 13, §§ 1.03, 1.19, Appendix B.

[14] Plaintiffs' citation and reliance upon declarations filed in unrelated cases (cited in footnote 19 of the Opposition) is improper and misleading. For example, Msgr. Steven Callahan's entire quote is, ". . . the Church is not a monolith operating like a corporation from the top down for the benefit of shareholders. The Catholic Church is hierarchical in structure *but it is also an aggregate of communities of individuals held together by a common bond of communion*." *In re Roman Catholic Bishop of San Diego,* No. 07-939 (Bankr. S.D. Cal. Aug. 27, 2007), ECF No. 1109, ¶ 6 (emphasis added).

restructured corporation will not be recognized as Catholic." (RJN, Ex. 11.) In quoting this portion of the *nihil obstat*, Plaintiffs leave out the reference to Canon 216 and fail to cite any religious authority regarding what this means. In fact, Canon 216 and related religious authorities show that the *nihil obstat* addressed whether Dignity Health is an official part of the church controlled by the Catholic Church hierarchy, not whether Dignity Health "shares common religious bonds and convictions" with the Catholic Church. Canon 216 provides that "all the Christian faithful have the right to promote or sustain apostolic action even by their own undertakings, according to their own state and condition" but further provides that "[n]evertheless, no undertaking is to claim the name Catholic without the consent of the competent ecclesiastical authority."[15]

The *Apostolicam Actuositatem* (1965), promulgated by Pope Paul VI, makes clear that the Catholic religion "admits of different types of relationships with the [church] hierarchy," including "many apostolic undertakings which are established by the free choice of the laity and regulated by their prudent judgment," but these projects may "claim the name 'Catholic'" only if they have "obtained the consent of the lawful Church authority."[16] *See* New Commentary on the Code of Cannon Law 284-86 (James A. Cordien, Thomas J. Green, and Donald E. Heintschel eds. Paulist Press 2000). Thus, the *nihil obstat* does not in the slightest belie the point that Dignity Health "shares common religious bonds and convictions" with the Catholic Church, but only that it is not an official part of the Catholic Church and is no longer under Church control. Dignity Health does not claim to be part of and controlled by the Catholic Church. *See also Universidad,* 793 F.2d at 400-02 (neither disaffiliation from Catholic University nor Archbishop's statement that the university was *not* "Catholic" is sufficient to find that University did not qualify for religious exemption from NLRB). Indeed, Canon 216's reference to the rights of all "the

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[15] *See* Code of Canon Law, Can. 216 at http://www.vatican.va/archive/ENG1104/_PU.HTM. "Canon law, a body of law used in the Catholic Church, 'governs the actions and rights of all Church entities.'" *Medina*, 877 F.3d at 1222.

[16] See Decree on the Apostolate of the Laity, *Apostolicam Actuositatem*, Solemnly Promulgated by His Holiness, Pope Paul VI on November 18, 1965, Chapter 5, No. 24 at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decree_19651118_apostolicam-actuositatem_en.html

Christian faithful [] to promote or sustain apostolic action" makes clear that there is no impediment to Dignity Health sharing common religious bonds and convictions with the Catholic Church, as exemplified by its undisputed mission to promote the healing ministry of Jesus.

Ultimately, Plaintiffs' focus on the *nihil obstat* is just another religious orthodoxy argument raising the same constitutional problems that are present when a court is asked to determine whether a school is "religiously associated" or "completely religious." *Cf. Universidad*, 793 F.2d 401[17] ("the 'state/religion entanglement' problems that underlay the Court's *Catholic Bishop* holding are present here in full force"); 23 F. Supp. 3d 816, 832 (E.D. Mich. 2014), 23 F.Supp.3d (finding that claims similar to those alleged by Plaintiffs in paragraph 9 of the Amended Complaint are "grounded in theology" and the "argument regarding religious orthodoxy is prohibited by the Constitution").[18] However, this is not an argument that helps them because the *nihil obstat* itself makes clear that Dignity Health remains associated with the Catholic Church. Specifically, it states that the governance restructuring was pursued to "strengthen CHW's healing Mission into the future, for complying with Catholic moral teaching and for preserving and strengthening the religious identity of their Catholic hospitals in the future." RJN, Ex. 11 at 3. And, the *nihil obstat* is also conditioned on the restated bylaws of Dignity Health being "modified to establish that Catholic moral teaching will be the basis for defining moral terms which are used in the Statement of Common Values." This condition, applicable to all of Dignity Health's hospitals, requires that the "two sisters of the Sponsoring Congregations who will sit on the restructured board will continue to be witnesses for human dignity, Catholic teaching and Gospel values, and thereby exert a positive influence on board decision impacting services, even though they will no longer be in a majority position of control .

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[17] Contrary to Plaintiffs' bald claim, many of the factors that *Universidad* concluded established church control in that case are present here. (Opp at 20 n.16.) The *Universidad* court considered aspects of clergy involvement in administration, the donation of land and buildings by the Dominican Order, and the University's public statements. *Universidad*, 793 F.2d at 400.

[18] Plaintiffs criticize *Medina's* reliance on *Overall*. However, *Overall* was the only district court church plan case cited, and approvingly, by the Supreme Court in *Advocate*. *Advocate*, 137 S. Ct. at 1659.

1 . . ." *Id*. at 3.[19]

2 **B. *Lown* and *Chronister* Should Not Be Followed.**

3 Plaintiffs' Opposition fails to explain why this Court should rely on *Lown v. Contl. Cas.*
4 *Co*., 238 F.3d 543, 548 (4th Cir. 2001) or *Chronister v. Baptist Health*, 442 F.3d 648 (8th Cir.
5 2006) (following *Lown*) given their criticism by the Tenth Circuit in *Medina* and the completely
6 inapposite facts. Plaintiffs' Opposition fails to respond to the facts that the hospitals in those
7 cases never claimed to be church plans, never presented any evidence to support such a claim,
8 and in fact asserted that the plans were covered by ERISA.[20] (Motion, 21). The dramatically
9 different facts guaranteed that these decisions would not include anything remotely approaching a
10 thoughtful analysis of the association issue. And neither decision addresses the constitutional
11 concerns applicable to denominational-based tests.

12 Likewise, as the Tenth Circuit noted, the factors identified by *Lown* and hence *Chronister*
13 had an "uncertain derivation" and "cannot be the exclusive means of determining whether an
14 organization is associated with a church." *Medina*, 877 F.3d at 1224.[21] Plaintiffs' responses are
15 unavailing. Plaintiffs contend that the *Lown* and *Chronister* factors, apparently including the
16 unconstitutional denominational test, give effect to Congress's purportedly "limited intent" to
17 enact laws that relate to small church plans dependent on "tithes" and "offerings." (Opp., 2:2-14).
18 Plaintiffs not only fail to confront the defects in these decisions, but also fail to acknowledge the
19 significance of the *Advocate* decision. We are long past any contention that Congress did not
20 intend church plans to be established by nonprofits associated with a church. That is exactly what
21 *Advocate* held and the reason Plaintiffs lost on the "establishment" issue.

22 Moreover, *Medina* did not find (as suggested at Opp. 21) that *Lown* and *Chronister* apply

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24 [19] Various statements in the Opposition (pp. 18-19) that the *nihil obstat* was focused solely on the
25 Sponsoring Congregations and was not intended to further the healing mission of CHW (now
Dignity Health) are simply false, as these quotes make clear.
26 [20] *Walsh v. Mutual of Omaha*, 2016 WL 5076197 (E.D. Mo. Sept. 20, 2016), and *Hanshaw v. Life
Ins. Co. of N. Am.*, 2014 WL 5439253 (W.D. Ky. Oct 24, 2014), are the same.
27 [21] *Medina* is only the most recent court to criticize or disregard *Lown* and *Chronister*. *See
Overall*, 23 F. Supp. 3d at 832; *Rinehart*, 2009 WL 995715, at *4 (applying the "associated with"
28 test provided under § (33)(C)(iv)); *Catholic Charities*, 304 F. Supp. 2d at 85 (not applying *Lown*).

only in disaffiliation cases. Rather, the court correctly observed that the *Lown* factors are narrower than the "broad language" defining "associated with a church," and that "an organization could share 'common religious bonds and convictions' with a church while satisfying none of the *Lown* factors." *Medina*, 877 F.3d at 1224. Certainly, association may be determined based on "objective facts such as statements by the church, involvement in governance, and provision of financial support," but Plaintiffs ignore even those facts, and do not explain why the Bylaws, the ERDs and SCVs, and Dignity Health's healing mission are not objective facts. (Opp. at 25.)

Plaintiffs correctly note that the facts here are different than in *Medina*, which involved Church control, but they are no better for Plaintiffs. The Sponsorship Council appoints two Sisters from the Sponsoring Congregations to sit on Dignity Health's Board of Directors; and one woman religious from the Sponsoring Congregations must be a member of the Board's Executive Committee. RJN, Exh. 1, §§ 7.2 and 10.2(a). Indeed, as noted above, in the *nihil obstat*, the Archbishop of San Francisco pointed to the important religious role of the Sisters who sit on the Board of Directors even though they would no longer control the Board. RJN, Ex. 11 at 3. The Sponsorship Council also appoints three members to the Mission Integrity Committee, which reviews and monitors "pension administration" and appointment of the members of the Sub-Committee. *Id*. at § 10.3(f)(4)(iii)(b). These are by definition "official roles" in the governance of Dignity Health and the Sub-Committee set forth in Dignity Health's governing bylaws.

Plaintiffs brush aside the Sponsoring Congregations' donation of 23 hospitals and related properties to impose a nonexistent requirement that financial assistance be "ongoing." (Opp., 24:13.) Moreover, Plaintiffs completely fail to respond to the Sponsoring Congregations ongoing rights with respect to these properties. These properties remain subject to Church Law. (Motion, 23-24.) As a result, the financial contribution is in fact "ongoing."[22]

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[22] Plaintiffs admit that the so-called denominational requirement is irrelevant. (Opp. at 24); *see also Ward v. Unum Life Ins. Co. of Amer*., 2010 WL 4337821, at *2 (E.D. Wis. Oct. 25, 2010) (emphasis added) ("it is difficult to imagine a health provider that would discriminate against non-Catholic patients and hire only Catholic doctors, nurses and other staff. In fact, the statutory test does not ask about the employees and patients or customers but about the organization itself.").

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IV. THE CHURCH PLAN EXEMPTION DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

A. The Supreme Court Rejected Plaintiffs' Argument.

Plaintiffs fully briefed their Establishment Clause argument in the Supreme Court. Although the unanimous opinion is silent on the issue, it speaks volumes because the Supreme Court could not have reached its decision without rejecting Plaintiffs' Establishment Clause Argument.[23]

B. The Church Plan Exemption Easily Satisfies The *Lemon* Test.

Plaintiffs incorrectly assert that there is a difference between facial and as-applied challenges under the Establishment Clause. (Opp. at 27-28.) As a matter of law, this is a distinction without a difference. *See Walker v. San Francisco Unified Sch. Dist.*, 46 F.3d 1449, 1455 n.5 (9th Cir. 1995) ("Because both [facial and as-applied challenges] require reference to the *Lemon* test, any distinction carries little utility. Further, an analysis under *Lemon* of the 'facial' validity of a statute is informed by how that statute is applied; *i.e.*, does it have a primary effect of advancing religion and does it lead to excessive entanglement between church and state.") (internal citation omitted). Contrary to Plaintiffs' claim, *Medina* considered and rejected the so-called as applied theory. *Medina*, 877 F.3d at 1231-34.

Under the three-part test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), "government action must have a secular purpose, its principal or primary effect must be one that neither advances nor inhibits religion, and it must not foster excessive entanglement with religion." *Catholic League for Religious & Civil Rights v. City & Cnty. of San Francisco*, 624 F.3d 1043, 1055 (9th Cir. 2010) (internal quotation omitted). In the over forty years since ERISA's enactment, courts have repeatedly applied the church plan exemption, and no court has held that it violates the Establishment Clause. The exemption easily satisfies *Lemon*.

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[23]The Court did not identify Plaintiffs' establishment clause argument as an issue it was not deciding, as it did with respect to association and maintenance. *Advocate*, 137 S. Ct. at 1657 and 1658 n.2 and 3. Justice Sotomayor's concurring opinion makes it clear that the Court implicitly rejected the constitutional challenge; though she lamented the breadth of the exception, she made clear that only Congress could narrow it. *Advocate*, 137 S.Ct. at 1663. Plaintiffs' reliance upon a scheduling order issued without briefing is hardly authority to the contrary. (Opp. at 27.)

1. The Exemption Has a Secular Purpose.

Plaintiffs' bald assertion that the church plan exemption lacks a secular purpose is without merit.[24] (Opp. at 27.) The secular purpose was obvious to the *Medina* court. *Medina*, 877 F.3d at 1230-31 (summarizing legislative history demonstrating secular purpose of avoiding entanglement). "Under the *Lemon* analysis, it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987).[25]

2. The Exemption Does Not Impermissibly Advance Religion.

Plaintiffs' also claim that the church plan exemption has a primary effect of advancing religion. (Opp. at 27.) Not true. As understood by the Establishment Clause's drafters, "'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 668 (1970). A regulatory exemption is a far cry from sponsorship or financial support, and the opposite of active involvement; the fact that Dignity Health does not pay PBGC premiums does not result in a loss to the PBGC because it is not required to insure the Plan. Plaintiffs again rely on the *Texas Monthly*, which is inapposite because the Supreme Court there held that the purpose of the Texas Statute was to advance religion. *Id.*

3. Application of the Exemption Avoids Entanglement.

As the *Medina* court observed, determining "whether an organization is a religious organization, or associated with one" is not entanglement.[26] *Medina*, 877 F.3d at 1233-34 (noting

[24] Plaintiffs must show that Congress had another purpose. *Medina*, 877 F.3d at 1231.

[25] Plaintiffs' reliance on *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) is misplaced. *Texas Monthly* stands only for the proposition that a law violates the Establishment Clause if it "directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens non-beneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion." But, "[i]t does not follow, of course, that government policies with secular objectives may not incidentally benefit religion." *Id.* at 10; *Amos*, 483 U.S. at 338.

[26] The IRS has applied this rule neutrally and without excessive entanglement for decades. It is only Plaintiffs who insist on the application of an intrusive inquiry that would impermissibly entangle the Court with religious affairs.

that under Plaintiffs' theory religious entities would be subject to ERISA investing rules and government monitoring). "[F]ar from entangling the government in the affairs of religious institutions, the church-plan exemption avoids . . . entanglement." *Id.* The Mission Integrity Committee, whose members must be approved by the Sponsoring Congregations, monitors Dignity Health's pension administration. (RJN, Exh. 1, § 10.3(f).) The Sub-Committee's Charter expressly provides that it "shall be mindful of the teachings and tenets of the Roman Catholic Church and the Sponsors" and its members must also be approved by the Mission Integrity Committee. Although ERISA permits screening morally objectionable investments *if alternative investments will perform equally well*, Congress determined that that is still a burden on the exercise of religion. Plaintiffs ignore all of this, but Congress reasonably determined that a religious entity should be free of these constraints.[27]

Not surprisingly, none of the cases Plaintiffs cite involved an exemption from generally applicable law. *Jimmy Swaggart Ministries v. Bd. of Equalization,* 493 U.S. 378(1990) (generally applicable sales and use tax, which applied to religious materials, imposed no burden); *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985) (religious nonprofit is not exempt from statutory minimum wage, overtime, and recordkeeping provisions for employees performing commercial activities); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000) ("Prayer at Football Games" policy lacked secular purpose). In each case, the Supreme Court found that the challenged laws created no entanglement issues in the first place. In contrast, here Congress stated multiple reasons why the exemption avoids entanglement issues. Moreover, *Amos* forecloses the distinction between religious and commercial purposes that Plaintiffs rely upon. (Opp. at 28.) *Amos*, 483 U.S. at 330-32 (rejecting argument that operating a gymnasium open to the public was not religious in case challenging Title VII exemption for religious employers).

V. <u>THE COURT SHOULD DECLINE SUPPLEMENTAL JURISDICTION</u>

In *Smith v. OSF Healthcare System*, 2017 WL 6021625 (S.D. Ill. Dec. 5, 2017), a district

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[27] Plaintiffs' reliance on 80 Fed. Reg. 65135-01 (Oct. 26, 2015), which outlines the fiduciary standard *under ERISA*, proves why the exemption is required to relieve burdens, and does not support the claim that application of ERISA would not apply additional burdens. (Opp. at 29.)

court declined to exercise supplemental jurisdiction over the same state-law claims pleaded here; Plaintiffs offer no compelling argument why this case is different. Plaintiffs imply that because they have alleged a single federal count that is not based on ERISA—Count X, seeking a declaration that the ERISA church plan exemption is void under the First Amendment's Establishment Clause—the preemption rationale of *Smith* does not apply. But a similar analysis confirms that regardless of the federal claims, the state-law claims should be dismissed. If Plaintiffs' ERISA claims are viable, the constitutional claim is moot and the state-law claims are preempted, mandating dismissal. On the other hand, if Plaintiffs' ERISA claims are dismissed and the court proceeds to adjudicate only the federal constitutional claim, then the Court should exercise its discretion to dismiss under 28 U.S.C. § 1367(c)(4) because the state law claims and the constitutional claim do not arise from "a common nucleus of operative fact." *Gilder v. PGA Tour, Inc.,* 936 F.2d 417, 421 (9th Cir. 1991).[28] As such, the court lacks supplemental jurisdiction. *See, e.g., Stevedoring Servs. of Am., Inc. v. Eggert*, 953 F.2d 552, 558 (9th Cir. 1992).

Finally, supplemental jurisdiction be declined under 28 U.S.C. § 1367(c)(4), as it would make no sense to try the Establishment Clause challenge and the fact-specific state contract law claims (which only survive if Plaintiffs lose the constitutional challenge) together. Judicial economy, convenience, fairness, and comity are not served by such a process. *See Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 561 (9th Cir. 2010).

VI. THE COURT LACKS JURISDICTION UNDER CAFA.

The Court also lacks jurisdiction under CAFA, 28 U.S.C. § 1332(d). Defendants met their burden to establish that the "local controversy" exception to CAFA applies under 28 U.S.C. § 1332(d)(4)(B), by submitting evidence showing that more than two-thirds of the putative class members are citizens of California. *See Mondragon v. Capital One Auto Finance*, 736 F.3d 880, 884 (9th Cir. 2013) (some facts are required for district court to make findings regarding class members' citizenship for purposes of CAFA's local controversy exception); *Brinkley v. Monterey*

[28] The facts informing the constitutionality of the church plan exemption are wholly unrelated to the facts underlying whether Defendants breached any contractual funding obligations.

Financial Services, 873 F.3d 1118, 1121 (9th Cir. 2017) (district courts may make reasonable inferences from facts in evidence in applying CAFA exception).[29] Plaintiffs simply speculate that the evidence might not accurately reflect the citizenship of class members as of the date the complaint was filed. But they provide no evidence that any putative class member who resided in California when the complaint was filed has since relocated.

Plaintiffs' speculation is insufficient because Defendants submitted evidence and are entitled to rely on the doctrine of continuing domicile. *Mondragron*, 736 F.3d at 885 ("a party with the burden of proving citizenship may rely on the presumption of continuing domicile, which provides that, once established, a person's state of domicile continues unless rebutted with sufficient evidence of change"). There is no reason why this presumption would not apply equally to both parties, meaning that once Defendants established with evidence the current citizenship of the putative class members, they are entitled to a presumption that the citizenship has not changed since the complaint was filed. *Cf. King v. Great American Chicken Corp.*, 2018 WL 587847 (N.D. Cal. Jan. 25, 2018), *appeal pending* (rejecting anecdotal evidence that at least one member of the class had moved where the parties stipulated that at least 67 percent of the class members' last known addresses were in California; relying on the presumption of continuing domicile). Similarly, here there is no basis for the notion that more than 4,000 putative class members have relocated into California from some other state in the five years since this complaint was filed. Defendants have satisfied their burden to invoke the local controversy exception. That exception is "Congress's explicit directive to decline jurisdiction . . ." *Mason v. Lockwood, Andrews & Newnam, P.C.*, 842 F.3d 383, 394-95 (6th Cir. 2016); *see also Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1023 (9th Cir. 2007) (same).

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[29] The Ninth Circuit has noted, but not yet itself addressed, the common presumption treating residence as prima facie evidence of domicile for diversity purposes. *See Mondragon*, 736 F.3d at 886; *see also King*, 2018 WL 587847, at *3 (discussing cases applying this presumption in the CAFA context). However, Plaintiffs do not contend here that putative class members with California residences are not citizens of California.

VII. THE COURT SHOULD DISMISS PLAINTIFFS' STATE LAW CLAIMS.

A. Plaintiffs Lack Article III Standing to Pursue Their State Law Claims.

Plaintiffs fail to establish that individual beneficiaries have a claim to, or interest in, the assets of the plan. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439-40 (1999). This is fatal to their ability to satisfy Article III standing requirements. Plaintiffs' vague citations to general principles of trust law and inapposite ERISA cases simply distract from the indisputable fact that beneficiaries of a defined benefit pension plan ("DB Plan") only have an interest in their accrued benefits. They do not (and cannot) allege that they have suffered any losses to their benefits or that there is any imminent risk of default.

1. Plaintiffs Do Not and Cannot Allege Particularized Injury.

Plaintiffs' arguments gloss over the limits of their interest in the Plan. They argue that, as beneficiaries, they have "an equitable interest in the trust property" and therefore do not need to allege a probable negative impact on future distributions. (Opp. at 33:22-34:3.) Plaintiffs quote *Scanlan v. Eisenberg*, 669 F.3d 838, 847 (7th Cir. 2012), an inapposite case, in which the plaintiff was a beneficiary of several discretionary trusts, under which "she [was] *currently eligible to receive all of the [t]rusts' corpus*." *Id.*, 669 F.3d at 846 (emphasis added). The court found that the plaintiff did not need to allege "facts indicating that the diminution in the trust assets had, or will ever have, a probable impact on . . . distributions" in the future because she was already fully entitled to the trusts' assets. *Id.* at 847. Plaintiffs also cite *Steinhart v. City of Los Angeles*, 47 Cal.4th 1298, 1319 (2010) for the general rule that "trust beneficiaries hold 'the equitable estate or beneficial interest in' property held in trust." (Opp., 35:21-23.) But Plaintiffs' beneficial interest does not itself create standing. "The question for standing purposes is not who has a beneficial interest in the assets, but whether those interests were adversely affected in a way that gives rise to standing to pursue a remedy." *Palmason v. Weyerhaeuser Co.*, 2013 WL 4511361, at *5 (W.D. Wash. Aug. 23, 2013). Here, of course, Plaintiffs do not allege that Dignity Health has failed to pay any accrued benefits; Plaintiffs are currently entitled only to their current accrued benefits, not the assets of the Plan.

Plaintiffs also argue that they are *not* actually asserting claims on behalf of the trust, but

rather seek to "enforce their own contractual rights." (Opp., at 36:11-12.) At the same time, Plaintiffs admit that their state law claims "seek to enforce Dignity's ongoing funding obligations" and that the relief they seek would "require[] payment into the trust." (Opp., at 36:3, 17.) Plaintiffs cannot have it both ways. The only authorities Plaintiffs cite stand for the uncontroversial general point that a beneficiary can sue "to enforce the duties of the trustee *to him* or to . . . obtain redress for a breach of the trustee's duties *to him*." (Opp., 36:12-16 (emphasis added).) But Plaintiffs do not explain why their limited entitlement to their own accrued benefits under the Plan translates into a contractual right to seek broad relief "to enforce Dignity's ongoing funding obligations" where there are no allegations showing an imminent risk to the plan, and they cite no authority to support that position.[30]

2. Plaintiffs' Alleged Injury is Highly Speculative.

Plaintiffs argue that their alleged injury is not speculative because an alleged "substantial risk" that the Plan will be unable to pay all of its accrued benefits is sufficient to establish Article III standing. (Opp., 34:4-6.) However, there is no support for Plaintiffs' related contention that a plan must be funded 100% at all times, lest there be "imminent risk" to the plan. (AC, ¶¶ 287 and 290.) It is well-established that unfunded accrued liability, alone, is irrelevant. "Most retirement systems have [unfunded actuarial accrued liability]. They arise each time new benefits are added and each time an actuarial loss is realized. [¶] The existence of [UAAL] is not in itself bad, any more than a mortgage on a house is bad. *[UAAL] does not represent a debt that is payable today*." *Bandt v. Bd. of Ret., San Diego Cty. Employees Ret. Ass'n*, 136 Cal. App. 4th 140, 157 and 160 (2006) (emphasis added) (decrease from 106.8% funded to 75.4% funded did not decrease benefit security); *see also Cty. of Orange v. Ass'n of Orange Cty. Deputy Sheriffs*, 192 Cal. App. 4th 21, 35 (2011).

There is no statutory funding requirement for a church plan under California law.

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[30] Plaintiffs' other cited cases, in which courts held that certain forms of monetary relief were still considered equitable relief, are inapposite. *Cigna Corp. v. Amara*, 563 U.S. 421, 441 (2011) (Article III standing not discussed and money to be paid directly to beneficiaries not to the plan); *Pender v. Bank of Am. Corp.*, 788 F.3d 354 (4th Cir. 2015) (plaintiffs sought to recover profits generated using assets that belonged to them).

Funding is governed by general principles of state trust law. Under ERISA, a plan is "at risk," mandating additional funding contributions, if it is less than 80% funded according to a specified accounting method that does not use financial statement figures. 29 U.S.C. § 1083(i). Because of the nature of a defined benefit plan, Article III standing is lacking for plans funded below 80% in the absence of other factors showing "imminent risk" to the Plan. *See Lee v. Verizon Commun., Inc.*, 837 F.3d 523 (5th Cir. 2016)[31] (no Article III standing where plan was 66% actuarially funded but Plaintiff failed to allege the employer could not cover the shortfall). Plaintiffs admit that their underfunding calculation is not in accordance with ERISA.[32] (Opp. at 38 n.30.) Moreover, 100% funding is not required. *See Freeman v. Cent. States, Se. & Sw. Areas Pension Fund*, 32 F.3d 90, 94 (4th Cir. 1994) (citing 29 U.S.C. § 1082).

Plaintiffs do not and cannot allege that the Plan is "at risk" under any standard. *Harley v. Minnesota Min. & Mfg. Co.*, 284 F.3d 901, 908 (8th Cir. 2002) ("Plaintiffs have no evidence that the Plan will terminate in the foreseeable future. . . . 'ERISA does not require [ongoing] plans to maintain funding at termination levels, a fact that the Supreme Court implicitly recognized in *Hughes*.'") (citation omitted).[33] Nor do Plaintiffs cite authority that remotely holds that unfunded accrued liability, calculated from financial statement figures, is relevant to determining whether a plan is at risk. The funding ratio is irrelevant because the Plan is not required to pay its obligations before they are due. Here, Plaintiffs do not allege that Dignity Health has failed to

[31] In *Lee* the Fifth Circuit did not "rely on" the existence of ERISA's protections in finding a lack of alleged injury. The Fifth Circuit merely noted that ERISA requires an employer to cover underfunding.

[32] Although ERISA is irrelevant in this context, Plaintiffs cannot show the Plan is underfunded using financial statement calculations, and such approach has been repeatedly rejected. *See Harley v. Zoesch,* 413 F.3d 866, 872 (8th Cir. 2005) ("The funding levels in the SEC and IRS filings resulted from different valuation methods [than ERISA], and Participants advance no convincing arguments as to why these valuation measures are relevant."); *Adedipe v. U.S. Bank, Nat'l Ass'n*, 2015 WL 11217175, at *5 (D. Minn. Dec. 29, 2015), *aff'd on other grounds sub nom. Thole v. U.S. Bank, Nat'l Ass'n,* 873 F.3d 617 (8th Cir. 2017); *Palmason*, 2013 WL 4511361, at *8. In *Slack v. International Union of Operating Engineers*, 2014 WL 4090383, at *15 (N.D. Cal. Aug. 19, 2014), the plaintiffs alleged reduced wages and there was no dispute that the plaintiff alleged underfunding under appropriate accounting methods.

[33] Unlike Plaintiff's showing here, in *Adedipe v. U.S. Bank Nat. Ass'n*, 62 F.Supp.3d 879, 893-95 (D. Minn. 2014) the plaintiffs alleged sufficient facts under what the Court determined to be the appropriate funding standard.

make payments, and admit that there is no risk that Dignity Health could fail to meet its obligations, even if they came due today. AC, ¶ 37 ("As of fiscal 2016 year end, Dignity had approximately $17 billion in assets, and operating revenues of approximately $12.6 billion.").[34]

B. Plaintiffs' State Law Claims Fail.

Plaintiffs' claim for breach of contract relies upon the untenable assertion that the Plan document requires the Plan to be fully funded at all times.[35] (AC, ¶¶ 287 and 290; Opp., 36:27-38:8.) As just discussed, there is no legal basis for this implausible proposition. Dignity Health is only required to fund the Plan with "an amount which is sufficient on an actuarial basis to provide for the retirement benefits and other benefits provided under the Plan." RJN, Exh. 8, § 6.01; FAC, ¶¶ 280 and 290.[36] Plaintiffs seek to add the words "as if the benefits were due today" to the plan document.[37] But Plaintiffs admit that *future* benefits are not *currently due* (Opp. at 37), and thus offer no more than the bare assertion that the existence of unfunded accrued liabilities is a breach of the Plan. *Cty. of Orange*, 192 Cal. App. 4th at 35. Plaintiffs cite no authority that supports the assertion that the Plan is required to be 100% funded at all times, which is not what the Plan document says, and they do not allege that the Plan ever failed to pay benefits when they were due. Because Plaintiffs' breach of fiduciary claim is premised on this

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[34] Appeal to general future uncertainty has been soundly rejected in other courts. *See David v. Alphin*, 704 F.3d 327, 338 (4th Cir. 2013) ("We find these risk-based theories of standing unpersuasive, not least because they rest on a highly speculative foundation lacking any discerning limiting principle.").

[35] Plaintiffs' unjust enrichment claim fails because, as this Court has recognized, where there is no dispute about the existence of an enforceable contract governing the subject matter of the claim, an unjust enrichment claim is properly dismissed with prejudice at the pleading stage. *See Gerstle v. American Honda Motor Co.*, 2017 WL 2797810, at *14-*15 (N.D. Cal. June 28, 2017) (Tigar, J.), (quoting *California Medical Ass'n, Inc. v. Aetna U.S. Healthcare of Cal., Inc.*, 94 Cal. App. 4th 151, 172 (2001)).

[36] The Dignity Health financial statements upon which Plaintiffs rely state that "[c]ontributions to the defined benefit pension plans are based on actuarially determined amounts sufficient to meet the benefits to be paid to plan participants." https://www.dignityhealth.org/-/media/cm/media/documents/Financial/2017DignityHealthConsolidatedSecured.ashx?la=en&hash=83A10812D314EC37E37F95AC372731025CCC6C53, at p. 27.

[37] For this reason, Plaintiffs cannot state a claim for breach of the covenant of good faith and fair dealing. *See Guz v. Bechtel Nat. Inc.*, 24 Cal.4th 317, 349-350 (2000) (the covenant of good faith and fair dealing "cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement"); *Avidity Partners, LLC v. State*, 221 Cal.App.4th 1180, 1204 (2013) (same).

incorrect assertion, that claim fails as well.

Plaintiffs' claim for specific performance fails, because Plaintiffs admit that they seek monetary damages in the form of contributions to be paid into the Plan. (Opp., 40:8-9.) Such monetary relief would "fully compensate" any alleged underfunding, and therefore would "render any equitable relief superfluous." *Canova v. Trustees of Imperial Irrigation District Employee Plan*, 150 Cal.App.4th 1487, 1494 (2007). Plaintiffs' argument that such monetary relief would be inadequate (Opp., 40:8-10) is premised on their faulty argument that the Plan must be fully funded at all times going forward. But, again, this purported "requirement" does not exist anywhere in the Plan document (nor is it alleged anywhere in the FAC), therefore it cannot be "enforced" via specific performance. *See Real Estate Analytics, LLC v. Vallas*, 160 Cal.App.4th 463, 472 (2008) (specific performance proper only where the contract is definite and the requested performance is required by the contract).

VIII. CONCLUSION.

For the foregoing reasons, the Court should grant Defendants' motion to dismiss without leave to amend.

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