UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LENORE R. OWENS, JEAN L. JEWETT, LORI L. BUKSAR, and JULIA SNYDER, on behalf of themselves, individually, and on behalf of all others similarly situated, Plaintiffs, v. ST. ANTHONY MEDICAL CENTER, INC. ("SAMC"), THE FRANCISCAN SISTERS OF CHICAGO SERVICE CORPORATION ("FSCSC"), FRANCISCAN COMMUNITIES, INC. f/k/a FRANCISCAN HOMES & COMMUNITY SERVICES, FRANCISCAN HOLDING CORPORATION, FRANCISCAN ALLIANCE, INC., DONNA GOSCIEJ, LINDA HORNYAK, the SAMC RETIREMENT COMMITTEE, the members of the SAMC RETIREMENT COMMITTEE, LEONARD WYCHOCKI, WALTER GARBARCZYK, JULIE SECVIAR, CHESTER LABUS, and SISTER HELENE GALUSZKA, the members of the FSCSC BOARD OF DIRECTORS, SISTER M. FRANCIS CLARE RADKE, SISTER M. FRANCINE LABUS, ANNETTE SHOEMAKER, JILL KRUEGER, LAWRENCE LEAMAN, SANDRA SINGER, SUSAN NORDSTROM LOPEZ, and JOHN and JANE DOES, each an individual, 1-40, Defendants.	Case No: 1:14-cv-04068 **MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT**

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I. OVERVIEW

Defendants'[1] failure to pay retirement benefits owed to Plaintiffs in exchange for their employment gives rise to this litigation. On May 4, 2012, Defendants notified the Plaintiffs and other class members of their unilateral decision to terminate the St. Anthony Medical Center, Inc. ("SAMC") Retirement Plan (the "Plan") without sufficient assets to meet its pension obligations. Plaintiffs learned for the first time that they would lose thirty to forty percent of the retirement benefits they earned while working at SAMC. The loss of this retirement income impacts Plaintiffs in every aspect of their lives, from what medicine and food they can purchase to whether they can afford to retire. *See, e.g.*, ECF Nos. 236, 240. On June 2, 2014, just over two years after learning that their benefits would be cut materially, Plaintiffs instituted this litigation on behalf of themselves and all other Plan participants.

Plaintiffs have pled alternative theories of liability. The first is that Defendants have improperly terminated the Plan, based on the erroneous claim that the Plan qualifies as a church plan exempt from the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq*. In the alternative, if the Court determines ERISA is inapplicable, then Defendants have violated state law by unlawfully cutting back accrued

[1] Defendants in this case are St. Anthony Medical Center, Inc. ("SAMC"), the Franciscan Sisters of Chicago Service Corporation ("FSCSC"), Franciscan Communities, Inc. F/K/A Franciscan Homes & Community Services, Franciscan Holding Corporation, Franciscan Alliance, Inc., Donna Gosciej, Linda Hornyak, the SAMC Retirement Committee and its individual members as well as members of the FSCSC Board of Directors. SAMC, Franciscan Communities Inc., and Franciscan Holding Corporation are "Participating Employers" with sole responsibility for making funding contributions to the Plan. TAC ¶¶ 32, 137. Defendant Franciscan Alliance, Inc. owns 100% of Franciscan Holding Corporation and thus is a member of the controlled group for Franciscan Holding Corporation pursuant to ERISA § 4001(a)(14), 29 U.S.C. § 1301(a)(14). TAC ¶ 32. Defendant FSCSC is the sole corporate member of SAMC and Franciscan Communities, Inc., is an employer responsible for maintaining the Plan, and is therefore the sponsor of the Plan within the meaning of ERISA § 3(16)(B), 29 U.S.C. § 1002(16)(B).

benefits that they promised to Plan participants. Plaintiffs also challenge whether Defendants claim of the church plan exemption violates the Establishment Clause of the First Amendment.

Under all theories of liability, Plaintiffs' claims were actionable when Defendants' made the May 4, 2012 announcement of their decision to terminate the Plan and cut their benefits. Despite Plaintiffs' filing suit on June 2, 2014, just over two years later, Defendants' primary basis for seeking dismissal of the Third Amended Complaint ("TAC") (ECF No. 261) is, once again, that Plaintiffs' claims are time-barred. Defendants argue that it is too late for Plaintiffs to bring this lawsuit because the statute of limitations began to run after the initial decision to convert the Plan to a church plan, more than twenty-five years ago. Defendants also argue that the claims are time-barred because some class members received a Summary Plan Description in 2005 that stated the Plan was being operated as a church plan.

Defendants' arguments are contrary to Supreme Court precedent, which makes clear that fiduciaries' obligations to plan participants are ongoing and that the last alleged fiduciary breach is what triggers the start of the statute of limitations analysis. Defendants, who seek dismissal of the TAC based on timeliness, must identify a claim with a statute of limitations of two years or less in order to prevail, since Plaintiffs filed this suit two years and one month after being notified the Plan was being terminated in an underfunded status. They did not, and accordingly, the motion to dismiss must be denied.

Plaintiffs allege that fiduciary breaches began when Defendants changed the Plan from an ERISA plan to an ERISA-exempt church plan; however, our allegations do not stop there. Rather, the violations were repeated throughout the life of the Plan, and Plaintiffs only discovered the fiduciary breaches upon notice of the improper termination of the Plan, on May 4, 2012. Defendants blithely claim that the termination date was a mere "effect" of the decision to convert to a church plan in 1989, as if every fund that operates a church plan necessarily will terminate and substantially reduce accrued benefits. In fact, there is nothing inexorable about it. Historically, under-funded terminations have occurred in less than one percent of pension plans that claim the church plan exemption. Defendants' breach of their fiduciary obligations cannot be brushed away as the mere consequence of an action taken twenty-five years earlier.

In the event the Court finds that the Plan is a church plan, Plaintiffs advance state law claims for breach of contract, unjust enrichment, breach of fiduciary duty, and negligence. The state law claims flow from the same fiduciary breaches by Defendants which form the basis of the ERISA claims, up to and including the decision to terminate the Plan in an underfunded state and cut all participants' benefits. Whether Defendants' actions violate ERISA, state law, or the Establishment Clause, Defendants' 2012 action to cut already earned benefits caused tremendous upheaval, uncertainty, and a loss of retirement income to Plaintiffs. Because the lawsuit filed in 2014 is timely, the motion should be denied.

II. BACKGROUND

Plaintiffs filed this class action against SAMC and FSCSC, and the Franciscan Holding Corporation and Franciscan Communities, Inc. ("Participating Employers"), claiming that Defendants were erroneously operating their retirement plan as a "church plan" in violation of ERISA. (ECF No. 1). Plaintiffs have since amended the complaint twice. (ECF Nos. 73, 206). Defendants now seek to dismiss the Third Amended Complaint.[2]

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[2] Plaintiffs sought and received permission to file the Second Amended Complaint in summer 2016, in order to add Defendant Franciscan Alliance, which was part of FHC's controlled group. In 2017, Plaintiffs sought and received permission to file the Third Amended Complaint due to changes in the law arising from *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017) ("*Advocate*"), which *reversed* the Seventh Circuit's unanimous decision that only churches could establish "church plans" exempt from ERISA.

The Plan was terminated in March 2012, with notice given to participants in May 2012, and benefits paid as of August 2, 2012. TAC ¶¶ 149–55. It was a non-contributory defined benefit pension plan, established and adopted by SAMC, effective March 1, 1975, for the benefit of all its employees. TAC ¶¶ 99–104. Plaintiffs Lenore R. Owens, Jean L. Jewett, Lori L. Buksar and Julia Snyder were employed by SAMC's hospital and were participants in the Plan. The Plan was administered by Defendants SAMC, FSCSC and the SAMC Retirement Committee ("Retirement Committee"), and promoted as a valuable supplement to personal savings to assure Plan Participants a retirement income. *Id.* ¶ 106.

Although SAMC had treated the Plan as ERISA-covered since its inception, it sought a private letter ruling from the IRS in 1989 that the Plan qualified as a "Church Plan" and should be given that status retroactively, as of March 1, 1975. The IRS issued an undated letter stating that the Plan was a church plan under section 414(e) of the Internal Revenue Code. *Id*. ¶¶ 112–13. Neither this conversion, nor any later events concerning the failure of Defendants to fund the Plan were shared with Plan participants. On June 30, 1998, SAMC and FSCSC froze the Plan for all employees and also ceased participants' benefit accruals, though participants remained entitled to receive benefits that they had accrued upon reaching retirement age. *Id*. ¶ 126. In 1999, SAMC sold its primary asset, the Hospital, to Franciscan Alliance. Nevertheless, both entities remained Participating Employers with liability for the Plan. TAC ¶¶ 24, 32–33, 49–51, 120.

Nor did Plan participants receive notice through any documents of Defendants' failure to fund their retirement benefits. A non-ERISA-compliant Summary Plan Description ("SPD") dated 2005 stated, "planning to assure yourself adequate income is a key to successful retirement." The SPD did not inform Plan participants about the Plan's funding levels or the value of benefits they had accrued, nor did it indicate that the Defendants intended to terminate the Plan with insufficient funds to pay its obligations. Moreover, although the Plan document is attached to the pleadings in this litigation, no Plaintiff received or read the Plan document, nor have Defendants suggested that they did.

Over time, however, the Participating Employers, and FAI, as owner of Holding Corp., failed to provide sufficient contributions to fund the Plan. By 2011, the Plan faced a $32 million shortfall. TAC ¶¶ 130–36. On May 4, 2012, Defendants SAMC and FSCSC informed Plan participants for the first time that the Plan had insufficient assets to meet its benefit obligations and, therefore, was being terminated. TAC ¶ 155. Following the termination, participants' benefits were cut, and they received pension benefits which were thirty to forty percent less than what they had been promised and accrued for their service to SAMC and other Defendants. *Id.* ¶ 148.

Plaintiffs have suffered financial hardship since their retirement income was cutback. Plaintiff Lori Buksar described the reduction in pension benefits as something that affects every financial decision she makes. Declaration of Lori Buksar ¶¶ 4–5, ECF No. 214. Plaintiff Lenore Owens explained that she has had to limit medical care and travel in light of her reduced benefit. Declaration of Lenore Owens ¶ 5, ECF No. 215. Other class members similarly have suffered as a result of Defendants' failure to provide retirement income owed to them.

III. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) allows a party to move to dismiss a complaint for "failure to state a claim upon which relief can be granted." To withstand a Rule 12(b)(6) motion to dismiss, a complaint must comply with Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009). Even post-*Iqbal* and *Twombly*, notice pleading remains all that is required in a complaint. *Camp Drug Store, Inc. v. Red Parrot Distribution, Inc.*, No. 17-CV-502-DRH-RJD, 2018 WL 538697, at *1 (S.D. Ill. Jan. 24, 2018) ("A plaintiff still must provide only 'enough detail to give the defendant fair notice of what the claim is and the grounds upon which it rests and, through his allegations, show that it is plausible, rather than merely speculative, that he is entitled to relief.'" *Id.* (citing *Tamayo v. Blagojevich*, 526 F.3d 1074, 1083 (7th Cir. 2008). "In ruling on a motion to dismiss brought pursuant to Rule 12(b)(6), the Court must draw all reasonable inferences that favor the plaintiff, construe the allegations of the complaint in the light most favorable to the plaintiff, and accept as true all well-pleaded facts and allegations in the complaint." *Camp Drug Store, Inc.*, 2018 WL 538697 at *1 (citing *Appert v. Morgan Stanley Dean Witter, Inc.*, 673 F.3d 609, 622 (7th Cir. 2012); *Rujawitz v. Martin*, 561 F.3d 685, 688 (7th Cir. 2009)). Plaintiffs easily satisfy this standard.

IV. ARGUMENT

A. <u>All of Plaintiffs' ERISA Claims Are Timely and the Motion Should Be Denied.</u>

Defendants must meet an extremely high bar to prevail on a motion to dismiss based upon the statute of limitations. The statute of limitations defense "is rarely a good reason to dismiss under Rule 12(b)(6)," *Reiser v. Residential Funding Corp.*, 380 F.3d 1027, 1030 (7th Cir. 2004), because Plaintiffs need not "anticipate and overcome" affirmative defenses like a limitations period in their Complaint. *Tolleson v. Kraft Foods Global, Inc.*, No. 16-cv-2055, 2016 WL 4439951, at *2 (N.D. Ill. Aug. 23, 2016) (Coleman, J.) (quoting *Sidney Hillman Health Ctr. of Rochester v. Abbott Labs., Inc.*, 782 F.3d 922, 928 (7th Cir. 2015)); *see also Barry Aviation, Inc. v. Land O'Lakes Mun. Airport Comm'n*, 377 F.3d 682, 688 (7th Cir. 2004). Dismissal on a Rule 12(b)(6) motion on a statute of limitations defense is rare because "[affirmative] defenses typically turn on facts not before the court at [this] stage." *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 690 (7th Cir. 2012).

The only way Defendants can prevail on a statute of limitations defense on a motion to dismiss is by showing that "the allegations of the complaint itself set forth everything necessary to satisfy the affirmative defense." *Chi. Bldg. Design, P.C. v. Mongolian House, Inc.*, 770 F.3d 610, 613–14 (7th Cir. 2014) (citing *United States v. Lewis*, 411 F.3d 838, 842 (7th Cir. 2005)). It necessarily follows that if there is "any set of facts that if proven would establish a defense to the statute of limitations," then a motion to dismiss should be denied. *Clark v. City of Braidwood*, 318 F.3d 764, 768 (7th Cir. 2003). Measured against this standard, Defendants' motion to dismiss fails.

1. <u>The Alleged Violations of Ongoing Duties under ERISA Were Repeated by Defendants Until the Date the Plan Terminated</u>

Defendants' entire argument that Plaintiffs' ERISA claims are untimely hinges on Defendants' improperly re-casting the TAC's allegations to two points in time: 1) the Plan's conversion to church plan status in 1989; and, 2) Defendants' assumption that Plaintiffs' receipt of an SPD in 2005 notified them of the ERISA violations. Defendants maintain that the statute of limitations for Plaintiffs' claims began running in 1989, when they converted the Plan to an ERISA-exempt church plan, or alternatively, in 2005, when they issued an SPD revealing the Plan was being operated as a church plan, and that the violations alleged by the Plaintiffs—failure to ensure the Plan was properly funded, failure to provide proper disclosures, failure to ensure the Plan purchased insured annuities to fund participants' benefits, and failure to pay accrued benefits, among others—were just effects of the original decision to convert the Plan that did not affect the accrual of Plaintiffs' claims. Mot. to Dismiss ("MTD") at 8, 11, 14, ECF No. 267.

The resurrection of this stale argument from Defendants' previous motion to dismiss has been squarely foreclosed by Supreme Court precedent. In 2015, the Supreme Court discussed the ERISA Section 413 limitations period for breach of fiduciary duty claims in *Tibble v. Edison Int'l*, 135 S. Ct. 1823 (2015). The Court stated that "under trust law, a fiduciary normally has a continuing duty of some kind to monitor investments and remove imprudent ones [. . .] [i]n such a case, so long as the alleged breach of the continuing duty occurred within six years of suit, the claim is timely." *Tibble*, 135 S. Ct. at 1828–29. The Court rejected the Ninth Circuit's holding that the six-year limitations period began running when the defendants made the initial selection of the allegedly imprudent funds. *Tibble*'s holding forecloses Defendants' timeliness argument in this case.

As in *Tibble*, Defendants here committed repeated fiduciary violations up until the termination of the Plan.[3] For example, after the Plan's conversion the fiduciaries failed to ensure the Plan was properly funded to pay all accrued benefits until the Plan terminated in a severely underfunded state. TAC ¶¶ 271–81, 313–32. The fiduciaries failed to ensure that the proper disclosures were made to participants annually until the Plan's termination. *Id.* ¶¶ 253–70. The fiduciaries failed to ensure that the insured annuities were purchased to fund participants' accrued benefits after the Plan's conversion from an Insured Annuity Plan to a Trusteed Plan. *Id.* ¶¶ 298–304, 305–12, 313–32. And the fiduciaries failed to ensure that the Plan was established pursuant to a proper written document or engaged a proper trust for the Plan's assets. *Id.* ¶¶ 282–86. *Every violation that Plaintiffs have alleged* continued until the Plan terminated in

[3] Even before *Tibble*, the Seventh Circuit endorsed the same concept of ongoing violations of fiduciary duty. *See Martin v. Consultants & Adm'rs, Inc.*, 966 F.2d 1078, 1088 (7th Cir. 1992) ("If knowledge of an ERISA violation barred claims based on similar future conduct, this continuing fiduciary duty would be severely weakened, and trustees would be left free to engage in repeated violations, so long as they have once been discovered but not sued").

March 2012, and which Plaintiffs discovered in May 2012. Plaintiffs filed their Complaint on June 2, 2014, within two years and one month of the discovery of the alleged violations.

Defendants half-heartedly attempt to distinguish *Tibble* by arguing that while *Tibble* involved ongoing investment management, here the issue is a one-time decision twenty-five years ago to request IRS approval to treat the Plan as a church plan. MTD at 18. First, this is a misfire because IRS private letter rulings are not dispositive and are not binding on this Court.[4] Second, *Tibble* instructs that a court must consider *the nature of the fiduciary duty* when applying Section 413; there is no separate carve out depending on the subject matter that gives rise to that duty. *Tibble*, 135 S. Ct. 1827. Because these fiduciary duties are ongoing, Defendants had these obligations to Plaintiffs up until the Plan was terminated; thus Plaintiffs' ERISA claims are timely.

The logic underlying *Tibble* is apparent with a simple example. If the decision to convert to church plan status was the date that "triggered" the statute of limitations in 1989, then an employee who began working for Defendants in 1997 would be unable to challenge the legality of the exemption. Further, if she received an SPD in 2005 and learned for the first time that her pension was exempt from ERISA, her ability to act on that information would also have been time-barred. And, finally, as is the case with the bulk of the class here, if she did not have actual knowledge that she had a claim until notice was provided that the trust was substantially underfunded she would never be entitled to take legal action *because the statute of limitations on her claim would have run before she was even hired.*

[4] *See Stapleton v. Advocate Health Care Network*, 76 F. Supp. 3d 796, 805 (N.D. Ill. 2014); *Kaplan v. St. Peter's Health Sys*., No. 13-2941 (MAS)(TJB), 2014 WL 1284854, at *10 (D.N.J. Mar. 31, 2014); *Rollins v. Dignity Health*, 19 F.Supp.3d 909, 912–13 (N.D. Cal. 2013).

2. Plaintiffs Had Actual Knowledge of a Fiduciary Breach in 2012 and Filed Suit Two Years Later, thus Satisfying the Three Year Limitations Period of ERISA Section 413

The shortest statute of limitations Defendants raise in their motion is ERISA Section 413's three-year limitations period for "actual knowledge" of a fiduciary breach or violation. 29 U.S.C. § 1113(2); MTD at 8–10. This limitations period only applies when a plaintiff has actual knowledge of the breach or violation alleged. Actual knowledge of a breach or violation is a high bar and requires more than just "constructive knowledge" or "inquiry notice." *Fish v. GreatBanc Trust Co.*, 749 F.3d 671, 678 (7th Cir. 2014) (citing *Martin v. Consultants & Adm'rs, Inc.*, 966 F.2d 1078, 1086 (7th Cir.1992)). Rather, the Seventh Circuit defines "actual knowledge" as "knowledge of 'the essential facts of the transaction or conduct constituting the violation,'" with the caveat that "it is 'not necessary for a potential plaintiff to have knowledge of every last detail of a transaction, or knowledge of its illegality.'" *Fish*, 749 F.3d at 679 (quoting *Rush v. Martin Petersen Co.*, 83 F.3d 894, 896 (7th Cir.1996)).

Defendants contend that Plaintiffs received the 2005 SPD and therefore must have discovered then that the Plan was a church plan, which would give them actual knowledge of their claims. MTD at 3. But on a motion to dismiss, the Court must "accept[] the complaint's well-pleaded allegations as true and draw[] all favorable inferences for the plaintiff." *Killingsworth v. HSBC Bank Nev., N.A.*, 507 F.3d 614, 618 (7th Cir. 2007). First, Defendants erroneously conclude that "Plaintiffs explicitly admit reading documents containing these disclosures." This conclusion is not supported by the allegations in the TAC. *See* TAC ¶ 374 ("The promises [to pay defined benefits upon retirement and to make ongoing contributions to the Plan trust] made in the Plan documents were clearly communicated to Plaintiffs and other Class members."). Second, even assuming that Plaintiffs did receive the SPD in 2005, and even assuming they read that the "Internal Revenue Service has determined that the plan is maintained by an organization described in Section 414(e)(A) of the Internal Revenue Code. This means that the Plan is qualified as a "church plan," within the meaning of Code Section 414(e)," what of it? This is far from sufficient to confer Plaintiffs with actual knowledge that Defendants could violate Title I and Title IV of ERISA with impunity. The language says no such thing. Nor does it tell the participants that neither the Court nor Defendants may rely on the IRS private letter ruling for any purpose except tax qualification. The Seventh Circuit interprets the Section 413 "actual knowledge" requirement as when a plaintiff knows the "essential facts of the transaction or conduct constituting the violation." *Fish*, 749 F.3d at 679.

For example, in *Fish*, the Seventh Circuit found information similar to what was provided in the 2005 SPD insufficient to confer "actual knowledge." *Id.* at 682. The court stated that proxy materials did not give participants "actual knowledge" of their claim that the trustee failed to use a proper process to approve a buy-out transaction because the proxy materials lacked essential facts surrounding the violation. *Id.* at 682. The same is true here—knowing the Plan's status as a church plan does not inform Plaintiffs that the Plan is underfunded, that SAMC was no longer contributing to the Plan, and the Plan would be terminated in an underfunded state several years later, causing participants to lose retirement income that they had earned.

Indeed, Defendants' discussion of *Utley v. Prairie Power, Inc.*, No. 15-cv-03324, 2016 WL 3030222 (C.D. Ill. May 26, 2016), bolsters Plaintiffs' position. In *Utley*, the court found the plaintiff to have actual knowledge of a violation upon learning of a delay in payment. *Utley*, therefore, supports Plaintiffs' argument that actual knowledge of Defendants' violation came when they were told their accrued benefits would be cutback at the Plan's termination.[5] Because

[5] Defendants urge the court to find that their illegal behavior is barred by the statute of limitations because Plaintiffs "admit they also knew they had not received *any* indication of ongoing funding (much less regular notices) since 1995, nor any other reports regarding the Plan

Plaintiffs had no actual knowledge of the impending termination of the Plan and their cutback in benefits years before they occurred, the three-year limitations period does not bar Plaintiffs' claims.

3. Plaintiffs' ERISA Claims Satisfy the Six-Year Limitations Section of ERISA Section 413

Moreover, because Plaintiffs satisfy the three-year limitations period of Section 413, they naturally satisfy the six-year limitations period in the statute. MTD at 14–18; 29 U.S.C. § 1113(1). The six-year limitations period of Section 413 provides that a participant's claim for breach of fiduciary duty accrues either six years from the date of an act[6] allegedly constituting a breach of fiduciary duty (29 U.S.C. § 1113(a)(1)(A)), or six years from the last date on which an omission[7] allegedly constituting a breach of fiduciary duty could have been cured (29 U.S.C. § 1113(a)(1)(B)). Whether Plaintiffs' claims for breach of fiduciary duty are classified as either actions or omissions, the date the claim accrued is the same. If Defendants' violations are actions, the violations continued until the Plan terminated in 2012, when the claims accrued. *See Tibble*, 135 S. Ct. at 1829. And if Defendants' violations were omissions, Defendants could have cured the violations up until the Plan terminated. Because Plaintiffs filed their Complaint two

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or their benefits." MTD at 10. Significantly, this contention ignores the fact that Defendants could have cured their funding shortfall by contributing the $32 million dollars owed to the trust before or upon termination. It also ignores the fact that Plaintiffs and Class members were assured at varying stages from 1995 through 2012 that their pensions were safe and their retirement benefits would be paid in full. *See, e.g.*, TAC ¶¶ 164–65, 175, 180.

[6] An action is defined as "[a] thing done." Action, Black's Law Dictionary (10th ed. 2014).

[7] An "omission" is "[a] failure to do something; esp[ecially] a neglect of duty." Omission, Black's Law Dictionary (10th ed. 2014).

years and one month after learning the Plan terminated and their claims accrued, Plaintiffs satisfy the six-year limitations period.[8]

B. Defendants' Timeliness Challenge Under ERISA Section 413 only Applies to Claims for Breach of Fiduciary Duty—Counts XI, XII, and XIII

Defendants purport to challenge all of Plaintiffs' ERISA claims, Counts I through XIII, under the Section 413 limitations period. Yet, this challenge is improper for the majority of Plaintiffs' claims. Section 413, by its text, applies only to "a fiduciary's breach of any responsibility, duty, or obligation [or violation of this part]," where "this part" means Title I, Part IV of ERISA. Plaintiffs have only pled three claims for breach of fiduciary duty—Counts XI, XII, and XIII—Plaintiffs' other claims are thus not subject to the limitations period of Section 413.

Defendants argue that the remaining ERISA claims, Counts I through X, should be subject to the fiduciary breach limitations period because these claims are based "on the same activity" as the fiduciary claims and represent the "effects" of the Plan's church plan status. MTD at 10, 11. Defendants' one-size-fits-all argument is at odds with the plain language of Section 413 and has been soundly rejected by courts in this Circuit.

When analyzing whether non-fiduciary ERISA claims are time-barred, the applicable statute of limitations is not ERISA Section 413 but rather the most analogous state statute of limitations. *See Daill v. Sheet Metal Workers' Local 73 Pension Fund*, 100 F.3d 62, 65 (7th Cir. 1996) ("ERISA itself does not impose a statute of limitations for the bringing of civil actions . . . the court applies the most analogous state statute of limitations"). District courts in this Circuit

[8] As if conceding its weakness on legal grounds, Defendants devote quite a bit of energy to arguing that policy considerations require that statutes of repose be enforced. MTD at 14–16. This argument misses the mark. Plaintiffs' claims fall easily within a three- or six-year statute of limitations.

abide by this rule—applying Section 413 to fiduciary claims but applying a state statute of limitation to non-fiduciary ERISA claims. *See Honeysett v. Allstate Ins. Co.*, 570 F. Supp. 2d 994, 1005 (N.D. Ill. 2008) (applying Section 413 to bar the fiduciary claim but declining to apply it to the ERISA forfeiture claim under § 203(a)); *see also Hakim v. Accenture United States Pension Plan*, 656 F. Supp. 2d 801, 817 (N.D. Ill. 2009) ("ERISA does not contain a statute of limitations for non-fiduciary duty claims such as those alleged by Plaintiff [ERISA Section 204(h)]").

Defendants' reliance on *Librizzi v. Children's Memorial Med. Ctr.,* 134 F.3d 1302 (7th Cir. 1998), lends no support to their argument that Section 413 applies to violations of other parts of ERISA. MTD at 11–12, 13.[9] Defendants conflate *Librizzi's* discussion of when a claim accrues with whether Section 413 can even *apply* to non-breach of fiduciary duty claims. Indeed, the claim in *Librizzi* was breach of fiduciary duty under ERISA § 404(a)(1)(B) for incorrect advice received from a fiduciary, which is properly subject to Section 413. *See Librizzi*, 134 F.3d at 1304 (describing Librizzi's claim as a violation of Section 404(a)(1)(B)). Nothing in *Librizzi* implies that the Section 413 limitations period is applicable to violations of other parts of ERISA, and Defendants cite no authority where Section 413 is applied to bar a claim under another part of ERISA.[10]

[9] Defendants' theory would result in an untenable situation in which all future ERISA violations based on an erroneous past decision would *already* be time-barred, even for those who were not participants at the time the decision was made. *See Page v. United States*, 729 F.2d 818, 821 (D.C. Cir. 1984) ("Just as res judicata cannot bar a claim predicated on events that have not yet transpired, knowledge acquired in 1972 that one has a claim could not trigger time limitations on allegedly tortious conduct that had not then occurred.").

[10] Defendants' cite to *Schroeder v. New Century Holdings, Inc.*, 387 B.R. 95, 108 (Bankr. D. Del. 2008), is curious because while the court discussed Section 413, the court declined to bar Plaintiffs' Count I on a motion to dismiss "until the facts are more fully developed." *Id.* at 109. Moreover, the court footnoted the definition of a fiduciary directly after discussion of the claim and emphasized in bold that the limitations period was applicable "**with respect to a violation of**

Because Section 413 only applies to claims alleging breach of a fiduciary duty or a violation of Part 4 of ERISA, Defendants' challenge is limited to the fiduciary claims: Counts XI–XIII.

C. Plaintiffs' Claims Are Not Barred by Laches

Defendants alternatively challenge the timeliness of Counts I–X under the doctrine of laches. MTD at 18–20. Laches comprises two elements: (1) plaintiffs unreasonably delayed in asserting their rights; and (2) that delay harmed defendants. *Bd. of Trs. of the Pipe Fitters Ret. Fund, Local 597 v. Am. Weathermakers, Inc.*, 150 F. Supp. 3d 897, 908 (N.D. Ill. 2015); *Teamsters & Employers Welfare Tr. of Illinois v. Gorman Brothers Ready Mix*, 283 F.3d 877, 880 (7th Cir. 2002). Neither element is met here. Claims brought within the statute of limitations are rarely found to have been unreasonably delayed. *See, e.g.*, *Martin v. Consultants & Adm'rs, Inc.*, 966 F.2d 1078, 1091 (7th Cir. 1992) (refusing to apply laches to bar plaintiffs' ERISA claims when they filed suit with the Section 413 limitations period).

Plaintiffs filed their lawsuit two years and one month after discovering Defendants were substantially reducing class members' pensions. As set forth *supra*, that filing was timely. Therefore, Plaintiffs cannot be subject to a laches defense. *Martin*, 966 F.2d at 1090 (stating that the laches defense is disfavored where a plaintiff has sued within the prescribed statutory time period).

Moreover, Defendants have not been prejudiced. Their contention that the emphasis on older events will create difficulties in launching a defense is disingenuous. Just because it may be

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this part," suggesting that the court applied the Section 413 limitations period to a breach of fiduciary duty claim. *Id.* at 108, n.10 (emphasis in original). Additionally, Defendants' implication that the court applied Section 413 to claims for violation of "many ERISA provisions," (MTD at 12) is incorrect, as the court only considered "Count I" under Section 413, not all of the *Schroeder* plaintiffs' claims. *Id.* at 109.

difficult to locate all of the documents, does not mean they should be immunized from liability. Defendants are fiduciaries who had an obligation to maintain documents. And, as Defendants acknowledge, they have already produced documents related to these older events to Plaintiffs.[11] Producing documents and witnesses to testify about events that occurred in 2012 cannot be burdensome. Defendants provide no explanation why records from the past decade are lost or incomplete. Accordingly, Defendants' motion to dismiss based on laches should be denied.

D. Plaintiffs' State Law Claims Are Viable

1. The State Law Claims Are Timely

Plaintiffs' state law claims are also timely. Illinois law has a ten year statute of limitations for breach of contract. *See* 735 ILCS 5/13-206. Under Illinois law, the statute of limitations for contract actions and for torts arising out of contractual relationships begins to run when an accrued claim is discovered. *Horbach v. Kaczmarek*, 915 F. Supp. 18, 24 (N.D. Ill. 1996); *Hermitage Corp. v. Contractors Adjustment Co.*, 651 N.E.2d 1132, 1135 (1995). As set forth *infra*, any claim with a statute of limitations of three years or longer is timely.

Defendants incorrectly maintain that the breach of contract occurred in 1995 when Defendants moved away from an insured annuity plan, rendering claims after 1995 untimely.[12] Based upon a misreading of the TAC, Defendants alternately argue that the contract breach first occurred by no later than 2005.[13] But of course, the accrued claim must be "discovered" for the

[11] Defendants have produced over 2,000 pages already that date back to 1989.

[12] In their motion opposing Plaintiffs' Third Amended Complaint, Defendants insisted the relevant statute of limitations was two years. They have now abandoned that argument.

[13] The Plan converted from an insured annuity plan to a plan funded through a trust in 1995. TAC ¶ 118. Thereafter, participants relied upon the Participating Employers to make ongoing contributions to the trust sufficient to pay all defined benefit obligations. Plaintiffs allege that "for over ten years" Defendants and the Participating Employers breached their contractual obligations by failing to make contributions to the Plan trust sufficient to pay for all accrued

statute of limitations to begin to run, and neither of these arguments makes any sense. Plaintiffs pled that the contract required that Defendants make ongoing contributions to the Plan trust sufficient to pay for their accrued pension benefits and pay defined benefits upon retirement. TAC ¶¶ 374, 378. Defendants breached their obligations by failing to make contributions to the trust sufficient to pay those benefits. There was no basis to allege a breach of contract as a result of Defendants becoming solely responsible for meeting retirement obligations rather than relying on an insured annuity plan. Rather, the termination of the Plan in an under-funded state provided Plaintiffs notice of breach of contract because, for the first time, Plaintiffs were made aware that Defendants had failed to make contributions to the trust sufficient to pay their benefits.

For example, in May 2010, Plaintiff Owens began receiving her promised monthly benefits. At that time, she had no indication that there was any shortfall in Plan assets. She could not have pled viable state law claims for breach of contract, unjust enrichment, or negligence by 2005 as Defendants contend.[14] Rather, Plaintiff Owens' claims accrued on May 4, 2012, when SAMC informed her that because the Plan was underfunded, she would have to accept a single lifetime annuity at a 37% reduced rate, or a single sum which was more than a 30% reduction in the actuarial equivalent value of the pension benefit she was entitled to receive under the Plan prior to the March 2012 Amendment. *See* TAC ¶¶ 164–68. The same is true for all other members of the class; they discovered the terms of the Plan had been breached when they received notification on May 4, 2012 that the benefits they had been promised were being substantially reduced.

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pension benefits. TAC ¶ 379. Plaintiffs received no notice or information concerning this breach until there were insufficient funds in the trust to pay their accrued benefits in 2012. TAC ¶ 385.

[14] Plaintiffs and Class members may have had breach of fiduciary duty claims earlier than May 4, 2012 due to the repeated violations of ongoing fiduciary duties, but the May 4, 2012 improper termination of the Plan forms the basis of the breach of fiduciary duty claims brought in this action.

For the same reasons, the claims for unjust enrichment, breach of common law fiduciary duty claims, and negligence are all timely. A cause of action for unjust enrichment is governed by Illinois's five-year statute of limitations. *Apollo Real Estate Inv. Fund, IV, L.P. v. Gelber*, 935 N.E.2d 949, 957 (2009); 735 ILCS 5/13–205. A five year limitations period also applies to the breach of fiduciary duty claims. *Fuller Family Holdings, LLC v. N. Tr. Co.,* 863 N.E.2d 743, 756 (2007); S.H.A. 735 ILCS 5/13–205. And, negligence too, has a five year statute of limitations. *See Mack Trucks, Inc. v. Axle Equip. Sales Co*., No. 84 C 10890, 1985 WL 2723, at *2 (N.D. Ill. Sept. 27, 1985); *Rock Island Bank v. Aetna Cas. & Surety Co.*, 692 F.2d 1100, 1103 (7th Cir. 1982); *Del Bianco v. American Motorists Ins. Co.*, 392 N.E.2d 120, 124 (Ill. App. Ct. 1978). Because the Defendants' promise to fully fund Plaintiffs' pension was broken on May 4, 2012, every legal claim advanced by Plaintiffs falls well within the limitations period.

2. The Doctrine of Laches is Inapplicable to Plaintiffs' State Law Claims

Defendants' laches defense to the state law claims is meritless for the same reasons as those set forth above with respect to their attempt to avoid ERISA liability. Because the lawsuit was not delayed unreasonably, and Defendants have not been prejudiced, the doctrine of laches is inapplicable. Again, laches cannot be raised as a defense to claims brought within the statute of limitations. *See, e.g.*, *SCA Hygiene Prod. Aktiebolag v. First Quality Baby Products, LLC*, 137 S. Ct. 954, 960 (2017); *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1974 (2014) ("[W]e adhere to the position that, in face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief. . . .") Accordingly, the Court should decline to give any weight to Defendants' defense of laches.

3. Plaintiffs Properly Plead Each State Law Claim

a. *Plaintiffs State a Valid Claim for Breach of Contract*

Plaintiffs have stated a claim for breach of contract, which under Indiana law consists of three elements: (1) the existence of a contract; (2) a breach of that contract by the defendant; and (3) damages suffered by the plaintiff as a result of the defendant's breach. *Cincinnati Specialty, Underwriters Ins. Co. v. DMH Holdings, LLC*, No. 3:11-CV-357, 2013 WL 683493, at *5 (N.D. Ind. Feb. 22, 2013); *Collins v. McKinney*, 871 N.E.2d 363, 369 (Ind. Ct. App. 2007). All three elements are properly alleged in the TAC. Plaintiffs' breach of contract claim is adequately pled. *Anchorbank, FSB v. Hofer*, 649 F.3d 610, 614 (7th Cir. 2011).

Plaintiffs allege that the Plan documents, restatements, and summary plan descriptions created a contract between SAMC, FSCSC, the Participating Employers on one hand and Plaintiffs and the Class members on the other. TAC ¶ 369. Defendants promised to pay Plaintiffs the full amount of benefits they had accrued upon their retirement. Plaintiffs accepted this offer by agreeing to employment and continuing in their employment. TAC ¶¶ 369–78. Defendants breached their obligations under the contract by making insufficient contributions to the Plan, failing to insure the Plan, and, ultimately, terminating the Plan which resulted in material reductions to retirement benefits that Plaintiffs had earned. *Id.* ¶¶ 379–86. Plaintiffs are damaged by the amount that their pension benefits were reduced as a result of insufficient assets upon termination—a thirty percent reduction for those who took a lump sum and a forty percent reduction for those who elected an annuity form of payment. *Id.* ¶ 385.

In exchange for Plaintiffs' continued employment, SAMC, the Participating Employers, and FSCSC (as a contractual successor in interest to SAMC) repeatedly promised to fund pensions and to pay a guaranteed level of benefits to Plaintiffs upon retirement. TAC ¶ 369. The Plan was promoted by Defendants as a valuable supplement to personal savings to assure that the retirement years of its Plan participants would be comfortable. TAC ¶ 106. Even well after the Plan was underfunded by over $32 million, SAMC and FSCSC continued to send form notices informing participants of the Plan that they would begin receiving, at age 65, the full accrued monthly retirement benefit calculated under the terms of the Plan and continue receiving such benefits for as long as the participants lived. *Id.*

SAMC, the Participating Employers and FSCSC now argue that they have not breached their contractual commitments (see MTD at 27–28). Defendant cannot at the pleading stage rely on a separate clause in the Plan that purports to absolve it of responsibility. *Id*. Section 8.1 promises that "[t]he Employers shall make contributions in such amounts and at such times in accordance with (i) a funding method and policy to be established by the Company consistent with Plan objectives, and (ii) annual actuarial valuations of the Plan prepared by the Actuary." St. Anthony Medical Center, Inc. Retirement Plan § 8.1, Ex. A to MTD, ECF No. 267-1 ("Plan"). That such language may be contradicted by other sections of the Plan is to Defendants' detriment. MTD at 28. Any ambiguity in a contract is to be construed against the drafter. *United Thermal Indus., Inc. v. Asbestos Training & Employment, Inc.*, 920 F.2d 1345, 1349 (7th Cir. 1990); *Bell v. Commonwealth Land Title Ins. Co*., 494 N.E.2d 997, 1000 n. 1 (Ind. Ct. App. 1986). "Interpretation of the contract should harmonize its provisions, rather than place the provisions in conflict." *Atl. Cas. Ins. Co. v. Garcia*, 878 F.3d 566, 569 (7th Cir. 2017) (*citing Allgood v. Meridian Sec. Ins. Co*., 836 N.E.2d 243, 247 (Ind. 2005)). The purpose of the Plan was to provide retirement benefits to employees; its provisions should be construed to effectuate that goal.

Moreover, Defendants' claim that they did not have a contractual obligation to contribute actuarially necessary amounts to the Plan and fully fund it before termination is belied by the plain language of the Plan, which requires Defendants to establish a funding policy and method. *See* Plan § 8.2 ("The Company shall establish a funding policy and method so that the investment of the Plan can be appropriately coordinated with the Plan's financial needs …. both on a short-term and a long-term basis."). The Plan promises that "[a]ll vested benefits accrued prior to May 1, 1995, will be payable for life with 120 payments guaranteed and will be eligible for future cost-of-living increases and that all vested benefits accrued after April 30, 1995, will be payable for life and will not be eligible for any future cost-of-living increases. *See* Plan Preamble. These provisions, which show the intent of the Plan to pay retirement benefits for the remainder of the lives of retired employees, eliminate any question of whether funding was "sufficient" or adequate.

Indiana recognizes an implied covenant of good faith when one party stands in a fiduciary relationship to the other. *See Perron on behalf of Jackson v. J.P. Morgan Chase Bank, N.A.*, 845 F.3d 852, 856 (7th Cir. 2017) (*citing Old Nat'l Bank v. Kelly*, 31 N.E.3d 522, 531 (Ind. Ct. App. 2015); *Paul v. Home Bank SB*, 953 N.E.2d 497, 504–05 (Ind. Ct. App. 2011); *Allison v. Union Hosp., Inc.*, 883 N.E.2d 113, 123 (Ind. Ct. App. 2008)). A party violates the implied duty of good faith and fair dealing even when, though not breaching the express terms of the contract, that party nonetheless behaves unreasonably or unfairly. *Perron on behalf of Jackson*, 845 F.3d at 856 (*citing Old Nat'l Bank*, 31 N.E.3d at 531). Defendants violate the implied covenant of good faith and fair dealing here, by relying on one sentence in a sixty-page contract to avoid performing the required obligations. It is unreasonable that a contract drafted to provide retirement benefits to employees would not require the employers to fund the Plan.

If SAMC, the Participating Employers and FSCSC did not have to contribute money, or could contribute insufficient amounts, the contract would be meaningless and would not serve the Plan's purpose. The Court should reject Defendants' self-serving interpretation. Contract terms are to be read reasonably, in the context of the entire document, and with the contract's textually evident purposes in mind. *E.T. Prod., LLC v. D.E. Miller Holdings, Inc.*, 872 F.3d 464, 466 (7th Cir. 2017), *reh'g denied* (Nov. 7, 2017). Defendants' request that Plaintiffs' contract claim be dismissed because "the Plan and SPD clearly contemplate termination in an underfunded state" (MTD at 29) should be denied.[15] Plaintiffs have pled facts that allow the Court to draw the reasonable inference that the Defendants are liable for breach of contract. *White v. Fitzpatrick*, No. 17-CV-00087-JPG-RJD, 2017 WL 2180927, at *1 (S.D. Ill. May 18, 2017) (citing *Iqbal*, 556 U.S. at 678; *Bell Atl. Corp.*, 550 U.S. at 556).

b. *Plaintiffs' Unjust Enrichment Claim Is Properly Pled*

The unjust enrichment claim is also sufficiently pled. While Plaintiffs intend to prove the existence of a valid contract and acknowledge they may only recover under one theory of liability, they are entitled to plead an unjust enrichment claim in the alternative. Pleading in the alternative means that a party is allowed to plead breach of contract, and, because the court may find no contract was formed, may also plead for quasi-contractual relief. *See Cromeens, Holloman, Sibert, Inc v. AB Volvo*, 349 F.3d 376, 397 (7th Cir. 2003).

[15] Despite the fact that all inferences are to be construed in Plaintiffs' favor, Defendants contend that the SPD contemplates termination in an underfunded state. The same SPD, however, explicitly contemplates residual assets will be returned to the participating employers. *See* 2005 SPD, Section 8 ("If the plan is ever terminated, all benefits earned to that time will become fully vested and the assets of the plan will be allocated to pay benefits to retired and active participants, as they come due (in a priority order established by law), to the extent that fund assets are adequate. *Any excess assets following plan termination will be returned to the participating employers*.") (emphasis added). At a minimum, the 2005 SPD is ambiguous, and any ambiguities must be resolved against Defendants. *United Thermal Indus., Inc.*, 920 F.2d at 1349; *Bell*, 494 N.E.2d 997 at 1000 n.1.

To plead a claim of unjust enrichment, Plaintiffs must allege that the Defendants unjustly retained a benefit to Plaintiffs' detriment, and that the Defendants' retention of the benefit violates the fundamental principles of justice, equity, and good conscience. *HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc.*, 545 N.E.2d 672, 679 (Ill. 1989). Plaintiffs have pled a claim for unjust enrichment, alleging that by not contributing to the Plan, Defendants were able to retain $32 million that, had it been contributed to the Plan, would have fully funded the trust prior to its termination. TAC ¶¶ 390–97. Instead, Defendants shirked their obligations and forced Plaintiffs and other class members to shoulder the burden of the shortfall. *Id.* ¶ 396. Moreover, Plaintiffs had already provided their years of service, in fact many were already retired, before learning that Defendants would break the promises made orally, in the Plan, and in the Plan documents to pay accrued retirement benefits. Defendants were unjustly enriched by receiving service from employees without meeting their end of the bargain and fully funding those employees' pensions.

Defendants' response, that the allegations do not identify a "measurable benefit" received by any particular Defendant, makes absolutely no sense, given that Defendants are alleged to have saved $32 million by not contributing to the Plan. TAC ¶¶ 143, 396–97. The argument that Plaintiffs have not identified particular funds held by a particular Defendant that should have been paid into the Plan trust (MTD at 29) is astounding for requiring what the law and Rule 8 do not. To put Defendants on notice of their claims, Plaintiffs need only allege that Defendants were unjustly enriched at the expense of the Plaintiffs. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. The law does not require

Plaintiffs to have actuarial precision about how Defendants should have funded their promises to their employees.

Fundamentally, Defendants misconstrue the nature of the claim and retirement benefits generally. A pension defers part of employees' wages while they are working. Even if the benefits are funded by an employer, like they are here, part of an employees' compensation is withheld (*e.g*., through a lower wage than would otherwise be paid). Plaintiffs allege that certain Defendants promised to pay, and fund, a pension for them in exchange for their work, but have not held up their end of the deal.

In addition to the obvious savings realized by not properly funding the Plan, by continuing to work for SAMC, FSCSC, and/or the Participating Employers, Plaintiffs and the other Class members performed their obligations under the contract and the Defendants benefitted. TAC ¶¶ 388–401. The TAC further alleges that the Participating Employers, SAMC, and FSCSC used the retirement Plan as a recruiting tool, in addition to encouraging Plaintiffs to continue working for the Participating Employers, SAMC, or FSCSC. TAC ¶ 391.

This Court must accept as true the well-pleaded facts in Plaintiffs' TAC and draw all reasonable inferences from those facts in the Plaintiff's favor. *AnchorBank*, *FSB*, 649 F.3d at 614. Plaintiffs plausibly allege a breach of contract claim. Alternatively, if the Court finds the promises contained in the Plan to be illusory[16] and the contract to be void and unenforceable,

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[16] Mutuality of obligation must be present for a valid Indiana contract. "[T]here can be no contract unless both parties are bound." *Feltner v. Bluegreen Corp*., No. IP 02-0873-C-M/S, 2002 WL 31399106, at *4 (S.D. Ind. Oct. 8, 2002); *Rogier v. Am. Testing & Eng'g Corp.,* 734 N.E.2d 606, 618 (Ind. Ct. App. 2000). An illusory promise, one which "makes performance entirely optional with the promisor," cannot form the basis for a valid contract, *Pardieck v. Pardieck*, 676 N.E.2d 359, 364 n.3 (Ind. Ct. App. 1997), because "a contract is unenforceable if it fails to obligate [one party] to do anything." *Feltner v. Bluegreen Corp*., No. IP 02-0873-C-M/S, 2002 WL 31399106, at *4 (S.D. Ind. Oct. 8, 2002) (citing *Ind.-Am. Water Co. v. Town of Seelyville*, 698 N.E.2d 1255, 1260 (Ind. Ct. App. 1998).

Plaintiffs plausibly allege a claim for unjust enrichment. *Iqbal*, 556 U.S. at 678 (2009); *see also Twombly*, 550 U.S. at 555.

c. *Plaintiffs' Breach of Fiduciary Duty Claims Are Adequately Pled*

Plaintiffs have properly pled a claim for breach of fiduciary duty, which requires a showing that (1) defendant owes a fiduciary duty to plaintiff; (2) defendant has breached that duty; and (3) the breach caused damages. *Neade v. Portes*, 739 N.E.2d 496, 502, 193 Ill.2d 433, 444 (Ill. 2000). Plaintiffs allege in the TAC that Defendants were fiduciaries to the Plan and owed Plaintiffs and the class the duty of loyalty, which included the responsibility under the Plan documents to make sufficient contributions to the Plan to fund accrued benefits and that their failure to contribute $32 million before terminating the Plan caused Plaintiffs to incur substantial reductions in the retirement benefits that they had earned. TAC ¶¶ 406–12, 418–24.

Defendants argue that Plaintiffs did not allege any facts from which a fiduciary relationship may be inferred. *See* MTD at 31. The TAC alleges that SAMC, FSCSC, and the Participating Employers, in their roles as employers with respect to the Plan, are fiduciaries *pursuant to the Plan documents*. TAC ¶ 405. The Plan defines fiduciary as "[t]he Company and other Employers (acting through their respective boards of directors or duly authorized officers), the Committee, the Trustee, and/or other parties named as Fiduciaries pursuant to Section 9.1, with respect to the specific responsibilities of each for Plan and Trust administration, all as described in Article IX." *See* Plan §1.20. The TAC further alleges that the Retirement Committee Defendants are trustees within the meaning of the common law of trusts, or alternatively that they are fiduciary trust managers or trust protectors within the meaning of the common law of trusts, *in addition to* being fiduciaries pursuant to the Plan documents. TAC ¶¶ 416–17. A fiduciary obligation is therefore not only pled in the TAC, but supported by documents Defendants themselves have put in the record.

The TAC goes on to allege that as fiduciaries to the Plan, the Defendants owed Plaintiffs and other Class members the duty of loyalty, including the duty to act solely in the interests of Plaintiffs and the other Class members. TAC ¶ 405. As fiduciaries, Defendants were required to ensure that the Plan was properly and sufficiently funded and make the requisite contributions. As fiduciaries, Defendants were required to effectuate the written intent of SAMC, the Participating Employers, and FSCSC "to continue this Plan as it applies to its employees and make contributions regularly each year." *See* Plan § 8.1.

Plaintiffs also state a breach of fiduciary duty claim against the Retirement Committee. *See* TAC ¶¶ 412–23. The Plan provides that the Retirement Committee is a Plan fiduciary (*see* Plan §1.20), and the TAC alleges that the Retirement Committee Defendants breached a duty to receive and review the periodic valuations of the Plan's actuary. TAC ¶ 420. Plaintiffs have pled facts that allow the court to draw the reasonable inference that SAMC, FSCSC, the Participating Employers, and the Retirement Committee have breached the fiduciary duties owed to Defendants. *White*, 2017 WL 2180927 at *1 (citing *Iqbal*, 556 U.S. at 678).

d. *Plaintiffs' Negligence Claim Is Properly Pled*

A negligence claim contains four elements: the existence of a duty, a breach of that duty, injury to the plaintiff(s), and proximate causation of the injury by the defendant's breach. *See Chiriboga v. Nat'l R.R. Passenger Corp.*, 687 F. Supp. 2d 764, 768 (N.D. Ill. 2009) (citing *Gouge v. Central Ill. Pub. Serv*., 582 N.E.2d 108, 111 (1991)). Duties can arise from common law, statute, ordinance, or regulation. *Chiriboga*, 687 F. Supp. at 768; *Bartelli v. O'Brien*, 718 N.E.2d 344, 355 (Ill. App. Ct. 1999). In addition, a duty exists when a defendant stands in relationship to a plaintiff such that the law obligates the defendant to exercise reasonable care for the plaintiff's benefit. *Chiriboga*, 687 F. Supp. at 768; *Ward v. K Mart Corp*., 554 N.E.2d 223, 226 (1990). This includes entities and individuals who administer employee benefits, including retirement plans, which is why employers routinely purchase Employee Benefits Liability Coverage. *See, e.g.*, *Hartford Cas. Ins. Co. v. Karlin, Fleisher & Falkenberg, LLC*, 134 F. Supp. 3d 1115, 1126 (N.D. Ill. 2015), *aff'd*, 822 F.3d 358 (7th Cir. 2016) (discussing Employee Benefits Liability insurance coverage and the coverage it affords for negligent acts and omissions).

Plaintiffs allege that Defendants owed Plaintiffs and the class a duty of care to ensure the Plan was properly funded to cover all accrued pension benefits and to ensure that the pension plan was sufficiently funded upon termination. TAC ¶ 426. The TAC alleges that each Defendant owed each Plaintiff a duty of care to ensure the Plan was properly funded, on an actuarial basis, to cover all accrued pension benefits, and to ensure that it was properly terminated. *Id.* The Defendants knew or should have known that by failing to make contributions to the Plan would result in a shortfall of money available to pay accrued pension benefits, and that failing to maintain insurance for the Plan would mean there would be no money available to make up any such shortfall in the Plan, yet nevertheless acted negligently in terminating the Plan anyway.

As a proximate cause of the Defendants' negligence, Plaintiffs and Class members were injured by the thirty to forty percent cutback in their accrued benefit upon termination of the Plan. *Id.* ¶¶ 428, 429. The allegations are simple but clear; accepting as true the well pleaded facts in the TAC and drawing all reasonable inferences from those facts in the Plaintiff's favor (*see AnchorBank, FSB*, 649 F.3d at 614) necessitates a finding that a plausible negligence claim has been pled by the Plaintiffs. *Iqbal*, 556 U.S. at 678 (2009); *see also Twombly*, 550 U.S. at 555.

E. <u>Plaintiffs Have Stated a Claim for Violation of the Establishment Clause</u>

Plaintiffs' TAC challenges the *application* of the church plan exemption to a hospital like St. Anthony's. Defendants rely on a non-binding Tenth Circuit opinion, *Medina v. Catholic Health Initiatives*, No. 16-1005, slip. op. (10th Cir. Dec. 19, 2017), to argue that Plaintiffs'

Establishment Clause claim should be dismissed. The Court should not entertain Defendants' comparison between this case and *Medina* for three reasons—first, *Medina's* analysis of the Establishment Clause claim was incorrect. Second, *Medina* wrongly assumed that plaintiffs' challenge was a facial challenge to the constitutionality of the church plan exemption, rather than *as applied* challenge to the religious hospital at issue. Third, *Medina* was decided on summary judgment after two years of discovery. Here, the parties are before the Court on a Rule 12(b)(6) motion—Plaintiffs must only plead allegations that plausibly state a claim for violation of the Establishment Clause and have done so. The Court should decline to dismiss this claim.

To withstand scrutiny under the Establishment Clause, the exemption *as-applied* must: (1) comport with a valid secular purpose for which the exemption was enacted (*see, e.g., Wallace v. Jaffree*, 472 U.S. 38, 59 (1985)); (2) alleviate a "significant state-imposed deterrent" to genuine religious practice (*Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 15 (1989) (plurality opinion)); (3) take adequate account of harm to third parties (*see Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–10 (1985); *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)); and (4) produce less entanglement with religion than denial of the exemption (*see Tex. Monthly, Inc.*, 489 U.S. at 20).[17] If the application of the exemption fails any of these parts, the application is unconstitutional. Here, Plaintiffs have adequately pled all of these elements.

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[17] Defendants contend that the applicable analysis for whether the Establishment Clause claim is valid is set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). However, the Supreme Court declines to apply *Lemon* to challenges to religious accommodations, such as the present application of the church plan exemption. *See, e.g., Cutter*, 544 U.S. at 717 (declining to apply *Lemon* in religious accommodation Establishment Clause challenge); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (ruling on Establishment Clause claim without *Lemon* test). Regardless, whether the *Lemon* test applies or not is irrelevant to the ultimate outcome, as the elements of the *Lemon* test are the same as those put forth in Plaintiffs' analysis *supra*, which Plaintiffs have satisfied.

As to the first factor—the application must comport with a valid secular purpose for which the exemption was enacted—Defendants make the same mistake as the *Medina* court and focus on Congress's purpose in passing the exemption rather than the purpose of the present application. MTD at 21. Plaintiffs alleged that the purpose for the application of the exemption to SAMC—to protect its books and records from examination—does not qualify as a secular purpose for granting the exemption. TAC ¶ 363. Any protection of St. Anthony's books and records is futile because it is a large hospital that operates in a heavily-regulated marketplace and is required to publicly disclose its financial records and relationships. *Id*. Defendants identify no secular purpose for applying the Church Plan exemption to the hospital—because the only purpose is to exempt the church-affiliated hospital from ERISA's generally applicable financial and administrative requirements. *See Wallace*, 472 U.S. at 59 (declaring statute permitting voluntary prayer in public schools invalid under the Establishment Clause because it served no secular purpose). Accordingly, Plaintiffs have properly alleged that this portion of the *Lemon* test is not satisfied.

St. Anthony's use of the exemption also fails the next factor—that the exemption must relieve a burden on religious practice. First, the church plan exemption relieves no burden on St. Anthony's ability to carry out its religious mission. ERISA is a neutral statute that does not significantly burden religious exercise—rather, it imposes requirements on the operation of a pension plan. *See, e.g.*, *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 392–97 (1990) ("substantial administrative burdens" imposed on religious business "do not rise to a constitutionally significant level"). 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 [St. Anthony's] has to spend on its religious activities, any such burden is not constitutionally significant." *Jimmy Swaggart*, 493 U.S. at 391.

A religious accommodation impermissibly advances religion if it is imposed at the expense of non-adherents. *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 15 (1989) (Texas's subsidy only available to religious organizations would "burden[] nonbeneficiaries markedly" and violates the Establishment Clause). Allowing St. Anthony's to reap the benefits of the exemption promotes St. Anthony's over secular hospitals that must comply with ERISA's requirements, which impermissibly advances religiously-affiliated hospitals over secular hospitals. TAC ¶¶ 365–67. The church plan exemption also impermissibly burdened St. Anthony's employees—they were denied ERISA's protections, which ultimately resulted in a reduction of their pension. TAC ¶ 365; *see also Tex. Monthly*, 489 U.S. at 18 n.8. If the employees had worked at a secular hospital, their pension plan would have been subject to ERISA, they would have had federal pension insurance, and they would not have suffered a severe reduction of their accrued benefits. Defendants argue that the Establishment Clause is only violated when the "government itself has advanced religion," but the application of the exemption does just that—it relieves a religious hospital of ERISA's administrative and financial burdens, even though ERISA's requirements do not hinder religious practice, and at the same time the application disadvantages secular hospitals and burdens St. Anthony's employees who lost a financially secure pension.[18] Thus, Plaintiffs have alleged that the application of the exemption fails the second part of the *Lemon* test.

Finally, the application of the exemption to St. Anthony's does not meet the last factor, which requires that compliance with ERISA produce less entanglement with religion than denial of the exemption. *Tex. Monthly*, 489 U.S. at 20. ERISA compliance requires *zero* entanglement with religion. But here, St. Anthony's use of the exemption creates greater entanglement because it requires courts and agencies to examine the religious convictions of St. Anthony's to determine if they are "shared" with a church. 29 U.S.C. § 1002(33)(C)(iv). ERISA is a neutral statute that protects pensions, and St. Anthony's has "no confidential books and records to shield from government scrutiny," as it discloses its financial records and relationships. *See, e.g.*, *Hernandez v. C.I.R.*, 490 U.S. 680, 696–97 (1989) ("routine regulatory interaction which involves no inquiries into religious doctrine" causes no government entanglement). Defendants' argument that ERISA compliance requires more "pervasive monitoring" than determination of church plan status is meritless—qualification for church plan status requires ongoing review to account for changes to corporate governance and relationships; moreover, *only* church plan analysis, and not ERISA monitoring, requires inquiry *into religion*. Most pension plans comply with ERISA, and simply applying ERISA's protections would require no inquiry into religious activities whatsoever. Plaintiffs allege that claiming the church plan exemption fosters more

[18] As for Defendants' latter point, Rule 12(b)(6) does not require that Plaintiffs identify an ERISA-compliant competitor hospital in the Complaint to establish plausibility of their claim. Defendants' point that the Plan is now terminated is similarly unavailing, as the Establishment Clause claim focuses on the prior operation of the Plan. TAC ¶¶ 365–67. Finally, Defendants' reference to the cases discussed in *Medina* that found exemptions for religious organizations to pass the Establishment Clause are inapt—those exemptions relieved a practice to religious burden. *See, e.g., Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987) (exemption to Title VII protected religious organization's ability to hire and fire employees based on religious belief, which was necessary to the organization's ability to carry out its religious mission).

government entanglement with religion than ERISA compliance, and thus have alleged that the exemption as-applied fails the third part of the *Lemon* test. The application of the Church Plan exemption to St. Anthony's fails to satisfy the four components of the Establishment Clause analysis—thus, Plaintiffs have stated a valid claim.

V. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss should be denied.

RESPECTFULLY SUBMITTED,

February 12, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2018, I caused a copy of the foregoing to be served via the Court's ECF system upon all counsel of record.

/s/ *Carol V. Gilden*___
Carol V. Gilden