UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LENORE R. OWENS, et al., Plaintiffs, vs. **ST. ANTHONY MEDICAL CENTER, INC. ("SAMC"),** et al., Defendants.	**DOCKET NO. 1:14-cv-04068** **HON. SHARON JOHNSON COLEMAN** **REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT**

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After four years of litigation (including substantial discovery), and four separate attempts to plead their claims, Plaintiffs are no closer to stating a viable claim for relief. Indeed, in their attempt to preserve this litigation in the wake of recent unfavorable precedent, Plaintiffs seem willing to say virtually anything – even to the point of misrepresenting their own allegations – to establish some kind of claim. In doing so, Plaintiffs offer a number of new allegations establishing that each of the Plaintiffs knew of the basis for their claims before 2005. In short, Plaintiffs have affirmatively pleaded themselves out of a timely ERISA claim.

Plaintiffs' alternative claims under state law are likewise untimely under applicable limitations, under the doctrine of *laches*, or both. If any of the state-law counts are timely, the supporting allegations fail to set forth specific facts supporting specific claims as to specific Defendants. Accordingly, those allegations fail to state viable claims under controlling standards of pleading. Finally, Plaintiffs' constitutional claims fail as a matter of law, either because the claim is non-justiciable, or for the reasons given in a new, nearly identical Tenth Circuit decision.

I. DEFENDANTS' MOTION.

It is undisputed that the Plan has been operated as a "church plan" exempt from ERISA since 1989, when SAMC invoked the exemption with federal regulators. In their initial moving papers, Defendants demonstrated that all of Plaintiffs' complaints about subsequent underfunding, non-disclosure and the like – whether characterized as breaches, violations, or omissions – merely represent the *effects* of much earlier *actions* – namely, the decision to invoke ERISA's church-plan exemption in 1989, or the Plan's 1995 transition from annuity-based funding to employer contributions.[1] It is likewise undisputed that the 2005 Summary Plan Description ("SPD")

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1 *See* Rec. Doc. 267 at 10-12.

disclosed the Plan's status as a church plan, as well as the fact that the Plan was no longer funded by annuity contracts, but by employer contributions.[2]

In opposing the instant motion, Plaintiffs claim that this knowledge is insufficient to render their claims untimely. But this argument overlooks another critical allegation in their Complaint: Plaintiffs also admit they "relied on" (as they put it) those employer contributions *since 1995* to fund their benefits.[3] Thus, by 2005, Plaintiffs were "relying" on those contributions, even though they had not received any notice, report or statement evidencing employer contributions for ten years.

As explained below, these allegations establish a degree of knowledge sufficient to support one or more of the time-based defenses set forth in Defendants' initial moving papers, both as to ERISA and state-law claims. Even if the state-law claims are otherwise timely, Defendants also seek dismissal on the grounds that the factual allegations fail to state a viable claim.

II. REPLY TO PLAINTIFFS' OPPOSITION.

A. ERISA's Three-Year Limitations Bars Plaintiffs' Fiduciary Claims.

The Third Amended Complaint presents significantly greater factual detail on certain critical points than earlier versions. Because much of this additional detail establishes that Plaintiffs had actual knowledge of Defendants' complained-of activity, Defendants moved to dismiss Plaintiffs' ERISA fiduciary claims as barred by ERISA's three-year statute of limitations.[4]

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[2] *See* Rec. Doc. 267 at 3-4 & nn. 7, 9; *id.* at 9 & nn. 31-33.

[3] *See* TAC, ¶118.

[4] This includes Counts VI-VII and XI-XIII. Counts XI-XIII are specifically denominated as fiduciary claims; Counts VI-VII assert claims for violations of Part 4 ("Fiduciary Responsibility") of ERISA Title I, Subpart B – specifically, ERISA §§402-03, 29 U.S.C. §1102-03. *See also* TAC, ¶¶282-90.

First, the Plan's status as a "church plan" was disclosed to Plaintiffs (and the putative class) no later than the 2005 SPD.[5] In opposition, Plaintiffs do not deny reading the 2005 SPD. Rather, Plaintiffs mischaracterize their own, explicit allegations:

> 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.").

Incredibly, in quoting the operative allegation, Plaintiffs omit the words "summary plan descriptions" which follows immediately after the quoted language. But for that misleading omission, Paragraph 374 states: "The promises made in the Plan documents were clearly communicated to Plaintiffs and other Class members, *including through summary plan descriptions*…."[6] Plaintiffs' material omission thus makes more sense: the allegation confirms Plaintiffs' knowledge of both the Plan's church-plan status, and the Plan's funding mechanism.

By 1995, however, Plaintiffs also knew the Plan was funded by employer contributions, as opposed to annuities.[7] Indeed, Plaintiffs allege they *relied upon* these contributions after 1995 to ensure Plan solvency and to fund Plan benefits.[8] Plaintiffs' explicit allegation of reliance on contributions necessarily implies their awareness of the funding mechanism.

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5 *See* Rec. Doc. 267 at 3.

6 *See* TAC, ¶374 (emphasis added). Of course, an outright denial would be even more deceitful than the omission: the record already includes testimony that Plaintiffs reviewed the 2005 SPD. *See, e.g.,* Rec. Doc. 130 at 11 & n.69 (and corresponding exhibits).

7 *See* Rec. Doc. 267 at 9 & nn.31-32.

8 *See* TAC, ¶118: "When the Plan converted from an insured annuity plan to a plan funded through a trust…, Plaintiffs then *had to rely upon* SAMC's and the Participating Employers' continued solvency and *continued contributions to the Retirement Plan*…." (emphasis added) This concession is no accident, since Plaintiffs' repeat the claim in their opposition: "[P]articipants *relied upon the Participating Employers to make ongoing contributions* to the trust sufficient to pay all defined benefit obligations." *See also* Rec. Doc. 268 at 16 n. 13 (emphasis added).

Plaintiffs' allegations thus establish their awareness, long before 2005, that Plan funding was allegedly not meeting Plaintiffs' expectations. Plaintiffs explicitly aver that after 1995 Defendants failed to provide funding notices (among other reports and notices).[9] If Plaintiffs were *relying* on those contributions after 1995, then a total absence of these notices and reports from 1995 forward (as they allege) clearly establishes actual knowledge of corresponding fiduciary breaches related to reporting/disclosure and funding-related violations of ERISA, years before Plaintiffs reviewed the 2005 SPD.[10]

Presented with these explicit allegations demonstrating their level of knowledge, Plaintiffs once again resort to their usual tactic of pivoting to a new argument. Now, Plaintiffs argue that their claims are really about the 2012 termination of the Plan, and thus their claims did not arise until they learned of the Plan's termination and the corresponding impact on their benefits.[11] This is wishful thinking, at best: Plaintiffs had "relied upon" employer contributions to fund their retirement benefits, but by their own admission, had not been notified of a contribution for 17 years by that point.[12]

In short, Plaintiffs' arguments fail because ERISA's limitations period is triggered by knowledge of *conduct*, not knowledge of *effects*. The combination of (1) Plaintiffs' admitted reliance on funding contributions and (2) the total absence of funding notices after 1995 clearly conferred knowledge of potential underfunding to trigger ERISA's three-year limitations on any funding-related claims by the late 1990s. The 2005 SPD confirmed the Plan's church-plan status,

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[9] *See* TAC, ¶¶265-67 (failure to send funding notices). *See also* TAC ¶¶259-60 (failure to issue summary annual reports to participants), ¶¶268-70 (failure to issue benefit statements).

[10] *See* Rec. Doc. 267 at 9 & 31-33; *see also* TAC, ¶118.

[11] *See, e.g.*, Rec. Doc. 268 at 10 (arguing Plaintiffs did not have "actual knowledge" of underfunding until 2012).

[12] This also overlooks Plaintiffs' allegations that funding shortfalls were present by 2004. *See* TAC, ¶¶139. This disposes of Plaintiffs' arguments that they could not have taken action before 2012.

such that claims based thereon are likewise barred. Plaintiffs' ERISA claims should, therefore, be dismissed.

B. *Tibble* Does Not Save Plaintiffs' ERISA Fiduciary Claims.

Plaintiffs offer a strained reading of *Tibble v. Edison International*,[13] in order to argue their claims are timely under a "continuing violations" theory. First, *Tibble* is inapplicable: it addressed ERISA's six-year repose provision, not the three-year limitations period. Second, *Tibble* turned on the premise that ERISA's fiduciary duty to monitor investments (wholly inapplicable here) applied there on an ongoing basis.[14] Thus, to apply *Tibble* here, this Court must adopt a circular course of reasoning: namely, to undertake an otherwise-untimely inquiry into whether ERISA applies, it must assume that ERISA makes that inquiry timely.[15]

The relevant allegations are, in addition, far too nebulous to sustain Plaintiffs' proposed application of *Tibble*. Plaintiffs ascribe various breaches of ERISA-imposed duties to various "Defendants," without specifying which "Defendants" breached which particular "continuing duty" within the six years before this action was filed. For example, Plaintiffs assert fiduciary-breach claims against an individual, Leonard Wychocki, even while recognizing his involvement with the Plan concluded in 2007, more than six years prior to the initial complaint. Similarly,

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[13] 135 S. Ct. 1823 (2015).

[14] *Id.* at 1828-29. Contrary to Plaintiffs' suggestion, *Tibble* did not embrace a continuing-violation theory. The *Tibble* Court remanded for consideration whether defendants breached investment-monitoring duties within six years of the initial complaint. If the Court adopted a continuing-violation theory, remand for that purpose would have been unnecessary.

[15] The Court has already recognized the logical flaws inherent in this approach: "[I]t would be inappropriate for the Court to determine the applicability of a statute of limitations based on ERISA claims before determining whether the church plan exemption applies and excepts the Plan from ERISA coverage." *See* Rec. Doc. 162 at 5

Plaintiffs admit that other individuals were no longer involved with the Plan when it terminated in 2012, even though Plaintiffs now argue the Plan termination was the critical event in this case.[16]

Indeed, most of the activities Plaintiffs complained about – for example, the 1989 invocation of church-plan status, the 1995 transition from an annuity-funded plan to a contributory plan, the benefits freeze in 1998, and the sale of the hospital in 1999 – all occurred more than six years prior to suit, even though they clearly form part of the claims Plaintiffs are asserting.[17] This renders claims arising from those events untimely, even under *Tibble*. Thus, Plaintiffs allegations have not set forth a plausible factual basis to determine which Defendants were engaged in the breach of an ongoing duty, such that corresponding claims are timely under *Tibble*.

C. Plaintiffs' Remaining Claim Are Also Time-Barred.

As noted in Defendants' moving papers, Plaintiffs' other ERISA counts are time-barred by ERISA's three-year limitations period, because they do not represent separate causes of action, but are instead challenges to the *effects* of the (alleged) fiduciary breaches, which Plaintiffs knew about before 2005. Alternatively, Defendants argued that these claims were, along with Plaintiffs' fiduciary claims, barred by ERISA's six-year statute of repose.[18] Plaintiffs respond that ERISA's limitations and repose periods only apply to fiduciary claims, and thus their remaining claims are

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[16] *See* TAC ¶28(i) (Wychocki). Similarly, Plaintiffs allege two other individuals (Julie Secviar and Chester Labus) departed by 2009. *See* TAC, ¶28(iii). Plaintiffs fail to specify the time frames applicable to other individual members of the SAMC Retirement Committee or the FSCSC Board. *See, e.g.*, TAC, ¶¶28, 30. This lack of detail might be excusable in an initial complaint, but this is the Plaintiffs' fourth effort in four years, with the benefit of substantial discovery. *See, e.g.*, Rec. Doc. 268 at 16 n. 11.

[17] Plaintiffs reference these events in support of their claims, even as they advocate the application of *Tibble*, which as explained elsewhere, would treat corresponding claims as time-barred absent a "continuing duty" imposed by ERISA. *See, e.g.,* Rec. Doc. 268 at 4 (referencing benefits freeze in 1998), 16 n. 13 (referencing Plan's transition from annuity-based funding in 1995).

[18] *See* Rec Doc. 267 at 10-14 (explaining distinction between actionable conduct and later effects), 14-18 (ERISA policy of repose).

governed by analogous state limitations periods.[19] Even if Plaintiffs are correct, however, their claims are untimely under Illinois' analogous limitations periods.[20]

Alternatively, these claims are barred by operation of the doctrine of *laches*.[21] In opposing the instant motion, Plaintiffs argue that (1) any delay in bringing suit was not unreasonable, because they filed suit in 2014, noting it was "only" two years and one month after the Plan terminated; and (2) Defendants suffered no prejudice as the result of Plaintiffs' delay.[22]

Plaintiffs' allegations demonstrate how wrong this is. Starting in 1995, Plaintiffs *relied* upon their employers' contributions to ensure that Plan benefits were funded. Nevertheless, Plaintiffs complained of a complete lack of information due to Defendants' (alleged) failure to provide annual reports, benefits statements, and funding notices.[23] Plaintiffs even ignored other notable events, such as a benefits freeze (in 1998) and SAMC's sale of the hospital (where Plaintiffs all worked) to FHC.[24] The 2005 SPD Plaintiffs reviewed served as a reminder of the contributory nature of the Plan (not to mention the church-plan exemption) at the very time Plaintiffs assert the funding situation had grown significantly worse.[25] In other words, *from 1995 to 2012*, Plaintiffs admit they had seen no evidence of contributions into the Plan, despite their

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19 *See* Rec Doc. 268 at 13-15.

20 Even if the ten-year period applicable to contract claims applies to all remaining claims, Plaintiffs' claims are untimely because Plaintiffs were aware of all relevant information well before 2005, as explained above.

21 *See* Rec Doc. 267 at 18-20. This includes Counts I-II, Counts IV-VII and Count X, since Plaintiffs explicitly acknowledge these counts assert claims under ERISA §502(a)(3), 29 U.S.C. §1132(a)(3), and as such, seek "appropriate equitable relief." *See, e.g.,* TAC, ¶235 (Count I), ¶238 (Count II), and ¶254 (Counts IV-VII and X). This also applies to Count III. *See also* ¶TAC, ¶244 (referencing ERISA §4070(a)'s authorization of "appropriate equitable relief").

22 *See* Rec Doc. 268 at 15.

23 *See* Section II(A), *supra*. *See also, e.g.*, Rec. Doc. 267 at 9 & nn. 31-32.

24 *See, e.g.*, TAC, ¶¶119-26.

25 Plaintiffs describe growing pension liabilities reported in tax filings in 2004 and 2005. By 2005, Plaintiffs assert that the Plan was $22 million underfunded. *See* TAC, ¶¶139-40.

professed *reliance* on these contributions. Nevertheless, Plaintiffs took no action until 2014, two years after they learned of the Plan's termination. Under these circumstances, in particular Plaintiffs' professed reliance on funding contributions after 1995, a delay in taking action until 2014 is self-evidently unreasonable.

Similarly, the glib assertion that Defendants suffered no prejudice from Plaintiffs' delay is likewise implausible. In addition to impairing defense of the claims, as explained in Defendants' initial motion, the prejudicial impact of Plaintiffs' delay is readily gleaned from the nature of the declaratory relief Plaintiffs seek. For example, retroactive application of ERISA will inevitably impose significant tax consequences, perhaps as far back as 1989, for both the Plan and for Defendants.[26] Similarly, reversal of the Plan's termination – the centerpiece of Plaintiffs' current arguments – would be unnecessary if Plaintiffs had acted sooner, thus avoiding inevitable and massive cost and effort associated with "resurrecting" the Plan.

Under Plaintiffs' own version of the facts, they had ample reason by 1999 (let alone 2005) to complain about Plan funding, the removal of annuity-based funding, or the absence of Plan-related reports and notices. In Plaintiffs' telling, they apparently also had ample causes for concern about the Plan, such as the benefits freeze in 1998, or the sale of the hospital in 1999. Instead, Plaintiffs ignored the actions they now criticize, while simultaneously claiming they were relying on Defendants to do something else. Because Plaintiffs' delay is both unreasonable and prejudicial, any claims not barred by ERISA's limitations period is barred by the doctrine of *laches.*

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[26] The Seventh Circuit emphasized this very point in a challenge related to a retirement plan's status: "Because the alteration of that status as a consequence of litigation can require a revision of tax liabilities for past years, disturbing expectations and entailing heavy administrative expenses, *it is vital that such litigation be instituted as soon as possible….*" *Flight Attendants Against UAL Offset v. Internal Revenue Service*, 165 F.3d 572, 576 (7th Cir. 1999) (emphasis added).

D. Plaintiffs' Establishment Clause Claim Fails.

In *Medina v. Catholic Health Initiatives*,[27] the Tenth Circuit squarely rejected an indistinguishable challenge to ERISA's church-plan exemption. Plaintiffs attempt to argue around *Medina* on the basis that their claim represents an "as applied" challenge, evidently hoping to persuade this Court that it must entertain a fact-intensive inquiry in this case. However, any such claim would be non-justiciable in light of the Plan's 2012 termination: that is, the Plan no longer operates under the church-plan exemption, *because the Plan no longer operates at all*.[28]

In addition, a close review of Plaintiffs' arguments reveal they are indistinguishable from the arguments rejected, as a matter of law, in *Medina*. For example, Plaintiffs deny the church-plan exemption has a valid secular purpose, and further, application of ERISA to religiously affiliated plan sponsors like SAMC would not burden religious practice.[29] Similarly, Plaintiffs argue that the church-plan exemption "impermissibly advances" religiously affiliated hospitals like SAMC over secular competitors that must endure ERISA compliance.[30] The *Medina* court considered and rejected all of these arguments, as a matter of law. This Court should, too.

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[27] 877 F.3d 1213 (10th Cir. 2017). Plaintiffs contend the *Medina* court improperly applied *Lemon v. Kurtzman*, 403 U.S. 602 (1971) to the constitutional claims. *See* Rec. Doc. 268 at 28 n. 17 (citing *Cutter v. Wilkinson*, 544 U.S. 709, 717 (2005)). However, in a post-*Cutter* decision, the *en banc* Seventh Circuit made clear that "*Lemon* remains the prevailing analytical tool for the analysis of Establishment Clause claims." *Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 849 (7th Cir. 2012) (*en banc*).

[28] Any constitutional inquiry in this case is moot, because there is no ongoing constitutional problem for this Court to remedy. *See, e.g., Devereaux v. City of Chicago*, 14 F.3d 328, 330-31 (7th Cir. 1994) (holding claim for declaratory relief was non-justiciable because challenged activity had ceased).

[29] *Compare* Rec. Doc. 268 at 29-30 *with Medina*, 877 F.3d at 1231-34 (noting church-plan exemption (1) serves valid secular purpose and (2) relieves religious employers, like SAMC, from "pervasive monitoring" of investment activity and prevents "interfer[ence] in the internal organization of a religious institution").

[30] *Compare* Rec. Doc. 268 at 30, *with Medina*, 877 F.3d at 1232 (noting Plaintiffs' proposed approach "would mean that Congress could never exempt religious organizations from laws that might burden them—even when burdening religious organizations would itself run afoul of the Constitution.").

E. Plaintiffs' State-Law Claims are Untimely.

Plaintiffs' contract-based claim is untimely because the claim accrues from the breach (an alleged failure to fund), which started in 1995, when the Plan shifted from an annuity-funded benefit to benefits funded by employer contributions.[31] Plaintiffs argue that the limitations period did not run until they "discovered" the lack of funding in 2012, when the Plan was terminated. This argument overlooks Plaintiffs' knowledge (or constructive knowledge) of the lack of funding, as described above.[32] Based upon Plaintiffs' reliance on employer contributions after 1995, and the concomitant absence of funding notices (not to mention summary annual reports and benefits statements), it is clear that Plaintiffs' state-law claims became untimely by or before 2004, when the funding shortfall was manifest.[33] The remaining state-law claims all have shorter limitations periods,[34] and are thus time-barred for the same reason as the contract claims.

Plaintiffs' state-law claims are also barred by the doctrine of *laches*. As explained above, Plaintiffs relied on employer contributions to fund the Plan, but after 1995, they claim they never saw funding notices, summary annual reports, benefits statements, or any other evidence that the relied-upon funding was actually happening.[35] Indeed, according to Plaintiffs, the Plan was underfunded by $22 million by the time Plaintiffs received the 2005 SPD. Nevertheless, Plaintiffs took no action until 2014 – over two years after the Plan was terminated and its assets distributed.

On this point, Plaintiffs' only response is that their state-law claims cannot be barred by *laches*, because they were brought within the applicable statute of limitations.[36] This of course

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31 *See* Rec. Doc. 267 at 25 & nn. 88-89.
32 *See* Section II(A), *supra*.
33 See TAC, ¶139.
34 *See* Rec. Doc. 267 at 29 & n.93.
35 *See* Rec. Doc. 267 at 26. *See also* Section II(C), *supra*.
36 *See* Rec. Doc. 268 at 18.

assumes the claims are timely under applicable statute of limitations but more importantly, is an incorrect statement of Illinois law, which provides that "laches will bar [a] right even within the statutory period of limitation."[37] Accordingly, to the extent Plaintiffs' state-law claims survive the limitations period, they are barred by *laches*.

F. Plaintiffs' Fail to State Viable Claims under State Law.

Even if Plaintiffs' state-law claims are timely, the supporting allegations near-uniformly consist of conclusory claims that unspecified "Defendants" collectively breached unspecified duties to fund the Plan to a "sufficient" level. As such, these allegations offer no factual basis to sustain claims against a particular Defendant, under any theory.[38]

1. <u>Plaintiffs' Allegations Do Not State a Contract Claim.</u>

Plaintiffs' contract theory posits that Defendants did not "sufficiently" fund benefits, and thus owe additional contributions. Defendants demonstrated that this claim is contradicted by the explicit terms of the Plan, also noting the lack of allegations (or contractual terms) that permits the Court or Defendants to discern the legal and factual basis on which Plan funding may be deemed *in*sufficient.[39]

In response, Plaintiffs rely on Plan provisions regarding a funding policy. Without more, this does not support an inference that funding policy would have yielded "sufficient" funding, especially in light of the Plan's express disavowal of any minimum-funding obligation. Thus, any

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[37] *Slatin's Props., Inc. v. Hassler*, 291 N.E.2d 641, 643 (Ill. 1972); *Bill v. Board of Education*, 812. N.E.2d 604, 613 (Ill. App. 2004) (same). Similarly, under Illinois law, *laches* applies to bar claims for legal relief, not just equitable relief. *See Bill, supra*, 812. N.E.2d at 612 (collecting cases).

[38] Except for a general claim of "negligence" in Count XIX (addressed below), neither FAI, nor the FSCSC Board, nor the Individual Defendants are included in these state-law counts. Similarly, the SAMC Retirement Committee is omitted from the contract and unjust-enrichment claims.

[39] *See* Rec. Doc. 267 at 27-28. *See also* Rec. Doc. 267, Exh. A (Plan), §8.1: "Nothing contained in this Plan … shall be deemed to require any Employer to make contributions under this Plan…."

contract claim based on this Plan term lacks a viable theory of causation.[40]

Ultimately, the contract claim turns on the termination of the Plan while underfunded.[41] However, the Plan reserved to SAMC the unqualified right to terminate the Plan, including an underfunded Plan.[42] Plaintiffs' respond that the Plan is ambiguous, because it also contemplates termination if the Plan has excess assets.[43] That the Plan also contemplates termination with a surplus is irrelevant; the relevant Plan provision clearly contemplates termination with inadequate funding.[44] Thus, there is no ambiguity, and Plaintiffs' contract claims fail because they are directly controverted by the Plan's terms.[45]

2. <u>Plaintiffs Do Not State a Claim for Unjust Enrichment.</u>

Any unjust-enrichment claim fails because Plaintiffs fail to allege "any measurable benefit has been conferred on the defendant under such circumstances that the defendant's retention of the benefit without payment would be unjust."[46] Plaintiffs respond that the "measurable benefit" requirement is met, simply because "Defendants … saved $32 million by not contributing to the

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[40] Additionally, the Plan names SAMC as the entity responsible for establishing the funding policy, so this would not support a contract claim against FSCSC, FCI or FHC. *See* Rec. Doc. 267 at 28 & n. 101.

[41] *See* Rec. Doc. 267 at 28 & n. 102. *See also* TAC, ¶385.

[42] *See* Rec. Doc. 267, Exh. A (Plan), §10.3.

[43] *See* Rec. Doc. 268 at 22 n. 15.

[44] The Plan's use of the term "priority," by definition, refers to situations where assets are insufficient to cover obligations. *See*, *e.g.*, BLACK'S LAW DICTIONARY (West 6th Ed. 1990) at 1193-94, which defines "priority" as "[t]he relative ranking of competing claims to the same property." Conversely, where assets are sufficient to pay all claims, there is no need for a priority ranking. Plaintiffs' proposed "ambiguity" requires the Court, in effect, to read away the Plan's explicit reference to payment priority.

[45] Plaintiffs seem to suggest that SAMC and FSCSC engaged in fraudulent misrepresentation, by (allegedly) issuing "form notices" to Plaintiffs and other participants about benefits when the Plan was underfunded. *See* Rec. Doc. 268 at 20. This assertion lacks the particularity required by Fed. R. Civ. P. 9(b), and like many of Plaintiffs' new allegations, threatens to present individualized issues that will make class resolution impossible. Nevertheless, Plaintiffs' allegation does not support the inference that Plaintiffs received contractual assurances that the Plan would remain adequately funded into perpetuity. Indeed, such an assertion would be inconsistent with the Plan (as noted above) and other documents, such as the 2005 SPD. *See* Rec. Doc. 267 at 4 & n. 11.

[46] *See, e.g., Bayh v. Sonnenburg*, 573 N.E.2d 398, 408 (Ind. 1991).

Plan," while Plaintiffs provided years of service to their employers.[47] This only asserts a "measurable benefit" to Defendants as a group. Plaintiffs do not identify particular funds retained by a particular Defendant that "should have been paid into the Plan trust,"[48] nor any basis to infer that a particular Defendant's actual use of those funds – for example, to cover Plaintiffs' pay checks, or subsidize their group-medical benefits – somehow constituted an unjust diversion from Plaintiffs' financial interest. Indeed, it is impossible to tell whether Plaintiffs are claiming the allegedly unjust $32 million in "savings" was received by each of the Defendants, or shared amongst them (and if the latter, in what "measurable" proportions). Plaintiffs do not even identify which of the Defendants was their employer, such that continued service would present an "unjust" benefit.[49]

As Defendants pointed out, an unjust-enrichment claim is also meritless where, as here, there is an express contract that governs the parties' conduct.[50] Plaintiffs' response is that the unjust-enrichment claim is a valid alternative claim, if their contract claims fail.[51] This, without more, however, fails to set forth an alternative claim for unjust enrichment.[52]

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[47] *See* Rec. Doc. 268 at 23. Consistent with its choice-of-law arguments, Defendants cited Indiana jurisprudence. However, the principle holds just as true under Illinois law. *See, e.g., Wave 3 Learning, Inc. v. AVKO Educ. Research Found., Inc.*, 2017 U.S. Dist. LEXIS 194845, *21 (N.D. Ill. Nov. 28, 2017); *Gagnon v. Schickel*, 983 N.E.2d 1044, 1053 (Ill. App. 2012).

[48] *See* TAC, ¶396.

[49] Each of the Plaintiffs alleges only that they worked for "St. Anthony," the hospital, but do not specify whether this means Defendant SAMC, which as noted above, sold the hospital in 1999.

[50] *See* Rec. Doc. 267 at 30.

[51] *See* Rec. Doc. 268 at 24; TAC, ¶¶388 (re-asserting prior allegations, including the existence of a contract, in support of the unjust-enrichment claim).

[52] *See, e.g., Cole-Hadden, Ltd. v. Drew Phillip Corp.*, 454 F. Supp. 2d 772, 777 & n.4 (N.D. Ill. 2006) (dismissing unjust-enrichment claim absent adequate factual basis beyond the contract's unenforceability); *Homestead Ins. Co. v. Chicago Transit Auth.*, 1997 U.S. Dist. LEXIS 716, **9-10 (N.D. Ill. Jan. 23, 1997) (similar).

3. Plaintiffs Do Not State a Claim for Breach of Fiduciary Duty.

Defendants have moved to dismiss Plaintiffs' state-law fiduciary claims because Plaintiffs' allegations do not establish a legally recognized fiduciary relationship, nor a particular act by a particular Defendant that breaches a duty imposed by that relationship. Plaintiffs argue the Plan documents establish a fiduciary relationship, but do not account for the explicit limitations the Plan documents impose on that relationship, nor the Plan's express disavowal of any obligation to make contributions.[53] The only relevant allegations that remain are conclusory assertions that "Defendants" are trustees (or fiduciaries) within the common law.[54] This is argument, not fact, and thus will not support an inference that any particular Defendants stands in a fiduciary relationship to any Plaintiff.[55] Accordingly, the allegations fall well short of the "clear and convincing" standard of pleading for a claim.[56]

4. Plaintiffs Do Not State a Claim for Negligence.

Plaintiffs' catch-all claim for "negligence" makes no attempt whatsoever to identify the legal duty of care that "[e]ach Defendant" allegedly owed "each Plaintiff."[57] Plaintiffs argue vaguely that duties can arise from statute or common law, or from a relationship that imposes a duty of reasonable care.[58] This does nothing to resolve the deficiencies in Plaintiffs' factual

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[53] *Compare* Rec. Doc. 268 at 25 (arguing that the Plan describes fiduciary roles for employers) *with* Rec. Doc. 267 at 31-33 & nn. 118-28 (describing Plan's limits on fiduciary roles and funding obligations).

[54] *See* Rec. Doc. 268 at 25 (citing TAC, ¶¶416-17). Nor can Plaintiffs' ERISA allegations support fiduciary status sufficient to make out a state-law claim. *See, e.g., Phillips v. Prudential Ins. Co.*, 714 F.3d 1017, 1024 (7th Cir. 2013) (rejecting state-law fiduciary claims based on alleged relationship resembling ERISA life-insurer arrangement).

[55] Indeed, the Plan documents explicitly identify JP Morgan and MetLife as institutional trustees of the Plan. *See* Rec. Doc. 267 at 31 & n. 117.

[56] *See, e.g., Farmer City State Bank v. Guingrich*, 487 N.E.2d 758, 763 (Ill. Ct. App. 1985)("[W]here the alleged relationship does not exist as a matter of law, facts from which a fiduciary relationship arises must be pleaded and proved by clear and convincing evidence.").

[57] *See* TAC, ¶426.

[58] *See* Rec. Doc. 268 at 26-27.

allegations: for example, what duty does FAI (the corporate parent of FHC) owe any duty to fund benefits for employees of FCI, a Participating Employer with which it has absolutely no relationship? Similarly, what funding duty does the FSCSC Board owe those employees? Plaintiffs' only other argument, that Defendants "knew or should have known" a shortfall in contributions might lead to underfunding in the Plan, adds nothing.[59] Thus, the claims fail.

III. CONCLUSION.

For the reasons set forth above, and in Defendants' initial motion papers, the Court should grant this motion and dismiss the action.

Dated: February 26, 2018.

Respectfully submitted,

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[59] Mere foreseeability of harm does not give rise to a legal duty. *See, e.g., Cunis v. Brennan*, 308 N.E.2d 617, 618-19 (Ill. 1974).

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2018 I caused the foregoing Reply Memorandum in Support of Defendants' Motion to Dismiss Plaintiffs' Third Amended Complaint to be electronically filed with the Clerk of the U.S. District Court for the Northern District of Illinois using the CM/ECF system, which will send notification of such filing to Plaintiffs' counsel of record.

/s/ René E. Thorne

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