14-8125

United States Court of Appeals

for the

Third Circuit

Case No.

LAURENCE KAPLAN, on behalf of himself, individually, and on behalf of all others similarly situated,

Plaintiff-Respondent,

– v. –

SAINT PETER'S HEALTHCARE SYSTEM, RONALD C. RAK, an individual, SUSAN BALLESTERO, an individual, GARRICK STOLDT, an individual, and JOHN AND JANE DOES, each an individual, 1-20,

Defendants-Petitioners.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DENYING DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION
CIVIL ACTION NO. 13-2941 (MAS)(TJB)
SAT BELOW: HONORABLE MICHAEL A. SHIPP, U.S.D.J.

PETITION OF DEFENDANTS-PETITIONERS SAINT PETER'S HEALTHCARE SYSTEM, RONALD C. RAK, SUSAN BALLESTERO, GARRICK STOLDT FOR LEAVE TO APPEAL PURSUANT TO 28 U.S.C. § 1292(b)

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JAMES M. HIRSCHHORN

United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. _____

LAURENCE KAPLAN, on behalf of himself, individually, and on behalf of all others similarly situated,
Plaintiff - Respondent,

v.

SAINT PETER'S HEALTHCARE SYSTEM, RONALD C. RAK, an individual, SUSAN BALLESTERO, an individual, GARRICK STOLDT, an individual, and JOHN and JANE DOES, each an individual, 1-20,
Defendants - Petitioners,

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Saint Peter's Healthcare System, S. Ballestero, R. Rak, & G. Stoldt (Name of Party) makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations: None

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not applicable

Jeffrey J. Greenbaum
(Signature of Counsel or Party)

Dated: 9/29/14

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PRELIMINARY STATEMENT

This is a putative class action under the Employee Retirement Income Security Act ("ERISA") to compel defendant-petitioner Saint Peter's Healthcare System ("Saint Peter's") to comply with ERISA's funding and notice requirements for its retirement plan ("Saint Peter's Plan") and to impose civil monetary penalties for the alleged failure to do so. Defendants moved to dismiss under Fed. R. Civ. P. 12(b)(1) and (6) on the grounds that its retirement plan is a "church plan" as defined in ERISA, 29 U.S.C. § 1002(33), that 29 U.S.C. § 1003(b)(2) excludes church plans from ERISA, and that the exclusion deprived the District Court of subject matter jurisdiction over plaintiff-respondent's ERISA claims. On March 31, 2014, the District Court denied the motion, holding that under § 1002(33)(A) only a retirement plan established by a "church," as the term is commonly understood, was within the church plan exclusion, and that Saint Peter's, a nonprofit healthcare system, was not a church (the "March 31 Order"). On September 19, 2014, the District Court certified the March 31 Order for interlocutory appeal under 28 U.S.C. § 1292(b). Defendants petition the Court to exercise jurisdiction under § 1292(b) over the March 31 Order.

This case presents the issue, of first impression in this Circuit, whether a retirement plan established by Saint Peter's Healthcare System, a nonprofit corporation controlled by and associated with the Roman Catholic Church, that is

maintained by its Retirement Plan Committee, also controlled by and associated with the Church, may qualify for the church plan exclusion from ERISA, 29 U.S.C. § 1002(33), thereby depriving the Court of subject matter jurisdiction over claims under ERISA. This case not only satisfies the three criteria for certification under § 1292(b), but it also strongly suggests an urgent need for immediate appellate review because of the public importance of the question presented and the broad impact the ruling will have on other cases and hundreds of institutions across the country.

The case presents a controlling question of law because the church plan exclusion from ERISA is jurisdictional and a reversal of the March 31 Order will lead to the dismissal of Plaintiff's ERISA claims for lack of subject matter jurisdiction. There is substantial ground for difference of opinion because the March 31 Order disagrees with numerous district court decisions holding that the church plan exclusion applies to retirement plans established by church-controlled nonprofit corporations – including two decisions in the past six months that considered and rejected the same arguments relied on by the District Court in this case. An appeal will materially advance the termination of this case because it will determine whether the church plan exclusion can be applied to a retirement plan established by a church-controlled or church-associated nonprofit corporation like Saint Peter's, thereby allowing the Court to resolve the issues of control and/or

association before a potentially needless examination of the merits of Plaintiff's ERISA claims.

Moreover, the public interest requires a prompt resolution of whether retirement plans established and maintained by church-controlled nonprofit corporations fall within ERISA's church plan exclusion. The case is part of a coordinated wave of litigation by Plaintiff's counsel against Catholic health care institutions around the country, including one pending in the Eastern District of Pennsylvania, and the March 31 Order has created great uncertainty as to whether the retirement plans of such institutions are subject to ERISA. A decision by this Court as to the scope of the church plan exclusion will not only materially advance the termination of this case – it will provide a measure of clarity and certainty to many other church-controlled or church-associated health care institutions as to whether or not their retirement and employee benefit plans are subject to ERISA. Defendants therefore request that this Court exercise its discretion under 28 U.S.C. § 1292(b) and take jurisdiction of the appeal certified by the District Court.

QUESTION PRESENTED

The District Court certified the following question for appeal: Whether an organization, a civil law corporation or otherwise, can both establish and maintain a "church plan," as defined in the Employee Retirement Income Security Act, 29

U.S.C. § 1002(33), if such organization is controlled by or associated with a church or a convention or association of churches. Dkt. # 111.[1]

FACTUAL BACKGROUND

This is one of eight putative class actions around the country brought by employees of health care systems affiliated with the Roman Catholic Church. The Complaint alleges that Saint Peter's, a nonprofit healthcare system, does not qualify for the "church plan" exclusion from ERISA, ERISA § 3(33), 29 U.S.C. § 1002(33) because only a "church" can establish a "church plan," Saint Peter's established its retirement plan, and Saint Peter's is not a "church" within the common meaning of the term. Dkt. # 1 (Complaint) ¶ 4. Alternatively, Plaintiff alleges that Saint Peter's cannot qualify for the exclusion because it is not controlled by or associated with the Roman Catholic Church as required by ERISA § 3(33)(C). Complaint ¶¶ 5-12. Finally, the Complaint alleges that if Saint Peter's does qualify, the church plan exclusion as applied to Saint Peter's violates the Establishment Clause of the First Amendment. Complaint ¶ 15.

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[1] References are to the District Court docket. Immediately on receipt of the District Court's September 19, 2014 Order, Plaintiff moved the District Court to restate the question presented as "whether a 'church plan' as defined in the Employee Retirement Income Security Act, 29 U.S.C. § 1002(33) must be established by a church or a convention of churches." Dkt. # 113-1. Plaintiff did not suggest this alternative phrasing when he opposed certification and should not be heard now to rephrase the issue.

Defendants moved to dismiss the Complaint under Fed. R. Civ. P. 12(b)(1) on the ground that it qualified for the church plan exclusion, which is jurisdictional, and under Fed. R. Civ. P. 12(b)(6), for failure to state a claim. Dkt. # 42. In support of its 12(b)(1) motion, Defendants submitted affidavits that demonstrate, under neutral principles of corporate law, that the Roman Catholic Bishop of Metuchen controls Saint Peter's by virtue of his being the corporation's sole member, and by virtue of provisions of the by-laws giving him the sole power to appoint all but two members of the Board of Governors, to remove all members at his pleasure, to veto any action of the Board, including the appointment of new members, and to appoint and remove at pleasure key officers including the Chairman of the Board, Vice Chairman, and Saint Peter's President and CEO, Treasurer and CFO, and Secretary. Dkt. ## 43 & 54-1. Defendants also submitted affidavits demonstrating that Saint Peter's is associated with the Roman Catholic Church through religious observance and through adherence to the U.S. Conference of Catholic Bishops' Ethical and Religious Directives for Catholic Health Care Services, which the Bishop adopted as binding in his Diocese. *See id.*, Dkt. ## 42-8 to 11 & 54-2. Plaintiff's affidavits in response were by employees who lacked first-hand knowledge of the corporate documents or of the Bishop's authoritative oversight of the management of Saint Peter's. Dkt. ## 48-2 to 6. On August 14, 2013, while this case was pending, the Internal Revenue Service issued

a letter ruling that the Saint Peter's Plan qualifies for the church plan exclusion. Dkt. # 45.

The March 31, 2014 Order denied Defendants' motion on a narrow statutory ground, holding that the plain language of 29 U.S.C. § 1002(33)(A) limited the church plan exclusion to plans established by a "church," as that term was commonly understood, and that Saint Peter's, as a nonprofit healthcare corporation was not and could not be a church within the meaning of the statute. Dkt. # 68 at 6-13.[2] It rejected the 30 plus years of Internal Revenue Service and Department of Labor interpretations of the church plan exclusion, the IRS ruling that the Saint Peter's Plan is a church plan, and the many judicial decisions that have relied on them, as not well reasoned and inconsistent with the statute's plain language. The District Court did not reach the issues of whether Saint Peter's was controlled by or associated with the Roman Catholic Church, or whether the church plan exclusion, as applied to Saint Peter's, would violate the First Amendment. *Id.* at 17 n.6.

Defendants moved for certification under 28 U.S.C. § 1292(b) on April 14, 2014. Dkt. # 74. On September 19, 2014, the District Court granted certification,

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[2] The March 31, 2014 Memorandum Opinion of the District Court is attached to the Petition as Exhibit 1 and the Order of that date as Exhibit 2.

finding that all three statutory factors had been satisfied and that this was "the rare case where an interlocutory appeal was appropriate." Dkt. # 110 at 7.[3]

ARGUMENT

THE COURT SHOULD GRANT LEAVE TO APPEAL

Under 28 U.S.C. § 1292(b), a Court of Appeals has discretion to grant leave to appeal an interlocutory order once the District Court has certified that the order meets the three statutory criteria: (1) the order raises a "controlling question of law," (2) as to which there is a "substantial ground for a difference of opinion," (3) the resolution of which by an immediate appeal may "materially advance the ultimate termination of the litigation." *See generally Katz v. Carte Blanche Corp.*, 496 F.2d 747, 754-55 (3d Cir. 1974). We recognize that leave to appeal under § 1292(b) is within this Court's discretion and is granted only in exceptional cases. *See, e.g., Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978); *Katz, supra.* This is such a case. For the reasons stated below, the March 31 Order satisfies all three requirements, and the importance of the case justifies this Court exercising its discretion to promptly decide a legal issue of national significance and first impression within this Circuit.

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[3] The September 19, 2014 Memorandum Opinion of the District Court is attached to the Petition as Exhibit 3 and the Order of that date as Exhibit 4.

A. Whether A Church Plan Exempt From ERISA Can Be Established By A Civil Law Corporation Controlled By Or Associated With A Church Presents A Controlling Question Of Law

"A question of law is controlling where its incorrect disposition would constitute reversible error on appeal." *New Jersey Reg'l Council of Carpenters v. D.R. Horton, Inc.*, No. 08-1731 (KSH), 2011 U.S. Dist. LEXIS 35448, at *4 (D.N.J. Mar. 31, 2011) (citing *Katz*, 496 F.2d at 755); *Katz v. Live Nation, Inc.*, No. 09-3740 (MLC), 2010 U.S. Dist. LEXIS 91310, at *7 (D.N.J. Sept. 2, 2010). Reversal of the order need not either reach the merits of the case or terminate the litigation. *Katz*, 474 F.2d at 755. Moreover, "saving of time of the district court and of expense to the litigants" is "a highly relevant factor." *Id.* In particular, review of the issue of subject matter jurisdiction is appropriate under § 1292(b) because the litigation will terminate if the Court of Appeals finds jurisdiction lacking. *See, e.g. Koval v. Wash. County Redevelopment Auth.*, 574 F.3d 238, 244 (3d Cir. 2009) ("government plan" exemption from ERISA jurisdictional; dismissal affirmed); *Fasano v. Fed. Reserve Bank of New York*, 457 F.3d 274, 280-81 (3d Cir. 2006) (dismissing for lack of subject matter jurisdiction).

The District Court ruled that § 1002(33)(A) requires that a church plan be established and maintained by a "church," as the word is commonly understood, and that establishment by such a church "is the gatekeeper to the church plan exemption." Dkt. # 68 at 7-8. It characterized the availability of the church plan

exclusion to Saint Peter's as a "dispute . . . centered on, and resolved by, the statutory construction of ERISA's church plan definition," in other words, as a pure question of law. *Id.* at 7. Based on that construction, it denied Defendants' motion to dismiss for lack of subject matter jurisdiction. In certifying the issue for appeal, the District Court found that the issue of law is controlling because "if the Court's statutory interpretation was incorrect, it would require reversal upon final appeal and likely strip this Court of subject matter jurisdiction." Dkt. #110 at 4. Reversal on a point of statutory interpretation is an issue of pure law that, if the Court of Appeals disagrees, would constitute reversible error. That is sufficient to find a controlling question of law.[4]

B. There Are Substantial Grounds For Difference Of Opinion Whether A Civil Law Corporation Controlled By Or Associated With A Church Can Establish A Church Plan Exempt From ERISA

The existence of conflicting precedents directly on point satisfies the requirement of substantial grounds for a difference of opinion. *See, e.g., SEC v. Lucent Techs, Inc.*, No. 04-2315 (WHW), 2009 U.S. Dist. LEXIS 107098, at *26

[4] On March 17, 2014, the district court in *Rollins v. Dignity Health*, denied defendants' motion to certify under § 1292(b), reasoning that there was no controlling question of law because defendants' motion to dismiss did not raise the issue of subject matter jurisdiction. *Rollins v. Dignity Health*, No. 13-cv-01450-TEH, 2014 U.S. Dist. LEXIS 35408, at *4-7 (N.D. Cal. Mar. 17, 2014). The District Court distinguished this decision on the ground that Defendants' motion did raise the issue of subject matter jurisdiction. Dkt. # 110 at 7.

(D.N.J. Nov. 16, 2009) (substantial grounds where circuits split and no Third Circuit authority); *State of New Jersey v. Fuld*, No. 09-1629 (AET), 2009 U.S. Dist. LEXIS 81084, at *5 (D.N.J. Sept. 8, 2009); *Morgan v. Ford Motor Co.*, No. 06-1080 (JAP), 2007 U.S. Dist. LEXIS 5455, at *24 (D.N.J. Jan. 25, 2007). There is a nationwide split of authority on whether 29 U.S.C § 1002(33)(C) provides that a plan established by a nonprofit corporation controlled or associated by a church, though not a church itself, falls within the exclusion from ERISA.

Subsection (A) of the exclusion, 29 U.S.C. § 1002(33)(A), applies the exclusion to "a plan established and maintained . . . for its employees . . . by a church." However, subsections (C)(i) and (ii), 29 U.S.C. § 1002(33)(C)(i)-(ii) provide that a plan "established and maintained . . . by a church" includes a plan maintained by a civil law corporation controlled by or associated with a church, and that the employees of a civil law corporation controlled by or associated with a church are church employees.[5] The current campaign of litigation against Catholic healthcare institutions has produced diametrically opposed District Court interpretations of § 1002(33). This case and *Rollins v. Dignity Health*, No. C13-1450 THE, 2013 U.S. Dist. LEXIS 174199, at *17-18 (N.D. Cal. Dec. 12, 2013) have held that under subsection (A) only a "church," as the term is commonly understood, could establish a plan within the church plan exclusion. *Overall v.*

[5] The text of 29 U.S.C. § 1002(33) is attached to the Petition as Exhibit 5.

Ascension, No. 13-11396, 2014 U.S. Dist. LEXIS 65418, at *28-30 (E.D. Mich. May 13, 2014) and *Medina v. Catholic Health Initiatives*, No. 13-cv-01249-REB-KLM, 2014 U.S. Dist. LEXIS 119491 at *5-7 (D. Colo. Aug. 26, 2014) reach the opposite conclusion and hold that the plain language of subsection (C) deems a "church" to include a nonprofit corporation controlled by or associated with a church.[6] Dkt. # 110 at 4-5. Moreover, *Overall and Medina* agree with all District Court decisions before this case and *Rollins*[7] and with 30 years of administrative interpretation by the IRS and Department of Labor.[8] The courts in *Overall* and

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[6] *Overall* has been appealed to the Sixth Circuit. *Overall v. Ascension*, Court of Appeals for the Sixth Circuit, Dkt. No. 14-1735. As of September 26, the Tenth Circuit's PACER showed no appeal of *Medina*.

[7] *See, e.g., Hall v. USAble Life*, 774 F. Supp. 2d 953 (E.D. Ark. 2011); *Thorkelson v. Publ'g House of the Evangelical Lutheran Church in Am.*, 764 F. Supp. 2d 1119, 1124-29 (D. Minn. 2011); *Rinehart v. Life Ins. Co. of N. Am.*, No. C08-5486 RBL, 2009 U.S. Dist. LEXIS 32864, at *6-17 (W.D. Wa. 2009); *Catholic Charities of Me., Inc. v. City of Portland*, 304 F. Supp. 2d 77, 84-86 (D. Me. 2004); *Friend v. Ancillia Sys., Inc.*, 68 F. Supp. 2d 969, 972-73 (N.D. Ill. 1999); *Humphrey v. Sisters of St. Francis Health Servs.*, 979 F. Supp. 781, 784-86 (N.D. Ind. 1997). Without reaching the merits of the issue, the only two courts of appeals to have considered it have also stated that a nonprofit hospital controlled by a church could establish an exempt church plan. *See Chronister v. Baptist Health*, 442 F.3d 648, 651-54 (8th Cir. 2006) (finding no control or association); *Lown v. Continental Cas. Co.*, 238 F.3d 543, 547-48 (4th Cir. 2000) (same).

[8] The Internal Revenue Service and the Department of Labor have consistently ruled that a civil law corporation controlled by or associated with a church can establish an exempt church plan. *See* Dkt. ## 42-5 & 68 at 15-16. The IRS issued a letter ruling that the Saint Peter's Plan is an exempt church plan. Dkt. # 68 at 4.

Medina considered and rejected the same arguments raised by Plaintiff in this case and adopted by the District Court. As the District Court recognized, the decisions are squarely in conflict. Dkt. # 110 at 5.

C. An Immediate Appeal Will Materially Advance The Termination Of This Case

"To determine whether certification will materially advance the ultimate termination of litigation, a district court should examine whether an immediate appeal would: '(1) eliminate the need for trial; (2) eliminate complex issues so as to simplify the trial; or (3) eliminate issues to make discovery easier and less costly.'" *State of New Jersey v. Fuld*, 2009 U.S. Dist. LEXIS 81084, at *6 (quoting *Orson, Inc. v. Miramax Film Corp.*, 867 F. Supp. 319, 322 (E.D. Pa. 1994)); *accord Fasano*, 457 F.3d at 280-81 (subject matter jurisdiction). The District Court correctly determined that an appeal would materially advance the termination of the case because a reversal on the controlling legal issue of subject matter jurisdiction would "likely eliminate the Court's subject matter jurisdiction of Plaintiff's ERISA claims altogether and, at the very least, will eliminate the necessity for certain avenues of discovery . . . ." Dkt. # 110 at 6. Moreover, it noted, the case is in its initial stages, where there has been no Rule 16 conference and no discovery has been conducted. *Id.*; *cf. L.R. v. Manheim Twp. Sch. Dist.*, 540 F. Supp. 2d 603, 613 (E.D. Pa. 2009) (interlocutory appeal on eve of trial will

not advance case); *SEC v. Lucent Techs., Inc.*, 2009 U.S. Dist. LEXIS 107098 at *27-28 (movant's multi-year delay grounds to deny certification).

Presumably Plaintiff will argue, as he did below, that an appeal will not advance the termination of the case because this Court will then have to consider the factual issues of whether Saint Peter's is in fact controlled by or associated with the Roman Catholic Church under ERISA § 1002(33)(C) – issues which the District Court found it unnecessary to reach in light of its reading of § 1002(33)(A). This argument fails because the scope of review under § 1292(b) is broad enough to resolve those issues on appeal. Even if this Court does not dismiss the case outright, a reversal of the Court's interpretation of § 1002(33) will focus on the facts demonstrating the control and association issues, facts that will never be addressed in the present posture of the case, while avoiding potentially needless discovery on the merits. *In re Dwek*, No. 10-4259 (MLC), 2011 U.S. Dist. LEXIS 11492, at *4 (D.N.J. Feb. 4, 2011) (eliminating issues that "make discovery more difficult and more expensive"); *cf. L.R.*, 540 F. Supp. 2d at 613 (certification denied when appeal would add new issue after case already ripe for summary judgment).

As the District Court noted, moreover, once this Court takes jurisdiction under § 1292(b), it may resolve any issue raised by the order appealed from, regardless of whether that issue was certified by the court below. *See Yamaha*

Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 204 (1996); *Ferrostaal, Inc. v. M/V Sea Phoenix*, 447 F.3d 212, 216 (3d Cir. 2006). In its review of the Order, this Court "may address any matters fairly set forth in the record and which ultimately affect the outcome of the litigation." *Campuzano-Burgos v. Midland Credit Mgmt., Inc.*, 550 F.3d 294, 300 (3rd Cir. 2008) (internal quotation marks and citations omitted). It may consider "any grounds justifying reversal" of the Order appealed from. *Johnson v. Smithkline Beecham Corp.*, 724 F.3d 337, 345 (3d Cir. 2013), *quoting Morris v. Hoffa*, 361 F.3d 177, 196 (3d Cir. 2004). That includes not only questions of law but issues of jurisdictional fact presented by the record below. *Johnson,* 724 F.3d at 346. *See* Dkt. # 110 at 4 n.1. Defendants' motion raised the issue of whether the church plan exclusion applied because Saint Peter's is a corporation controlled by and associated with the Roman Catholic Church, and it argued that there was no issue of fact with respect to control or association. On the record compiled below, this Court will be able to determine whether control or association exists or, if not, how the Court should address those issues on remand.[9]

Even if the Court of Appeals does not resolve those issues on the present record, its construction of § 1002(33) will guide and limit discovery on the issues

[9] The same issues of control and association are present in *Chavies v. Catholic Health East*, 13-cv-1645, now pending in the Eastern District of Pennsylvania. In *Chavies*, the court below denied defendants' motion to dismiss without prejudice and ordered discovery on the issue of whether the defendant hospital constituted a "church" under § 1002(33)(A). *See* Dkt. # 110 at 5 n.3.

of control and affiliation, allowing for a subsequent summary judgment motion on the issue of jurisdiction. As the District Court noted, an interlocutory appeal will determine which of two "mutually exclusive pathways" for discovery will be followed. If the March 31 Order is reversed, discovery will be limited, in the first instance, to those issues of church control and/or association that determine jurisdiction. If it is affirmed, on the other hand, discovery will not involve control or association but will involve class certification and the merits of Plaintiff's ERISA claims. Dkt. # 110 at 6. There can be no serious question that an immediate appeal will materially advance the termination of the case and avoid delay and unnecessary expense by focusing any subsequent discovery on one path or the other.

Finally, Plaintiff may also argue that reversal will not result in dismissal of the action because the Court would, if a church plan is found, need to decide the Establishment Clause challenge to the church plan exclusion. As the District Court noted, that issue presents a pure question of law that can be decided without discovery. Dkt. # 110 at 6-7. In the present posture, the District Court will never reach that question.

D. Interlocutory Appeal Is Appropriate Because Of The General Importance Of This Decision To Other Pending And Potential Cases And To Many Institutions Across the Country

One of the purposes of interlocutory appeal under § 1292(b) is to conserve judicial resources by the timely resolution of controlling legal questions that will avoid wasted effort. *See Katz*, 496 F.2d at 754. These considerations of efficiency and economy go beyond the individual case. In exercising its discretion as gatekeeper to interlocutory appeal, it is appropriate for the Court to consider whether resolving the issue in dispute will affect other, similar cases. *See Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1990); *Al Maqaleh v. Gates*, 620 F. Supp. 2d 51, 55-56 (D.D.C. 2009) (resolving jurisdictional issue will affect several cases); *Krangel v. Crown*, 791 F. Supp. 1436, 1449 (S.D. Cal. 1992) (certification may materially advance other cases involving the same legal issue).

Seven other putative class actions filed by Plaintiff's counsel involve the same issue.[10] The first decided, *Rollins*, was followed by the District Court. *Rollins* and this decision were followed by the magistrate judge in *Medina v. Catholic Health Initiatives*, No. 13-cv-01249-REB-KLM, 2014 U.S. Dist. LEXIS

[10] *Chavies v. Catholic Health East*, 13-cv-1645 (E.D. Pa.); *Overall v. Ascension*, 13-cv-11396 (E.D. Mich.), 14-1735 (6th Cir.); *Rollins v. Dignity Health*, 13-cv-1450 (N.D. Cal.); *Medina v. Catholic Health Initiatives*, 13-cv-1249 (D. Colo.); *Stapleton v. Advocate Health Care Network*, 14-cv-1873 (N.D. Ill); *Owens v. Saint Anthony's Medical Center*, 14-cv-4068 (N.D. Ill.); and *Lann v. Trinity Health*, 14-cv-2237 (D. Md.).

98208 (D. Colo. Jul. 9, 2014), though they were considered and rejected by the District Courts in *Overall*, 2014 U.S. Dist. LEXIS 65418, and *Medina*, 2014 U.S. Dist. LEXIS 119491. Until the issue is resolved by the Court of Appeals, this decision continues as an incentive to file suit against other church controlled hospitals, schools and other charitable institutions that have relied on the previously long-settled reading of the church plan exclusion. Such institutions now face the choice between maintaining the status quo and risking litigation, or making the irrevocable election to accept ERISA status, which will be unnecessary if the Court of Appeals ultimately reverses the decision in this case and affirms *Overall*. An immediate appeal will resolve the issue for the *Catholic Health East* case also pending in this Circuit, and will provide a benefit for all potentially interested parties by providing greater certainty.

An immediate appeal is also in the public interest. The public importance of this question cannot be seriously questioned nor can its wide impact on hundreds of institutions across the country. The District Court recognized that its ruling is contrary to dozens of IRS private letter rulings that church-related agencies have obtained supporting their church plan status. Dkt. # 68 at 15. In New Jersey alone, there are 20 Catholic hospitals and 39 Catholic long term care facilities. According to the Catholic Health Association, there are 642 Catholic hospitals in

the country.[11] There are, of course, many more healthcare organizations controlled by or associated with churches of other denominations.

Commenting on the decision below, Moody's Investor's Service warned that if the District Court's interpretation of the church plan exclusion stands, many Catholic hospitals may be exposed to previously unexpected pension funding liabilities that will reduce their cash reserves.[12] Without a prompt and authoritative resolution of this issue by this Court, these organizations now face grievous uncertainty about their current budgeting, their contributions to their pension plans, and their communications to their employees. What will be the impact on financially weaker healthcare institutions that may not be able to afford greater contributions that may or may not be mandated by ERISA? Will they need to terminate their plans, reduce benefits, reduce community benefits and charity care, or cut other services? A prompt ruling by this Court about eligibility for the church plan exclusion will provide needed certainty.

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[11] *See* Catholic Health Care in the United States, January 2014, *available at* http://www.chausa.org/docs/default-source/general-files/cha_miniprofile_final.pdf?sfvrsn=0 (last accessed on September 23, 2014).

[12] Moody's Weekly Credit Outlook: Public Finance, April 14, 2014, at 7-8. http://s3.documentcloud.org/documents/1145865/weekly-credit-outlook-for-public-finance.pdf (last accessed on September 23, 2014).

CONCLUSION

For the foregoing reasons, Defendants-Petitioners respectfully request that this Court grant its Petition for leave to appeal from the March 31, 2014 Order of the District Court.

Dated: September 29, 2014

Respectfully submitted,

SILLS CUMMIS & GROSS P.C.

By: _____
JEFFREY J. GREENBAUM
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EXHIBIT 1

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LAURENCE KAPLAN, on behalf of himself, individually, and on behalf of others similarly situated, Plaintiff, v. SAINT PETER'S HEALTHCARE SYSTEM, RONALD C. RAK, an individual, SUSAN BALLESTERO, an individual, GARRICK STOLDT, an individual, and JOHN and JANE DOES, each an individual, 1-20, Defendants.	Civil Action No. 13-2941 (MAS)(TJB) **MEMORANDUM OPINION**

SHIPP, District Judge

This matter comes before the Court upon the motions of Defendants Saint Peter's Healthcare System, Ronald C. Rak, Susan Ballestero, and Garrick Stoldt (collectively, "SPHS" or "Defendants") pursuant to Federal Rules of Civil Procedure ("Rule") 12(b)(1) and 12(b)(6). (Defs.' Br., ECF No. 42-1.) Plaintiff Laurence Kaplan ("Plaintiff" or "Mr. Kaplan") opposed Defendants' motions (Pl.'s Opp'n, ECF No. 48) and Defendants replied (Defs.' Reply, ECF No. 54).

Plaintiff brought this putative class action on behalf of participants and beneficiaries of the Saint Peter's Healthcare System Retirement Plan (the "Plan"), alleging that the Plan is being improperly maintained by SPHS as a "church plan" under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq*. This case requires the Court to determine the metes and bounds of ERISA's church plan exemption, as defined in 29 U.S.C. § 1002(33). The Court, in particular, must determine whether a non-profit healthcare corporation may establish and maintain a church plan if it is controlled by or associated with a church. If answered in the

affirmative, the Court must then determine whether this interpretation of the church plan definition violates the Establishment Clause of the United States Constitution.

After carefully considering the Parties' submissions and hearing oral argument on March 27, 2014, the Court holds that, as a matter of law, SPHS's employee pension Plan is not a church plan. Therefore, for the reasons set forth below and other good cause shown, Defendants' Motion to Dismiss is DENIED.

I. BACKGROUND

A. Overview of the Employee Retirement Income Security Act

In 1974, Congress passed ERISA, which "is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). It is a federal law that regulates private industry pension plans, retirement plans, profit-sharing plans and health insurance coverage. For such plans, ERISA establishes rules and minimum standards that are meant to protect plan participants. Nothing in ERISA mandates employers to create these plans; it only sets the standards for those that choose to establish them.

In alignment with its purpose, ERISA "seek[s] to ensure that employees will not be left empty handed once employers have guaranteed them certain benefits." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996). "To increase the chances that employers will be able to honor their benefits commitments—that is, to guard against the possibility of bankrupt pension funds—Congress incorporated several key measures into ERISA." *Id.* These measures include, among other things, minimum funding and vesting requirements for all ERISA covered plans and rules concerning reporting, disclosures, and fiduciary responsibilities. *See, e.g.*, 29 U.S.C. § 1082.

Although private sector employee benefit plans typically come under ERISA's purview, there are limited exemptions. One such exemption is the church plan. Church plans were

exempted from ERISA because the examination of a church's books by the government might be regarded as "an unjustified invasion of the confidential relationship that is believed to be appropriate with regard to churches and their religious activities." Report of Senate Finance Comm., No. 93-383 (Aug. 21, 1973). As a result, a church plan is exempt from ERISA's requirements unless an election is made under the Internal Revenue Code ("IRC"), 26 U.S.C. § 410(d). 29 U.S.C. § 1003(b)(2).

B. The Plan

SPHS is a non-profit healthcare corporation headquartered in New Brunswick, New Jersey. (Compl., ECF No. 1, ¶¶ 25, 44.) According to Plaintiff, SPHS does not receive funding from the Catholic Church or other religious entities but, instead, relies on revenue bonds to raise money. (*Id.* ¶¶ 47, 49, 85.) SPHS owns Saint Peter's University Hospital and Saint Peter's Health and Management Services Corporation, among other companies. (*Id.* ¶ 44.) SPHS employs over 2,800 people and, in 1974, established the Plan, which is a non-contributory defined benefit pension plan. (*Id.* ¶¶ 25, 45, 56, 68; *see also id.* ¶¶ 61-62, 66-67, 70-72.) For over thirty years, the Plan was operated as an ERISA plan—meaning, it complied with ERISA's requirements regarding funding, reporting, and insurance premiums paid to the Pension Benefit Guarantee Corporation ("PBGC")—and represented such to its employees via Plan documents and other written materials. (*Id.* ¶¶ 56-57.)

In 2006, during the rise of the nationwide economic downturn, SPHS "concluded that [its Plan] was a church plan" and proceeded to file an application for church-plan status with the Internal Revenue Service ("IRS"). (*Id.* ¶ 58.) Meanwhile, SPHS continued to pay insurance premiums to PBGC as an ERISA plan. (*Id.*) Notwithstanding its IRS application, SPHS waited until November 2011 to notify its employees of its application for church-plan status. (*Id.* ¶ 59.)

On August 14, 2013, in a private letter ruling, the IRS concluded that SPHS's Plan is a church plan as defined in ERISA.[1] (Stoldt Supplemental Cert., ECF No. 45-1, Ex. A.)

C. Plaintiff's Grievance

Mr. Kaplan is one of many current or former employees of SPHS purportedly affected by SPHS's alleged conversion of its Plan from an ERISA plan to a church plan, exempt from ERISA. (Compl. ¶ 24.) Mr. Kaplan worked for SPHS from 1985-1999. (*Id.*) He is a participant in the Plan maintained by SPHS because he is or will be eligible for pension benefits under the Plan. (*Id.*) Mr. Kaplan brings this action, pursuant to Rule 23(b)(1) and (b)(2), on behalf of himself and others who are participants or beneficiaries of "any Plan operated or claimed by [SPHS] to be a [c]hurch [p]lan as of [May 7, 2013,]" the date of the Complaint. (*Id.* ¶ 95.)

Plaintiff's principal grievance is that SPHS is improperly maintaining its Plan to the detriment of its employees. (*Id.* ¶ 2.) Strictly speaking, he alleges that SPHS is employing church-plan status to evade ERISA's various requirements including underfunding the Plan by over $70 million. (*Id.* ¶¶ 14, 65.) Mr. Kaplan's concerns are manifested in his eight-count Complaint, alleging various ERISA violations including violations of ERISA's requirements for reporting and disclosure, minimum funding, establishment of a trust, and for breach of fiduciary duties. He seeks, among other things, an order declaring that the Plan is not a church plan exempt from ERISA or, in the alternative, that the church plan exemption, as claimed by SPHS, is an unconstitutional accommodation under the Establishment Clause.[2]

[1] SPHS received this ruling after the Complaint was filed.

[2] The United States has filed a Notice to Intervene regarding Plaintiff's constitutional claim. (ECF No. 56.)

II. DISCUSSION

Defendants move to dismiss Plaintiff's claims on two grounds: (1) lack of subject matter jurisdiction, pursuant to Rule 12(b)(1), for Plaintiff's claims arising under ERISA; and (2) failure to state a claim for which relief can be granted, pursuant to Rule 12(b)(6), regarding Plaintiff's Establishment Clause claim. The Court will address each ground, in turn.

A. The Court Has Subject Matter Jurisdiction of Plaintiff's ERISA Claims

Before proceeding to review the merits of a case, the Court has a duty to assure itself that it has subject matter jurisdiction. Plaintiff alleges that the Court has subject matter jurisdiction pursuant to 29 U.S.C. § 1132(e)(1) for his claims brought under Title I of ERISA and 28 U.S.C. § 1331 based on a federal question. (Compl. ¶ 19.) Defendants do not dispute the Court's federal question jurisdiction as to Plaintiff's constitutional claim, but instead challenge subject matter jurisdiction of Plaintiff's ERISA claims. (Defs.' Br. 14.)

A defendant may challenge the court's subject matter jurisdiction with either a facial or factual attack. *See Gould Elecs. Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000), *modified by Simon v. United States*, 341 F.3d 193, 195 (3d Cir. 2003). Defendants have launched a factual attack, appending various extrinsic certifications and exhibits to their motion. (*See* ECF No. 42.) The extrinsic documents purportedly support their position that SPHS's Plan is a church plan exempt from ERISA and, therefore, outside of this Court's subject matter jurisdiction. (*See* Defs.' Br. 14-33.)

> As amended in 1980, the current definition of a church plan provides, in pertinent part:
>
> (A) The term "church plan" means a plan established and maintained (to the extent required in clause (ii) of subparagraph (B)) for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of Title 26.
>
> * * * *
>
> (C) For purposes of this paragraph--

> (i) A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.
>
> (ii) The term employee of a church or a convention or association of churches includes--
>
> (I) a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, regardless of the source of his compensation;
>
> (II) an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 of Title 26 and which is controlled by or associated with a church or a convention or association of churches; and
>
> (III) an individual described in clause (v).
>
> (iii) A church or a convention or association of churches which is exempt from tax under section 501 of Title 26 shall be deemed the employer of any individual included as an employee under clause (ii).
>
> (iv) An organization, whether a civil law corporation or otherwise, is associated with a church or a convention or association of churches if it shares common religious bonds and convictions with that church or convention or association of churches.
>
> * * * *

29 U.S.C. § 1002(33).[3]

1. Parties' Positions

According to SPHS, its Plan is a church plan exempt from ERISA for two primary reasons: (1) because SPHS and its Retirement Plan Committee, charged with maintenance of the Plan, are controlled by and associated with the Roman Catholic Church, as outlined under § 1002(33)(C)(i); and (2) because SPHS's employees are considered employees of the Roman Catholic Church under § 1002(33)(C)(ii)(II). (Defs.' Br. 1, 21.)

[3] The IRC contains a virtually identical definition. *See* 26 U.S.C. § 414(e).

At the base of SPHS's factual assertions, however, is a significant legal one: that a pension plan established and maintained by a tax exempt corporation controlled by or associated with a church is a church plan. (Defs.' Br. 15.) Plaintiff not only disputes Defendants' factual assertions, but his interpretation of the church plan definition differs in that he reads the definition as allowing only a church or a convention or association of churches—which SPHS is not—to establish and maintain a church plan. (Pl.'s Opp'n 1-2.) Despite their different interpretations of the church plan definition, neither party asserts that the definition is ambiguous. (*See* Defs.' Br. 17; Pl.'s Opp'n 10-11.)

The Parties' dispute is one centered on, and resolved by, the statutory construction of ERISA's church plan definition, to which the Court now turns.

2. SPHS's Plan is Not a Church Plan

When interpreting a statute, a court "must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). To ascertain Congress' intent, the Court "begin[s] with the language of the statute. The first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'" *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)); *accord United States v. Cooper*, 396 F.3d 308, 310 (3d Cir. 2005). Where the text provides a clear answer to the interpretive question, the analysis ends there as well. *Cooper*, 396 F.3d at 310 (citing *Steele v. Blackman*, 236 F.3d 130, 133 (3d Cir. 2001)). "In all events, it is not [the Court's] task to assess the consequences of each approach and adopt the one that produces the least mischief. [The Court's] charge is to give effect to the law Congress enacted." *Lewis v. City of Chicago*, 560 U.S. 205, 217 (2010).

a) *Plain Text Analysis*

As previously stated, the interpretive question here is whether a non-profit entity, purportedly controlled by or associated with a church, may both establish and maintain a church plan. Based on the plain text of the statute, the simple answer is no. Starting with subsection A, it is clear that

Congress intended for a church plan—first and foremost—to be ***established*** by a church. Once the church establishes the plan, the church must also ***maintain*** it. From these two requirements, a church plan is born—hence, "[t]he term 'church plan' *means* a plan established and maintained . . . by a church or by a convention or association of churches . . . ." 29 U.S.C. § 1002(33)(A) (emphasis added). However, in subsection C(i), Congress expanded the maintenance requirement outlined in subsection A: a church plan, as defined in subsection A,

> includes a plan ***maintained*** by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.

29 U.S.C. § 1002(33)(C)(i) (emphasis added). Put differently, Congress has explicitly provided two ways to fall within the church plan exemption: (1) a plan established and maintained by a church, or (2) a plan established by a church and maintained by a tax-exempt organization, the principal purpose or function of which is the administration or funding of the plan, that is either controlled by or associated with a church. Once a church plan is established in one of these ways, subsection C(ii) delineates what individuals may participate in the church plan as employees of the church.

The key to this interpretation is to recognize that subsection A is the gatekeeper to the church plan exemption: although the church plan definition, as defined in subsection A, is expanded by subsection C to include plans ***maintained*** by a tax-exempt organization, it nevertheless requires that the plan be ***established*** by a church or a convention or association of churches. In other words, if a church does not establish the plan, the inquiry ends there. If, on the other hand, a church establishes the plan, the remaining sections of the church plan definition are triggered.

b) *SPHS's Interpretation*

Defendants, nevertheless, argue that the definition does not mean what it says. To bolster its more general argument that a tax-exempt organization controlled by or associated with a church may

establish and maintain a church plan, SPHS grasps upon two specific propositions. SPHS first highlights the fact that ERISA does not define the term "church." (Defs.' Br. 17.) To fill this statutory crevice, SPHS provides its own definition to show that its Plan meets the requirements of the church plan exemption. According to SPHS, reading subsection C "into" subsection A, "a 'church' for the purposes of the statute is broader than simply an institution for religious worship[.]" (*Id.* at 18.) Specifically, SPHS asserts that subsection C expands the definition of a church to include "any federally tax exempt corporation controlled by or in association with such an institution that establishes and maintains a retirement plan for its employees, and a retirement plan established by the corporation for those employees is a church plan." (*Id.*) At oral argument, Defendants further justified their interpretation by contending that Plaintiff's interpretation would render the term "includes" in subsection C(i) and the entirety of subsection C meaningless. (Mar. 27, 2014 Rough Tr. 22:11-24; *see also* Defs.' Resp. to Pl.'s 2d Notice, ECF No. 59, 3-5.) SPHS's interpretation, however, is contrary to the plain text and the Court will address each of Defendant's arguments, in turn.

First, when interpreting a statute, the Court must be guided by the principle that Congress says what it means and means what it says. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000); *In re Phila. Newspapers, LLC*, 599 F.3d 298, 304 (3d Cir. 2010). It is no secret that ERISA is an "enormously complex and detailed statute[.]" *Conkright v. Frommert*, 559 U.S. 506, 509 (2010). As such, the Court concludes that Congress was cautious in crafting the definition of a church plan and therefore the definition means what it says—that a church plan must, from the outset, be established by a church and can be maintained by an organization controlled by or associated with a church. In essence, Defendants urge the Court to read subsection C(i) as follows:

> A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan **[established and]** maintained by an organization, whether a civil law corporation or otherwise . . . if such organization is controlled by or associated with a church or a convention or association of churches.

Congress could have added this language to subsection C, but decidedly did not. To be sure, Congress made the above distinction in the definition of a "governmental plan," which is the definition immediately preceding the church plan definition. The governmental plan definition states, in pertinent part:

> The term "governmental plan" means a plan established ***or*** maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, ***or*** by any agency or instrumentality of any of the foregoing . . . . The term "governmental plan" includes a plan which is established ***and*** maintained by an Indian tribal government . . . a subdivision of an Indian tribal government . . . ***or*** an agency or instrumentality of either[.]

29 U.S.C. § 1002(32) (emphasis added).

Second, Defendants' interpretation ignores—and renders superfluous—Section A which requires a church to establish a church plan. *See Alexander v. Riga*, 208 F.3d 419, 430 (3d Cir. 2000) (when interpreting a statute, a court must give effect, if possible, to every word and clause of a statute). If the Court were to accept SPHS's interpretation, any tax-exempt organization can establish its own pension plan, maintain it, and then employ the church plan exemption by purporting to be controlled by or associated with a church. In this context, a tax-exempt organization itself would have to be considered a church under the statute because a church is the only entity allowed to establish a church plan. Defendants' contention in this regard is unreasonable. The Court cannot conclude that Congress intended to create this slippery slope, especially considering that the point of enacting ERISA was to promote the interest of employees and their beneficiaries. Opening the door to expand the church plan exemption to this extent would place more employees at risk of having insufficient benefits upon retirement. What must be kept in mind is that ERISA is a remedial statute, so any exemptions included thereunder should be construed narrowly. *See Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 614 n.33 (1981). Defendants' interpretation would achieve quite the opposite.

On the other hand, Defendants insist that Plaintiff's and the Court's interpretation of the definition would render the term "includes," as provided in subsection C(i), meaningless. The Court disagrees. The Court's interpretation expands the definition of a church plan for the limited purpose of allowing a plan that is first established by a church to include a plan that is maintained by a tax-exempt organization. The term "includes" merely provides an alternative to the maintenance requirement but does not eliminate the establishment requirement. In addition, the Court's interpretation does not render the entire subsection of C meaningless. As stated above, after a church establishes a plan, subsection C provides clarity as to who can participate in the church's plan and the requirements for a tax-exempt organization, other than the church, to maintain a church-established plan. Defendants' interpretation would expand the church plan definition to untenable bounds and, in the process, change the plain text of the statute.

Third, when examining the text of a statute, the Court must interpret statutory words as taking their ordinary, common meaning unless otherwise defined by Congress. *See Perrin v. United States*, 444 U.S. 37, 42 (1979). The Court does not venture to define "church" but, needless to say, the Court cannot conclude that Congress intended for a tax-exempt agency, controlled by or associated with a church, to be considered a church under the statute. Despite SPHS's own definition of a church, it does not appear to be arguing that it is a church. (*See* Defs.' Br. 18; *see also* Defs.' Resp. to Pl.'s 2d Notice 5.) This became evident at oral argument when it seemingly retreated from its original position. (Mar. 27, 2014 Rough Tr. 24:5-7.)

Finally, the Court's reading of the statute is consonant with the two appellate decisions that have addressed the church plan definition. In both *Lown v. Continental Casualty Co.*, 238 F.3d 543 (4th Cir. 2001) and *Chronister v. Baptist Health*, 442 F.3d 648 (8th Cir. 2006), the Fourth and Eighth Circuits concluded that the entities at issue did not meet the definition of a church plan based on factual findings. *See Lown*, 238 F.3d at 548 (considering whether a disability plan was a church plan, but finding that Baptist Healthcare and the South Carolina Baptist Convention mutually ended their

affiliation); *Chronister*, 442 F.3d at 652 (finding that Baptist Health severed its ties with the Arkansas Baptist State Convention in 1966). The courts were not faced with the legal issue present before the Court and therefore did not need to address it.

Furthermore, the case law relied upon by Defendants is unpersuasive. Defendants primarily rely on *Thorkelson v. Publishing House of Evangelical Lutheran Church*, 764 F. Supp. 2d 1119 (D. Minn. 2011), for the proposition that a tax-exempt organization controlled by or associated with a church can establish and maintain a church plan. (Defs.' Br. 23, 30.) In *Thorkelson*, plaintiffs made the same arguments as Mr. Kaplan—that the benefit plan for defendant Augsburg Fortress Publishers ("AFP"), a non-profit publisher for the Lutheran Church, was not a church plan because it was sponsored by AFP. *Thorkelson*, 764 F. Supp. 2d at 1125. Interpreting the church plan definition, the court concluded that AFP's plan was a church plan exempt from ERISA. *Id.* at 1126. Even though plaintiff conceded that AFP was controlled by the Lutheran Church, the court focused its statutory analysis on whether the plan was sponsored by a tax-exempt entity that is controlled by or associated with a church. *Id.* at 1126-27. However, its interpretation did not apply § 1002(33)(A), which requires—from the outset—a plan to be established by a church. The court also noted that defendants' position was supported by case law and agency decisions of the IRS and Department of Labor ("DOL"). *Id.* at 1125.

On the other hand, a recent decision from the Northern District of California is more persuasive. In *Rollins v. Dignity Health*, No. C13-1450 TEH, 2013 WL 6512682 (N.D. Cal. Dec. 12, 2013), plaintiff brought similar ERISA claims as Mr. Kaplan, alleging that defendant's pension plan was not a church plan because it was sponsored by a non-profit healthcare organization and not a church. *Rollins*, 2013 WL 6512682, at *2. After a thorough analysis of the statutory text, the court concluded that

> notwithstanding section C, which permits a valid church plan to be maintained by some church-affiliated organizations, section A still requires that a church establish a church plan. Because the statute states that a church plan may only be established "by

> a church or by a convention or association of churches," only a church or a convention or association of churches may establish a church plan. 29 U.S.C. 1002(33)(A). Dignity's effort to expand the scope of the church plan exemption to any organization maintained by a church-associated organization stretches the statutory text beyond its logical ends.

Id. at *5. The *Rollins* court's interpretation of the church plan definition is in accord with this Court's decision.

Defendants reiterate that *Thorkelson* is in alignment with thirty years of judicial decisions, but none of these previous decisions undertook a detailed statutory analysis of the church plan definition as Judge Henderson did in *Rollins*. Instead, these prior decisions often bypassed subsection A of the definition and immediately applied subsection C(i), made conflicting determinations regarding the limitations of C(i), or even misstated the text of subsection C(i). *See, e.g., Rhinehart v. Life Ins. Co. of N. Am.*, No. C08-5486 RBL, 2009 WL 995715, at *2 (W.D. Wash. Apr. 14, 2009) (misquoting subsection A as providing that a church plan means a plan "established *or* maintained" by a church and concluding that subsection C(i) does not expand the definition of a church plan) (emphasis added); *Catholic Charities of Maine, Inc. v. City of Portland*, 304 F. Supp. 2d 77, 85 (D. Me. 2004) (adding words to the plain text when it concluded that "ERISA brings a plan *established or* maintained by a non-church organization within the general definition of 'church plan' if that organization is 'controlled by' or 'associated with' a church") (emphasis added); *Friend v. Ancillia Sys. Inc.*, 68 F. Supp. 2d 969, 973 (N.D. Ill. 1999) (pre-*Lown* decision considering whether a church plan is required to be maintained by an organization, the principal purpose of which is administering or funding the plan, and holding that this was not a requirement).

The Court finds that Plaintiff's interpretation of the church plan definition provides a common sense reading of the statute based on its plain text. Accordingly, for the foregoing reasons, which are dispositive, the Court finds, as a matter of law, that SPHS's Plan is not a church plan and that the Court has subject matter jurisdiction of Plaintiff's ERISA claims.

3. Legislative History Does Not Justify a Departure from the Plain Text

Both Parties seek refuge in the legislative history by pointing particularly to comments made on the congressional floor that purportedly support their reading of the statute. However, "where the text of a statute is unambiguous, the statute should be enforced as written and '[o]nly the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language.'" *In re Phila. Newspapers, LLC*, 599 F.3d at 314 (quoting *United States v. Albertini*, 472 U.S. 675, 680 (1985)). The Parties have not made such a showing here. *See Estate of Arrington v. Michael*, 738 F.3d 599, 606 (3d Cir. 2013) ("[S]elective invocation of fragments of the floor debate is an object lesson in the perils of appealing to . . . legislative history as a guide to statutory meaning . . . . The law is what Congress enacts, not what its members say on the floor.") (citations omitted).[4]

4. The IRS Private Letter Ruling Is Contrary to the Plain Text

Were the Court to conclude that the church plan definition is ambiguous as to what entity can establish and maintain a church plan, the Court could defer to an agency's reasonable interpretation of the statute. *See Chevron*, 467 U.S. at 842-43. Although the Court has determined Congress' intent based on the plain text, it seems appropriate to discuss the DOL and IRS private letter rulings; not only because SPHS has received an IRS private letter ruling on this issue, but because these rulings seem to be somewhat responsible for the overbroad application of the church plan exemption. *See* Gen. Counsel Mem. ("GCM") 39007 (July 1, 1983) (post-amendment interpretation of the church plan definition, which concluded that plans established and maintained by two Catholic orders—not

[4] The Court notes, however, that in 1978, when Representative Barber B. Conable, Jr. introduced a bill to amend the church plan definition in the Internal Revenue Code of 1954, the proposed language of what is now subsection C(i) read, in pertinent part: "A plan established and maintained by a church . . . shall include a plan *established and maintained* by an organization . . . ." 124 Cong. Rec. 12108 (May 2, 1978) (emphasis added). The subsequent 1980 amendment of the church plan definition excluded the word "established" from subsection C(i). *See, e.g., Doe v. Chao*, 540 U.S. 614, 622 (2004) (acknowledging that "drafting history show[s] that Congress cut the very language in the bill that would have authorized any presumed damages").

churches—that operated nursing homes and hospitals, were church plans). Since the 1983 GCM, dozens of IRS private letter rulings have held that a church-related agency can establish its own church plan. The DOL has also issued advisory opinions on church-related agencies, concluding that their plans are church plans. *See, e.g.*, Advisory Op. 94-04A (Feb. 17, 1994) (interpreting the church plan definition as follows: "In accordance with Section 3(33)(C)(iii) . . . the Church is deemed the employer of these individuals for purposes of the church plan definition in section 3(33); and the Church, as employer, *is deemed to have established and to maintain the Plans.*") (emphasis added).

Defendants argue that, "though not binding on the Courts, [these rulings] are entitled to deference in accord with their persuasive power" to the extent that they are reasonable and consistent with the text and legislative history. (Defs.' Br. 20; *see also id.* at 21-22.) In response, Plaintiff asserts that the agency determinations should not be given deference because they are inconsistent, unpersuasive, and interpret the statute differently than the courts. (Pl.'s Opp'n 15-16.) Defendants concede that courts and agencies interpret the church plan definition differently, but maintain that agency decisions are entitled to deference. (Defs.' Reply 5-6.) Moreover, Defendants assert that congressional silence regarding the church plan definition gives the agency decisions the force of law. (Mar. 27, 2014 Rough Tr. 6:5-10; 18:6-10.)

Although SPHS has received a private letter ruling, the Court cannot give it deference for several reasons. As an initial matter, the ruling conflicts with the plain text of the statute and is therefore unreasonable. "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *See Chevron*, 467 U.S. at 843 n.9. Furthermore, the IRS private letter ruling is conclusory, lacking any statutory analysis, and cannot be used as precedent because the ruling was issued in a non-adversarial setting based on information supplied by SPHS. *See* 26 U.S.C. § 6110(k)(3); *see also Christensen v. Harris Cnty.*, 529 U.S. 576, 586-87 (2000) (pointing out that an agency's opinion letters, policy

statements, agency manuals, and enforcement guidelines – unlike regulations adopted through "formal adjudication or notice-and-comment rulemaking" – "do not warrant *Chevron*-style deference"). In addition, courts have long held that congressional silence, alone, in the wake of administrative rulings does not give the rulings the force of law. *See Brown v. Gardner*, 513 U.S. 115, 121-22 (1994) ("As we have recently made clear, congressional silence 'lacks persuasive significance,' . . . particularly where administrative regulations are inconsistent with the controlling statute . . . .") (citations and internal quotations omitted); *Aaron v. SEC*, 446 U.S. 680, 694 n.11 (1980) ("[I]t is our view that the failure of Congress to overturn the Commission's interpretation falls far short of providing a basis to support a construction . . . so clearly at odds with its plain meaning and legislative history.") (citation omitted); *Girouard v. United States*, 328 U.S. 61, 69 (1946) ("It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law."); *cf. Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 580-81 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it *re-enacts a statute without change* . . . .") (internal citations omitted) (emphasis added). The church plan definition has not been amended since 1980 and Defendants cannot now use congressional silence to turn agency rulings into law.[5]

[5] On this point, Defendants appear to make a secondary argument that when an agency, such as the IRS, is charged with the responsibility of administering a "congressional act," deference should be given to its rulings. (*See* Mar. 27, 2014 Rough Tr. 5:23-6:1.) However, Defendants have not cited any precedent showing that Congress delegated authority for the IRS to issue regulations to define terms within the ERISA church plan definition. *Compare Christopher v. Smithkline Beecham Corp.*, 132 S. Ct. 2156, 2162, 2165 (2012) (noting that Congress delegated authority to the DOL to issue regulations and define the term "outside salesman" in the Fair Labor Standards Act, 29 U.S.C. § 213(a)(1), which states, in part, "any employee employed . . . in the capacity of an outside salesman ***(as such terms are defined and delimited from time to time by regulations of the Secretary . . . .***")) (emphasis added), *with Bellas v. CBS, Inc.*, 221 F.3d 517, 524, 532 (3d Cir. 2000) (stating that Congress contemplated the Treasury Department setting forth the definition of "retirement-type subsidy" in ERISA, but nevertheless holding that the IRS's interpretation was at odds with the statute and the legislative history) (citing ERISA, 29 U.S.C. § 1054(g)(2)(A), which states, in part, "a plan amendment which has the effect of . . . eliminating or reducing . . . a retirement-type subsidy ***(as defined in regulations)*** . . . .) (emphasis added).

For the reasons stated above, Defendants' motion to dismiss pursuant to Rule 12(b)(1) is denied.[6]

B. Violation of Establishment Clause of First Amendment

Plaintiff's Establishment Clause claim is based upon the Court finding that SPHS's Plan is a church plan as defined in ERISA. (Pl.'s Opp'n 32.) Because the Court finds that, as a matter of law, SPHS's Plan is not a church plan, it is unnecessary for the Court to address this claim. As such, Defendants' motion to dismiss pursuant to Rule 12(b)(6) is denied.

III. CONCLUSION

For the reasons set forth above, and other good cause shown, it is hereby ordered that Defendants' Motions to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6) are DENIED. An Order will be entered consistent with this Opinion.

s/ Michael A. Shipp
MICHAEL A. SHIPP
UNITED STATES DISTRICT JUDGE

DATED: March 31, 2014

[6] Because the Court finds, as a matter of law, that the Plan is not a church plan, the Court does not reach the merits of Defendants' factual assertions in connection with their Rule 12(b)(1) motion to dismiss or the Parties' dispute regarding whether the church plan exemption is jurisdictional. For the same reason, Plaintiff's Motion to Strike certain certifications and exhibits (ECF No. 47) is denied as moot.

EXHIBIT 2

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LAURENCE KAPLAN, on behalf of himself, individually, and on behalf of others similarly situated, Plaintiff, v. SAINT PETER'S HEALTHCARE SYSTEM, RONALD C. RAK, an individual, SUSAN BALLESTERO, an individual, GARRICK STOLDT, an individual, and JOHN and JANE DOES, each an individual, 1-20, Defendants.	Civil Action No. 13-2941 (MAS)(TJB) **ORDER**

This matter comes before the Court upon the motions of Defendants Saint Peter's Healthcare System, Ronald C. Rak, Susan Ballestero, and Garrick Stoldt (collectively, "SPHS" or "Defendants") pursuant to Federal Rules of Civil Procedure ("Rule") 12(b)(1) and 12(b)(6). (Defs.' Br., ECF No. 42-1.) Plaintiff Laurence Kaplan ("Plaintiff" or "Mr. Kaplan") opposed Defendants' motions (Pl.'s Opp'n, ECF No. 48) and Defendants replied (Defs.' Reply, ECF No. 54). Plaintiff also filed a Motion to Strike certain certifications and exhibits attached to Defendants' Motions to Dismiss (ECF No. 47) and Defendants opposed (ECF No. 53). The Court has carefully considered the Parties' submissions and heard oral argument on March 27, 2014. For the reasons stated in the Memorandum Opinion filed today, and other good cause shown,

IT IS on this 31st day of March, 2014, **ORDERED** that:

1) As a matter of law, the Saint Peter's Healthcare System Retirement Plan is not a church plan, as defined in the Employee Retirement Income Security Act, 29 U.S.C. § 1002(33).

2) Defendants' Motions to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6) are DENIED.

3) Plaintiff's Motion to Strike certain certifications and exhibits is DENIED as moot.

s/ Michael A. Shipp
MICHAEL A. SHIPP
UNITED STATES DISTRICT JUDGE

EXHIBIT 3

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LAURENCE KAPLAN, on behalf of himself, individually, and on behalf of all others similarly situated, Plaintiff, v. SAINT PETER'S HEALTHCARE SYSTEM, RONALD C. RAK, an individual, SUSAN BALLESTERO, an individual, GARRICK STOLDT, an individual, and JOHN and JANE DOES, each an individual, 1-20, Defendants.	Civil Action No. 13-2941 (MAS)(TJB) **MEMORANDUM OPINION**

On March 31, 2014, the Court issued an Order denying the motion to dismiss of Defendants Saint Peter's Healthcare System ("SPHS"), Ronald C. Rak, Susan Ballestero, and Garrick Stoldt (collectively, "Defendants"). (March 31 Order, ECF No. 67.) Defendants' motion to dismiss pursuant to Federal Rules of Civil Procedure ("Rule") 12(b)(1) and (b)(6) for lack of subject matter jurisdiction and failure to state a claim ultimately presented an issue of first impression in this Circuit: whether a non-profit healthcare corporation, such as SPHS, may establish and maintain a church plan, as defined in the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1002(33), if it is controlled by or associated with a church.

Presently before the Court is Defendants' motion to certify the Court's March 31 Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and to stay the proceedings pending an appeal to the Third Circuit. (Defs.' Br., ECF No. 74-1.) Plaintiff Laurence Kaplan opposed the motion (Pl.'s Opp'n, ECF No. 85) and Defendants replied. (Defs.' Reply, ECF No. 90). The Court has carefully

considered the submissions and has decided the motion without oral argument pursuant to Local Civil Rule 78.1. For the following reasons, and other good cause shown, Defendants' motion is GRANTED.

I. BACKGROUND

The Court detailed Plaintiff's factual allegations giving rise to this action in its Memorandum Opinion accompanying the Court's March 31 Order and incorporates that background herein. (*See* Mem. Op. at 2-4, ECF No. 68.)

In its Memorandum Opinion, the Court held that, as a matter of law, SPHS's Retirement Plan (the "Plan") is not a church plan exempt from ERISA, solidifying the Court's subject matter jurisdiction of Plaintiff's ERISA claims. (*Id.* at 2, 13, 17.) The Court also set forth its reasons for denying Defendants' motion to dismiss Plaintiff's ERISA's claims. After conducting a statutory analysis of ERISA's church plan definition, the Court concluded that the plain text of the statute "requires—from the outset—a [church] plan to be established by a church." (Mem. Op. at 12-13.) Because the Plan was established by SPHS, it could not be a church plan as defined under the statute. (*Id.* at 7-13.) Defendants also moved to dismiss Plaintiff's constitutional claim alleging that the church plan exemption, as claimed by SPHS, is an unconstitutional accommodation under the Establishment Clause. However, upon concluding that SPHS's Plan is not a church plan, Defendants' motion to dismiss the constitutional claim was rendered moot and denied as such. (*Id.* at 17; *see also* March 31 Order, ¶ 2.)

II. DISCUSSION

Defendants now move to certify the Court's March 31 Order for interlocutory appeal and for a stay of proceedings, asserting that the March 31 Order satisfies the three criteria for certification. Moreover, Defendants suggest that the March 31 Order has created "chaos" for "hundreds of institutions across the country" affected by the Court's ruling. (Defs.' Br. 1-2, 16; *see also* Greenbaum Supp. Cert. Ex. A, ECF No. 75.) Unsurprisingly, Plaintiff disagrees with Defendants' assertions and

contends that "[t]his case does not present 'exceptional' circumstances that warrant the disruption of the normal judicial process." (Pl.'s Opp'n 1.)

In this instance, the Court agrees with Defendants. This is an exceptional case warranting certification for interlocutory appeal and, as explained in more detail below, Defendants have met the criteria for a certificate. In granting Defendants' motion, the Court acknowledges the practical implications of its March 31 decision, though it does not agree its ruling created nationwide "chaos."

A. Motion for Interlocutory Appeal

The Court finds that Defendants have established the three elements necessary for the Court to certify its March 31 Order for interlocutory appeal.

As a general rule, a matter may not be appealed to the Third Circuit until final judgment is entered. Nevertheless, in "exceptional cases," an interlocutory appeal may be proper. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74 (1996). As such, a district court may exercise its discretion to grant leave to file an interlocutory appeal, under § 1292(b), if its order: (1) involves a "controlling question of law"; (2) there is "substantial ground for difference of opinion"; and (3) if appealed immediately, "may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *see also Katz v. Carte Blanche Corp.*, 496 F.2d 747, 754 (3d Cir. 1974). The burden to demonstrate that certification is appropriate lies with the moving party. *Orson, Inc. v. Miramax Film Corp.*, 867 F. Supp. 319, 320 (E.D. Pa. 1994) (citation omitted); *see also, e.g., Elec. Mobility Corp. v. Borns Sensors/Controls, Inc.*, 87 F. Supp. 2d 394, 398 (D.N.J. 2000).

First, the question of whether a non-profit healthcare corporation can establish and maintain a church plan, as defined in ERISA, is a controlling question of law. A question of law is controlling if "an incorrect disposition would constitute reversible error and . . . it is serious to the conduct of the litigation, either practically or legal[ly]." *Eisenberger v. Chesapeake Appalachia, LLC*, No. 09-cv-1415, 2010 WL 1816646, at *3 (M.D. Pa. May 5, 2010) (citing *Katz*, 496 F.2d at 755). Indeed, the Court acknowledged that "[t]he Parties' dispute is one centered on, and resolved by, the statutory

construction of ERISA's church plan definition[.]" (Mem. Op. at 7.) Plaintiff concedes that "the [Court's] statutory interpretation . . . is dispositive of Plaintiff's claim that the SPHS Plan is not exempt from ERISA as a church plan[.]" (Pl.'s Opp'n 2.) Nevertheless, he disputes that the interpretive question is a controlling question of law because it would not affect the entire litigation or its outcome. (Pl.'s Opp'n 2, 10-12, 16.) The Court disagrees.

The Court did not reach the issue of whether an exemption from ERISA eliminates the Court's subject matter jurisdiction.[1] However, if the Court's statutory interpretation was incorrect, it would require reversal upon final appeal and likely strip this Court of subject matter jurisdiction of Plaintiff's ERISA claims. *Beazer E., Inc. v. The Mead Corp.*, No. Civ.A.91-408, 2006 WL 2927627, at *2 (W.D. Pa. Oct. 12, 2006) ("The court believes that the fundamental issue of subject matter jurisdiction is one of the clearest examples of a 'controlling question of law' within the meaning of § 1292(b).") (citation omitted); *see also Koval v. Wash. Cnty. Redevelopment Auth.*, 574 F.3d 238, 244 (3d Cir. 2009) (affirming dismissal of complaint for lack of subject matter jurisdiction because the benefits plan at issue was a "government plan" exempt from ERISA).

Second, there is substantial ground for difference of opinion whether a non-profit, tax-exempt organization can establish and maintain a church plan as defined in ERISA. Substantial ground for difference of opinion exists when there is genuine doubt or conflicting precedent as to the correct legal standard. *P. Schoenfeld Asset Mgmt. LLC. v. Cendant Corp.*, 161 F. Supp. 2d 355, 360 (D.N.J. 2001). "The clearest evidence of 'substantial grounds for difference of opinion' is where 'there are conflicting interpretations from numerous courts.' " *Knopick v. Downey*, 963 F. Supp. 2d 378, 398 (M.D. Pa. 2013) (quoting *Beazer E.*, 2006 WL 2927627, at *2). In its Memorandum Opinion, the Court acknowledged and analyzed at length numerous federal court decisions and Internal Revenue Service and Department

[1] Although the Court did not reach this issue, the Court of Appeals "may address any issue fairly included within the certified order[.]" *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996).

of Labor advisory opinions, which have—at the very least—presumed that a non-profit, tax-exempt corporation can establish and maintain a church plan. (Mem. Op. at 11-15.) More troubling, however, is that these cases conflict with each other in their analysis (or lack thereof) of the church plan definition. (*See id.* at 13.) Even if the Court did not consider its March 31 decision as one in conflict with prior decisions, a more recent split has emerged amongst courts that have taken a closer look at the plain text. *Compare Overall v. Ascension*, --- F. Supp. 2d ----, 2014 WL 2448492, at *15 (E.D. Mich. May 13, 2014) ("A church plan is a plan that is (1) established by a church or (2) established by an organization that is controlled by or associated with a church.")[2], *and Medina v. Catholic Health Initiatives*, No. 13-cv-01249, 2014 WL 4244012, at *2-3 (D. Colo. Aug. 26, 2014) (rejecting report and recommendation and agreeing with *Overall*), *with Rollins v. Dignity Health*, --- F. Supp. 2d ----, 2013 WL 6512682, at *5 (N.D. Cal. Dec. 12, 2013) (concluding that "notwithstanding section C, which permits a valid church plan to be maintained by some church-affiliated organizations, section A still requires that a church *establish* a church plan") (emphasis in original).[3]

Third, a definitive, appellate ruling would materially advance the termination of the litigation. A § 1292(b) certification "materially advances the ultimate termination of the litigation where the interlocutory appeal eliminates: (1) the need for trial; (2) complex issues that would complicate trial; or (3) issues that would make discovery more costly or burdensome." *Bais Yaakov of Spring Valley v.*

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[2] In support of their motion, Defendants claim that this Court's "gatekeeper" reasoning has been "refuted" by *Overall*. (Defs.' Reply 14.) Although the Court agrees that *Overall* is in clear conflict with *Rollins* and this Court's decision, the *Overall* court failed to address the absence of the term "establish" in Section C(i) of the church plan definition, which was significant in *Rollins* and the Court's March 31 decision. *See* 29 U.S.C. § 1002(33)(C)(i); Mem. Op. at 9-10; *Rollins*, 2013 WL 6512682, at *5.

[3] *See also Chavies v. Catholic Health East*, No. 13-1645 (CDJ) (E.D. Pa. Mar. 28, 2014) (order denying hospital's motion to dismiss without prejudice and ordering jurisdictional discovery on the issue of whether defendant-hospital is itself a church pursuant to 29 U.S.C. § 1002(33)(A), after the hospital argued that it is a church). Because the *Chavies* court has not issued a decision regarding the construction of the church plan definition, the Court does not view that order as one in agreement with or against this Court's decision. However, any determination made by the Third Circuit will also bind the *Chavies* court.

Peterson's Nelnet, LLC, No. 11-00011, 2013 WL 663301, at *4 (D.N.J. Feb.21, 2013). "Certification is more likely to materially advance the litigation where the appeal occurs early in the litigation, before extensive discovery has taken place and a trial date has been set." *N.J. Prot. & Advocacy, Inc. v. N.J. Dep't of Educ.*, No. 07-2978, 2008 WL 4692345, at *3 (D.N.J. Oct. 8, 2008).

Plaintiff disputes that Defendants have met any of the criteria necessary for certification, but his major point of contention is that certification would not materially advance the ultimate termination of the litigation. (Pl.'s Opp'n 2, 7.) Specifically, Plaintiff asserts that a reversal would not prevent unnecessary expense and would broaden discovery by adding factual and legal issues. (*Id.* at 12-15.) To support his assertion, Plaintiff represents that this case could be submitted to the Court within five months after targeted discovery. (*Id.* at 5.) Defendants assert that discovery will take "two mutually exclusive pathways" and an interlocutory appeal will determine the appropriate path. (Defs.' Reply 7.) According to Defendants, if the case goes forward in the normal course, then discovery will focus on issues of class certification and the ERISA claims but not on issues of control or association with the Roman Catholic Church. On the other hand, if the March 31 Order is reversed, then there may be additional jurisdictional discovery. (*Id.* at 7.)

As discussed above, Defendants' motion concerns a controlling question of law. To that end, "[t]he requirement that an appeal may materially advance the ultimate termination of the litigation is closely tied to the requirement that the order involve a controlling question of law." *Pub. Interest Research Grp. of N.J., Inc. v. Hercules, Inc.*, 830 F. Supp. 1549, 1557 (D.N.J. 1993) (citation and internal quotations omitted). An interlocutory appeal would avoid unnecessary expense and will materially advance the ultimate termination of the litigation: at most, a reversal of the Court's decision will likely eliminate the Court's subject matter jurisdiction of Plaintiff's ERISA claims altogether and, at the very least, will eliminate the necessity for certain avenues of discovery in the manner Defendants have described. Furthermore, this case is still in the early stages of litigation, where the parties have not participated in a Rule 16 conference or engaged in any discovery. Finally, if the Court is reversed,

deciding the Establishment Clause issue would not require discovery because it is a pure question of law.

Plaintiff relies on the *Rollins* court's denial of Dignity Health's motion for interlocutory appeal. *See Rollins v. Dignity Health*, No. 13-cv-01450-TEH, 2014 WL 1048637 (N.D. Cal. Mar. 17, 2014). Judge Henderson's decision is distinguishable from the instant matter because of its procedural posture. The *Rollins* court's initial decision regarding the church plan definition was decided on a motion to dismiss for failure to state a claim, not for lack of subject matter jurisdiction. Indeed, Judge Henderson made this distinction in his explanation for denying Dignity Health's motion for interlocutory appeal. *Id.* at *2 ("a different ruling as to whether a court has jurisdiction . . . could invalidate an entire district court proceeding. In contrast, the matter at issue here is not of such high stakes"). Judge Henderson's decision, therefore, is not persuasive on this issue.

In sum, this is the rare case where an interlocutory appeal is appropriate. Ultimately, of course, that is not the Court's decision to make, as the Third Circuit may disagree and deny certification. Defendants, nevertheless, should at least have the opportunity to make their request to the Court of Appeals, and by certifying, the Court grants them leave to do so.

B. Motion to Stay

Defendants move to stay the proceedings pending a determination by the Third Circuit and Plaintiff opposes. (Defs.' Br. 18-19; Pl.'s Opp'n 2, 25-27.) Each court has the inherent power to control its own docket to promote fair and efficient adjudication. *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *Rolo v. Gen. Dev. Corp.*, 949 F.2d 695, 702 (3d Cir. 1991). To promote fair and efficient adjudication in this case, the Court will stay this action pending appeal from the March 31 Order. To

be clear, however, a stay is granted only until the Third Circuit decides whether it will permit an appeal to be taken.[4]

III. CONCLUSION

For the reasons set forth above, and other good cause shown, it is hereby ordered that Defendants' motion to certify the Court's March 31 Order for interlocutory appeal and to stay proceedings pending appeal is GRANTED. An Order will be entered consistent with this Opinion.

MICHAEL A. SHIPP
UNITED STATES DISTRICT JUDGE

DATED: September 19, 2014

[4] As provided in Federal Rule of Appellate Procedure 8 and Local Appellate Rule 8.0, Defendants may file a motion to stay on appeal.

EXHIBIT 4

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LAURENCE KAPLAN, on behalf of himself, individually, and on behalf of others similarly situated, Plaintiff, v. SAINT PETER'S HEALTHCARE SYSTEM, RONALD C. RAK, an individual, SUSAN BALLESTERO, an individual, GARRICK STOLDT, an individual, and JOHN and JANE DOES, each an individual, 1-20, Defendants.	Civil Action No. 13-2941 (MAS)(TJB) **ORDER**

This matter comes before the Court upon Defendants' motion to certify the Court's March 31, 2014 Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and to stay the proceedings pending an appeal to the Third Circuit. (Defs.' Mot., ECF No. 74.) Plaintiff opposed the motion (Pl.'s Opp'n, ECF No. 85) and Defendants replied. (Defs.' Reply, ECF No. 90). The Court has carefully considered the submissions and has decided the motion without oral argument pursuant to Local Civil Rule 78.1. Based on the foregoing and the Court's accompanying Memorandum Opinion filed today, and other good cause shown,

IT IS on this 19th day of September, 2014, **ORDERED** that:

1) Defendants' motion to certify the Court's March 31, 2014 Order for interlocutory appeal to the Third Circuit Court of Appeals (ECF No. 74) is **GRANTED**.

    a) The following question presented in the March 31 Order and accompanying Memorandum Opinion (ECF Nos. 67-68) is hereby certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b): Whether an organization, a civil law corporation or otherwise, can both establish and maintain a "church plan," as defined in the Employee Retirement Income Security Act, 29 U.S.C. § 1002(33), if such organization is controlled by or associated with a church or a convention or association of churches.

b) Defendants shall file its petition to the Third Circuit pursuant to 28 U.S.C. § 1292(b) within ten (10) days from the date of this order.

2) Defendants' motion to stay proceedings is **GRANTED** pending a decision by the Third Circuit Court of Appeals regarding Defendants' petition for an interlocutory appeal.

MICHAEL A. SHIPP
UNITED STATES DISTRICT JUDGE

EXHIBIT 5

*** Current through PL 113-163, approved 8/8/14 ***

TITLE 29. LABOR
CHAPTER 18. EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM
PROTECTION OF EMPLOYEE BENEFIT RIGHTS
GENERAL PROVISIONS

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29 USCS § 1002

§ 1002. Definitions

For purposes of this title:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 [*29 USCS § 186(c)*] (other than pensions on retirement or death, and insurance to provide such pensions).

(2) (A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program--

(i) provided retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan. A distribution from a plan, fund, or program shall not be treated as made in a form other than retirement income or as a distribution prior to termination of covered employment solely because such distribution is made to an employee who has attained age 62 and who is not separated from employment at the time of such distribution.

(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this Act providing one or more exempt categories under which--

(i) severance pay arrangements, and

(ii) supplemental retirement income payments, under which the pension benefits of retirees or their beneficiaries are supplemented to take into account some portion or all of the increases in the cost of living (as determined by the Secretary of Labor) since retirement,

shall, for purposes of this title, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment a principal effect of which is the evasion of the standards or purposes of this Act applicable to pension plans, such arrangement or payment shall be treated as a pension plan. An applicable voluntary early retirement incentive plan (as defined in *section 457(e)(11)(D)(ii) of the Internal Revenue Code of 1986* [*26 USCS §*

457(e)(11)(D)(ii)]) making payments or supplements described in section 457(e)(11)(D)(i) [*26 USCS § 457(e)(11)(D)(i)*] of such Code, and an applicable employment retention plan (as defined in section 457(f)(4)(C) of such Code [*26 USCS § 457(f)(4)(C)*]) making payments of benefits described in section 457(f)(4)(A) of such Code [*26 USCS § 457(f)(4)(A)*], shall, for purposes of this title, be treated as a welfare plan (and not a pension plan) with respect to such payments and supplements.

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

(4) The term "employee organization" means any labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships; or any employees' beneficiary association organized for the purpose in whole or in part, of establishing such a plan.

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

(6) The term "employee" means any individual employed by an employer.

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

(8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

(9) The term "person" means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.

(10) The term "State" includes any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, and the Canal Zone. The term "United States" when used in the geographic sense means the States and the Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (*43 U.S.C. 1331-1343*).

(11) The term "commerce" means trade, traffic, commerce, transportation, or communication between any State and any place outside thereof.

(12) The term "industry or activity affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and includes any activity or industry "affecting commerce" within the meaning of the Labor Management Relations Act, 1947, or the Railway Labor Act.

(13) The term "Secretary" means the Secretary of Labor.

(14) The term "party in interest" means, as to an employee benefit plan--

(A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan;

(B) a person providing services to such plan;

(C) an employer any of whose employees are covered by such plan;

(D) an employee organization any of whose members are covered by such plan;

(E) an owner, direct or indirect, of 50 percent or more of--

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation.[,]

(ii) the capital interest or the profits interest of a partnership, or

(iii) the beneficial interest of a trust or unincorporated enterprise,

which is an employer or an employee organization described in subparagraph (C) or (D);

(F) a relative (as defined in paragraph (15)) of any individual described in subparagraph (A), (B), (C), or (E);

(G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of--

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of

stock of such corporation,

(ii) the capital interest or profits interest of such partnership, or

(iii) the beneficial interest of such trust or estate,

is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);

(H) an employee, officer, director (or an individual having powers or responsibilities similar to those of officers or directors), or a 10 percent or more shareholder directly or indirectly, of a person described in subparagraph (B), (C), (D), (E), or (G), or of the employee benefit plan; or

(I) a 10 percent or more (directly or indirectly in capital or profits) partner or joint venturer of a person described in subparagraph (B), (C), (D), (E), or (G).

The Secretary, after consultation and coordination with the Secretary of the Treasury, may by regulation prescribe a percentage lower than 50 percent for subparagraph (E) and (G) and lower than 10 percent for subparagraph (H) or (I). The Secretary may prescribe regulations for determining the ownership (direct or indirect) of profits and beneficial interests, and the manner in which indirect stockholdings are taken into account. Any person who is a party in interest with respect to a plan to which a trust described in *section 501(c)(22) of the Internal Revenue Code of 1986* [*26 USCS § 501(c)(22)*] is permitted to make payments under section 4223 [*29 USCS § 1403*] shall be treated as a party in interest with respect to such trust.

(15) The term "relative" means a spouse, ancestor, lineal descendant, or spouse of a lineal descendant.

(16) (A) The term "administrator" means--

(i) the person specifically so designated by the terms of the instrument under which the plan is operated;

(ii) if an administrator is not so designated, the plan sponsor; or

(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

(B) The term "plan sponsor" means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

(17) The term "separate account" means an account established or maintained by an insurance company under which income, gains, and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.

(18) The term "adequate consideration" when used in part 4 of subtitle B [*29 USCS §§ 1101* et seq.] means (A) in the case of a security for which there is a generally recognized market, either (i) the price of the security prevailing on a national securities exchange which is registered under section 6 of the Securities Exchange Act of 1934 [*15 USCS § 78f*], or (ii) if the security is not traded on such a national securities exchange, a price not less favorable to the plan than the offering price for the security as established by the current bid and asked prices quoted by persons independent of the issuer and of any party in interest; and (B) in the case of an asset other than a security for which there is a generally recognized market, the fair market value of the asset as determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan and in accordance with regulations promulgated by the Secretary.

(19) The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 203(a)(3) [*29 USCS § 1053(a)(3)*].

(20) The term "security" has the same meaning as such term has under section 2(1) of the Securities Act of 1933 (*15 U.S.C. 77b(1)*).

(21) (A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or

responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 405(c)(1)(B) [*29 USCS § 1105(c)(1)(B)*].

(B) If any money or other property of an employee benefit plan is invested in securities issued by an investment company registered under the Investment Company Act of 1940, such investment shall not by itself cause such investment company or such investment company's investment adviser or principal underwriter to be deemed to be a fiduciary or a party in interest as those terms are defined in this title, except insofar as such investment company or its investment adviser or principal underwriter acts in connection with an employee benefit plan covering employees of the investment company, the investment adviser, or its principal underwriter. Nothing contained in this subparagraph shall limit the duties imposed on such investment company, investment adviser, or principal underwriter by any other law.

(22) The term "normal retirement benefit" means the greater of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement age. The normal retirement benefit shall be determined without regard to--

(A) medical benefits, and

(B) disability benefits not in excess of the qualified disability benefit.

For purposes of this paragraph, a qualified disability benefit is a disability benefit provided by a plan which does not exceed the benefit which would be provided for the participant if he separated from the service at normal retirement age. For purposes of this paragraph, the early retirement benefit under a plan shall be determined without regard to any benefit under the plan which the Secretary of the Treasury finds to be a benefit described in section 204(b)(1)(G) [*29 USCS § 1054(b)(1)(G)*].

(23) The term "accrued benefit" means--

(A) in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and, except as provided in section 204(c)(3) [*29 USCS § 1054(c)(3)*], expressed in the form of an annual benefit commencing at normal retirement age, or

(B) in the case of a plan which is an individual account plan, the balance of the individual's account.

The accrued benefit of an employee shall not be less than the amount determined under section 204(c)(2)(B) [*29 USCS § 1054(c)(2)(B)*] with respect to the employee's accumulated contribution.

(24) The term "normal retirement age" means the earlier of--

(A) the time a plan participant attains normal retirement age under the plan, or

(B) the later of--

(i) the time a plan participant attains age 65, or

(ii) the 5th anniversary of the time a plan participant commenced participation in the plan.

(25) The term "vested liabilities" means the present value of the immediate or deferred benefits available at normal retirement age for participants and their beneficiaries which are nonforfeitable.

(26) The term "current value" means fair market value where available and otherwise the fair value as determined in good faith by a trustee or a named fiduciary (as defined in section 402(a)(2) [*29 USCS § 1102(a)(2)*]) pursuant to the terms of the plan and in accordance with regulations of the Secretary, assuming an orderly liquidation at the time of such determination.

(27) The term "present value", with respect to a liability, means the value adjusted to reflect anticipated events. Such adjustments shall conform to such regulations as the Secretary of the Treasury may prescribe.

(28) The term "normal service cost" or "normal cost" means the annual cost of future pension benefits and administrative expenses assigned, under an actuarial cost method, to years subsequent to a particular valuation date of a pension plan. The Secretary of the Treasury may prescribe regulations to carry out this paragraph.

(29) The term "accrued liability" means the excess of the present value, as of a particular valuation date of a pension plan, of the projected future benefit costs and administrative expenses for all plan participants and beneficiaries over the present value of future contributions for the normal cost of all applicable plan participants and beneficiaries. The Secretary of the Treasury may prescribe regulations to carry out this paragraph.

(30) The term "unfunded accrued liability" means the excess of the accrued liability, under an actuarial cost method which so provided, over the present value of the assets of a pension plan. The Secretary of the Treasury may prescribe regulations to carry out this paragraph.

(31) The term "advance funding actuarial cost method" or "actuarial cost method" means a recognized actuarial

technique utilized for establishing the amount and incidence of the annual actuarial cost of pension plan benefits and expenses. Acceptable actuarial cost methods shall include the accrued benefit cost method (unit credit method), the entry age normal cost method, the individual level premium cost method, the aggregate cost method, the attained age normal cost method, and the frozen initial liability cost method. The terminal funding cost method and the current funding (pay-as-you-go) cost method are not acceptable actuarial cost methods. The Secretary of the Treasury shall issue regulations to further define acceptable actuarial cost methods.

(32) The term "governmental plan" means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. The term "governmental plan" also includes any plan to which the Railroad Retirement Act of 1935 or 1937 applies, and which is financed by contributions required under that Act and any plan of an international organization which is exempt from taxation under the provisions of the International Organizations Immunities Act (59 Stat. 669). The term "governmental plan" includes a plan which is established and maintained by an Indian tribal government (as defined in *section 7701(a)(40) of the Internal Revenue Code of 1986* [*26 USCS § 7701(a)(40)*]), a subdivision of an Indian tribal government (determined in accordance with section 7871(d) of such Code [*26 USCS § 7871(d)*]), or an agency or instrumentality of either, and all of the participants of which are employees of such entity substantially all of whose services as such an employee are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential government function)[.]

(33) (A) The term "church plan" means a plan established and maintained (to the extent required in clause (ii) of subparagraph (B)) for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under *section 501 of the Internal Revenue Code of 1986* [*26 USCS § 501*].

(B) The term "church plan" does not include a plan--

(i) which is established and maintained primarily for the benefit of employees (or their beneficiaries) of such church or convention or association of churches who are employed in connection with one or more unrelated trades or businesses (within the meaning of *section 513 of the Internal Revenue Code of 1986* [*26 USCS § 513*]), or

(ii) if less than substantially all of the individuals included in the plan are individuals described in subparagraph (A) or in clause (ii) of subparagraph (C) (or their beneficiaries).

(C) For purposes of this paragraph--

(i) A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.

(ii) The term employee of a church or a convention or association of churches includes--

(I) a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, regardless of the source of his compensation;

(II) an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under *section 501 of the Internal Revenue Code of 1986* [*26 USCS § 501*] and which is controlled by or associated with a church or a convention or association of churches; and

(III) an individual described in clause (v).

(iii) A church or a convention or association of churches which is exempt from tax under *section 501 of the Internal Revenue Code of 1986* [*26 USCS § 501*] shall be deemed the employer of any individual included as an employee under clause (ii).

(iv) An organization, whether a civil law corporation or otherwise, is associated with a church or a convention or association of churches if it shares common religious bonds and convictions with that church or convention or association of churches.

(v) If an employee who is included in a church plan separates from the service of a church or a convention or association of churches or an organization, whether a civil law corporation or otherwise, which is exempt from tax under *section 501 of the Internal Revenue Code of 1986* [*26 USCS § 501*] and which is controlled by or associated with a church or a convention or association of churches, the church plan shall not fail to meet the requirements of this paragraph merely because the plan--

(I) retains the employee's accrued benefit or account for the payment of benefits to the employee or his beneficiaries pursuant to the terms of the plan; or

(II) receives contributions on the employee's behalf after the employee's separation from such service, but only for a period of 5 years after such separation, unless the employee is disabled (within the meaning of the disability provisions of the church plan or, if there are no such provisions in the church plan, within the meaning of *section 72(m)(7) of the Internal Revenue Code of 1986* [*26 USCS § 72(m)(7)*] at the time of such separation from service.

(D) (i) If a plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under *section 501 of the Internal Revenue Code of 1986* [*26 USCS § 501*] fails to meet one or more of the requirements of this paragraph and corrects its failure to meet such requirements within the correction period, the plan shall be deemed to meet the requirements of this paragraph for the year in which the correction was made and for all prior years.

(ii) If a correction is not made within the correction period, the plan shall be deemed not to meet the requirements of this paragraph beginning with the date on which the earliest failure to meet one or more of such requirements occurred.

(iii) For purposes of this subparagraph, the term "correction period" means--

(I) the period ending 270 days after the date of mailing by the Secretary of the Treasury of a notice of default with respect to the plan's failure to meet one or more of the requirements of this paragraph; or

(II) any period set by a court of competent jurisdiction after a final determination that the plan fails to meet such requirements, or, if the court does not specify such period, any reasonable period determined by the Secretary of the Treasury on the basis of all the facts and circumstances, but in any event not less than 270 days after the determination has become final; or

(III) any additional period which the Secretary of the Treasury determines is reasonable or necessary for the correction of the default,

whichever has the latest ending date.

(34) The term "individual account plan" or "defined contribution plan" means a pension plan which provided for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

(35) The term "defined benefit plan" means a pension plan other than an individual account plan; except that a pension plan which is not an individual account plan and which provided a benefit derived from employer contributions which is based partly on the balance of the separate account of a participant--

(A) for the purposes of section 202 [*29 USCS § 1052*], shall be treated as an individual account plan, and

(B) for the purposes of paragraph (23) of this section and section 204 [*29 USCS § 1054*], shall be treated as an individual account plan to the extent benefits are based upon the separate account of a participant and as a defined benefit plan with respect to the remaining portion of benefits under the plan.

(36) The term "excess benefit plan" means a plan maintained by an employer solely for the purpose of providing benefits for certain employees in excess of the limitations on contributions and benefits imposed by *section 415 of the Internal Revenue Code of 1986* [*26 USCS § 415*] on plans to which that section applies, without regard to whether the plan is funded. To the extent that a separable part of a plan (as determined by the Secretary of Labor) maintained by an employer is maintained for such purpose, that part shall be treated as a separate plan which is an excess benefit plan.

(37) (A) The term "multiemployer plan" means a plan--

(i) to which more than one employer is required to contribute,

(ii) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and

(iii) which satisfies such other requirements as the Secretary may prescribe by regulation.

(B) For purposes of this paragraph, all trades or businesses (whether or not incorporated) which are under common control within the meaning of section 4001(b)(1) [*29 USCS § 1301(b)(1)*] are considered a single employer.

(C) Notwithstanding subparagraph (A), a plan is a multiemployer plan on and after its termination date if the plan was a multiemployer plan under this paragraph for the plan year preceding its termination date.

(D) For purposes of this title, notwithstanding the preceding provisions of this paragraph, for any plan year which

began before the date of the enactment of the Multiemployer Pension Plan Amendments Act of 1980 [enacted Sept. 26, 1980], the term "multiemployer plan" means a plan described in section 3(37) of this Act [para. (37) of this section] as in effect immediately before such date.

(E) Within one year after the date of the enactment of the Multiemployer Pension Plan Amendments Act of 1980 [enacted Sept. 26, 1980], a multiemployer plan may irrevocably elect, pursuant to procedures established by the corporation and subject to the provisions of sections 4403 [4303](b) and (c) [*29 USCS § 1453(b)* and (c)], that the plan shall not be treated as a multiemployer plan for all purposes under this Act or the Internal Revenue Code of 1954 [*26 USCS §§ 1* et seq.] if for each of the last 3 plan years ending prior to the effective date of the Multiemployer Pension Plan Amendments Act of 1980–

(i) the plan was not a multiemployer plan because the plan was not a plan described in section 3(37)(A)(iii) of this Act [para. (37)(A)(iii) of this section] and *section 414(f)(1)(C) of the Internal Revenue Code of 1954* [*26 USCS § 414(f)(1)(C)*] (as such provisions were in effect on the day before the date of the enactment of the Multiemployer Pension Plan Amendments Act of 1980 [enacted Sept. 26, 1980]); and

(ii) the plan had been identified as a plan that was not a multiemployer plan in substantially all its filings with the corporation, the Secretary of Labor and the Secretary of the Treasury.

(F) (i) For purposes of this title a qualified football coaches plan–

(I) shall be treated as a multiemployer plan to the extent not inconsistent with the purposes of this subparagraph; and

(II) notwithstanding *section 401(k)(4)(B) of the Internal Revenue Code of 1986* [*26 USCS § 401(k)(4)(B)*], may include a qualified cash and deferred arrangement.

(ii) For purposes of this subparagraph, the term "qualified football coaches plan" means any defined contribution plan which is established and maintained by an organization--

(I) which is described in section 501(c) of such Code [*26 USCS § 501(c)*];

(II) the membership of which consists entirely of individuals who primarily coach football as full-time employees of 4-year colleges or universities described in section 170(b)(1)(A)(ii) of such Code [*26 USCS § 170(b)(1)(A)(ii)*]; and

(III) which was in existence on September 18, 1986.

(G) (i) Within 1 year after the enactment of the Pension Protection Act of 2006 [enacted Aug. 17, 2006]--

(I) an election under subparagraph (E) may be revoked, pursuant to procedures prescribed by the Pension Benefit Guaranty Corporation, if, for each of the 3 plan years prior to the date of the enactment of that Act [enacted Aug. 17, 2006], the plan would have been a multiemployer plan but for the election under subparagraph (E), and

(II) a plan that meets the criteria in clauses (i) and (ii) of subparagraph (A) of this paragraph or that is described in clause (vi) may, pursuant to procedures prescribed by the Pension Benefit Guaranty Corporation, elect to be a multiemployer plan, if--

(aa) for each of the 3 plan years immediately preceding the first plan year for which the election under this paragraph is effective with respect to the plan, the plan has met those criteria or is so described,

(bb) substantially all of the plan's employer contributions for each of those plan years were made or required to be made by organizations that were exempt from tax under *section 501 of the Internal Revenue Code of 1986* [*26 USCS § 501*], and

(cc) the plan was established prior to September 2, 1974.

(ii) An election under this subparagraph shall be effective for all purposes under this Act and under the Internal Revenue Code of 1986 [*26 USCS §§ 1* et seq.], starting with any plan year beginning on or after January 1, 1999, and ending before January 1, 2008, as designated by the plan in the election made under clause (i)(II).

(iii) Once made, an election under this subparagraph shall be irrevocable, except that a plan described in clause (i)(II) shall cease to be a multiemployer plan as of the plan year beginning immediately after the first plan year for which the majority of its employer contributions were made or required to be made by organizations that were not exempt from tax under *section 501 of the Internal Revenue Code of 1986* [*26 USCS § 501*].

(iv) The fact that a plan makes an election under clause (i)(II) does not imply that the plan was not a multiemployer plan prior to the date of the election or would not be a multiemployer plan without regard to the election.

(v) (I) No later than 30 days before an election is made under this subparagraph, the plan administrator shall

provide notice of the pending election to each plan participant and beneficiary, each labor organization representing such participants or beneficiaries, and each employer that has an obligation to contribute to the plan, describing the principal differences between the guarantee programs under title IV [*29 USCS §§ 1101* et seq.] and the benefit restrictions under this title for single employer and multiemployer plans, along with such other information as the plan administrator chooses to include.

(II) Within 180 days after the date of enactment of the Pension Protection Act of 2006 [enacted Aug. 17, 2006], the Secretary shall prescribe a model notice under this clause.

(III) A plan administrator's failure to provide the notice required under this subparagraph shall be treated for purposes of section 502(c)(2) [*29 USCS § 1132(c)(2)*] as a failure or refusal by the plan administrator to file the annual report required to be filed with the Secretary under section 101(b)(1) [*29 USCS § 1021(b)(1)*].

(vi) A plan is described in this clause if it is a plan sponsored by an organization which is described in *section 501(c)(5) of the Internal Revenue Code of 1986* [*26 USCS § 501(c)(5)*] and exempt from tax under section 501(a) of such Code [*26 USCS § 501(a)*] and which was established in Chicago, Illinois, on August 12, 1881.

(vii) For purposes of this Act and the Internal Revenue Code of 1986 [*26 USCS §§ 1* et seq.], a plan making an election under this subparagraph shall be treated as maintained pursuant to a collective bargaining agreement if a collective bargaining agreement, expressly or otherwise, provides for or permits employer contributions to the plan by one or more employers that are signatory to such agreement, or participation in the plan by one or more employees of an employer that is signatory to such agreement, regardless of whether the plan was created, established, or maintained for such employees by virtue of another document that is not a collective bargaining agreement.

(38) The term "investment manager" means any fiduciary (other than a trustee or named fiduciary, as defined in section 402(a)(2) [*29 USCS § 1102(a)(2)*])--

(A) who has the power to manage, acquire, or dispose of any asset of a plan;

(B) who (i) is registered as an investment adviser under the Investment Advisers Act of 1940 [*15 USCS §§ 80b-1* et seq.]; (ii) is not registered as an investment adviser under such Act by reason of paragraph (1) of section 203A(a) of such Act [*15 USCS § 80b-3a(a)(1)*], is registered as an investment adviser under the laws of the State (referred to in such paragraph (1)) in which it maintains its principal office and place of business, and, at the time the fiduciary last filed the registration form most recently filed by the fiduciary with such State in order to maintain the fiduciary's registration under the laws of such State, also filed a copy of such form with the Secretary; (iii) is a bank, as defined in that Act [*15 USCS §§ 80b-1* et seq.]; or (iv) is an insurance company qualified to perform services described in subparagraph (A) under the laws of more than one State; and

(C) has acknowledged in writing that he is a fiduciary with respect to the plan.

(39) The terms "plan year" and "fiscal year of the plan" mean, with respect to a plan, the calendar, policy, or fiscal year on which the records of the plan are kept.

(40) (A) The term "multiple employer welfare arrangement" means an employee welfare benefit plan, or any other arrangement (other than an employee welfare benefit plan), which is established or maintained for the purpose of offering or providing any benefit described in paragraph (1) to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries, except that such term does not include any such plan or other arrangement which is established or maintained--

(i) under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements,

(ii) by a rural electric cooperative, or

(iii) by a rural telephone cooperative association.

(B) For purposes of this paragraph--

(i) two or more trades or businesses, whether or not incorporated, shall be deemed a single employer if such trades or businesses are within the same control group,

(ii) the term "control group" means a group of trades or businesses under common control,

(iii) the determination of whether a trade or business is under "common control" with another trade or business shall be determined under regulations of the Secretary applying principles similar to the principles applied in determining whether employees of two or more trades or businesses are treated as employed by a single employer under section 4001(b) [*29 USCS § 1301(b)*], except that, for purposes of this paragraph, common control shall not be based on an interest of less than 25 percent.

(iv) the term "rural electric cooperative" means--

(I) any organization which is exempt from tax under *section 501(a) of the Internal Revenue Code of 1986* [*26 USCS § 501(a)*] and which is engaged primarily in providing electric service on a mutual or cooperative basis, and

(II) any organization described in paragraph (4) or (6) of *section 501(c) of the Internal Revenue Code of 1986* [*26 USCS § 501(c)(4)* or (6)] which is exempt from tax under section 501(a) of such Code [*26 USCS § 501(a)*] and at least 80 percent of the members of which are organizations described in subclause (I), and

(v) the term "rural telephone cooperative association" means an organization described in paragraph (4) or (6) of *section 501(c) of the Internal Revenue Code of 1986* [*26 USCS § 501(c)(4)* or (6)] which is exempt from tax under section 501(a) of such Code [*26 USCS § 501(a)*] and at least 80 percent of the members of which are organizations engaged primarily in providing telephone service to rural areas of the United States on a mutual, cooperative, or other basis.

(41) Single-employer plan. The term "single-employer plan" means an employee benefit plan other than a multiemployer plan.

[(42)](41) The term "single-employer plan" means a plan which is not a multiemployer plan.

[(43)](42) the term "plan assets" means plan assets as defined by such regulations as the Secretary may prescribe, except that under such regulations the assets of any entity shall not be treated as plan assets if, immediately after the most recent acquisition of any equity interest in the entity, less than 25 percent of the total value of each class of equity interest in the entity is held by benefit plan investors. For purposes of determinations pursuant to this paragraph, the value of any equity interest held by a person (other than such a benefit plan investor) who has discretionary authority or control with respect to the assets of the entity or any person who provides investment advice for a fee (direct or indirect) with respect to such assets, or any affiliate of such a person, shall be disregarded for purposes of calculating the 25 percent threshold. An entity shall be considered to hold plan assets only to the extent of the percentage of the equity interest held by benefit plan investors. For purposes of this paragraph, the term "benefit plan investor" means an employee benefit plan subject to part 4 [*29 USCS §§ 1101* et seq.], any plan to which *section 4975 of the Internal Revenue Code of 1986* [*26 USCS § 4975*] applies, and any entity whose underlying assets include plan assets by reason of a plan's investment in such entity.

AFFIDAVIT OF SERVICE

DOCKET NO.

----------X

Kaplan, et al.,

vs.

Saint Peter's Healthcare System, et al.

----------X

I, Michael Cantwell, swear under the pain and penalty of perjury, that according to law and being over the age of 18, upon my oath depose and say that:

on September 29, 2014

I served the within Petition for Defendants-Petitioners Saint Peter's Healthcare System, Ronald C. Rak, Susan Ballestero, Garrick Stoldt for Leave to Appeal Pursuant to 28 U.S.C. §1292(b) in the above captioned matter upon:

Benjamin Leon Berwick
Michael Charles Pollack
U.S. Department of Justice
Federal Programs Branch
20 Massachusetts Avenue NW
Washington, DC 20530

Daniel S. Sommers
Cohen Milstein Sellers & Toll, PLLC
1100 New York Avenue, NW
Suite 500 West
Washington, DC 20005

Thomas R. Curtin
Graham Curtin, PA
4 Headquarters Plaza
P.O. Box 1991
Morristown, NJ 07962

via **Express Mail** by depositing 2 copies of same, enclosed in a post-paid, properly addressed wrapper, in an official depository maintained by United States Postal Service.

Unless otherwise noted, copies have been sent to the court on the same date as above for filing via Hand Delivery

Sworn to before me on September 29, 2014

Robyn Cocho

9-29-14

Robyn Cocho
Notary Public State of New Jersey
No. 2193491
Commission Expires January 8, 2017

Job # 255825

LAURENCE KAPLAN,
on behalf of himself, individually,
and on behalf of all others similarly situated,

v.

SAINT PETER'S HEALTHCARE SYSTEM; RONALD C. RAK, an individual;
SUSAN BALLESTERO, an individual; GARRICK STOLDT, an individual
JOHN AND JANE DOES 1-20,
Petitioners