United States Court of Appeals

for the

Third Circuit

Case No. 14-8125

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.

ANSWER OF PLAINTIFF-RESPONDENT LAURENCE KAPLAN IN OPPOSITION TO PETITION OF DEFENDANTS- PETITIONERS 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 FOR LEAVE TO APPEAL PURSUANT TO 28 U.S.C. § 1292(b)

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STATEMENT OF FACTS AND OF THE CASE

Plaintiff Laurence Kaplan is a participant in the Saint Peter's Healthcare System Retirement Plan ("SPHS Plan"), a pension plan covering employees of Saint Peter's Healthcare System ("SPHS"). Dkt. # 1 ¶¶ 24 & 56. SPHS is a holding company for a medical services conglomerate that includes Saint Peter's University Hospital ("SPUH"). *Id.* ¶¶ 44 & 46; Dkt. # 98-5 at 9. From 1974 until 2006, SPHS funded and administered the Plan in accordance with the Employee Retirement Income Security Act of 1974 ("ERISA"). Dkt. # 1 ¶ 56.

In 2006, the new managers of SPHS, who are the individual Defendants, decided that SPHS could obtain access to additional liquidity if it stopped funding its employees' pensions in accordance with ERISA. *Id.* ¶¶ 58 & 161. SPHS declared itself an exempt "church plan" and stopped complying with ERISA's pension funding, insurance, and disclosure requirements. *Id.* ¶¶ 114-135; Dkt. # 80-13. SPHS admits that the Plan is now underfunded by at least $ 30 million, or 17% below ERISA-required funding levels. Dkt. # 98-4 Ex. B at 2.

Mr. Kaplan filed this lawsuit alleging that SPHS is not a "church plan" on five alternative grounds under ERISA and the U.S. Constitution. Dkt. # 1 at ¶¶ 76-94. Defendants moved to dismiss Plaintiff's claims under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Dkt. # 42. Plaintiff disputed Defendants' assertion that the church plan exemption limits subject matter jurisdiction over his

federal-law claims and submitted affidavits from himself and three other SPHS employees, including a former executive who participated in meetings of the SPHS Board of Directors and its Retirement Plan Subcommittee, contesting SPHS's factual contentions regarding its church plan status. Dkt. # 48.

The District Court upheld the first of Plaintiff's alternative theories and denied Defendants' Motions. Dkt. # 68 at 7-8 ("Motion to Dismiss Order"). The Court held that the plain language of the ERISA "church plan" exemption requires that a church plan be established by a church. *Id.* The Court did not reach Plaintiff's alternative arguments and did not decide whether the church plan exemption limits subject matter jurisdiction. *Id.* at 17 n.6.

On April 30, 2014, Mr. Kaplan filed a Motion for Partial Summary Judgment seeking a declaration and injunction. Dkt. # 76. After that Motion was fully briefed, the District Court granted Defendants' Motion to Certify the Motion to Dismiss Order on September 19, 2014. The District Court acknowledged that the Motion to Dismiss Order "did not reach the issue of whether an exemption from ERISA eliminates the Court's subject matter jurisdiction," but speculated that reversal might "strip this Court of subject matter jurisdiction of Plaintiff's ERISA claims." Dkt. # 110 at 4. The Court found a "substantial ground" for difference of opinion, relying principally upon two recent district court decisions in other circuits, while noting a significant analytical flaw in one that rendered it

distinguishable. *Id.* at 5 n.2. Finally, the Court concluded that immediate appeal would advance the litigation if it lacked subject matter jurisdiction or if some discovery were foreclosed. *Id.* at 6-7.

QUESTION CERTIFIED

The District Court certified the question whether an "organization . . . can both establish and maintain a 'church plan'" as defined in 29 U.S.C. § 1002(33) "if such organization is controlled by or associated with a church . . . ." Dkt. # 111. This question inaccurately presumes that Defendant Saint Peter's Healthcare System ("SPHS") is "controlled by or associated with a church." The District Court did not make that determination. Dkt. # 68 at 17 n.6. Instead, the Court ruled that the SPHS Plan is not a church plan because it was not established by a church. Dkt. # 68 at 8. [1] Without a finding that SPHS is associated with or controlled by a church, the question certified calls for an impermissible advisory opinion. *See Step-Saver Data Sys., Inc. v. Wyse Tech.*, 912 F.2d 643, 648-49 (3d Cir. 1990) ("[M]aking law without finding the necessary facts constitutes advisory opinion writing, and that is constitutionally forbidden."). Because the dispositive issue is

[1] Modifying the question is within this Court's discretion. *See Yamaha Motor Corp., USA v. Calhoun*, 516 U.S. 199, 205 (1996) (appellate jurisdiction "is not tied to the particular question formulated by the district court").

whether the exemption permits an entity that is not a church or a convention or association of churches to establish a church plan, Plaintiff proposes this question:

> 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 convention or association of churches.

ARGUMENT SUMMARY

The Motion to Dismiss Order does not warrant interlocutory appeal. The District Court denied Defendants' Motions to Dismiss based on one of five alternative arguments that the SPHS Plan is not a church plan, any one of which would require denial of Defendants' Motions. If the District Court's order were reversed, each of these fact-based alternative theories will require discovery and findings of fact. If Plaintiff prevails on any of these arguments, he will be entitled to discovery as to the extent of Defendants' ERISA violations—the same issues that Defendants claim interlocutory review will avoid. In contrast, reversal of the Motion to Dismiss Order will not eliminate any discovery because Defendants concede that the Plan was not established by a church.

No Court of Appeals, nor any court within this Circuit, has reached a conclusion contrary to the Motion to Dismiss Order. Only three district courts—all in other circuits—have ruled differently on whether a non-church entity may

establish a church plan. Litigation of another case in this Circuit[2] has not produced any contrary ruling and defendants in that proceeding claim they would be exempt from ERISA regardless of whether the District Court's ruling is correct.

Defendants' attempt to gain an immediate appeal by characterizing the church plan exemption as limiting subject matter jurisdiction is flawed. Def. Br. at 8-9. The District Court made no determination as to whether church plan status is jurisdictional or merits-related. This Court has never held that the church plan exemption relates to subject matter jurisdiction. That Defendants have labeled the issue "jurisdictional" in their briefing does not favor interlocutory appeal.

Interlocutory appeal is also unnecessary because the District Court may grant Plaintiff's Summary Judgment Motion seeking an injunction, permitting an appeal under 28 U.S.C. § 1292(a) that will allow this Court to address the issues Defendants seek to appeal along with the scope and availability of relief.

ARGUMENT

The Court of Appeals has discretion to grant or deny permission to appeal under 28 U.S.C. § 1292(b). *Link v. Mercedes-Benz of N. Am., Inc.*, 550 F.2d 860, 862 (3d Cir. 1977). "[E]ven if the district judge certifies the order under § 1292(b), the appellant still has the burden of persuading the court of appeals that exceptional

[2] *Chavies v. Catholic Health East*, No. 13-cv-1645 (E.D. Pa. filed Mar. 28, 2013)

circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978) (internal quotation marks omitted). A non-final order may be appealed only where *all* of the following criteria are met: "(1) the issue involve[s] a controlling question of law; (2) as to which there are substantial grounds for difference of opinion; and that (3) an immediate appeal of the order may materially advance the ultimate termination of the litigation." *Simon v. United States*, 341 F.3d 193, 199 (3d Cir. 2003). These conditions must be "strictly construed and applied." *Milbert v. Bison Laboratories, Inc.*, 260 F.2d 431, 435 (3d Cir. 1958). Failure to satisfy any one of these criteria is sufficient to deny the petition, and the petition may be denied even where all criteria are met. *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 754 (3d Cir. 1974). Certification may be denied for any reason, including that it "may result in delay rather than expedition of cases in the district court." *Milbert*, 260 F.2d at 434.

I. IMMEDIATE APPEAL WOULD NOT MATERIALLY ADVANCE THE LITIGATION

A. Interlocutory Appeal Will Only Increase the Complexity and Expense of the District Court Proceedings

Interlocutory appeal does not materially advance the litigation when a successful appeal would broaden the legal issues and discovery presented to the district court. *E.g.*, *L.R. v. Manheim Township Sch. Dist.*, 540 F. Supp. 2d 603, 613

(E.D. Pa. 2008) (denying certification where successful appeal would add issues "and potentially expand the scope of trial"); *Orson, Inc. v. Miramax Film Corp.*, 867 F. Supp. 319, 322 (E.D. Pa. 1994) (certification denied where reversal "would serve to add, and not eliminate, issues for disposition").

Here, the Motion to Dismiss Order held the SPHS plan is not a church plan because it was not established by a church. Dkt. # 68 at 7-8. If that ruling were reversed, the District Court would be required to consider Plaintiff's alternative arguments that the SPHS Plan is not a church plan. Each of these alternative arguments will require a separate legal determination, discovery, and findings of fact. Rulings on each could lead to additional interlocutory appeal requests.

First, even if SPHS could establish a church plan, the SPHS Plan still would not be exempt because SPHS is not controlled by or associated with a church or a convention or association of churches. Dkt. # 1 ¶¶ 85-89. Although Plaintiff Kaplan has had no opportunity to take discovery, he submitted four affidavits in support of his opposition to Defendants' Motion to Dismiss contesting the existence of control by or shared bonds and convictions with any church.[3] *See*

[3] All four witnesses are former employees with a combined thirty-nine years of experience working at SPHS, and each has personal knowledge of SPHS's claimed control by and affiliation with a church. Dkt. # 48-2, 48-3, 50 & 50-1. Witness Bruce Pardo participated in meetings of SPHS's Board of Directors and Retirement Plan Committee as Vice President of Human Resources. Dkt. # 48-3 ¶

Mortensen v. First Fed. Sav. & Loan Ass'n., 549 F.2d 884, 892 (3d Cir. 1977) ("less in the way of jurisdictional proof" required to defeat Rule 12(b)(1) motion). This alternative claim would require discovery to determine SPHS's purported control by or association with a church. *See* 29 U.S.C. § 1002(33)(C)(iv).

Defendants' claim that the Court of Appeals can make its own factual determination that SPHS is controlled by or associated with any church is false. Def. Br at 14. As Defendants admit, the District Court made no factual findings and no legal determination as to either issue. Def. Br. at 6; Dkt. # 68 at 17 n.6. The Court of Appeals cannot make its own findings of fact where the District Court has not made any. *See Harris v. Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458, 464 (3d Cir. 2013) (refusing to entertain factual arguments as to subject matter jurisdiction absent finding by the district court); *Sewak v. I.N.S.*, 900 F.2d 667, 673 (3d Cir. 1990) ("As an appellate court we do not . . . determine disputed facts in the first instance."). Defendants' authorities acknowledge this and do not support their arguments. *See Johnson v. SmithKline Beecham Corp.*, 724 F.3d 337, 345-47 (3d Cir. 2013) (Court cannot "substitute our own jurisdictional facts for those credited by the District Court"). Even if this Court could determine the issue, interlocutory appeal "is not designed for review of factual matters." *Link*, 550 F.2d at 863.

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5. Plaintiff Kaplan has also submitted the affidavit of SPHS's former CEO John Matuska, which contests SPHS's control by a church. Dkt. # 104-2.

Second, even if the Plan met 29 U.S.C. § 1002(33)'s other requirements, it could not be a church plan because SPHS maintains the Plan and does not have the "principal purpose or function" of administering or funding the Plan. 29 U.S.C. § 1002(33)(C)(i); Dkt. # 1 ¶ 82. This claim would require discovery as to Plan financing by SPHS and any entities that Defendants claim "maintain" the Plan under § 1002(33)(C)(i). *See Shaver v. Siemens Corp.*, 670 F.3d 462, 479 (3d Cir. 2012) (entity did not establish or maintain ERISA plan where it did not commit to funding or providing for administration of the plan).

Third, if less than "substantially all" of SPHS Plan participants are members of a clergy or employed by an organization controlled by or associated with a church, the SPHS Plan is not a church plan pursuant to 29 U.S.C. § 1002(33)(B)(ii). Dkt. # 1 ¶¶ 91-92. This claim will require discovery to identify all SPHS Plan participants, their employers, and whether these employers are controlled by or associated with a church.

Fourth, extension of the exemption to SPHS would be an unconstitutional religious preference. Dkt. # 1 ¶¶ 94, 166-67. This claim requires discovery and adversarial testing. *Contra* Def. Br. at 15. In *Texas Monthly v. Bullock*, 489 U.S. 1 (1989), the Supreme Court invalidated an exemption for religious periodicals because "[the defendant] adduced no evidence that the payment of a sales tax . . . inhibit[s] religious activity." *Id.* at 3 (plurality op.). In *Metzl v. Leininger*, 57 F.3d

618 (7th Cir. 1995), the Seventh Circuit held a Good Friday closing law unconstitutional where defendants failed to meet their evidentiary burden to prove a "secular justification." *Id.* at 622. In *Freedom From Religion Foundation v. Lew*, 983 F. Supp. 2d 1051 (W.D. Wisc. 2013), the court granted summary judgment because defendants failed to present evidence that "a requirement on ministers to pay taxes . . . is more burdensome for them than for the many millions of others who must pay." *Id.* at 1062. Whether exempting SPHS as a church plan alleviates "a significant state-imposed deterrent to the free exercise of religion" requires discovery and fact-finding to resolve. *Texas Monthly*, 489 U.S. at 14.[4]

In *Rollins v. Dignity Health*, No. 13-cv-01450, 2014 WL 1048637 (N.D. Cal. Mar. 17, 2014), the court denied a motion to certify whether a hospital corporation may establish a church plan because if the Court of Appeals were to reverse,

> on remand the Court would be charged with applying the Ninth Circuit's interpretation of the statute to Dignity's plan and again determining if Dignity's plan is exempt. If Dignity's plan were not exempt, the Court would still have to consider Dignity's ERISA compliance. And if the Dignity plan was held to be exempt, the Court would then have to consider Rollins's claim regarding the constitutionality of such an exemption.

[4] *See also Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 613 n.59 (1989) *abrogated on other grounds by Town of Greece v. Galloway*, 134 S. Ct. 1811, 1820 (2014); *Lee v. Weisman*, 505 U.S. 577, 2677 (1992) (Souter, J., concurring).

Id. at *2. Here, as in *Rollins*, interlocutory appeal would not simplify this case or materially advance the litigation. The District Court's conclusion that *Rollins* is distinguishable overlooks that the District Court would be required to address each of the alternative theories *even if* the church plan exemption were jurisdictional: three of Plaintiff's alternative arguments address whether the SPHS Plan is a church plan, and jurisdiction over the constitutional claim arises independently from 28 U.S.C. § 1331. Because the District Court would be required to address these alternative claims even after a successful interlocutory appeal, the litigation would not be materially advanced. *See, e.g.*, *McFarlin v. Conseco Svcs. LLC*, 381 F.3d 1251, 1262 (11th Cir. 2004) (litigation not materially advanced where only one of several claims would be addressed on appeal); *In re Magic Marker Securities Litigation*, 472 F. Supp. 436, 439 (E.D. Pa. 1979) (denying certification where plaintiffs could proceed on alternative theories). The ten months it may take to decide an appeal will materially delay the litigation.[5]

Defendants' remaining argument that reversal might lead to a "mutually exclusive pathway[] for discovery" is flawed. Def. Br. at 15. If Plaintiff prevails on any of his three alternative theories, the discovery as to Defendants' ERISA violations will be the same. *E.g.*, *Jackson v. Rohm & Haas Co.*, No. 05-4988, 2007

[5] *See* Bar Ass'n for the Third Federal Circuit, U.S. Court of Appeals for the Third Circuit Practice Guide 25 (2012), *available at* http://thirdcircuitbar.org.

WL 2916396, at *1 (E.D. Pa. Oct. 5, 2007) (denying certification where "this case will go to discovery irrespective of whether the [disputed] claims were dismissed"). Interlocutory review of nearly any decision denying a motion to dismiss based on one of several alternative theories has the potential to set the litigation along a different path. *Rollins*, 2014 WL 1048637 at *2 ("[A] similar argument could be made for countless other denials of motions to dismiss that are routinely appealed in the regular course."). SPHS's "mere conjecture that certification would substantially reduce time and expense" does not merit appeal. *New Jersey Reg'l Council of Carpenters v. D.R. Horton*, *Inc.*, No. 08-1731, 2011 WL 1322204, at *5 (D.N.J. Mar. 31, 2011) (internal quotation marks omitted).

B. A Successful Appeal Will Not Eliminate Any Discovery

The Motion to Dismiss Order determined that only a church can establish a church plan. Dkt. # 68 at 7-13. Because Defendants concede that the SPHS Plan was not established by a church, no discovery is needed to prove that the Plan is not a church plan. Dkt. # 68 at 11. Accordingly, while a successful appeal would create a need for discovery, *supra* I.A, appeal would not eliminate any discovery.

C. The SPHS Plan's Church Plan Status is Ripe for Summary Judgment

The District Court's resolution of Plaintiff's Motion for Summary Judgment may grant the requested injunction, resulting in an appealable order. *See* 28 U.S.C. § 1292(a). Appeal from that order or a later final order will allow this Court to

review whether SPHS can establish a church plan, as well as any determination as to the available remedies. In contrast, granting SPHS's petition will require this Court to review each of these issues separately, violating "the prohibition against 'piecemeal' appellate review." *Link*, 550 F.2d at 863.

II. SPHS HAS NOT DEMONSTRATED THAT WHETHER A NON-CHURCH ENTITY CAN ESTABLISH A CHURCH PLAN IS A CONTROLLING QUESTION OF LAW

A. Defendants Cannot Obtain Certification By Calling the Motion to Dismiss Order Jurisdictional

SPHS attempts to portray the Motion to Dismiss Order as involving a controlling question by labelling the church plan exemption in 29 U.S.C. § 1003(b)(2) jurisdictional. Def. Br. at 9. However, the Motion to Dismiss Order did not decide whether the exemption is jurisdictional. Dkt. # 68 at 17 n.6. Defendants cannot obtain interlocutory review of the Motion to Dismiss Order on the ground that it involves subject matter jurisdiction when the District Court never adopted that interpretation. *See Link*, 550 F.2d at 863 ("Section 1292(b) is not intended to grant the appellate courts power to give advice on speculative matters. . . . [O]ur jurisdiction extends only to orders of the district court [that are] definitive, effective, and in a posture capable of affirmance or reversal."); *e.g.*, *Zulkowski v. Consol. Rail Corp.*, 852 F.2d 73, 76 (3d Cir. 1988) (refusing to review issue not ruled on by the district court). This Court should not presume the church plan

exemption is jurisdictional for purposes of ruling on Defendants' Petition merely because Defendants assume that it is.

B. The Motion to Dismiss Order is Not Jurisdictional and Not Controlling

The church plan exemption is not jurisdictional, and appeal is not warranted on that basis. This Court and the Supreme Court have warned against courts' "'less than meticulous'" descriptions of statutory provisions as "jurisdictional" "without explicitly considering whether the dismissal should be for lack of subject matter jurisdiction or for failure to state a claim." *Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F. 3d 462, 466-67 (3d Cir. 2011) (quoting *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 511 (2006)). This Court applies "a 'readily administrable bright line,' 'clearly states' rule to determine whether a statutory limitation" is jurisdictional. *Id.* at 467, 468 (quoting *Arbaugh*, 546 U.S. at 511, 515-16).

The ERISA provisions at issue fail that "'clearly states' rule." *Id.* ERISA contains an explicit jurisdictional provision in 29 U.S.C. § 1132(e) that neither includes nor makes reference to the exemption for church plans found in 29 U.S.C. § 1101(b)(2), or to the definition of church plan in § 1002(33). As in *Arbaugh*, § 1101(b)(2) "appears in a separate provision" from ERISA's jurisdictional provision and "does not speak in jurisdictional terms or in any way refer to the jurisdiction of the district court[]."*Arbaugh*, 546 U.S. at 515 (internal quotation marks omitted). Indeed, this Court's precedents dictate that "failure to prove the existence of an

employee benefit plan . . . does not deprive the district court of subject matter jurisdiction to enter a judgment on the merits." *Henglein v. Informal Plan for Plant Shutdown Benefits for Salaried Emps.*, 974 F.2d 391, 395 (3d Cir. 1992).

Defendants rely on *Koval v. Washington County Redevelopment Authority*, 574 F.3d 238 (3d Cir. 2009) in arguing that appeal is warranted. Def. Br. at 8. *Koval* did not involve the church plan exemption, instead it considered the "governmental plan" exemption in 29 U.S.C. § 1002(4)(b)(2). Neither the parties nor the court in *Koval* addressed whether the exemption was jurisdictional or merits-related. Accordingly, *Koval*'s disposition affirming the dismissal for lack of subject matter jurisdiction has no precedential effect. *Soyka v. Alldredge*, 481 F.2d 303, 306 (3d Cir. 1973) ("[q]uestions 'neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.'" (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925))). *Koval* fits precisely this Court's and the Supreme Court's definition of rulings that must be given "no precedential effect" on the issue of jurisdiction because it affirmed an order dismissing for lack of jurisdiction without considering whether the dismissal should be jurisdictional or merits-related. *Animal Science Products*, 654 F.3d at 466-67 (opinions dismissing "'for lack of jurisdiction . . . without explicitly considering whether the dismissal should be for lack of subject matter jurisdiction or failure to state a claim . . . should be accorded 'no precedential effect.'" (quoting

Arbaugh, 546 U.S. at 511)). Defendants' *ipse dixit* assertion that 29 U.S.C. §1102(b)(2) is jurisdictional is false and does not favor interlocutory review.

C. The March 19 Order is Not Controlling Because Plaintiff Alleges Alternative Bases for Holding the SPHS Plan is Not a Church Plan

Once Defendants' "jurisdictional" moniker is stripped away, the issue decided by the March 19 Order appears for what it is: a routine merits-related interlocutory ruling as to one of several alternative claims on a motion to dismiss. *See Rollins*, 2014 WL 1048637 at *2. That determination is no more "controlling" here than in "countless other denials of motions to dismiss that are routinely appealed in the regular course." *Id.*

A question of law is not controlling where the parties would continue litigating the same issue decided by the district court even after a successful appeal. *See, e.g.*, *Litgo New Jersey, Inc. v. Martin*, No. 06-2891, 2011 WL 1134676, at *4 (D.N.J. Mar. 25, 2011) (certification denied where "if the Court of Appeals reverses and remands any aspect of the case, the parties would need to re-litigate" the same issues decided by the district court). Because reversal of the Motion to Dismiss Order would merely return the parties to litigate SPHS's church plan status in the District Court under factually complex alternative theories, the Motion to Dismiss Order is not controlling. *See Zygmuntowicz v. Hospitality Invs., Inc.*, 828 F. Supp. 346, 354 (E.D. Pa. 1993) (refusing to certify order where other claims "involve[] a discrete set of issues that would be unaffected by" reversal).

D. Any Third-Party Interest Does Not Justify Immediate Appeal

SPHS takes up the mantle of third parties, arguing an appeal might be significant to them. Def. Br. at 16-18. The District Court properly rejected SPHS' claims of impact on third parties. Dkt. # 110 at 3 ("disagree[ing]" with Defendants' claims that ruling "created nationwide chaos."). Even those courts that consider precedential value deny the appeal when, as here, appeal would not materially advance the litigation. *E.g. In re Facebook, Inc. IPO Secs. & Derivative Litig.*, 986 F. Supp. 2d 524, 542-42 (S.D.N.Y. 2014) (denying certification despite precedential value); *S.E.C. v. Credit Bancorp, Ltd.*, 103 F. Supp. 2d 223, 227 (S.D.N.Y. 2000) (denying certification despite value for cases in the same circuit).

Defendants' claim that a decision on appeal would set precedent for other lawsuits ignores the dilatory impact of an appeal on *this* case. Because six of these seven cases are pending in other circuits, a ruling by the Third Circuit will not resolve the issue in any of these proceedings. To the extent Defendants argue that *any* appellate ruling would be relevant, Def. Br. at 17, the same issue that Defendants seek to appeal will be addressed by the Sixth Circuit. *Overall v. Ascension*, No. 13-11396, 2014 U.S. Dist. LEXIS 65418 (E.D. Mich. May 13, 2014), *appeal docketed*, No. 14-1735 (6th Cir. June 11, 2014). Nor would a successful interlocutory appeal have any immediate impact on *Chavies v. Catholic Health East*, 13-cv-1645 (E.D. Pa. filed Mar. 28 2013), because unlike SPHS, the

Chavies defendants claim their plan was established by a "church" and would be a church plan under the Motion to Dismiss Order's ruling. *See id.* Dkt. # 67.

Defendants speculate as to the impact of an appeal on lawsuits that have not been filed. Def. Br. at 17-18. Courts routinely reject arguments "that the ruling has precedential value for a large number of cases [that] have yet to be brought." *Primavera Familienstifung v. Askin,* 139 F. Supp. 2d 567, 573 (S.D.N.Y. 2001); *e.g. In re Facebook Inc.*, 986 F. Supp. 2d at 538 (no controlling question despite purported precedential value). Defendants cite to other medical facilities in New Jersey and in the country at large, Def. Br. at 17-18, but they fail to identify which (if any) of these have claimed the church plan exemption, how many would be eligible for the exemption according to the District Court's analysis, or how many would be ineligible for the exemption under Plaintiff's alternative theories. *See S.E.C. v. Gruss*, No. 11-2420, 2012 WL 3306166, at *3 (S.D.N.Y. Aug. 13, 2012) (certification denied because defendants failed to identify impacted cases).

III. NO SUBSTANTIAL GROUND EXISTS FOR ALLOWING A HOSPITAL HOLDING CORPORATION TO ESTABLISH A CHURCH PLAN

Interlocutory appeal requires a "*substantial* ground for difference of opinion." 28 U.S.C. § 1292(b) (emphasis added). A difference of opinion is not "substantial" unless there is "genuine doubt about the legal standard[.]"

Southeastern Penn. Transp. Auth v. AECOM USA, Inc., No. 10-117, 2010 WL 5023242, at *2 (E.D. Pa. Dec. 9, 2010) (internal quotation marks omitted).

The District Court's reading is compelled by the text of the statute. According to the text, churches and conventions or associations of churches are the *only* entities permitted to "establish" a church plan. 29 U.S.C.§ 1002(33)(A). Section A gives that authority to churches, and nothing in § 1002(33)(C) refers to any *other* type of entity that may "establish" a church plan. *See* Dkt. # 68 at 7-8. There is no need for immediate appellate review of the District Court's "common sense reading of the statute based on its plain text." *Id.* at 13. The Court of Appeals may dismiss Defendants' petition if it is persuaded by the District Court's analysis. *S.B.L. v. Evans*, 80 F.3d 307, 312 n.5 (8th Cir. 1996); *Burrell v. Bd. of Trustee of Ga. Military College*, 970 F.2d 785, 789 (11th Cir. 1992).

No appellate court in the country, nor any court in this Circuit, has ruled differently.[6] In *Rollins v. Dignity Health*, No. C13-1450, 2013 WL 6512682 (N.D. Cal. Dec. 12, 2013), the court reached the same conclusion. *Id.* at *5. Among the opinions issued before the Motion to Dismiss Order, only *one* addressed whether a

[6] Defendants admit that neither *Chronister v. Baptist Health*, 442 F.3d 648, 651-51 (8th Cir. 2006) nor *Lown v. Continental Casualty Co.*, 238 F.3d 543, 547-48 (4th Cir. 2000) "reach[ed] the merits of the issue." Def. Br. at 11 n.7.

non-church entity can establish a church plan;[7] others bypassed this issue and have no precedential value.[8] *See* Dkt. # 68 at 12-13; *Soyka*, 481 F.2d at 306. Similarly, IRS letters "may not be used or cited as precedent." 26 U.S.C. § 6110(k).[9] Although three district courts in other circuits have ruled differently, "allowing that consideration to qualify as a question for interlocutory appeal in every instance would severely undermine the general rule against piecemeal litigation[.]" *Adhikari v. Daoud & Partners*, No. 09-cv-1237, 2010 WL 744237, at *6 (S.D. Tex. March 1, 2010).

CONCLUSION

For the foregoing reasons, Defendants' Petition should be dismissed.

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[7] *Thorkelson v. Publishing House of Evnagelical Lutheran Church in Am.*, 764 F. Supp. 2d 1119 (D. Minn. 2011). *Thorkelson* also relied on previous decisions that failed to address the question. *See id.* at 1127-28 (relying on *Lown*, *Chronister*, and *Rinehart* opinions).

[8] *E.g. Hall v. USAble Life,* 774 F. Supp. 2d 953, 958-60 (E.D. Ark. 2011) (ignoring issue of whether a non-church may establish a church plan and relying on *Rinehart*); *Rinehart v. Life Ins. Co. of N. Am.*, No. C08-5486 RBL, 2009 U.S. Dist. LEXIS 32864, at *11-17 (W.D. Wash. April 14, 2009) (ignoring issue of whether plan must be established by a church); *Catholic Charities of Maine*, *Inc. v. City of Portland*, 304 F. Supp. 2d 77, 84 (D. Me. 2004) (assuming that non-churches can establish church plans without examining the issue); *Friend v. Ancilla Systems, Inc.*, 68 F. Supp. 2d 969, 972 (N.D. Ill. 1999) (same); *Humphrey v. Sisters of St. Francis Health Servs., Inc.*, 979 F. Supp. 781 (N.D. Ind. 1997) (ignoring issue and relying on non-precedential IRS opinion letter).

[9] *E.g. Blue Lake Rancheria v. United States*, 653 F.3d 1112, 1119 (9th Cir. 2011) (IRS private letter rulings cannot "influence [the court's] decision").

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Karen L. Handorf, hereby certify that I filed Plaintiff-Respondent's Answer in Opposition to 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) by filing it on the Third Circuit Court of Appeals CM/ECF system on October 9, 2014, which in turn served it upon to:

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AFFIDAVIT OF SERVICE

I, John W. Fust, hereby affirm that I served Plaintiff-Respondent's Answer in Opposition to 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) upon:

Bradley Heath Cohen
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by mailing two copies via Federal Express Mail on October 9, 2014.

Copies have been sent to the court on the same date as above for filing.

John W. Fust
Cohen Milstein Sellers & Toll PLLC

District of Columbia: SS
Subscribed and sworn to before me, in my presence,
this 9th day of October, 2014

Deborah Vanzego, Notary Public, D.C.
My commission expires January 1, 2019.