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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

STARLA ROLLINS on behalf of herself, individually, and on behalf of all others similarly situated,

Plaintiff,

v.

DIGNITY HEALTH, a California non-profit corporation, HERBERT J. VALLIER, an individual, the members of the Dignity Retirement Committee, and JOHN and JANE DOES, each an individual, 1-20,

Defendants.

No. 13-C-1450 TEH

DEFENDANTS' NOTICE OF MOTION AND MOTION FOR: (1) CERTIFICATION OF ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT PURSUANT TO 28 U.S.C. § 1292(b); AND (2) STAY PENDING APPELLATE PROCEEDINGS

Date: December 1, 2014
Time: 10:00 a.m.
Courtroom: 2
Judge: Hon. Thelton E. Henderson

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

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NOTICE OF MOTION AND MOTION FOR CERTIFICATION PURSUANT TO 28 U.S.C. § 1292(b) AND FOR STAY OF PROCEEDINGS

PLEASE TAKE NOTICE that on Monday, December 1, 2014 at 10:00 a.m. or as soon thereafter as counsel may be heard in the courtroom of the Honorable Thelton E. Henderson, United States District Judge for the Northern District of California, located at the United States Courthouse, 450 Golden Gate Avenue, San Francisco, California 94102, Defendants Dignity Health and Herbert J. Vallier (collectively "Defendants") will and hereby do move the Court pursuant to 28 U.S.C. § 1292(b) for an order certifying for interlocutory appeal the Court's July 22, 2014 Order granting Plaintiff's motion for partial summary judgment.

This motion is made on the ground that the Court's Order presents the following question: Does the church plan exemption set forth in ERISA § 3(33), 29 U.S.C. § 1002(33), apply to an employee benefit plan established by a non-profit organization that is not a church or an association of churches? This issue meets the criteria for certification under 28 U.S.C. § 1292(b) because it (1) "involves a controlling question of law," (2) "as to which there is substantial ground for difference of opinion" and (3) an "immediate appeal . . . may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

Defendants further will and hereby do move for an order staying proceedings in this action pending the Ninth Circuit's determination whether to grant review under section 1292(b) and the conclusion of any appellate proceedings.

This motion is based upon this Notice of Motion, the accompanying Memorandum of Points and Authorities, the Declarations of Harvey L. Rochman and Mary Connick, and such other evidence and further arguments as may be presented at the hearing on the matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

At the Case Management Conference on November 3, 2014, the Court invited the Defendants to bring a motion to certify for interlocutory appeal the Court's July 22, 2014 order granting Plaintiff's Motion for Partial Summary Judgment (the "Order") (ECF No. 175) and to stay proceedings. The Court further invited the parties to agree to an expedited briefing schedule.

(ECF No. 191).

The legal issue decided by this Court in the Order[1] – whether the church plan exemption set forth in ERISA § 3(33), 29 U.S.C. § 1002(33), applies to a benefit plan established by a non-profit organization that is not a church or an association of churches – is a controlling question of law that will have a massive impact on this litigation and on the legal obligations of hundreds of retirement plans long recognized as "church plans." Rollins does not dispute this, and said so in the most recent Updated Joint Case Management Statement (ECF No. 186 at 9:26-10:1 ("[I]n opposition to Defendants' prior motion to certify [] she did not contest whether the construction of the church plan statute is a controlling question of law.").) Indeed, since this Court ruled, the core statutory interpretation question has been recognized as an issue of national importance, and multiple federal courts have reached differing conclusions showing that there are substantial grounds for differences of opinion. Two other federal district courts have come to an interpretation of ERISA § 3(33) contrary to that of this Court. The one district court that did follow this Court's statutory interpretation subsequently determined that the issue should be certified for interlocutory appeal.

In addition, the Internal Revenue Service ("IRS") and the Pension Benefit Guaranty Corporation ("PBGC") have recently indicated that they will continue to rely on the IRS's long-standing contrary statutory interpretation. The PBGC has specifically said it will do so until there is final judicial resolution of the issue. This potentially sets up an impossible situation in which different branches of government apply inconsistent standards under ERISA for the operations of Defendants and other church-affiliated organizations. This result would be contrary to Congress's intent in enacting ERISA. As the Supreme Court has observed, Congress intended to ensure a "*uniform*" body of laws governing ERISA plans. *See Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990) (emphasis added).

Given the controlling nature of the threshold legal issue to this case and nationally, and

[1] The Order incorporated the Court's December 12, 2013 Order on Defendants' Motion to Dismiss, the Court relied upon the December Order, and the Court expressly prohibited Defendants from rearguing issues of law determined by the Court in the December Order. Accordingly, the December 12, 2013 Order is within the scope of the requested review. *See Yamaha Motor Corp., USA v. Calhoun*, 516 U.S. 199, 204-05 (1996) (section 1292(b) appellate jurisdiction encompasses all questions contained within the certified order).

the substantial grounds for differing opinions, the Court should certify the Order for interlocutory appeal and stay proceedings in this case pending the Ninth Circuit's determination whether to grant review under section 1292(b) and the conclusion of any appellate proceedings. A stay of proceedings is essential because Defendants, a non-profit health system and an individual, are currently obliged to respond to massive discovery demands involving review of tens of thousands of hard copy and electronic documents, to submit to at least ten percipient witness depositions, multiple Fed. R. Civ. P. 30(b)(6) depositions and expert discovery. In addition, Defendants would be forced to respond to motions for an injunction and class certification and to bring potentially dispositive motions of their own, all at the cost of hundreds of thousands (and likely millions) of dollars.[2] There is simply no question that the entire course of this case, including discovery, motion practice, and any trial, would be greatly impacted in the event that the Court's decision on the threshold legal issue is reversed. Moreover, the retirement benefits provided under the Dignity Health Retirement Plan (the "Plan") are safe and no participant has failed to receive a vested benefit.

* * *

The central legal issue of statutory interpretation decided by the Court, which is dispositive of Plaintiff Starla Rollins's ("Rollins") primary claim that the Plan is not exempt from ERISA, concerns the exemption from ERISA available to "church plans." Rollins contends, and this Court held in the Order, that the church plan exemption applies only to an employee benefit plan that is established by an actual church (or an association or convention of churches). Defendants respectfully submit that the Court's Order meets the criteria for certification for immediate appellate review under 28 U.S.C. § 1292(b), as it (1) "involves a controlling question of law" (2) "as to which there is substantial ground for difference of opinion," and (3) an "immediate appeal . . . may materially advance the ultimate termination of the litigation." 28

[2] Prior to the Case Management Conference on November 3, 2014 Rollins filed motions for class certification and an injunction. (ECF Nos. 180 and 183, both filed October 27, 2014.) These motions have been stayed pending resolution of this motion. (Minute Order, Nov. 4, 2014, ECF No. 191.) In the event that the case is not stayed pending resolution of proceedings in the Ninth Circuit, Defendants plan to file a motion challenging Rollins's minimum funding, breach of fiduciary duty, and related relief claims, as well as a motion challenging Rollins's continued failure to name and serve necessary individual parties to this case or the plan administrator. (Updated Joint Case Management Statement, Oct. 27, 2014, 4, 17-18, 32; ECF No. 186; Decl. of Harvey Rochman, ¶ 8.)

U.S.C. § 1292(b); *see also In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1981); *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 687-88 (9th Cir. 2011).

While Rollins has indicated an intent to oppose this motion, that opposition rings hollow. Rollins did not dispute that the Order involves a controlling question of law when she opposed certification in January 2014. *See* Updated Joint Case Management Statement, 9-10, Oct. 27, 2014, ECF No. 186 (Rollins "did not contest whether the construction of the church plan statute is a controlling question of law"). And, when Rollins's counsel brought nearly the same complaint in another action challenging the applicability of the church plan exemption to another religious hospital system's retirement plan, and lost on the same statutory interpretation question, her counsel quickly filed a motion seeking interlocutory review under section 1292(b). In that motion, when the shoe was on the other foot, Rollins's counsel argued that the very same statutory interpretation at issue here easily meets the three factors for interlocutory review. *See* Plaintiff's Motion to Certify Order Pursuant to 28 U.S.C. § 1292(b), and Request for a Stay of Proceedings Pending Appeal, filed October 3, 2014 in *Medina v. Catholic Health Initiatives*, No. 1:13-cv-01249-REB-KLM (D. Colo.) ("Plaintiff's *Medina* Motion"). Thus, Rollins's counsel has conceded that the legal issue presented here meets the requirements for certification.

That conclusion was correct. The Order meets all of the requirements for certification. First, whether ERISA's church plan exemption applies only to plans established by an actual church (or convention or association of churches) is a controlling question of law because a determination by the Ninth Circuit that this Court's statutory interpretation was incorrect would require reversal of any final judgment in this case. Any final judgment necessarily would be predicated on the statutory interpretation that forms the basis of the Order – that the church plan exemption does not and cannot apply to a plan that was not established by an actual church – which ruling will not change during further proceedings in this case. Rollins does not disagree. As noted, her lawyers sought to certify the identical question in *Medina*, when the Colorado district court came to a different determination of the same statutory interpretation issue.

A reversal on the controlling issue also would substantially impact and possibly eliminate Rollins's ability to prove most of her theories of liability against Defendants, including breach of

fiduciary duty and claims for statutory damages, and would necessarily take the case in a completely different direction. For instance, a ruling by the Ninth Circuit that the church plan exemption could apply to the Plan would, after reversal, place at issue the applicable law and facts regarding the association between the Catholic Church and Dignity Health and whether Dignity Health is sufficiently associated with the Church for the Plan to be a church plan. However, this Court will not be presented with that issue unless and until there is reversal of the statutory interpretation in the Order. Moreover, this Court might never even get to that issue as it could well determine that it is not appropriate for the Court to sit in judgment of whether Dignity Health was insufficiently "associated" with the Church for purposes of the exemption.

As noted above, the IRS and the PBGC, two of the federal agencies charged with interpreting and applying ERISA, have indicated, in the wake of the recent spate of litigation, that they will continue to take the position that the ERISA exemption includes church-affiliated hospital system plans. The IRS recently issued another Private Letter Ruling in which it continued to apply its long-standing interpretation of ERISA's church plan exemption, which is contrary to this Court's statutory interpretation. The PBGC has also said, with specific reference to this Court's ruling, that it will not change its policy of relying on IRS rulings unless and until the question is finally resolved at the appellate level. That regulatory position – binding on plans – leaves this Plan and others in an untenable position as to how to conduct plan operations in the meantime. This is yet another reason the issue is "controlling" for purposes of the section 1292(b) analysis.

Second, there are substantial grounds for difference of opinion on the controlling question. This Court, and one other district court (which subsequently certified its decision for appellate review), have concluded that only a church can establish a church plan. Other courts – including the court in *Overall v. Ascension Health et al.*, Case No. 2:13-cv-11396 (E.D. Mich. May 9, 2014), *appeal pending*, Case No. 14-1735 (6th Cir.), and at least two other district courts within the Ninth Circuit – have reached the opposite conclusion, and have found that an entity affiliated with a church, including a hospital, can establish a church plan. And, as noted, the IRS and the PBGC still take the position that the church plan exemption applies to plans like that at issue here.

Even without the inconsistent decisions interpreting ERISA – a statute that Congress intended to be applied uniformly nationwide – the impact of the issue is widespread. Hundreds, if not thousands,[3] of plans established by civil corporations associated with a religion have been maintained as church plans with the express approval of the IRS through private letter rulings.

Third, an immediate appeal will materially advance the ultimate termination of the litigation. If the parties must wait until after trial to appeal the threshold statutory interpretation issue addressed in the Order, the parties will be forced to undertake substantial, complex, and extremely expensive discovery, expert reports, motion practice, and very likely a trial on remaining issues. The motions include Rollins's pending motion for class certification, as well as her pending motion for an injunction directing the Plan – which has always been understood to be a church plan, has been administered accordingly, is considered a church plan by the IRS, and would be considered a church plan in at least several other Circuits – to comply with ERISA, which involves numerous subsidiary determinations about the scope of and time period for any required compliance. These are complex, fact-intensive issues that will require the expenditure of significant resources by the parties and the Court alike. If certification is granted and the Ninth Circuit reverses this Court, these issues will go away or be substantially narrowed. The discovery may not need to be conducted or will be minimized and the motions may not be necessary.

Certification therefore should be granted, and a stay of proceedings in this Court issued until the Ninth Circuit has acted on Defendants' request for interlocutory review and concluded any further proceedings.

II. FACTUAL AND PROCEDURAL BACKGROUND

Rollins was employed at a Dignity Health hospital, and is a participant in the Plan. The Plan was designed to be a "church plan" exempt from the requirements of ERISA. *See* 29 U.S.C. § 1002(33). Dignity Health sought and obtained four separate private letter rulings ("PLRs") from the IRS, over a 20-year period, confirming that the Plan (or plans merged into the Plan) is a

[3] While defendants have not determined the exact number of church plans established by church ministries at the time of filing of this motion, a single organization that serves Catholic health ministries, the Catholic Health Association of the United States, alone has more than 2,000 members. *See* Catholic Health Association of the United States, About Us, *available at* http://www.chausa.org/about/about (last visited November 9, 2014).

church plan and is not subject to the requirements of ERISA. As a result, Dignity Health understood that the Plan is a church plan and the Plan Administrator, the Dignity Health retirement committee (now known as the Dignity Health Retirement Plans Sub-Committee) has maintained the Plan as a church plan. Likewise, the Plan did not obtain pension insurance from the PBGC and did not otherwise seek to comply with the myriad and complex requirements of ERISA. Indeed, the PBGC acknowledged that the Plan is not covered by the federal pension insurance system and, in 1995, entered into a settlement with the Plan under which the PBGC returned to Dignity Health the pension insurance premiums that it had previously paid. Dignity Health agreed that in the future it would not make an election under 26 U.S.C. § 410(d) to treat the Plan as an ERISA plan eligible for pension insurance. As a result of these governmental rulings and actions, the Plan was administered as an exempt "church plan." In 2012, following a reorganization of the former Catholic Healthcare West and a name change to Dignity Health, the Plan filed another request for a PLR to confirm its church plan status. That request is pending.

Rollins filed this putative class action in April 2013, primarily claiming that the Plan does not qualify for ERISA's church plan exemption because only a church (or association or convention of churches) can establish an exempt church plan. Compl. ¶¶ 2, 33-34, 70-75.

On December 12, 2013, this Court denied Defendants' motion to dismiss, ruling that the Plan is not a church plan and is subject to ERISA. (ECF No. 84.) The Court interpreted ERISA's church plan exemption to apply only to plans established by a church. (*Id*. at 9.) The Court later denied Defendants' motion for section 1292(b) certification on March 17, 2014. (ECF No. 102.)

On July 22, 2014, the Court denied Defendants' motion for partial summary judgment and granted Rollins's motion for partial summary judgment. (ECF No. 175.) Citing its prior ruling, the Court again held that the church plan exemption only applies to plans established by a church: "[T]he Court . . . holds once more, that pursuant to the ERISA statute, mere association with a church does not give an entity the authority to establish a church plan." (*Id*. at 13.)

On November 3, 2014, the Court indicated at a Case Management Conference that Defendants should file this Motion to Certify the Order under section 1292(b) and stay proceedings in the case. (Minute Order, Nov. 4, 2014, ECF No. 191.) The Court also invited an

expedited briefing schedule.

At the Case Management Conference, in an attempt to persuade the Court not to stay the case, Rollins's counsel stated that discovery was almost "complete." That is not accurate. As described in the accompanying Declaration of Harvey L. Rochman and in Section VII, below, Rollins has insisted upon very extensive and expensive discovery, which is only in the early stages.

Finally, as detailed in the Declaration of Mary Connick, Dignity Health's Senior Vice President of Finance and Corporate Controller, the Plan has approximately $3.6 billion in assets and there is no danger that the Plan will be unable to pay benefits to Plan participants when due, so there is no prejudice from a stay of proceedings.

III. LEGAL STANDARD FOR SECTION 1292(B) CERTIFICATION

As noted, section 1292(b) permits a district court to certify an order for interlocutory review where the order involves (1) a "controlling question of law," (2) as to which there are "substantial grounds for difference of opinion," and (3) an immediate appeal may "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *see also In re Cement*, 673 F.2d at 1026. As demonstrated below, the July 22, 2014 Order (ECF No. 175) (the "Order") satisfies each requirement.

IV. THE ORDER INVOLVES A CONTROLLING QUESTION OF LAW

First, the Order involves interpretation and application of a controlling issue of federal law: whether ERISA's church plan exemption applies only to plans that are established by a church itself. This legal issue is controlling as to Rollins's central claim that Defendants have failed to operate the Plan in accordance with ERISA and thereby violated numerous requirements of ERISA.

"[A]ll that must be shown in order for a question to be 'controlling' is that resolution of the issue on appeal could materially affect the outcome of the litigation in district court." *In re Cement*, 673 F.2d at 1026. An order may involve a controlling question of law even if "reversal of the district court's order [will] not terminate the litigation." *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319 (9th Cir. 1996). However, "[t]here is no doubt that a question is 'controlling' if its

incorrect disposition would require reversal of a final judgment, either for further proceedings or for a dismissal . . . ." 16 Wright & Miller, Fed. Prac. & Proc. Juris. § 3930 (3d ed.). And a controlling question of law is one where "allowing an interlocutory appeal would avoid protracted and expensive litigation." *In re Cement*, 673 F.2d at 1026; *see also Su v. Siemens Indus., Inc.*, No. 12-cv-03743-JST, 2014 WL 2600539, at *2 (N.D. Cal. June 10, 2014) ("'A steadily growing number of decisions' have found 'that a question is controlling, even though its disposition might not lead to reversal on appeal, if interlocutory reversal might save time for the district court, and time and expense for the litigants.'") (quoting 16 Wright & Miller, Fed. Prac. & Proc. Juris. § 3930 (3d ed.)).

The question of whether only a church can establish a church plan is "controlling" in this case, as it is a threshold pure legal issue of statutory interpretation, the incorrect disposition of which would require reversal. *National Credit Union Admin. Bd. v. Goldman Sachs & Co.*, CV 11-6521-GW (JEMx), 2013 U.S. Dist. LEXIS 181149, at *21 (C.D. Cal. July 11, 2013) (holding that a controlling question of law exists where the order "deals with a question of statutory interpretation . . . [that] the Ninth Circuit could deal with . . . expeditiously"); 16 Wright & Miller, Fed. Prac. & Proc. Juris. § 3930 (3d ed.) (an issue is controlling if incorrect disposition would lead to reversal). In particular, questions of interpretation of provisions of ERISA may be controlling issues. *See Harris Trust & Savs. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 244 (2000) (noting that ERISA statutory interpretation question before the Court was the subject of the district court and appellate court's grant of interlocutory review under section 1292(b)).

A reversal by the Ninth Circuit on the interpretation of the church plan exemption would control the outcome of this case and require reversal of the Order and any final judgment, which would necessarily be based upon the statutory interpretation that underlies the Order for at least the following reasons:

First, a reversal would resolve against Rollins the central legal issue of whether the Plan can qualify as a "church plan," and whether Dignity Health could be entitled to the exemption.

Second, a reversal by the Ninth Circuit on the statutory interpretation issue would result in the reversal of the Court's partial summary judgment awarding declaratory relief in this case,

requiring Rollins to litigate completely different theories in any further litigation.

Third, further litigation, if any, following any reversal will likely be limited to the post-2012 period as to whether Dignity Health's current, post-restructuring status, as opposed to its pre-restructuring status under the name Catholic Healthcare West, meets the requirements for association with or control by a church. That is because the law is well-settled as to what it means for an entity to be associated with or controlled by a church, and there should be little, if any, room for Rollins to dispute that, at least prior to the reorganization, Dignity Health was associated with and/or controlled by a church.[4] Moreover, this Court will never reach those issues as long as the case remains in its present posture because the Court has already decided in the Order that the Plan was never a church plan.

Fourth, as the Court is aware, pending before the IRS is the Plan's request for a PLR on the Plan's church plan status after the 2012 reorganization. Even if the IRS rules that the Plan no longer enjoys church plan status, the ERISA statute provides that a plan improperly classified as a church plan will have time to correct the deficiency or come into compliance with the church plan exemption requirements, and if it does so timely, it will not be liable for violations of ERISA. 29 U.S.C. § 1002(33)(D). Under this statute, if the IRS finds Dignity Health out of compliance with the church plan exemption, Dignity Health must have the opportunity to attempt to come into compliance, which would likely render further litigation on the issue of current compliance unripe and unnecessary.

Fifth, this Court may conclude that it cannot adjudicate Rollins's allegations that the Plan is not "associated with" the church. Any argument by Rollins that there is an insufficient connection between the doctrines and tenets of the Catholic Church and Dignity Health is an argument about "religious orthodoxy" that "is prohibited by the Constitution." *Overall v. Ascension*, No. 2:13-cv-11396, 2014 WL 2448492, at *14 (E.D. Mich. May 9, 2014). The First Amendment creates a protected zone for churches to decide these issues of religious doctrine free

[4] While this evidence and argument have not yet been presented to the Court, it is virtually beyond dispute that at least prior to the 2012 reorganization, Catholic Healthcare West, the Plan sponsor, was controlled by and/or associated with the Catholic Church. *See, e.g, Overall v Ascension*, No. 2:13-cv-11396, 2014 WL 2448492, at *11-*14 (E.D. Mich. May 9, 2014), *appeal pending*, Case No. 14-1735 (6th Cir.); *Okerman v. Life Ins. of N. Am.*, No. CIV-S-00-0186, 2001 WL 36203082, at *3-*4 (E.D. Cal. Dec. 24, 2001).

from government intrusion. This protected zone includes: (1) a church's law and doctrine; (2) a church's religious mission; and (3) a church's policy, administration, and community." *Id.* (citations omitted). Rollins's contentions that Dignity Health is not associated with the church "are grounded in theology"; "[t]he First Amendment 'plainly forbids courts from inquiring into this departure-from-doctrine claim." *Id.*

Finally, this Court previously noted that Rollins's alternative constitutional challenge to the church plan exemption would remain to be litigated if the Ninth Circuit reversed. (ECF No. 102 at 3:14-16.) That might be the case, but the issues to be decided with regard to that claim are wholly distinct from how the church plan exemption applies and whether it applies to the Plan. The need to litigate the constitutional challenge does not mean that the statutory interpretation issue on the exemption is not "controlling" under the Ninth Circuit's section 1292(b) jurisprudence. *See, e.g., In re Cement*, 673 F.2d at 1026; *Kuehner*, 84 F.3d at 319; *Kaplan v. Saint Peter's Healthcare System*, No. 3:13-cv-2941, 2014 WL 4678059 at *4 (D.N.J. Sept. 19, 2014) (granting motion for certification of church plan exemption ruling, stating that "if the Court is reversed, deciding the Establishment Clause issue would not require discovery because it is a pure question of law"). Further, Rollins has conceded that the Court's interpretation of the church plan exemption "has obviated the need" to litigate the constitutional challenge. (ECF 186 at 9:2-5.) *See also Overall*, 2014 WL 2448492 at *15 (plaintiff failed to allege injury-in-fact to challenge the constitutionality of the church plan exemption where she did not allege that she would have a better funded pension had the church plan exemption been struck down). But if the Ninth Circuit reverses and holds that the church plan exemption can apply to the Plan, Rollins may litigate the constitutional claim after all – demonstrating that the resolution of the central issue of the applicability of the church plan exemption truly controls the litigation.

Regardless of the position Rollins may take in response to this motion, she effectively conceded in January 2014 that the question was controlling (ECF No. 87), and only last month her counsel argued to a district court in Colorado that the *identical question* of whether only a church or association of churches may establish a church plan is a controlling issue of law in litigation that is legally identical to this case. *See* Plaintiff's *Medina* Motion at 8 (framing the

"controlling issue" as "must a pension plan claiming that it is a 'church plan' exempt from ERISA be established by a church"). Rollins's counsel explained that this key issue is a purely legal issue, the resolution of which could substantially narrow the issues for trial:

> If at the conclusion of this litigation the Tenth Circuit agrees with Plaintiff's interpretation of 29 U.S.C. § 1002(33)(A), the Court and the parties will in the meantime have been required to devote substantial additional time and financial outlays to discovery and rulings on Plaintiff's alternative arguments concerning why the CHI Plan is not a church plan. Unlike the statutory interpretation issue presented here, these alternative arguments – including whether the Plan is maintained by an organization meeting the statutory definition of "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 or welfare benefits, or both," 29 U.S.C. § 1002(33)(C)(i), and whether CHI is itself "controlled by or associated with" a church within the meaning of the statute, 29 U.S.C. § 1002(33)(C)(ii)(II) – are heavily fact intensive. As a result, granting Plaintiff's Motion to Certify Order so that the narrow legal issue can be resolved now will substantially affect the course of the remaining litigation and conserve resources of both the district court and the parties.

Plaintiff's *Medina* Motion at 9. While Rollins's counsel framed the issue in terms of why it was important to obtain interlocutory review of a ruling that the church plan exemption did apply to a church-affiliated hospital, the same considerations establish that the issue is controlling no matter which side raises it. *See also* Updated Joint Case Management Statement, ECF No. 186 at 9-10 (Rollins's counsel "did not contest whether the construction of the church plan statute is a controlling question of law").

The above reasons demonstrate that the Order presents a controlling issue of law. But in addition, the need for interlocutory appeal under section 1292(b) is even more compelling where, as here, the issue transcends this particular action. *See Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1990), *vacated and remanded on other grounds*, 937 F.2d 44 (2d Cir. 1991); *see also AlMaqaleh v. Gates*, 620 F. Supp. 2d 51, 55 (D.D.C. 2009) ("[interlocutory appeal is warranted where the jurisdictional determination will impact numerous cases."); *In re Methyl Tertiary Butyl Ether Prods. Liability Litig.*, 399 F. Supp. 2d 320, 324 (S.D.N.Y. 2005) (stating that courts consider, in part, whether resolution of issue will impact other cases); *Krangel v. Crown*, 791 F. Supp. 1436, 1449 (S.D. Cal. 1992) ("Certification for appeal may also materially advance the conclusion of other cases involving this same legal issue.").

As discussed in Part V, *infra*, there is substantial ongoing judicial activity on this precise

issue in district courts in various circuits, as well as a pending appeal in the Sixth Circuit and a pending petition for certification before the Third Circuit. This key issue of the interpretation and application of ERISA will – and must – be resolved at the appellate level in order to ensure uniform interpretation of ERISA. As the Supreme Court has observed, in enacting ERISA, Congress intended to ensure a "*uniform*" body of laws governing ERISA plans. *See Ingersoll-Rand*, 498 U.S. at 142 (ERISA's preemption provision "was intended to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government. Otherwise, the inefficiencies created could work to the detriment of plan beneficiaries."). At present, many church-affiliated plans across the country are caught between the conflicting case law and the regulatory agencies. The Ninth Circuit should have an opportunity to examine this issue sooner rather than later so that consistency among the circuits may be developed or, if not, the issue may be examined sooner by the Supreme Court.

V. THERE IS SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION ON THE CONTROLLING LEGAL ISSUE

The second factor for 1292(b) certification also is met. In considering this factor:

> courts must examine to what extent the controlling law is unclear. Courts traditionally will find that a substantial ground for difference of opinion exists where "the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented."

Couch v. Telescope, Inc., 611 F.3d 629, 633 (9th Cir. 2010) (quoting 3 Federal Procedure, Lawyers Edition § 3:212 (2010)). The matter must "'involve[] an issue over which reasonable judges might differ'" such that the "'uncertainty provides a credible basis for a difference of opinion' on the issue." *Reese*, 643 F.3d at 688. Thus:

> A substantial ground for difference of opinion exists where reasonable jurists might disagree on an issue's resolution, not merely where they have already disagreed. Stated another way, when novel legal issues are presented, on which fair-minded jurists might reach contradictory conclusions, a novel issue may be certified for interlocutory appeal without first awaiting development of contradictory precedent.

Id. A split among various district courts in interpretation of a statute creates a substantial ground for difference of opinion. *See AsIs Internet Services v. Active Response Group*, No. 07-CV-6211 TEH, 2008 WL 4279695, at *3 (N.D. Cal. Sept. 16, 2008); *Muniz v. Sabol*, 517 F.3d 29, 32 (1st Cir. 2008) (split in district courts); *Fasano v. Fed. Reserve Bank of New York*, 457 F.3d 274, 279 (3rd Cir. 2006) (split in courts around the country). This split plainly exists here. District courts within the Ninth Circuit disagree; district and appellate courts across the country are split; and the relevant regulatory agencies are at odds with this Court's view.

In its December 12, 2013 Order initially interpreting the statute, this Court noted that "the position it takes here runs contrary to several cases outside this circuit that have considered the church plan exemption and have held that it applies to plans established by church-affiliated entities. . . . [T]he Court notes that the contrary cases themselves differ in their interpretations of the statutory text." ECF No. 84 at 9; *see also AsIs Internet Servs.*, 2008 WL 4279695, at *3 (finding "substantial ground for difference of opinion" existed where the court's order "made patently clear [that] this Court departed from the reasoning of other district court opinions").

Within the Ninth Circuit, the following decisions conflict with this Court's ruling:

- In *Okerman*, *supra*, the Eastern District of California found that a disability plan established by an affiliate of Dignity Health was a church plan exempt from ERISA, based on various factors as to whether a non-church organization qualifies as a church plan, including whether:

> a religious order or congregation controls the entities sponsoring the plan; the operation of the organization furthers the goals of the religious order; the entity and/or the religious organization are listed in an official religious directory; the organization is a not-for-profit tax-exempt entity pursuant to § 501 of the Internal Revenue Code; and members of the religious order sit on the board of directors of the organization.

Okerman, 2001 WL 36203082, at *3 (citation and internal quotation marks omitted).

- In *Rinehart* v. *Life Ins. Co. of N. Am.,* No. C08-5486 RBL, 2009 WL 995715, at *2 (W.D. Wash. Apr. 14, 2009), the district court for the Western District of Washington ruled that a disability plan covering employees of Providence St. Peters Hospital was a church plan; "[t]he term 'church plan' is somewhat misleading because even a plan established by a corporation

controlled by or associated with a church can also qualify as a church plan") (emphasis in original).

Outside of the Ninth Circuit, courts across the country recently have reached different conclusions as well:

- In *Overall*, *supra*, the Eastern District of Michigan dismissed the complaint after rejecting the plaintiff's argument that only a church could establish that hospital system's retirement plan. The court ruled:

> Congress added section (C) in 1980 which plainly broadened the exemption to include organizations controlled by or associated with churches. In the section, Congress provided that "church plans" include the plans that qualify under Section (A) **and** those that qualify under Section (C)(I). Thus, a plan of the Archdiocese of Detroit can be a "church plan" under section (A) since it is established by the Roman Catholic Church. So too can a plan established by another organization provided that organization is "controlled by or associated with a church."

Overall, 2014 WL 2448492, at *11 (emphasis in original). The court went on to find that the plan at issue, operated for employees of a healthcare system affiliated with the Catholic Church, was a church plan. *Id.* at *11-*14. The court dismissed the constitutional challenge to the church plan exemption because the plaintiff had alleged no injury and lacked standing. *Id.* at *15. The plaintiff appealed as of right to the Sixth Circuit, where the matter is pending.

- In *Medina*, a district court in Colorado issued a similar ruling. The Magistrate Judge had agreed with this Court that the church plan exemption applied only to plans established by a church; but the court rejected the recommendation of the Magistrate Judge that the court grant the plaintiff's motion for partial summary judgment on her claim for declaratory relief that her plan was not a church plan. The court found that:

> [S]ubsection (C) clearly evinces an intent to broaden the availability of the [church plan] exemption such that churches themselves need not be involved directly in the administration of their employee benefit plans in order to qualify.

Id. at *3. Thereafter, the *plaintiff* in *Medina* (represented by the same lawyers that represent Rollins) moved to certify the same legal issue for appellate review, arguing that the issue met the requirements for certification under section 1292(b). The *Medina* court denied certification. While the court concluded that interlocutory appeal would not materially advance the litigation,

one of its reasons was that the matter was set for trial very soon and that the appellate court likely would not resolve the case more expeditiously.

- In *Kaplan v. Saint Peter's Healthcare System*, No. 3:13-cv-2941, 2014 WL 1284854 (D.N.J. March 31, 2014), a district court in New Jersey ruled, like this Court, that a plan is not a church plan unless it was established by a church:

> [A]lthough 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.

Id. at *5 (emphasis in original). However, on September 19, 2014, the district court granted the defendant's motion to certify the issue for appeal under section 1292(b), finding that each of the criteria is met. *Kaplan v. Saint Peter's Healthcare System*, No. 3:13-cv-2941, 2014 WL 4678059 (D.N.J. Sept, 19, 2014). In certifying its ruling for appellate review, the *Kaplan* court considered, but declined to follow, this Court's March 17, 2014 ruling denying Dignity Health's motion for certification. The petition to the Third Circuit to grant interlocutory review of *Kaplan* is pending.[5]

Further, the Fourth and Eighth Circuits have held that a non-church, civil law corporation can establish a church plan. *See*, *e.g.*, *Chronister v. Baptist Health*, 442 F.3d 648, 652 (8th Cir. 2006) (interpreting church plan exemption to apply to plans established by a hospital associated with a church; further finding absence of association on the facts of the case); *Lown v. Cont'l Cas. Co.*, 238 F.3d 543, 547-48 (4th Cir. 2001) (same); *see also Thorkelson v. Publ'g House of Evangelical Lutheran Church in Am.*, 764 F. Supp. 2d 1119, 1128 (D. Minn. 2011) ("The Court has thoroughly reviewed the applicable law and the arguments of counsel, and finds no support for Plaintiffs' position that a single employer benefit plan, established and maintained by an organization controlled by or associated with a church, is not a church plan as defined by ERISA.").[6]

[5] *See also Chavies v. Catholic Health East*, No. 13-cv-01645 (E.D. Pa.) (March 28, 2014) (denying the defendant's motion to dismiss without prejudice, and ordering the parties to engage in jurisdictional discovery as to whether the hospital system was a church).

[6] *See also Hall v. USAble Life*, 774 F. Supp. 2d 953, 960-61 (E.D. Ark. 2011) (holding that a disability plan established by a hospital is a church plan); *Torres v. Bella Vista Hosp., Inc.*, 639 F. Supp. 2d 188, 194 (D.P.R. 2009)

Finally, the relevant regulators have taken a view at odds with this Court. The IRS has consistently issued PLRs to various plans, including (four times) to the Plan, taking the position that the church plan exemption does not require that the plan have been established by a church.[7] Even now, the IRS continues to stay its course. In IRS Private Letter Ruling, U.I.L 414-08-00 (PLR 201442072), issued on October 17, 2014 (dated July 21, 2014), the IRS found that Plan X was a church plan notwithstanding that Plan X was established by Entity E, and not Church C.

The PBGC, which insures ERISA plans, has said, notwithstanding this Court's ruling that only a church may establish a church plan, that the PBGC will continue to rely on IRS letter rulings to determine church plan status. In a recent ABA question-and-answer exchange with ERISA practitioners, the PBGC said it that "will continue to follow" its policy of relying on IRS private letter rulings to establish church plan status "unless there is a final court order finding a plan not be a church plan."[8]

And the Department of Labor has taken the position that the church plan exemption applies to plans that may not have been established by a church. *See Okerman*, 2001 WL 36203082, at *4 ("The Department of Labor, the agency responsible for ERISA, applies a 'chain of control' analysis when determining if a plan is a church plan . . .").[9]

In summary, the controversy over this Court's interpretation of the ERISA church plan exemption has – since the Court ruled – reached a fevered pitch. The "substantial grounds for difference of opinion" factor is met.

(holding that plan established by a hospital is a church plan); *Welsh v. Ascension Health,* Case No. 3:08cv348/MCR/EMT, 2009 WL 1444431, at *3-*7 (N.D. Fla. May 21, 2009) (holding that a plan established by a hospital is a church plan); *Coleman* v. *Pikeville United Methodist Hosp., Inc.,* CIV.A. 05-32-EBA, 2008 WL 819038, at *3 (E.D. Ky. Mar. 25, 2008) (acknowledging that non-church entities may establish church plans); *Catholic Charities of Maine, Inc.* v. *City of Portland,* 304 F. Supp. 2d 77, 84-85 (D. Me. 2004) (holding that a non-church entity can establish a church plan); *Friend v. Ancilla Sys. Inc.,* 68 F. Supp. 2d 969, 972 (N.D. Ill. 1999) (holding that an executive retirement plan established by a not-for-profit corporation that provides support services to health care providers is a church plan); *Humphrey v. Sisters of St. Francis Health Servs., Inc., 979* F. Supp. 781, 785 (N.D. Ind. 1997) (holding that hospital's pension plan was a church plan).

[7] *See, e.g.,* IRS PLRs 2013345042, 201322051, 200813044, 200514025, 200025061, 200023057, 9717039, 9525061, 9409042.

[8] *See* http://www.americanbar.org/content/dam/aba/events/employee_benefits/2014_pbgc_qa.authcheckdam.pdf at page 4.

[9] *See, e.g.,* DOL Opinion Letters 95-30A; 95-13A; 95-10A; 95-09A; 95-08A; 95-07A; 95-02A; 94-36A; 94-34A; 94-18A; 94-16A; 94-15A; 94-13A; 94-12A; 94-11A; 94-10A; 94-09A; 94-08A; 94-06A; 94-05A; 94-04A; 93-07A; 93-03A; 93-01A; 92-09A ; 91-46A ; 91-41A; 91-22A; 91-14A; 91-13A; 91-12A; 91-11A; 91-10A; 90-13A; 90-12A.

VI. APPELLATE RESOLUTION WILL MATERIALLY ADVANCE THE TERMINATION OF THIS LITIGATION.

Finally, appellate resolution of this question in favor of Defendants will materially advance the ultimate termination of the litigation because it will be dispositive of at least substantial aspects of the principal claims herein. It may not terminate the litigation completely, but "neither § 1292(b)'s literal text nor controlling precedent requires that the interlocutory appeal have a final, dispositive effect on the litigation." *Reese*, 643 F.3d at 688. Instead, section 1292(b) provides "a means by which, in appropriate circumstances and to further economy of litigation, full appellate review of important questions can be had prior to final judgment." *Arthur Young & Co. v. U.S. Dist. Ct.*, 549 F.2d 686, 697 (9th Cir. 1977); *Umatilla Water Quality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1323 (D. Or. 1997) ("Immediate appeal of this order may materially advance the termination of this litigation because the parties are likely to appeal this case in any event and guidance from the Ninth Circuit now will greatly help to focus and limit the plethora of legal issues and factual arguments that the parties will otherwise have to advance . . ."). Certification properly prevents "needless expense and delay." *Kuehner*, 84 F.3d at 319 ("expense and delay" of district court proceedings are factors rendering a question of law "controlling"). As Rollins's counsel has elsewhere argued, appellate resolution would materially advance the termination of the litigation because, while appellate reversal would not terminate the suit or render trial unnecessary, "it would substantially narrow the remaining issues to be litigated and would thus eliminate complex issues and make discovery easier and less costly." Plaintiff's *Medina* Motion at 12.

There is overlap between the considerations impacting the "controlling issue" factor and the "materially advance" factor. "The 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. . . . The choice to emphasize the 'controlling question of law' requirement or to emphasize instead the 'materially advance' requirement often seems a matter of chance. Direct focus on the seemingly pragmatic requirement that immediate appeal may materially advance the outcome may be more helpful, however, than wrestling with the more

abstract 'controlling question of law' requirement." 16 Wright & Miller, Fed. Prac. & Proc. § 3930 (3d ed.)

For many of the same reasons discussed in Part IV, the scope of this litigation stands to be drastically impacted by a reversal on interlocutory review and thus may materially advance the termination of the action. Among other things, the motion for injunction could well be mooted, doing away with the need to litigate the breadth and scope of the injunction. Likewise, there may be no need to litigate complex issues of breach of fiduciary duty, minimum funding and monetary damages. And even if the constitutional challenge were to proceed, no class certification proceedings would be necessary, as a determination of whether the church plan exemption does or does not violate the Establishment Clause would apply the same way to all members of the proposed class. *See Perez-Funez v. District Director, I.N.S.*, 611 F. Supp. 990, 998-99 (C.D. Cal. 1984) (noting that a challenge to the constitutionality of an INS policy need not be certified as a class action, but finding certification necessary in that case because of potential mootness issues).[10]

For these reasons, an immediate appeal of the key threshold issue addressed by the Order may materially advance the ultimate termination of the litigation. *See, e.g.*, *Hawaii ex. rel. Louie v. JP Morgan Chase & Co.*, 921 F. Supp. 2d 1059, 1068 (D. Haw. 2013) ("Were this Court to deny the Motion, and the case proceed to summary judgment or trial, the district court and the parties will have unnecessarily wasted significant time and resources if the Ninth Circuit ultimately determined on appeal that federal jurisdiction did not exist."); *Securities and Exchange Commission v. Mercury Interactive, LLC*, Case No. 5:07-cv-02822-JF, 2011 WL 1335733, at *3 (N.D. Cal. Apr. 7, 2011) (holding that interlocutory review of statutory interpretation issue would "materially advance" the litigation because "[a] final resolution as [to] the scope of the statute would have a significant effect on the trial of this action, and perhaps upon the parties' efforts to

[10] *See also* 7AA Wright & Miller, Fed. Prac. & Proc. Civ. § 1785.2 (explaining that a factor "courts have considered in actions brought under Rule 23(b)(2) for injunctive or declaratory relief is whether there is a need for class relief. . . . [T]he vast majority of courts have not felt . . . constrained [not to consider that factor], and the need requirement now seems well-accepted as an appropriate consideration when certifying a Rule 23(b)(2) action. . . . In most cases utilizing the requirement, the courts simply refuse class certification stating that a class action is not necessary inasmuch as all the class members will benefit from any injunction issued on behalf of a single plaintiff.") (footnotes omitted).

reach settlement").

VII. A STAY PENDING RESOLUTION OF THIS MATTER BY THE NINTH CIRCUIT IS WARRANTED.

The Court should stay proceedings pending resolution by the Ninth Circuit of Defendants' request for interlocutory review and any interlocutory appeal proceedings. The Court has authority to stay proceedings pending an interlocutory appeal both under 28 U.S.C. § 1292(b), *see Watson v. Yolo County Flood Control and Water Conservation Dist.*, 2007 WL 4107539, *2 (E.D. Cal. November 16, 2007), and based upon the Court's inherent authority to manage its docket. *AsIs Internet Servs. v. Active Response Grp*., No. 07-CV-6211 TEH, 2008 WL 427965, at *3 (N.D. Cal. Sept. 16, 2008). "When considering a stay pending appeal pursuant to § 1292(b), the Court has broad discretion to decide whether a stay is appropriate to 'promote economy of time and effort for itself, for counsel, and for litigants.'" *Id*. at *3-4 (quoting *Filtrol Corp. v. Kelleher*, 467 F.2d 242, 244 (9th Cir. 1972)); *see also Ritz Camera & Image, LLC v. Sandisk Corp.*, 2011 WL 3957257, *3 (N.D. Cal. September 7, 2011) (same); *Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1465 (9th Cir. 1983) ("A trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case.").

Here, a stay pending resolution of the interlocutory appeal clearly would promote economy of time and effort for both the Court and the parties and is necessary to preserve the resources of Defendants, which include an individual and Dignity Health, a non-profit charitable health system. When Rollins opposed Defendants' prior motion to certify for interlocutory appeal the Court's decision on the Motion to Dismiss, she told the Court that the remainder of her claims could be resolved by "limited," and "narrow, targeted discovery" (also referred to as "modest" discovery), which would allow the entire case to be submitted to the Court in a short time, perhaps four months. (ECF No. 87 at 4:21-5:9.) That is not what happened. Despite extensive meet and confer efforts, Rollins's counsel has continued to insist upon a response to massive document requests, requiring the collection of hundreds of thousands of hard copy and electronic documents and the review of over 150,000 documents. Decl. of Harvey L. Rochman, ¶

4. Defendants have already spent thousands of hours reviewing documents in order to respond to Rollins's production requests, and Defendants anticipate having to spend several thousand more attorney hours to complete the process. Decl. of Harvey L. Rochman, ¶ 5. The document discovery process has already cost hundreds of thousands of dollars and is anticipated to cost in excess of $500,000 more. *Id*.

Although Rollins's counsel stated at the Case Management Conference that discovery was almost "complete," the massive document review and production is not the only discovery that remains. Rollins's counsel have indicated that they would reduce her original extreme demand for 60 or more depositions, but Rollins continues to insist upon at least ten percipient witness depositions and multiple Fed. R. Civ. P. 30(b)(6) depositions, and she has not even agreed that the one deposition already taken was concluded. Decl. of Harvey L. Rochman, ¶ 6; Updated Joint Case Management Statement, ECF No. 186 at 21-22.

A reversal by the Ninth Circuit of the Court's ruling that a church plan must be established by a church, however, would render most of the pending discovery irrelevant and would narrow the scope of relevant facts and issues to those regarding Dignity Health's association with the Catholic Church after Dignity Health's 2012 restructuring. The remaining narrow issues before the Court would be questions of law that would require little or no discovery. As discussed above, this Court may also conclude that it cannot (or should not) adjudicate Rollins's allegations that the Plan is not associated with the Church because Rollins's argument that there is an insufficient connection between the doctrines and tenets of the Catholic Church and the operations of Dignity Health is an argument about "religious orthodoxy" that is "prohibited by the Constitution." *Overall*, 2014 WL 2448492, at *14. Such a finding would negate the need for any further discovery in this case, and would leave only Rollins's constitutional challenge to be litigated.

The parties also anticipate filing several substantial and complex motions on various pending issues, which will require significant time and effort by counsel on both sides and will generate substantial attorneys' fees and additional costs to be borne the parties. Decl. of Harvey L. Rochman, ¶ 8; Updated Joint Case Management Statement, ECF No. 186 at 16-18. These

motions could prove irrelevant or unnecessary based upon the Ninth Circuit's decision.

Furthermore, Rollins would not be unfairly prejudiced by a stay of proceedings in this case. The Plan has approximately $3.6 billion in assets and there is no danger that the Plan will be unable to pay benefits to Plan participants when due. Decl. of Mary Connick, ¶¶ 3-5.

Finally, no trial date has yet been set in this case, so there is no concern that an interlocutory appeal and corresponding stay of proceedings would delay, rather than expedite, any ultimate termination of the litigation.

Accordingly, Defendants respectfully request that the Court stay further proceedings pending resolution of Defendants' interlocutory appeal in the Ninth Circuit.

VIII. CONCLUSION

The critical legal question presented herein meets the statutory requirements for certification for an interlocutory appeal. Defendants respectfully request that the Court enter an order certifying the July 22, 2014 Order for interlocutory review under section 1292(b) and stay further proceedings in this Court pending resolution by the Ninth Circuit.

Dated: November 10, 2014

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313259359.2

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

STARLA ROLLINS on behalf of herself, individually, and on behalf of all others similarly situated,

Plaintiff,

v.

DIGNITY HEALTH, a California non-profit corporation, HERBERT J. VALLIER, an individual, the members of the Dignity Retirement Committee, and JOHN and JANE DOES, each an individual, 1-20,

Defendants.

No. 13-C-1450 TEH

[PROPOSED] ORDER GRANTING MOTION TO CERTIFY ORDER UNDER 28 U.S.C. § 1292(B) AND STAYING PROCEEDINGS PENDING APPELLATE RESOLUTION

The Court, having considered Defendants' motion for an order certifying under 28 U.S.C. § 1292(b) the Court's July 22, 2014 Order granting Plaintiff's motion for partial summary judgment and for a stay of proceedings, and all papers in support of and in opposition to the motion, and good cause appearing therefor,

certifies the following issue pursuant to 28 U.S.C. § 1292(b):

Does the church plan exemption set forth in ERISA section 3(33), 29 U.S.C. section 1002(33), apply to a benefit plan established by a non-profit organization that is not a church or an association of churches?

The Court finds that this is a controlling issue of law because it is a pure legal issue that is a threshold question of law that will have a substantial impact on this litigation and on the legal obligations of hundreds of retirement plans long recognized as "church plans." In addition, a reversal on the controlling issue would substantially impact Plaintiff's ability to prove most of her theories of liability against Defendants and would necessarily take the case in a completely different direction.

The Court further finds that there are substantial grounds for difference of opinion on this issue because while this Court, and one other district court (which subsequently certified its decision for appellate review) have concluded that only a church can establish a church plan, other district courts (one now on appeal) have reached the opposite conclusion, and have found that an entity affiliated with a church, including a hospital, can establish a church plan. In addition, relevant federal agencies take the position that the church plan exemption applies to plans that are not established by a church.

The Court further finds that immediate appellate resolution of the issue may materially advance the termination of the action because a reversal by the Ninth Circuit on the controlling issue likely will eliminate or at least narrow the need for substantial discovery, expert reports, motion practice and trial on remaining issues.

The Court further exercises its authority under 28 U.S.C. § 1292(b) and its inherent authority to stay further proceedings in this Court until the Ninth Circuit has acted on Defendants' petition for permission to appeal and, if granted, the conclusion of appellate proceedings.

IT IS SO ORDERED.

Dated: _____ _____

United States District Judge

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