

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS**

Sheilar Smith, Kasandra Anton, Bonnie
Bailey, Peggy Wise, and June Schwierjohn,
on behalf of themselves, individually, and
on behalf of all others similarly situated,
and on behalf of the OSF Plans,

Plaintiffs,

v.

OSF HealthCare System; The Sisters of the
Third Order of St. Francis Employees
Pension Plan Administrative Committee;
and Retirement Committee for the
Retirement Plan for Employees of Saint
Anthony's Health Center,

Defendants.

No. 3:16-cv-00467-SMY-RJD

**FOURTH AMENDED CLASS
ACTION COMPLAINT**

**CLAIM OF
UNCONSTITUTIONALITY**

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Plaintiffs Sheilar Smith, Kasandra Anton, Bonnie Bailey, Peggy Wise, and June Schwierjohn, individually and on behalf of all those similarly situated, as well as on behalf of the OSF Plans, as defined herein, by and through their attorneys, hereby allege as follows:

I. INTRODUCTION

1. Defendant OSF HealthCare System, by and through its subsidiaries and/or affiliates (“OSF,” “OSF HealthCare,” or “Defendant”), operates a hospital corporation that primarily provides healthcare services in Illinois, with certain operations in Michigan. This case concerns OSF’s failure to properly maintain its pension plans under the applicable federal law regulating pension plans, the Employee Retirement Income Security Act of 1974, as amended (“ERISA”). In the alternative, even if the pension plans are not subject to ERISA, OSF has breached its duties under state law. In particular, whether under federal or state law, OSF has failed to adequately fund the plans, creating a significant risk that these plans will be unable to pay the benefits to which OSF’s employees are entitled. As demonstrated herein, OSF’s failures harm its more than 19,000 current or former employees who continued to work for OSF in reliance on these promised pension benefits and who count on these benefits for their retirement.

2. As its name implies, ERISA was crafted to protect employee retirement funds. A comprehensive history of ERISA put it this way:

Employees should not participate in a pension plan for many years only to lose their pension . . . because their plan did not have the funds to meet its obligations. The major reforms in ERISA—fiduciary standards of conduct, minimum vesting and funding standards, and a government-run insurance program—aimed to ensure that long-service employees actually received the benefits their retirement plan promised.

James Wooten, *The Employee Retirement Income Security Act of 1974: A Political History* 3 (Univ. of Cal. Press 2005).

3. This class action is brought on behalf of all participants, former participants, and beneficiaries of defined benefit pension plans that are established, maintained, administered, and/or sponsored by OSF, OSF's affiliates, and/or OSF's committees and are operated as, or claimed to be, "church plans" under ERISA (referred to as the "OSF Plans" or simply the "Plans"). The OSF Plans include, without limitation, The Sisters of the Third Order of St. Francis Employees Pension Plan ("St. Francis Plan") and the Retirement Plan for Employees of Saint Anthony's Health Center ("St. Anthony's Plan").

4. OSF is violating numerous provisions of ERISA—including, on information and belief, underfunding the OSF Plans—while erroneously claiming that the Plans are exempt from ERISA's protections because they are "church plans." The OSF Plans do not meet the definition of "church plans" under ERISA because a "church plan" generally must be "maintained" by a church or a convention or association of churches and because OSF, who maintains the OSF Plans, plainly is not a church or a convention or association of churches.

5. OSF may claim that the OSF Plans are "maintained" by internal OSF retirement committees and thus qualify for a special accommodation for plans maintained by church-associated "organizations" whose "principal purpose" is funding or administering benefit plans. But it is OSF, and not any committees, that maintains the OSF Plans and OSF's principal purpose is providing healthcare, not funding or administering retirement plans. Even if the committees did "maintain" the plans, the OSF Plans still would not qualify as "church plans" because these committees are internal committees of OSF and are not distinct "organizations," as required by ERISA's "principal purpose" accommodation.

6. Furthermore, even if the OSF Plans were somehow "maintained" by a permissible entity, the church plan exemption still would not apply because other aspects of the definition

are not satisfied, including that OSF is not “controlled by” or “associated with” a church, within the meaning of ERISA. OSF is a non-profit healthcare corporation, not unlike other non-profit healthcare systems with which OSF competes in its commercial healthcare activities. OSF is not owned or operated by a church and does not receive funding from a church. No denominational requirement exists for OSF employees. Indeed, OSF tells prospective employees that any choice of faith, or lack thereof, is not a factor in the recruiting and hiring of OSF employees. In choosing to recruit and hire from the population at large, OSF must also be willing to accept neutral, generally applicable regulations, such as ERISA, imposed to protect those employees’ legitimate interests. Moreover, OSF affiliates with numerous healthcare facilities, including many that claim to be secular and have no relationship with any church.

7. Even if the Court determined that the OSF Plans fell within the scope of the church plan exemption, the church plan exemption would then be, as applied to OSF, an unconstitutional accommodation in violation of the Establishment Clause of the First Amendment. OSF claims, in effect, it must be relieved of its ERISA financial obligations because OSF claims certain religious beliefs. The Establishment Clause, however, does not allow such an economic preference for religious adherents that is not available to non-adherents, at least where, as here, an accommodation is not required to relieve a substantial burden on religious practice or to avoid government entanglement in religion. Extension of the church plan exemption to OSF: (A) is not necessary to further the stated purposes of the exemption; (B) harms OSF workers; (C) puts OSF competitors at an economic disadvantage; (D) relieves OSF of no genuine religious burden created by ERISA; and (E) creates more government entanglement with alleged religious beliefs than compliance with ERISA creates.

8. OSF's claim of church plan status for its defined benefit pension plans fails under both the statutory church plan definition and the First Amendment. Plaintiffs seek an Order requiring OSF to comply with ERISA and afford the Class all the protections of ERISA with respect to OSF's defined benefit pension plans, as well as an Order finding that the church plan exemption, as claimed by OSF, is unconstitutional because it violates the Establishment Clause of the First Amendment.

9. Yet even if the church plan exemption did apply to the OSF Plans and even if the application of the exemption were constitutionally permissible, OSF nonetheless has breached its contractual obligations under the OSF Plan documents and has breached its common law fiduciary duties by failing to make required contributions to the OSF Plan trusts. By refusing to fund the OSF Plans, in contravention of its obligations under the OSF Plan documents, its fiduciary duties, and its repeated promises to OSF Plan participants, OSF has left the OSF Plans severely underfunded. On information and belief, the OSF Plan trusts currently hold assets worth only approximately 50% of the accrued benefit obligations. Because of OSF's failures to fund the OSF Plans, there exists a substantial risk that the OSF Plans will be unable to pay the accrued pension benefits to which Plaintiffs and the other Class members are entitled. Accordingly, Plaintiffs seek an Order requiring OSF to make all contributions to the OSF Plan trusts necessary to fund, on an actuarial basis, all accrued pension benefits.

II. JURISDICTION AND VENUE

10. **Subject Matter Jurisdiction.** This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this is a civil action arising under the laws of the United States and pursuant to 29 U.S.C. § 1132(e)(1), which provides for federal jurisdiction of actions brought under Title I of ERISA. This Court has supplemental jurisdiction over Plaintiffs' state

law claims pursuant to 28 U.S.C. § 1367 because the state law claims are so related to Plaintiffs' other claims in this action that they form part of the same case or controversy.

11. **Personal Jurisdiction.** This Court has personal jurisdiction over all Defendants because ERISA provides for nationwide service of process. ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2). All of the Defendants are either residents of the United States or subject to service in the United States, and the Court therefore has personal jurisdiction over them. The Court also has personal jurisdiction over them pursuant to Federal Rule of Civil Procedure 4(k)(1)(A) because they would all be subject to a court of general jurisdiction in Illinois as a result of Defendant OSF transacting business in and/or having significant contacts with this District.

12. **Venue.** Venue is proper in this district pursuant to ERISA section 502(e)(2), 29 U.S.C. § 1132(e)(2), because (a) one or more of the Plans are administered in this District, (b) some of the violations of ERISA took place in this District, and/or (c) Defendant OSF may be found in this District through its operation of OSF Saint Anthony's Health Center, OSF Saint Anthony's Physician Group, OSF Saint Clare's Hospital, and Saint Clare's Villa in Alton, Illinois.

13. Venue is also proper in this District pursuant to 28 U.S.C. § 1391 because Defendants OSF and the Retirement Committee for the Retirement Plan for Employees of Saint Anthony's Health Center systematically and continuously do business in this District, and because a substantial part of the events or omissions giving rise to the claims asserted herein occurred within this District.

III. PARTIES

A. Plaintiffs

14. **Plaintiff Sheilar Smith.** Plaintiff Smith was an employee of Saint Anthony's Health Center beginning in 1986. In 2014, OSF acquired Saint Anthony's Health Center and re-

named it OSF Saint Anthony's Health Center. Plaintiff continued to be employed at OSF Saint Anthony's Health Center until late 2015. Plaintiff Smith is a vested participant in a defined benefit pension plan maintained by OSF, the St. Anthony's Plan, because she is eligible for, and receiving, pension benefits under the Plan. Additionally, and alternatively, Plaintiff Smith has a colorable claim to benefits under a pension plan maintained by OSF and is a participant within the meaning of ERISA section 3(7), 29 U.S.C. § 1002(7), and is therefore entitled to maintain an action with respect to the OSF Plans pursuant to ERISA sections 502(a)(1)(A)-(B), (a)(2)-(3), (c)(1), (c)(3), 29 U.S.C. § 1132(a)(1)(A)-(B), (a)(2)-(3), (c)(1), (c)(3).

15. **Plaintiff Kasandra Anton.** Plaintiff Anton was an employee of OSF from 1983 until 2009. Plaintiff Anton is a vested participant in a defined benefit pension plan maintained by OSF, the St. Francis Plan, because she is eligible for, and receiving, pension benefits under the Plan. Additionally and alternatively, Plaintiff has a colorable claim to benefits under a pension plan maintained by OSF and is a participant within the meaning of ERISA section 3(7), 29 U.S.C. § 1002(7), and is therefore entitled to maintain an action with respect to the OSF Plans pursuant to ERISA sections 502(a)(1)(A)-(B), (a)(2)-(3), (c)(1), (c)(3), 29 U.S.C. § 1132(a)(1)(A)-(B), (a)(2)-(3), (c)(1), (c)(3).

15.1 **Plaintiff Bonnie Bailey.** Plaintiff Bailey is a citizen and resident of Peoria, Illinois. Plaintiff Bailey was employed by Defendant as a receptionist at the Saint Francis Medical Center College of Nursing from 2003 until 2006, and then from 2006 until her retirement in November 2013 Plaintiff Bailey worked in the Communications Department at OSF Saint Francis Medical Center. Plaintiff Bailey is a current participant in the St. Francis Plan.

15.2 **Plaintiff Peggy Wise.** Plaintiff Wise is a citizen and resident of Peoria, Illinois. Plaintiff Wise worked for the Company full-time for 31 years as a certified technician at OSF Saint Francis Medical Center in numerous departments until her retirement in 2000. Plaintiff Wise is a current participant in the St. Francis Plan.

15.3 **Plaintiff June Schwierjohn.** Plaintiff Schwierjohn is a citizen and resident of Alton, Illinois. Plaintiff Schwierjohn was employed by Defendant Saint Anthony's Health Center ("SAHC") beginning in 1987 as a Cost Accountant Reimbursement Analyst, until her employment ended in August 2016. Plaintiff Schwierjohn is a current participant in the St. Anthony's Plan.

B. Defendants

16. As discussed below, all Defendants are ERISA fiduciaries.

17. **Defendant OSF HealthCare System ("OSF").** Defendant OSF is a 501(c)(3) non-profit corporation organized under, and governed by, Illinois law. OSF is headquartered in Peoria, Illinois. OSF owns and operates eleven acute care hospitals and other healthcare-related entities in Illinois, including thirty-nine hospital-based outpatient facilities, 250 physician office practices, clinics, six home health agencies, and five hospice programs. OSF also has one hospital in Michigan. In fiscal year 2016, OSF had net patient services revenues of \$2.41 billion and assets of \$3.49 billion. OSF currently employs more than 18,000 people. Defendant OSF is the employer responsible for maintaining the OSF Plans and is, therefore, the plan sponsor of the OSF Plans within the meaning of ERISA section 3(16)(B), 29 U.S.C. § 1002(16)(B). In the event that the terms of the instrument under which the OSF Plans are operated do not specifically designate an "administrator," as provided in ERISA section 3(16)(A)(i), 29 U.S.C. § 1002(3)(16)(A)(i), then the plan administrator is the plan sponsor, OSF. *See* ERISA § 3(16)(A)(ii), 29 U.S.C. § 1002(3)(16)(A)(ii).

18. **Defendant The Sisters of the Third Order of St. Francis Employees Pension Plan Administrative Committee (“St. Francis Administrative Committee”).** On information and belief, the St. Francis Administrative Committee is the person specifically designated as the “administrator” of the St. Francis Plan by the terms of the instrument under which the St. Francis Plan is operated, as provided in ERISA section 3(16)(A)(i), 29 U.S.C. § 1002(3)(16)(A)(i).

19. **Defendant Retirement Committee for the Retirement Plan for Employees of Saint Anthony’s Health Center (“St. Anthony’s Retirement Committee”).** On information and belief, the St. Anthony’s Retirement Committee is the person specifically designated as the “administrator” by the terms of the instrument under which the St. Anthony’s Plan is operated, as provided in ERISA section 3(16)(A)(i), 29 U.S.C. § 1002(3)(16)(A)(i).

20. The St. Francis Administrative Committee and the St. Anthony’s Retirement Committee are collectively referred to herein as the “Plan Administrator Defendants.”

IV. THE BACKGROUND OF THE CHURCH PLAN EXEMPTION

A. The Adoption of ERISA

21. Following years of study and debate, and broad bipartisan support, Congress adopted ERISA in 1974, and the statute was signed into law by President Ford on Labor Day of that year. Among the factors that led to the enactment of ERISA were the widely publicized failures of certain defined benefit pension plans, especially the plan for employees of Studebaker Corporation, an automobile manufacturing company, which defaulted on its pension obligations in 1965. *See generally* John H. Langbein et al., *Pension and Employee Benefit Law* 67-71 (6th ed. 2015).

22. As originally adopted in 1974, and today, ERISA protects the retirement savings of pension plan participants in a variety of ways. As to participants in traditional defined benefit

pension plans, such as the Plans at issue here, ERISA mandates, among other things, that such plans be currently funded and actuarially sound, that participants' accruing benefits vest pursuant to certain defined schedules, that the administrators of the plans report certain information to participants and to government regulators, that the fiduciary duties of prudence, diversification, loyalty, and so on apply to those who manage the plans, and that the benefits promised by the plans be guaranteed, up to certain limits, by the Pension Benefit Guaranty Corporation ("PBGC"). *See, e.g.*, ERISA §§ 303, 203, 101-06, 404-06, 409, 4007, 4022, 29 U.S.C. §§ 1083, 1053, 1021-26, 1104-06, 1109, 1307, 1322.

23. ERISA centers on pension plans, particularly defined benefit pension plans, as is reflected in the very title of the Act, which addresses "retirement income security." However, ERISA also subjects to federal regulation defined contribution pension plans (such as 401(k) plans) and welfare plans, which provide health care, disability, severance and related non-retirement benefits. ERISA § 3(34), (1), 29 U.S.C. § 1002(34), (1).

B. The Scope of the Church Plan Exemption in 1974

24. As adopted in 1974, ERISA provided an exemption from compliance for certain plans, in particular governmental plans and church plans. Plans that met the statutory definitions were exempt from all of ERISA's substantive protections for participants. ERISA § 4(b)(2), 29 U.S.C. § 1003(b)(2) (exemption from Title I of ERISA); ERISA § 4021(b)(3), 29 U.S.C. § 1321(b)(3) (exemption from Title IV of ERISA).

25. ERISA defined a "church plan" as a plan "established and maintained . . . for its employees . . . by a church or by a convention or associations of churches."¹

¹ ERISA § 3(33)(A), 29 U.S.C. § 1002(33)(A). ERISA is codified in both the labor and tax provisions of the United States Code, titles 29 and 26 respectively. Many ERISA provisions appear in both titles. For example, the essentially identical definition of church plan in the Internal Revenue Code ("IRC") is found at 26 U.S.C. § 414(e).

26. Under the 1974 legislation, although a church plan was required to be established and maintained by a church, it could also include employees of certain pre-existing agencies of such church (*i.e.*, there was a grandfather provision), but only until 1982 (*i.e.*, there was a sunset provision).² ERISA § 3(33)(C) (1974), 29 U.S.C. § 1002(33)(C) (1974) (Pub. L. No. 93-406, § 3(33), 88 Stat. 829 (1974)) (current version as amended at 29 U.S.C. § 1002(33) (2012)). Thus, under the 1974 legislation, a pension plan that was not established and maintained by a church could not be a church plan. *Id.*

C. The Changes to the Church Plan Exemption in 1980

27. The church plan definition was amended in 1980. Multiemployer Pension Plan Amendments Act of 1980 (“MPPAA”), Pub. L. No. 96-364, § 407, 94 Stat. 1208 (1980). The amended definition is current law.

28. The grandfather and sunset provisions, concerning employees of church agencies, were dropped. Congress achieved this by including a new definition of “employee” in subsection (C)(ii)(II) of section 3(33) of ERISA. 29 U.S.C. § 1002(33)(C)(ii)(II) (1980) (current version at 29 U.S.C. § 1002(33)(C)(ii)(II) (2012)). As amended, an “employee” of a church or a convention/association of churches includes an employee of an organization “which is controlled by or associated with a church or a convention or association of churches.” *Id.* The phrase “associated with” is then defined in ERISA § 3(33)(C)(iv) to include only those organizations that “share[] common religious bonds and convictions with that church or convention or association of churches.” 29 U.S.C. § 1002(33)(C)(iv) (1980) (current version at 29 U.S.C. § 1002(33)(C)(iv) (2012)). Accordingly, this new definition of “employee” permitted

² H.R. Rep. No. 93-1280 (1974) (Conf. Rep.), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5044.

a “church plan” to include among its participants employees of organizations controlled by or associated with the church, convention, or association of churches.

29. The 1980 amendments also permitted church plans to be maintained either by a church or by “an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.” ERISA § 3(33)(C)(i) (1980), 29 U.S.C. § 1002(33)(C)(i) (1980) (emphasis added) (current version at 29 U.S.C. § 1002(33)(C)(i) (2012)). For convenience, this type of organization is referred to here, as it is in the case law, as a “principal-purpose organization.”

30. Finally, the Supreme Court recently interpreted the 1980 amendments and held that a church plan that is maintained by a principal-purpose organization need not have been established by a church. *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1658 (2017). The Supreme Court expressly declined to interpret the meaning of “principal purpose organization” or to express an opinion on whether the plans at issue in the cases before it were maintained by principal purpose organizations. *Id.* at 1657 n.2.

31. However, a typical hospital benefit plan is plainly not maintained by a principal-purpose organization. It is maintained by the hospital itself, usually through its Board of Directors. Even if the hospital were “controlled by or associated with” a church, it cannot maintain its own “church plan” because its principal purpose or function is the provision of health care, not “the administration or funding of a plan or program for the provision of retirement benefits.” ERISA § 3(33)(C)(i), 29 U.S.C. § 1002(33)(C)(i).

V. OSF

A. OSF's Operations

32. OSF is a 501(c)(3) non-profit corporation organized under, and governed by, Illinois law. OSF is headquartered in Peoria, Illinois. OSF is an integrated health system that operates eleven acute care hospitals, home health care services, two colleges of nursing, a medical training simulation center and other health care facilities in Illinois and Michigan. Ten of OSF's hospitals are located in Illinois, including in such locations as Alton, Peoria, Bloomington, and Rockford, and one hospital is located in Michigan. OSF HealthCare also owns an extensive network of home health services known as OSF Home Care Services; a for-profit Illinois corporation comprised of healthcare related businesses called OSF Saint Francis, Inc.; and a philanthropic arm called OSF HealthCare Foundation.

33. As of fiscal year 2016, OSF had approximately \$3.49 billion in assets.

34. OSF employs more than 18,000 people.

35. In addition to its statewide hospital network, OSF has branched out to include numerous subsidiaries and/or related entities, including for-profit corporations such as OSF Saint Francis, Inc., limited liability companies such as OSF Lifeline Ambulance, LLC and PointCore, LLC, and twelve wholly owned physician group subsidiaries.

36. On November 1, 2014, Saint Anthony's Health Center in Alton, Illinois, merged into OSF pursuant to a statutory merger, and became known as OSF Saint Anthony's Health Center ("SAHC").

37. On information and belief, in connection with that merger, ownership and operational management of Saint Anthony's Health Center were transferred to OSF, and SAHC became an assumed business name of OSF.

38. OSF Saint Anthony's Health Center is a dual campus nursing care hospital that includes OSF Saint Clare Hospital. SAHC is the sole member of Saint Anthony's LLC, a Delaware limited liability company that operates as the general partner of Saint Clare's Villa, an Illinois limited liability partnership located in Alton, Illinois, that was created to own and operate a 64-unit assisted living apartment complex.

39. Like other large non-profit hospital systems, OSF relies upon revenue bonds to raise money, and it has significant sums invested in, among other things, fixed-income securities, equity securities, and hedge funds.

40. The principal purpose or function of OSF is not the administration or funding of a plan or program for the provision of retirement or welfare benefits, or both, for the employees of a church or a convention or association of churches.

41. Rather, the principal purpose or function of OSF is the provision of health care. According to OSF's Articles of Incorporation, the purposes for which the corporation is organized are:

[T]o establish, acquire, support, erect, maintain, own and equip health care providers and institutions including, without limiting the foregoing, hospitals, medical centers, nursing homes, skilled nursing facilities, intermediate care facilities, home health agencies and ambulatory care centers; to conduct, sponsor, support, promote, develop, own and operate charitable, educational, scientific and scholastic programs and activities and other activities and programs ancillary to and in support of the foregoing; and to foster, promote, support, develop, encourage, maintain, receive and accept funds, gifts and contributions for and on behalf of such activities; and to establish, conduct, sponsor, acquire, own, maintain and operate such other entities and activities which, in the opinion of the Board and at its discretion, will support the foregoing.

42. The management of OSF is comprised primarily of lay people, and Executive Officers of OSF receive compensation in line with executive officers of other hospital systems. For example, in 2014, the OSF Vice Chairperson Chief Executive Officer, Kevin Schoepfle, received reportable compensation of \$1.3 million. Two of OSF's Board members, Gerald J.

McShane and James W. Girardi, also received reportable compensation of \$704,210 and \$165,750, respectively.

43. OSF is not a church.

44. OSF is not a convention or association of churches.

45. In the annual returns of a tax-exempt organization (Form 990s) that OSF files with the IRS, OSF claims that the reason for its public charity status is that it is “[a] hospital or a cooperative hospital service organization” described in 26 U.S.C. § 170(B)(1)(A)(iii).

46. OSF is not owned by a church. In Defendants’ Answer to Plaintiff’s Second Amended Complaint (“2nd Answer”) at ¶ 49, ECF No. 110, Defendants admitted that OSF is not owned by a church.

47. OSF does not receive funding from any church.

48. In Defendants’ 2nd Answer at ¶ 50, Defendants admitted that OSF does not receive funding from the Roman Catholic Church.

49. OSF does not claim that any church has any liability for OSF’s debts or obligations.

50. The governance of OSF, including the management of OSF’s affairs, is vested in OSF’s Board of Directors, not any church.

51. No church has any role in the maintenance and/or administration of the OSF Plans.

52. OSF specifically chooses not to impose any denominational requirement on its employees.

53. OSF has no denominational requirement for its patients and/or clients.

54. OSF purports to disclose, and not keep confidential, its own highly complex financial records. For example, OSF is required and, in some cases, has voluntarily elected to comply with a broad array of elaborate state and federal regulations and reporting requirements, including Medicare and Medicaid. In addition, OSF makes public its consolidated financial statements, which describe OSF's representations as to its own highly complex operations and financial affairs. Finally, OSF's financial information is regularly disclosed to the rating agencies and the public when tax-exempt revenue bonds are issued.

B. The OSF Plans

55. The OSF Plans are non-contributory defined benefit pension plans covering substantially all of OSF's employees.

56. Upon information and belief, the St. Francis Plan is a noncontributory defined benefit pension plan that covers substantially all of the employees of OSF's healthcare providers, plus employees at OSF's corporate office.

57. Upon information and belief, the St. Anthony's Plan is a noncontributory defined benefit pension plan that covers eligible employees of SAHC.

58. There are over 18,000 participants in the St. Francis Plan.

59. There are over 1,300 participants in the St. Anthony's Plan.

60. The OSF Plans are not maintained by a church or a convention or association of churches.

61. The St. Francis Plan is not maintained by a church or a convention or association of churches.

62. The St. Anthony's Plan is not maintained by a church or a convention or association of churches.

63. OSF maintains the OSF Plans and has the power to continue, amend, or terminate the Plans. In Defendants' 2nd Answer, Defendants admitted that OSF maintains the St. Francis Plan and the St. Anthony's Plan. *Id.* at ¶ 65.

64. OSF maintains the St. Francis Plan. Defendants admitted this allegation in their 2nd Answer at ¶ 66.

65. OSF has the power to amend the St. Francis Plan. Defendants admitted this allegation in their 2nd Answer at ¶ 67.

66. OSF has the power to continue the St. Francis Plan. Defendants admitted this allegation in their 2nd Answer at ¶ 68.

67. OSF has the power to terminate the St. Francis Plan. Defendants admitted this allegation in their 2nd Answer at ¶ 69.

68. OSF, either itself (through its Board of Directors) or through the Board of Directors of SAHC, maintains the St. Anthony's Plan. Defendants admitted this allegation in their 2nd Answer at ¶ 70.

69. OSF, either itself (through its Board of Directors) or through the Board of Directors of SAHC, has the power to amend the St. Anthony's Plan. Defendants admitted this allegation in their 2nd Answer at ¶ 71.

70. OSF, either itself (through its Board of Directors) or through the Board of Directors of SAHC, has the power to continue the St. Anthony's Plan. Defendants admitted this allegation in their 2nd Answer at ¶ 72.

71. OSF, either itself (through its Board of Directors) or through the Board of Directors of SAHC, has the power to terminate the St. Anthony's Plan. Defendants admitted this allegation in their 2nd Answer at ¶ 73.

72. OSF is the employer and thus the plan sponsor with respect to the OSF Plans.

73. OSF is the employer and thus the plan sponsor with respect to the St. Francis Plan. Defendants admitted this allegation in their 2nd Answer at ¶ 75.

74. OSF is the employer and thus the plan sponsor with respect to the St. Anthony's Plan. Defendants admitted this allegation in their 2nd Answer at ¶ 76.

A. In the Declaration of April M. Rowe in Support of Defendants' Motion to Transfer Venue to the Central District of Illinois ¶ 5, ECF No. 33-1 (filed June 13, 2016), Ms. Rowe stated that OSF sponsors the St. Anthony's Plan.

B. On information and belief, under the terms of the St. Anthony's Plan and as a result of the statutory merger of Saint Anthony's Health Center into OSF (as well as the transfer of ownership and operational control to OSF), OSF is a successor corporation which assumed the obligations of an employer under the St. Anthony's Plan.

C. On information and belief, under the terms of the St. Anthony's Plan and as a result of the statutory merger of Saint Anthony's Health Center into OSF (as well as the transfer of ownership and control to OSF), provision was made by which the St. Anthony's Plan and its trust fund would be continued by the successor, OSF, and thus OSF was substituted as the "employer" within the meaning of the Plan.

D. Thus, on information and belief, OSF is the employer and plan sponsor of the St. Anthony's Plan.

75. On information and belief, on or about the time OSF became the sponsor of the St. Francis Plan, OSF determined that the Plan was a "church plan," even though (1) OSF was not a church; and (2) a different sponsor had previously operated the St. Francis Plan as an ERISA plan.

76. On information and belief, on or about the time that Saint Anthony's Health Center became the sponsor of the St. Anthony's Plan, it determined that the St. Anthony's Plan was a "church plan," even though (1) Saint Anthony's Health Center was not a church; and (2) a different sponsor had previously operated the St. Anthony's Plan as an ERISA plan.

77. Upon information and belief, when OSF became the sponsor of the St. Anthony's Plan, it continued to claim that the St. Anthony's Plan was a "church plan," even though OSF is not a church.

78. OSF, as the employer and plan sponsor of the OSF Plans, has the obligation—under ERISA as well as the express or implied terms of the OSF Plan documents—to make contributions to the OSF Plan trusts and to fund the OSF Plans.

79. OSF, as the employer and plan sponsor of the St. Francis Plan, has the obligation—under ERISA as well as the express or implied terms of the St. Francis Plan document—to make contributions to the St. Francis Plan trust and to fund the St. Francis Plan.

80. OSF, as the employer and sponsor of the St. Anthony's Plan, has the obligation—under ERISA as well as the express or implied terms of the St. Anthony Plan document—to make contributions to the St. Anthony's Plan trust and to fund the St. Anthony's Plan.

81. OSF has an obligation to make contributions to the OSF Plan trusts that are sufficient, on an actuarial basis, to fund all accrued benefits.

82. Upon information and belief, the OSF Plans, including the St. Francis Plan and the St. Anthony's Plan, are currently underfunded by at least \$484 million.

83. Plaintiffs are informed and believe that as of September 30, 2016, the St. Francis Plan was under-funded by \$446.7 million. Thus, as of September 30, 2016, that Plan was only funded at approximately 55.9%.

84. Upon further information and belief, the St. Anthony's Plan was under-funded by \$37.9 million as of September 30, 2016. Thus, as of September 30, 2016, that Plan was only funded at approximately 50.5%. A plan so drastically underfunded is at serious risk of defaulting on its obligations to its participants.

85. In bond offering documents, OSF has admitted that the assets of the trusts for its defined benefit plans, including on information and belief the OSF Plans, are insufficient to fund all liabilities under the plans. OSF further stated that any shortfall in trust assets for payment of benefits must be made up from the general assets of OSF.

86. Although OSF has an obligation to make contributions to the St. Francis Plan trust that are sufficient, on an actuarial basis, to fund all accrued benefits, the St. Francis Plan provides that if the St. Francis Plan terminates, Plan participants' accrued benefits will be nonforfeitable only to the extent the St. Francis Plan is funded.

87. Although OSF has an obligation to make contributions to the St. Anthony's Plan trust that are sufficient, on an actuarial basis, to fund all accrued benefits, the St. Anthony's Plan provides that if the St. Anthony's Plan terminates, Plan participants' accrued benefits will be nonforfeitable only to the extent the Plan is funded.

88. These fund-specific promises, triggered upon the termination of the OSF Plans, are not permissible under ERISA and place the participants' benefits at great risk.

C. The OSF Plans Meet the Definition of ERISA Defined Benefit Plans

89. The OSF Plans are plans, funds, or programs that were established or maintained by OSF and which, by their express terms and surrounding circumstances, provide retirement income to employees and/or result in the deferral of income by employees to the termination of their employment or beyond. As such, the OSF Plans meet the definition of "employee pension benefit plans" within the meaning of ERISA section 3(2)(A), 29 U.S.C. § 1002(2)(A).

90. The OSF Plans do not provide for an individual account for each participant and do not provide benefits based solely upon the amount contributed to a participants' account. As such, the OSF Plans are defined benefit plans within the meaning of ERISA section 3(35), 29 U.S.C. § 1002(35), and are not individual account plans or "defined contribution plans" within the meaning of ERISA section 3(34), 29 U.S.C. § 1002(34).

D. Defendants Meet the Definition of ERISA Fiduciaries

1. Nature of Fiduciary Status

91. Every ERISA plan must have "one or more named fiduciaries." ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1). The person named as the "administrator" in the plan instrument is automatically a fiduciary and, in the absence of such a designation, the sponsor is the administrator. ERISA § 3(16)(A), 29 U.S.C. § 1002(16)(A).

92. ERISA treats as fiduciaries not only persons explicitly named as fiduciaries under section 402(a)(1), 29 U.S.C. § 1102(a)(1), but also any other persons who in fact perform fiduciary functions. Thus, a person is a fiduciary to the extent "(i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).

93. Each of the Defendants was a fiduciary with respect to the Plans and owed fiduciary duties to the Plans and their participants and beneficiaries under ERISA in the manner and to the extent set forth in the Plans' documents and/or through their conduct.

94. As fiduciaries, Defendants were required by ERISA section 404(a)(1), 29 U.S.C. § 1104(a)(1), to manage and administer the Plans and the Plans' investments solely in the interest of the Plans' participants and beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

95. Plaintiffs do not allege that each Defendant was a fiduciary with respect to all aspects of the Plans' management and administration. Rather, as set forth below, Defendants were fiduciaries to the extent of the specific fiduciary discretion and authority assigned to or exercised by each of them, and, as further set forth below, the claims against each Defendant are based on such specific discretion and authority.

96. ERISA permits fiduciary functions to be delegated to insiders without an automatic violation of the rules against prohibited transactions, ERISA § 408(c)(3), 29 U.S.C. § 1108(c)(3), but insider fiduciaries, like external fiduciaries, must act solely in the interest of participants and beneficiaries, not in the interest of the plan sponsor.

2. Defendants Are Each ERISA Fiduciaries

97. **OSF.** OSF is the employer responsible for maintaining the OSF Plans and is, therefore, the plan sponsor of the OSF Plans within the meaning of ERISA section 3(16)(B), 29 U.S.C. § 1002(16)(B).

98. In the absence of a Plan Administrator specifically designated in any instrument governing the Plans, the plan sponsor of the OSF Plans under ERISA section 3(16)(A)(ii), 29 U.S.C. § 1002(16)(A)(ii), is the Plan Administrator. Thus, in the alternative to the Plan Administrator Defendants, OSF is an "administrator" of the OSF Plans within the meaning of ERISA section 3(16)(A), 29 U.S.C. § 1002(16)(A), a named fiduciary within the meaning of

ERISA section 402, 29 U.S.C. § 1102, and a functional fiduciary within the meaning of ERISA section 3(21)(A)(iii), 29 U.S.C. § 1002(21)(A)(iii).

99. Upon information and belief, Defendant OSF's responsibilities include fiduciary oversight of the OSF Plans. Upon further information and belief, Defendant OSF, by and through its Board of Directors, had the responsibility to appoint, and hence to monitor and remove, the plan administrators and other fiduciaries of the OSF Plans.

A. OSF, as the employer, has the power to appoint and remove the St. Francis plan administrator, *i.e.*, the St. Francis Administrative Committee.

B. On information and belief, OSF, either itself (through its Board of Directors) or through the Board of Directors of SAHC, has the power to appoint and remove the St. Anthony's plan administrator, *i.e.*, the St. Anthony's Retirement Committee.

C. Under the terms of the St. Francis Plan, OSF, as the employer, is a fiduciary to the Plan.

D. OSF, as the employer, is required to establish a funding policy and method for the St. Francis Plan—*i.e.*, it shall determine whether the St. Francis Plan has a short run need for liquidity or whether liquidity is a long run goal and investment growth is a more current need, or shall appoint a qualified person to do so.

E. OSF, as the employer, has promised and has an express or implied obligation under the OSF Plan documents to make ongoing contributions to the St. Francis Plan trust that are sufficient, on an actuarial basis, to fund all accrued benefits.

F. OSF, as the employer, has an obligation to periodically review the performance of any fiduciary or other person to whom duties have been delegated or

allocated by OSF under the provisions of the St. Francis Plan or pursuant to procedures established under the Plan document.

G. Under the terms of the St. Anthony's Plan, OSF, as the employer and plan sponsor, is a fiduciary to the Plan.

H. Under the terms of the St. Anthony's Plan, OSF, as the employer, has the responsibility for making contributions necessary to provide benefits under the Plan.

I. Under the terms of the St. Anthony's Plan, OSF, as the employer, has the power and responsibility to appoint and monitor other fiduciaries, such as the investment manager and, on information and belief, the St. Anthony's Retirement Committee.

100. Defendant OSF is a fiduciary with respect to the OSF Plans within the meaning of ERISA section 3(21)(A), 29 U.S.C. § 1002(21)(A), because it exercises discretionary authority or discretionary control respecting management of the OSF Plans, exercises authority and control respecting management or disposition of the OSF Plans' assets, and/or has discretionary authority or discretionary responsibility in the administration of the OSF Plans.

101. **St. Francis Administrative Committee.** On information and belief, the St. Francis Administrative Committee is the person or persons, if any, specifically designated as the "administrator" by the terms of the instrument under which the St. Francis Plan is operated, as provided in ERISA section 3(16)(A)(i), 29 U.S.C. § 1002(3)(16)(A)(i). As such, Defendant St. Francis Administrative Committee is a named fiduciary within the meaning of ERISA section 402, 29 U.S.C. § 1102, and a functional fiduciary within the meaning of ERISA section 3(21)(A)(iii), 29 U.S.C. § 1002(21)(A)(iii).

102. On information and belief, the primary responsibility of the St. Francis Administrative Committee is to administer the St. Francis Plan for the exclusive benefit of the Plan's participants and beneficiaries, subject to the specific terms of the St. Francis Plan.

103. As Plan Administrator, the St. Francis Administrative Committee also: (1) must administer the St. Francis Plan in accordance with its terms; (2) has the power and discretion to construe the terms of the St. Francis Plan and to determine all questions arising in connection with the administration, interpretation, and application of the Plan; and (3) has the power to establish procedures to carry out the purpose of the St. Francis Plan.

104. Furthermore, the St. Francis Administrative Committee (as Plan Administrator) has the full and complete authority, responsibility, and control in its sole and absolute discretion over the management, administration, and operation of the Plan, including but not limited to the following: (1) to resolve, in its discretion, all questions of fact relating to the administration of the St. Francis Plan or to determine all questions relating to the eligibility of any employee or beneficiary or other person to participate or remain a participant under the St. Francis Plan and to receive benefits under the Plan; (2) to compute, certify, and direct the trustee with respect to the amount and the kind of benefits to which any participant is entitled; (3) to authorize and direct the trustee with respect to all nondiscretionary or otherwise directed disbursements from the St. Francis Plan; (4) to maintain all necessary records for the administration of the St. Francis Plan; (5) to interpret the provisions of the Plan; (6) to determine the size and type of any contract to be purchased from any insurer; (7) to adopt such rules, regulations, and bylaws it deems necessary or desirable for the proper administration of the St. Francis Plan; (8) to compute and certify to OSF, as the employer, and to the trustee from time to time the sums of money necessary or desirable to be contributed to the St. Francis Plan; (9) to consult with OSF,

as the employer, and the trustee regarding the short and long-term liquidity needs of the Plan; (10) to administer the claims procedures and the claims review procedures set forth in the St. Francis Plan document; (11) to assist any participant regarding his or her rights, benefits, or elections available under the St. Francis Plan; and (12) to determine whether or not a partial or complete termination of the Plan has occurred. According to the St. Francis Plan document, the St. Francis Administrative Committee, as Plan Administrator, is also responsible for supplying all information and reports to the IRS, DOL, participants, and beneficiaries as required by law.

105. Defendant St. Francis Administrative Committee is a fiduciary with respect to the OSF Plans within the meaning of ERISA section 3(21)(A), 29 U.S.C. § 1002(21)(A), because it exercises discretionary authority or discretionary control respecting management of the OSF Plans, exercises authority and control respecting management or disposition of the OSF Plans' assets, and/or has discretionary authority or discretionary responsibility in the administration of the OSF Plans.

106. **St. Anthony's Retirement Committee.** On information and belief, the St. Anthony's Retirement Committee is the person or persons, if any, specifically designated as the "administrator" by the terms of the instrument under which the St. Anthony's Plan is operated, as provided in ERISA section 3(16)(A)(i), 29 U.S.C. § 1002(3)(16)(A)(i). As such, Defendant St. Anthony's Retirement Committee is a named fiduciary within the meaning of ERISA section 402, 29 U.S.C. § 1102, and a functional fiduciary within the meaning of ERISA section 3(21)(A)(iii), 29 U.S.C. § 1002(21)(A)(iii).

107. The St. Anthony's Retirement Committee administers the St. Anthony's Plan and has all discretionary powers and authority necessary to carry out the provisions of the St. Anthony's Plan.

108. The Retirement Committee makes determinations as to the rights of persons to a benefit under the Plan, and has the following duties: (1) to construe and interpret the Plan; (2) to prescribe procedures for participants or beneficiaries when filing applications for benefits; (3) to prepare and distribute information explaining the Plan; (4) to receive from the employer (OSF) and from St. Anthony's Plan participants such information as necessary for the proper administration of the Plan; (5) to furnish the employer (OSF), upon request, annual reports with respect to the administration of the Plan; (6) to receive and review the periodic valuation of the St. Anthony's Plan made by the actuary; (7) to receive, review, and keep on file reports of the financial condition and of receipts and disbursements for the St. Anthony's Plan; (8) to appoint or employ individuals to assist in the administration of the Plan; (9) to make available to each St. Anthony's Plan participant during business hours such documents, reports, notification, and records as may be required by ERISA and the IRC and regulations thereunder; (11) to make available, at least once a year, upon request, to each St. Anthony's Plan participant a statement based on the latest available information on his accrued benefits and his nonforfeitable benefits, if any, or the earliest date on which benefits become nonforfeitable; and (12) to furnish participants who have terminated service during the plan year and who are entitled to a deferred benefit under the St. Anthony's Plan, a statement of the nature, amount, and form of such terminated participant's nonforfeitable benefits.

109. The St. Anthony's Retirement Committee does not have the power to add to, subtract from, or modify any of the terms of the St. Anthony's Plan.

110. Defendant St. Anthony's Retirement Committee is a fiduciary with respect to the OSF Plans within the meaning of ERISA section 3(21)(A), 29 U.S.C. § 1002(21)(A), because it exercises discretionary authority or discretionary control respecting management of the OSF

Plans, exercises authority and control respecting management or disposition of the OSF Plans' assets, and/or has discretionary authority or discretionary responsibility in the administration of the OSF Plans.

111. Plaintiffs reserve the right to amend this Complaint to name other or additional Defendants once they have had the opportunity to conduct further discovery on these issues.

112. Although OSF contends that the OSF Plans are exempt from ERISA as church plans, it claims ERISA status for its medical and dental plan and its welfare benefits plan.

113. OSF's for-profit subsidiary, OSF St. Francis, Inc., composed of various health care related businesses, also claims ERISA status for its defined benefit pension plan.

114. Compliance with ERISA creates no undue, genuine burden on any religious practice of OSF, as evidenced by OSF's claimed compliance with ERISA for its medical, dental and welfare benefit plans, and the pension plan for its for-profit subsidiary, OSF Saint Francis, Inc.

E. The OSF Plans Are Not Church Plans

115. OSF claims that the OSF Plans are church plans under ERISA section 3(33), 29 U.S.C. § 1002(33), and the analogous section of the IRC, and therefore exempt from ERISA's coverage under ERISA §§ 4(b)(2), 4021(b)(3), 29 U.S.C. § 1003(b)(2), 1321 (b)(2).

1. Only Two Types of Entities May Maintain a Church Plan, and OSF Is Neither.

116. Under ERISA section 3(33), 29 U.S.C. § 1002(33), only the following two provisions address which types of entities may maintain a church plan:

- First, under ERISA section 3(33)(A), 29 U.S.C. § 1002(33)(A), a church plan may be maintained by a church or by a convention or association of churches; and
- Second, under ERISA section 3(33)(C)(i), 29 U.S.C. § 1002(33)(C)(i), a church plan may be maintained by an *organization, the principal purpose or function of which* is the administration or funding of a retirement plan, if such organization is

controlled by or associated with a church or convention or association of churches.

117. Although other portions of ERISA section 3(33)(C) address, among other matters, who can be *participants* in church plans—in other words, which employees can be in church plans, etc.—these other portions of ERISA section 3(33)(C) do not add any other type of entity that may *maintain* a church plan. ERISA § 3(33)(C), 29 U.S.C. § 1002(33)(C).

118. The OSF Plans do not qualify as church plans under either ERISA section 3(33)(A) or section 3(33)(C)(i), 29 U.S.C. § 3(33)(A) or (C)(i).

119. First, the OSF Plans are not maintained by any church or convention or association of churches within the meaning of ERISA section 3(33)(A), 29 U.S.C. § 1002(33)(A). The OSF Plans are maintained by OSF for its own, or its affiliates' own, employees. Because OSF is not a church or a convention or association of churches, and does not claim to be a church or a convention or association of churches, the OSF Plans may not qualify as church plans within the meaning of ERISA section 3(33)(A), 29 U.S.C. § 1002(33)(A).

120. Second, the OSF Plans are not maintained by an “organization” described in ERISA section 3(33)(C)(i), 29 U.S.C. § 1002(33)(C)(i)—*i.e.*, one whose principal purpose or function is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both. Because the principal purpose or function of OSF is to provide healthcare services rather than to administer or fund benefit plans, the OSF Plans may not qualify as church plans within the meaning of ERISA section 3(33)(C)(i), 29 U.S.C. § 1002(33)(C)(i).

121. In the alternative, to the extent OSF claims that the OSF Plans are “maintained” by a principal-purpose organization within the meaning of ERISA section 3(33)(C)(i) because

they are *administered* by a committee within OSF that has a principal purpose of administering benefit plans, the claim fails because the committee purportedly “administering” the OSF Plans does not have the full range of powers and responsibilities required to “maintain” a plan. The entity that maintains the plan “has the primary ongoing responsibility (and potential liability) to plan participants.” *Advocate Healthcare Network*, 137 S. Ct. at 1661. The only entity with the power to “maintain” the OSF Plans, which includes the power to fund, continue, amend, and/or terminate the Plans, is OSF. The claim further fails because even if a committee within OSF “maintained” the plans, such an internal committee of OSF does not qualify as a distinct principal-purpose “organization” within the meaning of ERISA section 3(33)(C)(i), 29 U.S.C. § 1002(33)(C)(i).

2. Even if the OSF Plans Were Maintained by a Permissible Entity, They Nonetheless Fail to Satisfy Other Elements of the Church Plan Definition.

122. Under both ERISA section 3(33)(A) and section 3(33)(C)(i), a church plan must be maintained for the employees of a church or a convention or association of churches. 29 U.S.C. § 1002(33)(A), (C)(i). The OSF Plans do not qualify. The more than 19,000 participants in the OSF Plans are or were employees of OSF, a non-profit healthcare system. OSF is not a church or convention or association of churches and its employees are not employees of a church or convention or association of churches within the meaning of ERISA.

123. Under ERISA section 3(33)(C)(ii), 29 U.S.C. § 1002(33)(C)(ii), however, an employee of a tax-exempt organization that is controlled by or associated with a church or a convention or association of churches also may be deemed an employee of a church. The OSF Plans also fail this part of the definition because OSF is not controlled by or associated with a church or convention or association of churches within the meaning of ERISA.

124. OSF is organized as a non-profit corporation under Illinois law.

125. OSF is governed by its Board of Directors.

126. OSF's Board of Directors owes fiduciary duties to the non-profit corporation.

127. OSF is not controlled by a church or convention or association of churches.

128. OSF is not owned by a church or convention or association of churches.

129. OSF is not operated by a church or convention or association of churches.

130. OSF does not receive funding from a church or convention or association of churches.

131. In addition, OSF is not "associated with" a church or convention or association of churches within the meaning of ERISA. Under ERISA section 3(33)(C)(iv), 29 U.S.C. § 1002(33)(C)(iv), an organization "is associated with a church or a convention or association of churches if it shares common religious bonds and convictions with that church or convention or association of churches." OSF does not share common religious bonds and convictions with a church or a convention or association of churches.

132. OSF does not impose any denominational requirement on its employees. Indeed, OSF tells prospective employees that religious affiliation is not a factor in the recruiting and hiring of OSF employees.

133. OSF has a practice of affiliating with hospitals that claim no religious affiliation, including community hospitals like Illinois Valley Community Hospital and Rochelle Community Hospital. In choosing to compete in the commercial arena of healthcare services and to embark upon a business plan that targets healthcare facilities with no claimed ties to any particular religion, or to religion generally, OSF must be willing to accept neutral regulations, such as ERISA, imposed to protect its employees' legitimate interests.

134. OSF provides non-denominational chapels and encourages its clients to seek the faith of their own choosing.

135. OSF does not impose any denominational requirement on its patients.

136. For these same reasons, the OSF Plans further fail to satisfy the requirements of ERISA section 3(33)(C)(i) because, even if the OSF Plans were “maintained” by the internal committees and even if the committees qualified as principal-purpose “organizations,” ERISA section 3(33)(C)(i) requires that a principal-purpose organization be “controlled by or associated with” a church or convention or association of churches. ERISA § 3(33)(C)(i), 29 U.S.C. § 1002(33)(C)(i). OSF’s internal committees, like OSF, are not controlled by or associated with a church or convention or association of churches within the meaning of ERISA.

3. Even if the OSF Plans Could Otherwise Qualify as Church Plans Under ERISA §§ 3(33)(A) or (C)(i), They Are Excluded from Church Plan Status Under ERISA § 3(33)(B)(ii).

137. Under ERISA section 3(33)(B)(ii), 29 U.S.C. § 1002(33)(B)(ii), a plan is specifically excluded from church plan status if less than substantially all of the plan participants are members of the clergy or employed by an organization controlled by or associated with a church or convention or association of churches. Even if the OSF Plans could otherwise qualify as church plans under ERISA sections 3(33)(A) or (C)(i), and even if OSF itself was controlled by or associated with a church, the OSF Plans still would be foreclosed from church plan status under section 3(33)(B)(ii), 29 U.S.C. § 1002(33)(B)(ii), because, on information and belief, the OSF Plans cover more than an insubstantial number of employees that work for subsidiaries or affiliates that are not controlled by or associated with any church or convention or association of churches and/or are not tax-exempt.

4. Even if the OSF Plans Could Otherwise Qualify as Church Plans Under ERISA, the Church Plan Exemption, as Claimed by OSF, Violates the Establishment Clause of the First Amendment of the Constitution, and Is Therefore Void and Ineffective.

138. The church plan exemption is an accommodation for *churches* that establish and maintain pension plans, and it allows such plans to be exempt from ERISA.

139. The Establishment Clause guards against the establishment of religion by the government. The government “establishes religion” where, as here, it exempts religious entities, but not secular entities, from a neutral, generally applicable law and such exemption is not required to alleviate a substantial burden on religious practice or to avoid government entanglement in religion. ERISA is a neutral statute that governs pension benefits, and thus application of the church plan exemption to OSF relieves OSF of no genuine religious burden. Moreover, application of the church plan exemption to OSF creates more government entanglement with alleged religious beliefs than does compliance with ERISA. Accordingly, application of the church plan exemption to OSF is not a valid religious accommodation. Extension of the church plan exemption to OSF and other hospital systems that are not themselves churches, but that claim ties to a church, but not to analogous secular hospital systems, unconstitutionally privileges religious adherents over non-adherents.

140. Such a naked preference for religion is particularly improper where, as here, the burdens of the exemption are imposed on OSF’s employees. Extension of the church plan exemption to OSF privileges OSF for its claimed religious beliefs at the expense of its employees, who are told that religion is not a prerequisite to their employment, yet who are then denied the benefit of insured, funded pensions, as well as many other important ERISA protections. Similarly, OSF has a privileged economic advantage over its competitors in the commercial arena it has chosen, based solely on OSF’s claimed religious beliefs.

141. As set forth in more detail below in Count IX, the extension of the church plan exemption to OSF, which is not a church, violates the Establishment Clause and thus is void and ineffective.

VI. CLASS ALLEGATIONS

142. Plaintiffs bring this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and the following class of persons similarly situated: All participants, former participants, or beneficiaries of any defined benefit pension plan operated as or claimed by OSF to be a church plan.

A. Numerosity

143. The exact number of Class members is unknown to Plaintiffs at this time, but may be readily determined from records maintained by OSF. OSF currently employs more than 18,000 individuals. There are over 18,000 participants or former participants in the St. Francis Plan and over 1,300 participants or former participants in the St. Anthony's Plan. Thus, the Class is so numerous that joinder of all members is impracticable.

B. Commonality

144. The issues regarding liability in this case present common questions of law and fact, with answers that are common to all members of the Class, including (1) whether the Plans are exempt from ERISA as church plans; (2) whether the fiduciaries of the Plans have failed to administer and enforce the funding obligations of the Plans in accordance with ERISA; (3) whether the church plan exemption, as claimed by OSF, violates the Establishment Clause of the First Amendment; and (4) whether OSF has failed to comply with its obligations to fund the Plans under ERISA, the plan documents, and/or the common law.

145. The issues regarding the relief are also common to the members of the Class as the relief will consist of: (1) a declaration that the Plans are ERISA covered plans; (2) an order

requiring that the Plans comply with ERISA's administration and funding obligations; (3) an order requiring OSF to pay civil penalties to the Class, in the same statutory daily amount for each member of the Class; and/or (4) an order requiring OSF to comply with its obligations to fund the Plans.

C. Typicality

146. Plaintiffs' claims are typical of the claims of the other members of the Class because their claims arise from the same event, practice and/or course of conduct, namely Defendants' failure to maintain the Plans in accordance with ERISA, the requirements of the Plan documents, and/or the common law. Plaintiffs' claims are also typical because all Class members are similarly affected by Defendants' wrongful conduct.

147. Plaintiffs' claims are also typical of the claims of the other members of the Class because, to the extent Plaintiffs seek equitable relief, it will affect all Class members equally. Specifically, the equitable relief sought consists primarily of (i) a declaration that the OSF Plans are not church plans; (ii) a declaration that the OSF Plans are ERISA covered plans; (iii) injunctive relief requiring Defendants to comply with the administration and funding requirements of ERISA; and (iv) an order requiring OSF to comply with its obligations to fund the Plans.

148. In addition, Plaintiffs' claims for monetary relief are for civil fines to Plaintiffs and the other Class members in the same statutory daily amount for each member of the Class.

149. OSF does not have any defenses unique to Plaintiffs' claims that would make Plaintiffs' claims atypical of the remainder of the Class.

D. Adequacy

150. Plaintiffs will fairly and adequately represent and protect the interests of all members of the Class.

151. Plaintiffs do not have any interests antagonistic to or in conflict with the interests of the Class.

152. Defendants have no unique defenses against Plaintiffs that would interfere with Plaintiffs' representation of the Class.

153. Plaintiffs have engaged counsel with extensive experience prosecuting class actions in general and ERISA class actions in particular.

E. Rule 23(b)(1) Requirements

154. The requirements of Rule 23(b)(1)(A) are satisfied because prosecution of separate actions by the members of the Class would create a risk of establishing incompatible standards of conduct for Defendants.

155. The requirements of Rule 23(b)(1)(B) are satisfied because adjudications of these claims by individual members of the Class would, as a practical matter, be dispositive of the interests of the other members not parties to the actions, or substantially impair or impede the ability of other members of the Class to protect their interests.

F. Rule 23(b)(2) Requirements

156. Class action status is also warranted under Rule 23(b)(2) because Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive, declaratory, or other appropriate equitable relief with respect to the Class as a whole.

G. Rule 23(b)(3) Requirements

157. If the Class is not certified under Rule 23(b)(1) or (b)(2), then certification under (b)(3) is appropriate because questions of law or fact common to members of the Class predominate over any questions affecting only individual members. The common issues of law or fact that predominate over any questions affecting only individual members include: (1)

whether the Plans are exempt from ERISA as church plans; (2) whether the fiduciaries of the Plans have failed to administer and enforce the funding obligations of the Plans in accordance with ERISA; (3) whether the church plan exemption, as claimed by OSF, violates the Establishment Clause of the First Amendment; and (4) whether OSF has failed to comply with its obligations to fund the Plans under ERISA, the plan documents, and/or the common law.

158. A class action is superior to the other available methods for the fair and efficient adjudication of this controversy because:

A. Individual Class members do not have an interest in controlling the prosecution of these claims in individual actions rather than a class action because the equitable relief sought by any Class member will either inure to the benefit of the Plans or affect each Class member equally;

B. Individual Class members also do not have an interest in controlling the prosecution of these claims because the monetary relief that they could seek in any individual action is identical to the relief that is being sought on their behalf herein;

C. This litigation is properly concentrated in this forum, which is where Defendant OSF transacts business and where Plaintiff Smith lives and accrued benefits; and

D. There are no difficulties managing this case as a class action.

VII. CAUSES OF ACTION

COUNT I

(Claim for Equitable Relief Pursuant to ERISA Sections 502(a)(2) and 502(a)(3) Against All Defendants)

159. Plaintiffs repeat and re-allege the allegations contained in all foregoing paragraphs herein.

160. ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), authorizes a participant or beneficiary to bring a civil action to obtain “appropriate equitable relief . . . to enforce any provisions of this [title].” Pursuant to this provision, 28 U.S.C. §§ 2201 and 2202, and Federal Rule of Civil Procedure 57, Plaintiffs seek declaratory relief that the OSF Plans are not church plans within the meaning of ERISA section 3(33), 29 U.S.C. § 1002(33), and thus are subject to the provisions of Title I and Title IV of ERISA.

161. ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), also authorizes a participant or beneficiary to bring a civil action “(A) to enjoin any act or practice which violates any provision of this [title] or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.” Pursuant to these provisions, Plaintiffs seek an order directing the OSF Plans’ sponsor and administrator to bring the OSF Plans into compliance with ERISA.

162. ERISA section 502(a)(2), 29 U.S.C. § 1132(2), authorizes a participant or beneficiary to bring a civil action for appropriate relief under 29 U.S.C. § 1109(a), against a fiduciary “who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries” and the fiduciary “shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate.” ERISA § 409(a), 29 U.S.C. § 1109(a). Because the operation of the Plans as non-ERISA Plans was a breach of Defendants’ fiduciary duties, Defendants breached their fiduciary duties and Plaintiffs also seek Plan-wide equitable and remedial relief under ERISA section 502(a)(2).

163. As the OSF Plans are not church plans within the meaning of ERISA section 3(33), 29 U.S.C. § 1002(33), and meet the definition of pension plans under ERISA section 3(2), 29 U.S.C. § 1002(2), the OSF Plans should be declared to be ERISA-covered pension plans, and Defendants should be ordered to bring the OSF Plans into compliance with ERISA, including by remedying the violations set forth below.

COUNT II

(Claim for Violation of Reporting and Disclosure Provisions Against All Defendants)

164. Plaintiffs incorporate and re-allege by reference the foregoing paragraphs as if fully set forth herein.

A. Summary Plan Descriptions

165. At no time have the Plan Administrator Defendants or, in the alternative, Defendant OSF, provided Plaintiffs or any member of the Class with summary plan descriptions with respect to the OSF Plans that meet the requirements of ERISA section 102, 29 U.S.C. § 1022, and the regulations promulgated thereunder.

166. Because the Plan Administrator Defendants, or, in the alternative, OSF, have been the Plan Administrator of the Plans at all relevant times, the Plan Administrator Defendants (or OSF) violated ERISA section 104, 29 U.S.C. § 1024, by failing to provide Plaintiffs and members of the Class with adequate summary plan descriptions.

B. Annual Reports

167. At no time have the Plan Administrator Defendants, or, in the alternative, OSF, filed an annual report with respect to the OSF Plans with the Secretary of Labor in compliance with ERISA section 103, 29 U.S.C. § 1023, nor have they filed a Form 5500 and associated schedules and attachments, which the Secretary has approved as an alternative method of compliance with ERISA section 103, 29 U.S.C. § 1023.

168. Because the Plan Administrator Defendants, or, in the alternative, OSF, have been the Plan Administrator of the OSF Plans at all relevant times, the Plan Administrator Defendants (or OSF) have violated ERISA section 104(a), 29 U.S.C. § 1024(a), by failing to file annual reports with respect to the OSF Plans with the Secretary of Labor in compliance with ERISA section 103, 29 U.S.C. § 1023, or Form 5500s and associated schedules and attachments, which the Secretary has approved as an alternate method of compliance with ERISA section 103, 29 U.S.C. § 1023.

C. Summary Annual Reports

169. At no time have the Plan Administrator Defendants, or, in the alternative, OSF, furnished Plaintiffs or any member of the Class with summary annual reports with respect to the OSF Plans in compliance with ERISA section 104(b)(3) and regulations promulgated thereunder. ERISA § 104(b)(3), 29 U.S.C. § 1024(b)(3).

170. Because the Plan Administrator Defendants, or, in the alternative, OSF, have been the Plan Administrators of the OSF Plans at all relevant times, the Plan Administrator Defendants (or OSF) have violated ERISA section 104(b)(3), 29 U.S.C. § 1024(b)(3), by failing to furnish Plaintiffs or any member of the Class with summary annual reports with respect to the OSF Plans in compliance with ERISA section 104(b)(3) and the regulations promulgated thereunder. ERISA § 104(b)(3), 29 U.S.C. § 1024(b)(3).

D. Notification of Failure to Meet Minimum Funding

171. At no time has OSF furnished Plaintiffs or any member of the Class with notices of failure to meet minimum funding standards with respect to the OSF Plans pursuant to ERISA section 101(d)(1), 29 U.S.C. § 1021(d)(1), informing them that OSF had failed to make

payments required to comply with ERISA section 302, 29 U.S.C. § 1082, with respect to the OSF Plans.

172. Defendant OSF is the employer that maintains the OSF Plans.

173. At no time has Defendant OSF funded the OSF Plans in accordance with ERISA section 302, 29 U.S.C. § 1082.

174. As the employer maintaining the OSF Plans, Defendant OSF has violated ERISA section 302, 29 U.S.C. § 1082, by failing to fund the OSF Plans. OSF is liable for its own violations of ERISA section 101(d)(1), 29 U.S.C. § 1021(d)(1), and as such may be required by the Court to pay Plaintiffs and each Class member up to \$110 per day (as permitted by 29 C.F.R. § 2575.502(c)(3)) for each day that Defendant has failed to provide Plaintiffs and each Class member with the notices required by ERISA section 101(d)(1), 29 U.S.C. § 1021(d)(1).

E. Funding Notices

175. At no time have the Plan Administrator Defendants, or, in the alternative, OSF, furnished Plaintiffs or any member of the Class with a funding notice with respect to the OSF Plans pursuant to ERISA section 101(f), 29 U.S.C. § 1021(f).

176. Because the Plan Administrator Defendants, or, in the alternative, OSF, have been the Plan Administrator of the OSF Plans at all relevant times, they have violated ERISA section 101(f) by failing to provide each participant and beneficiary of the OSF Plans with the funding notices required by ERISA section 101(f), and as such may be required by the Court to pay Plaintiffs and each Class member up to \$110 per day (as permitted by ERISA section 502(c)(1), 29 U.S.C. § 1132(c)(1), amended by 29 C.F.R. § 2575.502c-1) for each day that the Plan

Administrator Defendants (or OSF) have failed to provide Plaintiffs and each Class member with the funding notices required by ERISA section 101(f), 29 U.S.C. § 1021(f).

F. Pension Benefit Statements

177. At no time have the Plan Administrator Defendants, or, in the alternative, OSF, furnished Plaintiffs or any member of the Class with a pension benefit statement with respect to the OSF Plans pursuant to ERISA section 105(a)(1), 29 U.S.C. § 1025(a)(1).

178. Because the Plan Administrator Defendants, or, in the alternative, OSF, have been the Plan Administrator of the OSF Plans at all relevant times, they have violated ERISA section 105(a)(1) and as such may be required by the Court to pay Plaintiffs and each Class member up to \$110 per day (as permitted by ERISA section 502(c)(1), 29 U.S.C. § 1132(c)(1), amended by 29 C.F.R. § 2575.502c-1) for each day that the Plan Administrator Defendants (or OSF) have failed to provide Plaintiffs and each Class member with the pension benefit statements required by ERISA section 105(a)(1), 29 U.S.C. § 1025(a)(1).

COUNT III

(Claim for Failure to Provide Minimum Funding Against Defendant OSF)

179. Plaintiffs incorporate and re-allege by reference the foregoing paragraphs as if fully set forth herein.

180. ERISA section 302, 29 U.S.C. § 1082, establishes minimum funding standards for defined benefit plans that require employers to make minimum contributions to their plans so that each plan will have assets available to fund plan benefits if the employer maintaining the plan is unable to pay benefits out of its general assets.

181. OSF was responsible for making the contributions that should have been made pursuant to ERISA section 302, 29 U.S.C. § 1082, at a level commensurate with that which would be required under ERISA.

182. At all relevant times, OSF has failed to make contributions in satisfaction of the minimum funding standards of ERISA section 302, 29 U.S.C. § 1082.

183. By failing to make the required contributions to the OSF Plans, either in whole or in partial satisfaction of the minimum funding requirements established by ERISA section 302, Defendant OSF has violated ERISA section 302, 29 U.S.C. § 1082.

COUNT IV

(Claim for Failure to Establish the Plans Pursuant to Written Instruments Meeting the Requirements of ERISA Section 402 Against Defendant OSF)

184. Plaintiffs incorporate and re-allege by reference the foregoing paragraphs as if fully set forth herein.

185. ERISA section 402, 29 U.S.C. § 1102, provides that every plan will be established pursuant to a written instrument which will provide, among other things, “for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan” and will “provide a procedure for establishing and carrying out a funding policy and method constituent with the objectives of the plan and the requirements of [Title I of ERISA].”

186. Although the benefits provided by the OSF Plans were described to the employees and retirees of OSF (and/or its affiliates and subsidiaries) in various written communications, the OSF Plans have never been established pursuant to written instruments meeting the requirements of ERISA section 402, 29 U.S.C. § 1102.

187. Defendant OSF violated ERISA section 402 by failing to promulgate written instruments in compliance with ERISA section 402 to govern the OSF Plans’ operations and administration. ERISA § 402, 29 U.S.C. § 1102.

COUNT V

(Claim for Failure to Establish a Trust Meeting the Requirements of ERISA Section 403 Against Defendant OSF)

188. Plaintiffs incorporate and re-allege by reference the foregoing paragraphs as if fully set forth herein.

189. ERISA section 403, 29 U.S.C. § 1103, provides, subject to certain exceptions not applicable here, that “all assets of an employee benefit plan shall be held in trust by one or more trustees,” that the “trustee or trustees shall be either named in the trust instrument or in the plan instrument” described in ERISA section 402(a), 29 U.S.C. § 1102(a), “or appointed by a person who is a named fiduciary.” ERISA § 403(a), 29 U.S.C. § 1103(a).

190. Although the OSF Plans’ assets have been held in trust, upon information and belief, the trust does not meet the requirements of ERISA section 403, 29 U.S.C. § 1103.

191. Defendant OSF violated ERISA section 403 by failing to put the OSF Plans’ assets in trust in compliance with ERISA section 403, 29 U.S.C. § 1103.

COUNT VI

(Claim for Clarification of Future Benefits Under ERISA Sections 502(a)(1)(B) and 502(a)(3) Against All Defendants)

192. Plaintiffs incorporate and re-allege by reference the foregoing paragraphs as if fully set forth herein.

193. ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), provides, in part, that a participant or beneficiary may bring a civil action to “clarify his rights to future benefits under the terms of the plan.” ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).

194. Plaintiffs and members of the Class have not been provided ERISA-compliant benefit statements.

195. Pursuant to ERISA sections 502(a)(1)(B), 502(a)(3), 29 U.S.C. § 1132(a)(1)(B), 1132(a)(3), once the Plans are made compliant with ERISA, Plaintiffs seek to clarify their rights under the terms of the Plans and to require the Plan Administrator Defendants and/or Defendant OSF to provide Plaintiffs and the Class with ERISA-compliant benefit statements.

COUNT VII

(Claim for Civil Money Penalty Pursuant to ERISA Section 502(a)(1)(A) Against All Defendants)

196. Plaintiffs incorporate and re-allege by reference the foregoing paragraphs as if fully set forth herein.

197. ERISA section 502(a)(1)(A), 29 U.S.C. § 1132(a)(1)(A), provides that a participant may bring a civil action for the relief provided in ERISA section 502(c), 29 U.S.C. § 1132(c).

198. ERISA section 502(c)(3), 29 U.S.C. § 1132(c)(3), as provided in 29 C.F.R. § 2575.502c-3, provides that an employer maintaining a plan who fails to meet the notice requirement of ERISA section 101(d), 29 U.S.C. § 1021(d), with respect to any participant and beneficiary may be liable for up to \$110 per day from the date of such failure.

199. ERISA section 502(c)(1), 29 U.S.C. § 1132(c)(1), as provided in 29 C.F.R. § 2575.502c-3, provides that an administrator of a defined benefit pension plan who fails to meet the notice requirement of ERISA section 101(f), 29 U.S.C. § 1021(f), with respect to any participant and beneficiary may be liable for up to \$110 per day from the date of such failure.

200. ERISA section 502(c)(1), 29 U.S.C. § 1132(c)(1), as provided in 29 C.F.R. § 2575.502c-3, provides that an administrator of a defined benefit pension plan who fails to provide a Pension Benefit Statement at least once every three years to a participant with a nonforfeitable accrued benefit who is employed by the employer maintaining the plan at the

time the statement is to be furnished as required by ERISA section 105(a), 29 U.S.C. § 1025(a), may be liable for up to \$110 per day from the date of such failure.

201. Because Defendant OSF, as the employer, has failed to give the notices required by ERISA section 101(d), 29 U.S.C. § 1021(d), as set forth in Count II Subpart D, Defendant OSF is liable to Plaintiffs and each member of the Class in an amount up to \$110 per day from the date of such failures until such time that notices are given and the statement is provided, as the Court, in its discretion, may order.

202. Because the Plan Administrator Defendants, or, in the alternative, OSF, have failed to give the notices required by ERISA section 101(f), 29 U.S.C. § 1021(f), and the Pension Benefit Statement required by ERISA section 105(a), 29 U.S.C. § 1025(a), as set forth in Count II Subparts E through F, the Plan Administrator Defendants, or, in the alternative, OSF, are liable to Plaintiffs and each member of the Class in an amount up to \$110 per day from the date of such failures until such time that notices are given and the statement is provided, as the Court, in its discretion, may order.

COUNT VIII

(Claim for Breach of ERISA Fiduciary Duties Against All Defendants)

203. Plaintiffs incorporate and re-allege by reference the foregoing paragraphs as if fully set forth herein.

204. Plaintiffs bring this Count VIII for breach of fiduciary duty pursuant to ERISA section 502(a)(2), 29 U.S.C. § 1132(a)(2).

A. Breach of the Duty of Prudence and Loyalty

205. ERISA section 404(a)(1), 29 U.S.C. § 1104(a)(1), provides in pertinent part that “a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –

- (a) for the exclusive purpose of:
 - (i) providing benefits to participants and beneficiaries; and
 - (ii) defraying reasonable expenses of administering the plan;
- (b) with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; [and]
- [(c)] in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this [Title I of ERISA] and [Title IV].”

ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1).

206. As fiduciaries with respect to the OSF Plans, Defendants had the authority to enforce each provision of ERISA alleged to have been violated in the foregoing paragraphs pursuant to ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3). Having the authority to enforce the provisions of ERISA at those respective times, ERISA sections 404(a)(1)(A)-(D), 29 U.S.C. § 1104(a)(1)(A)-(D), imposed on Defendants the respective duty to enforce those provisions in the interest of the participants and beneficiaries of the OSF Plans during the times that each was a fiduciary of the OSF Plans.

207. Defendants have never enforced any of the provisions of ERISA set forth in Counts I-V with respect to the OSF Plans.

208. By failing to enforce the provisions of ERISA set forth in Counts I-V, Defendants breached the fiduciary duties that they owed to Plaintiffs and the Class.

The failure of Defendants to enforce the funding obligations owed to the Plans has resulted in a loss to the OSF Plans equal to the foregone funding and earnings thereon, and profited Defendant OSF by providing it the use of the money owed to the OSF Plans for its general business purposes.

B. Prohibited Transactions

209. ERISA section 406(a)(1)(B), 29 U.S.C. § 1106(a)(1)(B), prohibits a fiduciary with respect to a plan from directly or indirectly causing a plan to extend credit to a party in interest, as defined in ERISA section 3(14), 29 U.S.C. § 1002(14), if he or she knows or should know that such transaction constitutes an extension of credit to a party in interest.

210. ERISA section 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D), prohibits a fiduciary with respect to a plan from directly or indirectly causing a plan to use assets for the benefit of a party in interest if he or she knows or should know that such transaction constitutes a use of plan assets for the benefit of a party in interest.

211. ERISA section 406(b)(1), 29 U.S.C. § 1106(b)(1), prohibits the use of plan assets by a fiduciary with respect to a plan for his or her own interest or for his or her own account.

212. As fiduciaries with respect to the Plans and, with respect to OSF, as an employer of employees covered by the Plans, Defendants at all relevant times were parties in interest with respect to the OSF Plans pursuant to ERISA sections 3(14)(A), (C), 29 U.S.C. §§ 1002(14)(A), (C).

213. By failing to enforce the funding obligations created by ERISA and owed to the Plans, Defendants extended credit from the OSF Plans to OSF in violation of ERISA section 406(a)(1)(B), 29 U.S.C. § 1106(a)(1)(B), when Defendants knew or should have known that their failure to enforce the funding obligation constituted such an extension of credit.

214. By failing to enforce the funding obligations created by ERISA and owed to the OSF Plans, Defendants used the OSF Plans' assets for OSF's own benefit, when Defendants knew or should have known that their failure to enforce the funding obligations constituted such

a use of OSF Plans' assets, in violation of ERISA section 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D).

215. By failing to enforce the funding obligations created by ERISA and owed to the OSF Plans, Defendant OSF used the OSF Plans' assets in OSF's interest in violation of ERISA section 406(b)(1), 29 U.S.C. § 1106(b)(1).

216. The failure of Defendants to enforce the funding obligations owed to the OSF Plans has resulted in a loss to the OSF Plans equal to the foregone funding and earnings thereon.

217. The failure of Defendants to enforce the funding obligations owed to the OSF Plans has profited Defendant OSF by providing it the use of money owed to the OSF Plans for its general business purposes.

C. Failure to Monitor Fiduciaries

218. This sub-Count alleges fiduciary breach against Defendant OSF.

219. As alleged above, during the Class Period, Defendant OSF was a named fiduciary pursuant to ERISA section 402(a)(1), 29 U.S.C. § 1102(a)(1), or a de facto fiduciary within the meaning of ERISA section 3(21)(A), 29 U.S.C. § 1002(21)(A), or both. Thus, it was bound by the duties of loyalty, exclusive purpose, and prudence.

220. The scope of the fiduciary responsibilities of OSF included the responsibility to appoint, and remove, and thus, monitor the performance of other fiduciaries.

221. Under ERISA, a monitoring fiduciary must ensure that the monitored fiduciaries perform their fiduciary obligations, including those with respect to the investment and holding of plan assets, and must take prompt and effective action to protect the plan and participants when they are not.

222. The monitoring duty further requires that appointing fiduciaries have procedures in place so that they may review and evaluate, on an ongoing basis, whether the “hands-on” fiduciaries are doing an adequate job (for example, by requiring periodic reports on their work and the plan’s performance, and by ensuring that they have a prudent process for obtaining the information and resources they need). In the absence of a sensible process for monitoring their appointees, the appointing fiduciaries would have no basis for prudently concluding that their appointees were faithfully and effectively performing their obligations to plan participants or for deciding whether to retain or remove them.

223. Furthermore, a monitoring fiduciary must provide the monitored fiduciaries with the complete and accurate information in their possession that they know or reasonably should know that the monitored fiduciaries must have in order to prudently manage the plan and the plan assets, or that may have an extreme impact on the plan and the fiduciaries’ investment decisions regarding the plan.

224. Defendant OSF breached its fiduciary monitoring duties by, among other things: (a) failing to appoint persons who would run the Plans as ERISA Plans; (b) failing to ensure that the monitored fiduciaries appreciated the true extent of not running the Plans as ERISA Plans; (c) to the extent any appointee lacked such information, failing to provide complete and accurate information to all of their appointees such that they could make sufficiently informed fiduciary decisions with respect to the Plans; and (d) failing to remove appointees whose performance was inadequate in that they continued to run the Plans as non-ERISA Plans, and who breached their fiduciary duties under ERISA.

225. The failure of Defendant OSF to enforce the funding obligations owed to the Plans has resulted in a loss to the OSF Plans equal to the foregone funding and earnings thereon,

and profited Defendant OSF by providing it the use of money owed to the OSF Plans for its general business purposes.

D. Co-Fiduciary Liability

226. As alleged above, all Defendants were named fiduciaries pursuant to ERISA section 402(a)(1), 29 U.S.C. § 1102(a)(1), or de facto fiduciaries within the meaning of ERISA section 3(21)(A), 29 U.S.C. § 1002(21)(A), or both. Thus, they were bound by the duties of loyalty, exclusive purpose, and prudence.

227. ERISA section 405(a), 29 U.S.C. § 1105, imposes liability on a fiduciary, in addition to any liability which he may have under any other provision, for a breach of fiduciary responsibility of another fiduciary with respect to the same plan if he knows of a breach and fails to remedy it, knowingly participates in a breach, or enables a breach. Defendants breached all three provisions.

228. **Knowledge of a Breach and Failure to Remedy.** ERISA section 405(a)(3), 29 U.S.C. § 1105, imposes co-fiduciary liability on a fiduciary for a fiduciary breach by another fiduciary if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach. Each of the Defendants knew of the breaches by the other fiduciaries and made no efforts, much less reasonable ones, to remedy those breaches.

229. Because Defendants knew that the Plans were not being run as ERISA Plans, Defendants knew that the other Defendants were breaching their duties by not complying with ERISA. Yet, they failed to undertake any effort to remedy these breaches.

230. **Knowing Participation in a Breach.** ERISA section 405(a)(1), 29 U.S.C. § 1105(1), imposes liability on a fiduciary for a breach of fiduciary responsibility by another

fiduciary with respect to the same plan if he knowingly participates in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach. OSF knowingly participated in the fiduciary breaches of the other Defendants in that it benefited from the Plans not being run as ERISA Plans.

231. **Enabling a Breach.** ERISA section 405(a)(2), 29 U.S.C. § 1105(2), imposes liability on a fiduciary if, by failing to comply with ERISA section 404(a)(1), 29 U.S.C. § 1104(a)(1), in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled another fiduciary to commit a breach.

232. The failure of Defendant OSF to monitor the Plan Administrator Defendants enabled those Plan Administrator Defendants to breach their duties.

233. As a direct and proximate result of the breaches of fiduciary duties alleged herein, the Plans are currently underfunded, meaning that the Plans do not have sufficient assets to pay all accrued benefits they have promised to their participants and beneficiaries and are legally obligated to pay under ERISA.

234. The failure of Defendants to enforce the funding obligations owed to the Plans has resulted in a loss to the OSF Plans equal to the foregone funding and earnings thereon, and profited Defendant OSF by providing it the use of money owed to the OSF Plans for its general business purposes.

COUNT IX

(Claim for Declaratory Relief That the Church Plan Exemption Violates the Establishment Clause of the First Amendment of the Constitution, and Is Therefore Void and Ineffective)

235. Plaintiffs incorporate and re-allege by reference the foregoing paragraphs as if fully set forth herein.

236. The church plan exemption exempts churches and conventions and associations of churches, under certain circumstances, from compliance with ERISA.

237. Application of the church plan exemption to hospital systems like OSF—entities that have chosen to compete with commercial businesses by entering the economic arena and trafficking in the marketplace—would effect an exemption from a neutral, generally applicable statute that is available to hospital systems with some connection to religion but not to analogous secular hospital systems.

238. An exemption from a neutral, generally applicable statute that is available exclusively to religious entities is an unconstitutional establishment of religion unless the exemption is necessary to alleviate a substantial, state-imposed burden on religious exercise or to avoid substantial government entanglement in religion. Application of the church plan exemption to hospital systems like OSF accomplishes neither purpose.

239. An exemption from ERISA for hospital systems like OSF is not required to alleviate a substantial, state-imposed burden on religious exercise. ERISA is a neutral statute that governs pension benefits. It is materially indistinguishable from the array of neutral Congressional enactments that do not significantly burden religious exercise when applied to commercial activities. OSF maintains multiple separate ERISA-governed plans, which further evidences that ERISA creates no undue burden on any genuine religious practice of OSF.

240. An exemption from ERISA for hospital systems like OSF is not required to avoid government entanglement in religion. ERISA does not require government entanglement in religion. Although Congress enacted the church plan exemption to avoid “examination of books and records” that “might be regarded as an unjustified invasion of the confidential relationship

with regard to churches and their religious activities,”³ this purpose has no application to hospital systems like OSF. OSF is not a church and is neither run by, nor financially connected to, any church. Unlike a church, OSF has *no confidential books and records* to shield from government scrutiny because OSF already purports to disclose all material financial records and relationships when it seeks Medicare and Medicaid reimbursements and issues tax-exempt bonds. Thus, application of the exemption to hospital systems like OSF is not necessary to further Congress’ stated purpose for enacting the church plan exemption.

241. Indeed, an exemption from ERISA for hospital systems like OSF creates more government entanglement in religion than would the application of ERISA. OSF’s claim to the church plan exemption requires courts and government agencies to examine religious “convictions” of a hospital system like OSF to determine whether they are “shared” with a church, in the absence of any actual church responsibility for the pensions. This *creates* entanglement between government and putative religious beliefs. ERISA compliance, on the other hand, requires *zero* entanglement with religion for OSF because ERISA is a neutral statute that regulates pension protections and OSF has no relevant confidential books, records or relationships.

242. Because it is not necessary to alleviate substantial government burden on religious exercise or to avoid government entanglement in religion, application of the church plan exemption to hospital systems like OSF serves no purpose but to demonstrate government endorsement of religion.

243. Even if the application of the church plan exemption to hospital systems like OSF were a permissible religious accommodation, it still would run afoul of the Establishment

³ S. Rep. No. 93-383 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4889, 4965.

Clause because the costs and burdens of the exemption are imposed on OSF workers. To be constitutional, a religious accommodation must not impose burdens on non-adherents without due consideration of their interests. OSF tells prospective employees that their choice of faith, or lack thereof, is not a factor in the recruiting and hiring of OSF employees. Thus, as a practical matter, and by OSF's own design, the OSF Plans' participants include people of a vast number of divergent faiths. The church plan exemption, as claimed by OSF, places its thousands of longtime employees' justified reliance on their pension benefits at great risk, including because the Plans are uninsured and underfunded. In addition, OSF fails to provide the multitude of other ERISA protections designed to safeguard its employees' pensions. The church plan exemption, as claimed by OSF, provides no consideration of the harm that it causes to OSF's employees.

244. The church plan exemption, as applied to hospital systems like OSF, also fails because it does not provide consideration for the harms imposed on competing hospital systems that do not claim religious affiliations. OSF's commercial rivals face material disadvantages in their competition with OSF because the rivals must use their current assets to fully fund, insure (through premiums to the PBGC), and administer their pension plans, as well as providing other ERISA protections. In claiming that the OSF Plans are exempt church plans, OSF enjoys a material competitive advantage because it is able to divert significant cash, which otherwise would be required to fund, insure (through premiums to the PBGC), and administer the OSF Plans, to its competitive growth strategy. The church plan exemption, as claimed by OSF, provides no consideration of the disadvantage it creates for OSF's competitors.

245. Plaintiffs seek a declaration by the Court that the church plan exemption, as claimed by OSF, is unconstitutional under the Establishment Clause of the First Amendment, and is therefore void and ineffective.

COUNT X⁴

(Alternative Claim for Breach of Contract and Specific Performance Against Defendant OSF)

246. Plaintiffs incorporate and re-allege by reference the foregoing paragraphs as if fully set forth herein.

247. OSF has repeatedly promised to fund the pensions of Plaintiffs and the other Class members and to pay defined pension benefits upon retirement in exchange for their continued employment.

248. At all relevant times, OSF was the “sponsor” and “employer” with respect to the St. Francis Plan.

249. Prior to the merger of SAHC into OSF, SAHC was the “sponsor” and “employer” with respect to the St. Anthony’s Plan.

250. Upon the merger of SAHC into OSF, OSF became a successor to SAHC and assumed the obligations of the “sponsor” and “employer” under the St. Anthony’s Plan.

251. In the OSF Plan documents, including applicable plan restatements and summary plan descriptions, OSF as the “employer” made promises (or assumed the promises of predecessor employers) to: (1) pay to Plaintiffs and other Class members, upon retirement, defined benefit pensions in amounts that increased with each year of service; and (2) make

⁴ Counts X through XIV state alternative claims for relief under State law if the Court determines that the OSF Plans are “church plans” exempt from ERISA.

ongoing contributions to the OSF Plan trusts that were sufficient, on an actuarial basis, to pay for the accrued pension benefits.

252. The promises made or assumed by OSF to make contributions sufficient to pay promised benefits were further implied in fact and law by the benefit promises contained in the OSF Plan restatements, summary plan descriptions, and benefit statements issued to Plaintiffs and the other Class members.

253. The promises made in the OSF Plan documents were clearly communicated to Plaintiffs and the other Class members, including through summary plan descriptions, benefits statements, and other OSF Plan documents, such that Plaintiffs and the other Class members could reasonably understand that OSF (or its predecessor in interest) had made an offer, in exchange for their continued service, to make ongoing contributions to the OSF Plan trusts sufficient to pay for their accrued pension benefits.

254. Plaintiffs and the other Class members accepted OSF's offer by commencing or continuing to work after learning of OSF's promises to pay and fund pension benefits.

255. Plaintiffs' and the other Class members' continued work for OSF constituted consideration for the promises contained in the OSF Plan documents.

256. Accordingly, the OSF Plan documents constitute enforceable contracts.

257. By continuing to work for OSF, Plaintiffs and the other Class members performed their obligations under the contracts and satisfied the conditions of OSF's duty to make sufficient contributions to fund accrued pension benefits.

258. Defendant OSF breached its obligations under the contracts by failing to make contributions to the OSF Plan trusts that were sufficient to pay for all accrued pension benefits.

259. Defendant OSF further breached the implied covenant of good faith and fair dealing. Defendant OSF failed to exercise good faith in the performance of its obligation to make contributions sufficient, on an actuarial basis, to fund accrued benefits.

260. OSF willfully failed to perform, evaded the spirit of the bargain, and failed to act consistent with the reasonable expectations of Plaintiff and the Class to the extent it (a) sought to satisfy its funding obligation by making only partial contributions to the OSF Plan trusts; or (b) interpreted its funding obligation as being satisfied by its partial contributions, which as of 2016 resulted in the OSF Plans being funded at only 50% or 55% of their accrued benefit obligations.

261. A promise to pay pension benefits—as was made in the OSF Plan documents and repeated in benefit statements and other communications sent to Plaintiffs and the other Class members—is meaningful only if there is money in the plan trust that is sufficient, on an actuarial basis, to pay the accrued benefits. Plaintiffs believed, and a reasonable plan participant would expect, that in light of the promise to pay defined pension benefits upon retirement and the promise to make contributions sufficient to fund that promise, OSF would have made contributions sufficient, on an actuarial basis, to fund the *full* amount of the accrued benefit, not *half* that amount.

262. Defendant OSF had an improper motive to make insufficient contributions to the OSF Plans: Plaintiffs and the other Class members continued in their employment, relying in whole or in part on OSF's promises, while OSF simultaneously retained hundreds of millions of dollars for its own account that should have been contributed to the OSF Plans.

263. Because Defendant OSF breached its obligation to make contributions to the OSF Plans, Plaintiffs and the other Class members have been deprived of their contractual right to a

sufficiently funded trust supporting their accrued pension benefits. OSF's failure to make sufficient contributions to the OSF Plan trusts has left the OSF Plans severely underfunded, creating a significant risk that the OSF Plans will be unable to pay promised pension benefits. This risk is further amplified by OSF's designation of the OSF Plans as ERISA-exempt "church plans," which has left them uninsured by the Pension Benefit Guaranty Corporation.

264. Plaintiffs and the Class are entitled to specific performance of the obligations contained in the OSF Plan documents, including (a) OSF's obligation to make contributions to the OSF Plan trusts that are sufficient, on an actuarial basis, to pay for *all* accrued pension benefits; and (b) OSF's implied obligation to act fairly and in good faith in the performance of its contractual obligations.

COUNT XI

(Alternative Claim for Promissory Estoppel Against Defendant OSF)

265. Plaintiffs incorporate and re-allege by reference the foregoing paragraphs as if fully set forth herein.

266. Plaintiffs assert a state law claim for promissory estoppel against Defendant OSF to the extent that the OSF Plans did not create an enforceable contractual relationship between OSF and Plaintiffs and the other Class members.

267. OSF repeatedly promised to: (1) pay to Plaintiffs and other Class members, upon retirement, defined benefit pensions in amounts that increased with each year of service; and (2) make ongoing contributions to the OSF Plan trusts that were sufficient, on an actuarial basis, to pay for the accrued pension benefits.

268. These promises were clearly communicated to Plaintiffs and the other Class members through OSF Plan documents and communications, including summary plan

descriptions, benefit statements, and/or other generally distributed documents and oral assurances.

269. OSF expected or reasonably should have expected that Plaintiffs and the other Class members would continue to work for OSF in reliance, in whole or in part, on OSF's promise to pay and fund pension benefits in exchange for their completion of years of service. A principal purpose of a pension is to encourage employees to continue working at their job instead of leaving and causing turnover.

270. Plaintiffs and the other Class members continued working at their jobs and earned their years of service for their pension benefits in reliance on the promises made to them by OSF.

271. OSF has repudiated its promise by failing to make contributions to the OSF Plan trusts that are sufficient, on an actuarial basis, to pay for the accrued pension benefits.

272. If OSF does not adequately fund the promised pension benefits, Plaintiffs will not receive the retirement benefits to which they are entitled and on which they relied.

273. Because Plaintiffs and the other Class members continued to work for OSF in reliance on OSF's promises, they forewent opportunities to seek other employment that would have paid them benefits, including retirement benefits. Plaintiffs and the other Class members can never undo those years spent working for OSF and cannot reverse time to work for an employer that will actually honor its promises to pay pension benefits. Accordingly, if OSF does not honor its promises to adequately fund the promised pension benefits, Plaintiffs and the other Class members will retire with far less income than they expected and will have been deprived of the opportunity to make up for that lost income.

274. OSF's promises must be enforced to avoid this injustice to Plaintiffs and the other members of the Class.

COUNT XII

(Alternative Claim for Unjust Enrichment Against Defendant OSF)

275. Plaintiffs incorporate and re-allege by reference the foregoing paragraphs as if fully set forth herein.

276. Plaintiffs assert a state law claim for unjust enrichment against Defendant OSF to the extent that the OSF Plans did not create an enforceable contractual relationship between OSF and Plaintiffs and the other Class members.

277. Plaintiffs and the other Class members conferred substantial benefits on OSF, including their continued employment.

278. OSF promised to pay and fund defined benefit pensions to Plaintiffs and the other Class members in order to recruit them and encourage them to continue working at OSF, as previously alleged.

279. In reliance in whole or in part on these promises, Plaintiffs and other Class members worked for OSF for longer periods and lower wages than they would have in the absence of the promised benefits.

280. OSF benefitted from the contributions of Plaintiffs and other Class members of their time, effort, experience, training, and ideas.

281. OSF directly saved hundreds of millions of dollars by not contributing those amounts to the OSF Plans, as previously alleged.

282. OSF also avoided the cost of higher employee turnover as a result of Plaintiffs and the other Class members remaining employees of OSF. Costs of employee turnover can include: the time of management and human resources personnel devoted to exit interviews and

organizing work left behind by departing employees; severance benefits and variable unemployment insurance costs; advertising for replacement employees; the time of management devoted to reviewing applications and conducting interviews and reference checks; the time of managers and co-workers devoted to training new replacement employees; and reduced productivity of replacement employees due to inexperience.

283. OSF retained these benefits to the detriment of Plaintiffs and the Class. The hundreds of millions of dollars that OSF has retained for its own account should have been paid into the OSF Plan trusts to fund the already accrued pension benefits of Plaintiffs and the other Class members.

284. OSF's failure to make sufficient contributions to the OSF Plan trusts has left the OSF Plans severely underfunded, creating a significant risk that the OSF Plans will be unable to pay the pension benefits to which Plaintiffs and the other Class members are entitled. This risk is further amplified by OSF's designation of the OSF Plans as ERISA-exempt "church plans," which has left them uninsured by the Pension Benefit Guaranty Corporation.

285. Additionally, Plaintiffs and the other Class members continued working for OSF relying in whole or in part on their reasonable expectations that OSF would contribute that money into the OSF Plan trusts in exchange for their continued employment. By working for OSF in reliance on this reasonable expectation, Plaintiffs and the other Class members forewent opportunities to seek alternative employment that would have paid them benefits, including retirement benefits. Plaintiffs and the other Class members can never undo those years spent working for OSF and cannot reverse time to work for an employer that will actually honor its promises to pay pension benefits.

286. If OSF does not honor its promises to adequately fund the promised pension benefits, Plaintiffs and the other Class members will retire with far less income than they expected and will have been deprived of the opportunity to make up for that lost pension income.

287. Accordingly, OSF's retention of the benefits described herein would violate fundamental principles of justice, equity, and good conscience.

288. The amount of Defendant OSF's unjust enrichment, including the amounts retained by OSF that should have been contributed to the OSF Plans, should be disgorged and paid to the OSF Plan trusts.

COUNT XIII

(Alternative Claim for Breach of Common Law Fiduciary Duty Against Defendant OSF)

289. Plaintiffs incorporate and re-allege by reference the foregoing paragraphs as if fully set forth herein.

290. The OSF Plan assets are held in trusts.

291. Plaintiffs and the other Class members are beneficiaries of the OSF Plan trusts.

292. Defendant OSF, in its role as the employer with respect to the OSF Plans, is a fiduciary pursuant to the OSF Plan documents.

293. As a fiduciary to the OSF Plans, Defendant OSF owed Plaintiffs and the other Class members the duty of loyalty, including the duty to act solely in the interests of Plaintiffs and the other Class members.

294. Defendant OSF had the fiduciary responsibility under the OSF Plan documents to make contributions to the OSF Plan trusts that were sufficient, on an actuarial basis, to fund all accrued benefits.

295. Defendant OSF breached its duty to make sufficient contributions to the OSF Plans, as detailed above.

296. Additionally, because Defendant OSF retained hundreds of millions of dollars for its own accounts that it should have contributed to the OSF Plan trusts and because withholding those contributions from the OSF Plan trusts has left the OSF Plans severely underfunded and at significant risk that they will be unable to pay all accrued pension benefits, OSF failed to act solely in the interests of Plaintiffs and the other Class members, in breach of its duty of loyalty.

297. As a direct and proximate cause of Defendant OSF's fiduciary breaches, the OSF Plan trusts and their beneficiaries, including Plaintiffs and the other Class members, have been deprived of contributions to which they are entitled under the terms of the OSF Plans and the OSF Plan trusts have become severely underfunded, creating a significant risk that the OSF Plans will be unable to pay to Plaintiffs and the other Class members the pension benefits to which they are entitled under the OSF Plans.

298. Plaintiffs seek an order enforcing Defendant OSF's fiduciary duties, and enjoining Defendant OSF's ongoing breaches thereof, including an order directing Defendant OSF to make contributions to the OSF Plans that are sufficient, on an actuarial basis, to fund *all* accrued pension benefits.

299. Defendant OSF is liable to restore the losses to the OSF Plans caused by its breaches of fiduciary duties alleged in this Count. Plaintiffs further request other equitable relief as appropriate.

COUNT XIV

(Alternative Claim for Breach of Common Law Fiduciary Duty Against the Plan Administrator Defendants)

300. Plaintiffs incorporate and re-allege by reference the foregoing paragraphs as if fully set forth herein.

301. The OSF Plan assets are held in trusts.

302. Plaintiffs and the other Class members are beneficiaries of the OSF Plan trusts.

303. The Plan Administrator Defendants are trustees within the meaning of the common law of trusts.

304. Alternatively, the Plan Administrator Defendants are fiduciary trust managers or trust protectors within the meaning of the common law of trusts.

305. Additionally, the Plan Administrator Defendants are fiduciaries pursuant to the OSF Plan documents.

306. As fiduciaries of the OSF Plans, the Plan Administrator Defendants owed Plaintiffs and the other Class members the duty of loyalty, including the duty to act solely in the interests of Plaintiffs and the other Class members.

307. Defendant St. Francis Administrative Committee, which was obligated by the St. Francis Plan documents to take actions in accordance with the provisions of the Plan, had a duty under the St. Francis Plan documents to compute and certify to OSF the sums of money necessary to be contributed to the Plan.

308. Defendant St. Anthony's Retirement Committee, which was obligated by the St. Anthony's Plan documents to take actions in accordance with the provisions of the Plan, had a duty under the St. Anthony's Plan documents to receive and review the periodic valuations of

the Plan made by the Plan's Actuary and to receive and review reports of the financial condition of the trust holding plan assets.

309. The Plan Administrator Defendants, as common law trustees, had a fiduciary duty to preserve and maintain trust assets, which includes the duties to determine what property constitutes the subject matter of the trust, to use reasonable diligence to discover the location of trust property, and to use reasonable diligence to take control of trust property without unnecessary delay. If an entity obligated to make contributions to a trust retains possession of trust assets, this duty entails the duty to hold that entity to its obligation to place trust assets in trust.

310. The Plan Administrator Defendants possessed discretionary powers and authority necessary to carry out the provisions of the OSF Plans.

311. The Plan Administrator Defendants breached their fiduciary duties by failing to use reasonable diligence to take control of trust property without unnecessary delay, including by failing to take reasonable steps to hold OSF to its obligation to make contributions that were sufficient, on actuarial basis, to fund all accrued benefits under the OSF Plans.

312. As a direct and proximate result of the Plan Administrator Defendants' fiduciary breaches, the OSF Plan Trusts and their beneficiaries, including Plaintiffs and the other Class members, have been deprived of contributions to which they are entitled under the terms of the OSF Plans and the OSF Plan trusts have become severely underfunded, creating a significant risk that the OSF Plans will be unable to pay to Plaintiffs and the other Class members the pension benefits to which they are entitled under the OSF Plans.

313. Plaintiffs seek an order enforcing these fiduciary duties, and enjoining the Plan Administrator Defendants' ongoing breaches thereof, including an order directing the Plan

Administrator Defendants to review actuarial reports and other relevant information regarding the funded status of the OSF Plans and use all reasonable diligence to require OSF to make contributions to the OSF Plans that are sufficient, on an actuarial basis, to fund *all* accrued pension benefits.

314. The Plan Administrator Defendants are liable to restore the losses to the OSF Plans caused by their breaches of fiduciary duties alleged in this Count. Plaintiffs further request other equitable relief as appropriate.

VIII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that judgment be entered against Defendants on all claims and requests that the Court award the following relief:

A. Certifying the Class, under Fed. R. Civ. P. 23, appointing Plaintiffs as Class Representatives, and appointing their attorneys as Class Counsel to represent the members of the Class;

B. Declaring that the OSF Plans are employee pension benefit plans within the meaning of ERISA section 3(2), 29 U.S.C. § 1002(2), are defined benefit pension plans within the meaning of ERISA section 3(35), 29 U.S.C. § 1002(35), and are not church plans within the definition of ERISA section 3(33), 29 U.S.C. § 1002(33);

C. Ordering OSF to reform the OSF Plans to bring them into compliance with ERISA and to have the OSF Plans comply with ERISA, including as follows:

1. Revising the Plans' documents to reflect that the Plans are defined benefit plans regulated by ERISA;
2. Requiring OSF to fund the OSF Plans in accordance with ERISA's funding requirements, disclose required information to the OSF Plans' participants and beneficiaries, and otherwise comply with all other reporting, vesting, and funding

requirements of Parts 1, 2 and 3 of Title I of ERISA, 29 U.S.C. §§ 1021-31, 1051-61, 1081-85;

3. Reforming the OSF Plans to comply with ERISA's vesting and accrual requirements and providing benefits in the form of a qualified joint and survivor annuity;

4. Requiring the adoption of an instrument governing the OSF Plans that complies with ERISA section 402, 29 U.S.C. § 1102; and

5. Requiring the establishment of a trust in compliance with ERISA section 403, 29 U.S.C. § 1103;

D. Ordering Defendants to comply with ERISA reporting and disclosure requirements, including by filing Form 5500 reports, distributing ERISA-compliant summary plan descriptions, summary annual reports, and ERISA-compliant pension benefit statements, and providing notices of the OSF Plans' funding status and deficiencies;

E. Ordering clarification of rights to future benefits pursuant to ERISA section 502(a)(1)(B), 29 U.S.C. § 1102(a)(1)(B);

F. Appointing an Independent Fiduciary to hold the OSF Plans' assets in trust, to manage and administer the OSF Plans and its assets, and to enforce the terms of ERISA;

G. Ordering OSF to pay a civil money penalty of up to \$110 per day to Plaintiffs and each Class member for each day it failed to inform Plaintiffs and each Class member of its failure to properly fund the Plans;

H. Ordering the Plan Administrator Defendants, or, in the alternative, OSF, to pay a civil money penalty of up to \$110 per day to Plaintiffs and each Class member for each day they failed to provide Plaintiffs and each Class member with a funding notice; and

I. Ordering the Plan Administrator Defendants, or, in the alternative, OSF, to pay a civil money penalty of up to \$110 per day to Plaintiffs and each Class member for each day they failed to provide a benefit statement under ERISA section 105(a)(1)(B), 29 U.S.C. § 1025(a)(1)(B);

J. Ordering declaratory and injunctive relief as necessary and appropriate, including enjoining Defendants from further violating the duties, responsibilities, and obligations imposed on them by ERISA with respect to the OSF Plans;

K. Awarding, declaring or otherwise providing Plaintiffs and the Class all relief under ERISA section 502(a), 29 U.S.C. § 1132(a), or any other applicable law, that the Court deems proper;

L. Requiring Defendants, as fiduciaries of the OSF Plans, to make the OSF Plans whole for any losses and disgorge any profits accumulated as a result of their breaches of ERISA fiduciary duties;

M. Declaring, with respect to Count IX, that the church plan exemption, as claimed by OSF, is an unconstitutional accommodation under the Establishment Clause of the First Amendment, and is therefore void and ineffective;

N. In the alternative to the relief requested pursuant to Counts I-IX, if the Court determines that the OSF Plans are “church plans” exempt from ERISA, ordering specific performance of Defendant OSF’s contractual obligations under the OSF Plan documents, including an order requiring Defendant OSF to make contributions to the OSF Plan trusts that are sufficient, on an actuarial basis, to fund all accrued pension benefits under the OSF Plans;

O. In the alternative to the relief requested pursuant to Counts I-IX, if the Court determines that the OSF Plans are “church plans” exempt from ERISA, enforcing Defendant

OSF's promises to make contributions to the OSF Plan trusts that are sufficient, on an actuarial basis, to fund all accrued pension benefits under the OSF Plans;

P. In the alternative to the relief requested pursuant to Counts I-IX, if the Court determines that the OSF Plans are "church plans" exempt from ERISA, ordering Defendant OSF to disgorge and pay to the OSF Plan trusts all monies wrongfully obtained or retained and all revenues and profits derived by Defendant OSF as a result of its unjust enrichment;

Q. In the alternative to the relief requested pursuant to Counts I-IX, if the Court determines that the OSF Plans are "church plans" exempt from ERISA, ordering declaratory, injunctive, and other equitable relief as necessary and appropriate, including ordering Defendants to comply with, and enjoining Defendants from further violating of, the duties, responsibilities, and obligations imposed on them by the common law and the OSF Plan documents with respect to the OSF Plans;

R. In the alternative to the relief requested pursuant to Counts I-IX, if the Court determines that the OSF Plans are "church plans" exempt from ERISA, requiring Defendants, as trustees and fiduciaries of the OSF Plans, to make the OSF Plans whole for any losses and disgorge any profits accumulated as a result of breaches of their fiduciary duties under the common law and the OSF Plan documents;

S. Awarding to Plaintiffs attorneys' fees and expenses as provided by the common fund doctrine, ERISA section 502(g), 29 U.S.C. § 1132(g), and/or other applicable doctrine;

T. Awarding to Plaintiffs taxable costs pursuant to ERISA section 502(g), 29 U.S.C. § 1132(g); 28 U.S.C. § 1920; Fed. R. Civ. P. 54(d)(1); and 735 ILCS § 5/5-108, § 5/5-110, and § 5/5-111; and other applicable law; and

U. Awarding to Plaintiffs pre-judgment interest on any amounts awarded pursuant to law.

DATED this 12th day of October, 2017.

KELLER ROHRBACK L.L.P.

/s/ Laura R. Gerber

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CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which in turn sent notice to all counsel of record.

/s/ Laura R. Gerber _____

Laura R. Gerber