

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF ILLINOIS  
SPRINGFIELD DIVISION**

Mary Holcomb, Mary Grovogel, Holly  
Mollet, Rhonda Rosenthal, and Donald  
Schneider, on behalf of themselves,  
individually, and on behalf of all others  
similarly situated, and on behalf of the  
Hospital Sisters Health System Employees'  
Pension Plan,

Plaintiffs,

v.

Hospital Sisters Health System; Hospital  
Sisters Health System Retirement  
Committee; and John and Jane Does 1-20,

Defendants.

No. 3:16-cv-03282

Judge Sue E. Myerscough  
Magistrate Judge Tom Schanzle-Haskins

**AMENDED MASTER  
CONSOLIDATED COMPLAINT**

**CLAIM OF  
UNCONSTITUTIONALITY**

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Plaintiffs Mary Holcomb, Mary Grovogel, Holly Mollet, Rhonda Rosenthal, and Donald Schneider (“Plaintiffs”), individually and on behalf of all those similarly situated, as well as on behalf of the Hospital Sisters Health System Employees’ Pension Plan, by and through their attorneys, hereby allege as follows:

## I. INTRODUCTION

1. Defendant Hospital Sisters Health System, by and through its subsidiaries and/or affiliates (“HSHS”), operates a hospital corporation that provides healthcare and healthcare-related services in Illinois and Wisconsin. This case concerns HSHS’s failure to properly maintain its pension plan under the applicable federal law regulating pension plans, Employee Retirement Income Security Act of 1974, as amended (“ERISA”). In the alternative, even if the pension plan is not subject to ERISA, HSHS has breached its duties under state law. In particular, whether under federal or state law, HSHS has failed to adequately fund its pension plan, creating a substantial risk that the plan will be unable to pay the benefits to which HSHS’s employees are entitled. As demonstrated herein, HSHS’s failures harm its more than 14,000 current or former employees who continued to work for HSHS 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 and beneficiaries of The Hospital Sisters Health System Employees' Pension Plan, formerly known as The Hospitals of the Hospital Sisters of the Third Order of St. Francis Employees Pension Plan (referred to as the "HSHS Plan" or simply the "Plan").

4. HSHS is violating numerous provisions of ERISA—including, on information and belief, underfunding the HSHS Plan—while erroneously claiming that the Plan is exempt from ERISA's protections because it is a "church plan." The HSHS Plan does not meet the definition of "church plan" under ERISA because a "church plan" generally must be "maintained" by a church or a convention or association of churches, and HSHS, the entity that maintains the HSHS Plan, is plainly not a church or a convention or association of churches.

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

6. Furthermore, even if the HSHS Plan was somehow "maintained" by a permissible entity, the church plan exemption still would not apply because other aspects of the definition were not satisfied, including that HSHS is not "controlled by" or "associated with" a church, within the meaning of ERISA. HSHS is a non-profit healthcare corporation, not unlike other non-profit healthcare systems with which HSHS competes in its commercial healthcare

activities. HSHS is not owned or operated by a church and does not receive funding from a church. No denominational requirement exists for HSHS employees. Indeed, HSHS tells prospective employees that any choice of faith, or lack thereof, is not a factor in the recruiting and hiring of HSHS employees. In choosing to recruit and hire from the population at large, HSHS must also be willing to accept neutral, generally applicable regulations, such as ERISA, imposed to protect those employees' legitimate interests. Moreover, HSHS affiliates with numerous healthcare service providers, including providers that claim to be secular, that are not tax-exempt, and have no relationship with any church.

7. Even if the Court determined that the HSHS Plan fell within the scope of the church plan exemption, the church plan exemption would then be, as applied to HSHS, an unconstitutional accommodation in violation of the Establishment Clause of the First Amendment. HSHS claims, in effect, it must be relieved of its ERISA financial obligations because HSHS 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 HSHS: (a) is not necessary to further the stated purposes of the exemption; (b) harms HSHS workers; (c) puts HSHS competitors at an economic disadvantage; (d) relieves HSHS of no genuine religious burden created by ERISA; and (e) creates more government entanglement with alleged religious beliefs than compliance with ERISA creates. Plaintiffs make no claim in this case that the church plan exemption is unconstitutional as to a true church plan, established and maintained by a church.



8. HSHS's claim of church plan status for its defined benefit pension plan fails under both the statutory church plan definition and the First Amendment. Plaintiffs seek an Order requiring HSHS to comply with ERISA and afford the Class all the protections of ERISA with respect to HSHS's Plan. In the alternative, Plaintiffs seek an Order finding that if ERISA's church plan exemption applies to HSHS, the statute is, to that extent, unconstitutional because it violates the Establishment Clause of the First Amendment.

9. Yet even if the church plan exemption did apply to the HSHS Plan and even if the application of the exemption were constitutionally permissible, HSHS nonetheless has breached its contractual obligations under the HSHS Plan documents and has breached its common law fiduciary duties by failing to make required contributions to the Hospital Sisters Health System Employees Pension Trust ("HSHS Trust"). By refusing to properly fund the HSHS Plan, in contravention of its obligations under the HSHS Plan documents, its fiduciary duties, and its repeated promises to HSHS Plan participants, HSHS has left the HSHS Plan significantly underfunded. On information and belief, the HSHS Trust holds assets worth only approximately 70% of the accrued benefit obligations as of June 30, 2016. Because of HSHS's failures to fund the HSHS Plan, there exists a substantial risk that the HSHS Plan 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 HSHS to make all contributions to the HSHS Trust 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. In addition, this Court has subject matter jurisdiction under the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d)(2), because at least one class member is of diverse citizenship from one defendant, there are 100 or more class members nationwide, and the aggregate amount in controversy exceeds \$5,000,000. In addition, fewer than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of Illinois.

12. **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 HSHS transacting business in and/or having significant contacts with this District.

13. **Venue.** Venue is proper in this district pursuant to ERISA section 502(e)(2), 29 U.S.C. § 1132(e)(2), because (a) the Plan is administered in this District, (b) some or all of the violations of ERISA took place in this District, and/or (c) Defendant HSHS may be found in this District through its operation of its corporate headquarters in Springfield, Illinois, HSHS St. John's Hospital in Springfield, Illinois, HSHS St. Francis Hospital in Litchfield, Illinois, and HSHS St. Mary's Hospital in Decatur, Illinois.

14. Venue is also proper in this District pursuant to 28 U.S.C. § 1391 because Defendant HSHS systematically and continuously does 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

15. **Plaintiff Mary Holcomb.** Plaintiff Holcomb was an employee of HSHS St. Elizabeth's Hospital in Belleville, Illinois, from 1987 until 1994. Plaintiff Holcomb is a vested participant in a defined benefit pension plan maintained by HSHS, because she is eligible for, and receiving, pension benefits under the HSHS Plan. Additionally and alternatively, Plaintiff Holcomb has a colorable claim to benefits under a pension plan maintained by HSHS 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 HSHS Plan 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).

16. **Plaintiff Mary Grovogel.** Plaintiff Grovogel was an employee of HSHS St. Vincent Hospital in Green Bay, Wisconsin, from 1977 until 2004. Plaintiff Grovogel is a vested participant in a defined benefit pension plan maintained by HSHS, because she is eligible for, and receiving, pension benefits under the HSHS Plan. Additionally and alternatively, Plaintiff Grovogel has a colorable claim to benefits under a pension plan maintained by HSHS 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 HSHS Plan 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).

17. **Plaintiff Holly Mollet.** Plaintiff Mollet was an employee of HSHS St. Elizabeth's Hospital in Belleville, Illinois, from July 2002 until March 2011. She worked at HSHS St.

Joseph's Hospital in Breese, Illinois, from March 2011 until December 2015. Plaintiff Mollet is a vested participant in a defined benefit pension plan maintained by HSHS, because she is eligible for pension benefits under the HSHS Plan. Additionally and alternatively, Plaintiff Mollet has a colorable claim to benefits under a pension plan maintained by HSHS 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 HSHS Plan 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).

18. **Plaintiff Rhonda Rosenthal.** Plaintiff Rosenthal worked at HSHS St. Francis Hospital, in Litchfield, Illinois, from 1977 until July 1998. She also worked at HSHS St. John's Hospital, in Springfield, Illinois, and HSHS St. Joseph's Hospital in Highland, Illinois. Plaintiff Rosenthal is a vested participant in a defined benefit pension plan maintained by HSHS, because she is eligible for pension benefits under the HSHS Plan. Additionally and alternatively, Plaintiff Rosenthal has a colorable claim to benefits under a pension plan maintained by HSHS 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 HSHS Plan 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).

19. **Plaintiff Donald Schneider.** Plaintiff Schneider was an employee of HSHS St. Vincent Hospital in Green Bay, Wisconsin, from 1977 until 2005. Plaintiff Schneider was a vested participant in a defined benefit pension plan maintained by HSHS, and he is therefore eligible for pension benefits under the HSHS Plan. Additionally and alternatively, Plaintiff Schneider has a colorable claim to benefits under a pension plan maintained by HSHS 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 HSHS Plan 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).

**B. Defendants**

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

21. **Hospital Sisters Health System (“HSHS”)**. HSHS is a 501(c)(3) non-profit corporation organized under, and governed by, Illinois law. HSHS is headquartered in Springfield, Illinois. HSHS, through Hospital Sisters Services, Inc. (“HSSI”), an Illinois non-profit holding company that is the sole member of the hospitals, owns and operates fifteen hospitals and more than 200 physician practice sites in Illinois and Wisconsin that provide inpatient and outpatient healthcare services. In fiscal year 2016, HSHS had net patient services revenues of \$2.227 billion and assets of \$3.89 billion. HSHS employs more than 14,000 people. Defendant HSHS is the employer responsible for maintaining the HSHS Plan and is, therefore, the plan sponsor of the HSHS Plan within the meaning of ERISA section 3(16)(B), 29 U.S.C. § 1002(16)(B). Defendant HSHS also holds itself out to be the Plan Administrator as provided in ERISA section 3(16)(A), 29 U.S.C. § 1002(16)(A), in certain booklets distributed to Plan participants.

22. **Hospital Sisters Health System Retirement Committee (“Retirement Committee”)**. The HSHS Retirement Committee is designated as the “administrator” for the HSHS Plan by the terms of the instrument under which the HSHS Plan is operated, as provided in ERISA section 3(16)(A)(i), 29 U.S.C. § 1002(16)(A)(i). The membership of the Retirement Committee consists of at least three members, appointed by the Board of Directors.

23. The Retirement Committee has the responsibility to, *inter alia*, construe and interpret the Plan, determine eligibility for benefits, prescribe procedures and forms to be used in the administration of the Plan, prepare and distribute information explaining the Plan, and manage the investment of the Plan's assets.

24. **Defendants John and Jane Does 1-20.** Defendants John and Jane Does 1-20 are individuals who, through discovery, are found to have fiduciary responsibilities with respect to the HSHS Plan and are fiduciaries within the meaning of ERISA. These individuals will be added by name as Defendants in this action upon motion by Plaintiffs at an appropriate time.

25. The Retirement Committee, Defendants John and Jane Does 1-20, and HSHS are collectively referred to herein as the "Plan Administrator Defendants."

#### **IV. THE BACKGROUND OF THE CHURCH PLAN EXEMPTION**

##### **A. The Adoption of ERISA**

26. 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).

27. 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 Plan 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.

28. 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**

29. As adopted in 1974, ERISA provided an exemption from compliance for certain plans, in particular governmental plans and church plans. Plans that met those 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).

30. 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.”<sup>1</sup>

31. 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

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<sup>1</sup> 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).

provision).<sup>2</sup> 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

32. 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.

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

34. 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*

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



*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.”

35. 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.

36. 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. HSHS**

### **A. HSHS’s Operations**

37. HSHS is a 501(c)(3) non-profit corporation organized under, and governed by, Illinois law. HSHS is headquartered in Springfield, Illinois. HSHS, through HSSI, an Illinois non-profit holding company that is the sole member of the hospitals, owns and operates fifteen

hospitals in Illinois and Wisconsin that provide inpatient and outpatient healthcare services. HSHS is also the parent corporation for several other subsidiary corporations, including, HSHS System Services Center, a philanthropic foundation called Hospital Sisters of St. Francis Foundation, Inc., and Kiara, Inc., an Illinois for-profit corporation that provides a vehicle for joint ventures with physicians. HSHS also includes an education and research cooperative called Prairie Education & Research Cooperative, and an insurance company called Renaissance Quality Insurance, Ltd. (“RQIL”) that provides professional and general liability insurance coverage to HSHS and affiliates and is incorporated in the Cayman Islands.

38. As of fiscal year 2016, HSHS had approximately \$3.89 billion in assets.

39. HSHS employs more than 14,000 people.

40. In addition to its statewide hospital network, HSHS has branched out to include numerous subsidiaries and/or related entities, including for-profit entities such as Kiara, Inc., RQIL, Springfield Urgent Care Real Estate LLC, Prairie Heart Institute Management Company LLC, Northeast Wisconsin Radiation Therapy Services LLC, Pain Center of Wisconsin, Surgery Center of Sheboygan LLC, Carpenter Street Hotel LLC, Memorial and St. Elizabeth’s Healthcare Cancer Treatment Center, Prairie Heart Institute St. John’s, Lasante Wisconsin Inc., Lasante Inc., Prairie Cardiovascular, Prevea Health Services Inc., Prevea Clinic, Inc., OJV Inc., and Streatorland Quality Care Phs LLC.

41. On September 1, 2014, HSHS added a new hospital to its health system when HSSI became the sole corporate member of Community Memorial Hospital in Oconto Falls, Wisconsin, and effective on the date of the acquisition the hospital name was changed to St. Clare Memorial Hospital, Inc.

42. On January 23, 2017, HSHS added another new hospital to its health system, Shelby Memorial Hospital, in Shelbyville, Illinois. The hospital's name was changed to HSHS Good Shepherd Hospital.

43. While HSHS has a policy of treating certain patients regardless of their ability to pay, HSHS's charity care at cost (the cost of services provided to patients who cannot afford healthcare services due to inadequate resources) fell from \$38 million in 2014 to \$28 million in 2016.

44. Like other large non-profit hospital systems, HSHS relies upon revenue bonds to raise money. In 2014 and 2012, HSSI – Obligated Group utilized the Illinois Finance Authority and the Wisconsin Health and Educational Facilities Authority to raise money through bond offerings. HSHS also has significant corporate investments in, among other things, fixed-income securities, domestic equities, international equities, custom hedge funds, and real estate.

45. The management of HSHS is comprised primarily of lay people, and Executive Officers of HSHS receive compensation in line with executive officers of other hospital systems. For example, in 2014, the HSHS President and Chief Executive Officer received reportable compensation of \$1.3 million, and its Chief Operating Officer received reportable compensation of \$1.08 million.

46. In the annual returns of a tax-exempt organization (Form 990s) that HSHS files with the IRS, HSHS claims that the reason for its public charity status is that it is “[an] organization organized and operated exclusively for the benefit of, to perform the functions of, or to carry out the purposes of one or more publicly supported organizations described in section 509(a)(1) or section 509(a)(2).”

47. According to HSHS's Articles of Incorporation, the purposes for which the corporation is organized are to:

(a) Serve as a parent corporation for various incorporated ministry organizations, and in such capacity provide overall strategic planning and direction to such corporations through the exercise of reserved powers; (b) Provide consultation, management, coordination and shared programs for affiliated corporations and other entities engaged in the performance of services in the health care and related fields; (c) Provide religious, educational, charitable and such other activities, services and programs as are related to educational/social service and health care institutions; (d) Own and operate such institutions, services and educational programs that relate to the health and welfare of persons, including without limitation hospitals and all branches thereof, retirement and/or nursing home facilities, clinics, day care services, home care services, rehabilitation education programs, specialized information services and referral services, housing centers, wellness centers and treatment/rehabilitation programs, and other religious, educational and/or scientific charitable activities; (e) Engage in charitable works consistent with the mission of the Corporation and the mission and values of the Congregation; (f) Establish and maintain long-range ongoing recruitment, education and development programs for personnel working within the Corporation in order to further its purposes; (g) Own, lease or otherwise deal with all property, real and personal, to be used in furtherance of these purposes; (h) Contract with other organizations, for-profit and not-for-profit, with individuals, and with governmental agencies in furtherance of these purposes; (i) Do any and all other things in furtherance of these purposes which are consistent with the laws of the State of Illinois and the mission and philosophy of the Congregation; and (j) Otherwise operate exclusively for charitable, scientific and/or educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code.

48. HSHS's facilities, including those of subsidiaries, have no denominational requirement for their employees and medical staff.

49. HSHS has no denominational requirement for its employees.

50. Employees and medical staff of HSHS's facilities and the facilities of its subsidiaries are not required to sign or abide by a statement of faith or hold any particular religious beliefs.

51. HSHS's healthcare facilities and/or the healthcare facilities of its subsidiaries have no denominational requirement for their patients and/or clients.

52. HSHS does not limit its focus to the needs of a particular religious population, and it does not market to, or target, a particular religious population.

53. HSHS does not have a mission to serve only patients of a particular religion.

54. HSHS is required and has elected to comply with a broad array of elaborate state and federal regulations and reporting requirements, including health and safety, Medicare and Medicaid, fraud and abuse, tax, anti-trust, environmental and labor laws, among others.

55. In addition, HSHS purports to disclose, and not keep confidential, its own highly complex financial records. HSHS makes public its consolidated financial statements, which describe HSHS's representations as to its own highly complex operations and financial affairs. HSHS's financial information is regularly disclosed to the rating agencies and the public when tax-exempt revenue bonds are issued.

56. The principal purpose or function of HSHS 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.

57. Rather, the principal purpose or function of HSHS is the provision of general healthcare services to residents within communities served.

58. HSHS subsidiary Kiara, Inc. complies with ERISA for one of its retirement plans, the Kiara, Inc. 401(k) Profit Sharing Plan. Similarly, HSHS St. Clare Memorial Hospital sponsors the Community Memorial Hospital, Inc. 403(b) Plan and complies with ERISA.

59. HSHS is not a church.

60. HSHS's subsidiaries and/or related entities—including Kiara, Inc., RQIL, Springfield Urgent Care Real Estate LLC, Prairie Heart Institute Management Company LLC, Northeast Wisconsin Radiation Therapy Services LLC, Pain Center of Wisconsin, Surgery

Center of Sheboygan LLC, Carpenter Street Hotel LLC, Memorial and St. Elizabeth's Healthcare Cancer Treatment Center, Prairie Hearth Institute St. John's, Lasante Wisconsin Inc., Lasante Inc., Prairie Cardiovascular, Prevea Health Services Inc., Prevea Clinic, Inc., OJV Inc., and Streatorland Quality Care Pho LLC—are not churches.

61. HSHS is not a convention or association of churches.

62. HSHS's subsidiaries and/or related entities are not a convention or association of churches.

63. HSHS is not owned by a church.

64. HSHS does not receive financial support from a church.

65. HSHS does not claim that any church has any liability for HSHS's debts or obligations.

66. The governance of HSHS, including the management of HSHS's affairs, is vested in HSHS's Board of Directors.

67. No church has any role in the maintenance and/or administration of the HSHS Plan.

**B. The HSHS Plan**

68. The HSHS Plan is a noncontributory defined benefit pension plan that covers substantially all of the employees of HSHS. The Plan allows employees to earn a benefit based on a defined benefit formula using their pay and years of service. Employees can earn a year of service and a year of credited service for each calendar year in which they are credited with at least 1,000 hours of service. Participants are fully vested after they are credited with five calendar years of service.

69. On January 1, 1979, HSHS assumed the obligation as the employer and plan sponsor of the HSHS Plan to make contributions to the HSHS Plan and to fund the HSHS Plan. HSHS remains the plan sponsor today.

70. On information and belief, the HSHS Plan was an ERISA plan before July 1, 1984.

71. In 2014, the Plan was amended to provide a Cash Balance Benefit for certain employees. HSHS employees hired or rehired on or after July 1, 2014, are eligible to participate in the Plan with a Cash Balance Benefit, whereby a participant's pension benefit is expressed in the form of a cash balance account that shows the benefit as a lump sum dollar amount. According to HSHS, the cash balance benefit features an account balance that shows the value of the participant's accumulated benefit. HSHS pays the full cost, and credits participant accounts each year with contribution credits equal to 3% to 7% of the participant's eligible pay, depending on years of service, and interest credits based on the 10-year Treasury rate (reset annually), with a minimum of 3% and a maximum of 6%. Participants vest in their cash balance benefit after three years of service.

72. Through the "Retirement Program Guides" HSHS provided to Plan participants, HSHS has promised that it would contribute all the funds necessary to fund their pensions. For example, one such document, with respect to the HSHS Plan, stated: "The plan is free—you contribute nothing. Your Hospital makes all the contributions necessary to provide retirement benefits." The current Retirement Program Guide states: "You automatically participate in the plan and HSHS pays the full cost." Plan participants have reasonably relied on such statements.

73. The HSHS Plan is not maintained by a church or a convention or association of churches.

74. HSHS maintains the HSHS Plan and has the power to continue, amend, or terminate the Plan.

75. HSHS has the power to amend the HSHS Plan.

76. HSHS has the power to continue the HSHS Plan.

77. HSHS has the power to terminate the HSHS Plan.

78. The Retirement Committee has responsibility for administration of the HSHS Plan.

79. The Retirement Committee also monitors the funding of the HSHS Plan, including by reviewing the annual valuation of the Plan by the actuary, and the reports of the financial condition of the Trust and the investment portfolio of the HSHS Plan.

80. HSHS is the employer and thus the plan sponsor with respect to the HSHS Plan.

81. HSHS, as the employer and plan sponsor of the HSHS Plan, has the obligation—under ERISA as well as the express or implied terms of the HSHS Plan document—to make contributions to the HSHS Trust and to fund the HSHS Plan.

82. HSHS has an obligation to make contributions to the HSHS Trust that are sufficient to fund all accrued benefits.

83. HSHS does not fund the Plan consistent with ERISA's minimum funding requirements.

84. According to HSHS's June 30, 2016 Consolidated Financial Statements, the Plan was underfunded on a GAAP basis by over \$514 million. A plan so significantly underfunded is at substantial risk of defaulting on its obligations to its participants.

85. Because the HSHS Plan was underfunded by over \$514 million as of June 30, 2016, that Plan was only funded at approximately 71%.



86. Although HSHS has an obligation to make contributions to the HSHS Plan that are sufficient to fund all accrued benefits, the HSHS Plan provides that, “[u]pon termination of the Plan, or upon termination of employment of a group of Participants constituting a partial termination of the Plan, the Accrued Benefit of each Participant affected by the termination shall, as of the date of termination, become fully vested and nonforfeitable to the extent funded.”

87. These fund-specific promises, triggered upon the termination of the HSHS Plan, are not permissible under ERISA and place the participants’ benefits at substantial risk.

88. Participants’ benefits in the Plan are not protected by PBGC guarantees.

89. No church guarantees the obligations of the Plan.

90. No religious order guarantees the obligations of the Plan.

**C. The HSHS Plan Meets the Definition of an ERISA Defined Benefit Plan**

91. The HSHS Plan is a plan, fund, or program that was established or maintained by HSHS and which, by its express terms and surrounding circumstances, provides retirement income to employees and/or result in the deferral of income by employees to the termination of their employment or beyond.

92. The HSHS Plan meets the definition of an “employee pension benefit plan” within the meaning of ERISA section 3(2)(A), 29 U.S.C. § 1002(2)(A).

93. The HSHS Plan does not provide for individual accounts for each participant and does not provide benefits based solely upon the amount contributed to a participant’s account. As such, the HSHS Plan is a “defined benefit plan” within the meaning of ERISA section 3(35), 29 U.S.C. § 1002(35), and is not an individual account plan or “defined contribution plan” within the meaning of ERISA section 3(34), 29 U.S.C. § 1002(34).

94. The Plan also provided a “lump sum” option as a form of benefit available to certain retirees.

95. ERISA section 204(c)(3) provides that “in the case of any defined benefit plan, if an employee’s accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age [*e.g.*, a lump-sum distribution] . . . the employee’s accrued benefit . . . shall be the actuarial equivalent of such benefit . . .” 29 U.S.C. § 1054(c)(3).

96. ERISA sections 203(e)(2) and 205(g)(3) also require that when a participant’s accrued benefit is offered as the present value of such benefit, such as a lump sum distribution, the present value shall not be less than the present value of the plan’s normal retirement benefit, calculated using the “applicable mortality table” and “applicable interest rate.” 29 U.S.C. §§ 1053(e); 1055(g); *see also* 26 U.S.C. §§ 411(a)(11)(B); 417(e)(3) (corresponding IRC provisions); 26 C.F.R. § 1.417(e)-1 (2016) (implementing regulations).

97. In letters provided to participants in the HSHS Plan, HSHS offered participants the option of receiving their benefits as lump sum payments rather than single life annuities or other annuity options. The value of each participant’s lump sum offer, however, was substantially reduced from what it should have been if the lump sum had been calculated in accordance with ERISA.

98. In its mailing to participants, HSHS stated: “For the lump sum option, an interest rate of 6.5% and the 2013 Applicable Mortality Table as defined under Section 417(e)(3) of the Internal Revenue Code were used.” Although this statement suggests that the lump sum option was calculated in accordance with IRC § 417(e)(3)—which, as noted above, corresponds to ERISA section 205(g)(3)—it was not. For example, Plaintiff Schneider accepted HSHS’s offer of a lump sum payment in 2014, and his lump sum payment was tens of thousands of dollars

less than it should have been, had it been calculated in accordance with ERISA and its implementing regulations.

99. The HSHS Plan is being operated in violation of ERISA sections 205(g), 204(c)(3) and 203(e) because, on information and belief, it offers eligible participants lump sum distribution values that are less than the present value of the plan's normal retirement benefit, calculated using the "applicable mortality table" and "applicable interest rate." 29 U.S.C. §§ 1053(e); 1054(c)(3); 1055(g); *see also* 26 U.S.C. §§ 411(a)(11)(B); 417(e)(3) (corresponding IRC provisions); 26 C.F.R. § 1.417(e)-1 (implementing regulations).

#### **D. Defendants Meet the Definition of ERISA Fiduciaries**

##### **1. Nature of Fiduciary Status**

100. 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).

101. 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).

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

103. As fiduciaries, Defendants were required by ERISA section 404(a)(1), 29 U.S.C. § 1104(a)(1), to manage and administer the Plan and the Plan's investments solely in the interest of the Plan's 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.

104. Plaintiffs do not allege that each Defendant was a fiduciary with respect to all aspects of the Plan's 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.

105. 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**

106. **HSHS**. HSHS is the employer responsible for maintaining the HSHS Plan and is, therefore, the plan sponsor of the HSHS Plan within the meaning of ERISA section 3(16)(B), 29 U.S.C. § 1002(16)(B). A booklet entitled: "Your HSHS Retirement Program" that is distributed to HSHS Plan participants also states that HSHS is the Plan's sponsor and administrator.

107. In the absence of a Plan Administrator specifically designated in or pursuant to any instrument governing the Plan, the plan sponsor of the HSHS Plan under ERISA section 3(16)(A)(ii), 29 U.S.C. § 1002(16)(A)(ii), is the Plan Administrator. Thus, even without being so designated in the program booklet, HSHS is an “administrator” of the HSHS Plan 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).

108. Defendant HSHS is a fiduciary with respect to the HSHS Plan 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 HSHS Plan, exercises authority and control respecting management or disposition of the HSHS Plan’s assets, and/or has discretionary authority or discretionary responsibility in the administration of the HSHS Plan.

109. **Retirement Committee.** The Retirement Committee is the person or persons, if any, designated as the “administrator” by the terms of the instrument under which the HSHS Plan is operated, as provided in ERISA section 3(16)(A)(i), 29 U.S.C. § 1002(16)(A)(i). As such, Defendant 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).

110. The primary responsibility of the Retirement Committee is to administer the HSHS Plan for the exclusive benefit of the Plan’s participants and beneficiaries, subject to the specific terms of the HSHS Plan.

111. As the Plan Administrator, the Retirement Committee 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 reviewing any denial of a claim for benefits under the Plan; (2) construe and interpret the Plan; (3) prescribe procedures and forms to be used in the administration of the Plan; (4) receive from the employers and participants such information as shall be necessary for proper administration of the Plan; (5) prepare and distribute information explaining the Plan; (6) furnish the employers, upon request, such annual reports as are reasonable and appropriate; (7) manage the manner of investment or reinvestment of part of all of the HSHS Trust in accordance with the Company's Investment Policy Statement; (8) receive and review the annual valuation of the Plan made by the actuary; (9) receive and review reports of the financial condition and of the receipts and disbursements of the HSHS Trust from the Trustee; (10) appoint or employ any agents it deems advisable, including legal and actuarial counsel; (11) issue instructions to the Trustee concerning benefits and other expenses payable from the Trust; and (12) report annually to the Board of Directors on the Retirement Committee's activities, the financial performance of the Plan and such other items as may be required by the Board of Directors.

112. Defendant Retirement Committee is a fiduciary with respect to the HSHS Plan 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 HSHS Plan, exercises authority and control respecting management or disposition of the HSHS Plan's assets, and/or has discretionary authority or discretionary responsibility in the administration of the HSHS Plan.

113. **John and Jane Does 1-20**. John and Jane Does 1-20 are individuals who, through discovery, are found to have fiduciary responsibilities with respect to the HSHS Plan.

114. HSHS, the Retirement Committee, and John and Jane Does 1-20 are fiduciaries with respect to the HSHS Plan within the meaning of ERISA section 3(21)(A), 29 U.S.C. § 1002(21)(A), because they exercise discretionary authority or discretionary control respecting management of the HSHS Plan, exercise authority and control respecting management or disposition of the HSHS Plan's assets, and/or have discretionary authority or discretionary responsibility in the administration of the HSHS Plan.

115. Although HSHS maintains that the HSHS Plan is exempt from ERISA coverage as a church plan, it claims ERISA status for the Kiara, Inc. 401(k) plan and for the Community Memorial Hospital, Inc. 403(b) Plan.

116. Compliance with ERISA creates no undue, genuine burden on any religious practice of HSHS, as evidenced by HSHS's claimed compliance with ERISA for the Kiara Inc. 401(k) plan.

#### **E. The HSHS Plan Is Not a Church Plan**

117. HSHS claims that the HSHS Plan is a church plan 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 sections 4(b)(2) and 4021(b)(3), 29 U.S.C. §§ 1003(b)(2) and 1321(b)(3).

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

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

- First, under section 3(33)(A) of ERISA, 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 section 3(33)(C)(i) of ERISA, 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.

119. 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).

120. The HSHS Plan does not qualify as a church plan under either ERISA section 3(33)(A) or section 3(33)(C)(i). 29 U.S.C. §§ 3(33)(A) or (C)(i).

121. First, the HSHS Plan is 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 HSHS Plan is maintained by HSHS for its own, or its affiliates' own, employees. Because HSHS 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 HSHS Plan may not qualify as a church plan within the meaning of ERISA section 3(33)(A), 29 U.S.C. § 1002(33)(A).

122. Second, the HSHS Plan is 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 HSHS is to provide healthcare services rather than to administer or fund a benefit plan, the HSHS Plan may not qualify as a church plan within the meaning of ERISA section 3(33)(C)(i), 29 U.S.C. § 1002(33)(C)(i).

123. In the alternative, to the extent HSHS claims that the HSHS Plan is “maintained” by a principal-purpose organization within the meaning of section 3(33)(C)(i) because it is *administered* by a committee within HSHS that has a principal purpose of administering the



benefit plan, the claim fails because the committee purportedly “administering” the HSHS Plan 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 HSHS Plan, which includes the power to fund, continue, amend, and/or terminate the Plan, is HSHS. The claim further fails because even if a committee within HSHS “maintained” the Plan, such an internal committee of HSHS 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 HSHS Plan Was Maintained by a Permissible Entity, It Would Nonetheless Fail to Satisfy Other Elements of the Church Plan Definition.**

124. 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 HSHS Plan does not qualify. The approximately 14,000 participants in the HSHS Plan are or were employees of HSHS, a non-profit healthcare system. HSHS 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.

125. 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 considered an employee of a church. The HSHS Plan also fails this part of the definition because HSHS is not controlled by or associated with a church or convention or association of churches within the meaning of ERISA.

126. HSHS is a non-profit corporation under Illinois law.

127. HSHS is governed by its Board of Directors.

128. HSHS's Board of Directors must act in the best interests of HSHS at all times.

129. HSHS's Board of Directors owes fiduciary duties to the non-profit corporation.

130. HSHS is not controlled by any church.

131. HSHS is not controlled by a convention or association of churches.

132. HSHS is not operated by a church.

133. HSHS is not operated by a convention or association of churches.

134. HSHS does not receive funding from a church.

135. HSHS does not receive funding from a convention or association of churches.

136. In addition, HSHS 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." HSHS does not share common religious bonds and convictions with a church or a convention or association of churches.

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

138. HSHS has a practice of acquiring hospitals that claim no religious affiliation, including Community Memorial Hospital of Oconto Falls, Wisconsin, and Greenville Regional Hospital of Greenville, Illinois. HSHS also has a practice of affiliating with entities like Prevea Health Systems, Inc. Prevea Health is the largest, physician-owned multi-specialty group in the state of Wisconsin. HSHS St. Vincent Hospital and HSHS St. Mary's Hospital Medical Center each have a 25% interest in Prevea Health Systems, Inc. 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, HSHS must be willing to accept neutral regulations, such as ERISA, imposed to protect its employees' legitimate interests.

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

140. HSHS does not impose any denominational requirement on its patients.

141. For these same reasons, the HSHS Plan further fails to satisfy the requirements of ERISA section 3(33)(C)(i) because even if the HSHS Plan was "maintained" by the internal committee and even if the committee qualified as principal-purpose "organization," 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). HSHS's internal committee, like HSHS, is not *controlled by or associated with* a church or convention or association of churches within the meaning of ERISA. *See* ERISA § 3(33)(C)(i), 29 U.S.C. § 1002(33)(C)(i).

**3. Even if the HSHS Plan Could Otherwise Qualify as a Church Plan Under ERISA § 3(33)(A) or (C)(i), It Is Excluded From Church Plan Status Under ERISA § 3(33)(B)(ii)**

142. 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 HSHS Plan could otherwise qualify as a church plan under ERISA sections 3(33)(A) or (C)(i), and even if HSHS itself was controlled by or associated with a church, the HSHS Plan 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 HSHS Plan covers more than an insubstantial number of employees that work for entities are not controlled by or associated with the Roman Catholic Church, and/or are not tax-exempt.

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

143. 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.

144. 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 HSHS relieves HSHS of no genuine religious burden. Moreover, application of the church plan exemption to HSHS creates more government entanglement with alleged religious beliefs than does compliance with ERISA. Accordingly, application of the church plan exemption to HSHS is not a valid religious accommodation. Extension of the church plan exemption to HSHS 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.

145. Such a naked preference for religion is particularly improper where, as here, the burdens of the exemption are imposed on HSHS’s employees. Extension of the church plan exemption to HSHS privileges HSHS 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, HSHS has a privileged economic advantage over its competitors in the commercial arena it has chosen, based solely on HSHS's claimed religious beliefs.

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

## **VI. CLASS ALLEGATIONS**

147. 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 and beneficiaries of The Hospital Sisters Health System Employees' Pension Plan, formerly known as The Hospitals of the Hospital Sisters of the Third Order of St. Francis Employees Pension Plan (referred to as the "HSHS Plan" or simply the "Plan").

148. Excluded from the Class are any executives in senior leadership at HSHS or any employees who have responsibility or involvement in the administration of the Plan, or who are subsequently determined to be fiduciaries of the HSHS Plan.

### **A. Numerosity**

149. The exact number of Class members is unknown to Plaintiffs at this time, but may be readily determined from records maintained by HSHS. HSHS currently employs approximately 14,000 individuals. Upon information and belief, many, if not all, of those persons are likely members of the Class, and thus the Class is so numerous that joinder of all members is impracticable.

### **B. Commonality**

150. 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 Plan

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

151. The issues regarding the relief sought are also common to the members of the Class as the relief sought will consist of (1) a declaration that the Plan is an ERISA-covered plan; (2) an order requiring that the Plan comply with ERISA's administration, funding, reporting and disclosure obligations; (3) an order requiring HSHS 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 HSHS to comply with its obligations to fund the Plan.

### **C. Typicality**

152. 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 Plan 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.

153. 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 (1) a declaration that the HSHS Plan is not a church plan; (2) a declaration that the HSHS Plan is an ERISA-covered plan; (3) injunctive relief requiring Defendants to comply with the administration, funding, reporting, and disclosure obligations of ERISA; and (4) an order requiring HSHS to comply with its obligations to fund the Plan.

154. 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.

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

**D. Adequacy**

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

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

158. Defendants HSHS, the Retirement Committee, and John and Jane Does 1-20 have no unique defenses against the Plaintiffs that would interfere with Plaintiffs' representation of the Class.

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

**E. Rule 23(b)(1) Requirements**

160. 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.

161. 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**

162. 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**

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

164. 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 Plan 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 HSHS transacts business because: (a) the Plan is administered in this forum, (b) some or all of the violations of ERISA took place in this



forum, and Defendant HSHS operates its corporate headquarters and several hospitals in this forum; 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 Section 502(a)(2) and (a)(3) Against All Defendants)**

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

166. 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 HSHS Plan is not a church plan within the meaning of ERISA section 3(33), 29 U.S.C. § 1002(33), and thus is subject to the provisions of Title I and Title IV of ERISA.

167. 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 HSHS Plan’s Sponsor and Administrator to bring the HSHS Plan into compliance with ERISA.

168. ERISA section 502(a)(2), 29 U.S.C. § 1132(a)(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 Plan as a non-ERISA Plan was a breach of Defendants’ fiduciary duties, the Defendants breached their fiduciary duties and Plaintiffs also seek Plan-wide equitable and remedial relief under ERISA section 502(a)(2), 29 U.S.C. § 1132(a)(2).

169. As the HSHS Plan is not a church plan within the meaning of ERISA section 3(33), 29 U.S.C. § 1002(33), and meets the definition of a pension plan under ERISA section 3(2), 29 U.S.C. § 1002(2), the HSHS Plan should be declared to be an ERISA-covered pension plan, and the HSHS Plan’s Sponsor and Administrator should be ordered to bring the HSHS Plan 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)**

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

#### **A. Summary Plan Descriptions**

171. At no time have the Plan Administrator Defendants provided Plaintiffs or any member of the Class with Summary Plan Descriptions with respect to the HSHS Plan that meet the requirements of ERISA section 102, 29 U.S.C. § 1022, and the regulations promulgated thereunder.

172. Because the Plan Administrator Defendants have been the Plan Administrator of the Plan at all relevant times, the Plan Administrator Defendants 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**

173. At no time have the Plan Administrator Defendants filed an Annual Report with respect to the HSHS Plan 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.

174. Because the Plan Administrator Defendants have been the Plan Administrator of the HSHS Plan at all relevant times, the Plan Administrator Defendants have violated ERISA section 104(a), 29 U.S.C. § 1024(a), by failing to file Annual Reports with respect to the HSHS Plan 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**

175. At no time have the Plan Administrator Defendants furnished Plaintiffs or any member of the Class with a Summary Annual Report with respect to the HSHS Plan in compliance with ERISA section 104(b)(3) and regulations promulgated thereunder. ERISA § 104(b)(3), 29 U.S.C. § 1024(b)(3).

176. Because the Plan Administrator Defendants have been the Plan Administrator of the HSHS Plan at all relevant times, the Plan Administrator Defendants 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 a Summary Annual Report with respect to the HSHS Plan 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**

177. At no time has HSHS furnished Plaintiffs or any member of the Class with notices of failure to meet minimum funding standards with respect to the HSHS Plan pursuant to ERISA section 101(d)(1), 29 U.S.C. § 1021(d)(1), informing them that HSHS had failed to make payments required to comply with ERISA section 302, 29 U.S.C. § 1082, with respect to the HSHS Plan.

178. Defendant HSHS is the employer that established and/or maintains the HSHS Plan.

179. At no time has Defendant HSHS funded the HSHS Plan in accordance with ERISA section 302, 29 U.S.C. § 1082.

180. As the employer maintaining the HSHS Plan, Defendant HSHS has violated ERISA section 302, 29 U.S.C. § 1082, by failing to fund the HSHS Plan. HSHS 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) (2016)) for each day that Defendant has failed to provide Plaintiffs and each Class member with the notice required by ERISA section 101(d)(1), 29 U.S.C. § 1021(d)(1).

**E. Funding Notices**

181. At no time have the Plan Administrator Defendants furnished Plaintiffs or any member of the Class with a Funding Notice with respect to the HSHS Plan pursuant to ERISA section 101(f), 29 U.S.C. § 1021(f).

182. Because the Plan Administrator Defendants have been the Plan Administrator of the HSHS Plan at all relevant times, they have violated ERISA section 101(f) by failing to provide each participant and beneficiary of the HSHS Plan with the Funding Notice 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(2016)) for each day that the Plan Administrator Defendants have failed to provide Plaintiffs and each Class member with the notice required by ERISA section 101(f), 29 U.S.C. § 1021(f).

**F. Pension Benefit Statements**

183. At no time have the Plan Administrator Defendants furnished Plaintiffs or any member of the Class with a Pension Benefit Statement with respect to the HSHS Plan pursuant to ERISA section 105(a)(1), 29 U.S.C. § 1025(a)(1).

184. Because the Plan Administrator Defendants have been the Plan Administrator of the HSHS Plan 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 (2016)) for each day that the Plan Administrator Defendants have failed to provide Plaintiffs and each Class member with the Pension Benefit Statements required by ERISA section 105(a)(1)(B), 29 U.S.C. § 1025(a)(1)(B).

**COUNT III**

**(Claim for Equitable Relief Pursuant to ERISA Section 502(a)(3) for Violation of ERISA Sections 203(e), 204(c)(3), and 205(g) Against All Defendants)**

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

186. ERISA section 204(c)(3) provides that “in the case of any defined benefit plan, if an employee’s accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age [*e.g.*, a lump-sum distribution] . . . the employee’s accrued benefit . . . shall be the actuarial equivalent of such benefit . . .” ERISA § 204(c)(3), 29 U.S.C. § 1054(c)(3).

187. ERISA sections 203(e)(2) and 205(g)(3) also require that the present value of any optional form of benefit, such as a lump sum distribution, cannot be less than the present value of the plan’s normal retirement benefit, calculated using the “applicable mortality table” and “applicable interest rate.” ERISA §§ 203(e)(2), 205(g)(3), 29 U.S.C. §§ 1053(e)(2), 1055(g)(3); *see also* 26 U.S.C. §§ 411(a)(11)(B); 417(e)(3) (corresponding IRC provisions); 26 C.F.R. § 1.417(e)-1 (implementing regulations).

188. The HSHS Plan provided for a “lump sum” option as a form of benefit to certain retirees who were eligible to take their retirement benefits in the form of a lump sum. The lump sum distribution values provided to participants in the HSHS Plan were, however, substantially less than the present values of the participants’ normal retirement benefits, calculated using the applicable mortality table and applicable interest rate mandated by ERISA section 205(g)(3), 29 U.S.C. § 1055(g)(3). By offering these participants a lump sum distribution amount that was less than the actuarial equivalent of their accrued benefit commencing at normal retirement age, calculated using the applicable mortality table and applicable interest rate, Defendants HSHS and the Retirement Committee have violated ERISA sections 203(e), 204(c)(3), and 205(g); 29 U.S.C. §§ 1053(e), 1054(c)(3), 1055(g); their tax counterparts, IRC §§ 411(a)(11) and 417(e), 26 U.S.C. §§ 411(a)(11), 417(e), and the implementing regulations at 26 C.F.R. § 1.417(e)-1.

189. ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), 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.”

190. Pursuant to ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), Plaintiffs seek an order directing the HSHS and the Plan Administrator Defendants to retroactively amend the HSHS Plan, which provided for a “lump sum” option as a form of benefit available to certain retirees, to comply with all the special rules for offering lump sum distributions as an optional form of benefit, including ERISA sections 203(e), 204(c)(3), and 205(g); 29 U.S.C. §§ 1053(e), 1054(c)(3), 1055(g); their tax counterparts, IRC §§ 411(a)(11) and 417(e), 26 U.S.C. §§ 411(a)(11), 417(e), and the implementing regulations at 26 C.F.R. § 1.417(e)-1.

191. Pursuant to ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), Plaintiffs seek an order requiring the Plan Administrator Defendants to furnish all Plan participants who were offered “lump sum” options as a form of benefit with a benefit statement that is compliant with ERISA and that provides a lump sum distribution value that is calculated in accordance with ERISA.

192. To the extent the members of the Class have received lump sum distribution amounts that are less than the actuarial equivalent of their accrued benefit commencing at normal retirement age, calculated using the applicable mortality table and applicable interest rate, there has been an unlawful forfeiture of benefits to which participants are entitled.

193. The Plan Administrator Defendants have violated ERISA section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), to the extent they have followed Plan documents that are

inconsistent with ERISA. Pursuant to sections 404(a)(1)(D) and 502(a)(3), 29 U.S.C. §§ 1104(a)(1)(D), 1132(a)(3), Plaintiffs seek an order requiring the Plan Administrator Defendants to calculate the amount of the lump sum payments participants would have received under the Plan document retroactively amended to comply with ERISA and to pay to participants the additional monies to which they are entitled.

194. Pursuant to section 502(a)(3), 29 U.S.C. § 1132(a)(3), Plaintiffs seek an order requiring HSHS to contribute additional funding to the HSHS Plan, as required by ERISA section 302, 29 U.S.C. § 1052, to cover the additional liabilities for the Plan resulting from the additional benefits owed to participants who were offered and elected to receive a lump sum distribution of their benefits that was less than the actuarial equivalent of their accrued benefit commencing at normal retirement age, calculated using the applicable mortality table and applicable interest rate, in accordance with ERISA.

#### **COUNT IV**

##### **(Claim for Failure to Provide Minimum Funding Against Defendant HSHS)**

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

196. 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.

197. HSHS 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.



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

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

### COUNT V

#### **(Claim for Failure to Establish the Plan Pursuant to Written Instruments Meeting the Requirements of ERISA Section 402 Against Defendant HSHS)**

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

201. 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].”

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

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

## COUNT VI

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

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

205. 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 “trustees shall be either named in the trust instrument or in the plan instrument” described in 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).

206. Although the HSHS Plan’s assets have been held in the HSHS Trust, the trust does not meet the requirements of ERISA section 403, 29 U.S.C. § 1103.

207. Defendant HSHS violated section 403 by failing to put the HSHS Plan’s assets in trust in compliance with ERISA section 403, 29 U.S.C. § 1103.

## COUNT VII

### **(Claim for Clarification of Future Benefits Under ERISA Section 502(a)(1)(B) and (a)(3) Against the Plan Administrator Defendants)**

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

209. ERISA section 502(a)(1)(B), 29 U.S.C. § 1102(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. § 1102(a)(1)(B).

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

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

### **COUNT VIII**

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

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

213. 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).

214. 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. ERISA § 502(c)(3), 29 U.S.C. § 1132(c)(3).

215. ERISA section 502(c)(1), 29 U.S.C. § 1132(c)(1), as provided in 29 C.F.R. § 2575.502c-3 (2016), 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.

216. ERISA section 502(c)(1), 29 U.S.C. § 1132(c)(1), as provided in 29 C.F.R. § 2575.502c-3 (2016), 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. ERISA § 502(c)(1), 29 U.S.C. § 1132(c)(1).

217. Because Defendant HSHS, as the employer, has failed to give the Notices of failure to meet minimum funding standards required by ERISA section 101(d), 29 U.S.C. § 1021(d), as set forth in Count II Subpart D, Defendant HSHS 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.

218. Because the Plan Administrator Defendants have failed to give the Funding Notices required by ERISA section 101(f), 29 U.S.C. § 1021(f), and the Pension Benefit Statements 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 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 Pension Benefit Statement is provided, as the Court, in its discretion, may order.

## **COUNT IX**

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

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

220. Plaintiffs bring this Count IX 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**

221. This sub-Count alleges fiduciary breach against all Defendants.

222. 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).

223. As fiduciaries with respect to the HSHS Plan, 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 section 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 HSHS Plan during the times that each was a fiduciary of the HSHS Plan.

224. Defendants have never enforced any of the provisions of ERISA set forth in Counts I-VI with respect to the HSHS Plan.

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

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

**B. Prohibited Transactions**

227. This sub-Count alleges violations on behalf of all Defendants.

228. 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.

229. 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.

230. 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.

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

232. By failing to enforce the funding obligations created by ERISA and owed to the Plan, Defendants extended credit from the HSHS Plan to HSHS 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.

233. By failing to enforce the funding obligations created by ERISA and owed to the HSHS Plan, Defendants used the HSHS Plan's assets for HSHS's own benefit in violation of ERISA section 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D), when Defendants knew or should have known that their failure to enforce the funding obligations constituted such a use of HSHS Plan's assets.

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

235. The failure of Defendants to enforce the funding obligations owed to the HSHS Plan has resulted in a loss to the HSHS Plan equal to the foregone funding and earnings thereon.

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

### **C. Co-Fiduciary Liability**

237. This sub-Count alleges co-fiduciary liability against all Defendants.

238. 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.

239. 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.

240. **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.

241. Because Defendants knew that the Plan was not being run as an ERISA plan, 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.

242. **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. All Defendants knowingly participated in the fiduciary breaches of the other Defendants because they benefitted from the Plan not being run as an ERISA plan.

243. **Enabling a Breach.** ERISA section 405(a)(2), 29 U.S.C. § 1105(a)(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.

244. The failure of all Defendants to exercise fiduciary oversight over other Defendants and monitor the other Defendants enabled those Defendants to breach their duties.

245. As a direct and proximate result of the breaches of fiduciary duties alleged herein, the Plan is significantly underfunded, meaning that the Plan does not have sufficient assets to pay all accrued benefits it has promised to its participants and beneficiaries and is legally obligated to pay under ERISA.

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

### COUNT X

**(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)**

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

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

249. Application of the church plan exemption to hospital systems like HSHS—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 claimed ties to a religion, but not to analogous secular hospital systems.

250. 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 HSHS accomplishes neither purpose.

251. An exemption from ERISA for hospital systems like HSHS 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. On information and belief, HSHS maintains separate ERISA-governed plans, which further evidences that ERISA creates no undue burden on any genuine religious practice of HSHS.

252. An exemption from ERISA for hospital systems like HSHS 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,”<sup>3</sup> this purpose has no application to hospital systems like HSHS. HSHS is not a church and is neither run by, nor financially connected to, any church. Unlike a church, HSHS has *no confidential books and records* to shield from government scrutiny because HSHS 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

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

systems like HSHS is not necessary to further Congress's stated purpose for enacting the church plan exemption.

253. Indeed, an exemption from ERISA for hospital systems like HSHS creates more government entanglement in religion than would the application of ERISA. HSHS's claim to the church plan exemption requires courts and government agencies to examine religious "convictions" of a hospital system like HSHS 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 HSHS because ERISA is a neutral statute that regulates pension protections and HSHS has no relevant confidential books, records or relationships.

254. 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 HSHS serves no purpose but to demonstrate government endorsement of religion.

255. Even if the application of the church plan exemption to hospital systems like HSHS were a permissible religious accommodation, it still would run afoul of the Establishment Clause because the costs and burdens of the exemption are imposed on HSHS's workers. To be constitutional, a religious accommodation must not impose burdens on non-adherents without due consideration of their interests. HSHS tells prospective employees that their choice of faith, or lack thereof, is not a factor in the recruiting and hiring of HSHS employees. Thus, as a practical matter, and by HSHS's own design, HSHS Plan participants include people of a vast number of divergent faiths. The church plan exemption, as claimed by HSHS, places its

thousands of longtime employees' justified reliance on their pension benefits at great risk, including because the Plan is uninsured and underfunded. In addition, HSHS fails to provide the multitude of other ERISA protections designed to safeguard its employees' pensions. The church plan exemption, as claimed by HSHS, provides no consideration of the harm that it causes to HSHS's employees.

256. The church plan exemption, as applied to hospital systems like HSHS, also fails because it does not provide consideration for the harms imposed on competing hospital systems that do not claim religious affiliations. HSHS's commercial rivals face material disadvantages in their competition with HSHS 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 HSHS Plan is an exempt church plan, HSHS 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 HSHS Plan, to its competitive growth strategy. The church plan exemption, as claimed by HSHS, provides no consideration of the disadvantage it creates for HSHS's competitors.

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

**COUNT XI<sup>4</sup>**

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

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

259. HSHS 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.

260. At all relevant times, HSHS was the “sponsor” and “employer” with respect to the HSHS Plan.

261. In the HSHS Plan documents, including applicable plan restatements and summary plan descriptions, HSHS 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 ongoing contributions to the HSHS Trust that were sufficient to pay for the accrued pension benefits.

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

263. The promises made in the HSHS Plan documents were clearly communicated to Plaintiffs and the other Class members, including through summary plan descriptions, benefits

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<sup>4</sup> Counts XI through XIV state alternative claims for relief under State law if the Court determines that the HSHS Plan is a “church plan” exempt from ERISA.

statements, and other HSHS Plan documents, such that Plaintiffs and the other Class members could reasonably understand that HSHS (or its predecessor in interest) had made an offer, in exchange for their continued service, to make ongoing contributions to the HSHS Trust sufficient to pay for their accrued pension benefits.

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

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

266. Accordingly, the HSHS Plan documents constitute enforceable contracts.

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

268. Defendant HSHS breached its obligations under the contracts by failing to make contributions to the HSHS Trust that were sufficient to pay for all accrued pension benefits.

269. Defendant HSHS further breached the implied covenant of good faith and fair dealing. Defendant HSHS failed to exercise good faith in the performance of its obligation to make contributions sufficient to fund accrued benefits.

270. HSHS willfully failed to perform, evaded the spirit of the bargain, and failed to act consistent with the reasonable expectations of Plaintiffs and the Class to the extent it (a) sought to satisfy its funding obligation by making only partial contributions to the HSHS Trust; or (b) interpreted its funding obligation as being satisfied by its partial contributions, which as of 2016 resulted in the HSHS Plan being funded at only 71% of its accrued benefit obligations.

271. A promise to pay pension benefits—as was made in the HSHS 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 HSHS 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, HSHS would have made contributions sufficient, on an actuarial basis, to fund the *full* amount of the accrued benefit, not less than three-quarters of that amount.

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

273. Because Defendant HSHS breached its obligation to make contributions to the HSHS Plan, Plaintiffs and the other Class members have been deprived of their contractual right to a sufficiently funded trust supporting their accrued pension benefits. HSHS’s failure to make sufficient contributions to the HSHS Trust has left the HSHS Plan significantly underfunded, creating a substantial risk that the HSHS Plan will be unable to pay promised pension benefits. This risk is further amplified by HSHS’s designation of the HSHS Plan as an ERISA-exempt “church plan,” which has left it uninsured by the PBGC.

274. Plaintiffs and the Class are entitled to specific performance of the obligations contained in the HSHS Plan documents, including (a) HSHS’s obligation to make contributions to the HSHS Trust that are sufficient to pay for *all* accrued pension benefits; and (b) HSHS’s

implied obligation to act fairly and in good faith in the performance of its contractual obligations.

## COUNT XII

### **(Alternative Claim for Promissory Estoppel Against Defendant HSHS)**

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 promissory estoppel against Defendant HSHS to the extent that the HSHS Plan did not create an enforceable contractual relationship between HSHS and Plaintiffs and the other Class members.

277. HSHS 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 HSHS Trust that were sufficient to pay for the accrued pension benefits.

278. These promises were clearly communicated to Plaintiffs and the other Class members through HSHS Plan documents and communications, including summary plan descriptions, benefit statements, and/or other generally distributed documents and oral assurances.

279. HSHS expected or reasonably should have expected that Plaintiffs and the other Class members would continue to work for HSHS in reliance, in whole or in part, on HSHS'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.



280. 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 HSHS.

281. HSHS has repudiated its promise by failing to make contributions to the HSHS Trust that are sufficient to pay for the accrued pension benefits.

282. If HSHS 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.

283. Because Plaintiffs and the other Class members continued to work for HSHS in reliance on HSHS'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 HSHS and cannot reverse time to work for an employer that will actually honor its promises to pay pension benefits. Accordingly, if HSHS 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.

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

### **COUNT XIII**

#### **(Alternative Claim for Unjust Enrichment Against Defendant HSHS)**

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

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

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

288. HSHS 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 HSHS, as previously alleged.

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

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

291. HSHS directly saved hundreds of millions of dollars by not contributing those amounts to the HSHS Plan, as previously alleged.

292. HSHS also avoided the cost of higher employee turnover as a result of Plaintiffs and the other Class members remaining employees of HSHS. 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.

293. HSHS retained these benefits to the detriment of Plaintiffs and the Class. The hundreds of millions of dollars that HSHS has retained for its own account should have been

paid into the HSHS Trust to fund the already accrued pension benefits of Plaintiffs and the other Class members.

294. HSHS's failure to make sufficient contributions to the HSHS Trust has left the HSHS Plan significantly underfunded, creating a substantial risk that the HSHS Plan will be unable to pay the pension benefits to which Plaintiffs and the other Class members are entitled. This risk is further amplified by HSHS's designation of the HSHS Plan as an ERISA-exempt "church plan," which has left it uninsured by the PBGC.

295. Additionally, Plaintiffs and the other Class members continued working for HSHS relying in whole or in part on their reasonable expectations that HSHS would contribute that money into the HSHS Trust in exchange for their continued employment. By working for HSHS 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 HSHS and cannot reverse time to work for an employer that will actually honor its promises to pay pension benefits.

296. If HSHS 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.

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

298. The amount of Defendant HSHS's unjust enrichment, including the amounts retained by HSHS that should have been contributed to the HSHS Plan, should be disgorged and paid to the HSHS Trust.

#### COUNT XIV

##### **(Alternative Claim for Breach of Common Law Fiduciary Duty Against Defendant HSHS)**

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

300. The HSHS Plan assets are held in the HSHS Trust.

301. Plaintiffs and the other Class members are beneficiaries of the HSHS Trust.

302. Defendant HSHS, in its role as the employer with respect to the HSHS Plan, is a fiduciary pursuant to the HSHS Plan documents.

303. As a fiduciary to the HSHS Plan, Defendant HSHS 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.

304. Defendant HSHS had the fiduciary responsibility under the HSHS Plan documents to make contributions to the HSHS Trust that were sufficient to fund all accrued benefits.

305. Defendant HSHS breached its duty to make sufficient contributions to the HSHS Plan, as detailed above.

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

307. As a direct and proximate cause of Defendant HSHS's fiduciary breaches, the HSHS Trust and its beneficiaries, including Plaintiffs and the other Class members, have been deprived of contributions to which they are entitled and the HSHS Trust has become significantly underfunded, creating a substantial risk that the HSHS Plan will be unable to pay to Plaintiffs and the other Class members the pension benefits to which they are entitled under the HSHS Plan.

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

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

#### **COUNT XV**

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

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

311. The HSHS Plan assets are held in the HSHS Trust.

312. Plaintiffs and the other Class members are beneficiaries of the HSHS Trust.

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

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

315. Additionally, the Plan Administrator Defendants are fiduciaries pursuant to the HSHS Plan documents.

316. As fiduciaries of the HSHS Plan, 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.

317. Defendant HSHS's Retirement Committee, which was obligated by the HSHS's Plan documents to take actions in accordance with the provisions of the Plan, had a duty under the HSHS's Plan documents to receive and review the periodic valuations of the Plan made by the Plan's Actuary, to receive and review reports of the financial condition of the trust holding plan assets, and to report on the financial performance of the Plan to HSHS's Board of Directors.

318. 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.

319. The Plan Administrator Defendants possessed discretionary powers and authority necessary to carry out the provisions of the HSHS Plan.

320. 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 HSHS to its obligation to make contributions that were sufficient to fund all accrued benefits under the HSHS Plan.

321. As a direct and proximate result of the Plan Administrator Defendants' fiduciary breaches, the HSHS Trust and its beneficiaries, including Plaintiffs and the other Class members, have been deprived of contributions to which they are entitled and the HSHS Trust has become significantly underfunded, creating a substantial risk that the HSHS Plan will be unable to pay to Plaintiffs and the other Class members the pension benefits to which they are entitled under the HSHS Plan.

322. 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 HSHS Plan and use all reasonable diligence to require HSHS to make contributions to the HSHS Plan that are sufficient, on an actuarial basis, to fund *all* accrued pension benefits.

323. The Plan Administrator Defendants are liable to restore the losses to the HSHS Plan 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 Federal Rule of Civil Procedure 23, appointing Plaintiffs as Class Representatives, and appointing their attorneys as Class Counsel to represent the members of the Class;

B. Declaring that the HSHS Plan is an employee pension benefit plan within the meaning of ERISA section 3(2), 29 U.S.C. § 1002(2), is a defined benefit pension plan within the meaning of ERISA section 3(35), 29 U.S.C. § 1002(35), and is not a church plan within the definition of ERISA section 3(33), 29 U.S.C. § 1002(33);

C. Ordering HSHS to reform the HSHS Plan to bring it into compliance with ERISA and to have the HSHS Plan comply with ERISA, including as follows:

- i. Revising the Plan document to reflect that the Plan is a defined benefit plan regulated by ERISA;
- ii. Requiring HSHS to fund the HSHS Plan in accordance with ERISA's funding requirements, disclose required information to the HSHS Plan's 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;
- iii. Reforming the HSHS Plan to comply with ERISA's vesting and accrual requirements and provide benefits in the form of a qualified joint and survivor annuity;
- iv. Requiring the adoption of an instrument governing the HSHS Plan that complies with ERISA section 402, 29 U.S.C. § 1102; and
- v. Requiring the establishment of a trust in compliance with ERISA section 403, 29 U.S.C. § 1103;

D. Ordering Defendants to comply with ERISA's 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 HSHS Plan's 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 HSHS Plan's assets in trust, to manage and administer the HSHS Plan and its assets, and to enforce the terms of ERISA;



G. Ordering HSHS 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 Plan;

H. Ordering the Plan Administrator Defendants 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;

I. Ordering the Plan Administrator Defendants 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 HSHS Plan;

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 HSHS Plan, to make the HSHS Plan 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 X, that the church plan exemption, as claimed by HSHS, 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-X, if the Court determines that the HSHS Plan is a “church plan” exempt from ERISA, ordering specific

performance of Defendant HSHS's contractual obligations under the HSHS Plan documents, including an order requiring Defendant HSHS to make contributions to the HSHS Trust that are sufficient, on an actuarial basis, to fund all accrued pension benefits under the HSHS Plan;

O. In the alternative to the relief requested pursuant to Counts I-X, if the Court determines that the HSHS Plan is a "church plan" exempt from ERISA, enforcing Defendant HSHS's promises to make contributions to the HSHS Trust that are sufficient, on an actuarial basis, to fund all accrued pension benefits under the HSHS Plan;

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

Q. In the alternative to the relief requested pursuant to Counts I-X, if the Court determines that the HSHS Plan is a "church plan" 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 HSHS Plan documents with respect to the HSHS Plan;

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

S. Awarding to Plaintiffs attorneys' fees and expenses as provided by the common fund and/or common benefit 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 15th day of August, 2017.

**KELLER ROHRBACK L.L.P.**

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 15, 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*

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Laura R. Gerber