

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS**

HOLLY MOLLET individually, on behalf of all others similarly situated, and on behalf of the Hospital Sisters Health Services Employees’ Pension Plan,)	
)	
)	Civ. No.: _____
)	
Plaintiff,)	<u>CLASS ACTION</u>
)	
v.)	
)	<u>CLAIM OF</u>
)	<u>UNCONSTITUTIONALITY</u>
HOSPITAL SISTERS HEALTH SYSTEM, an Illinois Non-Profit Corporation, HOSPITAL SISTERS SERVICES, INC., an Illinois Non- Profit Corporation, STEPHEN J. BOCHENEK, WILLIAM MURRAY, MATTHEW LAMBERT, M.D., CHRISTA ANN STRUEWING, OSF, ROBERT B. ATWELL, STEVEN HASSEBROCK, WILLIAM BLUM, JANICE WIEGMANN, MARY STARMANN- HARRISON, JOHN SHEEHAN, JOHN and JANE DOES 1-10, members of the Retirement Committee of the Board of HSHS, JOHN and JANE DOES 11-20, members of the Investment Committee of the Board of HSHS, and JOHN and JANE DOES 21-40,)	
)	
Defendants.)	

**COMPLAINT FOR VIOLATIONS OF THE
EMPLOYEE RETIREMENT INCOME SECURITY ACT**

Plaintiff Holly Mollet (“Plaintiff”), individually and on behalf of all others similarly situated, as well as on behalf of the Plan, as defined herein, by and through her attorneys, hereby alleges as follows:

I. NATURE OF THE ACTION

1. This action is brought as a class action on behalf of all participants and beneficiaries of the Hospital Sisters Health Services Employees’ Pension Plan (the “Plan”), a

defined benefit pension plan that is established, maintained, administered, and sponsored by Hospital Sisters Health Services (the "HSHS").

2. Defendant HSHS, by and through its subsidiaries and/or affiliates, operates a system of hospitals and healthcare services in Illinois and Wisconsin.

3. HSHS does not maintain its pension plan pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), which provides various safeguards to employees, retirees and their beneficiaries, including, most importantly, that the plan be properly funded to provide promised benefits in the event company funds are insufficient to do so. As of June 2015, the Plan's pension benefit obligations exceed its assets by over **\$317 million**. The Plan has had no less than \$210 million in shortfalls since 2011, with over **\$410 million** in unfunded pension obligations in 2012.

4. Plaintiff and the other participants and beneficiaries of the Plan seek, among other remedies, an order compelling defendants to bring the Plan into compliance with ERISA, including making all necessary payments to properly fund the Plan. To the extent the religious organization exemption of ERISA is found as a matter of fact to apply, Plaintiff seeks, in the alternative, an order declaring such exemption to be unconstitutional as violating the establishment clause of the First Amendment to the United States Constitution.

II. JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it involves questions of federal law. This Court also has jurisdiction pursuant to 29 U.S.C. § 1132(e)(1), as the action is brought under Title I of ERISA.

6. This Court has personal jurisdiction over all defendants pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), which provides for nationwide service of process.

7. Venue is proper in this District pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), because: (1) Defendant Matthew Lambert, M.D., resides in this district; (2) the audits of HSHS and the Plan for the years 2014 and 2015 were conducted by KPMG in this district; and, (3) HSHS operated at least one facility (St. Mary's Hospital) and employed several hundred people in this district.

8. Venue is also proper in this district pursuant to 28 U.S.C. § 1391 because Defendant HSHS has sufficient minimum contacts with this district such that service upon it comports with accepted notions of fair play and substantial justice, and because a substantial part of the events or omissions giving rise to the claims asserted herein occurred within this district.

III. PARTIES

9. Plaintiff was an employee of HSHS from July 2002 until December 2015. Plaintiff is a vested participant in the Plan and is eligible for pension benefits under the Plan beginning June 1, 2042. Additionally, and alternatively, Plaintiff has a colorable claim to benefits under the Plan and is a Plan participant within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7), and is therefore entitled to maintain an action with respect to the Plan pursuant to ERISA §§ 502(a)(1)(A) and (B), (a)(2), (a)(3), and (c)(1) and (3), 29 U.S.C. §§ 1132(a)(1)(A) and (B), (a)(2), (a)(3), and (c)(1) and (3).

10. Defendant HSHS is a 501(c)(3) non-profit corporation organized under Illinois law. HSHS is headquartered in Springfield, Illinois. HSHS is the sponsor and administrator of the Plan.

11. Defendant Hospital Sisters Services, Inc. ("HS Services") is a 501(c)(3) non-profit subsidiary of HSHS. On information and belief, HS Services administers the Plan on behalf of HSHS and therefore exercises fiduciary discretion over the assets of the Plan.

12. HSHS Board of Directors (the “Board”) is the board of directors of HSHS, which is a fiduciary of the Plan by virtue of being the acting mechanism of HSHS, the named sponsor and administrator of the Plan. In addition, the Board exercises fiduciary discretion over the assets of the Plan, including holding appointment power with respect to other fiduciaries that administer the Plan or otherwise exercise fiduciary discretion over the assets of the Plan and reviewing and approving the Plan’s Investment Policy Statement. As a result, the individual members of the Board named below are fiduciaries of the Plan under ERISA.

13. Defendant Stephen J. Bochenek (“Bochenek”) is chairman of the Board. He is a fiduciary of the Plan for the reason stated in paragraph 12.

14. Defendant William Murray (“Murray”) is vice chairman of the Board. He is a fiduciary of the Plan for the reason stated in paragraph 12.

15. Defendant Matthew Lambert, M.D. (“Lambert”) is a member of the Board. He is a fiduciary of the Plan for the reason stated in paragraph 12.

16. Defendant Christa Ann Struewing, OSF (“Struewing”), is a member of the Board. She is a fiduciary of the Plan for the reason stated in paragraph 12.

17. Defendant Robert B. Atwell (“Atwell”) is a member of the Board. He is a fiduciary of the Plan for the reason stated in paragraph 12.

18. Defendant Steven Hassebrock (“Hassebrock”) is a member of the Board. He is a fiduciary of the Plan for the reason stated in paragraph 12.

19. Defendant William Blum (“Blum”) is a member of the Board. He is a fiduciary of the Plan for the reason stated in paragraph 12.

20. Defendant Janice Wiegman (“Wiegman”) is a member of the Board. She is a fiduciary of the Plan for the reason stated in paragraph 12.

21. Defendant Mary Starmann-Harrison (“Harrison”) is a member of the Board. She is a fiduciary of the Plan for the reason stated in paragraph 12.

22. Defendant John Sheehan (“Sheehan”) is a member of the Board. He is a fiduciary of the Plan for the reason stated in paragraph 12.

23. Defenants Bochenek, Murray, Lambert, Struewing, Atwell, Hassebrock, Blum, Weigman, Starmann-Harrison, and Sheehan are collectively referred to herein as the “Director Defendants.”

24. Defendants John and Jane Does 1-10 (“Retirement Committee Defendants”), members of the HSHS Retirement Committee (“Retirement Committee”) are Board members comprising a committee of the Board that authorizes major investment decisions for the Plan and oversees the Plan’s investment program. Each member of the HSHS Retirement Committee also necessarily exercises fiduciary authority over the Plan through their decision making respecting the activities of the Retirement Committee. As such, these individual members of the Retirement Committee exercise fiduciary discretion over the assets of the Plan and are therefore fiduciaries of the Plan under ERISA. These individuals will be added by name as defendants in this action upon motion by Plaintiff as soon as practicable.

25. Defendants John and Jane Does 11-20 (“Investment Committee Defendants”), members of the HSHS Investment Committee (“Investment Committee”) are Board members comprising a committee of the Board that oversees the investment activities of HSHS. On information and belief, the Investment Committee advises the Board in reviewing and approving the Plan’s Pension Plan Investment Policy Statement. As such, these individual members of the Investment Committee exercise fiduciary discretion over the assets of the Plan and are therefore

fiduciaries of the Plan under ERISA. These individuals will be added by name as defendants in this action upon motion by Plaintiff as soon as practicable.

26. Defendants John and Jane Does 21-40 are individuals who, through discovery, are found to have fiduciary responsibilities with respect to the 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 as soon as practicable.

27. The Director Defendants, the members of the Retirement Committee and Investment Committee and John and Jane Does 21-40 are collectively referred to herein as the “Individual Defendants.”

IV. THE PLAN

28. HSHS is the sponsor of the Plan and therefore has a settlor’s power to continue, amend, or terminate the plan. HSHS is also the administrator of the Plan and therefore is primarily responsible for maintaining and administering it.

29. The Plan is a non-contributory defined benefit pension plan covering substantially all of HSHS’s employees.

30. According to HSHS’s annual reports covering 2011-2015, the Plan has been and remains underfunded by hundreds of millions of dollars.

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

32. The 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 results in the deferral of income by employees to the termination of their

employment or beyond. As such, the Plan meets the definition of an “employee pension benefit plan” within the meaning of ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A).

33. Because the Plan does not provide for an individual account for each participant and does not provide benefits based solely upon the amount contributed to a participant’s account, it is a defined benefit plan within the meaning of ERISA § 3(35), 29 U.S.C. § 1002(35).

V. THE “CHURCH PLAN” EXEMPTION UNDER ERISA

34. ERISA mandates, among other things, that defined benefit pension plans be currently funded and actuarially sound, that the administrators of the plan report certain information to participants and to government regulators, and that the benefits promised by the plans be guaranteed, up to certain limits, by the Pension Benefit Guaranty Corporation (“PBGC”) which is funded by insurance premiums paid by private employers who offer such plans. Federal law requires that private employers seek from the PBGC exemptions from various funding requirements respecting defined benefit pension plans. In this way, the PBGC acts to police the ongoing actuarial soundness of the plan so that participants’ and beneficiaries’ vested benefits are adequately protected.

35. ERISA also establishes a fiduciary relationship between named and *de facto* fiduciaries and the participants and beneficiaries of plans within its purview. Such fiduciaries owe, among others, duties of prudence, diversification, and loyalty with respect to their custody and stewardship of plan assets.

36. ERISA provides an exemption from these strictures and safeguards for a “church plan,” which is defined as a plan “established and maintained for its employees by a church or by

a convention or associations of churches.”¹ Such exemption, by definition, puts at great peril the vested benefits of plan participants and beneficiaries because, among other things, the PBGC does not police such plans and does not insure the partial payment of them.

37. Courts have noted that ERISA’s “church plan” definition, by its explicit and clear terms, provides only “a church or convention or association of churches” can establish a church plan. Because HSHS is not a church, the Plan is subject to ERISA.²

38. Administration of a church plan need not be conducted by a church itself. However, ERISA provides that a properly established church plan can be maintained only by:

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

29 U.S.C. § 1002(33)(C)(i).

39. Here, given that HSHS is a hospital system that runs multiple hospitals and facilities, it is not an entity whose “principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches” Thus, regardless of whether “a church or convention or association of churches” established the Plan, it is not being administered within the “church plan” exemption and is therefore subject to ERISA.

¹ ERISA § 3(33)(A), 29 U.S.C. § 1002(33)(A). The identical definition of “church plan” is found in the Internal Revenue Code. *See* 26 U.S.C. § 414(e).

² The Summary Plan Descriptions of HSHS’s health and dental plans each claim the “church plan” exemption from ERISA. A document entitled “Your HSHS Retirement Program,” however, does not claim any such an exemption.

40. Under ERISA a plan cannot enjoy “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. ERISA § 3(33)(B)(ii), 29 U.S.C. § 1002(33)(B)(ii). Here, as alleged below, there are thousands of participants in the Plan very few of whom are clergy or employed by a church-controlled organization.

VI. HSHS’S OPERATIONS

41. HSHS was incorporated as an Illinois not for profit corporation in 1978 purportedly to serve as a holding company for the *health care operations* of the Hospital Sisters of the Third Order of St. Francis, which is an order of the Roman Catholic Church (the “Order”).

42. HSHS reorganized its corporate structure in 1983 when Hospital Sisters Services, Inc. (“HS Services”) was formed. HSHS is the sole corporate member of HS Services, which itself is the sole corporate member of thirteen other nonprofit corporations that own or operate the hospitals in the HSHS network.

43. According to a recently filed IRS Form 990, HSHS “provides professional and technical expertise in the management of [its] affiliated organizations.”

44. HSHS serves patients in 13 communities in Illinois and Wisconsin, with 14 hospitals, scores of community-based health centers and clinics and nearly 2,300 physician partners in its network. It provides inpatient, outpatient and emergency services.

45. The most recent annual report from 2015 discloses HSHS’ annual operating revenue of approximately \$2.1 billion. A June 30, 2014 Annual Report and Audit discloses assets of over \$2 billion.

46. HSHS employs nearly 15,000 people, the vast majority of whom are not members of the clergy or any religious order.

47. The principle purpose of HSHS demonstrably is not 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.”

48. As a non-profit hospital system, HSHS relies on revenue bonds to raise money, and its financials disclose significant investment activity, including fixed-income securities, equity securities, hedge funds and foreign securities.

49. The management of HSHS is comprised primarily of lay people, and executives receive compensation in line with executive officers of other hospital systems. For example, in 2013, the president and chief executive officer of HSHS received reportable compensation of \$1,209,196.00. Likewise, the chief operating officer of HSHS received \$1,234,818 in reportable compensation the same year.

50. On information and belief, HSHS does not receive funding from any church or convention or association of churches.

51. HSHS is not controlled by the Order, as a majority of the board of HSHS is not comprised of members of the Order. Nor is HSHS controlled by any church. Instead, lay people, including a physician, control HSHS.

52. On information and belief, HSHS does not claim that any church or convention or association of churches has any liability for HSHS's debts or obligations.

53. On information and belief, HSHS does not impose any denominational requirement on its employees.

54. HSHS has no denominational requirement for its patients and/or clients.

55. Unlike a church, HSHS publicly discloses its financial records. For example, HSHS's financial information is regularly disclosed to the rating agencies and the public when tax-exempt revenue bonds are issued.

56. Based on the foregoing, HSHS demonstrably is not a church or a convention or association of churches.

VII. DEFENDANTS' FIDUCIARY STATUS

57. ERISA requires a plan to be "established and maintained by a written instrument" which must contain one or more "named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan." ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1). ERISA provides that in the absence of a named administrator the sponsor is the administrator. ERISA § 3(16)(A), 29 U.S.C. § 1002(16)(A).

58. To be a fiduciary under ERISA, one need not be named in the trust instrument. ERISA provides that 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)(i), 29 U.S.C. § 1002(21)(A)(i).

59. 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 either as set forth in Plan documents or to the extent they exercised discretionary authority with respect to the administration of the Plan or Plan under ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i).

60. Defendants, as ERISA fiduciaries, were required 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." ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1).

61. Defendant HSHS is the Plan sponsor because it is the employer that "established or maintained" the Plan. ERISA § 3(16)(B), 29 U.S.C. § 1002(16)(B). A document distributed to employees entitled "Your HSHS Retirement Program" ("SPD") also states that HSHS is the sponsor and administrator of the Plan. According to HSHS's Annual Report and Audit for June 30, 2015 (the "2015 Audit"), the Plan is controlled, managed and administered by the "HSHS Board of Directors," as well as a "Retirement Committee" and an "Investment Committee." According to the 2015 Audit:

The Plan has developed an Investment Policy Statement (the IPS), which is reviewed and approved by the HSHS Board of Directors. The IPS establishes goals and objectives of the fund, asset allocations, allowable and prohibited investments, socially responsible guidelines, and asset classifications. The IPS dictates that assets should be rebalanced back to target allocation on a quarterly basis. Investments are managed by independent managers. Management monitors the performance of these managers on a quarterly basis.

2015 Audit at 36 (emphasis added).

Major investment decisions are authorized by ***the Board's Retirement Committee***, which ***oversees the Plan's investment program*** in accordance with established guidelines.

2015 Audit at 37 (emphasis added.)

The overall investment objective of HSHS is to invest its assets in a prudent manner that will achieve an expected rate of return, manage risk exposure, and focus on downside protection. HSHS' invested assets will maintain sufficient liquidity to fund a portion of HSHS' annual operating activities and structure the

invested assets to maintain a high percentage of available liquidity. HSHS diversifies its investments among various asset classes incorporating multiple strategies and managers. ***The HSHS board approves the investment policy statement. The Investment Committee oversees the investment program in accordance with the investment policy statement.***

2015 Audit at 21 (emphasis added).

62. Upon information and belief, Defendant HSHS's responsibilities include fiduciary oversight of the Plan. Upon information and belief, HSHS had the responsibility to appoint, monitor and remove, the Retirement Committee Defendants, Investment Committee Defendants and other *de facto* fiduciaries of the Plan.

63. Defendant HSHS is a fiduciary of the Plan because, on information and belief, it is the named Plan administrator. On information and belief, HSHS is also a fiduciary of the Plan because it exercises discretionary authority with respect to the administration of the Plan and over Plan assets within the meaning of ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i) quoted above.

64. The Retirement Committee Defendants and Investment Committee Defendants are, on information and belief, authorized to administer HSHS employee compensation and benefits, including administering the Plan. Upon information and belief, the Retirement Committee Defendants and Investment Committee Defendants exercise discretionary authority and fiduciary oversight over the Plan.

65. The Retirement Committee Defendants and Investment Committee Defendants are fiduciaries of the Plan within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), because, on information and belief, they exercise discretionary authority with respect to the administration of the Plan and over Plan assets within the meaning of ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i) quoted above.

**VIII. UNCONSTITUTIONALITY OF “CHURCH PLAN”
EXEMPTION AS APPLIED HERE**

66. The First Amendment to the United States Constitution provides that “Congress shall make no law respecting an establishment of religion” The phrase “establishment of religion” includes providing privileges to members of one religious sect while burdening the rest of society. The “church plan” exemption is an accommodation for churches that establish and maintain pension plans, insofar as it lessens the regulatory burden on such religious institutions.

67. Congress enacted the “church plan” exemption to avoid “examination of books and records . . . an unjustified invasion of the confidential relationship with regard to churches and their religious activities.”³

68. The stated purpose of the “church plan” exemption would not be served by applying it to HSHS here. As detailed above, HSHS is neither run by nor intimately connected to any church financially. As such, HSHS does not have any confidential books and records. Indeed, HSHS regularly discloses full financial and other information in connection with bond offerings and various regulatory filings, including on IRS Form 990.

69. In addition, the application of the “church plan” exemption to HSHS here would unduly burden HSHS’s employees with respect to the various procedural protections afforded by ERISA especially the security of their financial futures in retirement. Such application also is unfair to HSHS’s competitors who must bear the burden of ERISA’s regulatory expense, including adequately funding their pension plans and paying PBGC insurance premiums.

70. Applying the “church plan” exemption to HSHS here would alleviate no genuine burden created by ERISA on any of HSHS’s religious practices. The burdens of ERISA are not materially different from a multitude of neutral federal laws that do not significantly burden

³ S. Rep. No. 93-383 (1972), *reprinted in* 1974 U.S.C.C.A.N. 4889, 4965.

religious exercise in the context of a purportedly religiously-affiliated corporation's commercial activities.

71. Moreover, applying the exemption here would require courts to conduct inquiries into the religious "convictions" of a non-church entity and determine if they are "shared" with a church. This would create an unconstitutional entanglement between government and religion. ERISA entails no such entanglement because it neutrally regulates pension protections.

IX. CLASS ALLEGATIONS

72. Plaintiffs bring this action as a class action pursuant to Rules 23(a), (b)(1), (b)(2) and (b)(3) of the Federal Rules of Civil Procedure on behalf of herself and the following class of persons similarly situated (the "Class"):

All participants or beneficiaries of the Hospital Sisters Health Services Employees' Pension Plan. Excluded from the Class are: senior HSHS executives; individuals who have responsibility or involvement in the administration of the Plan; individuals who are determined to be fiduciaries of the Plan; and, defendants and their immediate family members.

73. The members of the Class are so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown to Plaintiff at this time, records maintained by HSHS shall make this clear. In addition, HSHS currently employs over 15,000 people. Upon information and belief, many, if not all, of those persons are likely members of the Class, making joinder impracticable.

74. Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting solely individual members of the Class. Among the questions of law and fact common to the Class are: (1) whether the Plan is exempt from ERISA, and, if not, (2) whether the fiduciaries of the Plan have breached their fiduciary duties by, among

other things, failing to administer the Plan according to ERISA and to enforce the funding obligations of the Plan in accordance with ERISA, and (3) whether the church plan exemption as applied here violates the establishment clause of the First Amendment to the United States Constitution.

75. Plaintiff's claims are typical of the claims of the members of the Class because her claims arise from the same event, practice and/or course of conduct, namely Defendants' failure to maintain the Plan in accordance with ERISA. Plaintiffs' claims are also typical because all Class members are similarly affected by Defendants' wrongful conduct. Plaintiff is also unaware of any defenses unique to her claims that would make them atypical vis-a-vis the claims of the Class.

76. Plaintiff will fairly and adequately protect the interests of the members of the Class and has retained counsel competent and experienced in class action, complex, and ERISA litigation. Plaintiff has no interests antagonistic to or in conflict with those of the Plan or the Class.

77. Class action status in this ERISA action is warranted under Rule 23(b)(1)(A) because prosecution of separate actions by the members of the Class would create a risk of establishing incompatible standards of conduct for defendants.

78. Class action status is also warranted under Rule 23(b)(1)(B) because prosecution of separate actions by the members of the Class would create a risk of adjudications with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of the other members not parties to the actions, or substantially impair or impede their ability to protect their interests.

79. 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.

80. If the Class is not certified under Rule 23(b)(1) or (b)(2), then certification under Rule 23(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, and, if not, (2) whether the fiduciaries of the Plan have breached their fiduciary duties by, among other things, failing to administer the Plan according to ERISA and to enforce the funding obligations of the Plan in accordance with ERISA, and (3) whether the church plan exemption as applied here violates the establishment clause of the First Amendment to the United States Constitution. 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 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. There is no other litigation begun by any other Class members concerning the issues raised in this litigation;

D. This litigation is properly concentrated in this forum, which is where Defendant HSHS is headquartered; and

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

X. CLAIMS FOR RELIEF

COUNT I

Failure to Administer and Fund the Plan According to ERISA (Against Defendant HSHS, Director Defendants, Retirement Committee Defendants and Investment Committee Defendants)

81. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth here.

82. ERISA § 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, Plaintiff seeks declaratory relief that the Plan is not a “church plan” within the meaning of ERISA § 3(33), 29 U.S.C. § 1002(33), and is therefore subject to the provisions of Title I and Title IV of ERISA.

83. ERISA § 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, Plaintiff seeks an order directing the Plan’s sponsor and administrator to bring the Plan into compliance with ERISA.

84. ERISA § 502(a)(2), 29 U.S.C. § 1132(2), authorizes a participant or beneficiary to bring a civil action for appropriate relief under 29 U.S.C. § 1109(a), against a fiduciary “who

breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries” and the fiduciary “shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate.” Because the operation of the Plan as a non-ERISA plan was a breach of defendants’ fiduciary duties, Plaintiff also seek plan-wide equitable and remedial relief under ERISA § 502(a)(2), including a declaration that the Plan is covered by ERISA and an order directing the Plan’s sponsor, administrator and *de facto* fiduciaries to bring the Plan into compliance with ERISA.

COUNT II

Failure to Report and Disclose According to ERISA (Against Defendant HSHS, Director Defendants, Retirement Committee Defendants and Investment Committee Defendants)

85. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth here.

86. As administrator of the Plan at all relevant times, HSHS—and the Retirement Committee Defendants, Investment Committee Defendants, and the Director Defendants, as agents of HSHS with respect to the administration of the Plan—violated ERISA § 104, 29 U.S.C. § 1024, by failing to provide Plaintiffs and members of the Class with Summary Plan Descriptions compliant with ERISA § 102, 29 U.S.C. § 1022.

87. As administrator of the Plan at all relevant times, HSHS—and the Retirement Committee Defendants, Investment Committee Defendants, and the Director Defendants, as agents of HSHS with respect to the administration of the Plan—violated ERISA § 103, 29 U.S.C. § 1023, by failing to file an annual report for the Plan with the Secretary of Labor in compliance

with ERISA. These defendants have also failed to file Forms 5500 and associated schedules and attachments annually, which is an approved alternative method of complying with ERISA § 103, 29 U.S.C. § 1023.

88. As administrator of the Plan at all relevant times, HSHS—and the Retirement Committee Defendants, Investment Committee Defendants, and the Director Defendants, as agents of HSHS with respect to the administration of the Plan—violated ERISA § 104(b)(3), 29 U.S.C. § 1024(b)(3), and regulations promulgated thereunder, by failing to provide Plaintiff or any other Class member with a compliant Summary Annual Report.

89. As administrator of the Plan at all relevant times, HSHS—and the Retirement Committee Defendants, Investment Committee Defendants, and the Director Defendants, as agents of HSHS with respect to the administration of the Plan—violated ERISA § 101(d)(1), 29 U.S.C. § 1021(d)(1), by failing to provide Plaintiff or any other Class member a compliant notice that HSHS had failed to make payments to the Plan as required by ERISA § 302, 29 U.S.C. § 1082. Pursuant to § 502(a)(1)(A), 29 U.S.C. § 1132(a)(1)(A), and 29 C.F.R. § 2575.502(c)(3), these defendants should be required by the Court to pay Plaintiff and each member of the Class up to \$110 per day for each day that they failed to provide Plaintiff and every other member of the Class with the notice required by ERISA § 101(d)(1), 29 U.S.C. § 1021(d)(1).

90. As administrator of the Plan at all relevant times, HSHS—and the Retirement Committee Defendants, Investment Committee Defendants, and the Director Defendants, as agents of HSHS with respect to the administration of the Plan—violated ERISA § 105(a)(1), 29 U.S.C. § 1025(a)(1), by failing to provide Plaintiff or any other Class member a compliant Pension Benefit Statement respecting their benefits in the Plan. Pursuant to §§ 502(a)(1)(A) and 502(c)(1), 29 U.S.C. § 1132(a)(1)(A) and 29 U.S.C. § 1132(c)(1), as amended by 29 C.F.R. §

2575.502c-1, these defendants should be required by the Court to pay Plaintiff and every other member of the Class up to \$110 per day for each day that they failed to provide Plaintiff and each member of the Class with the Pension Benefit Statements required by ERISA § 105(a)(1), 29 U.S.C. § 1025(a)(1).

91. Defendants HSHS, the Retirement Committee Defendants, the Investment Committee Defendants, and the Director Defendants, should be ordered to comply with all of the above-referenced reporting and disclosure requirements, including all past reports and disclosures and those in the future, and should be order to pay the daily fines detailed above.

COUNT III

Failure to Provide Minimum Funding (Against Defendant HSHS and Director Defendants)

92. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth here.

93. ERISA § 302, 29 U.S.C. § 1082, requires employers to make minimum contributions to their plans to meet minimum funding requirements so that each plan will have sufficient assets available to fund plan benefits regardless of an employer's ability to pay any such benefits out of its general funds.

94. HSHS and Director Defendants were and are responsible for making such contributions and have not done so.

95. HSHS's pension liabilities have exceeded its assets by hundreds of millions of dollars since at least 2011.

96. By failing to make such required minimum contributions to the Plan and failing to maintain applicable minimum funding requirements, Defendant HSHS and Director Defendants

have violated ERISA § 302, 29 U.S.C. § 1082, and should be ordered to adequately fund the Plan and make the required minimum contributions going forward.

COUNT IV

**Failure to Establish the Plan Pursuant to a Written Instrument
(Against Defendant HSHS and Director Defendants)**

97. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth here.

98. ERISA § 402, 29 U.S.C. § 1102, mandate that every plan be established pursuant to a written instrument providing, 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 1 of ERISA].”

99. Upon information and belief, the Plan has never been established pursuant to a written instrument meeting the requirements of ERISA § 402, 29 U.S.C. § 1102.

100. HSHS and Director Defendants are therefore in violation ERISA § 402 and should be ordered to comply with it.

COUNT V

**Failure to Establish an ERISA-Compliant Trust
(Against Defendant HSHS and Director Defendants)**

101. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth here.

102. ERISA § 403, 29 U.S.C. § 1103, mandates that all assets of an employee benefit plan shall be held in trust by one or more trustees and that these trustees shall be either named in

the trust instrument or in the plan document described in § 402(a), 29 U.S.C. § 1102(a), or appointed by a person who is a named fiduciary.

103. On information and belief, the Plan's assets have been held in a trust that is not compliant with ERISA § 403, 29 U.S.C. § 1103.

104. HSHS and Director Defendants are therefore in violation of ERISA § 403 and should be ordered to comply with it.

COUNT VI

Claim for Clarification of Future Benefits (Against Defendant HSHS and Director Defendants)

105. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth here.

106. ERISA § 502(a)(1)(B), 29 U.S.C. § 1102(a)(1)(B), provides that a participant or beneficiary may bring a civil action to “clarify his rights to future benefits under the terms of the plan.”

107. Plaintiff and the other members of the Class have not been provided ERISA-compliant benefit statements.

108. Pursuant to ERISA §§ 502(a)(1)(B) and 502(a)(3), 29 U.S.C. §§ 1132(a)(1)(B) and 1132(a)(3), upon HSHS and the other defendants making the Plan ERISA-compliant, Plaintiff seeks to clarify her rights under the terms of the Plan and to require Defendant HSHS and Director Defendants to provide Plaintiff and the other members of the Class ERISA-compliant benefit statements.

COUNT VII

**Civil Penalty for Failure to Report and Disclose According to ERISA
(Against Defendant HSHS, Director Defendants, Retirement Committee
Defendants and Investment Committee Defendants)**

109. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth here.

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

111. ERISA § 502(c)(3), 29 U.S.C. § 1132(c)(3), and 29 C.F.R. § 2575.502c-3 promulgated thereunder, provides an employer maintaining a plan, and an administrator of a defined benefit pension plan, who fails to meet the notice requirement of ERISA § 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.

112. ERISA § 502(c)(3), 29 U.S.C. § 1132(c)(3), and 29 C.F.R. § 2575.502c-3 promulgated thereunder, 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 § 105(a), 29 U.S.C. § 1025(a), may be liable for up to \$110 per day from the date of such failure.

113. Because Defendant HSHS, as the employer, has failed to give the notices required by ERISA § 101(d), 29 U.S.C. § 1021(d), as set forth in Count II, Defendant HSHS is liable to Plaintiff 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.

114. Because HSHS, as plan administrator of the Plan, has failed to give the notices required by ERISA § 101(f), 29 U.S.C. § 1021(f), and the Pension Benefit Statement required by ERISA § 105(a), 29 U.S.C. § 1025(a), as set forth in Count II, the HSHS is liable to Plaintiff and each member of the Class in an amount up to \$110 per day from the date of such failures until such time that notices are given and the statement is provided, as the Court, in its discretion, may order.

COUNT VIII

Breach of Fiduciary Duty (Against All Defendants)

115. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth here.

116. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), provides Plaintiff with the right to bring a civil action for breach of fiduciary duty against ERISA fiduciaries on behalf of herself and the Class.

117. Defendants breached their fiduciary duties of prudence and loyalty under ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), by failing to enforce the provisions of ERISA recounted in the preceding Counts. In particular, the failure of defendants to enforce minimum funding and contributions and levels has resulted in a loss to the Plan equal to the foregone funding and earnings thereon, and also resulted in HSHS profiting by allowing it to use such money for its general business purposes. Defendants are therefore liable for such losses to the Plan and its participants and beneficiaries.

118. Defendants breached their fiduciary duties not to allow prohibited transactions under ERISA §§ 406(a)(1)(B), (a)(1)(D) and (b)(1), 29 U.S.C. §§ 1106(a)(1)(B), (a)(1)(D), and (b)(1), by in effect extending credit to interested party HSHS when they failed to enforce the minimum funding and contribution provisions of ERISA cited above. This failure by defendants has resulted in a loss to the Plan equal to the foregone funding and earnings thereon, and also resulted in HSHS profiting by allowing it to use such money for its general business purposes. Defendants are therefore liable for such losses to the Plan and its participants and beneficiaries.

119. Defendant HSHS breached its fiduciary duty to monitor other fiduciaries of the Plan by failing to appoint fiduciaries who would administer the Plan in an ERISA-compliant manner and failing to adequately monitor them and remove them upon learning of their failure to administer the Plan lawfully. HSHS's duty to monitor included the duty to inform such appointed fiduciaries adequately concerning the applicable law and relevant facts respecting the Plan, including, among other things, that the Plan was subject to ERISA. Such failure to monitor resulted in such fiduciaries failing, among other failures, to enforce the minimum funding and contribution provisions of ERISA cited above, which resulted in the associated harm and losses to the Plan and its participants and beneficiaries detailed above. Defendant HSHS is therefore liable for such losses to the Plan and its participants and beneficiaries.

COUNT IX

Co-Fiduciary Liability (Against All Defendants)

120. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth here.

121. As alleged above, all Defendants were either named or *de facto* fiduciaries pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), or *de facto* fiduciaries within the

meaning of ERISA § 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.

122. ERISA § 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 here breached all three provisions.

123. ERISA § 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. In particular, because defendants knew that the Plan was not being run as an ERISA plan, they 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.

124. ERISA § 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. HSHS knowingly participated in the fiduciary breaches of the other defendants in that it benefited from the Plan not being run as an ERISA Plan.

125. ERISA § 405(a)(2), 29 U.S.C. § 1105(2), imposes liability on a fiduciary if, by failing to comply with ERISA § 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. The failure of Defendant HSHS to monitor the Retirement Committee Defendants, Investment Committee Defendants and other *de facto* fiduciaries enabled them to breach their fiduciary duties.

126. As a direct and proximate result of the breaches of fiduciary duties alleged herein, 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 because it is currently underfunded.

127. The failure of defendants to enforce the funding obligations owed to the Plan under ERISA has resulted in a loss to the Plan equal to the foregone funding and earnings thereon.

128. Pursuant to ERISA §§ 409, 502(a)(2) and (a)(3), 29 U.S.C. §§ 1109(a), 1132(a)(2) and (a)(3), defendants are liable to restore the losses to the Plan caused by their breaches of fiduciary duties alleged in this Count and to provide other equitable relief as appropriate.

COUNT X

Declaration that “Church Plan” Exemption is Unconstitutional as Applied (Against All Defendants)

129. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth here.

130. For the reasons stated in paragraphs 41-56, HSHS is not a church, nor is it an entity controlled or funded by a church. Extension of the “church plan” exemption to HSHS would violate the establishment clause of the First Amendment to the United States Constitution.

131. Plaintiff seeks a declaration by the Court that the “church plan” exemption is an unconstitutional accommodation under the Establishment Clause of the First Amendment as applied to HSHS, and is therefore void and ineffective.

XI. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for relief as follows:

A. That this Court certify this action as a class action under Fed. R. Civ. P. 23(a), (b)(1), (b)(2) and/or (b)(3);

B. That this Court declaring that the Plan is an employee pension benefit plan within the meaning of ERISA § 3(2), 29 U.S.C. § 1002(2), is a defined benefit pension plan within the meaning of ERISA § 3(35), 29 U.S.C. § 1002(35), and is not a “church plan” within the definition of ERISA § 3(33), 29 U.S.C. § 1002(33).

C. That this Court order HSHS to reform the Plan to bring it into compliance with ERISA and to have the Plan comply with ERISA, including, but not limited to, as follows:

1. Requiring the adoption of an instrument governing the Plan that complies with ERISA § 402, 29 U.S.C. § 1102

2. Revising the Plan documents to reflect that it is a defined benefit plan regulated by ERISA.

3. Requiring HSHS to fund the Plan in accordance with ERISA’s funding requirements;

4. Requiring HSHS to comply with ERISA reporting and disclosure requirements, including by filing Form 5500 reports, distributing ERISA-compliant Summary Plan Descriptions, Summary Annual Reports, and ERISA-compliant

Participant Benefit Statements, and providing Notice of the Plan's funding status and deficiencies.

5. Requiring clarification of rights to future benefits pursuant to ERISA § 502(a)(1)(B), 29 U.S.C. § 1102(a)(1)(B).

6. Requiring the establishment of a Trust in compliance with ERISA § 403, 29 U.S.C. § 1103.

D. That this Court order HSHS to make the Plan whole for any losses and disgorge any HSHS profits accumulated as a result of fiduciary breaches.

E. That this Court appoint an Independent Fiduciary to hold the Plan's assets in trust, to manage and administer the Plan and its assets, and to enforce the terms of ERISA.

F. That this Court order HSHS to pay a civil money penalty of up to \$110 per day to Plaintiff and each Class member for each day it failed to inform Plaintiff and each Class member of its failure to properly fund the Plan.

G. That this Court order HSHS to pay a civil money penalty of up to \$110 per day to Plaintiff and each Class member for each day it failed to provide Plaintiff and each Class member with a funding notice required by ERISA.

H. That this Court order HSHS to pay a civil money penalty of up to \$110 per day to Plaintiff and each Class member for each day it failed to provide a benefit statement under ERISA.

I. That this Court order declaratory and injunctive relief as necessary and appropriate, including enjoining the defendants from further violating the duties, responsibilities, and obligations imposed on them by ERISA with respect to the Plan.

J. That this Court declare that the “church plan” exemption is an unconstitutional accommodation under the Establishment Clause of the First Amendment as applied to HSHS.

K. That this Court awarding to Plaintiff attorneys’ fees and expenses as provided by the common fund doctrine, ERISA § 502(g), 29 U.S.C. § 1132(g), and/or other applicable doctrine.

L. That this Court awarding to Plaintiff taxable costs pursuant to ERISA § 502(g), 29 U.S.C. §1132(g), 28 U.S.C. § 1920, and other applicable law.

M. That this Court awarding to Plaintiff pre-judgment interest on any amounts awarded pursuant to law.

N. That this Court award, declare or otherwise provide Plaintiff and the Class all relief under ERISA § 502(a), 29 U.S.C. § 1132(a), or any other applicable law, that the Court deems proper.

Dated: September 26, 2016

Respectfully submitted,

s/ *Matthew T. Hurst*

HEFFNER HURST

30 North LaSalle Street, Twelfth Floor

Chicago, IL 60602

Tel.: (312) 346-3466

Fax: (312) 346-2829

Email: mhurst@heffnerhurst.com

Local Counsel for Plaintiff

Of Counsel:

HARWOOD FEFER LLP

Robert I. Harwood

Peter W. Overs, Jr.

488 Madison Ave., 8th Floor

New York, New York 10022

Tel.: (212) 935-7400

Fax: (212) 753-3630

Email: rharwood@hfesq.com

povers@hfesq.com

SARRAF GENTILE LLP

Ronen Sarraf
Joseph Gentile
14 Bond Street, Suite 212
Great Neck, New York 11021
Tel: (516) 699-8890
Fax: (516) 699-8968
Email: ronen@sarrafgentile.com
joseph@sarrafgentile.com

WHAM & WHAM LAWYERS

Ryan Rich
212 E. Broadway, P.O. Box 549
Centralia, Illinois 62801
Tel: (618)532-5621
Fax: (618)532-5055
Email: rdrwhamlawyers@aol.com

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Hospital Sisters Health System Hit with Pension Plan ERISA Lawsuit](#)
