

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE**

MARY L. BRACE, individually and on behalf of
herself and all others similarly situated,

Plaintiff,

vs.

METHODIST LE BONHEUR HEALTHCARE,
THE BENEFITS COMMITTEE and John Does
1-20,

Defendants.

Civil Action No.: _____

JURY DEMAND

COMPLAINT

Plaintiff Mary L. Brace, by and through her attorneys, on behalf of herself and all others similarly situated, based on personal knowledge with respect to her own circumstances and based upon information and belief pursuant to the investigation of her counsel as to all other allegations, alleges the following.

INTRODUCTION

1. This is a class action against Defendants Methodist Le Bonheur Healthcare (“MLBH” or the “Company”), the Benefits Committee (the “Committee”),¹ and John Does 1-20 (the “Committee members”) concerning the Methodist Healthcare Classic Pension Plan (the “Plan”).

2. The Plan has been chronically underfunded for years.

¹ And/or any other committee with responsibility for managing/administering the Plan (defined below).

3. As of December 31, 2013, the Plan was underfunded by \$49.328 million. *See* MLBH Consolidated Financial Statements and Supplemental Schedules December 31, 2014 and 2013 (“2014 Consolidated Financial Statements”), at 30.

4. The Plan’s deficit significantly worsened in the following year such that as of December 31, 2014, the Plan was underfunded by \$118.512 million. *Id.*

5. Defendants excuse the severe underfunding on the grounds that the Plan is a “church plan” and therefore is exempt from the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* (“ERISA”).

6. To the contrary, as described herein, the Plan does not meet ERISA’s requirements for the “church plan” exemption, because it was not “established,” and is not “maintained” by a church. Rather, the Plan was established and is maintained by MLBH, which is a business – not a church or a convention or association of churches.

7. Consequently, the Plan is governed by all of the funding, fiduciary, and notice requirements of ERISA. This action seeks to require Defendants to comply with all of those requirements, and to pay damages and penalties as a result of their past failures to do so.

JURISDICTION AND VENUE

8. This court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it is a civil action arising under the laws of the United States, and pursuant to 29 U.S.C. § 1332(e)(1), which provides for federal jurisdiction of actions brought under Title I of ERISA.

9. This court has personal jurisdiction over Defendants because they are headquartered and transact business in, or reside in, and have significant contacts with, this District, and because ERISA provides for nationwide service of process.

10. Venue is proper in this District pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), because some or all of the violations of ERISA occurred in this District and Defendants reside and may be found in this District. Venue is also proper in this District pursuant to 28 U.S.C. § 1391 because Defendants do business in this District and a substantial part of the events or omissions giving rise to the claims asserted herein occurred within this District.

PARTIES

Plaintiff

11. Plaintiff Mary L. Brace resides in the unincorporated Shelby Forest area of Millington, TN. Plaintiff Brace was employed by Defendant as a Registered Nurse from 1992 to 2009, working at both the University Hospital and later the Germantown Hospital in various departments including Nephrology, Methodist Extended Care Hospital, and the Twenty Three Hour Observation Unit during her employment. Plaintiff Brace is a current participant in the Plan.

Defendants

12. Defendant MLBH is a not-for-profit corporation, headquartered in Memphis, TN. Defendant MLBH either wholly owns or is a controlling member of various healthcare subsidiaries. *See* 2014 Consolidated Financial Statements, at 7.

13. The Committee is an unincorporated association, which, upon information and belief, is the Plan Administrator and/or named fiduciary.

14. John Does 1-20 are the individual members of the Committee and members of any other committee(s) which administer the Plan. The identity of the members of the Committee, and any of the other committee(s) which was or were responsible for carrying out

the provisions of the Plan, is currently not known. Upon information and belief, John Does 1-20 are senior executive officers of the Company who knew or should have known the facts alleged herein. The Committees and John Does 1-20 are hereafter collectively referred to as the “Committee Defendants.”

CLASS ACTION ALLEGATIONS

15. Plaintiff brings this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of herself and the class (the “Class”) defined as follows:

All participants in and beneficiaries of the Methodist Healthcare Classic Pension Plan (the “Plan”). Excluded from the Class are Defendants and any individuals who are subsequently to be determined to be fiduciaries of the Plan.

16. The members of the Class are so numerous that joinder of all members is impractical. Upon information and belief, the Class includes thousands of persons.

17. Plaintiff’s claims are typical of the claims of the members of the Class because Plaintiff’s claims, and the claims of all Class members, arise out of the same conduct, policies, and practices of Defendants as alleged herein, and all members of the Class are similarly affected by Defendants’ wrongful conduct.

18. There are questions of law and fact common to the Class and these questions predominate over questions affecting only individual Class members. Common legal and factual questions include, but are not limited to:

- A. Whether the Plan is covered by ERISA;
- B. Whether the Plan Administrator failed to comply with ERISA’s reporting and disclosure provisions;
- C. Whether Defendants failed to establish a funding policy in compliance with ERISA; and

D. Whether the Defendant-fiduciaries breached their fiduciary duties in failing to comply with the provisions of ERISA set forth above.

19. Plaintiff will fairly and adequately represent the Class and has retained counsel experienced and competent in the prosecution of ERISA class action litigation. Plaintiff has no interests antagonistic to those of other members of the Class. Plaintiff is committed to the vigorous prosecution of this action, and anticipates no difficulty in the management of this litigation as a class action.

20. This action may be properly certified under either subsection of Rule 23(b)(1). Class action status in this 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 Defendant. 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 that, as a practical matter, would be dispositive of the interests of other members not parties to this action, or that would substantially impair or impede their ability to protect their interests.

21. In the alternative, certification under Rule 23(b)(2) is warranted because Defendant has 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.

22. In the alternative, certification under Rule 23(b)(3) is also appropriate. A class action is superior to other available methods for the fair and efficient adjudication of the controversy within the meaning of Rule 23(b) and in consideration of the matters set forth in Rule 23(b)(3)(A)-(D). Because of the amount of the individual Class members' claims relative

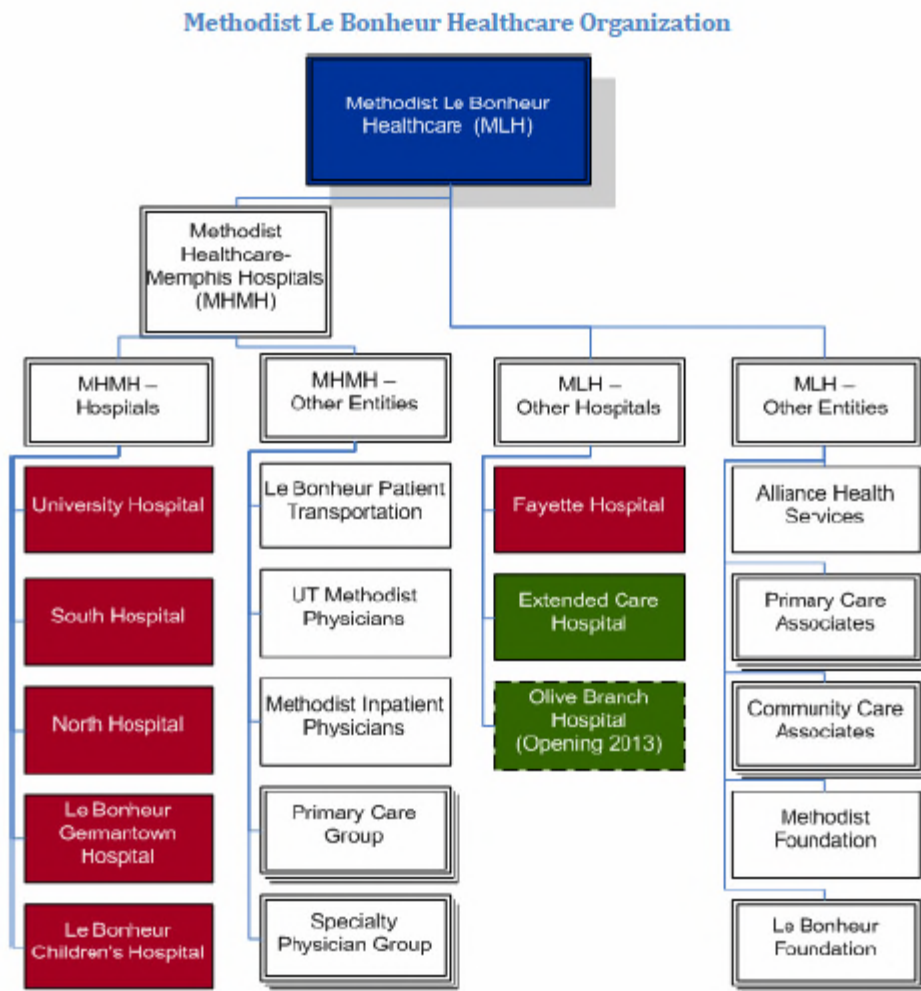
to the complexity of the litigation and the financial resources of the Defendants, few, if any, members of the Class would seek legal redress individually for the wrongs complained of herein. The maintenance of separate actions would place a substantial and unnecessary burden on the courts, and could result in inconsistent adjudications, while a single class action can determine, with judicial economy, the rights of all Class members. Absent a class action, Class members will continue to suffer damages, and Defendants' misconduct will proceed without remedy.

SUBSTANTIVE ALLEGATIONS

A. Defendant MLBH's Business

23. MLBH is a healthcare system headquartered in Memphis, Tennessee with over 1,750 licensed beds and over 12,100 employees. *See* 2014 Consolidated Financial Statements, at 7. The system consists of eight hospitals, including a dedicated pediatric hospital, a hospice residence and a home health agency, and serves patients in Tennessee, Mississippi and Arkansas. *Id.*

24. The organizational chart illustrates MLBH's expansive operations:



See id. at 10.

25. In addition to acute care centers, MLBH operates outpatient surgery centers, minor medical centers, diagnostic centers and sleep centers, and provides primary care services to patients in three states as one of Tennessee’s largest healthcare providers. *See* Methodist Le Bonheur Healthcare Community Health Needs Assessment & Strategic Implementation Plan, Version 11/19/2003 (“Health Needs Assessment”), at 6.

26. As demonstrated by the above-referenced organizational chart, MLBH is a healthcare conglomerate whose purpose is to provide patient care. The Company is not, and does not claim to be, a church.

27. Unlike a religious institution, the Company's 2014 Consolidated Financial Statements state its results are subject to the "Healthcare Industry Environment," such that its management closely monitors the healthcare provider industry, including the:

uncertainties associated with U.S. healthcare system reform and rising self-pay and emerging high-deductible health plan funded patient volumes coupled with increases in uncompensated care and decreasing reimbursement rates relative to governmental payors.

Id. at 14.

28. MLBH completed the Health Needs Assessment because it was required to "comply with the Patient Protection and Affordable Care Act of 2010 [to] maintain the hospital's tax-exempt status," as well as "to help meet the hospital's mission of enhancing the health of the people and the communities it serves." *Id.* at 13.

29. The Company's Board of Directors is not controlled by a church. As of December 31, 2014, the Directors were:

- Alan Graf, Jr., Chairman
- David Beckley, Ph.D.
- Ron Belz
- George Cates
- Chadd Durrett, Jr.
- Trey Eubanks, M.D.
- Carolyn Hardy
- Mary Jo Kirkpatrick
- Lisa Klesges, Ph.D.
- David Leggett, M.D.
- Jean-Claude Luiseau, M.D.
- Bishop Bill McAlilly
- Mark Medford
- Jackson Moore
- Bishop Gary Mueller
- Billy Orgel
- Steve Schwab, M.D.
- Gary Shorb
- David Stern, M.D.
- Randy Spicer

- Bishop James E. Swanson, Sr.
- Carter Towne, M.D.
- Jose Velazquez, Ph.D.
- Luke Yancy, III

See Methodist Healthcare Foundation Annual 2014 Year in Review, at 12 (available at <http://www.methodisthealth.org/dotAsset/b9069d3d-ff58-4eba-841e-1ed6770c7c18.pdf>).

30. Only 3 of the 24 Directors appear to be members of the clergy.

31. The website for MLBH also lists an extensive leadership group for MLBH. None of the forty-eight individuals appear to be ordained members of the church. As described by MLBH:

Our commitment to provide outstanding care to each patient begins with a diverse and talented leadership team. Our team includes leadership for the entire system, operational leaders for each hospital or facility and corporate leaders.

See <http://www.methodisthealth.org/about-us/leadership/>.

32. According to the Municipal Securities Rulemaking Board, MLBH funds its healthcare business with over \$300 million in government bonds, issued by the Health, Educational and Housing Facility Board of the County of Shelby, Tennessee — funding derived from taxpayers rather than the church.

33. In providing healthcare to the surrounding community, MLBH recorded \$1.654 billion in net patient service revenue as of December 31, 2013. See 2014 Consolidated Financial Statements, at 36. As of December 31, 2014, net patient service revenue had increased, to \$1.722 billion. *Id.*

34. A vast majority of this revenue was from Medicare, Medicaid, and managed-care payors — sources that only pay healthcare providers for medical services. See *id.* In fact, the 2014 Consolidated Financial Statements include warnings about these sources, noting,

“[c]hanges in the Medicare, TennCare and Medicaid programs and the reduction of funding could have an adverse impact on the System.” *Id.* at 38.

35. Despite the Plan’s status as an ERISA plan, the Company has inappropriately invoked “Church Plan” status to avoid various ERISA’s provisions designed to protect the Company’s employees. The Company’s avoidance of these provisions jeopardizes the Plan’s participants and their families by putting them at risk of receiving pension payouts drastically lower than proposed and depriving them of material information.

36. Moreover, by avoiding ERISA’s requirements, the Company obtains a competitive advantage over the other nonprofit healthcare entities that comply with ERISA.

B. The Plan

(1) Plan Overview

37. The Plan was established and is maintained by the Company to provide retirement income to employees. Thus, the Plan was not established and is not maintained by a church or convention or association of churches.

38. The Plan is an “employee pension benefit plan” within the meaning of ERISA § 3(2)(A), 29 U.S.C. § 1002(a)(A).

39. The Plan is a defined benefit plan within the meaning of ERISA § 3(35), 29 U.S.C. § 1002(35).

40. Upon information and belief, at all relevant times, the Committee Defendants have been the Administrators of the Plan within the meaning of ERISA § 3(16)(A), 29 U.S.C. § 1002(16)(A). They have also been fiduciaries of the Plan within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) because they have exercised authority or control respecting

management or disposition of Plan assets, or have had discretionary authority or discretionary responsibility in the administration of the Plan.

41. The Company is a fiduciary of the Plan within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) because it has exercised authority or control respecting management or disposition of Plan assets, or has had discretionary authority or discretionary responsibility in the administration of the Plan.

42. In particular, the Company, acting through its Board of Directors, officers, and employees, is responsible for all of the acts alleged herein.

43. Additionally, the Company has also been a party-in-interest under ERISA § 3(14), 29 U.S.C. § 1002(14), both because it is a fiduciary and because it is an employer whose employees are covered by the Plan.

44. The 2014 Consolidated Financial Statements note that the Plan is a “noncontributory defined benefit pension plan covering all nonsupplemental employees hired prior to July 1, 2009.” 2014 Consolidated Financial Statements at 29. “In February 2009, the System [Methodist Le Bonheur Healthcare and Affiliates] amended the Plan whereby employees hired subsequent to July 1, 2009 are not eligible for benefits under the Plan.” *Id.*

45. The 2014 Consolidated Financial Statements further note that “benefits of the Plan are based on average monthly compensation and service with the System.” *Id.*

46. Additionally, the 2014 Consolidated Financial Statements provide that the “Plan assets primarily consist of United States Government securities, investment grade corporate bonds, equity securities, and hedge funds.” *Id.*

47. The Plan covers employees of MLBH and “all affiliates for which Methodist Le Bonheur Healthcare or its board of directors is the controlling member, and its wholly owned subsidiaries” which include:

- Methodist Healthcare – Memphis Hospitals (Methodist Healthcare – University Hospital, North Hospital, South Hospital, Germantown Hospital, and Le Bonheur Children’s Hospital),
- Methodist Healthcare – Fayette Hospital,
- Methodist Healthcare – Olive Branch Hospital,
- Alliance Health Services, Inc.,
- Methodist Extended Care Hospital, Inc.,
- Methodist Le Bonheur Healthcare Foundation (comprised of Methodist Healthcare Foundation, Le Bonheur Children’s Hospital Foundation, and Le Bonheur Community Health and Well-Being),
- Methodist Healthcare Community Care Associates,
- Methodist Healthcare Primary Care Associates, and
- Ambulatory Operations, Inc.

2014 Consolidated Financial Statements at 29, 7.

(2) The Plan Is Not a “Church Plan” Under ERISA

48. The Plan is not a “Church Plan.”

49. MLBH claims that the Plan is a “church plan” as noted in the 2014 Consolidated Financial Statements which declare, “[t]he Plan has been determined to be a church plan under Section 414(e) of the IRC [Internal Revenue Code], and is therefore exempt from minimum

funding and certain other requirements of the Employee Retirement Income Security Act of 1974.” 2014 Consolidated Financial Statements at 29.

50. As alleged above, MLBH is not church or convention or association of churches. See ¶¶ 23-36.

51. Under Section 3(33)(A) of ERISA, 29 U.S.C. § 1002(33)(A), a plan must be both *established* and *maintained* by a *church* or by a convention or association of churches to qualify for the church plan exception.

52. The Plan was *established* by the Company or its predecessors, not by a church or convention or association of churches. See, e.g., 2014 Consolidated Financial Statements at 29 (“The System sponsors a noncontributory defined benefit pension plan (the Plan).”)

53. The Plan is *maintained* by the Company, not by a church or convention or association of churches.

54. Additionally, Section 3(33)(C)(i) of ERISA, 29 U.S.C. § 1002(33)(C)(i), provides that a plan maintained by a church or a convention or association of churches includes a plan

maintained 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.

55. The principle purpose of the Company is to provide health care services, not to operate a pension system.

56. Since the Plan is maintained by a healthcare company, the Plan is *not* maintained by “an organization . . . the principal purpose of which is the administration or funding of a plan or program for the provision of retirement benefits” 29 U.S.C. § 1002 (33)(C)(i).

57. Moreover, the Plan is not maintained for employees of any church or convention or association of churches. It is maintained for employees of the Company — *a health system*.

C. Defendants' Breaches of Fiduciary Duty

(1) Defendants Breached Their Fiduciary Duty to Ensure the Plan Is Fully Funded

58. Under ERISA, the Plan must have an annual actuarial report assessing the plan's funding needs. *See* ERISA § 103(d), 29 U.S.C. § 1023(d).

59. Defendants are further required to fund the Plan each year according to a funding plan that meets the funding standard of ERISA and is based on reasonable actuarial assumptions. *See* ERISA §§ 302, 303, 29 U.S.C. §§ 1083, 1083.

60. Defendants are responsible for setting the funding requirements and the funding policy for the Plan.

61. Defendants failed to set a funding policy that will adequately fund the anticipated obligations of the Plan or fund the Plan.

62. As of December 31, 2013, the Plan was underfunded by \$49.328 million. *See* 2014 Consolidated Financial Statements, at 30. Just one year later, as of December 31, 2014, the Plan was underfunded by \$118.512 million. *Id.*

(2) Defendants Breached Their Fiduciary Duty to Avoid Conflicts of Interest

63. By continuing to set an inadequate funding policy, which has resulted in the Plan becoming underfunded by over a hundred million dollars, Defendants have acted at all times in the interest of the Company, and have not acted solely in the interests of the Plan participants as is required of a fiduciary under ERISA.

64. MLBH benefits from Defendants' decision not to fund the Plan adequately, and Defendants have a conflict of interest that prevents them from carrying out their fiduciary duties in a manner consistent with ERISA.

65. Despite this conflict of interest, MLBH has failed to appoint fiduciaries who could carry out their duties to protect the Plan's participants in a manner consistent with ERISA or to take other appropriate steps to address the conflict.

66. As a result of this conflict of interest, and in light of Defendants' repeated and ongoing breaches of fiduciary duties, the Court should appoint an independent fiduciary who can protect the interests of Plan participants and carry out his or her duties consistent with ERISA.

FIRST CLAIM FOR RELIEF
Declaratory and Equitable Relief
(Declaratory Judgement Act and ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3))

67. Plaintiff re-alleges and incorporates herein by reference all prior allegations in this Complaint.

68. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), authorizes a participant or beneficiary to bring a civil action to: “(A) 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 title or the terms of the plan.”

69. 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 thus subject to the provisions of Title I and Title IV of ERISA.

70. Plaintiff further seeks orders directing all Defendants to bring the Plan into compliance with ERISA, including the reporting and funding requirements of ERISA, 29 U.S.C. §§ 1021, 1023, 1082, 1102, and 1104, and by remedying the additional violations set forth below.

71. Additionally, Plaintiff seeks an order that Defendants make all contributions to the Plan as necessary to remedy the Plan's funding shortfall.

SECOND CLAIM FOR RELIEF
Violation of Reporting and Disclosure Provisions
(ERISA §§ 101-104, 502(a)(1)(A), (a)(3), 29 U.S.C. §§ 1021-1024, 1132(a)(1)(A), (a)(3))

72. Plaintiff re-alleges and incorporates herein by reference all prior allegations in this Complaint.

73. ERISA § 502(a)(1)(A), 29 U.S.C. 1132(a)(1)(A), permits a plan participant to bring a suit for penalties when a defendant violates the recordkeeping obligations set forth in ERISA.

74. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), permits a plan participant to bring a suit to obtain appropriate equitable relief to enforce the provisions of Title I of ERISA or to enforce the terms of a plan.

A. Annual Reports

75. Under ERISA § 103, 29 U.S.C. § 1023, employee benefit plans are required to file an annual report with the Secretary of Labor. This report, submitted via Form 5500, must include certain specified information about the Plan's finances, participants, and administration.

76. Defendants failed to file an annual report concerning the Plan with the Secretary of Labor in compliance with ERISA § 103, 29 U.S.C. § 1023, or a Form 5500 and associated

schedules and attachments which the Secretary has approved as an alternative method of compliance with ERISA § 103, 29 U.S.C. § 1023.

77. Defendants have violated ERISA § 104(a), 29 U.S.C. § 1024(a), by failing to file annual reports with respect to the Plan with the Secretary of Labor in compliance with ERISA § 103, 29 U.S.C. § 1023, or Form 5500s and associated schedules and attachments.

B. Notification of Failure to Meet Minimum Funding Standards

78. Under ERISA § 101(d)(1), 29 U.S.C. § 1021(d)(1), employers maintaining employee benefit plans are required to issue a notice to beneficiaries and participants whenever the plan fails to make a required installment or other payment required to meet the minimum funding standards under ERISA.

79. MLBH has failed to furnish the Plaintiff or any member of the Class with a Notice with respect to the Plan pursuant to ERISA § 101(d)(1), 29 U.S.C. § 1021(d)(1), informing them that the Company failed to make payments required to comply with ERISA § 302, 29 U.S.C. § 1082.

C. Funding Notices

80. Under ERISA § 101(f), 29 U.S.C. § 1021(f), administrators of defined benefit plans are required to provide annual plan funding notices to all participants and beneficiaries of such defined benefit plans.

81. At no time has the Committee furnished Plaintiff or any member of the Class with a Funding Notice with respect to the Plan pursuant to ERISA § 101(f), 29 U.S.C. § 1021(f).

82. As the Administrator of the Plan, the Committee has violated ERISA § 101(f), 29 U.S.C. § 1021(f), by failing to provide each participant and beneficiary of the Plan with the Funding Notice required by ERISA § 101(f), 29 U.S.C. § 1021(f), and as such may be required

by the Court to pay Plaintiff and each Class member up to \$110 per day (as permitted by 29 C.F.R. § 2575.502(c)(3)) for each day that the Committee has failed to provide Plaintiff and each Class member with the Funding Notice required by ERISA § 101(f), 29 U.S.C. § 1021(f).

THIRD CLAIM FOR RELIEF
Failure to Provide Minimum Funding
(ERISA §§ 302 and 502(a)(3), 29 U.S.C. §§ 1082, 1132(a)(3))

83. Plaintiff re-alleges and incorporates herein by reference all prior allegations in this Complaint.

84. ERISA § 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.

85. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), permits a plan participant to bring a suit to obtain appropriate equitable relief to enforce the provisions of Title I of ERISA or to enforce the terms of a plan.

86. As the employer maintaining the plan, the Company was responsible for making the contributions that should have been made pursuant to ERISA § 302, 29 U.S.C. § 1082, at a level commensurate with ERISA's requirements.

87. Defendants have failed to make contributions in satisfaction of the minimum funding standards of ERISA § 302, 29 U.S.C. § 1082.

88. By failing to make the required contributions to the Plan, Defendants have violated ERISA § 302, 29 U.S.C. § 1082.

89. As a result of Defendants' failure to fund the Plan in accordance with ERISA's minimum funding standards, Plaintiff faces a substantial risk of her pension being lost or severely reduced.

FOURTH CLAIM FOR RELIEF
Failure to Establish the Plan Pursuant to a Written Instrument Under ERISA
(ERISA §§ 402, 502(a)(3), 29 U.S.C. §§ 1102, 1132(a)(2))

90. Plaintiff re-alleges and incorporates herein by reference all prior allegations in this Complaint.

91. ERISA § 402, 29 U.S.C. § 1102, provides that every plan will be established pursuant to a written instrument which will, among other things, "provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of [Title I of ERISA]."

92. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), permits a plan participant to bring a suit to obtain appropriate equitable relief to enforce the provisions of Title I of ERISA or to enforce the terms of a plan.

93. The Plan has not been established pursuant to a written instrument meeting the requirements of ERISA § 402, 29 U.S.C. § 1102.

94. As Defendants have been responsible for maintaining the Plan and have amendment power over the Plan, they violated § 402, 29 U.S.C. § 1102, by failing to promulgate written instruments in compliance with these sections to govern the Plan operation and administration.

FIFTH CLAIM FOR RELIEF
Breach of Fiduciary Duty
(ERISA §§ 404, 409, 502(a)(2), 29 U.S.C. §§ 1104, 1109, 1132(a)(2))

95. Plaintiff re-alleges and incorporates herein by reference all prior allegations in this Complaint.

96. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), provides that a fiduciary shall discharge her duties with respect to a plan solely in the interest of the participants and beneficiaries, and defraying reasonable expenses of administering the plan, 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.

97. ERISA § 409, 29 U.S.C. § 1109, provides, *inter alia*, that any person who is a fiduciary with respect to a plan and who breaches any of the responsibilities, obligations, or duties imposed on fiduciaries by ERISA shall be personally liable to make good to the plan any losses to the plan resulting from each such breach, and to restore to the plan any profits the fiduciary made through the use of the plan's assets. ERISA § 409 further provides that such fiduciaries are subject to such other equitable or remedial relief as a court may deem appropriate.

98. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), permits a plan participant, beneficiary, or fiduciary to bring a suit for relief under ERISA § 409.

99. As a fiduciary of the Plan, Defendants had the duty to comply with and enforce the provisions of ERISA alleged above.

100. Defendants have not complied with and/or enforced any of the provisions of ERISA set forth above with respect to the Plan.

101. By failing to enforce the provisions of ERISA set forth above, Defendants have breached their fiduciary duties.

102. The failure of Defendants to create and enforce adequate funding for the Plan has resulted in a loss to the Plan equal to the foregone funding and earnings thereon, and this failure has provided a benefit to MLBH, providing it with the use of the funds for its general business purposes that should have been paid to the Plan.

103. Plaintiff is entitled to recover those losses on behalf of the Plan.

JURY DEMAND

104. Plaintiff demands a jury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that judgement be entered against Defendants on all claims and requests that the Court awards the following relief:

- A. Certifying this action as a class pursuant to FED. R. CIV. P. 23;
- B. Declaring that the Plan is an employee 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. Ordering Defendants to bring the Plan into compliance with ERISA, including, but not limited to, requiring Defendants to fund the Plan in accordance with ERISA's funding requirements, disclose required information to the Plan's participants and beneficiaries, and otherwise comply with all other reporting, vesting, and funding requirements of Title I of ERISA;
- D. Requiring Defendants to make the Plan whole for all contributions that should have been made pursuant to ERISA funding standards, and for interest and investment income

on such contributions, and requiring Defendants to disgorge any profits accumulated as a result of their fiduciary breaches;

E. Granting a preliminary and permanent injunction removing Defendants as Plan fiduciaries, and appointing one or more independent fiduciaries to hold the Plan assets in trust, to manage and administer the Plan and its assets, and to enforce the terms of ERISA;

F. Requiring the Plan 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 fund the Plan in accordance with ERISA's requirements;

G. Requiring MLBH 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 with a Funding Notice;

H. Ordering 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;

I. Awarding, declaring, or otherwise providing 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, and such appropriate equitable relief as the Court may order, including, but not limited to, an accounting, surcharge, disgorgement of profits, equitable lien, constructive trust, or other remedy; and

J. Awarding to Plaintiff's counsel 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.

Dated: June 11, 2016

Respectfully submitted,

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