

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SCHENECTADY

PEOPLE OF THE STATE OF NEW YORK, BY
LETITIA JAMES, ATTORNEY GENERAL OF
THE STATE OF NEW YORK,

Plaintiff,

v.

ROMAN CATHOLIC DIOCESE OF ALBANY, NEW
YORK, BISHOP EDWARD SCHARFENBERGER,
BISHOP EMERITUS HOWARD HUBBARD, VERY
REVEREND DAVID LEFORT, JOSEPH POFIT,
AND THE ST. CLARE'S CORPORATION,

Defendants.

JURY TRIAL REQUESTED

VERIFIED COMPLAINT

Index No.

Hon.

The People of the State of New York, by their attorney, Letitia James, Attorney General of the State of New York, respectfully allege as follows:

PRELIMINARY STATEMENT

1. This is an action to hold the Roman Catholic Diocese of Albany, New York, bishops Edward Scharfenberger and Howard Hubbard of the Roman Catholic Diocese of Albany, the Very Reverend David LeFort, of the Albany Diocese, and Joseph Pofit (collectively the "Defendants"), as charitable fiduciaries of the St. Clare's Corporation, accountable for violating their fiduciary duties to the St. Clare's Corporation, and to hold St. Clare's Corporation accountable for failing to secure the proper administration of its charitable assets held by it for the benefit of the former employees of St. Clare's Hospital. St. Clare's Corporation was responsible for managing the St. Clare's Retirement Income Plan (the "Pension Plan"), and its intentional decision, made at the direction of the Diocese of Albany and Bishop Howard Hubbard, to remove the Plan from the protections available under federal law, pursuant to the Employment Retirement Income Security Act of 1974, 29 USC § 1001 et seq. ("ERISA"),

coupled with their subsequent failures to adequately fund or insure the Pension Plan, were violations of their fiduciary and legal obligations under New York state law that have stripped approximately 1100 pensioners of their hard-earned and vested pension benefits.

2. The Roman Catholic Diocese of Albany (the “Diocese”) cofounded St. Clare’s Corporation (the “Corporation” or “St. Clare’s Corporation”) (formerly known as St. Clare’s Hospital of Schenectady, N.Y.), to operate a hospital (the “Hospital”) in the City of Schenectady in 1948. The Diocese dominated and controlled the Corporation at all relevant times through its Bishops, who were required by the Diocese to serve as Honorary Chairman and members of the Corporation’s board of directors (the “Board”) pursuant to the Corporation’s Bylaws. As Board members serving at the behest and direction of the Diocese, the defendant Bishops, as well as Rev. LeFort, who acted as and voted on behalf of Bishop Scharfenberger on the Board, and Joseph Pofit, the president of the Board and a *de facto* employee of the Diocese (collectively, the “Individual Defendants”), each owed to the Corporation duties of care, loyalty and obedience. The Diocese and the Individual Defendants breached their fiduciary duties to the Corporation by failing to preserve and protect the Corporation’s assets and ensure that it fulfill its legal obligations to pay vested benefits to former employees of St. Clare’s Hospital, and otherwise comply with applicable law, including New York wage and insurance laws.

3. The Corporation, which had a legal obligation to administer the assets of the Pension Plan properly, so as to ensure that it was sufficiently funded to pay the benefits due and owing to the vested employees of the Corporation (the “Pensioners”), failed to fulfill its duties as well by not adequately funding, insuring or prudently managing the Pension Plan.

4. In 2018, the Board terminated the Pension Plan, effective February 1, 2019. As a result of the termination of the Pension Plan, over 1100 former employees of the Hospital lost

their retirement benefits. Over 650 former employees, vested in the plan, lost all pension rights; about 450 received a single payment equal to 70% of the value of their vested pension. These former employees served the St. Clare's Hospital as nurses, lab technicians, social workers, EMTs, orderlies, housekeepers, and other essential workers for between 10 and 50 years each, and trusted the Corporation and the Diocese, which controlled the Corporation, to provide their vested and promised retirement benefits.

Factual Background

5. In 1959, the Corporation established the Pension Plan to provide a pension benefit to retired hospital employees and their beneficiaries.

6. In 2008, the Hospital closed. The Corporation, however, continued to exist primarily to manage the Pension Plan. In connection with the Hospital closing, the Corporation's Pension Plan received \$28.5 million in Medicaid funds from the State of New York, which the Corporation's officers and directors represented to the State was sufficient to fully fund its employee and retiree pensions.

7. In 2018, when the directors of the Corporation learned that their current Directors' and Officers' Liability Insurance coverage would not be extended, to avoid exposing themselves to the risk of personal liability, they unanimously voted to terminate the Pension Plan and dissolve the Corporation.

8. The directors of the Corporation filed a petition pursuant to New York Not for Profit Corporation Law ("N-PCL") § 1102 to dissolve the Corporation in 2019. In the petition, the directors admitted that the Corporation owed over \$50,000,000 to the Pension Plan and Pensioners, and had no assets or intention to make the plan whole. The Attorney General opposed this petition for dissolution until she could fully investigate the cause of the harm to the

Corporation and Pensioners arising from the failure of the Corporation's directors, officers, and key persons to ensure that its charitable assets were administered properly and make reasonable provision for fulfilling the Corporation's obligations to the Pensioners.

9. The loss of pensions, and the harm to the over 1100 Pensioners, was the direct result of the decision of the defendant Diocese, the Corporation, Bishop Hubbard and other board members not named as defendants herein, to seek and obtain a "church plan" exemption in 1992 from provisions of ERISA, without taking other steps, including those expressly required under New York law, to ensure the viability of the Pension Plan. This exemption excused the Corporation from ERISA provisions that protected pension plan members, such as the St. Clare's Pensioners, by requiring pension plans to make minimum funding contributions and carry pension insurance coverage to protect pension beneficiaries. In the application for the church plan status, the Corporation and Diocese represented to the federal government that Hospital employees were Diocesan employees and the Diocese controlled the Corporation.

10. After obtaining a church plan exemption, the Diocese, the Corporation and the Individual Defendants as members of the Corporate board, led by Bishop Hubbard and later Bishop Scharfenberger, violated their fiduciary duties under New York law, by failing to make any annual contributions to the Pension Plan for all but three years from 2001 to 2019, and by concealing from the Pensioners and others, through communications and the filing of misleading IRS Form 990s, the insolvency of the Pension Plan.

11. The Corporation and its directors further breached their fiduciary duties by demanding a refund of federal pension insurance payments for the Pension Plan, and took no measures at any time thereafter to obtain alternative insurance coverage to protect the Pensioners' earned benefits.

12. In 2008, upon closure of the Hospital, the Corporation and its directors and officers, at the direction of the Diocese, determined that the Corporation would continue to exist for purposes of administering the Pension Plan. They also chose to continue treating the Pension Plan as a “church plan”— which it could do only if the Corporation’s former employees and Pensioners were designated as employees of the church. This was all in order to avoid the contribution and insurance requirements of ERISA, and the duties imposed by ERISA upon Corporation directors and trustees as fiduciaries.

13. The sitting bishop of the Diocese has authority to control the Board of the Corporation in that, pursuant to the Corporation’s Bylaws, he is both an automatic member of the Corporation's board of directors and its Honorary Chairman. He also has the authority to name the Chairman of the Board as well as a majority of the directors on the Board. In addition, the bishop of the Diocese had veto power over selection of all directors. Bishops Scharfenberger and Hubbard have exercised this authority by appointing to the Board certain directors who, by their own admission, were incompetent to govern the affairs of the Corporation and unable or unwilling to undertake their fiduciary responsibilities, failed in many cases even to show up for board or committee meetings, and who did not act in the best interest of the Corporation when it conflicted with the interests of the Diocese.

14. Officers, directors and “key persons” of nonprofit corporations are required under the N-PCL § 717 to discharge their duties in good faith and with the care an ordinarily prudent person would exercise.

15. Officers, directors and “key persons” of nonprofit corporations are charged under the N-PCL with the duty to ensure that the mission of the charitable corporation is carried out and that the Corporation complies with applicable law. This duty has been referred to as the duty

of obedience. Obedience to mission also requires that the Corporation must provide equitable wages and benefits to its employees.

16. By this action, the Attorney General of the State of New York seeks to hold accountable the Diocese of Albany, the Corporation and the Individual Defendants who are directors, officers, and other “key persons” of the Corporation, as well as their alter egos, for failing to fulfill their fiduciary duties in the administration of the Corporation’s charitable assets, and forcing it to violate its legal duties to pay wages to its employees, and depriving over 1,100 hard-working New Yorkers of their earned pension benefits.

17. As a result of the foregoing, and the facts set forth in more detail below, the Attorney General hereby seeks an order, pursuant to the N-PCL and New York Estates, Powers & Trusts Law (“EPTL”): (i) directing the Diocese and the Individual Defendants to account, make restitution and/damages and pay all penalties resulting from their breaches of fiduciary duties and other applicable law; (ii) directing all Defendants, including the Corporation, to account, make restitution and/or pay damages and pay all penalties resulting from their failure to administer the Corporation’s charitable assets properly, including the Pension Plan; and (iii) holding the Diocese vicariously liable for the other Defendants’ violations of the N-PCL and the EPTL.

PARTIES

18. Attorney General Letitia James, who brings this action on behalf of the Plaintiff, the People of the State of New York, is responsible for overseeing the activities of New York not-for-profit corporations, including entities that elect to incorporate under the provisions of the Religious Corporations Law (“RCL”), and the conduct of their respective, officers, directors, trustees and other fiduciaries in accordance with the N-PCL and the EPTL.

19. The Defendant Diocese is a New York religious corporation established by a Special Act 283 of 1941 of the New York Legislature. The governance of the Diocese is subject to the provisions of the RCL and the applicable provisions of the N-PCL. The appointed bishop of the Diocese serves as a trustee and as the Presiding Officer of the Diocese for the duration of his appointment. The appointed bishop has authority over all “public juridic persons”¹ in the Diocese. The appointed bishop has oversight and authority over the administration of all the goods which belong to public juridic persons, including the Corporation, subject to him.

20. The Diocese’s principal place of business is in Albany County at 40 Main Street, Albany, New York.

21. Defendant St. Clare’s Corporation is a New York corporation, formed and sponsored by the Diocese, under the N-PCL for the original purpose of operating a hospital in Schenectady County, with a principal office located at the Diocese, 40 Main Street, in Albany, New York.

22. Defendant Bishop Emeritus Howard Hubbard is named in this action individually and in his official capacity as Chairman, Honorary Chairman, and a Board member and officer of the Corporation. From March 27, 1977 until February 11, 2014, he served as Bishop of Albany, and presiding officer and trustee of the Diocese. At all times relevant prior to February 11, 2014, Bishop Hubbard was a member of the Corporation’s Board, including as its self-appointed Chairman from 1999 to 2008. In these roles, he owed fiduciary duties to the Corporation. Bishop Hubbard is a resident of Albany County, New York.

¹ A public juridic person is a canon law term for a group of persons or any aggregate of things approved and established by the Church who come together as an entity recognized under church law to participate in the apostolic life and mission of the Church.

23. Defendant Bishop Edward Scharfenberger is named in this action individually and in his official capacity as the Honorary Chairman and Board member and officer of the Corporation, having served in these positions from 2014 to present. He serves as the Bishop of the Diocese and presiding officer and trustee of the Diocese. In these roles, he owed and continues to owe fiduciary duties to the Corporation. Bishop Scharfenberger is a resident of Albany County, New York.

24. Defendant Joseph Pofit is named in this action individually and in his official capacity as a member and president of the Board of the Corporation, an officer of the Corporation and, at relevant times, as an actual or *de facto* employee of the Diocese. Pofit has served as a Board member and officer of the Corporation from 2008 to the present. For his work on behalf of the Corporation, Pofit was paid by Catholic Charities for his time, even though Catholic Charities had no involvement whatsoever with the Corporation and its governance. Part of Pofit's duties as an actual or *de facto* employee of the Diocese was undertaking and performing his role as president and director of the Corporation Board and communicating with the Pensioners. Pofit performed all his duties with respect to the Corporation for the benefit of the Diocese, working at the direction and under the control of the sitting bishop of the Diocese (here, Bishop Hubbard followed by Bishop Scharfenberger). Mr. Pofit is currently a resident of Vermont and Colorado, but was formerly a resident of Albany County, New York at the time of the wrongdoing alleged herein.

25. Defendant Very Reverend David LeFort is named in this action individually and in his official capacity as a *de facto* Board member and "key person" (as that term is defined in the N-PCL) of the Corporation, and has served as Vicar General of the Diocese since July 2017. Defendant LeFort is the Trustee of the Diocesan Investment and Loan Trust, which holds

significant assets of the Diocese, according to the diocesan financial statements. As Vicar General of the Diocese, defendant LeFort is a trustee of the Diocese and has responsibility on behalf of the Diocese to support, maintain, advise, and cooperate with the Corporation. He has acted as the purported “legal representative for Bishop Scharfenberger,” with Bishop Scharfenberger’s consent and approval, in connection with those responsibilities, as reflected in minutes of the Corporation board of directors’ meetings that took place on, *inter alia*, October 11, 2017, January 4, 2018, April 3, 2018, April 25, 2018, May 29, 2018, July 11, 2018, August 8, 2018, August 28, 2018, October 4, 2018 and February 28, 2019. Defendant LeFort is a resident of Albany County, New York.

JURISDICTION AND VENUE

26. This Court has personal jurisdiction over the Corporation because it is a New York not-for-profit corporation and has purposely availed itself of the opportunity to do business, solicit funds, recruit members and serve its charitable mission and beneficiaries in New York.

27. This Court has personal jurisdiction over the Diocese because it is a New York Religious Corporation and has purposely availed itself of the opportunity to do business and serve its charitable mission and beneficiaries in New York.

28. This Court has personal jurisdiction over the Individual Defendants pursuant to N-PCL § 309 because “by becoming a director, officer, key person or agent of a corporation [each individual defendant] is subject to the personal jurisdiction of the supreme court of the state of New York, and in an action or proceeding by the attorney general under [the N-PCL] process may be served....as provided in [CPLR § 313].”

29. This Court also has personal jurisdiction over the Individual Defendants pursuant to CPLR § 302(a), as each of them, in their roles as officers, directors and key persons of the

Corporation, has transacted business within the state on behalf of a New York chartered corporation and purposefully availed themselves of the privileges and protections, and assumed the obligations, of New York law.

30. Venue is properly set in Schenectady County, pursuant to NY CPLR Section 503(a), because a substantial part of the acts complained of herein occurred in Schenectady County, where the St. Clare's Hospital was located. In addition, this action is related to two actions currently pending before this Court and consolidated for discovery purposes, *In the Matter of Joseph F. Pofit, et al., for the Dissolution of St. Clare's Corporation*, No. 2019-653, to which the Attorney General is a necessary statutory party, and *Hartshorne, et al. v. Roman Catholic Diocese of Albany, et al.*, No. 2019-1989.

APPLICABLE LAW

31. The Attorney General brings this action against the Diocese, the Corporation and the Individual Defendants based on, among other things, violations of the following statutes and laws as they apply.

The Attorney General's Statutory Authority Under the Not-for-Profit Corporation Law and the Estates, Powers and Trust Law

32. The Attorney General has a wide range of supervisory powers over charitable not-for-profit corporations, and their officers, directors and key employees. The Attorney General's regulatory oversight of charitable not-for-profit corporations, and their officers, directors, and key persons, includes the authority to bring actions under Section 112 and Article 7 of the N-PCL, to compel officers, directors and key persons to account for their official conduct, remove officers and directors, obtain relief as a result of prohibited related party transactions, and to enforce any right given an officer or a director of a charitable corporation.

33. New York law further provides the Attorney General with authority over any “trustee” to ensure “property held for charitable purposes has been and is being properly administered.” EPTL § 8-1.4(i). A “trustee” is defined to include any “individual, group of individuals, . . . corporation or other legal entity holding and administering property for charitable purposes” and any nonprofit corporation organized under the laws of New York for charitable purposes. EPTL § 8-1.4(a). The Individual Defendants, the Corporation and the Diocese, as a result of its domination and control over the Corporation, are each a trustee under New York law, as that term is defined under the EPTL. The Attorney General has the legal authority to “institute appropriate proceedings...to secure the proper administration of any trust, corporation, or other relationship to which this section applies.” EPTL § 8-1.4(m).

34. In addition, the EPTL provides that the Attorney General is authorized to regulate and investigate trustees and the trustees’ administration of property held for charitable purposes, and that authority “shall apply regardless of any contrary provisions of any instrument and shall be liberally construed so as to effectuate its general purposes of protecting the public interest in charitable uses, purposes, and dispositions.” EPTL § 8-1.4(n).

35. Pursuant to N-PCL § 112(a), the Attorney General is authorized to bring an action “(7) To enforce any right given under this chapter to members, a director or an officer of a charitable corporation. The attorney-general shall have the same status as such members, director or officer ... [and] (10) To enjoin, void or rescind any related party transaction, seek damages and other appropriate remedies, in law or equity, in addition to any actions pursuant to section 715 (Related party transactions) of this chapter.”

36. Pursuant to N-PCL § 720(a), the Attorney General is authorized to bring a statutory action against a director, officer or key person of a not-for-profit corporation: “(1) To

compel the defendant to account for his official conduct in the following cases: (A) The neglect of, or failure to perform, or other violation of his duties in the management and disposition of corporate assets committed to his charge. (B) The acquisition by himself, transfer to others, loss or waste of corporate assets due to any neglect of, or failure to perform, or other violation of his duties.”

37. Pursuant to N-PCL §§ 701, 713 and 714, a not-for-profit corporation “shall be managed by its board of directors,” which has the power to elect officers and remove them, with or without cause.

38. Pursuant to N-PCL §§ 112(a)(4) and 706, the Attorney General may bring an action to remove a director for cause and bar a director from re-election for future service.

39. Pursuant to N-PCL § 714, the Attorney General may bring an action to remove an officer of the board and bar the officer from re-election or re-appointment for future service.

40. Pursuant to N-PCL §717, each officer, director and key person of a corporation organized under the N-PCL is obligated to discharge his/her duties of his/her position “in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.” This statutory provision is a codification of the fiduciary duties of due care, loyalty, and obedience to mission owed by directors and officers to the Corporation.

41. Fiduciaries such as defendants have the duty under New York law to act prudently, loyally, and honestly in the interests of the beneficiaries that they serve. A charitable board is essentially a caretaker of the not-for-profit corporation and its assets and, as caretaker, the board has the fiduciary obligation to act on behalf of the corporation and advance its interests.

42. Under New York law, fiduciaries, officers, directors and key persons owe a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect. This is a sensitive and inflexible rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty. Each officer and director of a corporation organized under the N-PCL is obligated under Section 717 to act with undivided loyalty toward the corporation.

43. Pursuant to N-PCL § 102 (a)(25), a “Key Person” is someone other than a director or officer who “exercises powers or influence over the corporation as a whole similar to the responsibilities, powers or influence of directors and officers....”

Religious Corporations Law

44. Pursuant to New York Act 283 of 1941, the Diocese was established as a New York Religious Corporation and is governed by the RCL.

45. Pursuant to New York Act 283 of 1941, the Diocese was established with a mission and duty “to support, maintain, advise, and cooperate with any charitable, religious, benevolent, recreational, welfare or educational corporation, association, institution, committee, agency, or activity, now or hereafter existing” within the bounds of the Roman Catholic Diocese of Albany, New York.

46. The RCL requires that corporations governed by the RCL comply with the N-PCL (RCL§ 2-b (1)), with certain exceptions not relevant to the instant proceeding.

New York State Insurance Law

47. New York pension plans that are not governed by ERISA are subject to applicable New York law, including but not limited to, Article 46 of the New York Insurance Law (“NY INS”).

48. Section 4602 of NY INS provides that employers may operate a pension plan only with the approval of the New York State Superintendent of Insurance, after he or she has determined that the plan's operation is sound and equitable.

49. Section 4604 of NY INS, entitled "Contributions", provides that participating employees, or the employer, or both may contribute to the funds of a New York pension plan and the rates of contribution shall be fixed by the trustees upon the basis of actuarial recommendations and shall be adequate to support the benefits granted. The trustees may, with the approval of the superintendent, increase or decrease the rates of contribution whenever such action is deemed by them necessary to preserve the solvency and equity of the pension plan.

50. Section 4606 of NY INS, entitled "Reserves", states that any New York pension plan shall, except to the extent that its benefits are reinsured by an insurance company authorized to transact such business in this state, create and maintain reserves, calculated to be adequate to cover the liabilities on account of benefits payable under its contracts, by-laws, or declaration of trust, which calculation shall be made on the basis of mortality, disability, and other experience tables based on reliable experience for such or a similar group of employees and approved by the superintendent.

New York State Labor Law

51. Section 198-c of the New York Labor Law provides:

1. In addition to any other penalty or punishment otherwise prescribed by law, any employer who is party to an agreement to pay or provide benefits or wage supplements to employees or to a third party or fund for the benefit of employees and who fails, neglects or refuses to pay the amount or amounts necessary to provide such benefits or furnish such supplements within thirty days after such payments are required to be made, shall be

guilty of a misdemeanor, and upon conviction shall be punished as provided in section one hundred ninety-eight-a of this article. Where such employer is a corporation, the president, secretary, treasurer or officers exercising corresponding functions shall each be guilty of a misdemeanor.

2. As used in this section, the term “benefits or wage supplements” includes, but is not limited to, reimbursement for expenses; health, welfare and retirement benefits; and vacation, separation or holiday pay.

THE ATTORNEY GENERAL INVESTIGATION AND FINDINGS

52. The Attorney General has conducted an investigation pursuant to her authority under the N-PCL and EPTL regarding the petition for dissolution filed by the directors of the Corporation in 2019, the conduct of the fiduciaries of the Corporation and the circumstances leading to the failure of the Pension Plan to provide promised benefits. The failure of the Pension Plan was the result of a series of both negligent and intentional wrongful acts by the named defendants, and other directors and officers, at the direction and under the control of the Diocese and its Bishops.

53. This investigation included examination of the conduct of the St. Clare’s Corporation, its directors, officers, employees and key persons, as well as that of the Diocese and its employees, agents, and affiliates, and their control of and role in the failure of the Pension Plan. This investigation is now complete, and the relevant findings of this investigation are set forth below.

54. St. Clare’s Corporation (formerly known as St. Clare’s Hospital until 2009) was cofounded and controlled by the Diocese. From 1977 until 2014, the Diocese exercised control

over the Corporation through defendant Bishop Hubbard, and from 2014 to the present, it has exercised its control through the current Bishop, defendant Edward Scharfenberger.

55. Pursuant to the Corporation's Bylaws, the sitting Diocesan Bishop is authorized to appoint and approve all of the Corporation's Board members as well as the Chairman of the Board, and the Diocesan Bishop is given automatic status as a Board member and Honorary Chair. The Corporation's Bylaws further provide that the Bishop has control over all decisions as to disposition of the Corporation's property and as to any amendment of the Bylaws regarding the Bishop's control or decision-making authority. Moreover, upon dissolution of the Corporation, corporate assets accrue to the Bishop of the Diocese.

56. The Diocese's control over the Corporation is further evidenced by the fact that the Corporation's organizational chart refers to its Board as subordinate to the Diocese, the Corporation is listed in the Official Catholic Directory, which includes listings for any organization operated, supervised, controlled by or in association with the Roman Catholic Church, the Amended Certificate of Incorporation names the designated agent for service as "c/o the Roman Catholic Diocese of Albany", and St. Clare's Hospital was the only Catholic Hospital within the Diocese of Albany that was sponsored by the Diocese, or for which the Bishop of Albany served as the Honorary Chairman of the Board.

57. In 1991, thirty-two years after the creation of the Hospital's Pension Plan in 1959, the Corporation, at the direction of the Diocese, applied to the Internal Revenue Service ("IRS") for an exemption from ERISA regulations, or "church plan" status. The "church plan" exemption from ERISA is limited in Section 3(33)(A) to a plan "established and maintained . . . for its employees . . . by a church" *See* ERISA § 3(33)(B) and (C) (29 U.S.C. §§

1002(33)(B) and (C)), 26 U.S.C. § 414(e)(3)(B) and 26 CFR 1.414 (e)-1. Thus, participants in a church plan must be deemed employees of the church.

58. As such, in the application to the IRS, pursuant to 26 CFR 1.414 (e)-1, the Corporation affirmatively stated, based upon information believed to have been provided to the Corporation by defendant Hubbard, that the Pension Plan was “was controlled by and associated with the Catholic Church ...[and] is established and maintained for its employees (or their beneficiaries) by” the church. 26 CFR 1.414 (e)-1.

59. A “church plan” exemption meant that the Pension Plan would no longer be subject to federal requirements for protection of Plan members, including mandatory annual pension contributions, mandatory pension benefit insurance coverage through the Pension Benefits Guaranty Corporation (“PBGC”), mandatory pension reporting, and the federal prohibition on reductions in benefits for vested employees.

60. Church plans, however, are not exempt from, but rather are subject to state laws, including laws relating to fiduciary responsibility, employment, contracts and insurance, which govern church retirement plans, and their fiduciaries.

61. On January 29, 1992, the IRS issued a ruling letter, based upon the factual representations of the Corporation and the Diocese, finding that the Pension Plan was a “church plan,” thereby exempt from all ERISA and PBGC insurance requirements.

62. After the Corporation and the Diocese obtained IRS approval for treatment of the Pension Plan as a “church plan”, the Defendants undertook a series of acts, discussed below, to reduce pension benefits for St. Clare’s Corporation’s Pensioners, thereby increasing the risk that such pension benefits would never be paid or not paid in full, and to conceal these decisions from vested employees.

63. Despite the Corporation having received advice from actuarial consultants about the required annual contribution necessary to maintain the Plan's financial condition, defendants failed to make these contributions in whole or in substantial part for nearly every year from 2001 to 2017, failed to make a prudent provision for funding benefits and concealed these decisions from the Pensioners. In each of these years, St. Clare's Corporation recorded an expense on its IRS Form 990– the informational return that not-for-profit corporations file annually– for the full actuarially calculated contribution amount, but failed to make the contributions it reported. As such, each of these filings was inaccurate and misleading.

64. Defendant Bishop Hubbard was Chairman of the Board of the Corporation when it failed to make actuarially calculated contributions to fund the Plan benefits between 1999 and 2006. During that period of time the Plan went from being fully funded to underfunded by \$43,000,000.

65. In 2005, the Corporation Board, led by Bishop Hubbard, “froze” the existing Pension Plan, so that vested employees could no longer accrue benefits based upon service after that date. The decision to stop all accrual of benefits under the Pension Plan had the effect of significantly reducing the benefits Pensioners were entitled to receive.

66. Similarly, in 2006 and 2007, the Corporation Board, led by Bishop Hubbard, elected to further reduce pension benefits and eligibility for vested employees by increasing the age at which benefits could be realized and eliminating early retirement options. These changes were impermissible under New York Labor and Insurance Laws, applicable given the Diocese's and Corporation's election to obtain the church plan exemption from ERISA.

67. On the whole, these actions violated the Individual Defendants' and the Diocese's duty of obedience, which required them to ensure that the Corporation complied with all applicable law.

68. From 2005 through 2008, the Corporation through its officers and directors, represented to the Pensioners that the elimination of further accruals under the Pension Plan, and the reduction in vested benefits, would ensure the solvency of the Plan. In fact, according to defendant Pofit while testifying under oath on behalf of the Corporation, the fiduciaries of the Corporation viewed the Pension Plan as too "rich" in the benefits it provided for Pensioners. In addition, contrary to the defendants' representations, the Pension Plan was deeply insolvent even after the reduction in vested benefits.

69. In 2007, the Corporation's Board members asked Bishop Hubbard, as Chairman of the Board, to consider combining the Pension Plan with other diocesan pension plans administered by the Diocese and available to lay employees. Bishop Hubbard rejected these requests and represented that his decision was based on a review of the request, conducted at his direction by those Diocesan employees with responsibility for Diocesan finances, which concluded that the request was not feasible. The Attorney General's investigation has not identified any evidence of such a review, and no documents relating to such review have been produced by the Diocese.

70. In 2007, the Corporation, the Diocese and Bishop Hubbard were aware that the assets in the Pension Plan were significantly below what was needed to fund it, even taking into account the reduced benefits the Plan then provided. At that time, the Corporation, at the direction of the Diocese and Bishop Hubbard, requested funding from the State of New York for

the Pension Plan to remedy the deficit they caused by repeatedly failing to make the actuarially calculated annual contributions and/or to insure the Plan assets.

71. In 2008, the State of New York provided the Corporation with a grant of \$28.5 million in Medicaid funds to cover the shortfall in funding of the Plan by the Corporation. At the time, the Corporation represented to the State of New York that the grant was sufficient to fully fund the Pension Plan and pay the promised benefits despite the fact that the Corporation's Board learned from two Plan actuaries, before the funds were received from the State, that this statement was not true, and that the Plan would be underfunded even with the infusion of \$28.5 million.

72. Not only did the Corporation fail to seek the appropriate amount of funding from New York State to fully fund the Pension Plan, but it also failed to pursue other prudent measures to protect the Pension Plan, including asking New York State for funds sufficient to rejoin ERISA and purchase PBGC insurance, to purchase other insurance coverage or to seek permission from the State to use a portion of the funds received to purchase insurance coverage.

73. In June 2008, after the Hospital closed, defendant Bishop Howard Hubbard, then Chairman of the Corporation Board, unilaterally disbanded that Board and usurped all authority of the Board over the Corporation, making himself the sole director of the Corporation. Once the Corporation's Board was disbanded, Bishop Hubbard appointed defendant Joseph Pofit to wind up the affairs of the Hospital. During this period of Bishop Hubbard's exclusive control, through himself and defendant Pofit, whose actions Hubbard, acting on behalf of the Diocese, directed and controlled, Bishop Hubbard breached his fiduciary duties to the Corporation and the Corporation violated its statutory and Bylaw duties by, *inter alia*, failing to monitor and

administer the Pension Plan. As a result, the Plan lost millions of dollars in assets it had held in just over one year.

74. In 2009, Bishop Hubbard reconstituted the Corporation's Board of directors, appointed Pofit as president thereof, and appointed the remainder of the Board members as well. As president of the Corporation Board and in connection with his duties and responsibilities to the Corporation, Pofit reported to the Bishop of the Diocese, was given direction by the Bishop of the Diocese, and was controlled at all times by the Diocese through its Bishops, including Rev. LeFort acting as Bishop. During this time, Pofit submitted his invoices to Catholic Charities for his work on behalf of the Corporation, even though Catholic Charities had no relationship with the Corporation, and all work he performed with respect to the Corporation was at the direction of the Diocese.

75. Thereafter, the Corporation's Board created the St. Clare's Retirement Income Plan Trust (the "Plan Trust") effective January 1, 2011, to manage the Pension Plan's assets and its board of trustees was comprised of every sitting Corporation Board member, other than Bishop Hubbard.

76. In creating the Trust, Bishop Hubbard, the Diocese and the Corporation failed to appoint a single person with pension experience or expertise. The board of trustees of the Plan Trust held no meetings and conducted no business from its formation until sometime in 2017, and left management of the Plan Trust entirely to the Corporation's Board.

77. In 2014, Bishop Hubbard retired and Bishop Scharfenberger became the Bishop of the Diocese, and as a consequence became an automatic member of the Corporation's Board and the Honorary Board chair. Nonetheless, Bishop Scharfenberger neglected to fulfill his duties in connection with the administration of the Pension Plan and, like Bishop Hubbard, refused the

Corporation Board's request that he consider combining the Pension Plan with other Diocesan pension church plans or, in the alternative, that the Diocese provide financial assistance to the Pension Plan.

78. In 2017, the Corporation Board voted unanimously to elect to rejoin ERISA and purchase PBGC coverage for the Pension Plan, with Rev. LeFort exercising Bishop Scharfenberger's vote. But, Bishop Scharfenberger later directed the Corporation Board to reverse its prior vote and not apply to the PBGC for pension coverage. The Board unanimously followed Bishop Scharfenberger's directive. As such, the Pension Plan remained uninsured and unfunded.

79. At the same time, the Corporation's officers and directors learned that their current Directors' and Officers' liability insurance coverage would not be extended and that they would no longer be insured in connection with their actions, or inactions, on behalf of the Corporation. As a result of this loss of insurance for each of them individually, the Board unanimously voted to terminate the Pension Plan and dissolve the Corporation. This decision was made by Bishop Scharfenberger, Rev. LeFort and Pofit based on their own personal interests, concern for individual liability, and loyalty to the Diocese and the Bishop, and not pursuant to the fiduciary obligations that they owed to the Corporation, including the duty to operate the Pension Plan prudently and in accordance with state law for the benefit of the Pensioners.

80. In October 2018, the Pensioners were informed by the Corporation Board that the Pension Plan was being terminated, that the majority of them would receive no benefits whatsoever, and that the remaining Pensioners would receive drastically reduced benefits.

81. On March 22, 2019, the directors of the Corporation filed a Petition of Dissolution pursuant to Article 11 of the N-PCL, in which they admitted the Corporation's liability to the Pension Plan, without defense or offset.

82. The current Bishop of the Diocese, Bishop Edward Scharfenberger, personally approved the termination of the Pension Plan and the filing of the petition for dissolution, which he, Rev. LeFort, Joseph Pofit and other board members each signed.

CAUSES OF ACTION

FIRST CAUSE OF ACTION

AGAINST THE INDIVIDUAL DEFENDANTS AND THE DIOCESE FOR BREACH OF FIDUCIARY DUTY PURSUANT TO N-PCL §§ 112(a), 717, & 720

83. The Attorney General herein repeats and realleges paragraphs 1 through 82 as if fully set forth herein.

84. Pursuant to NPCL § 720, the Attorney General may bring an action to compel a director, officer or key person of a not-for-profit entity to account for the failure to perform his or her duties in the management and disposition of charitable assets.

85. Bishop Hubbard, Bishop Scharfenberger and Joseph Pofit have each served as an officer and director of St. Clare's Corporation and, as a result of such service, owe fiduciary duties to it.

86. Very Reverend David LeFort has served as a *de facto* board member and key person of the Corporation by, among other things, serving as the representative of Bishop Scharfenberger on its Board and, as a result of such service, owes fiduciary duties to it.

87. The Diocese has served as a *de facto* and/or *de jure* director of St. Clare's Corporation and thereby has fiduciary duties to it by virtue of the Diocese's representation on the Board of Directors of St. Clare's Corporation, including by, among other things: (i) the Diocesan

Bishop automatically serving as a director; (ii) the Diocese being given authority to appoint the majority of the Board members, including the Board Chairman, and to veto the appointment of all the other directors; and (iii) the Diocese's actual exercise of authority to control the actions of the directors serving on the Board.

88. The Individual Defendants and the Diocese each owe the following fiduciary duties to the Corporation: (i) the duty of due care, which encompasses a duty to monitor investments and the responsibility to appoint, remove and monitor performance of both fiduciary and non-fiduciary service providers to the Pension Plan, (ii) the duty of loyalty, (iii) the duty of obedience; and (iv) the duty of disclosure.

89. The Individual Defendants and the Diocese each failed to comply with their fiduciary duties to St. Clare's Corporation, by failing to act in good faith, exercise due care, and maintain obedience to the mission of the Corporation in the management and disposition of the charitable assets, including without limitation, the Pension Plan and Plan Trust, committed to their care.

Breach of Duty of Due Care

90. The duty of due care is owed by all directors, officers, trustees and key persons to the Corporation.

91. Encompassed within the duty of due care is the duty to monitor both the investments of the Pension Plan and those who administer it.

92. The hiring or appointment of a Plan funding agent or investment advisor does not relieve a fiduciary of its independent duties, and no fiduciary may passively rely on information provided by a co-fiduciary. In order to rely on an expert's advice, a fiduciary must (a) investigate the expert's qualifications, (b) provide the expert with complete and accurate information, and (c) make certain that reliance on the expert's advice is reasonably justified under the circumstances.

93. In addition, fiduciaries have a continuing duty to monitor investments and remove imprudent ones, and a fiduciary cannot assume that investments that were prudent at one time will remain so indefinitely. Fiduciaries must consider all the investments at regular intervals to ensure that they are appropriate and cannot ignore changed circumstances that have increased the risk of loss of the investments.

94. The Individual Defendants and the Diocese each failed to fulfill their fiduciary duties of due care to St. Clare's Corporation, including without limitation, their duty to the Corporation to preserve the assets in the Pension Plan and to ensure that the Pension Plan, a "corporate asset[] committed to [their] charge," (N-PCL § 720), was properly managed after electing to designate the Pension Plan a church plan that is exempt from ERISA, by, among other things:

- a. Failing to apply for PBGC or other insurance coverage for the Plan at any time, leaving the Pensioners at risk of losing their earned benefits;
- b. Failing to make the annual contributions to the Pension Plan, as calculated and recommended by the Plan's actuaries, in full or in part, beginning in 2001;
- c. Removing funds that constituted Pensioners' earned benefits from an account held by the funding agent, in which such benefits were guaranteed, to a non-guaranteed account, thereby removing the guarantee and safeguards originally afforded to all Pensioners under the terms of the funding agent contract;
- d. Electing to guarantee only the benefits for those who retired prior to November 1, 2005, leaving the earned benefits for those who retired after November 1, 2005 uninsured and not guaranteed;

- e. Making amendments to the Plan that decreased or eliminated benefits owed to Pensioners, in contravention of the documents governing the Plan and applicable law;
- f. Affirming to New York State that \$28.5 million was adequate to fully fund the Plan, when they knew this representation to be false;
- g. Failing to request from New York State an amount sufficient to fully fund the Plan or purchase PBGC or other insurance coverage;
- h. Failing to use, or seeking permission to use, a portion of the \$28.5 million received from New York State to purchase PBGC or other insurance coverage;
- i. As the sole director of the Corporation from May 2008 to August 2009, Bishop Hubbard failing to take any steps to monitor or safeguard the Plan, leaving the Plan's assets to the volatility of the market during a severe financial crisis, and causing significant and avoidable loss;
- j. Failing to adequately monitor the investments in which the Plan's assets were placed;
- k. Failing to adequately oversee the funding agent and its management of the Plan, thereby allowing material errors in calculations and projections that caused the Plan to suffer significant losses;
- l. Entering into a contract that permitted the funding agent to invest the Plan assets, that were held in a guaranteed account, in low-yielding and under-performing stocks for the benefit of the funding agent and to the detriment of the Pensioners whose pensions were held in a non-guaranteed account;

- m. Entering into a new contract with the funding agent in 2008, despite being made aware by various professional advisors and Corporate officers that the funding agent had made numerous material errors in its administration of the Plan, including in calculating various returns on investments and benefit cost;
- n. Approving excessive payments to officers in 2008, which payments were neither reasonable nor commensurate with the salaries paid to similarly situated officers of other local hospitals, were not made in exchange for any services rendered to the Hospital, and were made at a time when the Corporate Board and Bishop Hubbard knew that the Corporation was insolvent;
- o. Electing to seek ERISA coverage in 2017 and then reversing that decision based on direction from Bishop Scharfenberger and the fact that the Board could not secure Directors' and Officers' Liability insurance coverage;
- p. Failing to require yearly audits and accounting of the Corporation's finances and the Pension Plan, as required by the Bylaws, to determine the financial stability of the Corporation and assess its liabilities to its creditors;
- q. Bishops Hubbard and Scharfenberger failing to attend regularly scheduled Board meetings;
- r. Bishop Scharfenberger and the Diocese allowing a non-director, Vicar General David LeFort, to assume the role of director and to vote as a director, although not permitted by the Corporation's Bylaws;
- s. Failing to adequately review IRS Form 990s to ensure that they were accurate and, as a result of such failure, filing IRS Form 990s that were inaccurate and misleading; and

- t. Terminating the Plan and failing to provide to pensioners the benefits due and owing under the Plan documents.

Breach of the Duty of Loyalty

95. The Individual Defendants and the Diocese each had a duty of loyalty to act solely in the best interest of St. Clare's Corporation, including by ensuring that St. Clare's Corporation acted in compliance with its contractual and statutory obligations with respect to the Pensioners and the Pension Plan, without consideration of other interests.

96. The Individual Defendants and the Diocese each failed to fulfill their fiduciary duties of loyalty to St. Clare's Corporation by, among other things:

- a. The decision to seek an exemption from ERISA without ensuring that the plan was adequately funded and that other pension insurance was in place, which was made based on the interests of the Diocese to maintain church plan status rather than the interest of the Corporation in seeking to ensure that the Pension Plan was properly administered and its Pensioners were protected;
- b. The decisions to decline PGBC coverage for the Plan, and, in 2019, to terminate the Plan, based significantly on a lack of Directors' and Officers' Liability Insurance coverage for the Individual Defendants, rather than the interest of the Corporation in seeking to ensure that the assets in the Pension Plan were adequately preserved;
- c. As Chairman of the board beginning in 1999, Bishop Hubbard's direction and/or allowance that the Corporation not make the actuarially calculated annual contributions to the Pension Plan, and instead to use funds that should have been contributed to the Pension Plan for other Hospital expenses in order to sustain

the Hospital and its Catholic identity, which resulted in underfunding in the amount of \$43,000,000 during the period of his Chairmanship;

- d. Bishop Hubbard appointed Diocesan employee Joseph Pofit to be president of the board of trustees of the Plan Trust and president of the Board of the Corporation despite Pofit's acknowledgment that he has no expertise in pension matters, in order that the Diocese could continue its domination over the Corporation through, among other things, the Bishops' control of Pofit who acted at their direction in connection with his activities on behalf of the Corporation;
- e. The Diocese, through the defendant Bishops, failed to direct, as requested by the Board, that the employees of the Corporation be added as participants in the Diocesan multiemployer defined benefit plan, which continues in operation today and, had they done so, the Pension Plan assets could have been preserved. The Diocese and the defendant Bishops deliberately chose not to permit the St. Clare's Pensioners to be included in the Diocesan pension plan, which was available to other lay employees of the Diocese and affiliated entities, which decision was made in the best interest of the Diocese and not the Corporation and its obligations to the Pensioners;
- f. The defendant Bishops failed to exercise their authority to appoint to the Board a single individual with the requisite expertise and experience to provide oversight of the Pension Plan and the Plan's funding agents, particularly after the Hospital closed and the only business of the board was administration of the Pension Plan. Instead, they appointed certain individuals as Board members who had no

relevant knowledge, skill or competence, but had an overriding duty of obedience to the Bishop and the Diocese;

- g. The defendant Bishops allowed payments to be made to the Diocese, their employer, and other insiders by the Corporation, including for the Corporation's rental of office space at the Diocese and fees to Pofit in connection with his work on behalf of the Corporation, that were not at arms-length, were without fair consideration and inured to the benefit of the Diocese at a time they knew the Corporation was insolvent;
- h. Bishop Scharfenberger directed the Board in 2017 that the Corporation not apply for PBGC insurance for the Pension Plan; and
- i. The defendant Bishops and Pofit participated in related party transactions in which the Diocese had a substantial financial interest, but failed to comply with the requirements of § 715 of the N-PCL.
- j. All other decisions, made individually and collectively, based in any measure on concerns regarding personal liability to the officers, directors, trustees or key persons, as well as loyalty to the Diocese and Bishops, and not in the best interest of the Corporation.

Breach of the Duty of Obedience

97. The Individual Defendants and the Diocese each had a duty of obedience to ensure that St. Clare's Corporation complied with its mission and operated in accordance with applicable law.

98. The Individual Defendants and the Diocese each violated their duty of obedience to St. Clare's Corporation by, among other things:

- a. Failing to ensure that St. Clare's Corporation complied with Section 198-c of the Labor Law by paying all agreed upon and earned wages and benefits to the Pensioners, including without limitation, all amounts due under the Pension Plan;
- b. Failing to ensure that St. Clare's Corporation complied with Section 46 of the Insurance Law with respect to its operation of the Pension Plan by, among other things, failing to ensure that: (i) the Pension Plan was registered with the Superintendent of Insurance; (ii) that approval of the Superintendent of Insurance for the operation of the Pension Plan and the Plan Trust was obtained; and (iii) all required contributions to the Pension Plan were made and all required reserves maintained; and
- c. Failing to ensure that the Corporation's IRS Form 990 filings were filed when due and were not inaccurate or misleading.

99. The foregoing breaches by the Individual Defendants of their fiduciary duties of care, loyalty and obedience damaged the Corporation by, among other things, causing loss and waste of its assets, including the assets used to fund the Pension Plan, and rendering it incapable of complying with its mission and honoring its commitments to the Pensioners and its employees, thereby creating liability for the Corporation.

100. As a result of the foregoing breaches of the fiduciary duties of care, loyalty and obedience, the Individual Defendants and the Diocese are liable under N-PCL § 720 to account and pay restitution and/or pay damages, plus interest at the statutory rate of 9%, for their neglect and violation of their duties in the management of St. Clare's Corporation.

SECOND CAUSE OF ACTION

**AGAINST ALL DEFENDANTS FOR FAILING TO PROPERLY
ADMINISTER CHARITABLE ASSETS AS REQUIRED BY
EPTL § 8-1.4(m)**

101. The Attorney General herein repeats and realleges paragraphs 1 through 100 as if fully set forth herein.

102. Section 8-1.4(m) of the EPTL authorizes the Attorney General to “institute appropriate proceedings” to secure the proper administration of any not-for-profit corporation organized under the laws of this State for charitable purposes.

103. Bishop Hubbard, Bishop Scharfenberger and Joseph Pofit, as officers and directors of St. Clare’s Corporation, are trustees pursuant to EPTL § 8-1.4 because they each are and/or were responsible for holding and administering property for charitable purposes in the State of New York.

104. Very Reverend David LeFort, as a *de facto* Board member and key person of St. Clare’s Corporation, is a trustee pursuant to EPTL § 8-1.4 because he is and was responsible for holding and administering property for charitable purposes in the State of New York.

105. St. Clare’s Corporation is a trustee pursuant to EPTL § 8-1.4 because it is and was responsible for holding and administering property for charitable purposes in the State of New York.

106. The Diocese, as a *de facto* and/or *de jure* director of St. Clare’s Corporation, is a trustee pursuant to EPTL § 8-1.4 because it is and was responsible for holding and administering property for charitable purposes in the State of New York.

107. For the same reasons that are set forth in detail in paragraphs 83–100 of the First Cause of Action describing the various breaches of fiduciary duty by the Defendants, which breaches of fiduciary duty led to St. Clare’s Corporation’s own failures to comply with its legal

obligations with respect to the Pension Plan and administer it properly, the Defendants failed to administer the charitable assets entrusted to their care properly.

108. The Defendant's failure to properly administer the charitable assets of the Corporation caused the loss and waste of its assets, including the assets used to fund the Pension Plan, and rendered it incapable of complying with its mission and honoring its commitments to the pensioners and its employees, thereby creating liability for the Corporation.

109. As a result of the foregoing, the Defendants should be required to account and make restitution and/or pay damages, plus interest at the statutory rate of 9%, for their failure to comply with EPTL 8-1.4.

THIRD CAUSE OF ACTION

AGAINST THE DIOCESE, HOLDING IT VICARIOUSLY LIABLE FOR THE OTHER DEFENDANTS' BREACHES OF FIDUCIARY DUTY UNDER THE N-PCL AND FAILURE TO ADMINISTER CHARITABLE ASSETS PROPERLY UNDER EPTL § 8-1.4

110. The Attorney General herein repeats and realleges paragraphs 1 through 109 as if fully set forth herein.

111. At all relevant times, the Defendant Bishops and defendant Vicar General LeFort were officers or trustees of the Diocese.

112. At all relevant times, defendant Pofit was an actual or *de facto* employee of the Diocese.

113. At all times since the creation of the Hospital, the Diocese, acting through its officers and/or trustees, controlled the Corporation Board and its members, as provided for in the Bylaws established by the Diocese in 1945.

114. The Diocese required, through the Corporation's Bylaws, that its Bishop, as an employee of the Diocese, serve as the Automatic Director and Honorary Chairman of the Board.

The Bylaws also grant to the Bishop control over the Board by giving him the authority to appoint the Chairman of the Board, appoint a majority of the board members, approve all elected board members, and control the transfer or disposition of all Corporate assets. In addition, the Bishop has the right to approve all executive hires for the Corporation, control deliberations and decisions of the Board with respect to the Plan and the Plan Trust, and has veto power over all corporate decision-making.

115. The Diocese and the defendant Bishops dominated and controlled the Corporation, ignored corporate formalities and the separate juridic existence of the Corporation, and caused its officers, directors and key persons to violate their fiduciary duties, including permitting a non-director, Rev. LeFort, to assume the role of Director Scharfenberger and to vote as a director.

116. According to Chapter 283 of the 1941 Laws of New York, the Bishops are members of the Diocese. Defendant LeFort has also been, at relevant times, a trustee of the Diocese, and has acted as a key person as defined by the N-PCL and in fact acted as a *de facto* director of the Corporation, by aiding Bishop Scharfenberger as a representative, in his control and dominion over the Corporation.

117. The Diocese is vicariously liable for the breaches of fiduciary duty and failure to administer the charitable assets of St. Clare's Corporation by the Defendant Bishops and Defendant LeFort set forth above in the First and Second Causes of Action because their acts and omissions were taken in connection with their positions, services, or authorities as officers and/or trustees of the Diocese.

118. The Diocese is vicariously liable for the breaches of fiduciary duty and failure to administer the charitable assets of St. Clare's Corporation by the Defendant Pofit set forth above

in the First and Second Causes of Action because his acts and omissions were made at the direction and under the control of the Diocese to further its interests and/or because he was an actual or *de facto* employee or agent of the Diocese.

119. The Corporation is an alter ego of the Diocese, as the Diocese, through the defendant Bishops, LeFort and Pofit, controlled and dominated the Corporation and made all decisions regarding the Plan and the Trust. As such, the Diocese is vicariously liable for St. Clare's Corporation's failure to administer the charitable assets properly as set forth above in the First and Second Causes of Action.

120. Accordingly, the Diocese should be required to account and make restitution and/or pay damages, plus interest at the statutory rate of 9%, for the other Defendants' breaches of fiduciary duty under the N-PCL and failures to manage charitable assets properly under the EPTL for which the Diocese is vicariously liable.

PRAYER FOR RELIEF

WHEREFORE, the Attorney General requests judgment against the Defendants for the following relief:

- A. Directing the Individual Defendants and the Diocese to account for their conduct in failing to perform their duties in managing the Corporation's charitable assets; to pay full restitution to the Corporation for the waste and misuse of its charitable assets, including the return of any salary received while breaching their fiduciary duties, plus interest at the statutory rate; and to pay damages to the Corporation arising from the breach of fiduciary duties pursuant to the N-PCL §§ 717 and 720;
- B. Directing all the Defendants to account for their conduct, to pay full restitution to the Corporation for the waste and misuse of its charitable assets, and to pay damages, plus

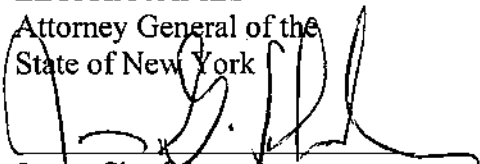
interest at the statutory rate, for their neglect and violation of their duties in the proper administration of St. Clare's Corporation's charitable assets pursuant to and EPTL §8-1.4;

- C. Directing the Diocese to account, to pay full restitution to the Corporation for the waste and misuse of its charitable assets and to pay damages, plus interest at the statutory rate, for the other Defendants' breaches of fiduciary duty under the N-PCL and failures to manage charitable assets properly under the EPTL for which the Diocese is vicariously liable; and
- D. For such other and further relief as the Court deems just and proper.

Dated: May 24, 2022
New York, NY

LETITIA JAMES
Attorney General of the
State of New York

By:


James Sheehan
Charities Bureau Chief
The Capitol
Albany, NY 12224
518-776-2158

DIANE HERTZ, *Assistant Attorney General, Charities Bureau*

Of Counsel

VERIFICATION

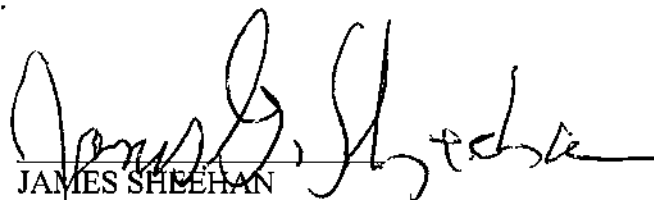
STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JAMES SHEEHAN, being duly sworn, deposes and says:

I am an Assistant Attorney General in the office of Letitia James, Attorney General of the State of New York (the "Attorney General"). I am duly authorized to make this verification.

I have read the foregoing complaint and am acquainted with the facts alleged therein, and the investigative materials contained in the files of the Attorney General's office. To my knowledge based on such acquaintance with the facts, the complaint is true, except as to those allegations made upon information and belief, and as to those allegations, I believe them to be true.

The reason this verification is not made by plaintiff is that plaintiff is a body politic and the Attorney General is its duly authorized representative.


JAMES SHEEHAN
Chief, Charities Bureau
The Capitol
Albany, NY 12224
518-776-2157

Sworn to before me this

24th day of May, 2022


NOTARY PUBLIC

