

IN THE CHANCERY COURT OF JACKSON COUNTY, MISSISSIPPI

CYNTHIA N. ALMOND,

Plaintiff,

v.

SINGING RIVER HEALTH SYSTEM, a/k/a
SINGING RIVER HOSPITAL SYSTEM, *et*
al.

Defendants.

Civil Action: 2014-2653JB

**THE SRHS DEFENDANTS' OPPOSITION TO
MOTION FOR LEAVE TO AMEND COMPLAINT AND FIRST AMENDED
COMPLAINT FOR DISCOVERY AND ACCOUNTING**

Defendants Singing River Health System ("SRHS"), Singing River Hospital System, Singing River Hospital System Foundation, Inc.; Singing River Health Services Foundation; Singing River Hospital System Employee Benefit Fund, Inc.; Michael Heidelberg; Allen Cronier; Tommy Leonard; Lawrence Cosper; Ira Polk; and Kevin Holland (collectively, "the SRHS Defendants") respectfully file this Opposition to Plaintiff Cynthia Almond's ("Almond") Motion for Leave to Amend Complaint and First Amended Complaint for Discovery and Accounting. Almond's Motion should be denied for the following reasons:

I. INTRODUCTION

SRHS is forced to oppose Almond's Motion for Leave to Amend the Complaint based on, among other things, the complete lack of restraint shown by Almond in naming persons who had no involvement in the acts alleged in her proposed Amended Complaint. Almond's far-fetched "conspiracy" theory, set forth in six new claims, is designed to harass and embarrass no less than 14 new parties, all of whom were well known to Almond's counsel when she filed her original six

complaints¹ months ago. SRHS is well-aware of this Court's liberal amendment standard, and normally would not oppose a motion to amend a complaint, but this is not a normal case. Almond's proposed Amended Complaint is a reckless fishing expedition that does no more than name every individual who had any position of authority at SRHS- regardless of whether those individuals were ever involved in any administration or management decisions affecting the pension plan. This conduct is no service to the justice system or the plan participants not represented by Almond's counsel, who are nonetheless joined in this case through the Court's consolidation order. The addition of the meritless, distracting and harassing claims in Almond's proposed amended complaint will unnecessarily delay this Court's investigation into the pension plan accounting.

Indeed, Almond makes no effort in her proposed Amended Complaint to even sort through the various parties and allegations, instead she just lumps all defendants together into fiery claims such as fraud, conspiracy and racketeering. SRHS takes these allegations very seriously, particularly when such claims are asserted against its current Chief Financial Officer ("CFO"), who did not take his position until after nearly all allegations in the proposed Amended Complaint occurred, and one of SRHS' outside law firms.

Almond makes these very serious, and inflammatory allegations, without even citing one case or statute to support her request to add 14 new parties and six new claims. In adding these new claims and parties, the law requires Almond to: 1) plead legally cognizable claims that are not futile, 2) state facts with particularity (instead of bald accusations), 3) advise which claims are being pleaded against which parties, and 4) follow the procedural requirements of the Mississippi Tort Claims Act ("MTCA") in order to assert tort claims against a public entity, like SRHS.

¹ Almond's counsel serves as counsel for five other actions pending before this Court, all with nearly identical Complaints: *Aguilar v. Singing River Health System, et al.* (Case No. 2014-2753); *Bosarge v. Singing River Health System, et al.* (Case No. 2014-2729); *Drury v. Singing River Health System, et al.* (Case No. 2015-0001); *Eiland v. Singing River Health System, et al.* (Case No. 2015-0030); and *Thompson v. Singing River Health System, et al.* (Case No. 2014-2695).

Almond fails to adhere to these most basic procedural obligations and, as such, her request to amend should be denied

II. ARGUMENT

Almond does not cite the standard for deciding a motion to amend, let alone show how she meets the standard. On that basis alone, Almond's Motion for Leave to Amend should be denied. Even putting the vital omissions from Almond's Motion for Leave to Amend aside, the Court should deny Almond's Motion because justice does not require the Court to give Almond leave in this instance.

A. Legal Standard

Under the Mississippi Rules of Civil Procedure, "a party may amend a pleading only by leave of court or upon written consent of the adverse party; leave shall be freely given when justice so requires." Miss. R. Civ. P. 15(a). The Mississippi Supreme Court has explained that leave to amend should be freely given by the Court, "[i]n the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc...." *Meredith v. Meredith*, 987 So. 2d 477, 482 (Miss. Ct. App. 2008) (affirming trial court's denial of plaintiff's motion to amend based on futility of proposed amendment) (citations omitted).

A trial court's denial of a motion to amend will only be reversed for abuse of discretion. *Id.* at 482. To determine whether a trial court abused its discretion in denying leave to amend, Mississippi courts generally consider "what the interests of justice would require." *Id.* (citations omitted). A trial court does not abuse its discretion when it denies the plaintiffs' motion to amend a complaint that seeks to add new causes of action "that would have changed the nature of their case from a case in equity to an action at law." *See Bailey Brake Farms, Inc. v. Trout*, 116 So. 3d 1064, 1070, (Miss. 2013) (affirming special chancellor's denial of plaintiffs' motion to amend to

add new causes of action, including breach of contract, breach of fiduciary duties, and breach of good faith and fair dealing seeking actual damages, punitive damages, prejudgment interest and attorneys' fees and costs where initial complaint filed with chancery court only requested equitable relief).

Not only does Almond fail to cite the standard for deciding a motion to amend in her half-page motion, she fails to make any effort to show how she meets the standard. On that basis alone, Almond's Motion for Leave to Amend should be denied. In any event, justice does not require the Court to give Almond leave in this instance because Almond's proposed amendments are futile and would change the nature of the case from a case in equity to an action at law. In addition, Plaintiffs have brought this motion in bad faith and Defendants would suffer undue prejudice if the Court allowed Almond's proposed Amended Complaint. Consequently, justice requires that Almond's Motion be denied.

B. Almond's Proposed Amendment is Futile

i. Plaintiff Seeks Leave to Amend Complaint to Add Tort Claims without Compliance with MTCA

It is apparent from the pleadings as well as the comments of Almond's counsel at the May 13 hearing that the true nature of their case is much more than a simple request for accounting. The Mississippi Tort Claims Act ("MTCA") provides the exclusive remedy against a governmental entity and its employees for acts or omissions which give rise to a suit. *McCoy v. City of Florence*, 949 So. 2d 69, 67 (Miss. Ct. App. 2006) (quoting *State of Williams v. City of Jackson*, 844 So. 2d 1161, 1164 (Miss. 2003). *See also Lang v. Bay St. Louis/Waveland School District*, 764 So. 2d 1234, 1236 (Miss. 1999). Claims against a governmental entity and its employees can be brought outside of the Act but those actions are limited to requests for declaratory relief. *Fordice v. Thomas*, 649 So. 2d 835 (Miss. 1995). However, those claims are not the ones that Almond attempts to assert in her Second Amended Complaint.

There is no question that each of the Singing River Defendants are either a political subdivision of the State, employees of a political subdivision, or public servants. *See Barnes v. Singing River Hosp. Sys.*, 733 So. 2d 199 (Miss. 1999). Although the proposed Amended Complaint includes the self-serving proclamation that no tort is alleged (PAC at ¶ 28), Almond's pronouncement is contradicted by her own pleading. The proposed Amended Complaint purports to include causes of action based upon fraud, conspiracy and breach of the duty of loyalty. Almond even goes so far as to cite the Restatement of Torts in the very pleading in which she contends no tort is alleged. (PAC at p. 30). The Mississippi Supreme Court has held that the MTCA applies not only to what might be considered traditional torts but, given the statutory language its intent, the Act grants immunity for breach of an implied term or condition of a contract as well. *City of Jackson v. Estate of Stewart, ex rel. Womack*, 908 So. 2d 703 (Miss. 2005) Miss. Code Ann. § 11-46-3 (Rev. 2002 and Supp. 2014), specifically provides that the State and its political subdivisions "are not now, have never been and shall not be liable, and are... immune from a suit at law or in equity on account of any wrongful or tortious act or omission or breach of implied term or condition of any... contract..."

Under Section 11-46-9, a governmental entity and its employees acting within the course and scope of their employment shall not be liable for any claim based upon an act or omission enumerated in the statute. Subsection (d) provides that such governmental entity or employees shall not be liable for any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function." Almond does not even allege that any of the actions by the individual defendants named or who they propose to name were committed other than in the course and scope of their employment and as a part of their duties. Section 11-46-5 (3) states that there shall be a rebuttable presumption under the Act that any act or omission of an employee committed within the time and at the place of their employment is within the course and scope of that employment.

The immunity granted to political subdivisions and their employees constitutes an “immunity from suit rather than a mere defense to liability.” *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002) (citing *Mitchell v. Forsight*, 472 US 511 (1985) (emphasis added)). In *McClendon* the Court explained that the defense is intended to give government officials a right not merely to avoid standing trial but also the right to avoid the burdens of pretrial matters such as discovery as inquiries of this kind can be particularly disruptive. 305 F.3d at 323 (citations omitted).

To the extent that Almond seeks leave of court to assert claims against the Singing River Defendants for conspiracy, fraud or breach of fiduciary duty, her motion should be denied on the grounds that the amendments would be futile.

As previously set forth, the proposed causes of action sound in tort not equity. Mississippi law is clear that a tort action against a political subdivision or its employees must be asserted under the MTCA. Miss. Code Ann. § 11-46-7(1). The MTCA requires compliance with the Act’s pre-suit notice requirements. Specifically, the MTCA provides that “at least ninety (90) days before instituting suit, the person must file a notice of claim with the chief executive officer of the governmental entity.” Miss. Code Ann. § 11-46-11(1). Almond has fully failed to comply with Section 11-46-11(1), and therefore her proposed Amended Complaint, to the extent the additional claims would be considered claims governed by the MTCA, would be subject to immediate dismissal. *See e.g., Univ. of Miss. Med. Ctr. v. Easterling*, 928 So. 2d 815, 820 (Miss. 2006) (holding that failure to comply with ninety-day waiting period under the MTCA requires dismissal of complaint.)

Furthermore, a chancery court does not have subject matter jurisdiction over MTCA suits. *See City of Ridgeland v. Fowler*, 846 So. 2d 210 (Miss. 2003) (en banc); *Lawrence Cty. Sch. Dist. v. Brister*, 823 So. 2d 459 (Miss. 2001). Accordingly, the proposed amended claims are futile inasmuch as they would be subject to a motion for dismissal under Miss. R. Civ. P. 12(b)(1).

The Supreme Court's opinion in *City of Ridgeland* is particularly instructive. In *City of Ridgeland*, the plaintiffs filed suit in chancery court against the City following a collision with a motor vehicle that was being pursued by two Ridgeland police officers. The *Ridgeland* plaintiffs sought remedies both at law and in equity including damages, a temporary restraining order, an inventory and accounting, and injunctive relief. *City of Ridgeland*, 846 So. 2d at 211-212. The City sought dismissal of the lawsuit based upon lack of subject matter jurisdiction which was denied.

On appeal, the Supreme Court held that the chancery court lacked jurisdiction. Although the *Ridgeland* plaintiffs pled equitable remedies in their Complaint, the Supreme Court noted that the requests for a restraining order and injunction were abandoned early on. Turning to the *Ridgeland* plaintiff's assertion that an accounting was necessary, the Supreme Court stated that "any accounting which might be required is easily developed during discovery in circuit court." *Id.* at 214 Therefore, the Court ruled that "[c]ircuit court is the proper court for a tort claims act case," further stating that "not only is it proper, the [circuit court] is the only court of jurisdiction" *Id.* (emphasis in original).

Turning once again to the case at bar, Almond has chosen the same path traveled by the plaintiffs in *City of Ridgeland* by asserting various tort claims against the Singing River Defendants under the guise of an action in equity. However, these causes of action sound in tort. By disavowing monetary damages and instead requesting an accounting, the proposed Amended Complaint is truthfully nothing more than a guileful attempt to improperly expand chancery jurisdiction over claims that fall under the MTCA. The Supreme Court has made clear that such actions are impermissible and invariably subject to dismissal. Therefore the Court should deny Almond's proposed amendments as futile.

ii. Plaintiff Seeks Leave to Amend Complaint to Add Claims Subject to Dismissal Under 12(b)(6)

Even if Almond had followed the procedural proscriptions of Mississippi Rule of Civil Procedure 15 and the MTCA, her request to amend should be denied because her requested amendments are baseless and futile. The claims Almond seeks to add are all subject to dismissal under Mississippi Rule of Civil Procedure 12(b)(6), thus, adding them to this cause of action will only unnecessarily delay adjudication of Almond's claims, and the claims of other plan participants².

Mississippi Rule of Civil Procedure 8 sets forth the standard for pleadings in Mississippi courts. As a notice pleading state, Mississippi courts require very little to set forth claims against defendants: all that is required is that the complaint include a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for the relief to which the plaintiff deems she is entitled. Miss. R. Civ. P. 8(a). The claim must be stated in a manner that is sufficient to provide notice to the defendant of the claim and the ground upon which it is based. *In re Estate of Stevens v. Wetzel*, 762 So. 2d 293, 295 (Miss. 2000). "Conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice [...]" at the pleading stage. *Penn Nat'l Gaming, Inc. v. Ratliff*, 954 So. 2d 427 (Miss. 2007).

Each of Almond's claims in the proposed Amended Complaint fail to meet these basic pleading standards. Thus, all are immediately subject to dismissal under Mississippi Rule of Civil Procedure 12(b)(6). Permitting Almond to amend her Complaint to add these claims would be futile.

(a) Almond's proposed Civil Conspiracy claim is futile

² On May 12, 2015, the Court Ordered this case should continue to be consolidated for discovery purposes with seven other matters pending in this Court. Almond's proposed amendment will necessarily delay the progression of the other seven suits and hurt not only the System but this sideshow will delay a resolution for the retirees and Plan participants. Not only will the proposed claims be futile, granting this motion to amend will sanction the outrageous conduct and complete lack of diligence shown by Almond in filing these six specious claims. Almond's counsel's conduct is especially galling given it is directly contradictory to their representations to the Court. On May 13, 2015, Mr. Denham assured the Court that the amended pleading would only add new parties. (Exhibit A, May 13, 2015 Hearing Transcript 32:18-22) He did not mention that it would add six entirely new claims. (*Id.*). Mr. Denham assured the Court the proposed amendment "won't in any way affect discovery in this matter [...]" (*Id.* at 33:6-9).

Almond seeks to add a civil conspiracy claim against SRHS' Chief Executive Officer ("CEO"), Kevin Holland, unnamed members of SRHS' Board of Trustees, SRHS' former counsel, Roy Williams, Williams' entire law firm (Dogan & Wilkinson) and other unnamed defendants. (Proposed Amended Complaint ("PAC"), Count II, p. 29). Not only is suing opposing counsel a rare occurrence (and one clearly designed to manufacture a conflict of interest between SRHS and its counsel), Almond fails to plead any facts to support any alleged conspiracy among these defendants. In one factually devoid sentence, Almond merely states the civil conspiracy defendants "conspired to cease contributions to the Plan and later to terminate the Plan." (PAC at p. 29).

This bare allegation fails to set forth the basic elements of a civil conspiracy claim. The elements needed to prove conspiracy under Mississippi law are: "(1) two or more persons or corporations; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result." *Gallagher Bassett Servs. v. Jeffcoat*, 887 So. 2d 777, 786 (Miss. 2004) (finding trial court erred in denying defendants' motion for judgment notwithstanding the verdict on issue of civil conspiracy where there was no evidence of any combination, agreement or damages). In other words, to allege a civil conspiracy, a plaintiff must allege two or more persons conspired for the purpose of accomplishing an unlawful purpose. *Cook v. Wallot*, No. 2011-CA-01056-COA, 2013 WL 1883533, *9-10 (affirming dismissal of civil conspiracy claim where plaintiff failed to allege any set of facts upon which any agreement of the defendant to accomplish an unlawful purpose may be found). Civil conspiracy allegations, like allegations of fraud, must be plead with specificity. *State Indus., Inc. v. Hodges*, 919 So. 2d 943, 946 (Miss. 2006).

Almond's proposed Amended Complaint simply alleges that certain defendants collectively determined SRHS would no longer contribute to the pension plan (PAC ¶ 30, 61) and that other defendants later voted to terminate the pension plan (PAC ¶ 34). These mere allegations

are not supported by any facts sufficient to provide a basis for an alleged conspiracy claim. Additionally, in pleading that there was a civil conspiracy to halt contributions to the Plan then terminate the Plan, Almond cites to sections of the Plan that actually permit such termination. (PAC ¶ 36). Thus, she has plead herself out of a claim of civil conspiracy by specifically negating element two - that the conspiracy was to commit an unlawful act.³

Because Almond has failed to adequately plead her civil conspiracy claim, it will be subject to immediate dismissal if the Court grants Almond's Motion to Amend. *See Penn Nat'l Gaming, Inc. v. Ratliff*, 954 So. 2d 427, 432 (Miss. 2007) (a plaintiff must set forth factual allegations that support each element of a claim, otherwise the claim is subject to dismissal at the outset).⁴ Consequently, Almond's proposed amendment to add this claim is futile.

(b) Almond's fraud claim is futile

Most egregiously, Almond pleads a fraud count but fails to specify even the most basic of information: the parties involved in the fraud. Almond merely states "the Defendants acted..." fraudulently but does not state specifically which defendants acted fraudulently, the fraudulent acts they committed, when such fraudulent acts occurred or any other specific nature of the fraud. (PAC at p. 30). This is wholly insufficient to plead a fraud claim under Mississippi law.

The elements of fraud under Mississippi law are lengthy, and must be plead with specificity. Miss. R. Civ. P. 9(b). The essential elements include: "(1) a representation, (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted upon by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; (9) and his

³ Termination by the Plan administrator is specifically allowed by the Plan. (Exhibit B, Article XI). Almond is left with, at best, a conspiracy to commit a lawful act.

⁴ In addition, Almond fails to show why the conspiracy claim is not subject to immediate dismissal for failure to acknowledge that an entity (here SRHS) cannot as a matter of law conspire with its officers and agents (i.e. Defendant Kevin Holland and proposed defendants Lee Bond and Roy Williams). It takes two separate persons or entities to have a conspiracy under Mississippi law. *Gallagher Bassett Servs*, 887 So. 2d at 786. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation." *Saucier v. Coldwell Banker JME Realty*, 644 F. Supp. 2d 769, 784 (S.D. Miss. 2007) (citations omitted).

consequent and proximate injury.” *In re Estate of Law*, 869 So. 2d 1027, 1029 (Miss. 2004). Without doubt, Almond has not even come close to pleading these elements⁵.

Almond groups all 25 defendants together in her proposed Amended Complaint and asserts general allegations against them collectively to support her fraud claim. This is impermissible under Mississippi law. The plaintiffs in *Howard v. Estate of Harper ex rel. Harper*, asserted similar allegations, that the collective defendants made misrepresentations to the plaintiffs instead of identifying each defendant who participated in the fraud specifically. 947 So. 2d 854, 861 (Miss. 2006). In that case, the Mississippi Supreme Court determined the plaintiffs’ failure to specify the identity of each defendant who participated in the fraud and the date and locations of the allegedly fraudulent statements was fatal to their pleading under Rule 9(b)). *Id.* Likewise, Almond’s failure to specify details about the alleged fraud here, including which defendants participated in the alleged fraud, and what was actually misrepresented by whom, is fatal to her proposed Amended Complaint.

When multiple claims are asserted against multiple defendants, the complaint must include the name of the defendant against whom each claim is asserted so defense counsel may, at a minimum, identify each defendant the plaintiff claims to sue and the alleged harm committed by specific defendants. *3M Co. v. Glass*, 917 So. 2d 90, 92 (Miss. 2005). In other words, “[c]omplaints should not be filed in matters where plaintiffs intend to find out in discovery whether or not, and against whom, they have a cause of action.” *Harold’s Auto Parts, Inc. v. Mangialardi*, 889 So. 2d 493, 494 (Miss. 2004). That is precisely what Almond is doing here. Almond’s Motion for Leave to Amend should be denied without prejudice and discovery should go forward. If Almond later has evidence of any of these inflammatory allegations leveled against a group of 25

⁵ Almond also labels this claim as one for “fraudulent concealment” and one for conspiracy to conceal. Neither of those labels changes the futility of her proposed Count IV. Fraudulent concealment requires allegations that an affirmative act was done to prevent discovery of a claim, and that plaintiff could not discover the claim because of that affirmative act. *Sanderson Farms, Inc. v. Ballard*, 917 So. 2d 783, 790 (Miss. 2005). Likewise, the elements for conspiracy to conceal incorporate the elements for civil conspiracy, which Almond fails to properly allege.

defendants, Almond may seek to amend at that time. Consequently, the proposed amendment to add this claim is futile.

(c) Almond's proposed RICO claim is futile

The sum total of Almond's allegations in support of her Mississippi Racketeer Influenced and Corrupt Organizations ("RICO") claim is that some unnamed defendants acted in concert to engage in racketeering activities to divert pension funds from the plan. (PAC, Count VI, p. 31). Almond alleges no specific facts in support of this claim. She does not even allege which defendants allegedly acted in concert with one another, or state which defendants are the target of this claim. (Though, SRHS presumes that the count is not asserted against all defendants since she specifically pleads that only some defendants engaged in such nefarious activities). Just as Almond fails to allege specific facts in support of her conspiracy claim, she likewise provides no factual basis to support a RICO claim based on that alleged conspiracy.

To plead a RICO claim, Almond must, at a minimum, allege: (1) a person engaged; (2) in a pattern of racketeering activity; (3) connected to the acquisition, establishment, conduct, or control of an enterprise. *Brown v. Prot. Life Ins. Co.*, 353 F.3d 405, 407 (5th Cir. 2003) (stating the elements for a federal RICO claim, cited here as persuasive authority because no Mississippi court has set forth the elements for a cause of action under the Mississippi RICO statute). A pattern of racketeering requires at least two racketeering acts, and a demonstration that the actions pose the threat of continued criminal activity. *Id.*

At no point in her proposed Amended Complaint does Almond allege that any action taken by any defendant is criminal; let alone that any defendant engaged in at least two criminal acts, and that those acts were sufficient to pose the threat of continued criminal activity. Thus, Almond fails to state a claim under RICO against any defendant upon which relief may be granted. Allowing Almond to amend her Complaint to add a RICO claim would be futile.

(d) Almond's proposed Breach of Fiduciary Duty Claims are likewise futile

Almond alleges all 25 proposed defendants breached certain, unnamed fiduciary duties to her. (PAC, Counts III and V). To plead this claim, Almond must, at a minimum, allege: (1) a defendant owed her a duty; (2) that defendant breached that duty; and (3) that defendant's breach of that duty was the cause of her damages. *Callicutt v. Prof. Servs. of Potts Camp, Inc.*, 974 So. 2d 216, 221 (Miss. 2007) (defendant did not owe any fiduciary duty to plaintiff, so no breach of duty alleged). *See also Victory Lane Prods., LLC v. Paul Hastings, Janofsky & Walker, LLP*, 409 F. Supp. 2d 773, 779 (S.D. Miss. 2006) (breach of fiduciary duty claim falls under duty of loyalty category).

Almond fails to allege how so many different defendants, each with different relationships (some with no relationship whatsoever) with Almond, owed her fiduciary duties. Thus, she has wholly failed to allege that any duty was owed to her, let alone that any such duty was breached.

These claims are particularly problematic as it applies to proposed Defendant Lee Bond ("Bond"). Bond became SRHS' CFO in approximately March 2014. Almond fails to plead information sufficient to demonstrate how Bond, as SRHS' CFO, may owe a fiduciary duty to Almond, a former SRHS employee, Almond also fails to demonstrate Bond's connection to the pension plan.

(e) Almond's proposed Breach of Contract Claim is futile

Almond's proposed breach of contract claim is premised on the misguided notion that SRHS was legally required to fund its pension plan at specific levels. (PAC, Count I, pp. 28-29). This claim is based solely on the allegation that multiple unnamed defendants breached the Plan by not making the "mandated and contracted for matching payments into Plaintiff's retirement account and eventually stopped paying the mandated matching payments, which were required to be paid under contract and by law..." (PAC ¶ 31). The Plan has no such requirement and, in fact,

the employer contributions to the plan are voluntary and not “mandated” by law.⁶ As such, and for other defects, Plaintiff’s Motion to Amend to add a breach of contract claim is futile.

C. Almond’s Amendment should be denied because of bad faith and because all other parties would suffer undue prejudice if the Court allowed the amendment

Notwithstanding its procedural deficiencies, Almond’s proposed amendment is prejudicial to SRHS, and all other parties in the consolidated cases. This Court has the discretion to deny Almond’s Motion to Amend if it finds, as is present here, Almond has failed to carry her burden of demonstrating that justice requires the amendment. Miss. R. Civ. P. 15(a). This Court can deny Almond’s Motion if it finds Almond seeks the amendment in bad faith, with a dilatory motive, or if Defendants will be prejudiced by the amendment. Justice clearly does not require an amendment made in bad faith, with dilatory motive, and with an aim to prejudice Defendants. Each of these bases support denial of Almond’s Motion to Amend.

The proposed Amended Complaint does not seek to add one claim or one party. Nor does it clarify factual allegations to aid in the Court’s resolution of this matter. Rather, it more than doubles the number of defendants in the case – raising the total from 11 to 25.

The timing of Almond’s amendment is, at best, suspect, and, at worst, dilatory. Almond’s counsel attended the hearing in this Court on May 12-13, 2015. During that hearing, Almond’s counsel watched SRHS agree to expedited discovery⁷. Knowing SRHS’ deadline to produce significant discovery, including written responses to Almond’s 92 document requests, Almond’s

⁶ The Plan requires SRHS to contribute an amount “from time to time [...] to provide the benefits of [the] Plan.” (Exhibit B, Plan § 9.03). The Plan language does not require SRHS to contribute a pre-determined amount, on a specified schedule, or with identifiable funds. SRHS’ obligation to contribute to the Plan “from time to time” did not create a contractual obligation between SRHS to contribute to the Plan. *See, e.g., Trustees of the Bricklayers & Allied Craftworkers Local 13 Defined Contrib. Pension Trust v. Granite Works, Inc.*, No. 2:10-cv-00767, 2011 WL 2158088, *3 (D. Nev. July 26, 2011) (plan document that simply stated that employer would “contribute” to plan did not mean that unpaid employer contributions were trust assets).

⁷ Almond avoids attempts to streamline the litigation by even agreeing to the most routine of requests – refusing to return phone calls seeking agreement on a standard protective order that every other party in the case acknowledges should be signed, so that documents from multiple parties can be produced as discovery. This type of conduct only slows down the cases and delays a resolution for the retirees and Plan participants.

counsel refused to meet and confer with SRHS' counsel regarding the scope of that discovery, then immediately sandbagged SRHS and the Court by filing a Motion to amend the Complaint, which must be opposed within the same timeframe as SRHS' expedited discovery.

After many weeks of thinly-veiled threats on Facebook and in other media, Almond's counsel unloaded the promised bombshell - a factually devoid smear campaign against two dozen individuals and entities, most of whom were not even associated with SRHS when the alleged bad acts occurred. For instance, Bond is lumped into several very serious claims for fraud, conspiracy and racketeering, without even one allegation of fact justifying his inclusion in this case. Giving new meaning to the adage "no good deed goes unpunished," since taking over as CFO, Bond has endeavored tirelessly to be transparent, collaborative and a part of the pension solution. You would never know this from the proposed Amended Complaint though, which (incorrectly) alleges Bond: decided not to fund the pension in 2009 (years before he arrived) (PAC ¶ 30), met with bond holders regarding the pension plan (PAC ¶ 33), terminated the pension plan (PAC ¶ 64), and failed to force third-parties to utilized generally accepted accounting and auditing standards (PAC ¶ 64).

Had Almond's counsel done some modicum of diligence, they would know that Bond did not join SRHS until March 2013, and did not become CFO at SRHS until April 2014. Thus, he could not have been involved in the auditors using alleged improper accounting principles (years before he arrived), or when the (unspecified) parties hatched the alleged conspiracy to not fund the pension plan. Rather than wait to amend the Complaint until discovery shows Bond (or others) had any involvement in the events leading up to the pension underfunding, Almond's counsel levels these serious charges against Bond in a "shoot first, ask questions later" fashion. Such conduct is an attempt to harass persons who had no involvement in the decisions related to the Plan. This Court has the authority and discretion to deny the far-fetched amendment and require Almond's counsel to come back and seek amendment when they actually have proof of these serious charges. *See, e.g., Harold's Auto Parts*, 889 So. 2d at 494 ("[c]omplaints should not be

filed in matters where plaintiffs intend to find out in discovery whether or not, and against whom, they have a cause of action"). Almond carries the burden of showing that amendment is proper and the instant motion and proposed complaint woefully fails to meet the burden.

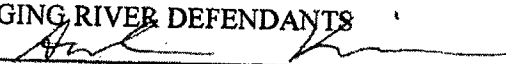
III. CONCLUSION


Almond's Motion to Amend is procedurally deficient and should be denied on that basis alone. Even if it were not procedurally deficient, the amendment sought is without basis and futile, such that it should not be permitted. Furthermore, Almond's proposed amendment is prejudicial to all other parties in the consolidated actions and should be denied for this reason as well.

WHEREFORE, PREMISES CONSIDERED, SRHS respectfully requests the Court to deny Almond's Motion to Amend Complaint and enter such other and further relief as the Court deems appropriate. In the alternative, if the Court is inclined to permit an amended complaint, SRHS respectfully requests the Court direct Almond to file a new amended complaint that does not include inaccurate factual allegations against Lee Bond.

Respectfully submitted, this the 26th day of May, 2015.

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CERTIFICATE OF SERVICE

I, Fredrick B. Feeney, II, Counsel for Singing River Health System, do hereby certify that I have this day served via email and regular mail, postage prepaid, a true and correct copy of the above Response in Opposition to Motion for Leave to Amend Complaint and First Amended Complaint for Discovery and Accounting to the following:

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This the 26th day of May, 2015.



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EXHIBIT A

1 IN THE CHANCERY COURT OF JACKSON COUNTY,
MISSISSIPPI
2
3 CYNTHIA N. ALMOND COMPLAINANT
4 VERSUS CIVIL ACTION NO. 2014-2653-NH
5 SINGING RIVER HEALTH SYSTEM, DEFENDANTS
A/K/A SINGING RIVER HOSPITAL SYSTEM;
6 SINGING RIVER HOSPITAL SYSTEM FOUNDATION, INC.;
7 SINGING RIVER HEALTH SYSTEM FOUNDATION, INC.;
8 SINGING RIVER HEALTH SERVICES FOUNDATION;
9 SINGING RIVER HOSPITAL SYSTEM EMPLOYEE BENEFIT
FUND, INC.;
10 TRANSAMERICA RETIREMENT SOLUTIONS CORPORATION;
11 JOHN DOE ACTUARIES A, B, OR C; AND
12 JOHN DOE ACCOUNTING FIRM A, B, OR C; and
13 MICHAEL HEIDELBERG, Individually and as a
Member of the Board of Trustees,
14 MICHAEL TOLLESON, Individually and as a Member
of the Board of Trustees,
15 ALLEN CRONIER, Individually and as a Member of
the Board of Trustees,
16 TOMMY LEONARD, Individually and as a Member of
the Board of Trustees,
17 LAWRENCE COSPER, Individually and as a Member
of the Board of Trustees,
18 MORRIS STRICKLAND, Individually and as a Member
of the Board of Trustees,
19 IRA POLK, Individually and as a Member of the
Board of Trustees,
20 STEPHEN NUNENMACHER, M.D., Individually and as
a Member of the Board of Trustees,
21 HUGO QUINTANA, M.D., Individually and as a
Member of the Board of Trustees,
22 KEVIN HOLLAND, Individually and in his Official
Capacity
23
24 REPORTER'S TRANSCRIPT OF PROCEEDINGS
25 Held before the Honorable L. Breland
Hilburn on May 12, 2015 at Chancery Court
Of Jackson County, Mississippi.
26
27 REPORTED BY:
28 CRYSTAL LYNN MORRIS, CSR #1704

CRYSTAL LYNN MORRIS, CSR

2
IN THE CHANCERY COURT OF JACKSON COUNTY,
MISSISSIPPI

2
3 MAURY THOMPSON COMPLAINANT
4 VERSUS CIVIL ACTION NO. 2014-2695-NH
5 SINGING RIVER HEALTH SYSTEM, DEFENDANTS
A/K/A SINGING RIVER HOSPITAL SYSTEM;
6 SINGING RIVER HOSPITAL SYSTEM FOUNDATION, INC.;
7 SINGING RIVER HEALTH SYSTEM FOUNDATION, INC.;
8 SINGING RIVER HEALTH SERVICES FOUNDATION;
9 SINGING RIVER HOSPITAL SYSTEM EMPLOYEE BENEFIT
FUND, INC.;
10 TRANSAMERICA RETIREMENT SOLUTIONS CORPORATION;
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18 MORRIS STRICKLAND, Individually and as a Member
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a Member of the Board of Trustees,
21 HUGO QUINTANA, M.D., Individually and as a
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22 KEVIN HOLLAND, Individually and in his Official
Capacity
23
24
25

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3
1 IN THE CHANCERY COURT OF JACKSON COUNTY,
MISSISSIPPI
2

3 HOWARD BOSARGE COMPLAINANT
4 VERSUS CIVIL ACTION NO. 2014-2729-NH
5 SINGING RIVER HEALTH SYSTEM, DEFENDANTS
A/K/A SINGING RIVER HOSPITAL SYSTEM;
6 SINGING RIVER HOSPITAL SYSTEM FOUNDATION, INC.;
7 SINGING RIVER HEALTH SYSTEM FOUNDATION, INC.;
8 SINGING RIVER HEALTH SERVICES FOUNDATION;
9 SINGING RIVER HOSPITAL SYSTEM EMPLOYEE BENEFIT
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21 HUGO QUINTANA, M.D., Individually and as a
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22 KEVIN HOLLAND, Individually and in his Official
Capacity
23
24
25

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4
1 IN THE CHANCERY COURT OF JACKSON COUNTY,
MISSISSIPPI
2

3 KITTY PATRICIA AGUILAR COMPLAINANT
4 VERSUS CIVIL ACTION NO. 2014-2752-NH
5 SINGING RIVER HEALTH SYSTEM, DEFENDANTS
A/K/A SINGING RIVER HOSPITAL SYSTEM;
6 SINGING RIVER HOSPITAL SYSTEM FOUNDATION, INC.;
7 SINGING RIVER HEALTH SYSTEM FOUNDATION, INC.;
8 SINGING RIVER HEALTH SERVICES FOUNDATION;
9 SINGING RIVER HOSPITAL SYSTEM EMPLOYEE BENEFIT
FUND, INC.;
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11 JOHN DOE ACTUARIES A, B, OR C; AND
12 JOHN DOE ACCOUNTING FIRM A, B, OR C; and
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17 LAWRENCE COSPER, Individually and as a Member
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18 MORRIS STRICKLAND, Individually and as a Member
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19 IRA POLK, Individually and as a Member of the
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23
24
25

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1 used them, but I want the documents. I
2 can't stress to you how strongly I feel
3 about this.

4 Again, the pot is being emptied
5 and nothing is going back in it. And all
6 this time they've fought since we filed
7 the discovery in December they have not
8 produced one single document. There is
9 going to be a proposal in an agreed stay
10 order that we have had no input into
11 whatsoever, Harvey and I, in our lawsuit.
12 It says "Nothing shall prohibit any party
13 from interfering in implementing any
14 settlement reached through mediation or
15 supervising from litigating any
16 settlement reached through mediation or
17 negotiation including said federal
18 litigation regarding the pension plan
19 providing party and these suits are given
20 notice in such mediation to participate".

21 We are not in federal court on
22 purpose. We came to this court to a
23 state judge to get justice for state
24 people in a state matter and we were
25 moved six times by these people to
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1 federal court wrongfully.

2 So I just want to predicate by
3 telling the Court we don't agree to that.
4 We ought to be bound by mediation and we
5 agree that you ought to and any attempt
6 to settle this matter ought to have to
7 come through you for settlement where
8 this state matter is proceeding. So that
9 is just to let you know the way things
10 stand.

11 THE COURT: Yes, sir. I certainly
12 would expect all the Plaintiffs' lawyers
13 to agree to anything that is presented to
14 the Court representing the Plaintiffs
15 posturing in any of these issues.

16 MR. DENHAM: Yes, sir. They are
17 talking about a mediation in federal
18 court, which we were neither privy nor
19 had any input nor are we interested in.
20 We are here in state court.

21 THE COURT: That would be something
22 you would need to take up with the
23 federal judge.

24 MR. DENHAM: If I do I would be
25 entering an appearance and he just let us
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1 out of 6 cases over there and I don't
2 want to go running back in.

3 MR. REEVES: Just a point of
4 clarification, I don't care about what
5 was entered but all it says it invites
6 everyone to participate if they want to.
7 Nobody has to.

8 THE COURT: Well, in 10 days we are
9 going to produce those documents to the
10 Plaintiffs.

11 MS. DUVALL: Correct, Your Honor. We
12 will produce within 10 days and we
13 anticipate there may be further
14 discovery.

15 THE COURT: And I think it would be a
16 good idea for us to set a date for us to
17 reconvene and for the Court to take up
18 what additional issues would be generated
19 by after you got a chance to review those
20 documents and/or if for no other reason
21 just have a meeting for a status report
22 for the Court.

23 So I would like for us to have
24 an agreed date for us to reconvene here
25 before we leave today. I would say
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1 within 30 days would be good.

2 MR. REEVES: Your Honor, we in the
3 draft scheduling order we have found it
4 helpful in other cases where you have a
5 lot of lawyers and parties to keep the
6 case moving we laid out specific dates.
7 I don't know if they are clear on my
8 calendar or anybody else's, but it is
9 productive to by every 30 days to have a
10 status conference where the Court is here
11 if anybody wants to bring a motion they
12 can. If they don't have a motion or
13 don't want to attend they don't have to.

14 THE COURT: Tell me that.

15 MR. REEVES: I encourage the Court to
16 set them 30 days apart and they don't lay
17 out for 30, 60, 90 days or more.

18 MR. DENHAM: Your Honor, I want to go
19 on the record so you will know, I am
20 going to file today a motion to allow us
21 to amend our pleadings to add other
22 parties. There won't be any question
23 then of whether agreements between
24 parties that have any sort of
25 significance because they are all
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1 defendants. So I'm going to file that
2 motion today and we will be sure to send
3 you a copy of it. And I would suggest
4 that as early a hearing as we could have
5 on that after we get it disseminated the
6 better off we will be. It won't in any
7 way affect discovery in this matter today
8 with the deadline, but it will effect
9 other parties. I intend to name the
10 Board of Supervisors and others. So we
11 won't have continuing it will go a lot in
12 the long run and I should have named them
13 in the beginning, but we were rushed at
14 that time to have the TRO before they had
15 the secret meeting and signed off on the
16 minutes. We did not flush out the
17 complainants. We did not have time at
18 that point.

19 THE COURT: Always as the rule of
20 thumb the amendment will be allowed. I
21 will have to see the pleading before we
22 give it to allow people to object if
23 there is a reason for objection.

24 MR. DENHAM: Yes, sir. We have one
25 last little draft we are looking through
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1 and we will file it today.

2 THE COURT: Can we go ahead and agree
3 on a specific date to reconvene in June?

4 MR. REEVES: Judge, we had suggested
5 -- I'm sorry.

6 THE COURT: It's all right.

7 MR. REEVES: -- reconvening
8 June 12th. We set dates for the next
9 several months and primarily to schedule
10 around Your Honor's convenience.

11 THE COURT: I actually had a hearing
12 in Tupelo on a case going on up there. I
13 know that has been continued. So I know
14 June 12th is available for me to be here
15 at 9:00 if that is agreeable for everyone
16 else.

17 MR. WILLIAMS: Yes, sir.

18 MR. REEVES: Your Honor, it may be
19 productive, may I suggest we go ahead and
20 set one for July before everybody's
21 calendar gets filled up on them and set
22 them 60 and 90s days out so most people
23 have flexibility. The next day we had
24 suggested was perhaps July 13th, so we
25 have them once a month.

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1 THE COURT: What day is that?

2 MS. DUVALL: That is a Monday, Your
3 Honor.

4 THE COURT: Monday. I did not bring
5 my calendar with me. I don't think I
6 have anything on July 13th, so let's go
7 ahead and set that date.

8 MR. BARTON: I am not available. My
9 daughter is getting married that day.

10 THE COURT: Oh, no you are not.

11 MR. BARTON: Never mind. Mr. Denham
12 says he will be here.

13 MR. DENHAM: I will be here, Judge.

14 THE COURT: We can come to the
15 wedding.

16 MR. BARTON: In the Bahamas and love
17 to have you.

18 MR. REEVES: I vote for the Bahamas.

19 THE COURT: All right. Well, then,
20 Mr. Denham represents he will be here.
21 Then July 13th will be our second
22 scheduled meeting and then we will go
23 after that.

24 Now, let me say this: If there
25 is some extended urgent circumstances
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1 that comes up in this case and you need
2 me to come down here and have a hearing
3 all you need to do is just let me know or
4 we will set a date and we will be down
5 here and we'll hook them up.

6 MR. BARTON: Judge, procedurally let
7 me discuss something with the Court so we
8 understand what is happening. They and I
9 say they, the defendants have not
10 discussed with Mr. Denham and myself at
11 all what we consider to be the core
12 documents. They are going to produce
13 documents that have already been
14 produced. I'm sure that is a clean
15 sanitized set of documents they have
16 thoroughly gone through and vetted before
17 it went out of their purview. In the
18 meantime, all of the requests for
19 production that we have filed they
20 objected to every one of them. Now, what
21 they want to do is start that process
22 again so that they can clean up those
23 objections. Everyone had a boilerplate
24 objection, so they are going to object
25 again to the same things they already
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1 deposition and do the best you can
2 without it.

3 MR. MAYO: Absolutely.

4 THE COURT: If the documentation is
5 there and he can't answer the question
6 then he would have to tell you he can't
7 answer.

8 MR. MAYO: Yes, sir.

9 THE COURT: That is a perfectly good
10 answer, I don't know.

11 MR. DENHAM: It is a difficult
12 situation. I've been informed by counsel
13 that he is capable of giving his
14 deposition today. I don't know what he
15 will be like a month from now.

16 Her problem is that he does not
17 have documents. When I've asked what
18 documents all I get is documents. This
19 is the CFO who served during a critical
20 period. He certainly knows who -- he
21 would know maybe who ordered the -- when
22 the payment -- who was present when the
23 payments -- when the decision was made
24 that the payments would quit going into
25 the plan. Who was it that authorized the
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1 sending out of communications to the
2 retirees that the plan was just fine when
3 it wasn't. He would know questions like
4 that without documents.

5 THE COURT: So you are asking me to
6 make a decision because I don't know the
7 condition of the deponent. I don't know
8 if he is critically ill and there is an
9 emergency situation where we need to go
10 and depose him now or whether he is, you
11 know, just on a clear day 30 days from
12 now he is still going to be able to be
13 deposed.

14 MS. HILLERY: That is the most
15 likely. Obviously I can't promise that
16 some catastrophic accident won't happen
17 between now and then, but it is not an
18 emergency situation as of right now.

19 MR. DENHAM: We had his deposition
20 set. Judge Harris had set the deposition
21 and then the Judge replaced him and they
22 took it away and the rest is history. So
23 it has been set one time. And I just
24 point that out.

25 Counsel ought to have an
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1 affirmative duty to check on the client
2 every day and make sure he is alright and
3 if there is any turn to notify everybody.
4 I don't want to find out 2 weeks after it
5 is all over with.

6 THE COURT: Well, it would be my
7 inclination to set the deposition the
8 week after June 12th so that would be
9 somewhere on the 14th. So you can be
10 prepared to depose him at that time. The
11 week after our meeting of June 12th.

12 MS. HILLERY: Okay.

13 THE COURT: What else have we?

14 MR. REEVES: Nothing further from the
15 Plaintiffs, I think, Your Honor.

16 MR. WILLIAMS: Nothing.

17 THE COURT: Well, I will see you at
18 9:00 on June the 12th unless there is
19 some revelation that changes that.

20 Like I said, I am available for
21 the phone conference any time there is
22 something that comes up that you need my
23 voice in. And let's get those orders to
24 me.

25 So we will stand adjourned until
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1 June 12th.
2 (Court session concluded at 10:41 a.m.)

EXHIBIT B

SINGING RIVER HEALTH SYSTEM
EMPLOYEES' RETIREMENT PLAN
AND TRUST AGREEMENT

**(Amended and Restated as of January 2014,
generally effective October 1, 2013, unless
otherwise stated in this Plan or
provided by law)**

(c) For the period of Membership on or after September 30, 1984, for each Member three percent (3%) of Compensation for each calendar year period. **[This Section is effective for all dates beginning October 1, 2007, and thereafter.]**

9.03 CONTRIBUTIONS BY EMPLOYER: The Employer shall make such contributions from time to time, which in addition to contributions made by Members pursuant to Section 9.02, shall be necessary as determined by the Actuary to provide the benefits of this Plan. However, the Employer is under no obligation to make any contributions under the Plan after the Plan is terminated, whether or not benefits accrued or vested prior to such date of termination have been fully funded.

9.04 FUNDING POLICY: The Employer shall have the responsibility for establishing a funding policy and method, and shall review such funding policy and method periodically.

ARTICLE XI

TERMINATION OF THE PLAN

11.01 RIGHT TO TERMINATE RESERVED: The Plan has been established in confidence that it will continue in effect indefinitely. However, due to the uncertainties under which all business activity operates, the Employer must and herewith does reserve the right to terminate the Plan on its own behalf, in whole or in part, at any time. A termination of the Plan shall be evidenced by a written instrument executed by the Employer on the order of its Board of Trustees and filed with the Committee and the Trustee. Termination of the Plan shall be effective upon the date specified in such instrument (hereinafter referred to as the "termination date"), but such termination shall not vest in the Employer any right, title, or interest in or to the funds held hereunder.

11.02 TOTAL TERMINATION: If the Plan is terminated by the Employer with respect to all its Employees, no further contributions shall be made to this Trust by the Employer or its Plan Members, and no Employees of the Employer shall become Members of the Plan after the termination date, and the rights of all such Members to benefits accrued to the date of such termination, shall fully vest and benefits shall be distributed as provided in Section 11.04.

11.03 PARTIAL TERMINATION: If the Plan is terminated only as to the designated group of Employees of the Employer, the Trust Fund shall be allocated between the group of Members as to whom the Plan is terminated and the remaining group of Members upon the basis of the funded actuarial requirements of the Plan

with respect to such groups, and the provisions of this Article XI shall apply only to the group of Members employed by the Employer as to whom the Plan is terminated and the part of the Trust Fund so allocated to such group. On such partial termination, the rights of all Members, Retired Members, and beneficiaries (as to whom the Plan is terminated) to benefits accrued to the date of such partial termination, to the extent then funded, shall fully vest immediately and the assets of such part of the Trust Fund shall be distributed as provided in Section 11.04, only if the Employer does not direct such part to be transferred to another fund or trust for the benefit of the group as to whom the Plan is terminated.

11.04 DISTRIBUTION ON TERMINATION: No funds shall be distributed until such time as a request for a determination of qualification concerning such termination has been filed with and approved by the Internal Revenue Service.

(a) **CONVERSION OF ASSETS:** If the Employer terminates the Plan with respect to all its Employees, the portion of the Trust Fund assets held for Members employed by the Employer shall be segregated and converted into cash as promptly as possible. If the Employer terminates the Plan with respect to a designated group of its employees, the portion of the Trust Fund assets allocated to such group under Section 11.03 shall be segregated and converted into cash as promptly as possible.

(b) **ALLOCATION OF ASSETS:**

(1) From the proceeds of the sale of all such segregated assets of the Fund (the "Segregated Fund"), there shall be set aside in a separate account an

amount adequate to defray all costs and charges (including those of counsel, the Trustee and the Actuary) for the liquidation and distribution of the Trust Fund to the extent herein provided.

(2) From the remaining cash in the Segregated Fund, the Committee shall make the following allocation among the Members and their beneficiaries in the following order:

(A) First, to that portion of each individual's accrued benefit derived from Member contributions;

(B) Second, in the case of benefits payable as an annuity:

(i) in the case of the benefit of a Member or beneficiary which was in pay status as of the beginning of the three-year period ending on the termination date of the Plan, to each such benefit, based on the provisions of this Plan (as in effect during the five-year period ending on such date) under which such benefit would be the least (the lowest benefit in pay status during a three-year period shall be considered the benefit in pay status for such period),

(ii) in the case of a Member's or beneficiary's benefit (except the benefit described in (i) immediately above) which would have been in pay status as of the beginning of the three-year period if the Member had retired prior to the beginning of the three-year period and if his benefits had commenced (in the normal form provided herein) as of the beginning of such period, to each such benefit based on the provisions of this Plan (as in effect during the five-year period ending on such date) under which such benefit would be the least;

(C) Third:

(i) to all other benefits (if any) of Members or beneficiaries guaranteed in nongovernmental plans under Title IV of the Employee Retirement Income Security Act of 1974 (determined without regard to the limitation placed on benefits paid monthly), and

(ii) to the additional benefits (if any) which would be determined under (i) immediately above if Section 4022(b)(6) of the Employee Retirement Income Security Act of 1974 did not apply;

(D) Fourth, to all other nonforfeitable benefits under this plan;

(E) Fifth, to all other benefits under this plan; and

(F) Sixth, to all benefits restricted by Section 11.04(f).

(c) **PROCEDURE IF FUNDS INSUFFICIENT TO PROVIDE FULL BENEFITS:** In the event that the cash realized pursuant to Section 10.04(a) is insufficient to provide in full for all of the amounts to be set aside pursuant to Section 11.04(b), such cash shall first be applied to the amount of costs and charges specified in Section 11.04(b)(1) and then to the benefits specified in Section 11.04(b)(2). When applying the assets to the benefits specified in Section 11.04(b)(2), each of the six levels will be funded in full in order of listing before funding the next listed benefit, and should the funding not be sufficient to fund in full any one level, then the assets will be allocated pro rata for that level on the basis of the present value of the respective Member's or beneficiary's benefits described in that level.

(d) LIQUIDATION OF FUND: Subject to the provisions of Section 5.07, the Segregated Fund shall be liquidated by purchasing with funds from the separate account set aside pursuant to Section 11.04(b)(2) an annuity or similar contract with a premium equal to the amount apportioned to such Member or beneficiary for such Member's or beneficiary's benefit; provided, however, that upon the written direction of the Committee, a cash distribution shall be made to each Member or beneficiary for whom the Committee shall deem it inadvisable to purchase the annuity or similar contract. The amount of such cash payment shall be the amount which was apportioned pursuant to Section 11.04(b)(2) to the Member or the beneficiary. Any annuity provided for in this Section 11.04(d) must be an annuity based on the life expectancy of the Member or, in the case of a joint pension annuity, based upon the life expectancy of the Member and the Member's spouse only.

(e) LIMITATION OF BENEFITS: If the Plan is terminated within ten (10) years of its adoption by the Employer, or within ten (10) years of the effective date of the most recent amendment which substantially increases pension benefits, the benefits with respect to any Member who is subject to the limitations of Section 11.04(f) shall, for the purpose of Paragraphs (a) through (d) of this Section 11.04, be determined without regard to such limitations, but the amount to be distributed with respect to him shall not exceed the applicable limitations of Section 11.04(f).

(f) TERMINATION WITHIN TEN YEARS:

(1) INDIVIDUAL DISTRIBUTIONS LIMITED TO

UNRESTRICTED BENEFITS: If the Plan is terminated by the Employer or the full current cost thereof has not been met at any time for the first ten (10) years of its adoption by the Employer, or the first ten (10) years of the effective date of the most recent amendment which substantially increases pension benefits, whether before or after such ten (10) year period, the funds or benefits which may be paid to any person whose benefits are limited by the United States Treasury Department Mimeograph 5717 from the contributions of the Employer (including any unrestricted benefits, but exclusive of any supplemental retirement income payments already received up to that time) shall not exceed his unrestricted benefits at that time. Such reapportionment of benefits to other employees as is made necessary by the restriction hereinbefore mentioned shall be made upon an equitable basis in such manner that each Member entitled to a share in the excess shall receive, in addition to such distribution as he may be entitled to receive under Section 11.04(d), a share of the excess proportionate to the ratio of his interest in the Funds to the entire Fund, exclusive of the excess. If after satisfaction of all liabilities to those persons whose benefits were not restricted there still remain funds, such funds shall then be apportioned to the restricted persons upon the ratio of each person's excess benefit as compared to all excess benefits.

(2) DEFINITIONS: For the purposes of this Section 11.04(f), the following definitions shall apply:

(A) "Unrestricted benefits" shall mean, as of any particular time, benefits of the form called for by the Plan which have been provided by the

Employer's contributions not exceeding the largest of the following amounts:

(i) If the Plan has been amended to substantially increase pension benefits, the Employer Contributions (or funds attributable thereto) which would have been applied to provide the benefits for the Member if the Plan in effect on the day preceding the effective date of the most recent amendment which substantially increased the pension benefits had been continued without change, or

(ii) Twenty Thousand Dollars (\$20,000.00), or

(iii) The sum of the following:

(aa) If the Plan has been amended to substantially increase pension benefits, the Employer Contributions (or funds attributable thereto) which would have been applied to provide benefits for the Member if the Plan had been terminated on the day preceding the effective date of the most recent amendment which substantially increases pension benefits, plus

(bb) An amount computed by multiplying the number of years after the date for which the current costs are met by twenty percent (20%) of the first Fifty Thousand Dollars (\$50,000.00) of the Member's regular annual compensation.

(B) "Supplemental retirement income payments" shall mean any current payments under the Plan to a retired Member sufficient, together with his unrestricted benefits, to bring the total current payments to him up to full retirement income benefits provided under the Plan.

(3) NO BENEFIT RESTRICTIONS WHILE PLAN IN FULL

EFFECT: The foregoing conditions shall not restrict the current payment of full retirement income benefits called for by the Plan for any retired member while the Plan is in full effect and its full current costs have been met.

(4) AUTOMATIC ABROGATION OF SECTION: Sections 11.04(e) and 11.04(f) shall automatically become inoperative and of no effect upon a ruling by the United States Treasury Department that the limitations on benefits therein referred to are no longer required.

11.05 GENERAL PROVISIONS: The amounts to be set aside and distributed pursuant to the foregoing provisions shall be determined by the Committee, with the advice and assistance of the Actuary, and the Committee shall give the Trustee such information as the Trustee may require to make the allocations and distributions required. The actuarial requirements of the Plan and the actuarial reserve required to provide benefits at the termination date shall be determined by the Actuary by the use of such actuarial factors, tables, assumptions and procedures, and interest rates as the actuary shall recommend, and which shall be in accordance with the federal law. Any distribution to be made pursuant to this Article XI to a Member shall, in the event of his death, be distributed to his designated beneficiary.

11.06 TRUSTEE NOT LIABLE: In liquidating the Trust Fund or a part thereof as provided in Section 11.04, the Trustee shall follow the interpretations and decisions of the Committee with respect to such liquidation, and upon the termination and liquidation of the Fund in accordance with Section 13.04 and the direction of the Committee, the Trustee shall be held forever discharged from further obligation with

respect thereto, whether any individual Member or beneficiary accepts or rejects the settlement offered him, and whether any Member or beneficiary signs or refuses to sign any receipt or discharge presented to him.

11.07 INVOLUNTARY TERMINATION: This Plan shall terminate with respect to employees of the Employer in the event of a legal adjudication of such Employer as a bankrupt, a general assignment by such Employer to or for the benefit of its creditors, or dissolution of such Employer.

11.08 SALE, TRANSFER OR LEASE: In the event the business and assets of the Employer are sold, exchanged, transferred or leased to any other business organization or entity or governmental unit or division thereof, the Plan will automatically be terminated, and the rights of all Members to benefits accrued to the date of such termination shall fully vest immediately. Upon termination of the Plan in accordance with the provisions hereof, the share of the assets of the Trust Fund available for distribution to the affected Members and Beneficiaries shall be allocated and distributed in accordance with the following procedure:

(a) The Committee shall determine the date of distribution.

(b) The distribution of the asset value will, subject to the provisions of Section 417(e)(1) of the Internal Revenue Code of 1986, be provided by the purchase of insured annuities from a company or companies selected by the Committee for each class of Members and other persons entitled to benefits under the Plan, as specified in (c) below, except that, in lieu of the purchase of an annuity, a lump sum distribution shall be made to or on behalf of a Member if (i) the actuarially

equivalent single sum value of the benefit (payable as a lump sum settlement) to be distributed to him or on his behalf under the provisions of this Section 11.08 is equal to or less than \$5,000, or is equal to or less than such larger amount that is permitted as an involuntary cashout of benefits under rules and regulations of the Internal Revenue Service and (ii) such distribution may be made without the necessity of having the consent of the recipient under any applicable rules or regulations of the Internal Revenue Service. Any annuities purchased pursuant to the provisions of this Section 11.08 will be subject to the provisions hereof pertaining to the Qualified Joint and Survivor Annuity Options and to the Qualified Preretirement Survivor Annuity.

(c) The Committee shall determine the asset value available for distribution after taking into account the expenses of such distribution. After having determined such asset value available for distribution and subject to the applicable provision of any Supplement hereto pertaining to the distribution of assets upon the termination of the Plan, the Committee shall allocate such asset value as of the date of termination of the Plan in accordance with the application of Section 4044 of the Employee Retirement Income Security Act of 1974, as amended, to nongovernmental plans.

(d) In the event there be asset value remaining after satisfaction of all liabilities of the Plan to Members and Beneficiaries, the Plan shall be deemed to be amended in order to allocate any such residual assets, after purchase of annuities for inactive Members, to the Active Members, Retired Members and eligible beneficiaries of Active or Retired Members, who are deceased, in the Plan on such

date of Plan termination. The deemed amendment to the Plan shall provide an additional benefit equal to the Member's Final Average Monthly Compensation multiplied by his Credited Service as of the date of termination further multiplied by a percentage which will exactly eliminate the residual assets based upon the mortality and interest rate assumption described in Section 1.05 of the Plan. If the Plan terminates, the additional benefit for Members in the active service of the Employer, Retired Members and eligible beneficiaries of Active or Retired Members, who are deceased, shall be paid in lump sum as soon as practical after approval of the appropriate governmental agencies.

(e) The order of priorities for, and the amounts and methods of, the distributions set forth in (c) above and the rights of Members and Beneficiaries to benefits under the Plan shall be subject (i) to the distribution rules set forth in the Plan, (ii) to the limitations provided by Section 5.07 of the Plan and (iii) to any changes required by the Internal Revenue Service as a condition for issuing a favorable determination letter stating that the distribution of assets will not adversely affect the continued qualified status of the Plan under section 401(a) of the Code.

(f) As soon as practicable after the date that a favorable determination letter is received from the Internal Revenue Service stating that in its opinion the method of distribution will not adversely affect the continued qualified status of the Plan under Section 401(a) of the Code, the Committee shall direct the Trustee to distribute the assets to the affected parties in accordance with such method. **[This Section is effective for all dates before and including September 30, 2007.]**

11.08 SALE, TRANSFER OR LEASE: In the event the business and assets of the Employer are sold, exchanged, transferred or leased to any other business organization or entity or governmental unit or division thereof, the Plan will automatically be terminated, and the rights of all Members to benefits accrued to the date of such termination shall fully vest immediately. Upon termination of the Plan in accordance with the provisions hereof, the share of the assets of the Trust Fund available for distribution to the affected Members and Beneficiaries shall be allocated and distributed in accordance with the following procedure:

- (a) The Committee shall determine the date of distribution.
- (b) The distribution of the asset value will, subject to the provisions of Section 417(e)(1) of the Internal Revenue Code of 1986, be provided by the purchase of insured annuities from a company or companies selected by the Committee for each class of Members and other persons entitled to benefits under the Plan, as specified in (c) below, except that, in lieu of the purchase of an annuity, a lump sum distribution may be made to or on behalf of a Member if (i) the actuarially equivalent single sum value of the benefit (payable as a lump sum settlement) to be distributed to him or on his behalf under the provisions of this Section 11.08 is equal to or less than \$5,000, or is equal to or less than such larger amount that is permitted as an involuntary cashout of benefits under rules and regulations of the Internal Revenue Service and (ii) such distribution is made in accordance with the provisions of Section 5.12. Any annuities purchased pursuant to the provisions of this Section 11.08 will be subject to the provisions hereof pertaining to the Qualified Joint and

Survivor Annuity Options and to the Qualified Preretirement Survivor Annuity.

(c) The Committee shall determine the asset value available for distribution after taking into account the expenses of such distribution. After having determined such asset value available for distribution and subject to the applicable provision of any Supplement hereto pertaining to the distribution of assets upon the termination of the Plan, the Committee shall allocate such asset value as of the date of termination of the Plan in accordance with the application of Section 4044 of the Employee Retirement Income Security Act of 1974, as amended, to nongovernmental plans.

(d) In the event there be asset value remaining after satisfaction of all liabilities of the Plan to Members and Beneficiaries, the Plan shall be deemed to be amended in order to allocate any such residual assets, after purchase of annuities for inactive Members, to the Active Members, Retired Members and eligible beneficiaries of Active or Retired Members, who are deceased, in the Plan on such date of Plan termination. The deemed amendment to the Plan shall provide an additional benefit equal to the Member's Final Average Monthly Compensation multiplied by his Credited Service as of the date of termination further multiplied by a percentage which will exactly eliminate the residual assets based upon the mortality and interest rate assumption described in Section 1.05 of the Plan. If the Plan terminates, the additional benefit for Members in the active service of the Employer, Retired Members and eligible beneficiaries of Active or Retired Members, who are deceased, shall be paid in lump sum as soon as practical after approval of the

appropriate governmental agencies.

(e) The order of priorities for, and the amounts and methods of, the distributions set forth in (c) above and the rights of Members and Beneficiaries to benefits under the Plan shall be subject (i) to the distribution rules set forth in the Plan, (ii) to the limitations provided by Section 5.07 of the Plan and (iii) to any changes required by the Internal Revenue Service as a condition for issuing a favorable determination letter stating that the distribution of assets will not adversely affect the continued qualified status of the Plan under Section 401(a) of the Code.

(f) As soon as practicable after the date that a favorable determination letter is received from the Internal Revenue Service stating that in its opinion the method of distribution will not adversely affect the continued qualified status of the Plan under Section 401(a) of the Code, the Committee shall direct the Trustee to distribute the assets to the affected parties in accordance with such method. **[This Section is effective beginning October 1, 2007, and thereafter.]**

11.09 SUSPENSION OR DISCONTINUANCE OF EMPLOYER CONTRIBUTIONS: If the Employer fails to make the contributions to the Plan required by Article IX of this Plan to fund the benefits hereunder and such failure constitutes a suspension of contributions which either affects benefits to be paid or made available to Members, then the Employer and the Trustee shall each give any required notification to the Commissioner of Internal Revenue and any other federal agency. During any such period of suspension, all provisions of the Plan and Trust as to the Employer and its Employees other than the provisions relating to Employer

contributions, shall continue in force and effect. Upon complete discontinuance of Employer contributions to the Plan, the rights of all of its Members to benefits accrued to the date of such discontinuance, to the extent then funded, shall vest immediately in accordance with the provisions of Section 11.02.

11.10 NON-TRANSFERABILITY: Notwithstanding any other provision of this Plan to the contrary, if any annuity contract or life insurance contract is distributed to a Member hereof, it must be issued or endorsed to be non-transferable; that is, such contract must be issued or endorsed so that the owner thereof cannot sell, assign, discount or pledge as collateral for a loan or as security for performance of an obligation from or to any other person other than the issuer thereof.

11.11 NO MERGER OF PLAN: Notwithstanding any other provision hereof, the Plan will not be merged or consolidated with, nor shall any assets or liabilities of the Plan be transferred to, any other plan.