

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

STEPHEN J. SAFRANEK, et al,
-vs-

Plaintiffs,

Hon. Melinda Morris

Case No. 07-1134-CZ

THOMAS STEPHEN MONAGHAN,
BERNARD DOBRANSKI,
AVE MARIA SCHOOL OF LAW,
FRIENDS OF AVE MARIA SCHOOL OF LAW,
a/k/a AVE MARIA SCHOOL OF LAW FOUNDATION,
and AVE MARIA FOUNDATION,

Defendants.

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AMENDED
MCR 2.116(C)(4) MOTION FOR
SUMMARY DISPOSITION BY
DEFENDANTS THOMAS S. MONAGHAN
AND THE AVE MARIA FOUNDATION

AMENDED MCR 2.116(C)(4) MOTION FOR SUMMARY DISPOSITION
BY DEFENDANTS THOMAS S. MONAGHAN AND THE AVE MARIA FOUNDATION

Defendants THOMAS S. MONAGHAN ("Monaghan") and the AVE MARIA FOUNDATION ("AMF") collectively "Defendants"), by their Counsel, PEAR SPERLING EGGAN & DANIELS, P.C., move for summary disposition under MCR 2.116(C)(4) for lack of subject matter jurisdiction, and state as follows:

1. Paragraph 2 of the First Amended Complaint ("the complaint") alleges that this case arises out of Plaintiff Safranek's employment relationship with Defendant Ave Maria School of Law ("AMSL"). Plaintiff challenges an adverse employment decision made by AMSL against him, namely the revocation of his tenure as a Professor of Law and termination of his employment for cause. The employment-related claims made against the Moving Defendants arise exclusively in tort and consist of tortious interference, fraud and silent fraud.
2. The moving Defendants are the Chairperson of AMSL's Board of Governors ("Monaghan"), and the Ave Maria Foundation ("AMF"), a Michigan non-profit corporation that has been the primary non-tuition funding source of AMSL to date.
3. On March 6, 2008, AMSL's Board of Governors, including its Chair, accepted the recommendation of its Tenure Hearing Panel and terminated Safranek's employment and revoked his tenure for cause. The cause found by the panel was that Safranek had engaged in behavior that was "inimical to the best interests of the law school."
4. AMSL was incorporated in 2000 as a private, non-profit religious institution with an orthodox Catholic mission expressly articulated in its Articles of Incorporation and its Faculty Handbook. As a *precondition* to bearing the title of a "Catholic law school," and to operating as such in Ann Arbor, Michigan, AMSL necessarily needed to request, and in fact received, the express written consent of the Catholic Diocese of Lansing.

5. With ecclesiastical authority, the Faculty Handbook was permitted to state: "Ave Maria School of Law is a Catholic law school . . . Inspired by Pope John Paul II's encyclical *Fides et Ratio*, Ave Maria School of Law will offer a distinctive legal education – an education characterized by the harmony of faith and reason." *Section III*. In all respects, AMSL's distinctive educational mission is marked by clear and obvious orthodox Catholic characteristics
6. The employment-related tort claims made against the Moving Defendants therefore give rise to application of the "ministerial exception," which has its roots in the Establishment and Free Exercise of religion clauses of the First Amendment to the United States Constitution (as extended to the states by the Fourteenth Amendment). The "ministerial exception" "bars any inquiry into a religious institution's underlying motivation for a contested employment decision." *See Weishuhn v Catholic Diocese of Lansing*, 279 Mich App 150 (2008).
7. AMSL's tenured faculty, including Plaintiff, were "ministerial employees" of AMSL as a matter of law, because they were required by AMSL's mission, as incorporated into the Faculty Handbook (attached to complaint) to "integrate the moral and social teachings of the Catholic Church" into the legal education provided by AMSL, and to evaluate their own research and scholarship in light of the moral and social teachings of the Church.
8. Here, the "ministerial exception" bars this Court's inquiry into the decision-making process behind the contested employment decision, namely that as AMSL's Chairman, Defendant Monaghan accepted the Tenure Hearing Panel's recommendation that Plaintiff's employment be terminated and that tenure be revoked.
9. Moreover, the related legal doctrine of "ecclesiastical abstention" is pertinent to the court's lack of subject matter jurisdiction of AMSL's employment decision and the allegations concerning AMSL's governance. While Plaintiff, who has never been a member of

AMSL's Board, lacks standing to litigate the "best interests" of the religious institution, countless hours of discovery in this case have been devoted to exploring and contesting this very issue. While Plaintiff lacks standing to litigate the appropriateness of AMSL's relationship with its Catholic priest, countless hours of discovery in this case have been devoted to exploring and contesting this issue. While Plaintiff lacks standing to litigate the nature, extent and sincerity of Defendant Monaghan's personal Catholic religious beliefs, countless hours in this litigation have been devoted to mischaracterizing and deriding those beliefs.

10. In Plaintiff's fraud claim against Monaghan and AMF, Plaintiff alleges that Monaghan affirmatively represented that AMSL's operation would be "consistent with . . . Catholic moral and ethical precepts" and that Monaghan's representation was false because AMSL's operation was not "consistent with . . . Catholic moral and ethical precepts." *Id* *And* *Comp.* ¶¶ 118*b*. & 119*b*. The court lacks jurisdiction and/or should abstain from deciding the nature of "Catholic moral and ethical precepts."

11. Under the "ecclesiastical abstention" doctrine, this court must, and should, abstain from inquiring into, or interfering with, governance of the religious institution, appropriateness of its chosen Catholic priest, and the nature of the religious beliefs held by members of the governing body of the religious institution, including Defendant Monaghan as Chair, and allegations that the operation of the law school was "inconsistent" with Catholic precepts.

WHEREFORE, for all the foregoing reasons, which are more fully articulated in the following brief, the Moving Defendants, Monaghan and AMF, respectfully request that this Court enter an order dismissing the claims against them alleged in Plaintiff's First Amended Complaint, on the basis of a lack of subject matter jurisdiction, with prejudice.

BRIEF IN SUPPORT OF MCR 2.116(C)(4) MOTION

I. STATEMENT OF FACTS

A. AMSL Has a Clear and Obvious Religious Mission.

The Ave Maria School of Law ("AMSL") is a private, non-profit, educational institution expressly founded on principles of orthodox Roman Catholicism, as defined in AMSL's written Mission Statement. When AMSL was created, the Articles of Incorporation filed with the State of Michigan contained a clear and obvious orthodox Catholic religious mission. See *Exh 1, Art's of Incorpor. Art II* (*emphasis added*). The Articles of Incorporation also establish that AMSL is a non-profit corporation, formed under Section 501(c)(3) of the Internal Revenue Code of 1986. See *Exh 1, at Art VII(a)* (*granted and recognized by the IRS*).

AMSL's mission was thereafter incorporated into its Faculty Handbook (attached to complaint) and expresses the Catholic religious mission in an obvious manner. See *Exh 2, Faculty Handbook*. The Handbook also sets forth the reasons for revocation of tenured faculty. Section III J. I. states that AMSL may terminate a tenured faculty member "for cause," defining "cause" to include "[a]ctions otherwise inimical to the best interests of the Law School." AMSL's Board of Governors, including Defendant Monaghan as Chair, accepted the recommendation of its Hearing Panel that Plaintiff Saffranek's actions were inimical to the best interests of AMSL, and this Court lacks jurisdiction to review Defendant Monaghan's decision-making in that regard or to review the Board's determination that Plaintiff is not an appropriate ministerial employee to carry out the clear religious mission of the law school.

B. Ecclesiastical Authority Has Determined AMSL is a Catholic Law School.

The 1983 Code of Canon Law provides rules and norms of behavior for Catholics and the fundamental elements of the hierarchical and organic structure of the Church. It is "to be

regarded as an indispensable instrument to ensure order both in individual and social life, and also in the Church's activity itself." See *Exh 3, Sacrae Disciplinae Leges, Apostolic Constitution, Pope John Paul II*. Canon 803, Section 1, provides that a school cannot be "Catholic" until "ecclesiastical authority or a public ecclesiastical juridic person supervises or... ecclesiastical authority recognizes as such by means of a written documents." Canon 803 continues in Section 3 "no school may bear the title *Catholic school* without the consent of the competent ecclesiastical authority." This edict is specifically extended to universities in Canon 808, "no university may bear the title or name *Catholic university* without the consent of the competent ecclesiastical authority." See *Exh 4, 1983 Code of Canon Law*.

In 1999, prior to AMSL's incorporation and to further AMSL's orthodox Catholic mission, AMSL's founding dean requested permission from the Catholic Diocese of Lansing ("Diocese") for AMSL to "call itself a 'Catholic' law school," and presented evidence of AMSL's Catholic mission. The dean communicated that the inspiration for AMSL was taken from Pope John Paul II's writings, including, "*Fides et Ratio*" and "*Ex Corde Ecclesiae*." The dean wrote that "we have made a conscious effort to internalize the requirements of *Ex Corde Ecclesiae* and to shape the entire institution by drawing from the intellectual heritage set forth so eloquently in the Pope's writings." See *Exh 5, Dobranski Ltr to Monsignor Langford*.

Dean Dobranski described each proposed document that would, when completed, reflect the Catholic intellectual tradition of *Ex Corde Ecclesiae*, including AMSL's By-Laws, AMSL's Faculty Handbook, AMSL's Student Handbook and the Dean's Viewbook. The dean described the "Viewbook" as the document showing how AMSL's curriculum "will, where relevant, incorporate Catholic doctrine and morals. Our students will be given an appropriate ethical formation; in fact, we believe that our effort to do this (through required courses and other

courses, and through other aspects of the intellectual and spiritual life of the law school) is unsurpassed at any other law school." *Id.* Dean Dobranski defined AMSL as a place where "our program will seek to unite intellectual learning with the religious dimension of life." *Id.* On October 19, 1999, the Bishop granted the Dean's request, stating that AMSL's formation documents were in compliance with the letter and spirit of *Ex Corde Ecclesiae*. See *Exh 6, Bishop Mengeling Ltr to Dobranski*; Diocesan permission was also given for AMSL to celebrate weekday Mass and provide the Blessed Sacrament at its chapel (where Father Michael Orsi serves as Chaplain). See *Exh 7, Bishop Mengeling Ltr to Roney*.

Ex Corde Ecclesiae sets forth AMSL's obligations as a Catholic institution of higher education. See *Exh 3, Ex Corde Ecclesiae*. The Code of Canon Law also sets forth AMSL's obligations as a "Catholic" law school. Canon 803, § 2, mandates that "the formation and education given in a Catholic school be based upon the principles of Catholic doctrine; teachers are to be outstanding for their correct doctrine and integrity of life." See *Exh 4, 1983 Code of Canon Law*. Canon 810, § 2, gives a duty to the diocesan bishops to be "vigilant that in these [Catholic] universities the principles of catholic doctrine are faithfully observed." Canon 811, § 2, calls out the classroom duties of the faculty at Catholic universities, "[i]n the individual Catholic universities classes should be given which treat in a special way those theological questions which are connected with the disciplines of their faculties." *Id.*

Dean Dobranski described the essence of how AMSL would fulfill these Canonical edicts in a 2002 article in the University of Toledo Law Review. In it, the dean stated that the difference between AMSL and other religiously-affiliated law schools is the curriculum, which expressly promotes the integration of faith and reason. See *Exh 19, Dobranski, New Lawyers*

for a New Century – Legal Excellence and Moral Clarity: the Founding of Ave Maria School of Law, The Univ of Toledo Law Review, Vol 31, No 1, Fall 2002, pp 5-7).

C. AMSL is a Religiously-Affiliated Law School

To celebrate the five-year anniversary of AMSL's founding, Plaintiff Safranek himself gave a lecture, which he memorialized in writing, where he states that he was personally charged with providing Defendant Monaghan with a "proposal for a new Catholic law school." In that proposal, he described what a Catholic law school would be." See *Exh 9, The Founding of Ave Maria School of Law, A Five Year Perspective*, p 5. Plaintiff stated that key to his proposal was *Fides et Ratio*, and the understanding of a Catholic law school as one "where the Catholic intellectual tradition was brought to bear on every aspect of instruction." *Id* p 5. Plaintiff ended his lecture (& writing) with a prayer that those in attendance should "thank God for His blessings upon us and pray that we may not only use His gifts with wisdom and charity until that day when we will be called to meet with Him, but also that we may hear the Words, 'well done my good and faithful servant.' Amen." *Id* p 7. Catholic religious doctrine and practice permeates every aspect of AMSL, including faculty's participation in prayer.

In his lecture, Plaintiff Safranek noted that there were several other faculty members charged with forming a Catholic law school, chief among those being Joseph Falvey, an AMSL incorporator, who became the first Associate Dean for Academic Affairs and a tenured professor. See *The Founding*, p 1. Falvey provided pertinent testimony about the law school's mission. See *Exh 10, Falvey Dep*, pp 453-54. Additionally, Dean Dobranski has testified that not only was AMSL a Catholic law school, but that it adhered to the traditional principals of the orthodox Catholic intellectual tradition. See *Exh 11, Dobranski Dep*, Vol. VI, pp 1030-32. Plaintiff has likewise admitted that AMSL was unique in its use of traditional Catholic orthodoxy and the use

of the Catholic intellectual tradition in the classroom. See *Exh 12, Safranek Dep, Vol. 1, pp 9-11*. As noted above, in 2002 Dean Dobranski wrote about this specific use of Catholic doctrine in the classroom as well. See *Exh 20, Dobranski, New Lawyers for a New Century, pp 5-7*. AMSL Tenured Professor James Some, who also sat on the Tenure Hearing Panel that recommended revocation of Plaintiff's tenure, was also deposed in this case, and he too testified about the unique religious mission incorporated into teaching at AMSL. See *Exh 13, Some Dep, pp 31-34*. AMSL's mission was, and has always been, that every teaching professor was expected to spread the Catholic faith, and incorporate Catholic doctrine, into that professor's course curriculum.

D. The Federal and State Constitutions Protect Religious Institutions.

The First Amendment to the United States Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," referenced as the "Free Establishment" and "Free Exercise" clauses; they have been read to include religious educational institutions (schools, universities), and not just churches themselves. The Michigan Constitution also provides protection for religious education: "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Const. 1963, Art. VIII, §1, Eff. Jan. 1, 1964.

II. ARGUMENT

A. Legal Standard.

When reviewing a motion for summary disposition for lack of subject matter jurisdiction, MCR 2.116(C)(4), this Court must determine whether the pleadings demonstrate that the defendant was entitled to a judgment as a matter of law. *Cork v Applebee's of Mich, Inc.*, 239 Mich App 311, 315 (2000). A motion under MCR 2.116(C)(4) is a question of law for the judge, not a question of fact for the jury, and while there may be an evaluation of the factual elements of the case during a motion brought under MCR 2.116(C)(4), that evaluation is for the judge --

not the jury. *Weishuhn v Catholic Diocese of Lansing*, 279 Mich App 150, 176 (2008). This is so because subject matter jurisdiction of a court arises by law, not by the consent of the parties. *Bowie v Arder*, 441 Mich 23, 56 (1992). And, a challenge to a court's subject matter jurisdiction may be raised at any time. *Polkton Charter Twp v Pellegroni*, 265 Mich App 88, 97-98 (2005).

B. This Court Lacks Subject Matter Jurisdiction to Hear this Case under Both the Ministerial Exception and the Ecclesiastical Abstention Doctrine.

Both the ministerial exception and the related ecclesiastical abstention doctrine provide separate bases for this Court to determine that it lacks subject matter jurisdiction over the claims at issue. Under the "ministerial exception," civil courts cannot exercise subject matter jurisdiction over cases involving the employment-related claims of "ministerial" employees. Further, under the ecclesiastical abstention doctrine, the civil courts are required to abstain from making decisions involving the internal decision-making of a faith-based institution such as AMSL. Under both of these legal doctrines, which are expressly recognized in Michigan, this Court should dismiss Plaintiffs' claims for lack of subject matter jurisdiction.

The ministerial exception precludes subject matter jurisdiction over employment claims involving the relationship between a religious institution and its ministerial employees. *Weishuhn v Catholic Diocese of Lansing et al*, 279 Mich App 150, 157 (2008). It generally bars an inquiry into a religious organization's underlying motivation for a contested employment decision. *Id*. The ministerial exception in Michigan applies when (1) the employer is a religious institution, and (2) the employee is a "ministerial employee" under four articulated factors (prongs). *Id at 159*. See also *Hollins v Methodist Healthcare, Inc.*, 474 F3d 223 (6th Cir 2007).

Under the first factor, the employer does not necessarily need to be a traditional religious organization such as a church, diocese, or synagogue, or even an entity operated by a traditional religious organization. Faith-based organizations are also "religiously affiliated schools,

corporations, and hospitals.” *Hollins*, *supra*, 474 F 3d at 225. The religiously-affiliated employer is a religious institution when the employer’s “mission is marked by clear or obvious religious characteristics.” *Weishuhn*, *supra*, 279 Mich App at 159; *Hollins*, *supra*, 474 F 3d at 225-26.

Under the second factor, the exception does not depend on the employee being an “ordained minister.” The courts must look at “the *function* of an individual’s employment position,” rather than focusing on the fact of ordination. *Weishuhn*, *supra*, 279 Mich App at 159-60. Moreover, the status of an employee as a “ministerial employee” is not a fact issue to be decided by a jury, but is a legal conclusion for the court. *Klouda v. Southwestern Baptist Theological Seminary*, *et al*, 543 F Supp 2d 594, 610 (ND Tex 2008), citing *Starbom v Evans*, 198 F 3d 173, 176 (5th Cir 1999). Once it is determined that the employer is a religious institution, and the employee serves a ministerial *function* at the institution, then the ministerial exception applies, preventing court review of the employment decision *without further determination as to whether the employee’s claims are ecclesiastical in nature*. *Id* at 611.

Here, AMSL’s mission is marked by clear and obvious religious characteristics, as set forth in the Articles of Incorporation for AMSL, in the AMSL Faculty Handbook itself, and as understood by AMSL’s founders. The mission clearly envisions a Catholic, faith-based non-profit law school, which teaches about the intersection between Catholic doctrine and law. Plaintiff further alleges in his Amended Complaint that Defendants Monaghan and Dobranski consistently represented to him that AMSL was operating consistently with “Catholic moral and ethical precepts.” *See Am. Compl. ¶118b*. Moreover, Plaintiff himself spent considerable time in public forums, both in written communications and in speeches, discussing AMSL’s unique Catholic mission and vision. In his lecture, *The Founding of Ave Maria School of Law A Five Year Perspective*, Plaintiff admitted that he was charged with providing Monaghan with a

“proposal for a new Catholic law school. In that proposal, he described what a Catholic law school would be.” *See Exh 9, The Founding, p 5*. Thus, Plaintiff himself has characterized AMSL as the type of faith-based religious institution protected under *Weishuhn* and *Hollins*.

As a general rule, the *Weishuhn* Court noted, “if the employee’s primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship he or she should be considered clergy.” *Weishuhn*, *supra*, 279 Mich App at 170, (quoting *Assembly v Archdiocese of Detroit*, 173 Mich App 752, 760-61 (1988)(emphasis added)). This requires the court to “determine whether a position is important to the spiritual and pastoral mission of the church.” *Id*. The court noted that the ministerial exception exists in Michigan and precludes subject matter jurisdiction over claims involving the employment relationship between a religious institution and its “ministerial employees.” *Id* at 173.

Application of the ministerial exception requires the courts to merely determine the threshold question of “whether the resolution of a plaintiff’s claim would limit a religious institution’s right to choose who will perform particular spiritual functions.” *Id* at 174. The *Weishuhn* Court gave explicit instructions to future courts to determine whether, under the totality of the plaintiff’s duties, the plaintiff was a “ministerial employee” and provided four factors that courts must analyze to determine whether a plaintiff is a “ministerial employee.” *Id* at 178; *see Exh 21 (recitation of the four factors)*. With respect to the first factor, the “primary duties” analysis has been the subject of many cases involving faith-based secondary educational institutions. In *Klouda v Southwestern Baptist Theological Seminary et al*, 543 F Supp 2d 594 (ND Tex 2008), the court granted summary judgment and dismissed claims against both the seminary and its president on the basis that the plaintiff faculty member was a ministerial

employee as contemplated by the ministerial exception. In *Kloutz*, plaintiff taught classes on Old Testament languages, but the court specifically found that she was not an ordained minister, she did not teach or spread the faith and she was not involved in church governance. She was merely a faculty member. Moreover, the plaintiff was told she was fired merely because she was a woman. *Id.* at 596. The court found that because the seminary was a religious institution and the plaintiff's primary job duties were ministerial, that the court could not entangle itself in the decision of the seminary. *Id.* at 611. The court also found that the ecclesiastical abstention doctrine applied, such that even if the ministerial exception had not applied, judicial review would still have been improper. *Id.* The court further held that because plaintiff's claims were either derivative of or intimately related to the employment action taken by the seminary, all of the derivative claims were also dismissed for lack of subject matter jurisdiction. *Id.* at 613. Notably, the court dismissed the claims against *all* parties, including the seminary and the president of the seminary.

Further, in *Peruska v Gannon University et al*, the plaintiff, a chaplain at Gannon University, a private Catholic university, sued her former employer, the board of trustees of the university, the chair of the board of trustees and several officers of the university in their individual and official capacities, for discrimination and retaliation, civil conspiracy, negligent retention and supervision, fraudulent misrepresentation and breach of contract. 462 F 3d 294, 299 (3rd Cir 2006). The court determined that Gannon was a religious institution, and that plaintiff was a ministerial employee for purposes of the ministerial exception and dismissed plaintiff's claims (again against all defendants) for discrimination and retaliation, civil conspiracy, negligent retention and supervision. *Id.* The court defined the ministerial exception

as a doctrine that "operates to bar any claim, the resolution of which would limit a religious institution's right to select who will perform particular spiritual functions." *Id.* at 307.

In *McDonough v The Catholic University of America*, 83 F 3d 455 (DC Cir 1996), the plaintiff was denied tenure and sued Catholic University for sex discrimination and retaliatory conduct. The court dismissed all claims on the basis that the ministerial exception applied, and it had no subject matter jurisdiction over the employment decision. In *Assemany v Archdiocese of Detroit*, 173 Mich App 752 (1988), the ministerial exception was used in Michigan to bar the claims of a plaintiff who participated in the selection, presentation and teaching of music in the Catholic church, on the basis that he was a ministerial employee. In *EEOC v Hosanna-Tabor Evangelical Lutheran Church and School*, 582 F Supp 881 (ED Mich 2008), the court determined that a teacher at a religious school could not bring claims for retaliation against her former employer, when she was fired after a medical leave, even though her firing had nothing to do with religious instruction. The court noted that the defendant was a religious institution and the plaintiff was a ministerial employee.

In *The Advocate*, Winter 2002 edition, AMSL printed an article by Defendant Monaghan, noting the extreme importance of the faculty's Catholic vision. See *Exh 14, Monaghan, Having an Impact, The Advocate, Winter 2002* (emphasis added). Later in that same issue of *The Advocate*, Plaintiff Safranek was interviewed/profiled about the founding of AMSL. In that article, Plaintiff made the statement that "[w]e realized that you could have the signs of being Catholic such as crucifixes and Mass; however, if Catholicism wasn't integrated within the curriculum as part of the intellectual tradition, we were going to fail." See *Exh 15, Safranek, Faculty Profile: Stephen J. Safranek, The Advocate, Winter 2002* (emphasis added). Thus, not only does Plaintiff Safranek admit that AMSL is a religious institution, but he also admits that he

was a ministerial employee: that he was mandated to make Catholicism part and parcel of his teaching responsibilities in the classroom.

Courts have determined that even when the religious institution subjects itself to the process of accreditation, accepts federal or state funds for student aid or notes that it is an equal opportunity employer, the religious institution has not waived its right to assert the ministerial exception. In *Hollins v Methodist Healthcare, Inc.*, the plaintiff argued that the hospital had waived its right to rely on the ministerial exception on the basis that it had obtained accreditation from the Association of Clinical Pastoral Education, which included an agreement that the hospital would abide by the association's nondiscrimination policy. The court determined that the hospital could nonetheless invoke the exception, and dismissed for lack of subject matter jurisdiction over the claim. 474 F.3d at 224-25. The Sixth Circuit affirmed. *Id.* at 227.

The Sixth Circuit first noted that the ministerial exception applies to various statutory and common law claims, and that it applies if the employer is a religious institution and the employee is a ministerial employee. *Id.* at 225. The court then agreed with the trial court that the hospital was a religious institution and that plaintiff was a ministerial employee. *Id.* at 226. Plaintiff attempted to argue that the hospital had waived its right to assert the ministerial exception by subjecting itself to the accrediting entity, but the court noted that in order to waive a first amendment right, the entity must make the waiver "voluntarily, intelligently and knowingly." *Id.* (internal citations omitted). The court stated:

Given the presumption against waivers of constitutional rights and the heavy burden required to overcome that presumption, the district court found that the defendant "did not knowingly or voluntarily waive its constitutional right to be free from judicial interference with the selection of its ministers by seeking and obtaining...accreditation...[w]e have recognized that even when the plaintiff alleges that the religious tribunal's decision was based on a misapplication of its own procedures and laws, the CIVIL courts may not intervene.

Hollins, supra, 474 F.3d at 226-27. Giving further support for the court's lack of subject matter jurisdiction, Judge McKeague, who concurred with the majority, noted that the Seventh Circuit had specifically found that the ministerial exception was not subject to waiver (or estoppel) at all. *Id.* at 227. See *Tomic v Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006). Accordingly, as this court should find here, the Sixth Circuit determined that it had no subject matter jurisdiction over the matter and dismissed the action.

The Third Circuit has also addressed the issue of waiver of the ministerial exception in the context of a private religious institution accepting state and federal funding with conditions limiting discrimination and by repeatedly and publicly representing itself as an equal opportunity employer. *Perwaska v Gannon University et al, supra*, 462 F.3d at 308. In *Perwaska*, the court specifically found that the religious institution's acceptance of state or federal funding and/or the representation that the religious institution was an equal opportunity employer did not constitute waivers of the ministerial exception, because waivers of constitutional rights must be knowing and voluntary. *Id.* at 309.

2. The Ecclesiastical Abstention Doctrine Precludes Jurisdiction in this Matter.

The ecclesiastical abstention doctrine provides that civil courts do not have subject matter jurisdiction to entangle themselves in internal disputes of religious institutions. The doctrine as applied in Michigan has been summarized in several cases, and a good description is in *Abr v Moore*, 2003 Mich App LEXIS 946 (*Mich* 2003) at *2 (*emphasis added*)(*Exhibit 16*). Moreover, this country has a long history of prohibiting the courts from involving themselves in "ecclesiastical matters, such as disputes concerning theological controversy, church discipline, ecclesiastical government or the conformity of the members of the church to the standard of

morals required.” *Klouta v Southwestern Baptist Theological Seminary, et al.*, 543 F Supp 2d 594, 611 (ND Tex 2008), citing *Watson v Jones*, 80 US (13 Wall) 679, 733, 20 L ED 666 (1871).

In *Maciejowski v Breitenbeck*, 162 Mich App 410 (1987), the Michigan Court of Appeals noted that “[w]henver the court must stray into questions of religious doctrine or ecclesiastical polity the court loses jurisdiction,” no matter how the language is couched in the complaint. *Id.* at 414. The ecclesiastical abstention doctrine has been applied under a variety of circumstances. The constitutional provisions and their protections, as well as the ecclesiastical abstention doctrine, are not limited to churches. See *Klouta v Southwestern Baptist Theological Seminary, et al.*, 543 F Supp 2d 594 (ND Tex 2008).

As shown above, the courts have limited ability to review any religious entity’s governance decisions, including decisions to relocate. Here, if you take Plaintiff’s allegations at face value, this case is about his employment relationship with AMSL. See *Am. Compl.* ¶2. However, Plaintiff’s employment-related claims are couched in terms of his vehement disagreement with the governance of AMSL, including his disagreement with the AMSL Board’s decision to relocate the law school to Florida. Specifically, Plaintiff complains of how Defendants Monaghan and Dobranski, as the Chairman of the Board of Governors and President and Dean, respectively, made governance decisions for AMSL in their fiduciary capacities. See *Am. Compl.* ¶¶30-90. And discovery in this case has largely focused on AMSL’s governance, rather than the employment decision at issue. Either way, whichever label is placed on these claims, this Court does not have subject matter jurisdiction to hear disputes over the governance of AMSL in the guise of an employment case.

Plaintiff’s complaint suggests that this case is really about the governance of AMSL. See *Am. Compl.* ¶¶30-90. Plaintiff’s undisguised complaint concerns the Board of Governors’

decision to relocate AMSL. Plaintiff begins his complaint by alleging that the decision to move AMSL to Florida was based on an “improper purpose” in paragraph 30. Plaintiff continues with this line of allegations through paragraph 63, so for a full 33 paragraphs in his Amended Complaint, he complains about the governance of AMSL with respect to the move. After this, Plaintiff alleges improper governance of AMSL with respect to tax treatment of a professor’s compensation. Following this line of allegations, Plaintiff argues that AMSL’s fiduciaries improperly handled various other governance decisions at AMSL, until the point that he was allegedly censured and disciplined for, in his own words, “under[taking] numerous efforts to counteract the improper influence of [Chairman] Monaghan and his conflicting interests.” See *Am. Compl.* ¶¶55-90. Plaintiff lacks standing to place governance questions directly in issue, and the court lacks jurisdiction to decide governance questions in any event.

AMSL is a “religious institution.” For purposes of comparison, the Supreme Court in *NLRB v Catholic Bishop of Chicago*, 440 US 490, 499-507 (1979) and its progeny, in the context of NLRB jurisdiction, stated that parochial schools (i.e., church operated schools) that taught both religious and secular subjects were religious institutions. The Michigan Court of Appeals has expressly followed *Catholic Bishop* (as to MERC issues) in *MEA v Christian Bro’s Inst of MI db/a Brother Rice HS*, 267 Mich App 660 (2005). In the cases following *Catholic Bishop*, courts have established a three part test to determine the primary purpose of the school. To determine whether a school is a *bona fide* religious institution, the school must meet the following criteria: (1) it holds itself out to students faculty and the community as providing a religious educational environment; (2) it is organized as a nonprofit; and (3) it is affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization. *University of Great Falls v NLRB*, 278 F3d 1335, 1343-45 (DC Cir 2002). See also *Carroll*

College, Inc v NLRB, --- F3d ---, 2009 WL 635114 (DC Cir 2009). The test was developed to make sure that religious institutions avoided government inquiry into the substance and contours of their religious beliefs and missions. *Carroll College*, *supra*, 2009 WL 635114 at *3. AMSL fulfills all three parts of this test. AMSL's formation documents, and public documents cited earlier clearly and obviously state that it is a Catholic law school and it holds itself out as such to the public. It is a non-profit organization, organized under section 501(C)(3) of the 1986 IRS code. Finally, it was given express diocesan consent to call itself a Catholic law school, with all of the rights and obligations attached to it, including complying with Canon law.

In *Peruska v Gannon University et al*, 462 F 3d 294 (3rd Cir 2006), while the case was ultimately decided on the basis of the ministerial exception, the court made it a point to note that the activity that gave rise to the plaintiff's claims was plaintiff's dismissal from employment and that such activity by a private Catholic university was *protected under the ecclesiastical abstention doctrine*, such that the court had no subject matter jurisdiction to review it. *Id.* at 308 (citing *Elvig v Calvin Presbyterian Church*, 375 F 3d 951, 955 (9th Cir 2004)).

Additionally, in *Dalkin v Roodbeen*, 206 Mich App 591, 593-94 (1994), the court held that civil courts had no subject matter jurisdiction to hear claims that students had been inappropriately kept out of a religious school, on the basis that the ecclesiastical policies and services of the school enjoyed First Amendment protection. In *Sikh Society of Michigan, Inc v Singh et al*, 2004 Mich App LEXIS 537 (Mich 2004) at *3 (Exhibit 17), The court determined that there was no civil court jurisdiction on the basis that the case involved the manner in which the society sought to fulfill its mission of promoting the Sikh faith.

Plaintiff has two main claims against Defendants AMF and Monaghan, tortious interference with business relationships and fraud. In his tortious interference claim, Plaintiff

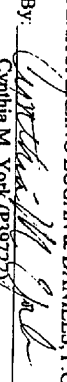
alleges that the "interference" in his employment relationship was undertaken "solely to further [Monaghan's] interest in moving [AMSL]...in fulfillment of a religious vision purportedly received by Defendant Monaghan." *Id.* at ¶113. Second, in Plaintiff's fraud claim, he alleges that Monaghan made representations that AMSL's operations would be "consistent with...Catholic moral and ethical precepts" and that those representations were false, because AMSL's operation was not (allegedly) consistent with Catholic moral and ethical precepts. *Id.* at ¶¶118b-119b. This cuts to the very core of the problem with this court addressing Plaintiff's allegations: how is it appropriate, in light of the Free Exercise clause, for a civil court to determine what is appropriate religious governance of AMSL? It is not.

The various discovery orders in this matter show exactly how far into the governance of AMSL this action has improperly strayed, without proper civil court jurisdiction. The orders have given Plaintiff access to materials that are *only* relevant to the governance of AMSL, and not Plaintiff's employment relationship with AMSL. For example, Defendants have been ordered to produce 10 years worth of Board of Governors meeting minutes, not just those that are relevant to Plaintiff (or former Plaintiffs). Defendant Monaghan has been ordered to produce 10 years worth of his *personal notes*, whether or not they relate to Plaintiff, including all of his notes that are related to AMSL's relocation. Defendants have been ordered to produce all daily reports from Defendant Dobranski and Defendant Monaghan concerning the daily activities at the law school, not just those related to Plaintiff. The vast majority of court-ordered discovery does not relate to Plaintiff's employment relationship with AMSL, but concerns his disagreement with AMSL's governance, which he lacks standing to address in any event.

To take Plaintiff's allegations at face value, his claims relate to his employment relationship with AMSL, a religious institution. He cannot prevail here, either, because civil

courts have no subject matter jurisdiction over cases in which a religious institution's disciplinary procedure is challenged. This prohibition is clearly outlined in *Ogle v. Church of God et al*, 2005 US App Lexis 23666 (6th Cir 2005)(Exhibit 18). The *Ogle* court analyzed the case in light of U.S. Supreme Court precedent that no civil court could interfere with the determinations of the faith-based institution's disciplinary bodies on matters involving "questions of discipline, or of faith, or ecclesiastical rule, custom, or law." *Id* at **10 (citing *Watson v Jones*, 80 US 679, 727 (1871)). Moreover, the *Ogle* court noted that the First Amendment bars civil courts from reviewing decisions of religious disciplinary bodies relating to the employment of clergy. *Id* at **10-11. The court decided that regardless of how the claims were labeled in the plaintiffs' complaint, resolving the plaintiffs' claims would require the court to enter into areas implicating the First Amendment. *Id* at *11. Based on these findings, the court determined that because the breach of implied contract, tortious interference with business relationships, conspiracy, invasion of privacy, defamation and declaratory judgment actions implicated the church's internal disciplinary proceedings, the court did not have subject matter jurisdiction over those primary claims. Thus, the court also lacked jurisdiction over the remaining secondary claims of intentional infliction of emotional distress, loss of consortium and punitive damages. *Id* at **12. As in *Ogle*, the Free Exercise Clause bars the Court from hearing any of Plaintiff's claims in this matter and all of his claims should be dismissed.

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