UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

STEPHEN DEL SESTO, AS RECEIVER AND ADMINISTRATOR OF THE ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND RETIREMENT PLAN, et al.	:	
Plaintiffs,	:	
v.	:	C. A. No.18-cv-00328-WES-LDA
PROSPECT CHARTERCARE, LLC, et al.	:	
Defendants.	:	

REPLY TO PLAINTIFFS' OBJECTION TO DEFENDANT THE ANGELL PENSION GROUP, INC.'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

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The Angell Pension Group, Inc. ("Angell") hereby submits this memorandum of law in reply to the Opposition (Dkt. No. 97) (the "Opposition" or "Opp.") filed by Plaintiff Del Sesto ("Del Sesto") and Plaintiffs Major, Zompa, Bryden, Willner, Short, Boutelle and Levesque (the "Class Plaintiffs") (collectively with Del Sesto, the "Plaintiffs") to Angell's Motion to Dismiss the First Amended Complaint ("FAC") pursuant to Fed. R. Civ. P. 12(b) ("Motion to Dismiss") (Dkt. No. 68).[1]

INTRODUCTION

Plaintiffs' Opposition, like the FAC, is a veritable "house of cards" built on a legally erroneous foundation that some lesser pleading standard applies in this case. Without any valid legal basis, Plaintiffs suggest that they do not need to plead ***facts***, as opposed to mere ***conclusions***. But the law does not provide Plaintiffs the free pass they so desperately want, and need, to survive dismissal. Plaintiffs cannot build plausible claims upon conclusory allegations, tangential leaps, and buzzwords like "knowledge" and "conspiracy" to survive dismissal under Fed. R. Civ. P. 12(b)(6) and 9(b).

First, Plaintiffs' allegations do not support an action against Angell unless one is willing to entertain preposterous and implausible conclusions. The supposed telephone message is a good example. Plaintiffs contend that if a Plan participant is sufficiently concerned about the future solvency of the Plan to call Angell and ask about it, the participant would be comforted and lulled into complacency by the statement: *"We can't speak to the future solvency of the Plan."* Apparently, Plaintiffs wish to convert this statement regarding Angell's inability to speak to the future solvency of the Plan into a personal guarantee by Angell of the future solvency of the Plan. As another example, Plaintiffs would like this Court to take a document which plainly states:

[1] All Capitalized terms herein have the same meaning as in Angell's Motion to Dismiss.

"These figures are not a promise or guarantee of any future benefits" and convert it into a personal guarantee by Angell of future benefits owed.

Second, Plaintiffs would like this Court to overlook their failure to allege facts that are essential to the basic chain of causation. For example, Plaintiffs consider it sufficient to allege that Angell agreed to respond to a telephone inquiry in a particular manner if asked, without alleging that Angell was ever actually asked the question or ever actually gave the message.[2] This and other similar failures are more than mere technicalities.

Third, Plaintiffs have utterly failed to allege any damages that could be causally related to Angell's alleged conduct. Plaintiffs wish to wave away the requirement of a causal connection by asking the Court to speculate as to vague "life-altering decisions" which are nowhere to be found in the FAC, and for which Plaintiffs have, to this day, supplied no specifics to support a finding of detrimental reliance.

Fourth, Plaintiffs seek to fault Angell for failing to dispel notions that were never asserted. There is no allegation that anyone ever claimed the Plan ***was*** covered by ERISA, yet Plaintiffs seek to implicate Angell in a conspiratorial cover-up because it did not warn Plan participants that the Plan ***wasn't*** covered by ERISA.[3] There is no allegation that Angell ever told Plan participants

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[2] Plaintiffs, in their Opposition, attempt to bypass this necessary allegation by contending that discovery is necessary to determine which Plan participants, if any, received the telephone message. However, seven of the Plaintiffs are Plan participants, and they would not need any discovery to determine whether any of them had been given the telephone message. None of them have alleged they received this message directly or even through conversations with other Plan participants. Thus, none of the Class Plaintiffs can claim any breach, reliance or damages from the supposed telephone messages, which they never received.

[3] As Angell pointed out in its Motion, Plaintiffs also claim (and Angell agrees), that the Plan ***is*** covered by ERISA, raising the question of how it could be fraudulent to "conceal" a falsity. Plaintiffs' Opposition attempts to paper over this inconsistency by claiming that "[i]f it turns out that the Plan was covered by ERISA, it will be because that fraudulent scheme [to avoid ERISA coverage] ultimately failed." (Opp. at 33.) But, by Plaintiffs' logic, it would ***also*** have been

that St. Joseph Health Services of Rhode Island ("SJHSRI") ***was*** making the recommended contributions, yet Plaintiffs seek to fault Angell for failing to notify participants that SJHSRI ***wasn't*** making the contributions.[4] This issue goes beyond the question of whether Angell had a duty to Plan participants – Plaintiffs seem to think Angell's duty, whatever it was, included reading the participants' minds to find out what facts, which were never asserted to them, they might think of and rely on, and then to correct those misimpressions.

Fifth, Plaintiffs contend that by uttering the word "conspiracy," they can wave a magic wand and make the Fed. R. Civ. P. 9(b) pleading standard disappear. If this were true, the requirement that each defendant's communications be identified with particularity would disappear entirely, never to be seen again in any case. Plaintiffs contend that the mere use of the word "conspiracy" is sufficient, without any allegations that would lead to a plausible inference of Angell's participation in any conspiracy, and indeed, contrary to the numerous allegations in the FAC of perfectly legal conduct by Angell that is completely incompatible with Angell being a co-

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fraudulent to claim that the Plan ***wasn't*** covered by ERISA. So, again, ultimately Plaintiffs seek to fault Angell for failing to make false statements. Further, Plaintiffs claim the PBGC will run out of money and not pay their benefits. So, if Angell had told participants that the Plan ***was*** covered by ERISA, Plaintiffs would now claim that Angell fraudulently convinced participants that their benefits were protected. Accepting Plaintiffs' logic would inevitably lead to the conclusion that – no matter what Angell said or didn't say – it would have been fraudulent; thus, Plaintiffs' position is untenable.

[4] The FAC details various booklets prepared by SJHSRI and given to Plan participants stating that the Diocese or the Hospital pays the entire cost of the Plan, which is not the same as making the actuarially recommended contributions. The FAC also details booklets given to Plan participants stating that actuaries calculate the amount of money which the Hospital will pay to the Plan and that this money is set aside. However, these booklets were prepared in 1982, 1986, 1988, 1993, 1995, 1996, and finally in 1999, six years *before* Angell became the Plan's actuary. (FAC ¶¶ 268, 269, 271.) The FAC also details that, as late as 2006, SJHSRI's financial statements said it was the Hospital's "policy" to fund pension costs within the guidelines established by ERISA, but does not allege that these financial statements were distributed to Plan participants, that Angell ever saw these statements, or that the statements were untrue at the time they were made. (FAC ¶ 227.)

conspirator.

Sixth, Plaintiffs contend that they can allege "knowledge" by Angell without any requirement that such an allegation be plausible and supported by factual allegations. As discussed below, that is not the standard.

Each of these fatal failures of law and logic underpin each and every count against Angell. The superficiality of the "knowledge" and "conspiracy" allegations, coupled with the speculative nature of the claims as a whole, makes clear that Plaintiffs have failed to plead any plausible cause of action against Angell under the requirements of Fed. R. Civ P. 8, 9(b) and 12(b)(6). For the reasons discussed more fully below, Plaintiffs FAC cannot survive dismissal.[5]

ARGUMENT

I. PLAINTIFFS MUST PLEAD SUFFICIENT *FACTS*, NOT *CONCLUSIONS*, TO STATE A PLAUSIBLE CLAIM UNDER FED. R. CIV. P. 12(B)(6)

Plaintiffs disingenuously attempt to shift the burden here, suggesting that defendants bear the "burden of proof" at the pleadings stage. (Opp. at 6.) That is wrong. There is no "evidence" or "proof" at this stage. Rather, the burden is squarely on *Plaintiffs* to state "sufficient factual matter," accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)); *Hochendoner v. Genzyme Corp.*, 823 F. 3d 724, 730 (1st Cir. 2016) ("*plaintiff* bears the burden of plausibly alleging a viable cause of action.") (emphasis added).

This plausibility standard articulated by *Iqbal/Twombly* has become the "new normal" in federal civil practice. *A.G. v. Elsevier, Inc.,* 732 F.3d 77, 78–79 (1st Cir. 2013). Conducting a

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[5] In order to avoid duplication, Angell hereby adopts and incorporates by reference the arguments of the Prospect Entities and Diocesan Entities addressing why PBGC is a necessary party; why PBGC's single employer trust fund is solvent; why the applicability of ERISA leads to preemption of Plaintiffs' state law claims and why the Class Plaintiffs do not have standing to bring the claims they assert.

plausibility inquiry is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* citing *Iqbal*, 556 U.S. at 679. First, the court "must separate the complaint's factual allegations (which must be accepted as true) from its conclusory legal allegations (which need not be credited)." *Id.* Then, the court must determine whether the remaining factual content allows a "reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (internal quotation marks omitted). When allegations, though disguised as factual, are so threadbare that they omit any meaningful factual content, the court must treat them as what they are: *naked conclusions*. *Id.* citing *Iqbal*, 556 U.S. at 678; *see also Artuso v. Vertex Pharm., Inc.,* 637 F.3d 1, 9 (1st Cir. 2011) (explaining that even though an averment may be couched as a factual allegation, it can be "so subjective that it fails to cross 'the line between the conclusory and the factual.'") Indeed, "if the factual allegations in the complaint are too meager, vague, or conclusory to remove the possibility of relief from the realm of mere conjecture, the complaint is open to dismissal." *SEC v. Tambone*, 597 F.3d 436, 442 (1st Cir. 2010) (citing *Twombly*, 550 U.S. at 555).

In short, Fed. R. Civ. P. 8 simply "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal*, 556 U.S. at 678-79. The confines of Fed. R. Civ. P. 8 and 12(b)(6) are of particular value as they serve to prevent "a largely groundless claim from tak[ing] up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value." *See Twombly,* 550 U.S. at 558–59 (rejecting the argument that "a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through careful case management . . .") (citations and internal quotation marks omitted); *see also Pension Benefit Guar. Corp. v. Morgan Stanley Inv. Mgmt. Inc.,* 712 F.3d 705, 719 (2d Cir. 2013) ("Rules 8 and 12(b)(6) of the Federal Rules of Civil

Procedure, as interpreted in *Twombly* and *Iqbal*, help to prevent settlement extortion — using discovery to impose asymmetric costs on defendants in order to force a settlement advantageous to the plaintiff regardless of the merits of his suit." (internal quotation marks and citations omitted)).

Because their FAC is based largely on speculation and conjecture (as opposed to *facts*), Plaintiffs accuse Angell of "exceed[ing] the proper bounds of a motion to dismiss" by actually "arguing the facts." (Opp. at 3, 61-62.) Contrary to Plaintiffs' suggestion, challenging the sufficiency of alleged facts is the crux of any Fed. R. Civ. P. 12(b)(6) motion. While the standard requires the Court to accept factual allegations as true, Plaintiffs are only entitled to "reasonable inference[s]" in their favor. *Iqbal*, 556 U.S. at 679. Nothing precludes Angell from identifying the fundamental flaws and inconsistencies with Plaintiffs' scarce facts in order to highlight *why* certain inferences they suggest are not *reasonable* and, therefore, Plaintiffs' claims are not *plausible*. *See, e.g., Gregor v. Aurora Bank FSB*, 26 F. Supp. 3d 146, 155 (D.R.I. 2014) (rejecting the plaintiffs' inferences drawn from factual allegations contained in the complaint as a "kind of deductive leap, or conclusory statement, [which] is insufficiently 'plausible on its face' to satisfy the pleading requirements set forth in [*Iqbal*]").

To that end, it is entirely proper for Angell to submit documents referenced in the FAC to support this plausibility challenge. While the Court must accept as true all well-pleaded facts set out in the FAC, it is well established that the Court "may augment these facts and inferences with data points gleaned from documents incorporated by reference into the complaint, matters of public record, and facts susceptible to judicial notice." *Elsevier,* 732 F.3d at 78-80. This is especially true when, as here, Plaintiffs have cherry-picked select quotes from documents to support the claims in their FAC, and excluded key language necessary to understand the full

picture. *See Penney v. Deutsche Bank Nat'l Trust Co.*, No. 16-cv-10482-ADB, 2017 U.S. Dist. LEXIS 37162, *11-12 (D. Mass. Mar. 15, 2017) ("Courts may examine a contract's terms at the motion to dismiss stage to determine if the plain terms of the contract contradict a plaintiff's allegations.") citing *Young v. Wells Fargo Bank, N.A.*, 717 F.3d 224, 232 (1st Cir. 2013); *Amerifirst Bank v. TJX Cos. Inc. (In re TJX Cos. Retail Sec. Breach Litig.)*, 564 F.3d 489, 499-500 (1st Cir. 2009); *Henning v. Wachovia Mortg., FSB*, 969 F. Supp. 2d 135, 147 (D. Mass. 2013) (reasoning that "[w]hen such documents [mortgage and note] contradict allegations in the complaint, the documents trump the allegations," and dismissing breach of contract claim where allegation was "flatly contradicted by the terms of the mortgage and note"); *see also Clorox Co. P.R. v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 32 (1st Cir. 2000) ("It is a well-settled rule that when a written instrument contradicts allegations in the complaint to which it is attached, the exhibit trumps the allegations." quoting *N. Ind. Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 454 (7th Cir. 1998)). In short, contrary to Plaintiffs' assertion (Opp. at 3), Angell is unquestionably permitted to "offer documents" referenced in the FAC, in order to challenge the implausibility of Plaintiffs' theories.

II. ALL OF PLAINTIFFS' CLAIMS AGAINST ANGELL ARE FATALLY FLAWED

A. Plaintiffs fail to plausibly allege Angell had the requisite "knowledge" to be liable for any wrongdoing.

Because the FAC contains allegations of fraud (including claims for a purported "fraudulent scheme" and "conspiracy") an additional hurdle must be surmounted: Plaintiff must "state with particularity the circumstances constituting [the] fraud." Fed. R. Civ. P. 9(b). While the second prong of Fed. R. Civ. P. 9(b) allows "intent" and "knowledge" (such as fraudulent intent, knowledge or scienter) to be "alleged generally," the Supreme Court has made clear that "generally" is a relative term. *Iqbal*, 556 U.S. at 686–87. It does not mean, as Plaintiffs suggest

(Opp. at 11), that states of mind can be summarily alleged in "conclusory" fashion. Rather, pleading these "conditions of a person's mind" must still meet the minimum requirements of Fed. R. Civ. P. 8(a) and, therefore, *Iqbal*'s "plausibility" standard. *Iqbal*, 556 U.S. at 686–87 ("Rule 9 merely excuses a party from pleading" state of mind "under an elevated pleading standard. It does not give him license to evade the less rigid — though still operative — strictures of Rule 8."); *see also Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 58 (1st Cir. 2012) (noting that "Rule 9 merely excuses a party from pleading [states of mind] under an elevated pleading standard" — it does not give him carte blanche "to plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss").

Consistent with *Iqbal*, it has long been the rule in this Circuit, and others, that a complaint must allege the scienter elements of fraud by "set[ting] forth specific facts that make it reasonable to believe that defendant *knew* that a statement was materially false or misleading." *North Am. Catholic Educ. Programming, Inc. v. Cardinale*, 567 F.3d 8, 13 (1st Cir. 2009) (quoting *Greenstone v. Cambex Corp.*, 975 F.2d 22, 25 (1st Cir. 1992)); *Schatz,* 669 F.3d at 58 (dismissing case for failure to sufficiently plead requisite states of mind under the more robust 12(b)(6) standard articulated by the Supreme Court in *Iqbal*); *see also Mayfield v. Nat'l Ass'n of Stock Car Auto Racing, Inc.*, 674 F.3d 369, 377-78 (4th Cir. 2012) ("the complaint's allegation that the defendants' statements 'were known by [them] to be false at the time they were made,' is entirely insufficient . . . This kind of conclusory allegation — a mere recitation of the legal standard — is precisely the sort of allegations that *Twombly* and *Iqbal* rejected.")

The crux of all of Plaintiffs' claims against Angell is that it made misleading statements to Plan participants and, indirectly, to the Attorney General and the Department of Health (the "Regulators"), resulting in the Plan participants and the Regulators inferring the *future* solvency

of the Plan. That is, Plaintiffs claim that Angell not only "knew" that the "annual maximum and minimum contributions to the Plan recommended by Angell each year were not actually contributed to the Plan by those who had responsibility to fund the Plan," (Opp. at 60-61) but also that Angell "knew" such contributions *would not be made in the future*.[6] Thus, all of Plaintiffs' claims against Angell rest upon the fundamental notion that Angell "knew" that SJHSRI would not be willing or able to make *future* contributions to the Plan. Without such knowledge, Angell would have absolutely no reason to warn the Plan participants or the Regulators of anything, nor would Angell have any reason to believe that any of its communications could mislead Plan participants into thinking, incorrectly, that the Plan would be solvent in the future.[7]

But, as highlighted in Angell's Motion, Plaintiffs allegation in this regard is entirely conclusory. Plaintiffs have not alleged any *facts* to suggest that Angell could have possibly *known* that SJHSRI would run out of money and not be willing or able to fund the Plan. Plaintiffs do not allege a single meeting, phone call or other communication wherein any representative from SJHSRI informed Angell that future contributions would not be forthcoming. As a result,

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[6] As explained in Plaintiffs' Opposition, Plaintiffs' allegations are based on Angell knowing that the Plan would run out of money long before most of the Plan participants passed away. (Opp. at 10.) As detailed extensively in the FAC, all of Angell's projections showed future recommended contributions. The FAC is devoid of any allegation that the Plan would ever be insolvent if, in the future, SJHSRI made the contributions recommended by Angell and promised by SJHSRI to the Attorney General in connection with approval of the Asset Sale.

[7] The FAC does not allege that Angell ever told any participant, or anyone else, that the Plan was ever solvent, or would be in the future. Rather, Plaintiffs contend that true statements, such as, "your Retirement Plan benefit is an important part of your total retirement income" (FAC ¶ 278), are misleading as to the future solvency of the Plan in 2030 or 2034. Nor does the FAC allege that any of the named Plaintiffs took (or failed to take) any particular action in reliance on this supposed guarantee of future solvency. Thus, the FAC requires the Court to speculate as to what Plan participants thought, as well as to speculate as to what they might have done had they thought differently, as well as to speculate that Angell knew what inaccuracies Plan participants might infer from its true statements, in addition to speculating that Angell "knew" facts that it would have no way of knowing, and that the Regulators were unable to uncover.

Plaintiffs have not alleged any *facts* from which it could be "reasonably inferred" that Angell "knew" about the future solvency of the Plan. Indeed, by Plaintiffs' own admission, this is exactly what Angell conveyed to participants: *"[W]e can't speak to the future solvency of the plan."* (FAC ¶¶ 306-311.)

Plaintiffs' Opposition merely rehashes its conclusory allegation that Angell "knew" that its statements regarding the future solvency of the Plan were false, and then references that "knowledge" is one of the factors that may be alleged "generally" under Fed. R. Civ. P. 9(b). (Opp. at 11.) However, as set forth above, it is simply insufficient to generally plead "buzzwords" – like "knowledge" – to nudge a case into discovery. *Schatz*, 669 F.3d at 56. Rather, Plaintiffs must "set forth specific facts that make it reasonable to believe that [Angell] knew that a statement was materially false or misleading." *North American Catholic*, 567 F.3d at 13 (quotation omitted).

Plaintiffs' few alleged "facts" – even if assumed true – do not help them. (Opp. at 11-12.) First, Plaintiffs contend that Angell "knew" its statements regarding the future solvency of the Plan were false because Angell "knew" that "SJHSRI for years had been disregarding Angell's funding obligations and making no contributions." (*Id.*) But Angell's knowledge of SJHSRI's past behavior in no way confirms how SJHSRI would act in the future, when its financial position would be fundamentally altered by the Asset Sale, and it no longer had to manage a money-losing business. Moreover, Plaintiff do not and cannot cite to anything suggesting that advance funding is *required* for a promise to pay in the future. SJHSRI's failure to make recommended contributions in the past (that is, more than enough to just pay benefits as they come due) is simply not a cause for warning participants about what might happen in the future.

Second, Plaintiffs contend Angell "knew" that "once the Asset Sale went through, SJHSRI would have insufficient funds to make the actuarial-recommended contributions, even if it wanted

to." (*Id.*) Again, however, Plaintiffs offer no factual basis from which to suggest Angell was aware that SJHSRI would have insufficient funds. They do not allege any communication or meeting by which Angell – the Plan's actuary – was informed of SJHSRI's internal corporate finances or business decisions. Rather, Plaintiffs' "facts" assume Angell is a clairvoyant, with the ability to perfectly predict how SJHSRI would act in the future, despite the fact that the Regulators, who were actually responsible for that determination, were unable to make such a prediction. Plaintiffs' purported *facts* simply do not nudge the bare allegations of Angell's knowledge across "the line [from] possibility [to] plausibility." *Twombly*, 550 U.S. at 557.

B. Plaintiffs fail to plausibly allege Angell made any false statements.

Setting aside the fact that Angell did not have the requisite "knowledge" to be liable for any alleged wrongdoing, the FAC fails to allege that any statements made by Angell were actually "false." According to the facts alleged in the FAC, the Regulators knew that future contributions would be required and even asked about SJHSRI's ability to make those future contributions. (FAC ¶ 343 (as of April 11, 2014, the Attorney General inquired: *"Will the pension liability remain in place – how much, and what is the plan going forward to fund the liability?"*) And, the FAC further acknowledges that, if UNAP had known that SJHSRI could not make future contributions after the Asset Sale, it would not have supported the Asset Sale. (FAC ¶ 303.) Thus, it is clear from the face of the FAC itself that no communication from Angell – however indirect – could have possibly confused or misled the Regulators as to the need for future contributions.

Regardless, Plaintiffs put great weight on the 94.9% Projection, which they (falsely) contend showed nothing more than a 94.9% funding status after payment of the $14 million

contribution, with no other information about the future.[8] Even if this Court ignores the actual 94.9% Projection and assumes that Plaintiffs' characterization is accurate, such a hypothetical communication could not possibly have tricked the Regulators into approving the Asset Sale, for the following reasons:

- Since 94.9% is less than 100%, such a demonstration would inevitably lead the Regulators to ask about the amount of the shortfall and how it would be made up (which, as the FAC documents, they did ask).
- The idea that this one projection is the only actuarial document the Regulators had access to, and the only one they relied on, goes beyond implausible – it is preposterous. That the Regulators would not, or did not, ask for any other actuarial document – the many actuarial reports and alternative scenarios prepared by Angell, as detailed in the FAC – assumes a lack of sophistication by the Regulators that could not possibly exist.
- Further, even if the Regulators were so negligent as to take a piece of paper with nothing on it other than "94.9%" as the sum total of actuarial information available to review before approving a multi-million dollar transaction, such negligence by the Regulators would be unforeseeable by Angell, as well as an intervening cause.

If the Court chooses to take judicial notice of the actual 94.9% Projection, then the contention that the Regulators could have been misled shifts from the preposterous to the absurd. The 94.9% Projection shows a recommended contribution of $1,391,000 the year *after* the $14 million contribution, discloses that it is based on a rate of return of 7.75%, discloses twice that it is an estimate and subject to change, explicitly states that future results will be different, and explicitly states that "the results do not reflect all possible future funding and accounting costs."

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[8] As Plaintiffs note, Angell inadvertently attached a draft rather than the final version of the 94.9% Projection to its Request for Judicial Notice. The actual version of the 94.9% Projection that should have been attached to the Angell's Request for Judicial Notice is attached to the accompanying Declaration of Peter Karlson. The final version was different in only two minor respects: (1) it had page numbers; and (2) the footnote on page 2 warned that the 2013 *and* 2014 results were based upon a number of assumptions, whereas in the draft, the footnote stated only that the 2014 results were based upon certain assumptions. These differences were so minor and inconsequential, the draft and final versions were virtually indistinguishable. This was a mistake, and has been corrected. Plaintiffs' argument that these immaterial differences were "dehors the record" is no justification for the Plaintiffs continuing misrepresentation of fact to the Court. (Opp. at 66.)

Such a document could not possibly be part of an attempt to trick experienced professionals into believing that no future contributions were required.

Similarly, the benefit statements and PowerPoint presentations that Plaintiffs complain about were not false, even accepting all well-pled facts in the FAC to be true. Plaintiffs' contentions, fairly read, are that that these documents are false because they might leave Plan participants with the impression that their life annuities – which the Plan unquestionably promised – were not subject to any contingencies. However, Plaintiffs' unwarranted inferences and assumptions do not make any of the statements false. Even disregarding the explicit statements in these documents that benefits were not guaranteed, and disregarding the difference between "false" and "misleading," a promise to pay money in the future is not either "false" or "misleading" just because the promisor *currently* does not have the money to pay in the future. If that were the case, virtually all borrowing transactions would be fraudulent. Rather, to be actionable, a "false representation must be of an existing fact." *Grassi v. Gomberg*, 81 R.I. 302, 304, 102 A.2d 523, 524 (1954). Plaintiffs' contention about the documents being misleading depends on Angell "knowing," at the time the statement was made, that the Plan would run out of money in the future, as well as Angell being able to predict what unwarranted conclusions Plan participants might jump to. As explained above, Plaintiffs have failed to plead any facts from which it could plausibly be inferred that Angell "knew" that there would be no future contributions and the Plan would run out of money during the Plan participants' lifetimes. Thus, the statements were not in any sense "false" or even misleading as to an existing fact.

C. Plaintiffs fail to plausibly allege any detrimental reliance by the Plan participants or the Regulators.

Moreover, Plaintiffs fail to adequately allege another key element of their misrepresentation claim against Angell: ***detrimental reliance***. As noted in Angell's Motion, there

is no "presumption" of class-wide reliance applicable to common law claims of fraud like the ones at issue here. *See* Motion at 16, n. 15 citing *Yarger v. ING Bank*, 285 F.R.D. 308, 327 (D. Del. 2012); *Aubrey v. Sanders*, 346 Fed. Appx. 847, 849–50 (3d Cir. 2009) (rejecting application of fraud-on-the-market theory for common law fraud claims); *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 223 (2d Cir. 2008) (refusing to apply "presumption of reliance" in putative class action where defendants had conducted "national marketing campaign," noting that "reliance on the misrepresentation [ ] cannot be the subject of general proof"). Rather, Plaintiffs must allege sufficient *facts* to plausibly suggest detrimental reliance on behalf of the putative class.

In their Opposition, Plaintiffs summarily allege that all of the Plan participants relied on communications from Angell to "make life-altering decisions such as whether to seek other employment, when to retire, what benefit elections to make, and how best to protect their loved ones." (Opp. at 40.) Though Plaintiffs cite to several paragraphs from their FAC, such specific factual allegations do not actually appear anywhere in the FAC and, therefore, should be disregarded. *McMahon v. Verizon New England, Inc.*, No. 15-512 WES, 2018 WL 2187365, at *3 (D.R.I. May 11, 2018) (Smith, J.) citing *Foley v. Town of Lee*, 871 F. Supp. 2d 39, 54–55 (D.N.H. 2012) ("But this theory is not intelligibly set forth in the amended complaint, so it cannot be raised for the first time in opposition to a summary judgment motion . . . ") and *Calvi v. Knox Cty.*, 470 F.3d 422, 430–31 (1st Cir. 2006).

Even indulging Plaintiffs' attempt to assert such unsupported facts for the first time in their brief, Plaintiffs fail to state a *plausible* claim for detrimental reliance. To suggest that *all* 2700 or more Plan participants "relied" upon communications in exactly the same life-altering manner defies all logic. Ample authority cited by Angell demonstrates that "reliance" necessarily implicates individualized issues, which is exactly why common law fraud/misrepresentation

claims of this type simply cannot be asserted on a class-wide basis. (*See* Motion at 16, n. 15.) Furthermore, seven of the Plaintiffs actually are Plan participants, and the FAC does not assert a single specific fact regarding any personal detrimental reliance by any of them. There is no allegation that any of the named Plaintiffs had any particular decision to make, that any Plaintiff had an alternative course of action that was abandoned, or what damages accrued from abandoning that alternative course of action.

Other than Plan participants' gauzy "life-altering decisions," the only possible source of damage is approval of the Asset Sale. In this regard, Plaintiffs seem to place all of their reliance on a single document – the 94.9% Projection – which supposedly deceived the Regulators into thinking that no additional contributions would be needed. However, it is clear from the allegations in the FAC that no such thing ever happened.

Each and every claim against Angell is dependent on the same supposed misrepresentations and the same sources of damages ("life-altering decisions" and approval of the Asset Sale). Plaintiffs' failure to plausibly allege the key elements of their misrepresentation theory dooms every other claim against Angell.

III. PLAINTIFFS FAIL TO STATE A CLAIM AGAINST ANGELL FOR PROFESSIONAL MALPRACTICE

A. The Class Plaintiffs do not have standing to bring any malpractice claim against Angell.

In its Motion, Angell cited to *Clark v. Feder Semo & Bard, P.C.*, 634 F. Supp. 2d 99, 108 (D.D.C. 2009) (citing *Dill v. Wood Shovel & Tool Co.*, No. 4110, 1972 U.S. Dist. LEXIS 14098 (S.D. Ohio Apr. 20, 1972)) for the notion that participants do not have standing to bring a malpractice claim against Angell. (Motion at 23-24.) Plaintiffs fail to explain why this line of cases does not apply.

Indeed, Plaintiffs correctly point out that in *Clark*, "the court dismissed the plaintiff's claims because she failed to allege she was either in privity of contract or the direct and intended beneficiary of the actuary's services." (Opp. at 57-58.) But Plaintiffs artfully omit key language in the court's opinion in that is directly applicable here:

> Clark has not alleged that she was in privity of contract with PAF, nor has she alleged facts that would demonstrate she was the direct and intended beneficiary of PAF's services. Instead, PAF's actuarial services – like Much [] legal services – were procured by Feder Semo to assist it with the retirement plan and ***Clark was merely a plan participant***. See Third-Party Compl. PP 4, 9. Accordingly, Clark cannot sue PAF for professional malpractice.

Id. at 108 (emphasis added). In other words, Clark was "merely a plan participant" and, therefore, not in privity of contract with the professionals servicing the plan at issue. This is the central shortcoming of the Class Plaintiffs' standing here, and Plaintiffs offer no answer as to why their situation here is any different.

Finding no cases to bolster their argument, Plaintiffs strain to find support in a series of inapplicable cases from jurisdictions outside the First Circuit. (Opp. at 58.)[9] For example, Plaintiffs cite to *Saffo v. Occidental Life Ins. Co. of California*, 602 F.2d 1265 (8th Cir. 1979) for the argument that "plan participants who receive negligent advice from actuaries can sue them for professional negligence, even if the actuary's formal client is the employer." (Opp. at 58.) But the facts in *Saffo* are much more complex and nuanced. In that case, a pension plan sponsor's actuaries erroneously determined that the plan could support a certain level of benefits, which ultimately caused the employer to attempt to amend the plan and reduce benefits by almost 50% going forward to continue paying benefits. *Id*. at 1270-71. No similar facts exist here. Plaintiffs

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[9] As out of circuit authority, such cases are not binding on this Court. *United States v. Sabetta*, 221 F. Supp. 3d 210, 223 n.11 (D.R.I. 2016) (Smith, J.) ("opinions [from other circuits] do not change our analysis because we are bound by First Circuit precedent").

do not allege their benefits have been improperly reduced because of any action or advice provided by Angell. Quite the opposite, the FAC alleges Angell advised and encouraged SJHSRI to make more contributions.

Plaintiffs next rely on a Louisiana state court case, *Orthopaedic Clinic of Monroe v. Ruhl*, 786 So.2d 323 (La. App. 2001), for the proposition that participants in a defined benefit plan were "permitted to recover against [an] actuary retained by company whose faulty advice caused them substantial economic loss." (Opp. at 58.) Once again, Plaintiffs' cited authority is inapposite. In *Ruhl*, the plaintiff-clients were initially owners of four separate individual defined benefit plans which merged due to a change in tax law which provided "a [defined benefit plan] could no longer discriminate between highly and less highly compensated employees by maintaining separate plans." *Id*. at 326-27. The actuary recommended termination of the merged plan, following years of poor communication and confusion, which lead to the lawsuit by the participant doctors and the clinic. *Id*. at 328. The court in *Ruhl* found the actuary liable in large part due to its failure to provide accurate communication in the course of his direct relationship *with the plaintiffs/clients themselves.* That is an entirely different relationship than the one between Angell and the participants here, who are not in a direct contractual relationship.

Plaintiffs also incorrectly stress the importance of *Metro. Life Ins. Co. v. Bialik*, No. 3-99-CV-2679-M, 2001 WL 169600, at *4 (N.D. Tex. Jan. 16, 2001). (Opp. at 58.) That case involved a claim for negligent misrepresentation under Texas state law – a claim which may be asserted against a much broader variety of defendants than professional malpractice. Moreover, Plaintiffs incorrectly state that the court found the third party administrator "liable for negligent misrepresentation" when, in fact, the court simply declined to dismiss on the pleadings. *Id. Bialik*

is irrelevant, and unhelpful to the claims for actuarial malpractice under Rhode Island law at issue here.

Aware they have no contractual relationship with Angell to confer standing for a malpractice claim, the Class Plaintiffs instead argue they should be treated as "intended beneficiaries" to the contract. (Opp. at 59.) There is no such allegation in the FAC. Even accepting that Plaintiffs' argument can take the place of actual allegations, "to succeed on a theory of liability based on one's status as an intended third party beneficiary, the [p]laintiff must overcome a high burden." *Sangermano v. Roger Williams Realty Corp.*, No. 06-6628, 2009 R.I. Super. LEXIS 91, at *36 (R.I. Super. Ct. July 22, 2009). Plaintiffs fail to meet their burden here.

First, Plaintiffs cite *Paulsen v. CNF Inc.*, 559 F.3d 1061, 1080 (9th Cir. 2009) for the proposition that "actuaries may be held liable under a third party beneficiary theory even if they have no communications with employees, upon evidence that they breached their duty of care to the employer." (Opp. at 59.) Again, the claim in that case arose under California state law, inapplicable to a claim of professional malpractice under Rhode Island law. Indeed, the court explicitly based its holding on state law, noting "***California law recognizes an exception to the general rule***, that such a supplier of information does owe a duty to intended third party beneficiaries." *Id*. at 1081 (emphasis added). Plaintiffs cite to no such exception to the "general rule" in Rhode Island, because Rhode Island follows the "general rule" against imposing such duties. Because *Paulsen* arises entirely under a different legal framework, it is irrelevant to the analysis here. Moreover, as discussed below, there is no allegation or suggestion that Angell breached any such duty to SJHSRI here.

Plaintiffs also quote a lengthy passage from *Glassie v. Doucette*, 157 A.3d 1092, 1097-98 (R.I. 2017) in support of the proposition that Plan participants were the intended beneficiaries of

the service agreement between SJHSRI and Angell. However, that case dealt with a "complicated, multistate continuing saga . . . arising in the context of a legacy of wealth." *Glassie*, 157 A.3d at 1094. The parties in *Glassie* — children suing an estate over their trust fund — bear no resemblance to pension plan participants suing an actuary for professional malpractice in the course of rendering professional services.[10] Moreover, Plaintiffs conveniently omit the fact that the court in *Glassie* affirmed a ***dismissal for lack of standing as an intended third party beneficiary***. The court explained:

> In our opinion, once the Trust was created, the law of trusts became the governing law. From that point forward, [plaintiff's] beneficiary status was that of a trust beneficiary, not of a third-party beneficiary to a contract. Accordingly, plaintiff lacked the requisite standing to sue her father's estate for benefits she would have received based on her status as the beneficiary of the Trust.

Id. at 1100. Ignoring the holding, Plaintiffs merely state the standard described in *Glassie*. Plaintiffs fail to explain why the cited law applies, or how the facts of this case satisfy this standard.

Even if Angell had breached its contract with SJHSRI — and it has not — Plaintiffs fail to show how they are possibly anything more than incidental beneficiaries to a contract for which there is no claim of breach between contracting parties. *See Forcier v. Cardello*, 173 B.R. 973, 985 (D.R.I. 1994) ("Incidental third party beneficiaries of a contract do not have a right to recovery on the contract in the event of a breach"); *Davis v. New England Pest Control*, 576 A.2d 1240,

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[10] Cases involving professional services affecting third party beneficiaries are more helpful than trust disputes between wealthy children. *See, e.g., Int'l Strategies Grp., Ltd. v. Greenberg Traurig*, LLP, 482 F.3d 1, 11 (1st Cir. 2007) (affirming Massachusetts District grant of summary judgment in favor of attorney who was not liable to plaintiff investor who "put itself in the position of an incidental third-party financial beneficiary, and therefore no implied attorney-client relationship was established") (citing *Spinner v. Nutt*, 417 Mass. 549, 631 N.E.2d 542 (1994) (finding no duty of care as between the estate's attorneys and the estate's beneficiaries stating "[t]he fact that third parties are thus benefited, or damaged, by the attorney's performance does not give rise to a duty by the attorney to such third parties, and hence cannot be the basis for a cause of action by the third parties for the attorney's negligence.")

1242 (R.I. 1990) (recognizing the general rule that only intended, and not incidental, third party beneficiaries can maintain action for damages resulting from breach of contract between two other contracting parties).

B. Plaintiffs fail to plausibly allege Angell breached any duty to Plaintiffs.

Unlike ordinary negligence, a claim for professional malpractice applies only to professional services such as actuaries, attorneys, and accountants. *See, e.g.*, *Steiner Corp. v. Johnson & Higgins*, 135 F.3d 684, 689 (10th Cir. 1998) (applying the "professional negligence standard of care" to attorneys, accountants, and actuaries); *see also Gerosa v. Savasta & Co.*, 329 F.3d 317, 320 n.3 (2d Cir. 2003) (analyzing "[a]ttorneys, accountants, actuaries and consultants performing their usual professional functions" under the same non-fiduciary lens) (citing 29 C.F.R. § 2509.75-5 (2002)). For a plaintiff to prevail on a professional malpractice claim in Rhode Island, "a plaintiff must prove by a fair preponderance of the evidence not only a defendant's duty of care, but also a breach thereof and the damages actually or proximately resulting therefrom to the plaintiff." *Johnson v. Kosseff*, No. WC 2011-0366, 2013 R.I. Super. LEXIS 11, at *31 (R.I. Super. Ct. Jan. 11, 2013) (internal citations omitted) (dismissing second amended complaint because the plaintiffs failed to allege what legal duty the defendant attorney owed to the plaintiffs or how it was breached). Thus, in this case, Plaintiffs must demonstrate that Angell owed a duty of care *to Plaintiffs*, that Angell breached this duty *to Plaintiffs*, and that *Plaintiffs* have suffered actual harm as a result.[11]

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[11] In their Opposition, Plaintiffs claim they "are not required to plead evidence even in support of claims with heightened pleading requirements." (Opp. at 57.). Despite this blanket assertion, Plaintiffs provide no case law that actually supports their position. Plaintiffs first cite to *Smith v. Frontera Produce*, for the misleading quote that a complaint need not contain "the auditor's required standard of care." No. 3:13-CV-832, 2014 U.S. Dist. LEXIS 127211, at *14 (N.D. Ind. Sept. 11, 2014). This case falls outside of Rhode Island and the First Circuit and is therefore not binding on this Court. Plaintiffs also fail to inform the Court that *Smith* was one of

Even if Angell owed a duty to the Class Plaintiffs, Plaintiffs have not alleged facts from which it could be inferred that Angell breached any duty, either to Class Plaintiffs or to the Plan itself. Plaintiffs' Opposition helpfully clarifies that Plaintiffs do not allege that any of Angell's calculations are incorrect. (Opp. at 61.) All of the ASOPs that Plaintiffs cite, which they contend Angell violated, deal with communications – that they be appropriate to the audience, not misleading, and that the actuary take reasonable precautions against their use by others to mislead third parties. In this regard, Plaintiffs contend that Angell should have taken care to warn Plan participants and Regulators that the Plan would eventually run out of money. As explained above, such a prediction is predicated on the underlying premise that future contributions would not be made by SJHSRI, and that Angell supposedly knew this. If SJHSRI had made the recommended contributions after the Asset Sale, the Plan would not run out of money, and none of the harms would have occurred that Angell supposedly had a duty to warn of. Since there is no factual

many cases filed "in numerous courts throughout the country based on the July 2011 outbreak of *Listeriosis* allegedly tied to contaminated cantaloupe . . ." *Id.* at *11-12. Clearly, the "auditing" required for a food outbreak has no application to pleading the ASOPs supposedly at issue here. This case has no bearing on the pleading requirements of a claim for actuarial malpractice under Rhode Island law. Plaintiffs also cite to *ACA Financial Guaranty Corp. v. Advest, Inc.*, 512 F.3d 46, 63 (1st Cir. 2008), for the proposition that the Private Securities Litigation Reform Act of 1995 does not require plaintiffs to plead evidence. (Opp. at 57.) This case is irrelevant as it deals with an entirely different statutory framework unrelated to the issues of this case. Even if this case were relevant, this case was ***dismissed on the pleadings***, and Plaintiffs' selectively quoted language cuts against their own argument when read in full. The court held, "[i]t is true, as the plaintiffs argue, that the PSLRA does not require plaintiffs to plead evidence . . . [b]ut more meat was needed on these bones." *Id.* at 63 (internal citation omitted). In fact, Plaintiffs cite to no case addressing the ASOPs in a claim for professional malpractice. *Compare with Bd. of Trs. New Orleans Emplrs. Int'l Longshoremen's Ass'n v. Gabriel*, 529 F.3d 506, 511-12 (5th Cir. 2008) (affirming district court ruling that actuary did not commit malpractice, noting "[ASOP] Section 5.8 puts an actuary's duty into context" providing that "the actuary does not have 'complete responsibility' for the Plan's actions . . . [and] the ultimate decision on whether to adopt a particular benefit proposal rests with the plan sponsor.") (internal citations omitted). In this case, like the plaintiffs in *ACA Financial*, more meat is needed on the "bones" of Plaintiffs' allegations to survive a motion to dismiss.

allegation supporting Angell's knowledge of SJHSRI's inability to make future contributions, any such warning (from Angell's perspective at the time) could do more harm than good. And, Angell was entirely reasonable in its reliance on the Regulators to determine, before approving the Asset Sale, whether SJHSRI would be able to make future contributions.

Moreover, even if Plaintiffs could plead that Angell actually owed a duty to Plaintiffs and that Angell breached such duty, "[t]he mere breach of a professional duty, causing only . . . speculative harm, or threat of future harm—not yet realized—does not suffice to create a cause of action for negligence." *Levin v. Berley*, 728 F.2d 551, 553-54 (1st Cir. 1984); *see also City of Providence v. Buck Consultants LLC*, C.A. No. 13-131 S, 2015 U.S. Dist. LEXIS 153893, at *16 (D.R.I. Nov. 13, 2015) (Smith, J.) (granting summary judgment where the plaintiff's damages from alleged actuarial malpractice were entirely speculative).

As discussed above, nothing Angell said or did could have tricked the Regulators into approving the Asset Sale, and Plaintiffs' vague and conclusory allegations relating to "life-altering decisions" are insufficient. Thus, Plaintiffs' malpractice claim also fails for lack of a plausible allegation of damages.

C. Plaintiffs' case law is misleading and inapposite.

Plaintiffs rely on *Mallette v. Children's Friend and Service*, 661 A.2d 67, 71 (R.I. 1995) for the proposition that Angell's "partial disclosures imposed on it the duty to refrain from making negligent misrepresentations." (Opp. at 52.) Plaintiffs' authority is misleading and inapposite. This case, though under Rhode Island law, is highly distinguishable and entirely irrelevant. The plaintiffs in *Mallette* were parents suing an adoption agency for negligent misrepresentation after they discovered the extent of mental disabilities of their adopted child. *Mallette,* 661 A.2d at 73. Importantly, the court in *Mallette* explicitly declared that case presented a "narrow issue . . . [of] whether to recognize the tort of negligent misrepresentation in the adoption context." *Id*. at 70.

The court also tailored the holding itself, stating "[w]e caution that our opinion in no way renders adoption agencies guarantors or insurers of a child's future health." *Id*. at 73. Even if the holding were not so narrowly tailored, the cause of action in *Mallette* was negligent misrepresentation, not professional malpractice. Plaintiffs attempt to suggest Angell's "disclosures" to Plan participants were akin to an adoption agency negligently, or fraudulently, communicating with prospective adopting parents is totally disingenuous.

IV. PLAINTIFFS FAIL TO STATE A CLAIM AGAINST ANGELL UNDER RHODE ISLAND LAW

Plaintiffs apparently rely on Rhode Island law in bringing their remaining claims against Angell which all relate to information that Angell provided regarding the Plan's funded status and/or communications between Angell and Plan participants about benefits. (*See* Counts VII, VIII, IX, XVI, XVIII, XIX, XXI, XXII, XXIII.) Because these Counts all "relate to" work Angell did for the Plan (which Plaintiffs claim is subject to ERISA), such claims are preempted by ERISA. 29 U.S.C. § 1144(a); *see, e.g., Carlo v. Reed Rolled Thread Die Co.,* 49 F.3d 790, 794 (1st Cir. 1995); *Vartanian v. Monsanto Co.,* 14 F.3d 697 (1st Cir. 1994); *Pemental v. Sedgwick Claims Mgmt. Sys., Inc.,* No. 14-45-M, 2014 WL 2048279, at *5 (D.R.I. May 19, 2014).[12] However, even if not preempted by ERISA, Plaintiffs' Opposition does not save their claims under Rhode Island law.

A. Plaintiffs fail to establish that Angell owed any fiduciary duty to the Plan participants under Rhode Island law.

Plaintiffs claim Angell "had a fiduciary relationship with Plan participants" (Opp. at 39) by virtue of extremely limited contacts, such as a single phone call or a statement mailed to the

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[12] In order to avoid duplication, Angell hereby adopts and incorporates by reference the arguments of the Prospect Entities and Diocesan Entities regarding ERISA preemption of Plaintiffs' state law claims.

participant showing the participant's benefit under the Plan. Plaintiffs contend that Angell's greater expertise lead to this fiduciary relationship. Plaintiffs do not allege that Angell made any explicit promises that would lead to such a fiduciary relationship, nor that any participant established a long-standing relationship with Angell through multiple calls or requests for personalized advice. In this respect, Plaintiffs grossly misstate the standard for a fiduciary relationship.

In *Chamber of Commerce v. United States DOL*, 885 F.3d 360, 363 (5th Cir. 2018), the Fifth Circuit vacated the Department of Labor's "fiduciary rule" because it purported to establish a fiduciary relationship based on individual transactions in which the furnishing of advice was incidental to the transaction. The Fifth Circuit contrasted such transactions with, "learning the personal and intimate details of the financial affairs of clients and making recommendations" which would cultivate "a confidential and intimate relationship." *Id.* at 374. Here, the FAC does not allege that Angell engaged in any activity that would establish a "relationship of trust and confidence that characterizes fiduciary status." *Id.* at 376. The FAC merely alleges that Angell agreed to "deal" with Plan participants. (FAC ¶ 288.) The FAC does not allege that Angell ever agreed to go beyond the normal and ordinary functions of an actuary in such a position: providing election forms and answering participants' questions about their accrued benefits, the provisions of the Plan, and how to complete their elections. The FAC does not allege, and could not plausibly allege, that Angell ever agreed to (or actually did) assist Plan participants in making any "life-altering" decisions based on the intimate details of the participants' financial conditions.

Indeed, Plaintiffs do not cite a single case from within Rhode Island or the First Circuit holding that an actuary (or even a third party administrator) is a fiduciary (much less a fiduciary to plan participants versus the employer who hired the actuary). Instead, Plaintiffs' primary

argument against dismissing the claims for breach of fiduciary duty and aiding and abetting a breach of fiduciary duty (Counts XXI and XXII) is that "determination of fiduciary status is not susceptible to being addressed on a motion to dismiss." (Opp. at 40.) However, again, Plaintiffs rely on case law that is both: (1) outside of Rhode Island and the First Circuit, and (2) does not involve an actuary such as Angell (or even a third party administrator). (*Id.* at pp. 40-41.) Plaintiffs' citation to such non-precedential cases is unavailing in light of precedent from courts within Rhode Island and the First Circuit which makes clear both that the determination of fiduciary status is proper on a motion to dismiss and that Angell's role with respect to the Plan did not subject it to fiduciary duties. *See Sabetta*, 221 F. Supp. 3d at 223 n.11.

Contrary to Plaintiffs' position (Opp. at 40-41), courts within Rhode Island and the First Circuit routinely find that the determination of fiduciary status is appropriate at the motion to dismiss stage. *See, e.g., Rocha v. Wells Fargo Bank, N.A.*, No. 16-600 WES, 2018 U.S. DIST. LEXIS 68586, at *11 (D.R.I. Apr. 24, 2018) (granting motion to dismiss where "Plaintiff has failed to allege facts demonstrating a fiduciary relationship between him and Wells Fargo"); *Emrit v. Universal Music Grp., Inc.*, NO. 13-181-ML, 2013 U.S. DIST. LEXIS 97637, at *8 (D.R.I. July 12, 2013) (granting motion to dismiss where "[t]he complaint does not allege facts to support a theory of a fiduciary relationship between the parties"); *Bogosian v. R.I. Airport Corp. (T.F. Green Airport)*, No. 17-16S, 2017 U.S. DIST. LEXIS 106872, at *20 (D.R.I. May 3, 2017) (granting motion to dismiss where "nothing in his complaint suggests the existence of any fiduciary relationship with any Defendant"); *R.I. Res. Recovery Corp. v. Albert G. Brien & Assocs.*, No. PB 10-5194, 2012 R.I. Super. LEXIS 113, at *122 (R.I. Super. Ct. July 16, 2012) (granting motion to dismiss where "[c]onsidering the facts alleged in the Amended More Definite Statement, even in the light most favorable to RIRRC, it is clear that no fiduciary relationship existed in this case").

Indeed, it is entirely proper for this Court to determine whether Angell is subject to fiduciary duties based on the facts alleged in the FAC because "whether a fiduciary duty exists 'is a question of law for the court.'" *R.I. Res. Recovery Corp.*, 2012 R.I. Super. LEXIS 113, at *117. And, as noted in Angell's Motion, courts within Rhode Island and the First Circuit have also routinely held that actuaries are *not* fiduciaries as a matter of law. (Mot. at 50-51.) Plaintiffs' citation to one case from a New York state court is again misplaced in light of the precedential authority cited by Angell. (Opp. at 38 (citing *NY State Workers' Comp. Bd. v. SGRisk, LLC*, 116 A.D.3d 1148 (N.Y. App. Div. 2014)).)

Plaintiffs' attempt to refute case law cited in Angell's Motion also fails. (Opp. at 42-45.) First, Plaintiffs accuse Angell of mischaracterizing *Geo. Knight & Co., Inc. v. Watson Wyatt & Co.*, 170 F.3d 210 (1st Cir. 1999) as "holding, under Massachusetts law, that an actuary did not occupy a position of trust and confidence with its client retirement plan in part because there was nothing in the record to suggest that [the plan's] trust in [the actuary] resulted in its ceding control of the plan's management or assets to [the actuary]." (Opp. at 42-43 (quoting Mot. at 51).) However, as noted in the Motion and ignored by Plaintiffs, the First Circuit itself has summarized *Geo. Knight & Co., Inc.* as reaching exactly this holding. Mot. at 51 (citing *Erlich v. Oulette, Labonte, Roberge and Allen, P.A.,* 637 F.3d 32, 36 (1st Cir. 2011) (expressly acknowledging *Geo. Knight & Co., Inc.* as "holding, under Massachusetts law, that an actuary did not occupy a position of trust and confidence with its client retirement plan in part because there was 'nothing in the record to suggest that [the plan's] trust in [the actuary] resulted in its ceding control of [the plan's] management or assets to [the actuary]").)[13] Thus, it is indisputable that Angell has not

[13] Plaintiffs agree that "something 'more' needs to be established 'before elevating actuaries and accountants to fiduciary or other special status," (Opp. at 42 (quoting Mot. at 51 (quoting

mischaracterized this holding of *Geo. Knight & Co., Inc.*

Plaintiffs also incorrectly argue that "the First Circuit did not hold that the actuary in [*Geo. Knight & Co., Inc.*] was *not* a fiduciary, or that the actuary did *not* occupy a position of trust and confidence." (Opp. at 43.) In fact, the First Circuit expressly held that the actuary did not have any fiduciary obligation to disclose information—thus giving the reasonable inference that the actuary was not a fiduciary. 170 F.3d at 215-17. The First Circuit further expressly "rejected the notion that actuaries are, as a matter of law, fiduciaries." 170 F.3d at 217, n.14. Plaintiffs fail to acknowledge this holding, and instead focus on the First Circuit's pronouncement that:

> We do not mean to suggest, of course, that an actuary can never owe duties of a fiduciary nature to its client. Indeed, it is conceivable that if Watson Wyatt had found confidential information in Knight's books and had appropriated the information or had otherwise used the information to its own advantage, a claim might be made for breach of a duty of loyalty. Such allegations are not now before us.

(Opp. at 43 (quoting *Geo. Knight & Co., Inc.*, 170 F.3d at 216-17).) However, this passage supports that the actuary in *Geo. Knight & Co., Inc.* was not a fiduciary and that fiduciary obligations would have arisen only if the actuary "had appropriated the information or had otherwise used the information to its own advantage," facts which were not present in that case and are not present here. *Id.; see also Geo. Knight & Co., Inc.*, 170 F.3d at 216 ("Thus, trust and confidence reposed in a party possessing a great disparity of knowledge or expertise in a commercial setting, while ordinarily not enough standing alone to give rise to fiduciary obligations, may produce such obligations if the trust and confidence is knowingly betrayed by

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Erlich, 637 F.3d at 36)), but otherwise ignore the First Circuit's opinion in *Erlich*. As in *Erlich*, the complaint here "describe arms-length, contractual arrangements" with an actuary "providing routine, even mechanical, financial services," such that a fiduciary relationship has not been pled. *Erlich*, 637 F.3d at 36.

that party for the purpose of securing some benefit to itself.”).[14]

Plaintiffs further dismiss Angell’s citation to *Fleet Nat’l Bank v. H & D Entm’t, Inc.*, 926 F. Supp. 226 (D. Mass. 1996), *aff’d* 96 F.3d 532 (1st Cir. 1996), as concerning “accountants, not actuaries.” (Opp. at 44-45.) This ignores the many similarities between accountants and actuaries, and that the First Circuit itself has grouped these professionals together for determining fiduciary status. *See Erlich*, 637 F.3d at 36-37 (“Other states require more before elevating actuaries and accountants to fiduciary or other special status. Our survey leads us to conclude that Maine would too.”); *see also Krumme v. W. Point-Pepperell*, 735 F. Supp. 575, 580 (S.D.N.Y. 1990) (noting “rough similarity of the work performed by accountants and actuaries”). Furthermore, in their Opposition, Plaintiffs argue that interpreting *Fleet* to hold that “an actuary is not a fiduciary unless he ‘exercises some managerial control over the assets in question,’” is contradicted by *Geo. Knight & Co., Inc.* (Opp. at 45.) This argument lacks any merit. Plaintiffs ignore that this exact holding was approvingly cited by the court in *Geo. Knight & Co., Inc.* at 170 F.3d at 216 and n.12 (citing *Fleet* to support its conclusion that the lack of evidence that the actuary had been given “control of the Plan’s management or assets” supported that the actuary did not have a fiduciary duty to disclose).

In an attempt to detract from the abundance of case law finding that actuaries are not

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[14] Plaintiffs also inappropriately elevate the significance of the First Circuit’s citation to *Burns v. Massachusetts Institution of Technology*, 394 F.2d 416, 419 (1st Cir. 1968) as “demonstrat[ing] that the holding in *Geo. Knight & Co., Inc.* did not depend on a finding that [the actuary] was not a fiduciary.” (Opp. at 44.) However, *Geo. Knight & Co., Inc.* simply cited *Burns* for the proposition that a fiduciary duty to disclose may exist when “one party reposes, to the other’s knowledge, trust and confidence under circumstances in which the other’s failure to make disclosure would be inequitable.” 170 F.3d at 215-16 (quoting *Burns*, 394 F.2d at 419). Thus, there is no basis for Plaintiffs’ interpretation.

fiduciaries, Plaintiffs argue that because Angell also performed "certain administrative services," Angell is a fiduciary based on its alleged additional "role of third party administrator." (Opp. at 38-39.)[15] To this end, Plaintiffs cite two easily distinguishable and non-precedential cases. (Opp. at 39.) First, there is no indication in *New York State Workers' Compensation Board v. Consolidated Risk Services, Inc.* that the third-party administrator challenged the conferral of fiduciary status, and the court did not discuss the facts that led to an assumed fiduciary relationship. 125 A.D.3d 1250, 1252-53 (N.Y. App. Div. 2015). This contrasts to an earlier opinion in the case, wherein a separate defendant—the actuary—explicitly challenged the conferral of fiduciary status. 2013 NY Slip Op 51403(U), ¶ 1, 40 Misc. 3d 1232(A), 1232A, 977 N.Y.S.2d 668, 668 (Sup. Ct.) (declining to address actuary's "contention that its duties were not fiduciary in nature" since the fiduciary duty claim was time-barred as against the actuary). Second, *Heim v. Madison National Life Insurance Co.* concerned a third party administrator for a disability insurance policy wherein such defendant "was involved in the decision to deny [plaintiff's disability] claim." No. 1:13-CV-00130-SEB-DKL, 2013 U.S. DIST LEXIS 133294, at *4-6 (S.D. Ind. Sept. 18, 2013). The exercise of a discretionary decision whether to award benefits is a far cry from any of the facts pled in the FAC.

Here, even assuming Angell is a third party administrator in addition to an actuary for the Plan, its role aligns with those of non-fiduciary, ministerial third-party administrators rather than a third-party administrator with discretionary authority over plan assets. *See, e.g., Carolinas Elec. Workers Ret. Plan v. Zenith Am. Sols., Inc.*, 658 F. App'x 966, 969 (11th Cir. 2016) ("A third-party administrator that performs purely ministerial functions, such as calculating benefits,

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[15] There is no allegation in the FAC that Angell was a "third party administrator." Plaintiffs' arguments in the Opposition cannot correct deficiencies in the allegations of the Plaintiffs' already amended complaint.

maintaining participant records, and communicating with participants, is not a fiduciary."); *Reich v. Lancaster*, 55 F.3d 1034, 1047 (5th Cir. 1995) ("third-party administrator who merely performs ministerial duties or processes claims is not a fiduciary").[16]

In conclusion, for the reasons discussed above and in the Motion, Plaintiffs have not pled facts sufficient to confer fiduciary status on Angell under Rhode Island law. Instead, Plaintiffs' allegations of fiduciary status are entirely conclusory and are not supported by relevant case law. Thus, Plaintiffs fail to state a claim for breach of fiduciary duty or aiding and abetting a breach of fiduciary duty (Counts XXI and XXII).

B. Plaintiffs fail to state a claim that Angell should be held civilly liable for a violation of the HCA.

Count XVI should be dismissed as to Angell because there is no allegation that Angell ever gave any false or incorrect information to the Regulators vetting the 2014 Asset Sale.[17] In response to Angell's Motion to Dismiss Count XVI, Plaintiffs make three arguments: (1) that criminal culpability under R.I. Gen. Laws § 23-17.14-30 does not require a defendant to give information to regulators evaluating HCA applications; (2) that Angell should be held liable for aiding and abetting other Defendants' alleged violation of the HCA regardless of whether Angell violated the

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[16] While both of these cases evaluated fiduciary status under ERISA, "all relevant sources indicate that Congress codified [in ERISA] the touchstone of common law fiduciary status — the parties' underlying relationship of trust and confidence." *Chamber of Commerce of the U.S.*, 885 F.3d at 369. Indeed, the similarity of the definition of fiduciary status under ERISA and Rhode Island law highlights the absurdity of Plaintiffs apparently conceding that Angell is not a fiduciary under ERISA while pursuing a claim for breach of fiduciary duty under Rhode Island law.

[17] Indeed, even Plaintiffs' false and tortured description of the 94.9% Projection, if taken as true, reveals that Plaintiffs do not really contend that anything in it is false. Rather, Plaintiffs' contention is that it is so incomplete as to provide a false impression. However, the FAC also details many other projections given to SJHSRI, such that, in total, there is nothing that is missing or misleading. So, Plaintiffs wish to hold Angell responsible for SJHSRI (supposedly) providing only some information to the Regulators, and not all the information Angell provided, notwithstanding that the FAC also shows that the Regulators were well aware of the need for future contributions.

HCA; and (3) that the Court should ignore the 94.9% Projection that is the centerpiece of the HCA claims against Angell and instead accept their unsupportable mischaracterization of the 94.9% Projection so that their claim may proceed. Plaintiffs' explanation of the basis of their various claims against Angell lays bare the deficiencies in their HCA claim. Plaintiffs' HCA claim depends upon an impermissibly broad interpretation of a criminal statute, a distorted reading of the 94.9% Projection that renders unreasonable every inference Plaintiffs would ask the Court to draw from it, and a theory of aiding and abetting that would impose liability without any plausible allegation of scienter.

1. **Plaintiffs' acknowledgment that Angell did not provide any information to the Regulators forecloses any claim that Angell violated the HCA.**

Plaintiffs apparently concede that Angell never gave their calculations to the Regulators evaluating the HCA application concerning the 2014 Asset Sale. (Opp. at 61.) Instead, they claim the HCA was violated when Angell provided its calculations to its client SJHSRI. Section 30 of the HCA imposes criminal penalties upon "any person" who "willingly or knowingly gives false or incorrect information." The statute, as Plaintiffs note, does not specify *to whom* false or incorrect information must be given in order for criminal penalties to be imposed. (Opp. at 63.) Nor, however, does section 30 of the HCA state that the giving of false or incorrect information must be related to an application under the HCA for criminal liability to attach. From the legislative omission of *who* must be given false or incorrect information for an HCA violation to occur, Plaintiffs draw the absurd conclusion that the HCA imposes criminal liability upon "any person" who gives "false or incorrect information" to any other person. (*Id.*)

Rhode Island courts have rejected similar efforts by civil litigants attempting to stretch criminal statutes to accommodate their claims. *See Alves v. Cintas Corp.*, PC-2009-2412, 2013 R.I. Super. LEXIS 125, at *11 (R.I. Super. Jul. 8, 2013) (rejecting as absurd an interpretation of

Rhode Island's statute governing employer drug testing that would hold employees liable for administering prohibited drug tests for their employers where the statute was silent as to who could be held civilly liable). Furthermore, where penal statutes (such as section 30 of the HCA) lack specificity as to precisely what conduct is prohibited, Rhode Island's Supreme Court has consistently determined that application of such statutes to conduct that is not specifically proscribed is unconstitutional. *See State v. Carter*, 827 A.2d 636, 644 (R.I. 2003) (stating "a penal statute must contain a description or definition of the act or conduct which comprises the offense contemplated therein stated with legal certainty.") Plaintiffs' interpretation of Section 30 of the HCA would impose criminal liability upon any person who knowingly provides false or incorrect information to any other person. Interpreted as Plaintiffs would have it, R.I. Gen. Laws § 23-17.14-30 would lack the "legal certainty" required of penal statutes in Rhode Island. *Id.* Plaintiffs' interpretation would also violate the rule of lenity and exceed the bounds of reason. *See Carter,* 827 A.2d at 643-44.

2. The FAC does not sufficiently allege that Angell aided and abetted others in violating the HCA.

In apparent recognition of the deficiency of their HCA claim against Angell, Plaintiffs fall back on an "aiding and abetting" theory of liability under R.I. Gen. Laws § 11-1-3. The statute provides:

> Every person who shall aid, assist, abet, counsel, hire, command, or procure another to commit any crime or offense, shall be proceeded against as principal or as an accessory before the fact, according to the nature of the offense committed, and upon conviction shall suffer the like punishment as the principal offender is subject to by this title.

R.I. Gen. Laws § 11-1-3.[18] Culpability for aiding and abetting under R.I. Gen. Laws § 11-1-3 requires a showing that, a defendant "shared in the criminal intent of the principal and there must be a community of unlawful purpose at the time the act is committed . . . it assumes some participation in the criminal act in furtherance of the common design. . . It implies some conduct of an affirmative nature and mere negative acquiescence is not sufficient." *State v. Gazzero*, 420 A.2d 816, 828 (R.I. 1980) (quoting *Johnson v. United States*, 195 F.2d 673,675 (8th Cir. 1952)). This formulation applies equally when a civil litigant seeks damages under R.I. Gen. Laws §9-1-2 for a defendant's alleged aiding and abetting. *See Willis v. Omar*, 954 A.2d 126, 131 (R.I. 2008).

Plaintiffs state, without any elaboration, that their "allegations are sufficient to give rise to a reasonable inference" that Angell aided and abetted a violation of the HCA. (Opp. at 64.) That Plaintiffs do not specify which allegations give rise to this inference is no surprise. The FAC does not contain the allegations necessary to give rise to an inference of the intent necessary to support Plaintiffs' aiding and abetting claims against Angell. Scienter "buzzwords, contending that [a defendant] had 'knowledge' that its statements were 'false' or had 'serious doubts' about their truth and a 'reckless disregard' for whether they were false . . . are merely legal conclusions, which must be backed by well-pled facts." *Schatz*, 669 F.3d at 56. *See also* Section II, *supra*.

Plaintiffs' FAC falls short of such well-pled facts. The FAC alleges that: (1) an Angell employee was contacted by a CCCB representative "and was told that CCCB 'wants to show the projection of the funded status after the $14M contribution for 2014,' in order to 'highlight the

[18] Under R.I. Gen. Laws § 11-1-3, the punishment for aiding and abetting a crime is limited to the punishment imposed under "this title," *i.e.,* Title 11. The punishments for violations of the HCA are not set forth in title 11 of the General Laws. So, even accepting for the sake of argument Plaintiffs' contention that one can aid and abet a violation of the HCA it would be a crime without a punishment since no punishment for violation of the HCA is available under Title 11.

stabilization of the plan'" (FAC ¶ 331); (2) based upon that Angell "knew" it was being asked to present a misleading calculation (FAC ¶ 332); and (3) Angell prepared the requested calculation [i.e. the 94.9% Projection] "knowing and intending" SJHSRI, RWH and CCCB would give the calculation to "the Rhode Island Department of Health and the Rhode Island Attorney General in support of the application for approval of the asset sale". (FAC ¶ 333.) Nothing in these allegations leads to a permissible inference of scienter to support Plaintiffs' aiding and abetting claims. There are no *facts* alleged to indicate that Angell *knew* it was being asked to present a misleading calculation. Plaintiffs' concession that the 94.9% Projection was accurate (Opp. at 61), and the disclosures in the 94.9% Projection that would prevent anyone from being misled about the necessity of future contributions certainly do not permit an inference that Angell understood that it was being asked to provide misleading calculations.

Plaintiffs allege that Angell provided the 94.9% Projection "knowing and intending" that it would be given to the Regulators (FAC ¶ 333). But for reasons discussed above, the 94.9% Projection could be misleading only if: (1) the Court chooses to ignore the actual 94.9% Projection in favor of Plaintiffs' false description of it; *and* (2) the Regulators lacked access to Angell's actuarial reports and other projections; *and* (3) the Regulators were so negligent as to believe that a single piece of paper with nothing on it other than a single percentage is the sum total of the actuarial information available; *and* (4) the Regulators were so unsophisticated as to be unable to discern that 94.9% is less than 100%. Plaintiffs do not allege a single fact that would permit such absurd inferences, or the even more absurd inference that Angell could have scienter of these "facts." In short, Plaintiffs' aiding and abetting claim relies on buzzwords that cannot support the inference of criminal purpose that is necessary for the claim's survival. *See Gazzero*, 420 A.2d at 828; *Schatz*, 669 F.3d at 56.

3. <u>Angell did not knowingly or willingly give false or incorrect information to anyone.</u>

The cornerstone of Plaintiffs' claim that Angell violated the HCA is the allegedly "false or incorrect" information that Angell provided to its client, who then allegedly provided it to the Regulators. (FAC ¶ 332; Opp. at 64-66.).[19] In a moment of candor, Plaintiffs concede that they "do not allege that Angell's calculations were inaccurate." (Opp. at 61.) The fact that Angell's calculations were accurate forecloses Plaintiffs' claim that Angell violated the HCA by providing false or incorrect information. While Plaintiffs concede that Angell's calculations regarding the Plan were accurate, they argue that "Angell's liability is based upon its *negligent* misrepresentations and failures to disclose the facts that made its calculations meaningless." (*Id.*) (emphasis added.) This theory of negligence and omission falls short of establishing a violation of Section 30 of the HCA which requires a defendant to "willingly or knowingly" give "false or incorrect" information.

Angell's' calculations cannot be both accurate (as Plaintiffs concede) and "false or incorrect" as required by R.I. Gen. Laws § 23-17.14-30. They are mutually exclusive. Plaintiffs do not dispute that, following the contribution of $14 million to the Plan, the Plan attained a funding ratio of 94.9%. (Opp. at 61.) Rather, they claim that disclosing this funding ratio rendered the 94.9% Projection misleading and that the omission of future projections rendered the calculation "meaningless." (FAC ¶ 332, 335; Opp. at 61). But the disclosures contained in the 94.9% Projection plainly warned that the analysis was "for illustrative purposes only," that it did not account for "future funding and accounting costs," and that the future funding status of the

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[19] Admittedly, Angell mistakenly attached an earlier version of the 94.9% Projection to its motion to dismiss the FAC. While Plaintiffs make much of this in their Opposition, their protestations ring hollow when the documents are compared. As set forth in the accompanying Declaration of Peter Karlson the differences between the two documents are immaterial.

Plan would depend upon participant demographics, asset values and assumptions. (94.9% Projection at p. 1.) Critically, the 94.9% Projection made obvious to any reader that future funding of the Plan was required. It included a recommended contribution of $1,391,000 for the Plan year beginning July 1, 2014 "[b]ased on a *10-year open amortization* of the unfunded liability." (*Id.* at pp. 1, 2.) (emphasis added.) If anyone failed to comprehend that a future recommended contribution of $1,391,000 and a ten-year amortization of unfunded liability disclosed a requirement for future plan funding, that misunderstanding necessarily resulted from something other than the 94.9% Projection. Indeed, the FAC itself shows that Plaintiffs well understand that any funding ratio less than 100% necessarily implies that future Plan contributions are required. (FAC ¶ 342) (stating "a funding level of 91.5% would practically guarantee pension plan failure, since it would denote insufficient funds to meet plan obligations even if all of the future assumptions upon which the funding level is based perform exactly as assumed . . ."). Plaintiffs will undoubtedly beg the Court to infer that the Regulators were misled by the 94.9% Projection, but that inference is wholly unreasonable given the actual contents of the document upon which Plaintiffs rely.

Plaintiffs also allege that:

> 334. [The 94.9% Projection] also did not disclose that the funding percentage of 94.9% was based on assumed investment returns that SJHSRI, RWH, CCCB, Angell, and Defendants Prospect Chartercare, Prospect Chartercare St. Joseph, Prospect Chartercare Roger Williams, Prospect Medical Holdings, and Prospect East knew were nearly 70% above market rates of return (i.e., Angell's projected rate of return of 7.75% was over 68% greater than the market rate of 4.6%).

(FAC ¶ 334.) This is simply a falsehood. Plaintiffs lack *any* good faith basis to make this allegation. The assumed rate of return (7.75%) was disclosed in the 94.9% Projection, and the Regulators evaluating the HCA applications were well aware of it. (94.9% Projection at p. 1; FAC

¶ 335.) The "Projection Assumptions" preceding Angell's projections included the following disclosed assumption: "Rate of Return on Investments: 7.75%" and indicated that "[t]his assumption has been selected by St. Joseph Health Services of Rhode Island consistent with direction from the Plan's investment manager regarding long-term expectations for the Plan's rate of return based on the current investment allocation." (94.9% Projection at p. 1.) The Regulators evaluating the HCA application were aware of this assumption and specifically inquired regarding the "investment risk" that is inherent in any calculation of future Plan liabilities, and asked what would happen if "investment returns don't match up to ***predictions***." (FAC ¶ 355.) (emphasis added).

Plaintiffs are also well aware that the assumed rate of return (7.75%) was disclosed in the 94.9% Projection. They simply urge the Court to ignore the truth because the truth is "not alleged in the Complaint." (Opp. at p. 65.) On this much, Plaintiffs and Angell agree. But the Court is not bound, as Plaintiffs suggest, to accept fiction as truth where the allegations of the FAC are directly contradicted by the documents upon which Plaintiffs rely. *See* Section I, *supra*.

Recognizing the outright falsity of their allegation that the assumed rate of return was not disclosed to Regulators, Plaintiffs engage in a shell game by noting that the version of the 94.9% Projection that was attached to Angell's' Request for Judicial Notice was not the one provided to Regulators. Plaintiffs are correct, and the attachment of the incorrect version of the 94.9% Projection to the Request for Judicial Notice was due to an inadvertent error. As noted in footnote 8, *supra*, the differences between the versions were immaterial.

4. <u>**Plaintiffs fail to allege the scienter required under R.I. Gen. Laws § 23-17.14-30.**</u>

The HCA does not proscribe the production of "meaningless" calculations resulting from "negligent misrepresentations" or omissions (Opp. at 61); it plainly prohibits the knowing or

willful production of false or incorrect information. *See* R.I. Gen. Laws § 27-17.14-30. The HCA's prohibition of knowing or willful misrepresentation cannot be expanded to criminalize allegedly negligent misstatements or omissions because that interpretation would run counter to the plain meaning of "willingly or knowingly." *See City of Providence v. Buck Consultants*, *LLC*, C.A. No. 13-131 S, 2013 U.S. Dist. LEXIS 112512, at *12-13 (D.R.I. Aug. 9, 2013) (holding that alleged negligence is insufficient to satisfy the "knowingly" scienter requirement of Rhode Island's False Claims Act); *State v. Lima*, 316 A.2d 501, 503 (R.I. 1974) (stating, "to act either 'knowingly' or 'willfully' is to act voluntarily and intentionally, and not because of mistake or accident or other innocent reason."). For this reason alone, Plaintiffs' HCA claim against Angell fails.

Undoubtedly, Plaintiffs will beg again for the Court to draw an inference of scienter based upon the allegations of the FAC. However, as explained above, an inference of scienter requires more than the use of "buzzwords." It requires allegations of *fact* that make allegations of willing or knowing deception plausible. *See Schatz,* 669 F.3d at 56 (holding that bare allegations of knowledge or intent are mere conclusions that are not accepted as true in ruling on a motion to dismiss). Here, the FAC falls far short. Plaintiffs allege that Angell prepared the concededly accurate 94.9% Projection, but Plaintiffs' concession of accuracy (Opp. at 61) cannot lead to a reasonable inference that Angell knew it to be false or incorrect. Plaintiffs allege that Angell knew or intended that the 94.9% Projection would be given to the Regulators, but they do not allege a single fact to support the idea that the Regulators would not also have access to Angell's other reports and projections. In light of the lack of sufficient factual allegations to support an inference of Angell's willing or knowing submission of false information to the Regulators, Count XVI must be dismissed as to Angell.

C. Plaintiffs fail to state a claim against Angell for civil liability for violation of R.I. Gen. Laws § 11-18-1.

In response to Angell's request for dismissal of Count XVIII, Plaintiffs cite to bare recitations of the elements of an offense under R.I. Gen. Laws § 11-18-1 that are contained in the FAC. (Opp. at 67 citing FAC ¶ 540.) Copying and pasting a statute into the FAC is insufficient to state a claim against Angell under R.I. Gen. Laws §§ 9-1-2 and 11-18-1. *See Schatz*, 669 F.3d 50 (setting forth the steps in evaluating the sufficiency of complaint, "Step one: isolate and ignore statements in the complaint that simply offer legal labels and conclusions *or merely rehash cause-of-action elements*." (emphasis added)). The FAC lacks sufficient factual allegations to sustain a claim under R.I. Gen. Laws § 11-18-1 because: (1) as explained in Angell's Motion to Dismiss, the documents that it is alleged to have given to others were not false, erroneous or defective (Motion at 45-50); and (2) Plaintiffs' allegations that Angell intended to deceive by giving these documents to others depend upon scienter buzzwords and not facts that would allow a reasonable inference of actual intent to deceive. (FAC ¶¶ 294, 309, 540.)

First, in order for Plaintiffs' claim under R.I. Gen. Laws § 11-18-1 to succeed they "must negat[e] any reasonable interpretation that would make" the documents upon which they rely truthful or correct. *See United States v. Anderson*, 579 F.2d 544, 460 (8th Cir. 1978), *cert. denied*, 439 U.S. 908 (1978); *State v. Salvatore*, 763 A.2d 985, 990 (R.I. 2001). For the sake of brevity, Angell does not explain again why the documents it is alleged to have given to others were accurate.[20] Suffice it to say, there are myriad interpretations that would make these documents correct and truthful, and Angell submits that any other interpretations would be unreasonable inferences that the Court is not obliged to draw in considering a motion to dismiss. *See Schatz*, 669

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[20] The explanations concerning the accuracy of Participant Statements, PowerPoint Presentations, the Bar Graphs and the 94.9% Projection are set forth in Angell's Motion at 45-50.

F.3d at 57 ("while we must draw all reasonable inferences in the plaintiff's favor, we need not accept every imaginable inference." *citing Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 514, 515 (1st Cir. 1988).) Even if there is some reasonable interpretation of these documents that would make then inaccurate, as Plaintiffs contend, their claim under R.I. Gen. Laws § 11-18-1 can only survive if the Court cannot discern *any* reasonable interpretation of the documents that would render them truthful or accurate. *See Anderson*, 579 F.2d at 460; *Salvatore*, 763 A.2d at 990. Plaintiffs' claim against Angell under R.I. Gen. Laws § 11-18-1 does not clear this hurdle.

Second, Plaintiffs' allegations of scienter with respect to the four documents that Angell is alleged to have given to others are nothing but conclusory statements that Angell knew of the documents' falsity and/or intended to deceive others by way of these documents. (FAC ¶¶ 291 (regarding Participant Statements), 292 (regarding the PowerPoint Presentation), 332-336 (regarding the 94.9% Projection).)[21] The Court cannot accept bare allegations regarding Angell's alleged knowledge of a document's falsity or Angell's intent to deceive by way of such documents. *See Schatz*, 669 F.3d at 58 (dismissing a complaint for lack of sufficient allegations of malice where plaintiff's conclusory allegations that the defendant knew a statement to be false failed to push the "actual-malice claim 'across the line from conceivable to plausible'" quoting *Twombly*, 550 U.S. at 570).) The Plaintiff's R.I. Gen. Laws § 11-18-1 must be dismissed due to the failure to state a plausible claim that Angell possessed the necessary intent.

Finally, Plaintiffs' Opposition to Angell's Motion to Dismiss their claim under R.I. Gen. Laws § 11-18-1 appears to imply that the document upon which the claim is based is the 94.9 % Projection. The FAC alleges that the 94.9% Projection was prepared by Angell at the request of

[21] The FAC does not appear to contain even a conclusory allegation that Angell intended to deceive someone by preparing the Bar Graphs.

SJHSRI, RWH and CCCB and that they all understood the contents thereof. (FAC ¶¶ 332-336). The FAC does not allege that *Angell* gave the 94.9% Projection to the Regulators; rather the FAC alleges it was given to the Regulators by SJHSRI, RWH and CCCB. (FAC ¶ 333.) The claim that Angell gave the 94.9% Projection to the entities that requested it and completely understood the meaning thereof, is nonsensical and fails to satisfy the requirements of R.I. Gen. Laws § 11-18-1. *See Salvatore*, 763 A.2d at 990 (explaining that R.I. Gen. Laws § 11-18-1 is only violated when a documents is intended to deceive *the entity to which the defendant transmits it)*. To claim that Angell violated the R.I. Gen. Laws § 11-18-1 by providing the 94.9% Projection to the entities that requested and understood it is implausible on its face and must be dismissed.

D. Plaintiffs fail to state a claim against Angell for civil conspiracy.

Plaintiffs' Opposition does nothing to save its purported "conspiracy" claim against Angell. Plaintiffs simply rehash the allegation from the FAC that Angell and the other defendants "participated in a conspiracy to injure the Plaintiffs." (Opp. at 47.) But this conclusory allegation of "conspiracy" is woefully insufficient to state a plausible claim. *See Mendez Internet Mgmt. Servs., Inc. v. Banco Santander de Puerto Rico*, 621 F.3d 10, 15 (1st Cir. 2010) (". . . as for conspiracy or attempt, the complaint says only that the defendants 'entered into a conspiracy to extort the plaintiff,' a conclusory assertion inadequate under *Twombly* . . ."); *Penalbert-Rosa v. Fortuno-Burset*, 631 F.3d 592, 596 (1st Cir. 2011) (noting that Circuit precedent has been tightening even before *Iqbal/Twombly*, and the use of "general statements" and "legal boilerplate" terms like "conspiracy" are "no longer a passport to discovery").

However, Plaintiffs' failure in pleading a supposed "conspiracy" goes beyond lack of particularity. The FAC details Angell's many reports, projections and communications detailing the need for future contributions, both before and after the $14 million contribution. Such actions are simply insufficient to give rise to a plausible inference that Angell participated in any so-called

"conspiracy." *See Twombly,* 550 U.S. at 568 (finding that industry developments provided a "natural explanation" for defendants' alleged conduct that helped to foreclose plaintiffs' suggestion of conspiracy); *Iqbal,* 129 S. Ct. at 1951–52 (finding that though some of the plaintiff's allegations were "consistent with" purposeful discrimination, the complaint as a whole supported a plausible and legitimate motive by law enforcement officers to protect the nation from "suspected terrorists"); *DM Research, Inc. v. Coll. of Am. Pathologists,* 2 F. Supp. 2d 226, 229 (D.R.I. 1998), aff'd, 170 F.3d 53 (1st Cir. 1999) ("The existence of a conspiracy may be inferred from the actions of the alleged conspirators. However, such an inference must be reasonable and 'is warranted only when a theory of rational, independent action is less attractive than that of concerted action.' Thus, '[I]f [CAP and/or NCCLS] had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy.'" *citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 596–597 (1986)); *see also Am. Dental Ass'n v. Cigna Corp.,* 605 F.3d 1283, 1294–95 (11th Cir. 2010) (allegations of parallel conduct, accompanied by nothing more than a bare assertion of a conspiracy, do not plausibly suggest a conspiracy, stating that "without that further circumstance pointing to a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory.")

Plaintiffs simply have not pled any acts that Angell performed that were reasonably related to the promotion of the claimed conspiracy with any degree of particularity to meet the requirements of Rules 9(b) and 12(b)(6). *Hayduk v. Lanna*, 775 F.2d 441, 444 (1st Cir. 1985) ("This circuit has required that the complaint 'allege with at least some degree of particularity overt acts which defendants engaged in which were reasonably related to the promotion of the claimed conspiracy'"). Instead, Plaintiffs contend that this first "particularity" prong of Fed. R.

Civ. P. 9(b) should somehow be "relaxed" in this instance. (Opp. at 30-31.) This argument is baseless. Plaintiffs rely solely on one, cherry-picked quote from a treatise that – on its face – applies only to instances involving a "bankruptcy trustees" who have "secondhand knowledge." *Id.* citing Wright, Miller, et al., Fed. Prac. & Proc. Civ. § 1298 (3d ed.).[22] None of the cases cited by the Wright & Miller treatise extend the supposed "relaxed" particularity requirement beyond bankruptcy trustees with second hand knowledge. *See* Wright & Miller, *et al.*, Fed. Prac. & Proc. Civ. § 1298 (4d ed.) (citing *Devaney v. Chester*, 813 F.2d 566, 569 (2d Cir. 1987); *Welch v. Synovus Bank*, 517 B.R. 269 (M.D. Fla. 2014); *Smith ex rel. Estates of Boston Chicken, Inc. v. Arthur Andersen L.L.P.,* 175 F. Supp. 2d 1180 (D. Ariz. 2001); *In re Comprehensive Power, Inc.,* 578 B.R. 14, 24 (Bankr. D. Mass. 2017); *In re Atomica Design Group, Inc.,* 556 B.R. 125, 148 (Bankr. E.D. Pa. 2016); *In re Collins,* 540 B.R. 54, 65–66 (Bankr. E.D.N.Y. 2015)). Nor are any of the cases outside the First Circuit cited by the treatise binding on this Court in any event.

Moreover, the treatise plainly limits the supposed "relaxed" standard to situations where the bankruptcy trustee has limited or "secondhand" information. That is not the case here. As receiver of the Plan, Plaintiff Del Sesto – admittedly – has possession of *thousands* of documents concerning the administration of the Plan. (Opp. at 72 (noting that Plaintiffs have obtained "substantial productions of documents")). Plaintiffs even concede that they have already engaged in substantial litigation to "uncover the facts" here. *Id.* Because Plaintiffs have access to far more information than just "secondhand knowledge," there is simply no such reason to "relax" the particularly requirement of Fed. R. Civ. P. 9(b) here. *See, e.g., In re Rollaguard Sec., LLC,* 570 B.R. 859, 870 (Bankr. S.D. Fla. 2017), reconsideration denied, 576 B.R. 260 (Bankr. S.D. Fla.

[22] This quote does not appear in the Third Edition of Wright & Miller cited by Plaintiffs; however it does appear in the Fourth Edition.

2017) (a bankruptcy trustee will be held to the usual Fed. R. Civ. P. 9(b) standard when the trustee does not suffer from a lack of knowledge as that eliminates the need to relax the heightened particularity requirement of Fed. R. Civ. P. 9(b).)[23]

E. Plaintiffs fail to state a claim against Angell for obtaining money under false pretenses.

In their Opposition to Angell's Motion to Dismiss Count XIX (civil liability for obtaining money or property under false pretenses) Plaintiffs appear to abandon any claim that Angell obtained any money or property under false pretenses. (Opp. at 68.) Instead, Plaintiffs claim that Angell conspired with and/or aided and abetted other defendants in doing so. The FAC fails to set forth sufficient allegations of: (1) any deprivation of property from a victim as a result of false pretenses; or (2) any scienter on the part of Angell to support conspiracy or aiding and abetting claims.

R.I. Gen. Laws § 11-41-4 provides

> Every person who shall obtain from another designedly, by any false pretense or pretenses, any money, goods, wares, or other property, with intent to cheat or defraud, and every person who shall personate another or who shall falsely represent himself or herself to be the agent or servant of another and shall receive any money or other property intended to be delivered to the person so personated, or to the alleged principal or master of that agent or servant, shall be deemed guilty of larceny.

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[23] In this regard, courts have refused to relax the requirements of Fed. R. Civ. P. 9(b) when the information necessary to plead with particularity is within the control of a party other than defendants. *In re Neurontin Mktg. & Sales Practicing Litig.*, No. 04-10981, 2007 WL 609875, at *1 (D. Mass. Feb. 23, 2007) citing *Yuhasz v. Brush Wellman, Inc.,* 341 F.3d 559, 566 (6th Cir. 2003) (emphasizing that Fed. R. Civ. P. 9(b) "may be relaxed where information is *only* within the opposing party's knowledge," not where third parties also possess the information (citation omitted)); *United States ex rel. Russel v. Epic Healthcare Mgm't Group*, 193 F.3d 304, 308 (5th Cir. 1999) (plaintiff not entitled to relaxed pleading standard where "documents containing the requisite information were possessed by other entities" besides defendants); *Jepson, Inc. v. Makida Corp.*, 34 F.3d 1321, 1328 (7th Cir. 1994) (relaxation of heightened pleading requirements inappropriate in RICO case where plaintiffs "have as much access as defendants" to third parties in possession of the necessary information).

Proof of a violation of R.I. Gen. Laws § 11-41-4 requires a showing that the victim was fraudulently induced to part with money or property. *State v. Aurgemma*, 358 A.2d 46, 49 (R.I. 1976) (stating "the crime is committed at the moment *the **victim** is fraudulently induced to part with his money or property*.") (emphasis added.) In Plaintiffs' Opposition, they contend that Defendants other than Angell "(especially the Prospect Defendants) obtained property under false pretenses, and that Angell aided and abetted and/or conspired with those other Defendants." (Opp. at 68.) Plaintiffs' theory does not satisfy the elements of the crime alleged because it ignores the requirement that the ***victim*** of the alleged crime be fraudulently induced to part with property.

The Prospect Defendants are alleged to have received property from SJHSRI, RWH and CCCB as a result of the 2014 Asset Sale. (FAC ¶ 11.) There are no other allegations in the FAC concerning a party obtaining property by any means. Therefore, read fairly, the FAC alleges that SJHSRI, RWH and CCCB are the putative victims of the crime as they are the *only* parties who allegedly parted with property. But, there is no allegation that they were fraudulently induced to part with their property through the 2014 Asset Sale. If anything, the FAC alleges that SJHSRI, RWH and CCCB were the perpetrators of a fraud, not the victims of it. The FAC simply fails to allege the underlying crime proscribed by R.I. Gen. Laws § 11-41-4. *See Aurgemma*, 358 A.2d at 49.

Angell argued in its Motion that Count XIX should be dismissed because the FAC does not allege that Angell received any money or property, let alone through false pretenses. In response, Plaintiffs' sole argument is that Angell conspired with or aided and abetted the Prospect Defendants as they obtained property under false pretenses. (Opp. at 68.) A criminal conspiracy under R.I. Gen. Laws § 11-1-6 requires proof of a "combination of two or more persons to commit an unlawful act or to do a lawful act for an unlawful purpose." *State v. Porto*, 591 A.2d 791, 795,

(R.I. 1991) *quoting State v. Sabitoni,* 434 A.2d 1339, 1342 (R.I. 1981). As explained above, however, there was no underlying violation of R.I. Gen. Laws § 11-41-4 because the only parties that are alleged to have parted with any property as a result of the 2014 Asset Sale are SJHSRI, RWH and CCCB. While a conviction for conspiracy does not require that the underlying crime actually be completed, it does require proof that the alleged conspirators agree to commit the underlying crime. *See State v. Parente*, 460 A.2d 430, 440-41 (R.I. 1983). The FAC does not allege that Angell agreed to act in concert with any party to fraudulently induce SJHSRI, RWH and CCCB to part with their property. Therefore, any claim that Angell conspired to violate R.I. Gen. Laws § 11-41-4 must be dismissed.

Plaintiffs' aiding and abetting theory as to Count XIX is also deficient. Liability for aiding and abetting requires the underlying crime to actually have been committed. *Gazerro*, 420 A.2d 816, 828 (R.I. 1980) ("there must be a community of unlawful purpose *at the time the act is committed*") (emphasis added and quotations omitted). Since the FAC does not allege that anyone was fraudulently induced to part with property, there is no violation of R.I. Gen. Laws § 11-41-4 alleged. Angell simply cannot have aided or abetted a crime that was not committed. For this reason, Plaintiffs' aiding and abetting theory as to Count XIX fails and the count should be dismissed.[24]

V. THERE IS NO SUCH CAUSE OF ACTION UNDER ERISA § 502(A)(3), 29 U.S.C. § 1132(A)(3) FOR PARTICIPATING IN A FIDUCIARY BREACH BY A NON-FIDUCIARY

Much of Plaintiffs' Opposition focuses on whether Angell is a "fiduciary" or owes "fiduciary duties" to the Plan and its participants under Rhode Island state law. (Opp. at 1, 4, 37-

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[24] For the sake of brevity, Angell does not repeat its arguments regarding the insufficiency of Plaintiffs' allegations of scienter necessary to support any claim of aiding and abetting. Angell incorporates those arguments with respect to Plaintiffs' aiding and abetting theory in Count XIX.

44.) However, Plaintiffs concede that Angell is not a "fiduciary" under ERISA§ 3(21), 29 U.S.C. § 1002(21) (definition of fiduciary). (Opp. at 6, n. 9.) Instead, with Count III, Plaintiffs seek to hold Angell – a non-fiduciary – liable for supposedly "aiding and abetting" or "participating" in a breach of fiduciary duty under ERISA by the Plan's actual fiduciaries – SJHSRI and CCCB.[25]

In its Motion (at 19-20), Angell cited ample Supreme Court and First Circuit authority that ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) simply does not authorize suit against non-fiduciaries for "participating" in a fiduciary breach. *Id.* citing *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254 (1993) (holding a non-fiduciary actuary could not be held liable under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) for knowingly assisting in a breach by a fiduciary); *Reich v. Rowe*, 20 F.3d 25, 26 (1st Cir. 1994) ("Although ERISA may allow for some types of actions against non-fiduciaries, it does not authorize suits against non-fiduciaries charged solely with participating in a fiduciary breach."). As the Supreme Court has recognized, this was no "oversight" because ERISA *does* explicitly impose "knowing participation" liability on co-fiduciaries. *Mertens,* 508 U.S. at 254 (citing 29 U.S.C. § 1105(a)) (emphasis in original).

Plaintiffs' Opposition does not even attempt to address or distinguish Angell's cited authority. Instead, Plaintiffs rely on a cherry-picked quote from one case from the Western District of New York. (Opp. at 6 citing *In re M&T Bank Corp. ERISA Litigation*, No. 16-CV-375 FPG, 2018 WL 4334807, at * 11 (W.D.N.Y. Sept. 11, 2018). However, this cite and quote is misleading, and is not supported by the authority cited therein. First, M&T expressly cites to the Supreme Court's decision in *Harris Tr. & Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S.

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[25] Plaintiffs suggest that Angell somehow waived arguments with regard to the allegations against other Defendants. (Opp. at 6.) This is simply not the case. In order to avoid duplication for the Court, Angell chose not to address allegations against other Defendants that those Defendants were addressing, and simply incorporated their briefs by reference.

238 (2000). But in that case, the Supreme Court held that ERISA § 502(a)(3), 29 U.S.C. § 1132, authorizes suits against non-fiduciaries for participating in a transaction prohibited by ERISA § 406(a), 29 U.S.C. §1106(a). However, as noted in Angell's Motion (at 20-21, n. 18), the *Harris Trust* decision is plainly limited to prohibited transaction claims under ERISA § 406(a), 29 U.S.C. § 1106 only, and does not hold that ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) provides a cause of action against non-fiduciaries for participating in breaches of fiduciary duty by plan fiduciaries under ERISA §§ 404 or 409, 29 U.S.C. §§ 1104 or 1106. *See, e.g., McDannold v. Star Bank,* 261 F.3d 478, 486 (6th Cir. 2001) (explaining the "narrow reach" of *Harris Trust*). Accordingly, the *M&T* reasoning is inapplicable here because Plaintiffs have not alleged a prohibited transaction claim under ERISA § 406, 29 U.S.C. § 1106.[26]

M&T also cites to *Gerosa v. Savasta & Co.*, 329 F.3d 317, 320–21 (2d Cir. 2003). However, in *Gerosa*, the Second Circuit made clear that "ERISA does not expressly or even impliedly create a right of action," by "participants and beneficiaries in an ERISA plan against a non-fiduciary, who was alleged to have knowingly participated in a plan fiduciary's breach of duty." *Id.* at 322. The Second Circuit then went on to recognize that post-*Mertens*, "non-fiduciaries who knowingly participate in a fiduciary breach cannot be liable for ordinary money damages." *Id.* As a result, the Second Circuit held that a claim could not proceed against the plan's actuary for a supposed "knowing participation in a breach" under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) because there was no such remedy available. *Id.*[27]

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[26] Plaintiffs also disingenuously cite to *In re Estate of Ross*, 131 A.3d 158 (R.I. 2016). Ross, a probate court case involving an alleged breach of fiduciary duty under Rhode Island state law, has absolutely no application to whether a cause of action exists under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

[27] This is consistent with the First Circuit's decision in *Reich*, and other Circuit courts. *See, e.,g., Renfro v. Unisys Corp.,* 671 F.3d 314, 325 (3d Cir. 2011) ("In light of *Reich*, and interpreting

Indeed, as Angell addressed in its Motion (at 22-23), as addressed by the Second Circuit in *Gerosa* (329 F.3d at 321-22), the issue is not just whether ERISA authorizes such a suit against non-fiduciaries, but whether the remedy Plaintiffs seek falls within such "other appropriate equitable relief" as they may obtain under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). Plaintiffs have not alleged sufficient facts to make out a claim for restitution or other form of equitable disgorgement against Angell.[28] Plaintiffs have not alleged that any moneys sought by Plaintiffs were ever in Angell's possession, or that Angell was unjustly enriched, and they are not seeking any identifiable, traceable funds from Angell. Plaintiffs' Opposition does not address this argument at all. Therefore, Plaintiffs' claim for relief against Angell under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) fails as a matter of law.

VI. TO THE EXTENT THE COURT DISMISSES CLAIMS AGAINST OTHER DEFENDANTS, ANY DERIVATIVE CLAIMS ALLEGED AGAINST ANGELL SHOULD BE DISMISSED

To the extent the Court dismisses the FAC as alleged against the Prospect Entities and the Diocesan Entities for fraud, breach of fiduciary duty, and/or conspiracy, the Court should dismiss any related counts against Angell for aiding, abetting or otherwise "conspiring" with those Defendants with respect to any such dismissed counts. *See, e.g.*, *Taylor v. Airco, Inc.*, 503 F. Supp. 2d 432, 448 (D. Mass. 2007) (dismissing claim against remaining defendants because "the court

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identical language, we find *Mertens* persuasive and hold that 29 U.S.C. § 1132(a)(3) does not authorize suit against 'non-fiduciaries charged solely with participating in a fiduciary breach.' Because, as previously discussed, the Fidelity entities did not act as fiduciaries with respect to the alleged breach, they may not be sued under this section for acts taken in a non-fiduciary role.") (citation omitted); *Nieto v. Ecker*, 845 F.2d 868, 871 (9th Cir. 1988) ("The plain language of section 409(a) limits its coverage to fiduciaries, and nothing in the statute provides any support for holding others liable under that section.")

[28] In order to make out a claim for restitution, a plaintiff must show that the defendant has unjustly received from the plaintiff a benefit, such as a payment, or that the defendant holds funds or property that in good conscience should belong to the plaintiff. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002).

has found that [p]laintiffs' fraud claim [against dismissed defendant Monsanto] lacks merit, it therefore follows that the civil conspiracy claim [against remaining defendants] must fail as well") *aff'd Taylor v. Am. Chemistry Council*, 576 F.3d 16, 21 (1st Cir. 2009); *Díaz-Nieves v. United States*, 858 F.3d 678, 689 (1st Cir. 2017) (dismissing remaining claim because it was "wholly derivative" and depending on the viability of the underlying claim).

CONCLUSION

For all of the foregoing reasons, the FAC should be dismissed as to Angell with prejudice.

This 4th day of March, 2019.

THE ANGELL PENSION GROUP, INC.

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of March, 2019, I have caused the within *Reply to Plaintiff's Objection to Defendant The Angell Pension Group, Inc.'s Motion to Dismiss the First Amended Complaint* to be filed with the Court via the ECF filing system. As such, this document will be electronically sent to the registered participants identified on the Notice of Electronic Filing (NEF).

/s/ Steven J. Boyajian
Steven J. Boyajian