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.

PROSPECT CHARTERCARE, LLC; ET AL.,

Defendants.

C.A. No. 1:18-CV-00328-S-LDA

DEFENDANTS ROMAN CATHOLIC BISHOP OF PROVIDENCE, A CORPORATION SOLE, DIOCESAN ADMINISTRATION CORPORATION AND DIOCESAN SERVICE CORPORATION'S REPLY IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

DATED: March 4, 2019

ROMAN CATHOLIC BISHOP OF PROVIDENCE, A CORPORATION SOLE, DIOCESAN ADMINISTRATION CORPORATION and DIOCESAN SERVICE CORPORATION

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Defendants Roman Catholic Bishop of Providence, a corporation sole ("RCB"), Diocesan Administration Corporation ("DAC") and Diocesan Service Corporation ("DSC", and collectively with RCB and DAC, the "Diocesan Defendants") respectfully submit this reply memorandum in further support of their Motion to Dismiss the First Amended Complaint, ECF No. 60, ("Amended Complaint" or "FAC").

PRELIMINARY STATEMENT

After certain defendants filed motions to dismiss the original complaint, Plaintiffs filed a 165-page, twenty-three count Amended Complaint. That was followed by Plaintiffs' collective 488 pages of opposition to defendants' renewed motions. Two memoranda are directed at the Diocesan Defendants' motion to dismiss: a 103 page memorandum addressing the Diocesan Defendants' motion specifically ("the Opposition")[1] and a 165-page "Omnibus Memorandum" containing 77 pages of factual recitation and numerous arguments directed to various ERISA claims.[2] In their motion to dismiss the Amended Complaint, the Diocesan Defendants noted that the allegations lodged against them were patently false, implausible, conclusory and lacked sufficient factual or legal basis to state a valid claim for relief. The Plaintiffs' voluminous opposition filings do nothing to change that.

- The Opposition does not argue that the Diocesan Defendants incorrectly declared that the St. Joseph Health Services of Rhode Island Retirement Plan (the "Plan") had a surplus of assets over accrued benefits leading up to the Great Recession of 2008, or that the Plan lost over 30% of its value because of that crash. Instead, Plaintiffs argue that the Court should not look at records quoted in the Amended Complaint or posted on Plaintiff Del Sesto's (the "Receiver")

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[1] Pls.' Mem. in Opp'n to Diocesan Defs.' Mot. to Dismiss ("Opposition" or "Opp'n"), ECF No. 96-1.

[2] Pls.' Omnibus Mem. in Supp. of their Objection to Defs.' Mots. To Dismiss. ("Omnibus Memo" or "Omnibus Mem."), ECF No. 100.

own website that confirm the Diocesan Defendants' statements. The Opposition further contends that the Diocesan Defendants can be liable for representations that were true when made if, decades later, circumstances change and those ancient statements are no longer accurate. Plaintiffs are wrong on the facts and the law on this score and the Court should clear out claims devoid of causation and any hope of success. *Infra* Part I.C., II, III.B.

- The Opposition does not deal with the greater context of the June 20, 2014 asset sale (the "2014 Asset Sale") between CharterCare Community Board ("CCCB"), St. Joseph Health Services of Rhode Island Inc. ("SJHSRI"), and Roger Williams Hospital ("RWH") and the Prospect Entities.[3] Nor does it meaningfully dispute the statements in the Diocesan Defendants' Motion to Dismiss that all of the key elements of the Plaintiffs' implausible secret scheme were actually disclosed to state regulators (rendering the allegations even more implausible that it was an illegal scheme at all). Instead, Plaintiffs again beseech the Court not to review public records referenced in the Amended Complaint. No doubt fearful of the logical force of those arguments, they raise red-herrings like the Court cannot look to those documents for the truth of the matters asserted (knowing full well that the Diocesan Defendants merely argued that facts Plaintiffs alleged were not disclosed were disclosed, and the Court need not weigh the truth of any statement at all) and that the facts, presented in the Amended Complaint as hidden from *regulators*, were not disclosed to Plaintiffs. *Infra* Part I.B & III.C.

- The Opposition does not negate the conclusion that the fraud and conspiracy that Plaintiffs allege is implausible and that the Diocesan Defendants' actions are far more plausibly explained as concerned parties trying to help community hospitals teetering on failure in 2014. *Infra* Part III-IV.

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[3] "Prospect Entities" refers to Defendants Prospect Medical Holdings, Inc., Prospect East Holdings, Inc., Prospect CharterCARE, LLC, Prospect CharterCARE SJHSRI, LLC, and Prospect CharterCARE RWMC, LLC.

- The Opposition adds no clarity at all to the roles allegedly played by the three distinct Diocesan Defendants. Plaintiffs' sole response to failing to allege with any specificity which Diocesan personnel or entity said what to whom, or when, is to argue merely that the Bishop is the President of all three Diocesan Defendants and therefore, without any further explication, all actions referenced in the Amended Complaint were done on behalf of all three defendants. No fraud claim alleged against the Diocesan Defendants survives this fatal pleading deficiency. *Infra* Part III.A.

- The Opposition fails to save the numerous causes of action that are clearly not justified on the allegations in the Amended Complaint. These claims include not just the fraud and conspiracy claims for the reasons just mentioned, but also the more "esoteric" of Plaintiffs' numerous claims, like those based improperly on R.I. Gen. Laws § 9-1-2, unsubstantiated fiduciary claims, and Plaintiffs' too-clever attempt to seek monetary relief from non-fiduciaries under ERISA by labeling the claim "equitable." *Infra* Part V-VIII.

Plaintiffs have had sufficient opportunity to justify their claims and failed. Indeed, they have had opportunities well beyond most claimants as they had nearly a year's worth of significant pre-suit discovery. This case cries out for substantial pruning of the underbrush so that whatever real claims remain get the attention they deserve, while others, perhaps more worthy of Oliver Stone's rather than this Court's attention, meet an early and deserved end.

ARGUMENT

I. THE COURT CAN (AND SHOULD) REVIEW THE EXHBITS APPENDED TO THE DIOCESAN DEFENDANTS' MOTION TO DISMISS

Plaintiffs argue that the Court should ignore documents referenced in their own complaint and public records, including those posted on the Receiver's own website. Opp'n at

3-14, 18-19, 50. Plaintiffs protest too much. And a review of the law—and the documents—makes clear why.

A. <u>First Circuit Law Permits The Court To Review The Exhibits</u>

Consistent with First Circuit precedent, the Court may consider Exhibits 1-25 of the Diocesan Defendants' motion to dismiss (collectively, the "Exhibits") because—as set out in the Table of Exhibits in the Diocesan Defendants' brief in support of that motion—these documents are referenced in the Amended Complaint and/or are public records. Dioc. Defs. Mem. in Supp. of Mot. to Dismiss ("Opening Brief" or "Dioc. MTD"), ECF No. 67-1, at vi-vii, 11, 26-27, 43.[4]

The Diocesan Defendants will not engage in a point-by-point rebuttal of the many authorities that the Opposition cites in an attempt to convince the Court to eschew the Exhibits (although they could).[5] It is obvious from Plaintiffs' discussion of most of these cases that the documents involved are either of a different stripe and/or submitted for different purposes than the Exhibits here. For all of the cases Plaintiffs cite on this issue however, the relatively few references to First Circuit precedent is telling.

As this Court has observed: "The First Circuit Court of Appeals has adopted a 'practical, commonsense approach' for determining what materials may be properly considered on a motion to dismiss." *Roy v. Gen. Elec. Co.*, 544 F. Supp. 2d 103, 107 (D.R.I. 2008) (quoting *Beddall v. State St. Bank & Tr. Co.*, 137 F.3d 12, 16 (1st Cir. 1998)). Under this approach, a court may consider not only the complaint, but also documents whose authenticity is not

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[4] All references to "Exhibit __" or "Ex. __" are to the exhibits attached to the Opening Brief, unless otherwise noted.
[5] The same is true for the authorities referenced in other parts of the Opposition and the Omnibus Memo, as well as Plaintiffs' efforts to distinguish the cases cited in the Opening Brief. In many instances, Plaintiffs distinguish the Diocesan Defendants' authorities on irrelevant grounds. Although the Diocesan Defendants could rebut each of those efforts, doing so would not be helpful to the Court and would only distract from the many problems in the Amended Complaint.

disputed, the facts extractable from documents annexed to or sufficiently referenced in the complaint, matters of public record, and facts susceptible to judicial notice. *Jorge v. Rumsfeld*, 404 F.3d 556, 559 (1st Cir. 2005); *Watterson v. Page*, 987 F.2d 1, 3-4 (1st Cir. 1993). Moreover, a court may consider any document "integral to or explicitly relied upon in a complaint, even if that document is not annexed to the complaint." *Jorge*, 404 F.3d at 559.

As part of this process, the Court can use such documents to assist in gauging the plausibility of the complaint and ruling on a motion to dismiss. *In re Montreal, Me. & Atl. Ry., Ltd.*, 888 F.3d 1, 7 n.2 (1st Cir. 2018) ("Because the complaint's averments are explicitly tied to and dependent upon the Second Amendment (the authenticity of which is not challenged), the Second Amendment is fair game in gauging the plausibility of the complaint."). This is so even when the documents contradict allegations in the complaint. *Lister v. Bank of Am., N.A.,* 790 F.3d 20, 22 n.2 (1st Cir. 2015) (finding that the district court was well within its discretion to examine "copies of land records that were expressly referred to in the complaint" in granting a motion to dismiss, particularly where plaintiffs had "attached documents to the complaint suggesting that certain mortgage-related evidence did not exist."); *cf. id.* at 23 ("[W]e disregard facts which have been conclusively contradicted by [plaintiffs'] concessions or otherwise." (internal quotation marks and citation omitted) (brackets in original)).

The Opposition does not attempt to grapple with *Beddall*, cited in the Opening Brief. Dioc. MTD at 8. *Beddall* provides that courts on a motion to dismiss may not only consider documents referenced in a complaint, but also review the document as a whole to determine whether it supports the allegations regarding the document. 137 F.3d at 17-24; *see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 568 n.13 (2007) ("[T]he District Court was entitled to take notice of the full contents of the published articles referenced in the complaint, from which

the truncated quotations were drawn"). Exhibits 3-4, 10-18, and 20-25 are referenced in the Amended Complaint and undermine Plaintiffs' allegations. Dioc. MTD, vi-vii; *see Beddall*, 137 F.3d at 17-24; *see also Lister*, 790 F.3d at 22 n.2.

The only two First Circuit cases the Opposition cites directly are distinguishable. In *Foley v. Wells Fargo Bank, N.A.*, 772 F.3d 63, 70-75 (1st Cir. 2014), the district court improperly referred to evidence submitted during a preliminary injunction hearing to grant a subsequent motion to dismiss, including a letter that the plaintiff alleged that the bank had told him was coming, but which the plaintiff had not received prior to filing his complaint. The First Circuit ruled that the plaintiff had no reason to expect the lower court to rely on such documents in considering the motion to dismiss. *See id.* at 73-75. Likewise, in *Freeman v. Town of Hudson*, 714 F.3d 29, 36-37 (1st Cir. 2013), the plaintiffs sought consideration of deposition excerpts in opposing a motion to dismiss, which were "unrelated to any matter discussed in the complaint." In addition, they sought review of a transcript of 911 calls and police reports, but made no effort to justify review of those documents apart from calling them "public records," and apparently had not referenced them in their complaint. *See id.* The First Circuit held it was proper for the district court to refrain from reviewing such documents. *Id.*

There is little in common between *Foley* and *Freeman* and this case. Contrary to *Freeman*, *id.*, the Diocesan Defendants' exhibits are referenced in the Amended Complaint, and/or are public records capable of judicial notice.[6] Dioc. MTD at vi-vii, 11, 26-27, 43. And they are all directly related to matters discussed in the Amended Complaint. *Id.* Unlike *Foley* moreover, Plaintiffs here have had an opportunity to contest consideration of the Exhibits. *See* 772 F.3d at 73-75.

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[6] Plaintiffs' arguments concerning the propriety of review of records of an administrative/regulatory agency on a motion to dismiss are addressed *infra* at Part I.B.

Critically, Plaintiffs do not challenge the authenticity of the Exhibits, nor can they claim that they have been caught off guard like the plaintiff in *Foley*. *See id.* Exhibits 1-8 are actuarial reports posted on a website maintained by the Receiver, a Superior Court officer. Exhibit 9 is a compilation of data from those actuarial reports provided solely as a convenience to the Court. Exhibits 3-4, 10-18, and 20-25, are referenced in the Amended Complaint or parts of documents referenced in the complaint.[7] Exhibit 19 is a public record on file with the Rhode Island Secretary of State, capable of judicial notice, and discussed in additional detail *infra* at Part III.G.1. Accordingly, the Court can, and should, review the Exhibits in connection with the Diocesan Defendants' motion to dismiss. *Beddall*, 137 F.3d at 17-24; *Watterson*, 987 F.2d at 3-4.

B. The Court Can Properly Review Administrative Records Referenced In The Amended Complaint (Exhibits 10-17 & 24) In Connection With The Diocesan Defendants' Motion To Dismiss

Courts routinely review administrative records/proceedings in connection with motions to dismiss. *See, e.g.*, *Town of Norwood, Mass. v. New Engl. Power Co.,* 202 F.3d 408, 412 n.1 (1st Cir. 2000) (taking judicial notice of records in "underlying FERC proceeding" in reviewing order granting motion to dismiss); *Barber v. Verizon New Engl., Inc.*, No. C.A. 05-390ML, 2005 WL 3479834, at *1 n.1 (D.R.I. Dec. 20, 2005) (reviewing discrimination charge filed with the Rhode Island Commission for Human Rights and granting motion to dismiss). The Opposition, nonetheless, resists the Diocesan Defendants' proffer of administrative records (Exhibits 10-17 & 24) in connection with their motion. Plaintiffs claim that certain defendants failed to disclose various facts to state regulators reviewing those administrative records. Dioc.

[7] The Table of Exhibits in the Opening Brief identifies the specific paragraphs in the Amended Complaint where such documents are referenced. Dioc. MTD at vi-vii.

MTD at 23-33. One would think Plaintiffs would want this Court to peruse the most relevant evidence on this issue. Instead, they fear such a review.

Plaintiffs falsely accuse the Diocesan Defendants of having taken the position that any document posted on the internet or in a regulator's files is subject to review on a motion to dismiss is a classic strawman. Opp'n at 4-6. Plaintiffs then quote extensively from *Freeman* in support of the proposition that "many documents in the possession of public agencies simply lack any indicia of reliability whatsoever." 714 F.3d at 36. Of course, the Diocesan Defendants argued no such thing. The Diocesan Defendants do not maintain that documents become available for review on a motion to dismiss just because they are posted somewhere on the internet or placed in a regulator's files. As discussed in detail *supra* at Part I.A, the administrative records here are referenced in the Amended Complaint or are parts of documents that are so referenced and form the bases of several of Plaintiffs' claims. The Court may review these administrative records. *In re Montreal, Me. & Atl. Ry., Ltd.*, 888 F.3d at 7 n.2; *Lister*, 790 F.3d at 22 n.2.

Plaintiffs' second attempted diversion is to argue that the Court should not consider these regulatory documents for the truth of their content. As explained in the Opening Brief, Plaintiffs allege that certain defendants failed to disclose to state regulators facts concerning the funding status of the Plan, the structure of the 2014 Asset Sale, the Plan's status and intended future as a church plan, and the continued Catholicity of the hospitals. Dioc. MTD at 23-33. The Diocesan Defendants have submitted Exhibits 10-17 and 24 to demonstrate that the very documents referenced in the Amended Complaint and submitted to state regulators flatly contradict those assertions. *Id.* This Court need not accept, or weigh at all, the truth of the contents of a document to determine whether the document discloses something that allegedly

was not disclosed. It need only read the document. Multiple courts have reached this conclusion. *See*, *e.g.*, *Kramer v. Time Warner Inc.*, 937 F.2d 767, 774-75 (2d Cir. 1991) (affirming taking of judicial notice of Offer to Purchase and Joint Proxy Statement because the documents were filed with the SEC and "are the very documents that are alleged to contain the various misrepresentations or omissions and are relevant not to prove the truth of their contents but only to determine what the documents stated"); *In re Lantus Direct Purchaser Antitrust Litig.*, No. 16-12652-JGD, 2018 6629708, at *8 (D. Mass. Oct. 24, 2018) (taking judicial notice of letters to the FDA for their content).

C. The Court May Also Review The Actuarial Reports (Exhibits 1-8) In Connection With The Motion To Dismiss

In their Opening Brief, the Diocesan Defendants set out the grounds for the Court's consideration of Exhibits 1-8 (collectively, the "Actuarial Reports"). Dioc. MTD at 14 n.9. Summarily, the Court can review the Actuarial Reports because they are matters of public record, posted to the Receiver's website under the heading, "Public Data Associated with this Matter," whose authenticity is not questioned. *Id.* The Receiver is an officer of the Superior Court. *See R.I. Hosp. Tr. Co. v. R.I. Covering Co.*, 182 A.2d 438, 441 (R.I. 1962) ("A receiver is an officer of the court that appointed him[.]"). Additionally, there is absolutely no question that the Court can consider Exhibit 3 ("2006 Actuarial Report") and Exhibit 4 ("2007 Actuarial Report") for the additional reason that these documents are specifically referenced in the Amended Complaint. FAC ¶ 230(c). Plaintiffs do not contest the authenticity of any of these reports.

Plaintiffs nevertheless oppose the Court's review of these documents. They make two primary arguments.

1. *Plaintiffs' Submissions To This Court Belie Their Argument Concerning The Purported Lack Of Reliability Of The Actuarial Reports*

First, the Opposition, but not the Amended Complaint, raises questions about the reliability of the Actuarial Reports. The Amended Complaint's own allegations and the Omnibus Brief negate any such contention.

i. Amended Complaint

To divert the Court from reviewing these documents, Plaintiffs mischaracterize their own claims. Plaintiffs argue that they have accused the author of most of the Actuarial Reports, Defendant Angell Pension Group, Inc. ("Angell"), of malpractice and that the Court therefore should not refer to any of the Actuarial Reports for the truth of their content. Opp'n at 18-19. The Amended Complaint does not allege, however, that Angell ever got its math wrong or that there was any error in the Actuarial Reports posted on the Receiver's website. The Opposition does not point the Court to any paragraph of the Amended Complaint making such an allegation.[8] Nor does it point to their own brief in response to Angell's motion to dismiss in which they assert exactly the opposite: "***Moreover, Plaintiffs' do not allege that Angell's calculations were inaccurate***." Pls.' Mem. in Opp'n to Angell's Mot. to Dismiss, ECF 97-1, at 61 (emphasis added).

In fact, the Amended Complaint actually seeks to hold SJHSRI and other defendants liable for failing to follow Angell's recommendations.[9] *See, e.g.*, FAC ¶¶ 63-64, 244-

[8] The Opposition argues that the "Actuarial Malpractice" claim extends to "these valuation analyses in particular." Opp'n at 14. The Amended Complaint, however, does not take issue with any of these specific reports or claim that Angell provided SJHSRI with inaccurate calculations in the Actuarial Reports. Count X (Actuarial Malpractice) incorporates paragraphs 1-54, 238-251, 255, 259-264, 270, 288-297, 298-312, and 323-335 of the Amended Complaint. Conspicuously absent from this list is paragraph 230(c), which referenced the 2006 and 2007 Actuarial Reports. From those two reports, the Court can perceive adequate funding through at least mid-2008. Dioc. MTD 13-14.

[9] Additionally, as explained in the Opening Brief, Dioc. MTD at 15-16, and *infra* at Part II, Plaintiffs have alleged no specific facts to suggest that the Plan was underfunded prior to 2010. Plaintiffs, however, argue that even the "Diocesan Defendants own 'summary' of the actuarial reports indicates that Angell was recommending that SJHSRI

47, 270. Plaintiffs' allegations to this effect, however, all identify specific recommendations post-dating the Great Recession. Dioc. MTD at 15-16; FAC ¶¶ 244-47. Plaintiffs do not want the Court to review the myriad recommendations predating the Great Recession, not because the Amended Complaint questions those numbers, but precisely because Angell (and its predecessors) reported that no contributions were required and that the Plan's assets exceeded the present value of accrued liabilities for the years leading up to 2008. Exs. 1-8.

The Actuarial Reports flatly contradict many of Plaintiffs' claims and also go to the overall plausibility of Plaintiffs' allegations. Dioc. MTD 10-18; *infra* Part II. The Court should consider them not just for their truth, but also because their content alone contradicts the Amended Complaint. *See Lister*, 790 F.3d at 22 n.2; *Kramer*, 937 F.2d at 774-75.

ii. Omnibus Memorandum

Finally, Angell's work product is perfectly reliable for Plaintiffs when it suits them. For example, Plaintiffs append Angell's calculations filed in connection with the Receivership Petition for the Plan to the Omnibus Memo to rebut arguments concerning their standing. Omnibus Mem. at Tab 1. Plaintiffs explain:

> The Receivership Petition, including exhibits, should be considered in connection with the resolution of Defendants' motions to dismiss, for several reasons: 1) it is extensively referred to in the First Amended Complaint . . . 2) it is a court record of which the Court may take judicial notice . . . and 3) the relevant exhibits ***are authored by Defendant Angell and adopted by Defendant SJHSRI***.

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make contributions to the Plan." Opp'n 18 n.13. Plaintiffs are referring to the recommended "maximum contribution" for 2006-2008, and not the recommended "minimum contribution" for that period, which was zero. *See* Dioc. MTD at 12. As Plaintiffs' acknowledge, recommended maximum plan contributions under ERISA (which the actuaries were purporting to follow, FAC ¶ 230), relate to the tax consequences of the contributions. FAC ¶¶ 242 ("The term 'recommended maximum contribution' referred to the maximum contribution that SJHSRI could deduct from federal income taxes if it were a for-profit corporation."); *see* Michael I. Bernstein et al., *PPC's 1120 Deskbook* § 15C (Mary C. Danylak et al. eds, 28th ed. 2018) ("The [defined benefit] plan's minimum funding requirement and the maximum deductible contribution use the same actuarial assumptions and funding method. . . . Normally, it is expected that the minimum funding requirement will be less than the maximum deductible contribution.") (Westlaw No.: "1120 Deskbook Key Iss 15C"); *see also* 26 U.S.C. § 404 (setting rules for deductions for employer contributions to pension plans).

Id. at 7 n.30 (emphasis added). Plaintiffs therefore ask the Court to trust Angell's conclusions when they supposedly support Plaintiffs' claims, but not when those conclusions undermine them. Plaintiffs cannot have it both ways.

2. *The Court Can Refer To The Actuarial Reports Without Resort To Expert Testimony*

Second, the Opposition contends that whether the Plan had adequate funding at a particular time requires expert testimony and is not fit for resolution on a motion to dismiss. Opp'n at 14, 18. The Opposition ignores that Plaintiffs—including the Receiver—have used the figures in various actuarial reports from 1995 to 2008 to assert claims against SJHSRI and other defendants. *See, e.g.*, FAC ¶ 230. The Court can appropriately review these reports to assess the Amended Complaint's viability. *In re Montreal, Me. & Atl. Ry., Ltd.*, 888 F.3d at 7 n.2; *Lister*, 790 F.3d at 22 n.2; *Beddall*, 137 F.3d at 17-24. And, with just these two reports, the Court can easily confirm the adequacy of the Plan's funding through at least mid-2008. Dioc. MTD at 12-14.

Plaintiffs specifically assert that defendants (generally) ignored the funding "recommendations of SJHSRI's actuaries" for years. FAC ¶¶ 63-64, 270. No expert assistance is needed for the Court to review the Actuarial Reports, read what they say about funding recommendations and determine for which years those recommendations were ignored.

Likewise, the Actuarial Reports very clearly set forth the funding levels of the Plan. For each year, they describe the "Market Value of Assets" and "Present Value of Accrued Benefits." *See generally* Exs. 1-8. These concepts—market value and present value of accrued benefits—are certainly within the experience and ken of the Court. So is subtracting one number from the other to determine whether the result is a positive or negative number. That simple exercise is set forth in Exhibit 9 and the Opening Brief. Dioc. MTD at 12.

Critically, as set forth at Part I.C.1 and Part II, Plaintiffs never challenge the accuracy of these numbers. In fact, they rely on them to make their claims.

II. THE OPPOSITION DOES NOT EXPLAIN HOW ALLEGED MISCONDUCT FROM DECADES AGO COULD HAVE CAUSALLY BEEN THE SOURCE OF PLAINTIFFS' HARM

In their Opening Brief, the Diocesan Defendants explained that the Amended Complaint failed to specifically allege that the Plan was not adequately funded in any years prior to the Great Recession. Dioc. MTD at 15-16. Plaintiffs' inability to do so is confirmed by the Actuarial Reports. *Id.* at 10-16. Briefly, the Actuarial Reports demonstrate that, from at least 2003 through 2008 (the dates for reports posted on the Receiver's website), the Plan's actuaries consistently reported that the Plan was more than appropriately funded, and that continued until the Great Recession of 2008 crippled it. *Id.* at 11-16. The Opposition is powerful support for the accuracy of these arguments. Plaintiffs do not cite to specific paragraphs of the Amended Complaint that the Diocesan Defendants missed in their analysis. They do not identify an Actuarial Report predating the Great Recession that stated that the present value of accrued liabilities exceed market value of Plan assets. They do not point to portions of the Actuarial Reports themselves that were mischaracterized. Rather, Plaintiffs argue that the Court should not read the Actuarial Reports and cannot understand basic accounting concepts, and then they mischaracterize their claims against the Actuarial Reports author—in a most inconsistent manner, to boot. *Supra* Part I.C.

Any claims premised on wrongdoing predating the stock market crash of 2008 must be dismissed. Dioc. MTD at 16-18. Many intervening years of adequate funding and the

Great Recession of 2008 constitute a separate intervening cause, which Plaintiffs cannot plead around—and they did not even try.[10] *Id.*

Plaintiffs predictably oppose this argument, which would permit the Court to conclude that there is no causation between the purported harm and acts preceding the Great Recession, thus disposing of four decades worth of allegations and greatly simplifying this litigation. Plaintiffs' contentions are easily dispatched.

A. Courts Can Consider Economic Crises When Considering Whether A Complaint Plausibly Alleges Causation

Plaintiffs dispute that the Court can consider the impact of a global economic crisis in determining whether Plaintiffs have plausibly alleged claims. Opp'n at 17. The Diocesan Defendants cited multiple cases where courts have done just that on a motion to dismiss. *See, e.g., Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 998-99 (9th Cir. 2014) (affirming dismissal of complaint because allegations were equally consistent with the "innocent alternative[] that the recession decreased business viability and property values"); *In re Merrill Lynch & Co., Inc.*, 273 F. Supp. 2d 351, 362 (S.D.N.Y. 2003) ("The alleged omissions are not the 'legal cause' of the plaintiff's losses. There was no causal connection between the burst of the bubble and the alleged omissions; it was the burst which caused the market drop and the resultant losses . . . .").[11]

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[10] The one change Plaintiffs made between their original complaint and the Amended Complaint implicitly acknowledges that Plan funding was adequate. *Compare* Compl. ¶ 65, ECF No. 1 ("At various times during the period from 1995 to the present, SJHSRI did not fund the Plan in accordance with the requirements of ERISA and the recommendations of the Plan's actuaries, with the result that the Plan is grossly underfunded") *with* FAC ¶ 63 ("At various times during the period from 1995 to the present, SJHSRI did not fund the Plan in accordance with the requirements of ERISA and the recommendations of the Plan's actuaries, including but not limited to *2010, 2011, 2012, 2013, 2014, 2015, and 2016*, with the result that the Plan is grossly underfunded" (emphasis added)); *see also* Dioc. MTD at 15-16 (discussing how addition of italicized language "amounts to an admission . . . that Plaintiffs are not specifically alleging that the Plan was not adequately funded in any years prior to 2010").

[11] Plaintiffs attempt to distinguish *Eclectic Properties* and *Merrill Lynch* on their facts. Opp'n at 17, 21. Such distinctions do not change that these cases support the Diocesan Defendants' position that courts can consider economic crises on a motion to dismiss.

The Court has before it the Actuarial Reports that show that the Plan's assets exceeded its liabilities in a string of years, ending with a precipitous drop from 2008 to 2009, the exact timeframe of a well-recognized and very dramatic economic downturn. Dioc. MTD at 11-16. The standards of Rule 12(b)(6), and the law surrounding judicial notice, do not require the Court to affirmatively maintain a false ignorance that flouts reality. The Court can connect these open, obvious and compelling dots. *See, e.g., Eclectic Props.*, 751 F.3d at 998-99.

B. Other Objections

The Opposition raises two other objections to the Diocesan Defendants' funding argument, which overlap with arguments that Plaintiff make elsewhere. First, Plaintiffs contend that Rule 9(b) somehow relieves them of the requirement that they plausibly plead facts suggesting that the Diocesan Defendants knew the Plan was underfunded prior to 2008. Opp'n at 19. This is despite the reality that they do not even allege facts indicating that the Plan ***was underfunded*** prior to 2010. Dioc. MTD at 11-16. Second, Plaintiffs argue that even if the Plan was appropriately funded prior to the Great Recession, their claims should still survive because the Diocesan Defendants had a duty to correct statements that, although true when made, became inaccurate years or even decades later. To avoid undue repetition, the Diocesan Defendants explain why these objections lack merit *infra* at Part III.B.3-4.

C. Summary

Suffice it to say however, that none of Opposition's arguments attempt to plead additional facts as to the funding status of the Plan prior to the stock market crash of 2008 or otherwise establish that conduct predating the crash plausibly or causally was the source of Plaintiffs' alleged harm. In the years that followed the market crash Dioc. MTD at 10-18. This is critical, indeed fatal, here because the funding levels of the Plan changed over time and

drastically in response to a cataclysmic economic downturn ***and*** because Plaintiffs themselves allege that the role of the Diocesan Defendants changed dramatically over time as well. *Id*. Vague, general and broad allegations, unlimited in time, that the Plan was underfunded or that defendants failed to make required contributions are insufficient. *Id.* at 15-18. That is especially so when the Amended Complaint cites to documents that actually contradict and disprove these general and conclusory averments. *Id.* at 11-16. The Court, therefore, should dismiss Counts III, VII, VIII, IX, XXI and XXII to the extent that they rely upon and incorporate allegations regarding conduct or alleged misrepresentations predating September 2008.[12] *Id.* at 10-18.

III. THE OPPOSITION DOES NOT REPAIR THE FATAL FLAWS IN COUNT VII (FRAUD THROUGH INTENTIONAL MISREPRESENTATION AND OMISSION)

The Amended Complaint swirls together allegedly false representations through time and actors, without differentiation as to when statements were made, who made them, to whom, or whether the alleged statements are fraudulent in themselves or as part of some so-called "fraudulent scheme." The Opposition continues that obfuscation.

[12] Plaintiffs argue that "it is claims upon which relief is sought that may be dismissed pursuant to a motion to dismiss, not 'allegations.'" Opp'n at 19. But Plaintiffs do not seem to dispute that the Court may dispose of claims to the extent they are premised on non-actionable allegations. *See W. Reserve Life Assur. Co. of Ohio v. Caramadre*, 847 F. Supp. 2d 329, 349 (D.R.I. 2012) ("Insofar as Plaintiffs have attempted to revive their counts for rescission and declaratory judgment in case 09–471 on the basis that the annuities were void *ab initio* due to fraud in the factum, those counts also are dismissed."); *Catholic Charities of Me., Inc. v. City of Portland*, 304 F. Supp. 2d 77, 96 (D. Me. 2004) ("The City's motion for summary judgment on Count I is GRANTED with respect to the time between the Ordinance's enactment and Catholic Charities' section 410(d) election and with respect to those benefits offered by Catholic Charities that are not covered by ERISA."). Indeed, they cite such a case themselves. *Pledger v. Reliance Tr. Co.*, 240 F. Supp. 3d 1314, 1327-1328, 1337 (N.D. Ga. 2017) (dismissing claim to the extent it was premised on facts that were time-barred).

A. Count VII Must Be Dismissed In Its Entirety For Improper And Conclusory Group Pleading That Lumps The Diocesan Defendants Together In Violation Of Rules 8(a) And 9(b)

1. *The Opposition Does Nothing To Justify The Group Pleading That Fatally Infects The Amended Complaint*

The Opening Brief explained that the Amended Complaint had engaged in improper group pleading in violation of Rules 8(a)(2) and 9(b) of the Federal Rules of Civil Procedure. Dioc. MTD at 18-21. The Opposition does not cure this defect or offer any reason why this Court should overlook it. This fatal flaw in the Amended Complaint applies across the board to every one of Plaintiffs' fraud claims, all of which should be dismissed.

The Opposition offers no explanation as to why merely replacing the offending phrase from the original complaint, "Diocesan Defendants," with a new phrase, "Corporation Sole, Diocesan Administration, and Diocesan Service," adds any clarity whatsoever to Plaintiffs' fraud claims. Plaintiffs—in both the Amended Complaint and the Opposition—simply make no attempt at all to allege or clarify which diocesan entity (or person) actually made which alleged misrepresentations. Instead, their response to their failure to meet this fundamental pleading requirement of Rules 8(a)(2) and 9(b) is to allege, over and over again, that all three of these distinct diocesan corporate entities apparently each did everything alleged in the Amended Complaint jointly and collectively. Every time one entity spoke or acted, all three entities spoke or acted. Of course, that is absurd as a factual matter and woefully deficient as a legal matter.[13]

Plaintiffs simply double down on their group pleading, arguing that "there is nothing wrong with making an allegation that applies to all three Diocesan Defendants, where

[13] Because Plaintiffs' perfunctory substitution of an undifferentiated list of entities for a defined phrase for those same entities adds no meaning or substance to the allegations, these defendants will continue to refer to themselves as the "Diocesan Defendants" in this reply. It is just as meaningful (or, more accurately, meaningless) and has the virtue of being shorter.

the Bishop is the actor or making the statement." Opp'n at 26. Plaintiffs, however, utterly fail to explain how all statements and actions alleged in the Amended Complaint applies to all three Diocesan Defendants. Plaintiffs' sole argument, beyond pure ipse dixit, appear to be that, because the Bishop is the president of all three of the Diocesan Defendants, he was acting on their behalf and his conduct and statements invariably can be attributed to each of the Diocesan Defendants in every instance. *Id.* at 24-25. This argument is itself ipse dixit, completely unsubstantiated.

Nowhere in the Amended Complaint or the Opposition do Plaintiffs identify any facts or even set forth allegations to support the notion that the Bishop was acting simultaneously in his multiple capacities as president of RCB, DAC, and DSC when he made any—indeed every—allegedly fraudulent statement or when he allegedly participated in the conspiracy described in the Amended Complaint. The Amended Complaint merely alleges that Bishop Tobin was an officer of RCB, DAC, and DSC. FAC ¶¶ 26-28. That is the sum and substance of all allegations in the Amended Complaint explaining the role and function of those three distinct corporate entities. The Opposition adds nothing beyond that.

Invariably, the Amended Complaint simply alleges in conclusory and unsupported fashion, that whenever Bishop Tobin spoke or took some (indeed, any) action, he did so "on behalf of" all three Diocesan Defendants. For example, Plaintiffs make the following conclusory, unexplained allegations:

- "Indeed, shortly after the closing of the 2014 Asset Sale, **Bishop Tobin, individually and in his capacity as President of Corporation Sole, Diocesan Administration, and Diocesan Service,** extolled the advantages of the arrangement in precisely those terms, except that he failed to disclose that these advantages were at the expense of Plan participants[.]" FAC ¶ 152 (emphasis added).

- "Later in the day on August 14, 2013, counsel for SJHSRI, CCCB, and RWH . . . attended a meeting of the Executive Committee of CCCB's Board of Trustees . . . and assured them that

Defendants SJHSRI, CCCB, RWH, and Defendants Corporation Sole, Diocesan Administration, and Diocesan Service had a "common understanding," and that **Bishop Tobin in particular (individually and on behalf of Defendants Corporation Sole, Diocesan Administration, and Diocesan Service) was "comfortable."** FAC ¶ 163 (emphasis added).

- "On September 17, 2013, the Diocesan Finance Council and College of Consultors met to decide whether to vote in favor of alienation of the assets of SJHSRI pursuant to the proposed asset sale. Bishop Tobin, Chancellor Reilly, and Monseigneur Theroux attended as members of both, with Bishop Tobin as Chairman. **Bishop Tobin also acted in his capacity as President of Corporation Sole, Diocesan Administration, and Diocesan Service."** FAC ¶ 166 (emphasis added).

See also FAC ¶¶ 179, 320. Using these paragraphs for purposes of illustration, nothing in the Amended Complaint or the Opposition explains what connection, if any, RCB, DAC, or DSC had to the Plan in 2013-2014, how or why the Bishop attended the meeting in August 2013, how or why Plaintiffs allege that he did so on behalf of those three distinct entities, or why each of those three entities would be interested in forming the "understanding" allegedly reached at that meeting. There is no allegation indicating what role each of these entities played in any decision to alienate the assets of SJHSRI in 2013 or 2014 (or any other time for that matter).

That the Bishop is the president of all three corporate entities means nothing standing alone, as every first-year law student knows. The Rhode Island Supreme Court stated in *Doe v. Gelineau*, another case involving RCB, that "the stakes are too high for courts regularly to disregard the separate legal status of corporations." 732 A.2d 43, 44, 49 (R.I. 1999) (stating that, although "Bishop Gelineau served as the single member of RCB, as the ecclesiastical head of the diocese, and as the President, Treasurer, and Director of St. Aloysius," "[t]he mere fact that a person holds an office in two corporations that may be dealing with each other and that have offices in the same building, without more, is not enough to make them identical in contemplation of law").

Bishop Tobin is president of dozens of separate legal entities. He does not act for every single one of those entities every time he does anything or everything. Repeated, unexplained, conclusory allegations that the Bishop is the president of and acted on behalf of three distinct corporate entities in all that he did must be ignored by this Court. They certainly do not pass muster under Rules 8(a)(2) and 9(b). That is particularly the case here, where Plaintiffs' allegations of fraud span six decades during which Plaintiffs concede the role of the Diocesan Defendants changed drastically as regards the Plan. *See*, *e.g.*, FAC ¶¶ 75, 84, 87, 203, 214-15.

2. *The Opposition's Authorities Do Not Change The Equation*

None of the four cases that Plaintiffs cite provide any support for their argument. For example, in *In re Duramax Diesel Litigation*, 298 F. Supp. 3d 1037, 1056 (E.D. Mich. 2018), the court found that the plaintiffs' allegations against the "Bosch Defendants" did not constitute impermissible group pleading because the plaintiffs had specifically alleged that the "Bosch employees and constituent entities often blur the legal boundaries between Bosch subsidiaries." The Amended Complaint contains no such allegation with respect to the Diocesan Defendants.

Similarly, in *Commonwealth of Kentucky v. Marathon Petroleum Co.*, No. 3:15-CV-354-DJH-CHL, 2018 WL 4620621, at *9 (W.D. Ky. Sept. 26, 2018), the district court found that reference to defendants as "Marathon" rather than identifying them as single entities was permissible because the plaintiff alleged that the defendants acted as an integrated corporate unit and that the "Marathon" entities acted together to commit the alleged antitrust actions. Nowhere in the Amended Complaint do Plaintiffs allege that the Diocesan Defendants acted as a corporate unit—which they do not—or that they were acting together to perpetuate fraud on the Plaintiffs.

TTCP Energy Finance Fund II, LLC v. Rails Corp., 255 F. Supp. 3d 1285, 1289-90 (N.D. Ga. 2017) is inapposite for the same reasons. There, the court found that the use of a collective moniker *in a handful of paragraphs* did not constitute group pleading because the plaintiff had alleged that the "Sany Defendants collectively developed the marketing materials" at issue, and branded them with the "Sany logo [that was] common to all Sany Defendants." *Id.* (internal quotation omitted). Again, Plaintiffs have never claimed that the Diocesan Defendants acted collectively, and they merely set forth conclusory allegations that Bishop Tobin engaged in misconduct on all of their behalf every time he took any action referenced in the Amended Complaint. Opp'n at 26. Moreover, the *TTCP Energy* court found that, "without discovery, it would be impossible for [the plaintiff] to more precisely describe the respective conduct of the four related entities." 255 F. Supp. 3d at 1290. Plaintiffs have already had the opportunity to conduct and review substantial discovery from the Diocesan Defendants, and, importantly, to replead their claims to add more particularity. Dioc. MTD at 20-21. Plaintiffs did so with regard to other defendants in certain instances. *See, e.g.*, FAC ¶¶ 300-02, 309. Plaintiffs utterly failed to do so with respect to the Diocesan Defendants.

JAC Holding Enterprises, Inc. v. Atrium Capital Partners, LLC, 997 F. Supp. 2d 710, 728 (E.D. Mich. 2014), also fails to support Plaintiffs' argument. There, the court found that the use of the term "Conspirators" when referring to multiple defendants did not violate Rule 9(b). However, integral to the court's decision was the fact that, "even with the collective references in the complaint, the pleading attribute[d] specific false statements to identified individual defendants[.]" *Id.* Here, other than the single paragraphs devoted to the most generic identification of each of RCB, DAC, and DSC, FAC ¶¶ 26-28, there are no allegations attributing

any specific action or role at all—let alone any false statements—to any one of the Diocesan Defendants. Dioc. MTD at 20.

Finally, although the Diocesan Defendants will not address every effort by Plaintiffs to differentiate the cases cited in the Opening Brief concerning Rule 9(b), it is worth noting that Plaintiffs' attempt to distinguish *Beta Group., Inc. v. Steiker, Greenaple, & Croscut, P.C.*, No. CV 15-213 WES, 2018 WL 461097 (D.R.I. Jan. 18, 2018), particularly misses the mark. Opp'n at 23. The Diocesan Defendants cited *Beta Group* for the proposition that "a plaintiff cannot lump multiple defendants together and must state clearly which defendant or defendants committed each of the alleged wrongful acts." Dioc. MTD at 19 (quoting *Beta Grp.*, 2018 WL 461097, at *1). Nothing in the portion of *Beta Group* cited by the Opposition undermines this proposition. Although the allegations in *Beta Group* may be different than those here, the general principle remains. *See* 2018 WL 461097, at *1.

B. Alleged Misrepresentations To Plan Participants In The 1970s Through The 2008 Market Crash Are Not Actionable

Critically, the Amended Complaint does not identify a single specific representation by the Diocesan Defendants to Plan Participants that post-dates 2008. Rather, any alleged specific representation to Plan Participants even remotely tied to the "Diocese" dates from the 1970s and 1990s. *See* FAC ¶¶ 256-284 ("Misrepresentations to Plan Participants"). These paragraphs recount statements from several booklets or handouts provided to Plan Participants through the years. Only two paragraphs in that section of the Amended Complaint quote statements that reference the diocese in any way beyond simple references to the Diocesan Plan. FAC ¶¶ 265 and 277. All other paragraphs in the section entitled "Misrepresentations to Plan Participants" that recite specific representations refer to other actors, most often the "Hospital" or "SJHSRI." *See, e.g.*, *id.* ¶¶ 267, 269, 273, 274, 280, 281, 284.

This fact is critical for a variety of reasons. As discussed above, there is no possible causation between any such statements and the condition of the Plan in 2014 or today. *Supra* Part II. Further, these claims should be dismissed because (1) Plaintiffs fail to allege the statements were false when made; (2) the statements were projections, forecasts and opinions that are not actionable; (3) Plaintiffs fail to allege that the Diocesan Defendants knew any alleged statements were false or that they intended to mislead anyone; and (4) there is no duty to correct true statements that somehow become "false" decades later. These arguments will be dealt with in turn.

1. *Plaintiffs Fail To Allege That Any Statements Made By The Diocesan Defendants To Plan Participants Were False When Made*

The Opening Brief pointed out that there are no specific allegations in the Amended Complaint that the Plan was ever underfunded predating September 2008. Dioc. MTD at 16. The Opposition did not point to any factual allegations contradicting that assertion. The Opening Brief also asserted that Plaintiffs had in their possession numerous documents that showed the Plan had surplus funding through 1995. *Id.* at 23. (The Diocesan Defendants do not have Actuarial Reports after 1995 except for those posted on the Receiver's website, which also show surplus funding through 2008. *Id.* at 11-14.) The Opposition did not contest that assertion, either. The dispositive conclusion in the Opening Brief, repeated here, thus remains wholly uncontested and untouched:

> Although the Amended Complaint is rife with alleged misrepresentations from the 1970s through the 1990s, it never once references the status of the Plan's funding during that entire time period. The Receiver has records containing that data at least through 1995 because they were produced in response to a subpoena several months ago. Had they been referenced in the Amended Complaint, the Actuarial Reports for the Plan show consistent surplus funding through 1995. While the Court cannot consider the content of those documents on a motion to dismiss because they were not referenced in the Amended Complaint, it can consider that the Amended Complaint pleads no facts about the Plan's funding when alleged promises were made decades ago. Indeed, no specific

> allegations of underfunding in the Amended Complaint predate September 2008. FAC ¶¶ 235-255. Without those averments, any fraud claims based on facts before September 2008 must be dismissed.

Id. at 23. All claims related to any direct statements made by the Diocesan Defendants to Plan Participants should be dismissed because there is not a single allegation asserting that these statements were false when made. (What is worse, Plaintiffs definitively know they were not and press them anyway.)

2. *The Opposition Does Not Negate The Legal Reality <u>That Forecasts And Future Promises Are Not Actionable As Fraud</u>*

The Opening Brief pointed out that the Amended Complaint's allegations as it concerned statements prior to the 2008 stock market crash could not support a fraud claim because the statements were not false when made, but merely conveyed a future intent to fund the Plan in a particular manner or make certain payments to Plan beneficiaries. *Id.* at 14, 21-23. The Opening Brief raised similar points as it concerned Bishop Tobin's letters to the Vatican ("Vatican Letter") and the Health Services Council ("HSC Letter"). *Id.* at 35-38.

The Opposition fails to hurdle this obstacle. It concedes, moreover, that a representation regarding future intention is only fraudulent if the maker "does not have that intention at the time he makes the representation." Opp'n at 28. Likewise, Plaintiffs recognize that forecasts are only actionable if "they are not reasonably based on, or are inconsistent with, the facts at the time the forecast is made." *Id.* at 30. And the cases that the Opposition cites conform to this rubric. *Palmacci v. Umpierrez*, 121 F.3d 781, 788-93 (1st Cir. 1997) (upholding finding that defendant "did not intend to defraud the [plaintiff] when he promised to contribute . . . his own personal funds to the project" because "there was no knowing misrepresentation"); *see Cummings v. HPG Int'l, Inc.*, 244 F.3d 16, 22 (1st Cir. 2001) (holding that manufacturer of roofs was not liable in deceit for making false statements that its roofs would last for 20 years

and that they were suitable for the New England climate absent evidence that the manufacturer knew, or should have known of the falsity of its statements when they were made).

3. *Plaintiffs Fail To Allege That The Diocesan Defendants Knew Any Alleged Statements Were False Or That They Intended To Mislead Anyone*

At various points throughout the Opening Brief, the Diocesan Defendants explained that Plaintiffs' fraud claims could not survive because the Amended Complaint did not adequately plead fraudulent intent or knowledge as it concerns alleged misstatements by the Diocesan Defendants. Dioc. MTD at 14, 23 (concerning statements to Plan Participants prior to the Great Recession); *id.* at 35-38 (concerning Bishop Tobin's letters to the Vatican and HSC). The Opposition's response is to hide behind Rule 9(b)'s proviso that knowledge and intent can be pled generally, Opp'n at 19, and to refer to paragraphs of the Amended Complaint that reflect generalized and conclusory assertions as to intent/knowledge respecting statements prior to the Great Recession of 2008 and the Vatican and HSC Letters.

i. Rule 9(b) And Scienter

Although Rule 9(b) provides that knowledge and intent can be pled generally, courts have held that the rule does not relieve plaintiffs of the obligation to plead knowledge, intent, and other conditions of the mind plausibly. *Ashcroft v. Iqbal*, 556 U.S. 662, 680-81, 686-87 (2009). As the First Circuit has explained:

> Rule 9(b) requires not only specifying the false statements and by whom they were made but also identifying the basis for inferring scienter. . . . The courts have uniformly held inadequate a complaint's general averment of the defendant's knowledge of material falsity, unless the complaint *also* sets forth specific facts that make it reasonable to believe that defendant knew that a statement was materially false or misleading.

N. Am. Catholic Educ. Programming Found., Inc. v. Cardinale, 567 F.3d 8, 13 (1st Cir. 2009) (internal quotation omitted) (emphasis in original); *accord Mourad v. Marathon Petroleum Co.*,

654 Fed. Appx. 792, 798 (6th Cir. 2016) ("While Rule 9(b) clearly dictates that allegations regarding a defendant's mental state are not subject to the heightened pleading requirements imposed on claims for fraud or mistake, Appellants fail to recognize that pleadings regarding the conditions of a person's mind, including malice and intent, remain bound by the plausibility requirement of Rule 8."); *Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 614 (7th Cir. 2013) ("States of mind may be pleaded generally, but a plaintiff still must point to details sufficient to render a claim plausible.").

Iqbal itself is instructive in this regard, as it began its analysis of the complaint by "identifying the allegations in the complaint that are not entitled to the assumption of truth" and immediately set its sights on conclusory allegations relative to states of mind. *See* 556 U.S. at 680. To that end, the following allegations from the *Iqbal* plaintiff did not impact the plausibility calculus:

- "Petitioners [John Ashcroft and Robert Mueller] 'knew of, condoned, and willfully and maliciously agreed to subject [plaintiff]' to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.'" *Id.* at 680 (third brackets in original);
- "Ashcroft was the 'principal architect' of this invidious policy[.]" *Id.*; and
- "Mueller was 'instrumental' in adopting and executing it." *Id.* at 681

In dispensing with these allegations in the face of Rule 9(b)'s allowance that plaintiffs may allege states of mind "generally," the Supreme Court described "generally" as a "relative term," one that simply excused a party from pleading intent or knowledge with the particularity otherwise required when pleading fraud. *Id.* It did not, however, give plaintiffs "license to evade the less rigid—though still operative—strictures of Rule 8." *See id.* at 686-87. And, as explained below, Plaintiffs have failed to plead scienter within those bounds. *See id.*

ii. The Opposition Does Not Demonstrate How Plaintiffs Have Alleged Scienter For Alleged Misstatements Preceding The Stock Market Crash Of 2008

Plaintiffs have failed to allege any facts from which the Court can infer that, prior to the stock market crash of 2008, the Diocesan Defendants did not intend to fund the plan[14] or make payments to Plan beneficiaries in the future or knowingly misrepresented the financial state of the Plan.[15] Dioc. MTD at 21-22. The Opposition contends that the Amended Complaint not only sets forth "particular misrepresentations but explains how they were deceptive." Opp'n at 31. It cites only one paragraph in support of this claim that refers to statements by ***SJHSRI*** in 1998. *See id.* (citing FAC ¶ 277) (stating "*SJHSRI* did not inform Plan participations of the separation [of Plan assets]" (emphasis added)). Allegations pertaining to statements by SJHSRI have nothing to do with the knowledge or intent of the Diocesan Defendants.[16]

Plaintiffs also claim that they have alleged a lack of intent to keep promises made to the pensioners by reference to paragraphs 259-67 of the Amended Complaint. Opp'n at 32. Yet, not one of those paragraphs pleads facts to establish the Diocesan Defendants' state of mind prior to 2008. Those paragraphs contain references to materials provided to Plan Participants dated 1973 and several other generic and conclusory allegations. Paragraph 259 is emblematic:

> In contrast to the extremely difficult, obscure, and technical language set forth in Plan documents, SJHSRI, Corporation Sole, Diocesan Administration, Diocesan Service, Prospect Chartercare, and Angell made or provided statements to Plan participants, on different occasions, in many different contexts, over many years, and using plain language, that assured Plan participants that the Plan was an earned benefit of their employment, that the contributions necessary to properly

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[14] Indeed, they do not make allegations that the Diocesan Defendants actually had a duty to fund the Plan ***at all*** after 1998. The Amended Complaint contains numerous specific references to documents that place that responsibility with "the Hospital" or "SJHSRI." FAC ¶¶ 230(a), 267, 268, 269, 277-278, 280, 281, 284.

[15] Instead, they desperately argue that the Court should not look at the documents cited in the Amended Complaint and posted on the Receiver's website that conclusively negate any possible scienter pre-dating 2008. *See supra* Part I.C & II.

[16] Nor does the Amended Complaint offer any explanation as to the actual facts surrounding the division of the Plan referenced in that one paragraph, for example, whether that division actually strengthened or weakened the Plan or how that statement from SJHSRI in 1998 is in any way causally connected to the Plan's financial difficulties decades later. FAC ¶ 277.

> fund the Plan were being made, that it was management's policy, practice and duty to do so, and that SJHSRI and not the Plan participants bore the risk of Plan assets not earning expected returns or incurring investment losses.

FAC ¶ 259; *see also id.* ¶ 260 (conclusory allegation of reliance); *id.* ¶¶261-262 (conclusory allegations of general understandings amongst Plan Participants and labor union). This is the quintessential generalized and conclusory allegation. *See Iqbal*, 556 U.S. at 680-81, 686-87.

The Opposition admits as much. In response to the Diocesan Defendants' criticism that the Amended Complaint lacks specific allegations concerning the Diocesan Defendants' knowledge of the Plan's underfunding before 2008, the Opposition simply claims: "[u]nder Rule 9(b) . . . knowledge may be alleged generally and need not to be alleged with specificity." Opp'n at 19. The Opposition, of course, conveniently ignores that the Amended Complaint still must plead knowledge with plausibility. *Iqbal*, 556 U.S. at 686-87. It has failed to do so.

To put this in perspective, Plaintiffs ask this Court to accept their conclusory allegations that when the Diocesan Defendants made certain statements to Plan Participants (assuming they were the entities that made such statements)[17] about the funding and operation of the Plan in 1973, during the Nixon administrations, they knew or intended that those representations would prove unreliable, not during the Carter, Reagan, Bush, Clinton, or the second Bush administrations, but in 2009, when President Obama was in the White House. They ask the Court to rely upon a generalized pleading of knowledge and intent that survives decades even as they also acknowledge, as they must, that the role of the Diocesan Defendants in the Plan

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[17] The Diocesan Defendants reiterate a point that impacts numerous ***arguments*** throughout this memorandum and should not be lost as the Diocesan Defendants repeat Plaintiffs' ***allegations*** in this memorandum. Plaintiffs make ***general and conclusory*** allegations as to all three corporate entities' purported involvement in "the hospital" and "the Plan." *See, e.g.*, FAC ¶¶ 211, 214-16, 223, 259, 276. The Amended Complaint's characterizations in this regard are wrong, but that fight must await another day.

changed drastically over those same decades. FAC ¶¶ 75, 84, 87, 203, 214-15. That kind of clairvoyance simply does not exist and Rule 9(b)'s reference to pleading knowledge or intent generally was never intended to stretch to that absurd length.[18] *Iqbal*, 556 U.S. at 686-87.

iii. The Opposition's Authorities Do Not Change The Result

The Opposition cites a number of cases in support of its argument that fraud claims can rest on false statements of intent. *See* Opp'n. at 29-30, 42-43. But without sufficient factual allegations related to scienter, none of Plaintiffs' cases are particularly relevant. *Id.* For example, in *Hoefer v. Wisconsin Education Ass'n Insurance Trust*, 470 N.W.2d 336, 340 (Iowa 1991), the Iowa Supreme Court affirmed the lower court's entry of summary judgment in favor of the defendants because the plaintiff failed to demonstrate any evidence on the damage element of his fraud claim. The plaintiff's fraud claim was based on what the defendant ***admitted*** to be a misrepresentation that the district court found "was unintentional and merely based on an honest misunderstanding of the law which is not actionable." *Id.* In dicta, the Iowa Supreme Court stated that, "[w]ere ***scienter*** the only controverted element, [plaintiff's] argument might well prevail" because the plaintiff had alleged specific facts related to the defendant's knowledge and intent. *Id.* (emphasis added). And, in another case cited by Plaintiffs, *Cheetham v. Ferreira*, 56 A.2d 861, 864 (R.I. 1948), the complainants' allegations concerning the defendant's fraudulent misrepresentations were particularly detailed and sufficient for the court to infer that "they constituted positive representations of existing material facts that were known by her to be false . . . ." Curiously, the Opposition also cites *Glassman v. Computervision Corp*., 90 F.3d 617, 629 (1st Cir. 1996). In *Glassman*, the First Circuit affirmed the denial of a motion for leave to file a second amended complaint because the plaintiffs did not plead factual allegations sufficient to

[18] Statements in the Vatican Letter and HSC Letter suffer from similar frailties and are addressed *infra* at Part III.D.

reasonably allow the inference that the defendants' statements were false when made. *Id.* Like the plaintiffs in *Glassman*, and for all the reasons set for *supra* at Part III.B.3. Plaintiffs have not pled sufficient allegations for the Court to infer scienter either. Their fraud claims should be dismissed.

4. The Opposition Wrongly Suggests That The Diocesan Defendants Had A Duty To Correct Statements Prior To 2008, Which Were Accurate When Spoken, But Allegedly Ceased To Be Accurate At Some Point In The Future (In Some Cases Decades Later)

The Diocesan Defendants explained in their Opening Brief that Plaintiffs could not rest fraud claims on statements concerning the Plan prior to the 2008 stock market crash because such statements could not have caused Plaintiffs' harm and Plaintiffs had failed to allege that the statements were factually false when made. Dioc. MTD at 21-22. In yet another implicit concession that the documents in Plaintiffs' possession do, in fact, establish that there were periods of time where the Plan was adequately funded, Plaintiffs make the bizarre argument that the "Diocesan Defendants were under a continuing duty to correct such prior misrepresentations and inform employees and other Plan Participants that the statements were no longer reliable." Opp'n at 31; *see also id.* at 15-16. As presented by Plaintiffs, this duty appears unlimited in time—even for representations made decades prior. *Id.* at 31. This sweeping response is flawed for a number of reasons.

First, as discussed previously, it is important to identify the representations to Plan Participants actually attributable to the Diocesan Defendants contained in the Amended Complaint. There are only two: paragraphs 265 and 277. *See also supra* note 14. Beyond those two allegations, Plaintiffs fail to allege with any specificity that the Diocesan Defendants were responsible for any alleged misstatements about the Plan's funding or which other statements to

Plan Participants in the Amended Complaint allegedly are attributable to the Diocesan Defendants. *See* Dioc. MTD at 22 & n.18.

The specific representations referencing diocesan entities occurred years before the Great Recession, in 1973 and 1998. FAC ¶¶ 265, 277. Plaintiffs cite no case that identifies a continuing duty lasting that long.

Second, the Amended Complaint clearly identifies statements made by parties other than the Diocesan Defendants about the Plan and its funding and operation. *See, e.g.*, FAC ¶¶ 268-71, 273-75, 279-81. Plaintiffs do not allege facts demonstrating that the Diocesan Defendants were privy to those statements or knew when they were made, much less explaining how the Diocesan Defendants were under a duty to correct such statements made by others. Such a duty is inappropriate, especially without some allegation as to the Diocesan Defendants' role when such statements were made and when they became untrue. *See Lyons v. Midwest Glazing*, 265 F. Supp. 2d 1061, 1076–77 (N.D. Iowa 2003) (rejecting breach of fiduciary duty claim following bench trial because at the time these alleged breaches occurred, the counterclaim defendant "no longer owed [counterclaim plaintiff] a fiduciary duty").

And on that score, the Amended Complaint fails. Plaintiffs expressly allege that the role of the Diocese evolved and lessened over many years. FAC ¶¶ 75, 84, 87, 203. Yet they simultaneously contend that the Diocesan Defendants had a continuing duty to correct statements that were true when made, but rendered false by subsequent events. Opp'n at 31. Plaintiffs' claims about the Diocesan Defendants' involvement in hospital affairs changing over time is readily apparent from the facts set forth by Plaintiffs in their Omnibus Memo. *See, e.g.*, Omnibus Mem. at 14.

All the above leaves aside that, at some point, the successor fiduciary is responsible if something becomes untrue on its watch. *See* 29 U.S.C. § 1109(b) ("No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary."); *McCarty v. Holt*, No. 12-3279, 2013 WL 775531, at *4 (D.N.J. Feb. 27, 2013) (dismissing claim for breach of ERISA fiduciary duty where defendant "was not trustee when [successor] committed the improper activities"); *Coriale v. Xerox Corp.*, 775 F. Supp. 2d 583, 600 (W.D.N.Y. 2011) ("Since the alleged breach of fiduciary duty . . . did not occur until years after Nazemetz ceased acting as plan administrator, there is no basis here for a claim against her under § 1132(a)(3).").

None of the Opposition's cases (all from outside Rhode Island) stands for the proposition that any duty to disclose new information that makes earlier statements untrue or misleading *continues indefinitely* or on the facts plead in the Amended Complaint. *Id.*

In *George Joseph Assets, LLC v. Chenevert*, 557 S.W.3d 755, 761 (Tex. App. Ct. 2018), the parties entered into a settlement pursuant to which the defendants agreed to convey certain real estate to the plaintiff. However, during *the six-month period* after the court entered the settlement agreement, but *before the conveyance took place*, the defendants became aware of new information that made their prior representations during settlement negotiations concerning the real estate at issue untrue, which the defendants knowingly failed to disclose. *Id.* at 762-63, 766. The Court of Appeals of Texas found that, in those circumstances and under Texas law, the defendants had a duty to disclose such information and failure to do so constituted fraud. *Id.* at 767-77. The circumstances here are entirely distinguishable from those in *George Joseph Assets*, where the defendants knew the plaintiff was relying on their misleading statements, and learned the new information shortly after making such statements. *See id.* at 762-73. Here, any

allegedly misleading statements by the Diocesan Defendants did not become "untrue" until decades after they were made. Dioc. MTD at 10-18 (discussing funding levels of plan prior to Great Recession and Amended Complaint's failure to allege insufficient funding prior to 2009); *supra* Part II.

In re Wayport, Inc. Litigation, 76 A.3d 296, 323 (Del. Ch. 2013), offers even less support for Plaintiffs' argument. There, the Delaware Court of Chancery found a defendant liable for fraud for failing to correct a representation made during negotiations that it became aware was untrue *only a month after* it was made and before the sale of the stock took place. *Id.* That is hardly the situation described in the Amended Complaint.

The other two cases cited in the Opposition are completely inapposite. In *St. Joseph Hospital v. Corbetta Construction Co.*, 316 N.E.2d 51, 70-71, 73 (Ill. App. Ct. 1974), the Appellate Court of Illinois found the defendant liable for fraud under Illinois law for making misleading statements and withholding information concerning the safety of one of its paneling products. *Id.* There, the defendant not only knew that the statements were deceptive at the time they were made, but also failed to alert anyone that the product was unsuitable for the project's use. *Id.* There is no allegation that the Diocesan Defendants knew the disputed statements respecting funding were misleading at the time they were made (because they were not). *See* Dioc. MTD at 10-23; *supra* Part III.B.1-3. Likewise, *Druckzentrum Harry Jung GmbH & Co. KG v. Motorola Mobility LLC*, 774 F.3d 410, 418-19 (7th Cir. 2014), provides support *for the Diocesan Defendants' arguments*. In that case, the court held that there was no duty to disclose where the plaintiff had failed to identify "anything in the updated forecasts that was inaccurate, much less willfully false." *Id.* at 419. As explained *supra* at Part III.B.1 and in the Opening

Brief, Plaintiffs have failed to plead that any of the statements predating the Great Recession (or in correspondence from the Bishop) were actually false. Dioc. MTD at 21-23, 33-35.

C. The Opposition Cannot Overcome The Flaws In Plaintiffs' "Quid Pro Quo" Fraud And Conspiracy Claims On Account Of Disclosures Of Purportedly Concealed Facts

Plaintiffs largely predicate their fraud and conspiracy claims on the failure to disclose the Plan's funding issues and status as a church plan, the scope of the 2014 Asset Sale, and the continued Catholicity of the hospitals. However, the Diocesan Defendants demonstrated that all of these items were publicly disclosed to state regulators. Dioc. MTD at 25-33 (detailing disclosures to the Rhode Island Department of Health and Rhode Island Attorney General). The Opposition does not seriously dispute this. Rather, Plaintiffs argue that the documents attached by the Diocesan Defendants as exhibits were not incorporated by reference in the Amended Complaint and cannot be considered on a motion to dismiss. *See* Opp'n at 3-4. Plaintiffs further argue that, even if those disclosures could be properly considered by the Court, they were not made to Plaintiffs and therefore Plaintiffs did not receive any such disclosures. *Id.* at 33, 37, 41.

As explained in greater detail *supra* at Part I.B, the Court may consider Exhibits 10-17 and 24 on a motion to dismiss because these documents are referenced in the Amended Complaint and/or are public records. Moreover, whether or not Plaintiffs themselves had actual notice of the facts disclosed to regulators is irrelevant to whether the Court may consider the exhibits. The Diocesan Defendants attached Exhibits 10-17 and 24, in part, to point out that each component of the so-called "plot" to defraud regulators was revealed to these very regulators, thus demonstrating that no action based on that theory survives and, moreover, the alleged fraud or conspiracy is beyond implausible. *Supra* Part I.B. The fact remains that the Plan's financial issues and status as a church plan, the scope of the 2014 Asset Sale, and the continued

Catholicity of the hospitals were not part of a secret conspiracy, but rather were expressly disclosed, even if all Plaintiffs were not aware that such disclosures had occurred. Dioc. MTD at 23-33.

D. Plaintiffs' Claim For Fraud Fails Because The Alleged Statements In The Vatican And Health Services Council Letters Were Not False And Were Opinions

Nothing in the Opposition demonstrates that the HSC Letter or the Vatican Letter contained misstatements. Plaintiffs attempt to dismiss the merits of the Diocesan Defendants' arguments by stating that the Diocesan Defendants merely "recite snippets" of what was said in the Vatican and HSC Letters and "quibble about the veracity of those snippets." Opp'n at 41. This argument, however, ignores the fact that Bishop Tobin's statements must be false before Plaintiffs can build a fraud claim on top of them. In Rhode Island, common law fraud requires a "false representation of material fact." *Siemens Fin. Servs., Inc. v. Stonebridge Equip. Leasing, LLC*, 91 A.3d 817, 821 (R.I. 2014).

Importantly, the Opposition does not explain why statements in either of the letters were factually false. Plaintiffs simply refer to their contrary conclusory allegations in the Amended Complaint that the Diocesan Defendants "knew that even after the $14 million contribution, the Plan would remain seriously underfunded," that the "the financial future of the pensioners would be at much more than merely 'significant risk,'" and that "approval of the alienation would not avoid the "catastrophic implications of that failure.'" FAC ¶ 177; *see also id.* ¶ 322. Plaintiffs' mere disagreement with Bishop Tobin's choice of words does not make his statements false. Bishop Tobin never claimed in those letters that the Plan would be fully funded after the $14 million contribution or that the $14 million contribution would completely avoid failure of the Plan. Ex. 21 (Vatican Letter); Ex. 25 (HSC Letter). Accordingly, Bishop Tobin's statement cannot form the basis for a fraud claim. Dioc. MTD at 35.

Plaintiffs' allegations of fraudulent intent and knowledge of falsity as it concerns the Vatican and HSC Letters also come up short. To defend their assertion that the Bishop misrepresented his opinion of the impact of the 2014 Asset Sale on the Plan, Plaintiffs cite to a wholly generalized statement as to what the Diocesan Defendants purportedly knew:

> Defendants Corporation Sole, Diocesan Administration, Diocesan Service, SJHSRI, RWH, and CCCB knew that these statements were at best misleading if not simply false. They knew that even after the $14 million contribution, the Plan would remain seriously underfunded, and the financial future of the pensioners would be at much more than merely "significant risk." They knew that approval of the alienation would not avoid the "catastrophic implications" of that failure. To the contrary, they knew that such approval would increase the risk of such failure by depriving SJHSRI of operating income it needed to meet its obligations under the Plan, and hindering if not completely frustrating the Plan participants' rights to demand contributions by or recover damages from an asset-holding and income-generating hospital.

Opp'n at 42 (quoting FAC ¶ 177). But the Amended Complaint does not set out predicate facts from which to conclude (or even infer) that the inferences and conclusions drawn by the Diocesan Defendants, and specifically Bishop Tobin, in this paragraph were intended to mislead. Plaintiffs do not allege that Bishop Tobin is an actuary, an ERISA expert, a healthcare executive, a financial professional, or privy to the actuarial analyses concerning the purported insufficiency of the proposed $14 million payment into the Plan allegedly shared with other defendants. *See, e.g.*, FAC ¶¶ 252, 294, 297-305, 313, 324-35, 339-40, 343-45, 347-48 (discussing *other defendants'* knowledge of such actuarial reports and not alleging that the Bishop was privy to these communications).

Instead, Plaintiffs ask this Court to presume such "knowledge" (and reject all other plausible explanations) because one adjective in a draft of the Vatican Letter that conveyed that the Plan was in trouble ("spiraling and gaping unfunded liability") was swapped out for another adjective that also indicated the pension was in trouble ("significant unfunded

liability.”). *See* FAC ¶¶ 175, 254-55, 320-22. Stating that “the financial future for employees-beneficiaries of the pension plan would be at significant risk,” while also referencing “the catastrophic implications of such a failure” is plainly and simply not fraud at all, Ex. 21, Ex. 25, let alone a plausible basis to infer knowledge or intent to deceive. *See Iqbal*, 556 U.S. at 680-84.

E. Plaintiffs Cannot Premise Their Fraud Claims On Statements To, Or Reliance By, Third Parties

As the Diocesan Defendants explained in their Opening Brief, the Amended Complaint does not allege that Plaintiffs were the intended recipients of alleged misstatements to the Vatican, HSC, U.S. Conference of Catholic Bishops (“USCCB”), Official Catholic Directory (“OCD”) and/or the IRS and so fraud claims based on those statements must fail. Dioc. MTD at 38-41. The Opposition attempts to refute this argument by contending that “[i]t is unnecessary that Plaintiffs were [the] intended recipients of these particular representations[.]” Opp’n at 44. Plaintiffs are wrong.

1. *Misstatements To, And Reliance By, Individuals Other Than The Plaintiffs Are Not Actionable*

Fraud claims cannot be based on misrepresentations to third parties, and the Diocesan Defendants cited three cases in support of that proposition in the Opening Brief: *Lifespan/Physicians Prof'l Servs. Org., Inc. v. Combined Ins. Co. of Am.*, 345 F. Supp. 2d 214, 226 (D.R.I. 2004); *Gorbey ex. Rel. Maddox v. Am. Journal of Obstetrics & Gynecology*, 849 F. Supp. 2d 162, 166 (D. Mass. 2010); and *Ang v. Spidalieri*, No. WC-2006-0569, 2018 WL 810086, at *14 (R.I. Super. Ct. Feb. 5, 2018). Dioc. MTD at 38, 40. The Opposition contains no contradictory case law on this issue. Rather, Plaintiffs respond to the Diocesan Defendants’ argument by completely ignoring *Lifespan/Physicians* and simply dismissing the other two cases on the basis that “[n]either case involved any discussion of whether the plaintiffs were intended

recipients of any misrepresentations." Opp'n at 46. However, the courts in both *Ang* and *Gorbey* considered to whom the allegedly false statements were made in rejecting fraud claims. Dioc. MTD at 38-41.

In *Ang*, the Rhode Island Superior Court found that the plaintiff had failed to demonstrate a defendant was liable to her for fraud because the allegedly fraudulent statement was made to a third party—not the plaintiff—which the third party—not the plaintiff—relied on. 2018 WL 810086, at *14. The court reasoned: "It was a false statement that [the defendant] made to Finan, which *Finan* and his principal, WaMu, relied and acted upon. At no time did [the defendant] make a false statement of fact to [the plaintiff] which [the plaintiff] then relied upon." *Id.* (emphasis in original). Similarly, in *Gorbey*, the district court denied the plaintiffs' motion to amend their complaint to add a fraud count based on two doctors' *publicly published statements* that *third parties*—not the plaintiffs—relied on. 849 F. Supp. 2d at 166. Tellingly, Plaintiffs provide no case law to refute these cases or holding that statements like those to the Vatican, HSC, USCCB, OCD and the IRS properly formed the basis for someone else's fraud claim.[19]

Plaintiffs also contend that they have alleged "sufficient reliance on misrepresentations to third parties," based on fraud cases from other jurisdictions.[20] Opp'n at 46-

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[19] Moreover, Plaintiffs' argument that the Diocesan Defendants "do not dispute that they made other misrepresentations directly to Plaintiffs" is simply not true. Opp'n at 44. In the Opening Brief, the Diocesan Defendants stated that they disputed that they made any of the misrepresentations to the Plan Participants from the 1970s through the mid-2000s. *See* Dioc. MTD at 21. Separately, the Diocesan Defendants disagree with Opposition's contention that this Court could not dismiss Count VII to the extent it was premised on non-actionable representations to third parties. Courts routinely dismiss claims to the extent they rest on non-actionable allegations. *Supra* note 12.

[20] Among these cases is *Wheat v. Sofamor*, S.N.C., 46 F. Supp. 2d 1351, 1365 (N.D. Ga. 1999), which Plaintiffs' describe as "recognizing but granting summary judgment on claim for fraud on the Food & Drug Administration, in the absence of evidence that defendants intended to deceive the FDA." Opp'n at 46 n.33. There are two major problems with Plaintiffs' reliance on *Wheat*. First, *Wheat* ***rejected*** the plaintiffs' common law fraud claim because they "***failed to identify a material, false statement of fact made by Defendants to any plaintiff***[.]" *Id.* at 1364 (emphasis added). Second, to the extent *Wheat* recognized a "fraud on the FDA" claim, it has no basis in law and offers no support for Plaintiffs' argument as it concerns third-party reliance. To recognize a "fraud on the FDA" claim, *Wheat* followed the lead of *In re Orthopedic Bone Screw Products Liability Litigation*, 159 F.3d 817 (3d Cir. 1998). *See Wheat*, 46 F. Supp. 2d at 1364 n.17 (citing *Bone Screw Prods.*). The U.S. Supreme Court subsequently

48 & n.33. None of these cases are persuasive in light of the Superior Court's decision in *Ang*, which clearly rejects the third-party reliance theory. 2018 WL 810086, at *14. In *Gorbey*, moreover, the Massachusetts federal district court was not aware of any cases "support[ive] of a theory that third-party reliance on fraud is cognizable under Massachusetts law." 849 F. Supp. 2d at 166. The Rhode Island Supreme Court, notably, has perceived no conflict between the law of fraud in Massachusetts and Rhode Island. *See Siemens Fin. Servs.*, 91 A.3d at 820 n.4 (R.I. 2014).

Ignoring *Ang* (the only direct Rhode Island authority on this issue), Plaintiffs rely instead on *Vucci v. Meyers Bros. Parking System, Inc.*, 494 A.2d 530, 534 (R.I. 1985), which concerns apparent authority. Why Plaintiffs think *Vucci* is relevant, however, is not particularly apparent. In *Vucci*, the Supreme Court held that a trial justice may permit a plaintiff *in a personal injury action* to introduce evidence relating to apparent authority when the evidence indicates that a third party relied on that appearance of authority and plaintiff was injured as a result. *Id.* Accordingly, the Supreme Court's holding relates strictly to admission of evidence to prove negligence. *See id.* Plaintiffs argue that this holding is somehow "the essence" of third party reliance in fraud claims, Opp'n at 48, ignoring that the essence of a fraud claim is that a "defendant made a false representation intending to induce the plaintiff to rely thereon . . . ." *McNulty v. Chip*, 116 A.3d 173, 184 (R.I. 2015) (stating elements of a *prima facie* fraud claim). *Vucci* contains no discussion as to whether the defendant intended the plaintiff to rely on the apparent authority that the employee did not have, and cannot be stretched as far as the Opposition attempts to take it.

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reversed *Bone Screw Products* under the name *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001), holding that state law claims for "fraud on the FDA" were impliedly preempted. Plaintiffs may be familiar with *Buckman* since the Diocesan Defendants cited it extensively in connection with their argument that federal law preempts Plaintiffs' "fraud on the IRS" claim (Count XVII of the Amended Complaint). Dioc. MTD at 67-71.

2. *The Opposition's Fallback To Fraudulent Scheme/Vicarious Tort Liability Cannot Save Plaintiffs' Common Law Fraud Claim Against The Diocesan Defendants*

Plaintiffs argue that, even if statements to, and reliance by, third parties cannot be the basis for a fraud claim, the Diocesan Defendants would still be liable for misrepresentations by others because said statements were part of a common conspiracy or fraudulent scheme. Opp'n at 44. Putting aside the Amended Complaint's failure to state claims for conspiracy or fraudulent scheme, Dioc. MTD at 8, 47-59,[21] the fact remains that statements not actionable in fraud do not suddenly become actionable if made as part of a conspiracy or scheme. *See Fogarty v. Paulmbo*, 163 A.3d 526, 543 (R.I. 2017) (providing that conspiracy "is not an independent basis of liability," but "requires a valid underlying intentional tort theory"). Because fraud claims cannot rest on alleged misrepresentations to third parties or third parties' reliance on such statements, Count VII must be dismissed to the extent it is based on the Diocesan Defendants' statements to the Vatican, the HSC, the USCCB, the OCD, the IRS, or anyone else.[22]

F. The Opposition's Assertion That The Reasonableness Of Reliance Is Not Susceptible To Resolution On A Motion To Dismiss Does Not Overcome Their Failure To Plead Specific Facts To Support Reliance

In response to the Diocesan Defendants' contention that statements to third parties could not support a fraud claim due to, among other reasons, a lack of reliance, Dioc. MTD at 38, Plaintiffs argue that they have adequately pled reliance in support of their fraud claims and contend that reliance cannot be disproved on a motion to dismiss. Opp'n at 46-47. The Opposition then cites a number of cases holding that *reasonable* reliance cannot properly be

[21] The Diocesan Defendants' joined Angell's argument that Plaintiffs' had failed to state a claim for fraudulent scheme. Dioc. MTD at 8.

[22] Plaintiffs should not be permitted to do an end-run around the elements of fraud and base a "fraudulent scheme" claim on statements that are otherwise not actionable. As noted in the Opening Brief, Plaintiffs' "fraudulent scheme" claim is not an independent cause of action and, at any rate, should be dismissed for the same reasons Plaintiffs' fraud and conspiracy claims fail. *See* Dioc. MTD at 8.

decided at this stage of the proceedings. *Id.* Courts have held, however that "[w]hen, . . . the facts alleged in the complaint preclude a finding of reasonable reliance, a court may enter an order of dismissal under Rule 12(b)(6)." *Rodi v. S. New England Sch. Of Law*, 389 F.3d 5, 16 (1st Cir. 2004); *see Reinach v. Hanover Co*., No. CIV.A.07-12337-FDS, 2009 WL 6506883, at *10 (D. Mass. Sept. 19, 2009) ("Although reasonable reliance is ordinarily a question for the jury, the Court may dismiss such a claim if the facts alleged in the complaint preclude a finding of reasonable reliance."). That is the exact circumstance here.

Plaintiffs' argument conveniently ignores the fact that the Amended Complaint makes no attempt to allege reliance, reasonable or not, by the putative class representatives. The Amended Complaint contains no allegations that any of the putative class representatives received any of the alleged misstatements to Plan Participants. Furthermore, there are no allegations that any of the class representatives relied on such statements or that the class representatives would have behaved differently if information that was purportedly not disclosed was disclosed. Without such allegations, Plaintiffs have failed to sufficiently allege reliance by the class representatives as a matter of law—and the Court need not even consider whether such reliance was reasonable. *See Ouch v. Fed. Nat'l Mortg. Ass'n*, No. CIV.A. 11-12090-RWZ, 2013 WL 139765, at *1 (D. Mass. Jan. 10, 2013), *aff'd*, 799 F.3d 62 (1st Cir. 2015) (dismissing class action fraud claim where plaintiffs alleged "a grand fraudulent scheme by the [mortgage] originator defendants" but "fail[ed] to state who made what alleged misrepresentations and when and where to each named plaintiff" which "fail[ed] to meet the heightened pleading standard of Rule 9(b)")); *Kaufman v. i-Stat Corp.*, 754 A.2d 1188, 1190, 1197 (N.J. 2000) (reversing denial of motion to dismiss where class representative admitted that she neither "actually or directly

receive[d] or rel[ied] on any communication containing any misrepresentation . . . nor . . . omitted material facts" and therefore "fail[ed] to make out a claim for fraud").

Lastly, Plaintiffs are not relieved from having to make allegations of reliance by class representatives simply because this is a class action. The Opposition contends that "it is not necessary to prove individualized reliance in pension class actions," citing *Osberg v. Foot Locker, Inc.*, No. 07-CV-1358 (KBF), 2014 WL 5800501, at *1 (S.D.N.Y. Nov. 7, 2014). Opp'n at 35. *Osberg*, however, was resolved in the context of class certification and stated that reliance "can be demonstrated on a ***generalized basis***" for that purpose. *Id.* (emphasis added). *Osberg* does not hold that putative class representatives are relieved of any obligation to allege that they actually received the purportedly misleading communication or relied on it, when their common law fraud claim confronts a motion to dismiss for failure to state a claim. *See id.* The Amended Complaint is completely devoid of allegations of any individualized reliance by the putative class representatives.[23] It accordingly fails to state a claim for common law fraud. *Ouch*, 2013 WL 139765, at *1; *Kaufman*, 754 A.2d at 1197. Count VII should be dismissed.

G. The Opposition Does Not Save The Amended Complaint From The Reality (Which Plaintiffs Concede) That SJHSRI *Was* Operated In Connection With The Roman Catholic Church For OCD Listing Purposes

When Plaintiffs lay out the supposed "quid pro quo" conspiracy in their Amended Complaint, they make clear that, in their scenario, the linchpin related to the Diocesan Defendants is their agreement to continue to improperly list SJHSRI in the Official Catholic Directory ("OCD"). FAC ¶¶ 153-160. The Diocesan Defendants' Opening Brief demonstrated that continued listing in the OCD was proper as SJHSRI was operated in connection with the

[23] The Amended Complaint does contain several generalized and conclusory averments of reliance. FAC ¶¶ 219, 260-62, 273, 496. Such allegations are not entitled to an assumption of truth however. *See Iqbal*, 556 U.S. at 680-81.

Diocese of Providence and the Roman Catholic Church. Dioc. MTD 42-44. The Opposition fails to answer these arguments. This is fatal to Plaintiffs' claims against the Diocesan Defendants, including Counts III, VII, VIII, IX, XVII, XXI, and XXII to the extent they rely upon the supposed "misrepresentations" and "conspiracy" surrounding such a listing.

1. *The Court Can Look To SJSHRI's Articles Of Amendment On A Motion To Dismiss*

To support their contention that SJHSRI was operated in connection with the Diocese of Providence, the Diocesan Defendants attached the Articles of Amendment to SJHSRI's Articles of Incorporation, dated January 4, 2010, as Exhibit 19 (the "Amended Articles") to their Opening Brief. The Amended Articles name RCB the Class B member of SJHSRI and grant RCB specific controls over SJHSRI's conduct of business, even in wind-down, to prevent the diminishment of SJHSRI's Catholicity and its continued adherence to the USCCB's Ethical and Religious Directives for Catholic Health Care Services ("ERDs").[24] Plaintiffs argue, however, that the Court should not refer to the Amended Articles.

The Opposition is misplaced. Courts may properly take judicial notice of official public records, like articles of incorporation filed with a state agency. *See, e.g.*, *Overall v. Ascension*, 23 F. Supp. 3d 816, 825 (E.D. Mich. 2014); *Singleton v. Volunteers of Am.*, No. C 12-5399 LHK (PR), 2013 WL 5934647, at *2 n.3 (N.D. Cal. Nov. 4, 2013); *In re Greater Se. Cmty. Hosp. Corp.*, 333 B.R. 506, 527 n.25 (Bankr. D.D.C. 2005). The Amended Articles are on file with the Rhode Island Secretary of State. Ex. 19. Plaintiffs do not question their authenticity. *See Watterson*, 987 F.2d at 3-4.

[24] The Diocesan Defendants also attached the ERDs as Exhibit 20 to the Opening Brief. Although referenced in the Amended Complaint and capable of review at this stage of the proceedings on that ground, FAC ¶ 149 & n.3, the ERDS are also susceptible to judicial notice. *Overall v. Ascension*, 23 F. Supp. 3d 816, 825 (E.D. Mich. 2014).

Plaintiffs instead argue that the provisions in the Amended Articles that the Diocesan Defendants cite in their Opening Brief are "moribund," Opp'n at 50, and "no longer operative," Opp'n at 4 n.4. The Opposition, however, does not contend that these provisions were not in effect in 2015, 2016, or 2017, when the Diocesan Defendants listed SJHSRI in the OCD. Indeed, the Amended Complaint and the Omnibus Memorandum concede that they were effective during that period. Omnibus Mem. at 42 (citing FAC ¶ 150) ("These 'Catholic identity covenants' included essentially all the rights which Corporation Sole, Diocesan Administration, and Diocesan Service, and the Diocese of Providence, were entitled to exercise over Old Fatima Hospital and Old Roger Williams Hospital, SJHSRI, and RWH, since 2009 when SJHSRI and RWH became part of CCCB."). The Court, therefore, can properly review the Amended Articles as public records susceptible to judicial notice in connection with the Diocesan Defendants' motion to dismiss.

2. *In Any Event, The Complaint Concedes That There Is A Connection Between SJHSRI And The Diocese Of Providence*

But even if the Court declined to review the Amended Articles, the Amended Complaint concedes that there is a connection between SJHSRI and the Diocese of Providence. Paragraph 88 of the Amended Complaint states:

> Upon the conclusion of the 2014 Asset Sale, the Diocese of Providence had no meaningful role in the governance of SJHSRI. To the contrary, *the only rights it had concerned the "Catholicity" of SJHSRI's operation of the hospital and provision of health care.* Since SJHSRI no longer operated a hospital or otherwise provided health care as a result of the 2014 Asset Sale, that role was rendered completely moot.

FAC ¶ 88 (emphasis added). Accordingly, editorializing aside, Plaintiffs concede that the Diocese of Providence had rights concerning the enforcement of Catholicity as against SJHSRI. *Id.* Likewise, Plaintiffs' allegation that "the Diocese of Providence had no ***meaningful*** role" is

an acknowledgement that there was a role for the Diocese of Providence in the governance of SJHSRI, just not a significant one in their view. *Id.* (emphasis added). On Plaintiffs' own facts, therefore, there is a connection between SJHSRI and the Church. Deciding whether that role is "meaningful" enough for the Church to conclude that there was a connection worthy of inclusion in the OCD is precisely the kind of inquiry precluded by the First Amendment, as set forth in the next section of this reply.

3. *Because There Is A Connection Between SJHSRI And The Diocese Of Providence, The First Amendment Bars Plaintiffs From Challenging The Connection's Sufficiency For OCD Listing Purposes Regardless Of The Standard That Plaintiffs Apply*

Plaintiffs contend that they do not conflate the test for admission to the OCD with that for qualification as a "church plan" under ERISA.[25] Opp'n at 51-52. The Amended Complaint suggests otherwise. *See* FAC ¶¶ 158, 183, 202. Whatever standard Plaintiffs purport to gauge the sufficiency or "meaningfulness" of SJHSRI's connection to the Diocese of Providence for OCD listing purposes, however, is ultimately irrelevant. Because Plaintiffs concede that there is such a connection, the First Amendment precludes Plaintiffs from challenging the sufficiency of that connection. *See Overall*, 23 F. Supp. 3d at 832 (identifying decisions as to challenges to "a church's polity, administration, and community" as beyond judicial inquiry). The Diocesan Defendants covered this point in their Opening Brief and will not repeat it here. Dioc. MTD at 46-47.

The Opposition raises the specter of an absurd slippery slope to resist the application of the First Amendment to preclude Plaintiffs' challenge. Plaintiffs contend that if the Court accepts the Diocesan Defendants' argument, then by logical extension local dioceses

[25] The Opposition pushes this argument, while at the same time citing *Rollins v. Dignity Health*, 338 F. Supp. 3d 1025, 1028 (N.D. Cal. 2018). It is not clear how *Rollins* supports the Opposition on this score, given that *Rollins* involved a challenge to whether a purported "church plan" was controlled by or associated with a church within the meaning of ERISA. *See id.*

across the country will be able to sell federal tax and ERISA exemptions to "supermarkets, bus terminals, and driving ranges." Opp'n at 53. This is another red herring. First, the Opposition distorts the Diocesan Defendants' argument, ignoring that it is premised on there being some connection between the listed organization and the diocese—a fact Plaintiffs concede. FAC ¶ 88. To be clear, the Diocesan Defendants argue that the First Amendment precludes inquiry into the sufficiency of that connection, not whether there is a connection at all. Dioc. MTD at 46.

Second, and more directly to the substance of Plaintiffs' concern, it takes more than a diocese claiming an entity is connected to the diocese to qualify the entity for listing in the OCD or for the USCCB's group tax exemption. *See* Ex. 18 (2017 Memorandum from U.S. Conference of Catholic Bishops, referenced in the Amended Complaint at paragraphs 106-107). Rather, the USCCB requires an entity wishing to be listed in the OCD and to claim exemption under the USCCB's group exemption to demonstrate that it is a public charity pursuant to 26 U.S.C. § 509(a). Ex. 18 at 3. A "public charity" is an organization that not only qualifies as tax exempt under 26 U.S.C. § 501(c)(3), but also meets certain requirements under § 509(a). *Create (Christian, Research, Educ., Action, Tech., Enter., Inc.) v. C.I.R.*, 634 F.2d 803, 809 (5th Cir. 1981) ("Section 501(c)(3) allows an exemption from federal income taxes for certain charitable organizations . . . . Section 509(a) provides that all organizations exempt under s[ection] 501(c)(3) are private foundations, except for certain classes of public charities.").[26] Accordingly, to the extent that Plaintiffs' concern about for-profit entities skirting federal tax law and ERISA were even relevant here, their concern is unwarranted. Count VII should be dismissed.

[26] The Diocesan Defendants produced documents to the Receiver both reflecting that an entity must also be a public charity to qualify for the USCCB's group exemption, as well as SJHSRI's efforts to show that it met the requirements of 26 U.S.C. § 509(a). Plaintiffs, notably, do not allege that the Diocesan Defendants erred in determining that SJHSRI met those requirements.

IV. THE OPPOSITION FAILS TO SHOW THAT THE AMENDED COMPLAINT'S CONSPIRACY THEORY (COUNT IX) IS PLAUSIBLE

A. Plaintiffs Overlook A Fundamental Component Of Rhode Island Law Of Civil Conspiracy And Federal Procedural Law

1. *Rhode Island Law*

The Opening Brief cited *Stubbs v. Taft*, 149 A.2d 706 (R.I. 1959), in connection with the Diocesan Defendants' argument that Plaintiffs failed to state a claim for conspiracy under Rhode Island law. Plaintiffs contend that *Stubbs* has no relevance since it predates the adoption of the Superior Court Rules of Civil Procedure in 1966.[27] Opp'n at 55-56, 60-61. The Diocesan Defendants, however, cite *Stubbs* not for procedural principles, but because *Stubbs* sets forth the substantive Rhode Island law of civil conspiracy. Federal and state courts continued to cite *Stubbs* in connection with assessing civil conspiracy claims long after 1966. *See, e.g.*, *Guilbeault v. R.J. Reynolds Tobacco Co.*, 84 F. Supp. 2d 263, 268 (D.R.I. 2000) (granting motion to dismiss and citing *Stubbs*); *Smith v. O'Connell*, 997 F. Supp. 226, 241 (D.R.I. 1998) (granting summary judgment and citing *Stubbs*); *ERI Max Entm't v. Streisand*, 690 A.2d 1351, 1353-1354 (R.I. 1997) (affirming grant of motion to dismiss and citing *Stubbs*); *R.I. Resource Recovery Corp. v. Albert G. Brien & Assocs.*, No. PB 10-5194, 2012 R.I. Super. LEXIS 113, at *42-43 (R.I. Super. Ct. Jul. 16, 2012) (granting motion to dismiss and citing *Stubbs*). Plaintiffs' view of *Stubbs* is just plain wrong.

Plaintiffs' aversion to this Court's consideration of *Stubbs* stems from its holding. In *Stubbs*, the Rhode Island Supreme Court held that to establish a claim for civil conspiracy,

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[27] The Opposition also asserts that the Superior Court Rules of Civil Procedure are "patterned on the federal rules." Opp'n at 56. To the extent Plaintiffs intimate that the pleading standards in state and federal court are the same, they are wrong. Although that may have been true in 1966, both the First Circuit and another session of Rhode Island's federal court have since recognized that the Rhode Island pleading standard is less demanding than the one this Court must apply. *Lister*, 790 F.3d at 24; *see Era v. Morton Cmty. Bank*, 8 F. Supp. 3d 66, 69 (D.R.I. 2014).

"evidence must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties ***to the prosecution of the unlawful enterprise***." 149 A.2d at 708. (internal quotation omitted and emphasis added). "Disconnected circumstances any one of which, or all of which, are just as consistent with a lawful purpose as with an unlawful undertaking are insufficient to establish a conspiracy." *Id.* at 708-09. The "evidence must do more than raise a suspicion. It must lead to belief." *Id.* at 709. With *Stubbs*, the Rhode Island Supreme Court reined in conspiracy claims to preclude plaintiffs from taking disparate events (e.g., the 2014 Asset Sale and the listing of SJHSRI in the OCD) that are "just as consistent with a lawful purpose" and making them into an actionable conspiracy. *See id.*; *see also Albert Brien & Assocs.*, 2012 R.I. Super. LEXIS 113, at *42-43. The Diocesan Defendants are entitled to test the Amended Complaint to that end.

2. Federal Law

To the extent *Stubbs* sets out a more exacting "pleading" standard, it is entirely consistent with the need for courts to police implausible, factually deficient, and conclusory claims animating the United States Supreme Court's decisions in *Twombly* and *Iqbal*. Indeed, the plausibility standard announced in *Twombly* arose in direct response to an implausible conspiracy claim. 550 U.S. at 566-68. The Court explained: "The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'" *Id.* at 557 (brackets in original). Where there is an "obvious alternative explanation" to the conspiracy theory, the claim is not plausible. *Id.* at 567. The Court reinforced these points in *Iqbal*. 556 U.S. at 679 ("[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has

alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" (second bracket in original)); *id.* at 681 ("Taken as true, these allegations are consistent with petitioners' purposefully designating detainees 'of high interest' because of their race, religion, or national origin. But given more likely explanations, they do not plausibly establish this purpose.").

Pursuant to *Iqbal*, *Twombly*, and *Stubbs* therefore, this Court must consider lawful alternative explanations when reviewing a conspiracy claim on a motion to dismiss. *Iqbal*, 556 U.S. at 679 (explaining that "[d]etermining whether a complaint states a plausible claim for relief," is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense"). The Diocesan Defendants requested that this Court engage in that exercise in their Opening Brief and nothing in the lengthy Opposition negates the strong rationale for the Court to do so here. Dioc. MTD at 47-59.

B. The Lawful Alternative Explanation Consistent With The Alleged Facts, Along With Frailties In Plaintiffs' Allegations, Render Plaintiffs' Conspiracy Theory Implausible

The Opposition, nonetheless, ponders over the Diocesan Defendants' argument that the facts in the Amended Complaint are equally consistent with a lawful, alternative explanation to Plaintiffs' conspiracy theory. They criticize the Diocesan Defendants for raising the alternative in a motion to dismiss and contend that the appropriate time for such argument is summary judgment or at trial. Opp'n at 58-59, 65-66. Not so. As discussed *supra* at Part IV.A, it is proper for this Court to consider lawful alternative explanations when it reviews the well-pleaded facts, as well as documents referenced in the Amended Complaint/capable of judicial notice, to gauge whether Plaintiffs have stated a plausible conspiracy claim. *In re Montreal, Me. & Atl. Ry., Ltd.*, 888 F.3d at 7 n.2; *Lister*, 790 F.3d at 22 n.2; *Beddall*, 137 F.3d at 17.

1. *The Lawful Alternative*

The Diocesan Defendants raised the components of the lawful alternative explanation at various points of their Opening Brief. They repeat them in one place here:

- The Plan was adequately funded until the Great Recession of 2008 crippled it. Dioc. MTD 11-14.
- With the CharterCare system in financial trouble and experiencing losses that could not be sustained over the long term, Dioc. MTD at 25-27, CCCB reached an agreement with the Prospect Entities, structured as an asset sale. *Id.*; Ex. 11 (Asset Purchase Agreement); FAC ¶¶ 11, 124, 253.
- Because RCB was SJHSRI's Class B member with a veto over any substantial sale of assets, Ex. 19, representatives from CCCB met with Bishop Tobin, Monsignor Theroux and Chancellor Reilly to discuss the proposed transaction. Dioc. MTD at 51; FAC ¶ 141.
- To assist in that endeavor, CCCB's President, Kenneth Belcher, and its counsel Keith Anderson, brought a presentation concerning the elements of the transaction, which had been prepared for the Boards of Trustees of SJHSRI, RWH, and CCCB. FAC ¶¶ 141, 143-47; *see* Ex. 23 ("Overview of the Strategic Transaction"); Dioc. MTD at 51-53.
- The presentation did not speak of any affirmative obligations on the part of the Diocesan Defendants or reference the OCD. Dioc MTD at 51-53; *see* Ex. 23.[28] It did reference that the Plan would continue as a church plan and that there would be an infusion of $14 million into the Plan. FAC ¶ 147; Ex. 23 at 2.
- CCCB and the Prospect Entities made application to state regulators for approval of the 2014 Asset Sale, where they disclosed the underfunding and church plan status of the Plan, the scope of the 2014 Asset Sale, and the continued Catholicity of the hospitals. Dioc. MTD 23-33.
- Concerned with the future of the Plan, the continued viability of the hospitals, and the ability of the underserved populations who had used the hospitals for decades to obtain healthcare, Bishop Tobin wrote letters to the Vatican and the HSC in support of the proposed transaction. Dioc. MTD at 55; Ex. 21; Ex. 25.
- In those letters, the Bishop wrote that the Plan was at "significant risk" and in danger of "failure," which would be "catastrophic." Dioc. MTD at 33. Bishop Tobin was of the *opinion* that the 2014 Asset Sale would help avert that possibility, in large measure because of the very same information that was ultimately provided to state regulators. Dioc. MTD at

[28] Exhibit 23 is a presentation to the Diocesan Finance Council following the meeting between CCCB's representatives and Bishop Tobin, Monsignor Theroux, and Chancellor Reilly. FAC ¶ 166. Plaintiffs allege this presentation was identical to the one made to Bishop Tobin, Monsignor Theroux, and Chancellor Reilly, except for a title change and the removal of Attorney Client privilege legends. FAC ¶ 165.

33-38, 55-56. He did not state that the Plan would be fully funded after the $14 million contribution or that the $14 million contribution would completely avoid failure of the Plan. Ex. 21; Ex. 25.

- Following the 2014 Asset Sale, SJHSRI sought continued listing in the OCD from the Diocesan Defendants, FAC ¶ 184, who were the gatekeepers of the OCD. FAC ¶ 104. Chancellor Reilly questioned whether SJHSRI could remain in the OCD, because he thought that the Prospect Entities, a for-profit company, had acquired SJHSRI.[29] Ex. 22 (November 11, 2014 Email from Chancellor Reilly, misleadingly quoted at FAC ¶ 185); Dioc. MTD 49-50. Prospect had not, however, acquired SJHSRI, but just its assets. Dioc. MTD at 29; FAC ¶ 11.

- With that issue resolved, the Diocesan Defendants listed SJHSRI in the OCD for 2015, 2016, and 2017, because it remained operated in connection with the Diocese of Providence by virtue of the imposition of catholicity covenants on SJHSRI's operations and RCB's status as Class B member of SJHSRI. Dioc. MTD at 42-44; FAC ¶ 88 (conceding the continued connection between SJHSRI and the Diocese of Providence).

The Court can and should properly consider this alternative explanation in testing the plausibility of Plaintiffs' conspiracy theory. *Iqbal*, 556 U.S. at 678-79; *Twombly*, 550 U.S. at 566-68; *Stubbs*, 149 A.2d at 708-09. Moreover, the Amended Complaint simply fails to allege facts sufficient to establish a conspiracy. *See Albert G. Brien & Assocs.*, 2012 R.I. Super. LEXIS 113, at *42-43 (R.I. Super. Ct. Jul. 16, 2012) (granting motion to dismiss under state procedural law which does not apply federal plausibility standard).

2. *The Inconsistent, Counterintuitive, Implausible Conspiracy Theory*

Although Plaintiffs seem to treat their conspiracy claim as the equivalent of two criminals agreeing to rob a bank, the conspiracy theory is hardly that straightforward, especially as it relates to the Diocesan Defendants. This is particularly so when viewed through the lens of Rule 9(b), which is appropriate here because the conspiracy sounds in fraud. *See Hayduk v. Lanna*, 775 F.2d 441, 443-44 (1st Cir. 1985).

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[29] The Chancellor's concern in this regard related to the other requirement for listing in the OCD, discussed in the Opening Brief and this reply, that an entity not only be operated in connection with a Catholic diocese, but also qualify as a "public charity" within the meaning of 26 U.S.C. § 509(a). *See* Dioc. MTD 50 n.39; Ex. 18 (discussing public charity requirement for OCD listing); *supra* Part III.G.3 (same).

The Diocesan Defendants did their best to summarize the alleged conspiracy in their Opening Brief:

> The Amended Complaint describes a scheme in which the Diocesan Defendants allegedly plotted with other defendants to surreptitiously isolate and abandon SJHSRI's unfunded pension liability to a surviving SJHSRI shell entity that would have no operating assets. *Id.* ¶¶ 114-158. The allegations are as follows: At the time of the 2014 Asset Sale, SJHSRI, RWH, CCCB, Prospect and the Diocesan Defendants "knew" that the Plan was underfunded. *See, e.g.*, *id.* ¶ 148. All of SJHSRI's assets would be transferred to a new separate company. *Id.* ¶¶ 55, 148, 154. The Plan would be left alone without any operating assets and receive "*only*" an *additional* $14 million. *Id.* ¶ 147. The Diocesan Defendants would agree to continue to maintain SJHSRI in the OCD and therefore the Plan could continue as a church plan, which meant that ERISA would not apply. *Id.* ¶¶ 153-154. In return, the Diocesan Defendants would receive Catholicity covenants that would apply to both "New" Our Lady of Fatima Hospital and "New" Roger Williams Hospital. *Id.* ¶ 153. Via this scheme, and unbeknownst to all but the schemers, the Plan participants would not have the protection of ERISA. *Id.* ¶ 154.

Dioc. MTD at 23-24.

For this conspiracy to survive a motion to dismiss, the Court must overlook multiple inconsistencies and lacunae in the Amended Complaint that belie any notion of an unlawful agreement, and assume that the conspirators engaged in conduct counterintuitive to furthering their alleged evil scheme, as revealed by the allegations, documents referenced in the Amended Complaint, and facts susceptible to judicial notice. Most critically:

- Multiple conspirators disclosed to state regulators with the power to veto the proposed transaction the underfunding and church plan status of the Plan, the fact that liability for the Plan would remain with SJHSRI and that further funding after the 2014 Asset Sale would be needed, the scope of the 2014 Asset Sale, and the continued Catholicity of the hospitals. Dioc. MTD at 24-32. These items—all identified by Plaintiffs as critical components of the alleged conspiracy omitted from the state regulators—were actually disclosed. *Id.*

- The conspirators overlooked the legal reality that the Diocesan Defendants could not maintain the Plan as a church plan simply by listing SJHSRI in the OCD. Dioc. MTD at 48-49. They made this error despite the allegation that the improper listing of SJHSRI in the

OCD was the alleged fulcrum upon which the viability of the 2014 Asset Sale purportedly rested. FAC ¶¶ 69(c), 129, 140, 157-59, 202-03.[30]

- Mr. Belcher used the same presentation given to the Boards of Trustees of CCCB, RWH, and SJHSRI concerning the proposed structure of the 2014 Asset Sale to explain the "conspiracy" to the Diocesan Defendants and obtain their agreement to list SJHSRI in the OCD and maintain the Plan as a church plan. Dioc. MTD 51-52; FAC ¶¶ 143-53, 164-69. This presentation, however, does not reference the OCD and does not indicate a need for the Diocesan Defendants to do anything. Dioc. MTD at 51-52; Ex. 23. Nor do Plaintiffs explain why Mr. Belcher would explain an illicit conspiracy to the Boards of Trustees, complete with a PowerPoint presentation.

- Our Lady of Fatima Hospital was already subject to Catholicity covenants and the Diocesan Defendants did not need to agree to anything to retain them. Dioc. MTD at 31-32; FAC ¶¶ 150, 237.

- RCB held a veto over the 2014 Asset Sale because the Amended Articles expressly granted RCB a veto over any significant asset sale. Dioc. MTD at 51; Ex. 19.

- Bishop Tobin is alleged to have misled the Vatican and Health Services Council when he wrote in favor of the 2014 Asset Sale and highlighted that the Plan was at "significant risk," because he "knew" that the proposed payment of $14 million into the Plan would be insufficient to save it. FAC ¶ 322. The Bishop, moreover, is not alleged to be an actuary, ERISA expert, a healthcare executive, a financial professional, or privy to the actuarial analysis concerning the purported insufficiency of the proposed $14 million payment into the Plan.[31]

- Nonetheless, Plaintiffs ignore—and ask the Court to ignore—that financial records laying out in significant detail the finances and condition of the Plan were provided to such experts as part of the regulatory review of this transaction. Dioc. MTD at 36; Ex. 17 at 20, 53 (discussing Attorney General's retention of experts). Plaintiffs also ignore that Bishop Tobin did not state that the Plan would be fully funded after the $14 million contribution or that the $14 million contribution would completely avoid failure of the Plan. Ex. 21; Ex. 25.

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[30] As part of the receivership proceedings, the Diocesan Defendants produced documents to the Receiver concerning the Diocesan Defendants' review of SJHSRI's request for continued listing in the OCD. Within these records rests correspondence in which Chancellor Reilly warned SJHSRI that its continued listing in the OCD only meant that SJHSRI continued to meet the requirements for a subordinate organization under the terms of the USCCB's group exemption. In that letter, he made clear that this did not mean that RCB had taken any position as to whether the Plan was a church plan. Plaintiffs have conveniently omitted any discussion of this correspondence from the Amended Complaint, and so the Diocesan Defendants did not append it to their Opening Brief.

[31] The Amended Complaint is, of course, replete with conclusory statements as to the Diocesan Defendants' purported knowledge that the 2014 Asset Sale would not save the Plan because the Plan was too underfunded. FAC ¶¶ 65, 148, 155, 177-79, 254-55, 321. These conclusory assertions are not entitled to the assumption of truth and the Court should ignore them in considering this motion to dismiss. *See Iqbal*, 556 U.S. at 680-81. And, as explained in the Opening Brief, the fact that the Bishop revised the Vatican Letter to change the adjective used to describe the Plan's substantial underfunding from "spiraling and gaping" to "significant" is irrelevant. Dioc. MTD at 37-38

- Finally, Chancellor Reilly—alleged to have been intimately involved in the conspiracy to list SJHSRI in the OCD to maintain the Plan as a church plan—questioned the ability of SJHSRI to remain in the OCD mere months after the 2014 Asset Sale. Ex. 22 (November 11, 2014 Email from Chancellor Reilly); FAC ¶ 184-85. He had apparently forgotten that the continued listing of SJHSRI in the OCD was a pillar of the conspiracy, despite having had the entire scheme set out to him more than once by CCCB's president, Mr. Belcher. FAC ¶¶ 153, 166.[32]

The facts underpinning the conspiracy theory in the Amended Complaint are far more consistent with the "more likely explanation[]" set out in the Opening Brief and *supra* at Part IV.B.1. *Iqbal*, 556 U.S. at 681. For that reason, the conspiracy is, if anything, an implausible one. Count IX should be dismissed.

V. THE OPPOSITION DOES NOT SAVE COUNTS XVI THROUGH XIX (CIVIL LIABILITY UNDER R.I. GEN. LAWS § 9-1-2) FROM DISMISSAL

A. The Alleged Injuries Were Not Proximately Caused By Any Alleged Criminal Violations

The Opening Brief explained in detail that Plaintiffs' claims under R.I. Gen. Laws § 9-1-2 failed due to a lack of proximate cause. The Opposition does not overcome that reality.

1. *The Alleged Injuries Must Be The Direct And Proximate Result of a Crime Under Rhode Island General Laws § 9-1-2*

The Opposition's attack on the Opening Brief's proximate cause analysis first takes aim at the standard used for determining proximate causation. Opp'n at 78-80. Plaintiffs argue that the standard that the Diocesan Defendants cite has no basis in R.I. Gen. Laws § 9-1-2, and that, assuming "ordinary" proximate causation is the correct standard, the Diocesan Defendants have asked the Court to adopt a different standard. Opp'n at 79-80. Additionally, the Opposition attempts to discount the Diocesan Defendants' analysis because Plaintiffs do not

[32] Moreover, Chancellor Reilly's misunderstanding as to Prospect's ownership of SJHSRI—as set out in his November 11, 2014 email (referenced in the Amended Complaint at paragraph 185)—belies any notion that the Diocesan Defendants understood that there was a conspiracy, let alone agreed to join it. Ex. 22. The whole point of the alleged conspiracy, after all, was to permit Prospect to acquire SJSHRI's assets, without acquiring SJHSRI and buying the liability for the Plan. FAC ¶¶ 127, 153-54, 168.

assert any claims under RICO. *Id.* at 80, 82. What Plaintiffs ignore, however, is that the only court to specifically analyze proximate causation with respect to claims under R.I. Gen. Laws § 9-1-2 has explicitly adopted the standard and reasoning of *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992), which requires a "direct relation" between the alleged injury and a defendant's conduct. *Cortellesso v. Cortellesso*, No. P.C. 95-457, 1997 WL 839911, at *7-8 (R.I. Super. Apr. 29, 1997). Furthermore, the Rhode Island Supreme Court has approved a trial justice's jury instructions on a R.I. Gen. Laws § 9-1-2 claim which required a finding that the plaintiff "has suffered injury to his person as a direct and proximate result" of the defendants' violation. *Cady v. IMC Mortg. Co.*, 862 A.2d 202, 215 (R.I. 2004). The Opposition cites to no case holding that a different causation standard applies to claims under this statute.

Application of the proximate cause analysis applied in RICO cases makes perfect sense here, because RICO and R.I. Gen. Laws § 9-1-2 are analogous statutes that impose civil liability for criminal violations. *See* 18 U.S.C. § 1964(c). Furthermore, the direct relation requirement is not some new standard that is foreign from proximate cause jurisprudence. *See Holmes*, 503 U.S. at 268. As the U.S. Supreme Court stated in *Holmes* itself, "among the many shapes this concept took at *common law*, . . . was a demand for some direct relation between the injury asserted and the injurious conduct alleged." *Id.* (citing *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 532–33 (1983)) (emphasis added). While foreseeability was also one of the "many shapes" that proximate cause took, it was not the only judicial rule that would "limit a person's responsibility." *Id.* Indeed, the lack of direct relation between the injury and the injurious conduct in *Holmes* was sufficient—by itself—for a finding of lack of proximate cause. *Id.* at 268-276; *see also Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 12 (2010) (plurality opinion) ("Our precedents make clear that in the RICO context,

the focus is on the directness of the relationship between the conduct and the harm. Indeed, *Anza* and *Holmes* never even mention the concept of foreseeability.")[33]

Moreover, Plaintiffs, in conclusory fashion, assert that their injuries are sufficiently direct under *Holmes*, yet they tellingly provide no explanation as to why, and do not even point to a single alleged fact to support their conclusion. Opp'n at 80. The U.S. Supreme Court has instructed that proximate cause is not established if a court must "go beyond the first step" to find a plaintiff's injury. *Holmes*, 503 U.S. at 271 (internal citations omitted). Plaintiffs fail to assert facts that demonstrate a single step between the alleged crimes and their asserted injuries, and therefore, as a matter of law, those injuries were not caused "by reason of" the alleged violations. *See Cortellesso*, 1997 WL 839911, at *7-8.

Plaintiffs also attempt to undermine the Diocesan Defendants' citation to *In re McNulty*, 597 F.3d 344 (6th Cir. 2010), on the grounds that it involved the Crime Victims' Rights Act, 18 U.S.C. § 3771 ("CVRA"). Opp'n at 80-81. The CVRA, however, requires a showing that a movant is "directly and proximately harmed as a result of the commission of a Federal offense" in order to receive the benefits of the CVRA, and therefore, *In re McNulty* speaks directly to the inquiry in this case. 597 F.3d at 350. The Opposition offers no case interpreting R.I. Gen. Laws § 9-1-2, or any other analogous statute, to support their position regarding the requisite proximate cause for their claims. The § 9-1-2 claims fail.

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[33] The focus on the directness of the relationship between the conduct and the harm is also good policy in the context of R.I. Gen. Laws § 9-1-2 and RICO, because those statutes impose civil liability for conduct that constitutes criminal violations. *See* 18 U.S.C. § 1964(c). When actions rise to the level of being criminal, the law defines, and punishes, them as such, because they are deemed to harm society as a whole. *See* 22 C.J.S. Criminal Law: Substantive Principles § 1. As such, limiting civil liability to only those citizens who were harmed as a direct result of the conduct prevents limitless suits for recovery for remote injury as a general member of society. This is especially sensible when, as is the case here, there is a more direct victim who can vindicate the law. *See Holmes*, 503 U.S. at 273.

2. *There Are More Direct Victims Of The Alleged Crimes Who Are Better Suited To Pursue Remedies*

Plaintiffs also obscure the Diocesan Defendants' explanation that Plaintiffs have failed to establish proximate cause because the direct victims of the alleged crimes are in a better position to vindicate the law. Plaintiffs mischaracterize the argument as one of public policy "in favor of repealing R.I. Gen. Laws § 9-1-2." Opp'n at 83. However, the inquiry into whether direct victims of crimes are better suited to pursue remedies goes directly to the question of proximate causation—an element of the claim itself—is explicitly found in *Holmes*, and has been repeated by the Supreme Court and other courts numerous times thereafter. 503 U.S. at 269-70, 273; *see also Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 460 (2006); *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1055 (9th Cir. 2008) (holding that the first "factor" examined "in determining whether a plaintiff has shown proximate cause" is "whether there are more direct victims of the alleged wrongful conduct who can be counted on to vindicate the law"). This inquiry is endorsed, if not mandated, by the Supreme Court, and weighs heavily in favor of a finding of a lack of proximate cause in this case. *See Anza*, 547 U.S. at 460.

3. *Section 9-1-2 Claims In This Context Would Create An End Run Around Final Administrative Decisions*

Plaintiffs also lodge an attack on the Diocesan Defendants' public policy argument with respect to administrative finality and the application of proximate causation principles. Opp'n at 84-85. Plaintiffs cite to a memorandum of the Attorney General which asserts his belief that the Administrative Procedures Act ("APA") does not apply to him in the context of hospital conversions. *Id.* In that memorandum, the Attorney General reasons that the HCA has its own procedures for judicial review, which are independent of the APA. Opp'n, Ex. 1 (Attorney General Mem.) at 2-3. Even assuming that the procedures for judicial review under

the HCA wholly supplant those of the APA with respect to hospital conversions however, the public policy reasons for finality are still sound.

Furthermore, judicial review under the HCA is even stricter than that of the APA, because the HCA limits those who may seek review to only a "transacting party" (defined as only "the acquiree and the acquirer"), R.I. Gen. Laws §§ 23-17.14-4(17), 23-17.14-34, whereas the APA permits any "aggrieved" party to seek judicial review. R.I. Gen. Laws § 42-35-15. Use of § 9-1-2 to unwind final administrative decisions is not only unsound public policy, but, in this case, a violation of the HCA, which expressly prohibits non-transacting parties (like Plaintiffs) from challenging administrative decisions made pursuant to that statute. *See* R.I. Gen. Laws § 23-17.14-34.

This Court has enough claims and legal issues regarding the Plan to sort through and unravel without allowing Plaintiffs to stretch § 9-1-2 beyond any reasoned or historically-sanctioned application. That is especially so where Plaintiffs' interpretation potentially opens the floodgates to limitless claims by any future plaintiff somehow dissatisfied with the outcome or process of future administrative rulings.

B. Nothing In The Opposition Changes The Reality That Count XVII Is Preempted By Federal Law And Constitutes An Impermissible End Run Around The Lack Of A Private Right Of Action Under The Internal Revenue Code

1. *R.I. Gen. Laws § 9-1-2 Is Preempted By Federal Law*

Plaintiffs seek to undermine the Diocesan Defendants' preemption defense to Plaintiffs' "fraud-on-the-IRS" claim (Count XVII) by citing cases where § 9-1-2 provided civil remedies for violations of federal law. Opp'n at 85. This argument misses the mark for at least two reasons. First, none of those cases grappled with the question of whether certain federal statutes preempt the application of § 9-1-2. *See Transamerica Life Ins. Co. v. Caramadre*, No.

CV 09-470 S, 2017 WL 752145, at *2-3 (D.R.I. Feb. 27, 2017); *Cady*, 862 A.2d at 215; *Mello v. DaLomba*, 798 A.2d 405, 411 (R.I. 2002). *Mello* came closest, and merely held that the language of § 9-1-2 itself did not limit its application to state crimes, without considering preemption issues. *See* 798 A.2d at 411. Second, at least with respect to the question of preemption, the issue is not just whether a § 9-1-2 claim can permissibly rely on alleged violations of federal law without being preempted, but rather, whether § 9-1-2 is preempted when it is used to police fraud on a federal agency by enforcing 26 U.S.C. § 7206. In this instance, the statute is preempted.

The Opposition does not even attempt to address the Supreme Court's unequivocal holding in *Buckman v. Plaintiffs' Legal Committee*, 531 U.S. 341, 347-53 (2001), and the several other fraud-on-the-agency cases cited in the Opening Brief. Instead, Plaintiffs ignore this precedent and counter with inapposite cases from the Seventh Circuit and two state courts. Opp'n at 85-88. *Buckman* and its progeny make clear that state law claims by private citizens for fraud against a federal agency are preempted, because such claims infringe on an inherently federal sphere and burden both the federal agency and those it regulates. 531 U.S. at 347-52; *Nathan Kimmel, Inc. v. DowElanco*, 275 F.3d 1199, 1207 (9th Cir. 2002). Especially where Congress has provided no private right of action, such state law claims are in conflict with federal law and are, therefore, preempted. *See Buckman*, 531 U.S. at 352.

By contrast, the cases cited by Plaintiffs involved fraud against, and breach of a contractual duty owed to, *the plaintiffs themselves*, where "federal law simply provide[d] the standard of compliance." *Bible v. United Student Aid Funds, Inc.*, 799 F.3d 633, 653 (7th Cir. 2015); *see Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 570, 579 (7th Cir. 2012). Those cases did not involve fraud on a federal agency, and therefore, have no bearing on this case.

Bible, 799 F.3d at 653; *Wigod*, 673 F.3d at 570, 579. Conversely, here, as in *Buckman*, Plaintiffs seek to police fraud against a federal agency (by enforcing 26 U.S.C. § 7206) where Congress has not permitted them to do so. 531 U.S. at 347-52. In short, state actions based on fraud that rely on misrepresentations to a federal agency infringe on an area that is exclusively within the purview of the federal government, and are, therefore, preempted. Actions for breach of contract—based on a contract with the plaintiff—or fraud—where the actionable misrepresentation were made to the plaintiff (as opposed to the federal agency) are not. *See id.* at 351-52 (distinguishing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984)).

The state court cases cited in the Opposition are also unpersuasive. They (i) involved state criminal prosecutions for violations of state forgery laws based on conduct that may have also constituted a violation of federal law; (ii) do not grapple with *Buckman*; and (iii) do not involve private citizens attempting to enforce federal law though state based claims when there is no federal private right of action. *State v. Radzvilowicz*, 703 A.2d 767, 786–87 (Conn. App. 1997); *State v. Diaz-Rey*, 397 S.W.3d 5, 8–9 (Mo. Ct. App. 2013).

2. *Count XVII Seeks An Impermissible End Run Around The Lack Of A Private Right Of Action Under The Internal Revenue Code*

The Opposition tries to differentiate the cases that the Diocesan Defendants cited in support of their argument that Count XVII represents an improper end run on the lack of a private right of action under the Internal Revenue Code on the ground that those cases involved breach of contract claims. Opp'n at 89. This is a distinction without a difference. Plaintiffs fail to give any reason why the Supreme Court would preclude third-party beneficiary breach of contract claims that circumvent a lack of private right of action, but would permit the same action if it were brought under a state statute. *See Astra USA, Inc. v. Santa Clara Cty., Cal.*, 563 U.S. 110, 117-19 (2011). As the Supreme Court has stated, "'any private right of action for

violating a federal statute . . . must ultimately rest on congressional intent to provide a private remedy,'" regardless of whether the remedy is based in statute or common law. *Id.* at 117 (quoting *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991)). The fact that § 9-1-2 is a state statute does not save it from preemption. But for the alleged violations of federal law, there is no state law basis for a claim. *See In re Pennsylvania*, No. 13-CV-1871, 2013 WL 4193960, at *14 n.15, *16 (E.D. Pa. Aug. 15, 2013). Count XVII should be dismissed.[34]

C. Count XIX Must Be Dismissed Because Plaintiffs Have Failed To Show That They Have Pled Sufficient Facts To Demonstrate A Violation of R.I. Gen. Laws § 11-41-4

The Opening Brief demonstrated that the Amended Complaint's § 9-1-2 claim premised on a violation of R.I. Gen. Laws § 11-41-4 (Count XIX) failed for several reasons, including the lack of an allegation that the Diocesan Defendants obtained any property from Plaintiffs.[35] Dioc. MTD at 71-73. In an attempt to save Count XIX, Plaintiffs assert that they can recover from the Diocesan Defendants because, after the 2014 Asset Sale, a ***non-party*** (the Inter-Parish Loan Fund) received the repayment of a lawful debt from a different Defendant (SJHSRI). Opp'n at 77. Curiously absent from this set of facts is the receipt of any money by the Diocesan Defendants from Plaintiffs.

As alleged in the Amended Complaint, "the Inter-Parish Loan Fund received proceeds of $638,838.25 from the proceeds of the sale of SJHSRI's assets" as a repayment of a loan that had been made to SJHSRI. FAC ¶¶ 91, 206, 209. The Inter-Parish Loan Fund is a non-profit corporation, distinct from the Diocesan Defendants, and is not a party to this suit. Under

[34] Plaintiffs' questions regarding the Diocesan Defendants' candor in their discussion of *Brissenden v. Time Warner Cable of N.Y. City*, 25 Misc. 3d 1084 (N.Y. Sup. Ct. 2009) are thoroughly perplexing. *See* Opp'n at 91. To simplify a sentence, the Diocesan Defendants used brackets to replace "General Business Law § 349" with "a state statute." Dioc. MTD at 71. General Business Law § 349 is, indeed, a New York state statute.

[35] The Opening Brief mistakenly identified Plaintiffs' § 9-1-2 claim for a violation of § 11-41-4 as Count XVIII of the Amended Complaint. Dioc. MTD at 71-73. It is actually Count XIX.

these facts there can be no liability, because the Diocesan Defendants obtained no property, and Plaintiffs surrendered no property. *See Nat'l Credit Union Admin. Bd. v. Regine*, 795 F. Supp. 59, 70–71 (D.R.I. 1992).

D. Claims Under R.I. Gen. Laws § 9-1-2 For Alleged Criminal Conspiracy Must Be Dismissed Because They Were Not Pled In The Amended Complaint

Finally, Plaintiffs' raise—for the first time in their Opposition—claims of violations of new criminal statutes, which they posit as a basis for liability under § 9-1-2. Opp'n at 70. Plaintiffs assert that the Diocesan Defendants should be held liable for conspiring and aiding and abetting under R.I. Gen. Laws §§ 11-1-3, 11-1-6, and 18 U.S.C. § 2. Opp'n at 70. However, not only are violations of these statutes not pled as a basis of liability under R.I. Gen. Laws § 9-1-2, they are also not mentioned anywhere in the Amended Complaint. For this reason alone, these claims should be rejected. *See* Fed. R. Civ. P. 8(a)(2).

Additionally, Plaintiffs argue that the Diocesan Defendants should be held liable under § 9-1-2 for "participating in the other Defendants' violations in connection with the overall scheme and conspiracy." Opp'n at 70, 72, 76-77. However, "the crime of conspiracy is separate and distinct from the substantive offense," and, therefore, must be pled independently. *State v. LaPlume*, 375 A.2d 938, 941 (R.I. 1977). Plaintiffs have failed to do so, and the Court should not consider these claims.

Moreover, even if Plaintiffs' criminal conspiracy claims were properly pled, they would fail for lack of proximate cause, because Plaintiffs' alleged harm is even further attenuated in the case of conspiracy, compared with a substantive offense, as a finding of liability would require imputing the acts of others to the Diocesan Defendants. Indeed, in the criminal context, the gravamen of conspiracy is a mere agreement. *State v. Lassiter*, 836 A.2d 1096, 1104 (R.I. 2003) ("Once an agreement has been made, no further action in furtherance of the

conspiracy is necessary to find a defendant guilty of the crime of conspiracy.”). However, an agreement, without more, cannot cause injury. *See Cortellesso*, 1997 WL 839911, at *10, 13 (holding that “[o]f course the conspiracy itself cannot cause injury” and “it is impossible to harm anyone by an agreement without conduct”). Therefore, any attempt to hold the Diocesan Defendants civilly liable under R.I. Gen. Laws § 9-1-2 for the conduct of others fails for lack of proximate cause. *See Holmes*, 503 U.S. at 268 (“Here we use ‘proximate cause’ to label generically the judicial tools used to limit a person’s responsibility for the consequences of *that person’s own acts*.”) (Emphasis added)).

In any event, whether allegedly committed by the Diocesan Defendants or someone else, the violations listed in the Amended Complaint fail for lack of proximate cause because of the lack of a direct relation between the alleged crimes and the alleged harm, as the Diocesan Defendants have argued in depth. See *supra* Part V.A; Dioc. MTD at 59-67.

VI. THE OPPOSITION DOES NOT SAVE COUNT XXI (RHODE ISLAND LAW, BREACH OF FIDUCIARY DUTY) FROM DISMISSAL BECAUSE IT DOES NOT ESTABLISH THAT THE DIOCESAN DEFENDANTS WERE FIDUCIARIES

In order to recover on a claim for breach of fiduciary duty, a plaintiff must first establish the existence of such a duty. *Chain Store Maint., Inc. v. Nat'l Glass & Gate Serv., Inc.*, No. CIV.A. PB 01-3522, 2004 WL 877599, at *13 (R.I. Super. Apr. 21, 2004) (holding that “the elements of a fiduciary duty claim consist of ‘(1) the existence of a fiduciary duty; (2) breach of that duty; and (3) damage proximately caused by the breach.’” (quoting *Griffin v. Fowler*, 260 Ga. App. 443, 445 (Ga. App. 2003)). The facts alleged in the Amended Complaint make clear that no such duty existed at the time of any alleged breach of that duty by the Diocesan Defendants. *See* FAC ¶¶ 75-77, 87.

As of 2009, the Diocesan Defendants had no role—as a fiduciary or otherwise—over the Plan. *Id.* ¶¶ 75-77. Plaintiffs expressly pled that "[a]s of 2009, SJHSRI had taken over the administration of the SJHSRI Plan ***and*** [that] SJHSRI's Finance Committee was administering the Plan and making its investment decisions," *id.* ¶ 75 (emphasis added), and that the 2011 Plan documents stated that SJHSRI "shall be the Plan Administrator, hereinafter called the Administrator *and named fiduciary of the Plan.*" *Id.* ¶ 77 (emphasis added). Plaintiffs only basis for asserting the existence of a fiduciary duty is their conclusory claim that Plaintiffs' trust and confidence in the Diocesan Defendants "stemmed from decades of communications" to Plan Participants "through the Bishop," assuring them that "their interests were being protected by the Diocese." Opp'n at 95. The Opposition (and the Amended Complaint) fails to specify in which "decades" these communications were made. *See id.* This is because the last of these communications alleged in the Amended Complaint purportedly occurred in 1998—more than two "decades" ago. FAC ¶ 277. Nor do Plaintiffs attempt to explain—at all—how each or any of the three distinct Diocesan Defendants had the special relationship with Plaintiffs from which a fiduciary duty derives. They are all just mushed together here as elsewhere in the Amended Complaint. *Supra* Part III.A.

A fiduciary duty does not continue in perpetuity. *See Rohe v. Bertine, Hufnagel, Headley, Zeltner, Drummon & Dohn, LLP*, 160 F. Supp. 3d 542, 552 (S.D.N.Y. 2016) ("lack of evidence of any ongoing legal relationship between plaintiffs and defendants after August 2009 demonstrates that" defendants had not "carried on a fiduciary relationship with plaintiffs within three years of" filing the action); *Lyons*, 265 F. Supp. 2d at 1076-1077 (holding at the time the alleged breaches were made, counterclaim defendant "no longer owed [counterclaim plaintiff] a fiduciary duty"). As of 2009, Plaintiffs themselves concede that SJHSRI was the named

fiduciary of the Plan, and reference "the diminished or nonexistent roles of Bishop Tobin and the Diocese" with SJHSRI long ago. FAC ¶ 87. These allegations demonstrate that any fiduciary duty that the Diocesan Defendants may have had decades ago would have terminated. *See id.* The Opposition attempts to minimize this fact by emphasizing that the Diocesan Defendants' role no longer existed with respect to SJHSRI's *governance*, but simultaneously arguing that the Diocesan Defendants still maintained a fiduciary duty to the Plan. Opp'n at 95. This argument is contradictory. According to Plaintiffs, the Diocesan Defendants (undistinguished) had little to no role in governing the Plan administrator (SJHSRI), yet retained a special fiduciary duty with respect to the Plan that they no longer had a role in administering. *See id.* Plaintiffs cannot have it both ways.

Plaintiffs also apparently argue that nothing was communicated to Plaintiffs that would suggest that the Diocesan Defendants no longer had a fiduciary relationship with them after 2009 (assuming that such a relationship could be shown to have existed prior to then). Opp'n at 95-96. First, this claim ignores the numerous representations quoted in the Amended Complaint that expressly declare that it is the "Hospital" or "SJHSRI" or the "Company," that funds the Plan. *See, e.g.*, FAC ¶¶ 267, 269, 280-81, 284. Second, the Opposition cites no authority to support the assertion that such communication was legally required to terminate a fiduciary duty. Opp'n at 95-96. In fact, case law leads to the opposite conclusion that no such communication is necessary. *Rohe*, 160 F. Supp. 3d at 552 (holding that a "lack of evidence of any ongoing legal relationship" was sufficient to find that a fiduciary duty no longer existed). Nonetheless, even the selective facts presented in the Amended Complaint evidence that Plan Participants received a notice in 2009 signed by SJHSRI as the Plan Administrator, and showing SJHSRI's control over the Plan by stating that SJHSRI was freezing the Plan. FAC ¶ 76.

Moreover, as a close examination of the Amended Complaint makes clear, with one exception in 1998 (two decades ago), all references to representations made to *Plaintiffs* about the Plan, after its separation from the Diocesan Plan in 1995, come from and reference "the Hospital" or "SJHSRI" – not any Diocesan entity. *Id.* ¶¶ 76, 273-287.

Moreover, even pleading that defendants are the "investment manager, trustee and pension fund manager" may be insufficient to establish a fiduciary duty and survive a motion to dismiss, as one of the Opposition's cases seems to recognize. *Cf. R.I. Resource Recovery Corp. v Van Liew Trust Co.*, No. PC-10-4503, 2011 WL 1936011, at *7 (R.I. Super. May 13, 2011) ("[t]he Court is mindful that this allegation alone may be insufficient to set forth a claim against the Defendants"). Rather, more is needed to establish that particular defendants were in fact managing a fund. *Id.* (relying on facts listing defendants "as part of the staffing responsible for investment management services" to allow claim for breach of fiduciary duty to survive). Here, the facts in the Amended Complaint unequivocally demonstrate that the Diocesan Defendants had neither a titular role, nor an actual role, in the management of the Plan when any alleged breach occurred. FAC ¶¶ 75-77, 87. On these facts, Count XXI must be dismissed.

VII. COUNT XXII (RHODE ISLAND LAW, AIDING AND ABETTING BREACHES OF FIDUCIARY DUTY) MUST STILL BE DISMISSED FOR FAILURE TO STATE A CLAIM

To the extent Rhode Island courts have recognized the tort of aiding and abetting a breach of fiduciary duty, a key element that a plaintiff must prove is that a defendant participated in the breach of another "to the degree that he or she could not reasonably be held to have acted in good faith." *Albert G. Brien & Assocs.*, 2012 R.I. Super. LEXIS 113, at *45-46 (quoting *Arcidi v. Nat'l Ass'n of Gov't Emps., Inc.*, 856 N.E.2d 167, 174 (Mass. 2006)). The facts alleged do not plausibly demonstrate that the Diocesan Defendants could not have been

acting in good faith. *Supra* Part III.C & IV; *see* Dioc. MTD at 23-33, 47-59. Despite the purported details of specific meetings on specific dates, almost all of these meeting did not involve the Diocesan Defendants. *See, e.g.*, FAC ¶¶ 116-25, 136-39, 298-317, 323-33, 343-44. 363-68, 434. Plaintiffs still have failed to explain how the actions they allege could not reasonably be consistent with a lawful purpose. *Supra* Part IV.B.

The actual, lawful purpose behind the Diocesan Defendants' actions are obvious on the face of Bishop Tobin's letters to the HSC and the Vatican, which Plaintiffs cite as the basis for liability. Ex. 21; Ex. 25; Dioc. MTD at 55-56. They are, in fact, the very reasons that regulators cited when they approved the reorganization of the hospitals. Ex. 17 (Attorney General's Decision) at 8-9. Indeed, it is hard to imagine a stronger set of facts for determining that it is reasonable to conclude a party acted in good faith than a regulator approving the transaction being challenged on essentially the same facts. Plaintiffs have not pled sufficient facts to plausibly overcome the sincere purpose explicitly stated in those letters, namely, the good faith belief that the 2014 Asset Sale was the best hope for saving an ailing hospital system and pension plan. *Id.*; *see also Stubbs*, 149 A.2d at 708-09; *Albert G. Brien & Assocs.*, 2012 R.I. Super. LEXIS 113, at *45. Count XXII should be dismissed.

VIII. THE OPPOSITION FAILS TO SAVE PLAINTIFFS' ERISA CLAIMS AGAINST THE DIOCESAN DEFENDANTS

A. Plaintiffs Fail To Establish That The Monetary Relief They Seek Is Within The Scope Of 29 U.S.C. § 1132(a)(3)

In their Opening Brief, the Diocesan Defendants demonstrated that Count III should be dismissed because it sought monetary damages from non-ERISA fiduciaries to make up a funding deficiency, a remedy beyond of the scope of 29 U.S.C. § 1132(a)(3). Dioc. MTD at 77-81. Plaintiffs effectively concede that this is their aim. Omnibus Mem. at 150-51. Despite

the fact that *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), forecloses such relief, Plaintiffs nonetheless maintain that the remedy they want from the Diocesan Defendants is "appropriate equitable relief." Opp'n at 150-57. Seizing on dicta in *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011), Plaintiffs essentially argue that if a monetary payment is the only way to make them whole, then equity will provide for that remedy in the form of a surcharge. Opp'n at 150-55.

Amara does not bear the construction Plaintiffs give it. 563 U.S. at 441-44. In their Opening Brief, the Diocesan Defendants observed that surcharge could offer Plaintiffs no succor because Plaintiffs had not alleged that the Diocesan Defendants were ERISA fiduciaries. Dioc. MTD at 81 n.50.[36] Plaintiffs mistook this observation as merely repeating the Prospect Entities' argument that § 1132(a)(3) claims do not lie against non-fiduciaries. Omnibus Mem. at 155-56. The Diocesan Defendants' point, however, was more nuanced.

Put another way: although surcharge is an equitable remedy, surcharge is only "appropriate equitable relief" under § 1132(a)(3) when turned against an ERISA fiduciary or trustee. *See Amara*, 563 U.S. at 441-44. *Amara* itself defines surcharge in this fashion:

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[36] In support of this and other propositions, the Diocesan Defendants cited *Depot, Inc. v. Caring for Montanans, Inc.* (*Depot I)*, No. CV 16-74-M-DLC, 2017 WL 3687339, at *5 (D. Mont. Feb. 14, 2017). *Depot I* declined to grant a request for "make-whole" relief pursuant to § 1132(a)(3) on account of the plaintiffs' failure to allege that the defendants were ERISA fiduciaries. 2017 WL 3687339, at *5 ("As discussed above, Plaintiffs have not alleged that Defendants were fiduciaries under ERISA law. Thus, 'make-whole' relief is not available."). After the filing of the Diocesan Defendants' motion to dismiss, the Ninth Circuit reviewed various conclusions of the district court. *Depot, Inc. v. Caring for Montanans, Inc. (Depot II)*, 915 F.3d 643 (9th Cir. 2019). The Ninth Circuit did not disturb this portion of *Depot I*'s holding. Instead, the Ninth Circuit reinforced it, indicating that certain equitable remedies like "an accounting for profits" and surcharge were only appropriate against fiduciaries. *Depot II*, 915 F.3d at 664 n.15 ("But fiduciary status is '[t]he important ingredient.'" (brackets in original)).

The Opening Brief had also cited *Depot I*'s conclusion that under *Montanile v. Bd. of Trs. of Nat'l Elevator Industry Health Benefit Plan*, 136 S. Ct. 651 (2016), "a party cannot recover in equity [under § 1132(a)(3)] unless the funds have been maintained in a segregated account." *Depot I*, 915 F.3d at 662. The Ninth Circuit clarified that *Montanile* "concerned dissipation and tracing, not segregation," and left open the possibility for a recovery if a defendant commingles a specifically identified fund with a different fund. *Depot II*, 915 F.3d at 662. *Depot II* emphasized, however, that the key to recovery is the existence of a specific and identifiable fund, not just a calculable amount of money. *See id.* As Plaintiffs have not even named the Inter-Parish Loan Fund as a party, let alone alleged that it or the Diocesan Defendants are still in possession of the proceeds that they received from the closing of the 2014 Asset Sale in repayment of a preexisting debt, or that such funds are traceable and not dissipated, the Amended Complaint still fails.

> "The surcharge remedy extended to a breach of trust committed by a ***fiduciary*** encompassing any violation of a duty imposed upon that ***fiduciary***. Thus, insofar as an award of make-whole relief is concerned, the fact that the defendant in this case, unlike the defendant in *Mertens*, is ***analogous to a trustee makes a critical difference***."

Id. at 442 (emphasis added) (internal citation omitted); *see id.* at 444 ("To be sure, just as a court of equity would not surcharge a ***trustee*** for a nonexistent harm, a ***fiduciary*** can be surcharged under § [1132](a)(3) only upon a showing of actual harm" (emphasis added) (internal citation omitted)). Interpreting *Amara* in this fashion is the only way to take the case out of tension with *Mertens*, which held that ERISA does not permit an award of money damages against a non-fiduciary to make up a funding deficiency resulting from a breach of fiduciary duty. *See Mertens*, 508 U.S. at 254-56; *see also id.* at 262 ("All that ERISA has eliminated, on these assumptions, is the common law's joint and several liability, for *all* direct and consequential damages suffered by the plan, on the part of persons who had no real power to control what the plan did." (emphasis in original)).

The Opposition's read of *Amara*, conversely, would have the effect of overruling *Mertens*, which the Supreme Court has expressly declared *Amara* did not do. *See Montanile v. Bd. of Trs. of Nat'l Elevator Industry Health Benefit Plan*, 136 S. Ct. 651, 660 n.3 (2016) (rejecting interpretation of *Amara* that would have "all but overrul[ed] *Mertens*," and instead confirming that "our interpretation of 'equitable relief' in *Mertens* . . . remains unchanged" (internal citations omitted)). Instead, as *Amara* observed, whether the defendant's status is "analogous to a trustee" is the key factor to determining if "make-whole" monetary relief via a surcharge is appropriate. 563 U.S. at 442.

Courts that have considered the scope of § 1132(a)(3) surcharge post-*Amara* have consistently restricted the remedy in this fashion:

- *McCravy v. Metro. Life Ins. Co.*, 690 F.3d 176, 181 (4th Cir. 2012) ("The Supreme Court has made quite clear that surcharge is available to plaintiffs ***suing fiduciaries*** under Section 1132(a)(3)." (emphasis added));

- *Gearlds v. Entergy Servs., Inc.*, 709 F.3d 448, 451 (5th Cir. 2013) ("The [Supreme] Court believed it 'critical' that the *Amara* defendant's position as a fiduciary was analogous to a trustee, and it concluded that 'an award of make-whole relief' in the form of surcharge was within the scope of 'appropriate equitable relief' for purposes of § [1132](a)(3).");

- *Kenseth v. Dean Health Plan*, 722 F.3d 869, 878-79 (7th Cir. 2013) ("The [*Amara*] Court thus clarified that equitable relief may come in the form of money damages when the ***defendant is a trustee*** in breach of a fiduciary duty" (emphasis added));

- *Gabriel v. Alaska Elec. Pension Fund*, 773 F.3d 945, 957 (9th Cir. 2014) ("Because *Amara* involved a suit by a beneficiary ***against a plan fiduciary***, and it was within the power of traditional equity courts to grant a demand for make-whole relief in the form of the equitable remedy of surcharge, such a remedy was available to the beneficiaries in *Amara*." (internal citations and quotation marks omitted) (emphasis added)); *id.* ("The Court therefore distinguished *Mertens*, in which the plan participants had sued a defendant who was ***not a trustee***. Because such a lawsuit would fall outside of traditional equitable jurisprudence, the make-whole relief in that case constituted compensatory damages against a nonfiduciary, which . . . was legal, not equitable, in nature." (internal citations and quotation marks omitted) (emphasis added));

- *Silva v. Metro. Life Ins. Co.*, 762 F.3d 711, 720 (8th Cir. 2014) ("In *Amara*, the Supreme Court identified three possible 'equitable' theories of recovery under § 1132(a)(3) for an ***administrator's*** breach of fiduciary duty: surcharge, reformation, and estoppel"); *id.* at 722 (describing *Amara* as concerning "an equitable remedy under ERISA for breaches of fiduciary obligations ***by plan administrators***" (emphasis added)).

- *In re DeRogatis*, 904 F.3d 174, 199 (2d Cir. 2018) ("[P]laintiffs asserting a claim under section [1132](a)(3) may seek remedies such as . . . a monetary surcharge to recompense 'a loss resulting from a [***fiduciary's***] breach of duty, or to prevent the [***fiduciary's***] unjust enrichment." (second and third brackets in original and internal quotation marks omitted) (emphasis added)).

These authorities include many of the cases that Plaintiffs cite in connection with their § 1132(a)(3) arguments. Omnibus Mem. at 153-55 (citing *Kenseth*, *Gabriel*, and *DeRogatis*).

Plaintiffs cite one case that they purport holds a non-fiduciary subject to a § 1132(a)(3) surcharge. Omnibus Mem. at 154 (citing *Schmitt v. Nationwide Life Ins. Co.*, No. 2:17-cv-558, 2018 WL 4051835 (S.D. Ohio Aug. 24, 2018)). Although Plaintiffs describe

Schmitt as concluding that "plaintiffs' knowing participation claim against [a] nonfiduciary entitles them to monetary compensation including [the] remedy of surcharge because no legal remedy is available under ERISA," *id.* at 154, *Schmitt* only did so after concluding that the defendant—who performed record keeping and customer service functions for the plan—was like a "trustee." 2018 WL 4051835, at *3 ("Here, because the defendant is analogous to a trustee, the disgorgement, accounting, and surcharge remedies fall within the scope of the term appropriate equitable relief." (internal quotation marks omitted)). Plaintiffs here, on the other hand, have not alleged facts suggesting that the Diocesan Defendants held a role "analogous to a trustee" at any time when the Plan was an ERISA plan. *See id.*; Dioc. MTD at 73-75 (discussing Plaintiffs' failure to state a claim for breach of state law fiduciary duty). Indeed, the Amended Complaint asserts that the Plan's conversion to an ERISA plan in 2009 coincided with SJHSRI's finance committee's takeover of the administration of the Plan. *See* FAC ¶¶ 75, 84.

Perhaps more importantly, *Schmitt* involved a claim to recover payment of allegedly unreasonable service fees (*i.e.*, a claim seeking return of property in the non-fiduciary defendants' possession). 2018 WL 4051835, at *1, *3 ("The operative question, then, is whether the fees Ms. Schmitt seeks constitute particular funds held by Nationwide. The answer is yes."). That is a proper form of equitable relief. *Montanile*, 136 S. Ct. at 658-59. *Schmitt* did not involve a request for an order to compel a non-fiduciary to pay money from its general assets to make up a funding deficiency purportedly arising from its participation in a breach of fiduciary duty. *See Mertens*, 508 U.S. at 254-56.

That is precisely what the Amended Complaint seeks here from the Diocesan Defendants. The Opposition essentially concedes the point, but contends that such relief is available under the guise of "surcharge." Opp'n at 150-57. Clever word choice, however,

cannot save this claim. *Mertens*, 508 U.S. at 255. Section 1132(a)(3) surcharge is unavailable against non-fiduciaries like the Diocesan Defendants. *Amara*, 563 U.S. at 443. *Mertens* controls. 508 U.S. at 254-56. Count III should be dismissed.

B. ERISA Equitable Estoppel Is Not An Available Remedy

Plaintiffs contest the Diocesan Defendants' argument that the Amended Complaint fails to state a claim for an equitable estoppel remedy under ERISA. Omnibus Mem. at 157-58. Plaintiffs argue that the Diocesan Defendants' criticism that Plaintiffs cannot use equitable estoppel to re-write the Plan is inapplicable given that the Plan was not treated as an ERISA plan or intended to be an ERISA plan. *Id.* The Diocesan Defendants do not dispute that the Plan was not treated as an ERISA plan, nor intended to be one. This does not change the fact that the relief Plaintiffs are seeking nonetheless appears beyond the narrow parameters of ERISA equitable estoppel as the First Circuit has defined that remedy.[37] Dioc. MTD at 81-83; *see Guerra-Delgado v. Popular, Inc.*, 774 F.3d 776, 782 (1st Cir. 2014) ("We have in the past assumed that any such claim [for equitable estoppel] under ERISA is necessarily limited to statements that *interpret* the plan and cannot extend to statements that would *modify* the plan." (emphasis in original)). This Court, therefore, should dismiss Count III to the extent it seeks equitable estoppel.

CONCLUSION

For the foregoing reasons, the Court should dismiss the First Amended Complaint with prejudice.

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[37] It also goes without saying that Plaintiffs cannot use ERISA equitable estoppel to address alleged misconduct predating the Plan's conversion to an ERISA plan. *See Catholic Charities*, 304 F. Supp. 2d at 92-93.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of March 2019, the foregoing document has been filed electronically through the Rhode Island ECF system, is available for viewing and downloading, and will be sent electronically to the counsel who are registered participants identified on the Notice of Electronic Filing.

/s/ Howard Merten

3507960.3/1444-35