

**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-LDA

**DEFENDANTS ROMAN CATHOLIC BISHOP OF PROVIDENCE, A
CORPORATION SOLE, DIOCESAN ADMINISTRATION CORPORATION
AND DIOCESAN SERVICE CORPORATION'S SUPPLEMENTAL BRIEF IN
SUPPORT OF THEIR MOTION TO DISMISS THE FIRST AMENDED COMPLAINT**

Defendants Roman Catholic Bishop of Providence, a corporation sole, Diocesan Administration Corporation and Diocesan Service Corporation (collectively, the “Diocesan Defendants”) respectfully submit this supplemental brief concerning church plan election issues in support of their motion to dismiss Plaintiffs’ First Amended Complaint, ECF No. 60 (“Amended Complaint or “FAC”).

PRELIMINARY STATEMENT

From the inception of this lawsuit, Plaintiffs have adamantly maintained that the Defendants formed a conspiracy to hide that the St. Joseph Health Services of Rhode Island Retirement Plan (the “Plan”) was an ERISA plan, as opposed to a church plan. Plaintiffs have maligned the Defendants in their filings in this Court and to the Plan Participants. They have refused to take a position on whether the Plan ceased to be a church plan or when.

Though there is ample briefing establishing the defects in Plaintiffs’ claims, a recent regulatory filing by Plaintiff Stephen Del Sesto (the “Receiver”) establishes that by the

Receiver's own acts, core elements of the Plaintiffs' claims are completely implausible and deficient. On April 15, 2019, the Receiver made an election pursuant to 26 U.S.C. § 410(d) (the "Election"), which functions as a representation to the Internal Revenue Service ("IRS"), the U.S. Department of Labor ("DOL") and the Pension Benefit Guaranty Corporation ("PBGC") that the Plan is a church plan that has elected to be governed by ERISA.

They have done this despite alleging in this case that the Plan was not a church plan in 2014 (or potentially 2009) and that the Defendants were engaged in a fraud and conspiracy premised on the Plan's church plan status. This Election cements the implausibility of their claims. The Election establishes one of two things. Either, the Receiver has concluded that the Plan was and is a church plan that can elect to be governed by ERISA (meaning there could be nothing fraudulent about anyone saying the Plan was a church plan in 2014, 2009 or earlier). Or, despite having served almost two years as the Plan's court-appointed fiduciary and having hired a slew of lawyers and consultants to assist him, he cannot tell whether the Plan is or is not a church plan (meaning that non-fiduciaries like the Diocesan Defendants could not have plausibly misrepresented the Plan's status). Under either scenario, a claim that non-fiduciaries like the Diocesan Defendants knew the Plan was not a church plan sometime in the past (whether 2014, 2009, or earlier) is not only completely implausible – but absurd.

Even though well established in previous briefing, there is no logical or plausible argument that the Plaintiffs can now make that the Defendants were engaged in an alleged fraud premised on the Plan being a church plan or exempt from ERISA. As such, the Court now has even more reason to dismiss the Amended Complaint with prejudice.

ARGUMENT

I. The Election Renders Implausible Plaintiffs’ Church Plan Fraud And Conspiracy Claims (And Any Claims Dependent On Them)

A § 410(d) election can only be made with respect to a church plan. 26 U.S.C. § 410(d) (“If the church or convention or association of churches which maintains any *church plan* makes an election under this subsection . . . then the provisions of this title . . . shall apply to such *church plan*” (emphasis added)); *Story v. Aetna Life Ins. Co.*, No. 4:13-CV-149-A, 2013 WL 4050160, at *5 (N.D. Tex. Aug. 8, 2013) (“Only if it was a ‘*church plan*’ was there any occasion for an election under § 410(d)(1).” (emphasis added)). By making the Election therefore, the Receiver has communicated (to multiple federal agencies) that the Plan was at least arguably a church plan as late as April 15, 2019.¹ *See* 26 U.S.C. § 410(d). That choice renders implausible the Plaintiffs’ simultaneous claim here that the Defendants knew that the Plan was governed by ERISA, but nonetheless conspired to falsely represent to Plan Participants, state regulators, and the Rhode Island Superior Court that the Plan was a church plan. *See, e.g.*, FAC ¶ 65 (“As discussed below, there came a time when the Plan no longer qualified as a Church Plan, but [the Diocesan Defendants and other defendants] all fraudulently conspired to misrepresent that the Plan remained qualified as a Church Plan”). The same is true of any other claim against the Diocesan Defendants to the extent it rides on this alleged fraud or conspiracy theory.

¹ The Receiver included the Election as an attachment to the Plan’s 2017 Form 5500, which is a joint form, filed with the DOL, PBGC, and IRS. 29 U.S.C. § 1024 (requiring reporting to the DOL); 29 U.S.C. § 1365 (requiring reporting to the PBGC); 26 U.S.C. § 6058 (requiring reporting to the IRS); *see* Internal Revenue Service, Form 5500 Corner, <https://www.irs.gov/retirement-plans/form-5500-corner> (last visited June 14, 2019) (“The IRS, Department of Labor, and Pension Benefit Guaranty Corporation jointly developed the Form 5500-series returns for employee benefit plans to satisfy annual reporting requirements under ERISA and the Internal Revenue Code). A copy of the Election is attached at Exhibit 1 and a copy of the signature page of the 2017 Form 5500 is attached as Exhibit 2. Both exhibits are public records that the Receiver filed with multiple federal agencies, and therefore can be considered on a motion to dismiss. *See Lister v. Bank of Am., N.A.*, 790 F.3d 20, 22 (1st Cir. 2015).

To make out a claim for fraud, Plaintiffs must plausibly allege scienter by setting “forth specific facts that make it reasonable to believe that defendant *knew* that a statement was materially false or misleading.”² *No. Am. Catholic Educ. Programming, Inc. v. Cardinale*, 567 F.3d 8, 13 (1st Cir. 2009) (emphasis added); *see Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 57-58 (1st Cir. 2012) (dismissing case for failure to sufficiently plead requisite state of mind under the more robust 12(b)(6) standard articulated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)). Here, that means Plaintiffs must plausibly allege that the Diocesan Defendants (and their alleged co-conspirators) knew the Plan was covered by ERISA.

The Election removes that sort of allegation from the realm of plausibility (if it had any to start with). Assuming the Receiver had a good faith basis to make the Election, his doing so is a concession that the Plan was (1) not clearly governed by ERISA prior to the Election and (2) potentially still a church plan in April 2019, nearly a *year* after this litigation was filed. *See* 29 U.S.C. § 410(d) (providing that election is only available to church plans). Such an admission cannot be squared with the Receiver’s and the putative class’ allegation here that the Plan was obviously governed by ERISA and the Defendants were aware of the Plan’s status but instead claimed that it was a church plan. FAC ¶ 65. The Election, rather, establishes that none of the Defendants could have had such knowledge, and renders Plaintiffs’ allegations to the contrary implausible. *See Iqbal*, 556 U.S. at 686-87; *see also Schatz*, 669 F.3d at 57 (affirming grant of motion dismiss because concessions by plaintiff rendered implausible his claim that defendant knew alleged defamatory statements were false). The Receiver is a lawyer, charged with administration of the Plan, who has himself retained special outside counsel with

² The Diocesan Defendants explained how the Amended Complaint failed to sufficiently plead state of mind at several points in the briefing on their motion to dismiss. Diocesan Defs.’ Mem. In Supp. Of Their Mot. To Dismiss Pls.’ First Am. Compl., ECF No. 67-1, at 14, 21-23, 35-38; Diocesan Defs.’ Reply In Further Supp. Of Their Mot. To Dismiss Pls.’ First Am. Compl., ECF No. 114, at 25-30.

expertise in ERISA and in dealing with the PBGC.³ The Plan’s church plan status has vitally important implications for the administration for which the Receiver is responsible. In his capacity as the court appointed fiduciary for the Plan, the Receiver was also empowered to conduct discovery and he and his special counsel did so with much gusto. FAC ¶ 46; Decl. of Max Wistow, ECF No. 65, ¶¶ 11-16.

If the status of the Plan was so ambiguous that the Receiver could still, in 2019, make an election *only available to church plans*, 26 U.S.C. § 410(d), it is simply not plausible that the status of the Plan was also so clear that the Diocesan Defendants knew ERISA applied as far back as 2009 (or earlier). *See Iqbal*, 556 U.S. at 686-87. And, if the Diocesan Defendants did not know or could not determine that the Plan was an ERISA plan, then they could not have plausibly conspired to falsely represent that the Plan was a church plan.⁴ Accordingly, by dint of the Election, Plaintiffs cannot plausibly plead scienter and their claims to the extent they are premised on a church plan fraud or conspiracy theory must be dismissed. *See id.*; *Schatz*, 669 F.3d at 57; *Cardinale*, 567 F.3d at 13.

II. The Receiver’s Hedge In The Election Does Not Insulate The Amended Complaint From The Unavoidable Implications Of The Act Of The Election

Plaintiffs will surely argue that the Election has no impact on their claims because the Receiver hedged when making it. Specifically, the Receiver purported that the Election was “without prejudice to the position taken [in this lawsuit] by the Plan Administrator [the Receiver] . . . that the Plan ceased to qualify as a Church Plan (and became subject to ERISA) on or prior to the Effective Date, possibly as of 2009 or earlier.” Ex. 1 (the Election form). Such a self-

³ *See* Decl. of Jeffrey B. Cohen, ECF No. 83-2, ¶¶ 2-3 (affidavit of the Receiver’s ERISA counsel).

⁴ Even if the standard were negligent disregard of the truth, the allegation could not stand because the Receiver must concede that either position – church plan or ERISA plan – is reasonable, because he now effectively takes *both* positions.

serving statement cannot insulate Plaintiffs' claims from the fatal implications of the Election. By making the Election, the Receiver hopes to gain substantial benefits for the Plan including, presumably, plan termination insurance from the PBGC. He cannot avoid the costs.

Regardless, even if one credits the hedge, the hedge does not render the fraud and conspiracy claims any more plausible. *See* 26 U.S.C. § 410(d). Why? Because if the Plan's alleged ineligibility for "church plan" status was so obvious (like the type that could be the basis for a fraud or conspiracy claim), there would be no reason for the Receiver – and indeed, no legal ability for the Receiver – to make and file a § 410(d) election. *See id.* Moreover, there would be no reason why the Receiver could not say definitively and clearly when the Plan ceased to qualify as a church plan. What the Election must mean then, at a minimum, is that the status of the Plan is so difficult to determine that even a fiduciary who has been running the Plan for almost two years, with the benefit of lawyers and consultants to assist him, and full access to the Plan's records, *still* cannot tell. That renders the Plaintiffs' fraud and conspiracy based claims implausible. *See Iqbal*, 556 U.S. at 686-87. If the Receiver still cannot say whether the Plan is a church plan or when it ceased being one, it is not plausible that non-fiduciaries like the Diocesan Defendants could have reached a conclusion that the Receiver still cannot reach. *See id.*

For the Receiver to argue otherwise (i.e. that despite the Election, the Plan was so obviously covered by ERISA that it was a fraud to say it was a church plan) would mean he has not just invoked § 410(d) improperly but also made the Election without a good faith basis for doing so. This would run directly counter to the oath that the Receiver swore when he electronically signed and filed the 2017 Form 5500 (of which the Election was a component):

"Under penalties of perjury and other penalties set forth in the instructions, I declare that I have examined this return/report, including accompanying schedules, statements and attachments, as well as the electronic version of this

return/report, and to the best of my knowledge and belief, it is true, correct, and complete.”

Ex. 2 (2017 Form 5500, page 1). The Receiver could not, in good faith, take this oath, *make an election only available to a church plan*, 26 U.S.C. § 410(d), and then continue to allege that since 2009 (or earlier) the Plan *was not a church plan* and that a fraud occurred when someone said otherwise.⁵ FAC ¶¶ 65, 75-81. Rather, as the Receiver presumably did not make the Election in bad faith, the act of the Election must be read as a concession that the Plan was at least arguably still a church plan in April 2019. In turn, the contentions of the Receiver and the putative class that the Diocesan Defendants (and others) knew that the Plan was one thing in 2014 or 2009 (an ERISA plan), but falsely asserted it was something else (a church plan) are implausible. *See Iqbal*, 556 U.S. at 686-87; *Schatz*, 669 F.3d at 57-58. The Court, therefore, should look past the Receiver’s semantic shield and dismiss the Amended Complaint to the extent it is premised on an alleged church plan fraud or conspiracy.

CONCLUSION

For the reasons stated herein and in the Diocesan Defendants’ prior briefing in support of their motion to dismiss, the Court should dismiss the Amended Complaint with prejudice.

⁵ Such conduct, of course, would also arguably put the Receiver in violation of the same federal statute he accuses the Diocesan Defendants of violating. *See* FAC ¶¶ 535-538 (describing Plaintiffs’ Fraud-On-The-IRS claim against the Diocesan Defendants). The irony should not elude this Court.

Respectfully Submitted,

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

By Their Attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of June 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

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EXHIBIT 1

Form 5500 – Attachment

St. Joseph Health Services of Rhode Island Retirement Plan

EIN/PN: 82-2871833 / 001

Election Statement

1. On behalf of the St. Joseph Health Services of Rhode Island Retirement Plan (the “Plan”), the Plan Administrator hereby makes an irrevocable election pursuant to section 410(d) of the Internal Revenue Code of 1986, as amended (the “410(d) Election”). The Plan historically claimed to be and was managed as a “Church Plan” within the meaning of section 414(e) of the Internal Revenue Code of 1986, as amended (the “Code”), and the Treasury Regulations issued thereunder.
2. This 410(d) Election statement is submitted as an attachment to the first Form 5500 filed for the Plan, in accordance with the procedural requirements of section 1.410(d)-1(c) of the Treasury Regulations. This 410(d) Election shall be effective as to all Plan years beginning on or after August 17, 2017 (the “Effective Date”). As of and following the Effective Date, the Plan shall be administered in compliance with the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), and the provisions of the Code that apply to “employee pension benefit plans” (as defined under section 3(2) of ERISA).
3. This 410(d) Election is made without prejudice to the position taken by the Plan Administrator in the litigation styled *Stephen Del Sesto, As Receiver and Administrator of the St. Joseph Health Services of Rhode Island Retirement Plan, et al., v. Prospect Chartercare, LLC, et al.*, Civil Action No. 1:18-cv-00328-WES-LDA, pending in the U.S. District Court for the District of Rhode Island, that the Plan ceased to qualify as a Church Plan (and became subject to ERISA) on or prior to the Effective Date, possibly as of 2009 or earlier.

EXHIBIT 2

<p>Form 5500</p> <p>Department of the Treasury Internal Revenue Service</p> <hr/> <p>Department of Labor Employee Benefits Security Administration</p> <hr/> <p>Pension Benefit Guaranty Corporation</p>	<p>Annual Return/Report of Employee Benefit Plan</p> <p>This form is required to be filed for employee benefit plans under sections 104 and 4065 of the Employee Retirement Income Security Act of 1974 (ERISA) and sections 6057(b) and 6058(a) of the Internal Revenue Code (the Code).</p> <p>▶ Complete all entries in accordance with the instructions to the Form 5500.</p>	<p>OMB Nos. 1210-0110 1210-0089</p> <hr/> <p style="font-size: 24pt; font-weight: bold;">2017</p> <hr/> <p>This Form is Open to Public Inspection</p>
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Part I	Annual Report Identification Information
For calendar plan year 2017 or fiscal plan year beginning <u>07/01/2017</u> and ending <u>06/30/2018</u>	
A	This return/report is for: <input type="checkbox"/> a multiemployer plan <input type="checkbox"/> a multiple-employer plan (Filers checking this box must attach a list of participating employer information in accordance with the form instructions.)
	<input checked="" type="checkbox"/> a single-employer plan <input type="checkbox"/> a DFE (specify) _____
B	This return/report is: <input checked="" type="checkbox"/> the first return/report <input type="checkbox"/> the final return/report
	<input type="checkbox"/> an amended return/report <input type="checkbox"/> a short plan year return/report (less than 12 months)
C	If the plan is a collectively-bargained plan, check here. ▶ <input type="checkbox"/>
D	Check box if filing under: <input type="checkbox"/> Form 5558 <input type="checkbox"/> automatic extension <input checked="" type="checkbox"/> the DFVC program
	<input type="checkbox"/> special extension (enter description)

Part II	Basic Plan Information —enter all requested information						
1a Name of plan <u>ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND RETIREMENT PLAN</u>	<table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td style="width:80%;">1b Three-digit plan number (PN) ▶</td> <td style="width:20%; text-align: center;"><u>001</u></td> </tr> <tr> <td colspan="2">1c Effective date of plan <u>07/01/1965</u></td> </tr> </table>	1b Three-digit plan number (PN) ▶	<u>001</u>	1c Effective date of plan <u>07/01/1965</u>			
1b Three-digit plan number (PN) ▶	<u>001</u>						
1c Effective date of plan <u>07/01/1965</u>							
2a Plan sponsor's name (employer, if for a single-employer plan) Mailing address (include room, apt., suite no. and street, or P.O. Box) City or town, state or province, country, and ZIP or foreign postal code (if foreign, see instructions) <u>STEPHEN DEL SESTO, RECEIVER</u> <u>ONE FINANCIAL PLAZA, 26TH FLOOR</u> <u>PROVIDENCE, RI 02903</u>	<table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td colspan="2">2b Employer Identification Number (EIN) <u>82-2871833</u></td> </tr> <tr> <td colspan="2">2c Plan Sponsor's telephone number <u>401-490-3415</u></td> </tr> <tr> <td colspan="2">2d Business code (see instructions) <u>622000</u></td> </tr> </table>	2b Employer Identification Number (EIN) <u>82-2871833</u>		2c Plan Sponsor's telephone number <u>401-490-3415</u>		2d Business code (see instructions) <u>622000</u>	
2b Employer Identification Number (EIN) <u>82-2871833</u>							
2c Plan Sponsor's telephone number <u>401-490-3415</u>							
2d Business code (see instructions) <u>622000</u>							

Caution: A penalty for the late or incomplete filing of this return/report will be assessed unless reasonable cause is established.

Under penalties of perjury and other penalties set forth in the instructions, I declare that I have examined this return/report, including accompanying schedules, statements and attachments, as well as the electronic version of this return/report, and to the best of my knowledge and belief, it is true, correct, and complete.

SIGN HERE	Filed with authorized/valid electronic signature.	04/15/2019	STEPHEN DEL SESTO
	Signature of plan administrator	Date	Enter name of individual signing as plan administrator
SIGN HERE	Filed with authorized/valid electronic signature.	04/15/2019	STEPHEN DEL SESTO
	Signature of employer/plan sponsor	Date	Enter name of individual signing as employer or plan sponsor
SIGN HERE			
	Signature of DFE	Date	Enter name of individual signing as DFE

For Paperwork Reduction Act Notice, see the Instructions for Form 5500.

Form 5500 (2017)
v. 170203