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
ORAL ARGUMENT REQUESTED

THE DIOCESAN DEFENDANTS' RENEWED MOTION
TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

DATED: February 11, 2022

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

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TABLE OF EXHIBITS

Ex. #	Document	First Am. Compl. ¶¶	Additional/Other Basis to Review on Motion to Dismiss
1	Actuarial Report as of July 1, 2004, for the Plan Year Ended June 30, 2005	N/A	Public Record (Posted on Receiver's website under "Public Data" heading)
2	Actuarial Report as of July 1, 2005, for the Plan Year Ended June 30, 2006	N/A	Public Record (Posted on Receiver's website under "Public Data" heading)
3	Actuarial Report as of July 1, 2006, for the Plan Year Ended June 30, 2007	230(c)	Public Record (Posted on Receiver's website under "Public Data" heading)
4	Actuarial Report as of July 1, 2007, for the Plan Year Ended June 30, 2008	230(c)	Public Record (Posted on Receiver's website under "Public Data" heading)
5	Actuarial Report as of July 1, 2009, for the Plan Year Ended June 30, 2010[*]	240-44	Public Record (Posted on Receiver's website under "Public Data" heading)
6	Actuarial Report as of July 1, 2010, for the Plan Year Ended June 30, 2011	245	Public Record (Posted on Receiver's website under "Public Data" heading)
7	Actuarial Report as of July 1, 2011, for the Plan Year Ended June 30, 2012	246	Public Record (Posted on Receiver's website under "Public Data" heading)
8	Actuarial Report as of July 1, 2012, for the Plan Year Ended June 30, 2013	247	Public Record (Posted on Receiver's website under "Public Data" heading)
9	Chart reflecting compilation of data in Exhibits 1-8 and 29	N/A	Compiled from data in Exhibits 1-8 and 29
10	Excerpted Change in Effective Control Application ("CEC Application") to the R.I. Department of Health	305, 431(f)	Public Record (filed with R.I. Department of Health)

[*] Exhibits 5-8 reflect the communications from Defendant Angell Pension Group, Inc. described in the Amended Complaint, which enclosed the relevant actuarial reports. The actuarial reports from the Receiver's website are on the Court's docket at ECF No. 67-6, ECF No. 67-7, ECF No. 67-8, and ECF No. 67-9 and the web address *infra* note 34.

11	Asset Purchase Agreement with Selected Exhibits	*See* Ex. 10; *see also* 140, 142, 148, 153, 172, 306, 417, 420, 429, 443, 447-49	Public Record (filed with R.I. Department of Health, as part of CEC Application)
12	Excerpted 2009-2010 Financial Statements	*See* Ex. 10; *see also* 447	Public Record (filed with R.I. Department of Health, as part of CEC Application)
13	Excerpted 2010 Government Auditors' Reports	*See* Ex. 10; *see also* 447	Public Record (filed with R.I. Department of Health, as part of CEC Application)
14	Excerpted 2010-2011 Financial Statements	*See* Ex. 10; *see also* 447	Public Record (filed with R.I. Department of Health, as part of CEC Application)
15	Excerpted 2011-2012 Financial Statements	*See* Ex. 10; *see also* 447	Public Record (filed with R.I. Department of Health, as part of CEC Application)
16	2012-2013 Financial Statements	*See* Ex. 10; *see also* 447	Public Record (filed with R.I. Department of Health, as part of CEC Application)
17	R.I. Attorney General's Decision Concerning Hospital Conversion Act Application	391	Public Record (filed decision of R.I. Attorney General)
18	2017 Memorandum from U.S. Conference of Catholic Bishops	106-07	
19	January 4, 2010 Articles of Amendment to the Articles of Incorporation of St. Joseph Health Services of Rhode Island	N/A	Public Record (filed with R.I. Secretary of State)
20	Ethical and Religious Directives of the United States Conference of Catholic Bishops	149 & n.3	
21	September 27, 2013 Letter to the Vatican	171-80	
22	November 11, 2014 Email from Chancellor Reilly	185	
23	"Overview of the Strategic Transaction Presentation" at August 14, 2013 Meeting	144-51, 153	
24	February 14, 2014 Letter to the Health Services Council	320-21	Public Record (filed with R.I. Department of Health)

25	Valuation of SJHSRI prepared by Cain Brothers & Company, LLC		Public Record (filed with R.I. Department of Health and R.I. Attorney General, as part of Hospital Conversion Act application)
26	Confidential Final Supplemental Responses to HCA Application	347-49	Public Record (filed with R.I. Department of Health and R.I. Attorney General, as part of Hospital Conversion Act application)
27	Email from Patricia Rocha (counsel for CCCB), Enclosing Resolution from the RWMC Board Authorizing Use of Board Designated Funds to Satisfy Plan Liabilities	358	
28	February 2, 2009 Affiliation Agreement*	237	Public Record (filed with R.I. Department of Health and R.I. Attorney General, as part of Hospital Conversion Act application)
29	Actuarial Report as of July 1, 2008, for the Plan Year Ended June 30, 2009	230(d)	
30	Table of Contradictory Allegations	N/A	Compiled from review of First Amended Complaint

* For the sake of consistency, the Diocesan Defendants have provided the identical version of the Affiliation Agreement filed with their motion for summary judgment. The version provided to state regulators will also be made available if the Court desires.

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 renew their Motion to Dismiss the First Amended Complaint, ECF No. 60, ("FAC"), as supplemented here.

PRELIMINARY STATEMENT

The FAC alleges no facts against RCB, DAC or DSC that state a legally cognizable claim for relief. While unsupported conclusions, aspersions and invective are abundant, what remains utterly lacking is the one thing precisely required by the Federal Rules of Civil Procedure: "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). There is no question that the FAC is neither short nor plain. It is far from clear. And this is by design.

Plaintiffs apparently hope that because the FAC is 163 pages, 558 paragraphs and 23 counts long, the Court will presume there *must* be something there stating a cognizable legal claim and dispense with the work needed to review it under Rule 12(b)(6). The Diocesan Defendants are entitled to test the legal sufficiency of the factual allegations directed *against them*. That is true of a complaint that complies with Rule 8's requirement of a short and plain statement of the claim. Perforce, it must be true of a complaint that defies that requirement. Anything else would reward Plaintiffs' intentional obfuscation and verbosity.

The Diocesan Defendants understand that this motion is lengthy. That is the direct result of the numerous and overlapping infirmities in Plaintiffs' pleading. Testing the sufficiency of the sheer volume of assertions is not easy, given the length of the FAC and that many of the claims are subject to dismissal for multiple reasons. But the Federal Rules do provide that those assertions and claims should be so reviewed upon this motion.

Consequently, the Court is faced with two options in applying Rule 12(b)(6) here. One is to spend the time reviewing the specific allegations made against *these* defendants and apply the *Twombly/Iqbal* analysis to each well-pleaded allegation and determine (i) whether it alleges a fact; (ii) if it does, whether that alleged fact states a claim; and (iii) whether the claim and alleged facts are plausible. This option necessarily requires extensive briefing and time given the number of allegations and claims and the frailties within them. Alternatively, the Court can direct Plaintiffs to file a complaint that is short, clear, and to-the-point – and based upon factual allegations, not conclusions and conjecture. The Court could then conduct this analysis in a much more reasonable and efficient manner. Through two rounds of briefing on motions that were never decided, Plaintiffs have insisted that their complaint complies with the Rules. Accordingly, out of necessity, this motion will present the more fulsome analysis in the alternative.

The FAC must be dismissed for the following reasons.

First, the FAC fails to provide a short and plain statement of the claim, nor does it satisfy Rule 9(b)'s specificity requirements (the who, what, when, where, why behind their allegations of fraud). Plaintiffs' original complaint referenced the "Diocesan Defendants" collectively and without any differentiation, in virtually every allegation directed towards them. The FAC did not fix this substantive problem at all, and merely replaced one empty formulation with three. It fails to allege facts establishing that any individual's alleged actions were actions undertaken by the corporate defendants named. It improperly groups these defendants together in a way that is completely conclusory and with no regard for their existence as separate corporations. One is completely left adrift as to why these corporate defendants are named as opposed to the many others for which Bishop Tobin is the President. The FAC conclusorily

asserts that Bishop Tobin was acting on behalf of all three of these separate entities each and every time he said or did anything mentioned in the FAC. The FAC presumes wholesale that Plaintiffs are free to disregard corporate identity entirely. This fails to comply with Rule 8(a), Rule 9(b) and controlling Rhode Island Supreme Court precedent requiring courts to honor the corporate separateness of church related corporations.

Second, despite their recent attempts to divert the Court from deciding whether and when ERISA applies to the St. Joseph Health Services of Rhode Island Retirement Plan (the "Plan"), the FAC asserts ERISA claims. They should all be dismissed because Plaintiffs are not entitled to monetary relief against the Diocesan Defendants as a matter of law. To the extent ERISA governs (and it would have to govern the ERISA claims Plaintiffs assert in their FAC), it precludes the relief Plaintiffs seek against the Diocesan Defendants. *Infra* Part II.

Third, upon review of the allegations pursuant to Rule 12(b)(6), no facts remain which plausibly state a claim for relief against the Diocesan Defendants. After removing conclusory allegations and those that conflict with the very documents referenced in the FAC (and the public record) and considering obvious, lawful alternative explanations, the Court must assess whether Plaintiffs have alleged sufficient facts to sustain any of their claims against these defendants. The FAC fails that review. *Infra* Part III.

Instead, the FAC is contradictory and conclusory. It asks this Court to improperly presume that the Diocesan Defendants somehow knew and understood that the June 20, 2014 Asset Sale ("2014 Asset Sale") between St. Joseph Health Services of Rhode Island ("SJHSRI"), Roger Williams Hospital ("RWH") and CharterCARE Community Board ("CCCB") and various entities associated with Prospect Medical Holdings, Inc. (collectively "Prospect") was "really" an illicit conspiracy to divert assets from the Plan's beneficiaries and falsely claim church plan

status for the Plan and then the Diocesan Defendants agreed to that scheme. That notion is not only implausible in light of obvious alternative explanations, but for three additional reasons:

- First, all the facts upon which Plaintiffs rely to claim the Diocesan Defendants were in on the conspiracy were public and/or known to the regulators (and largely disconnected from the Diocesan Defendants). There was no deception. *Infra* Part III.A.

- Second, Plaintiffs' case rests in large part on their contention that the alleged conspirators knew in 2013 and 2014 that the Plan was not a church plan but misrepresented that it was. However, the law surrounding this issue was so muddled at that time that any assertion on this issue could not support a fraud claim. Indeed, recently in this Court, Plaintiffs contended that they could still argue either that the Plan qualified as a church plan or an ERISA plan and meet the strictures of Rule 11. Assuming that what Plaintiffs told this Court was true, neither assertion could support a fraud claim. *Infra* Part III.B.

- Third, the FAC presents claims that rest on Plaintiffs' possession of contradictory states of mind. It alleges that defendants never told Plaintiffs the Plan was a church plan so Plaintiffs would think that they had the protections of ERISA. Simultaneously, it alleges that defendants told Plaintiffs the Plan was a church plan to mislead them into thinking the Plan was not subject to ERISA protections. Plaintiffs cannot allege contradictory states of mind as to what they were tricked into believing. Accordingly, their fraud claims fail as a matter of law. *Infra* Part III.C.

Fourth, Plaintiffs cannot plead facts to establish any causation of any alleged wrongdoing by these defendants and any harm to the Plan or its participants prior to 2008-2009 and the Great Recession. Actuarial reports cited in the FAC and posted publicly on Plaintiff Receiver's website show that the Plan was adequately funded for many years leading up to the market decline that began in 2008. Those same reports also show that Plan assets totaled $114,718,822 in 2007 but fell to $78,260,116 in 2009 after the market crash—a drop of $36,458,706, ***a devastating 32%***. It was not until *after* the market crash that Plan actuaries reported that accrued benefits exceeded assets and that SJHSRI (not the Diocesan Defendants) needed to contribute to the Plan. Despite that historical reality – literally displayed on the Plaintiff Receiver's website for all to see, Plaintiffs continue to maintain generalized allegations of wrongdoing dating back as far as the 1970s. Adequate funding through 2008, however,

breaks any causal chain for any conduct allegedly occurring before 2009. Further, the Great Recession constitutes a glaring intervening cause for which no defendant—certainly not these remaining defendants—is responsible. Claims based upon conduct predating the market collapse must be dismissed. *Infra* Part IV.

Finally, Parts V through X of this motion focus on the remaining individual counts against the Diocesan Defendants and demonstrate why all fail as a matter of law. The Court need not reach those grounds if it finds the arguments in Parts I through IV of this motion persuasive and dismisses the complaint. If the Court proceeds beyond those Parts in its decision, it is critically important to resolve the issues raised in Parts V through X so that the Court and the parties can proceed to resolve whatever real issues remain in this case.

STANDARD OF REVIEW

Rule 8. Fed. R. Civ. P. 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). A complaint does not "suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (citations omitted). Rather, in order "[t]o survive a motion to dismiss, a complaint must contain *sufficient factual matter*, accepted as true, to 'state a claim to relief that is *plausible* on its face.'" *Id.* (emphasis added) (citations omitted).

"The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* In short, "Rule 8(a)(2) requires a "'*showing*,' rather than a blanket assertion, of entitlement to relief," and the "*[f]actual allegations* must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555-56, n.3 (emphasis added). "Something beyond the mere possibility of" unlawful conduct "must be alleged lest a plaintiff with a largely groundless claim be allowed to take up

the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value." *Id.* at 557-58 (internal quotations omitted). Indeed, to the extent a complaint fails to meet this threshold level of plausibility, "this basic deficiency should … be exposed at the point of minimum expenditure of time and money by the parties and the court." *Id.*

Rule 9(b). Further, Rule 9(b) governs a claim "where the core allegations effectively charge fraud." *N. Am. Catholic Educ. Programming Found., Inc. v. Cardinale*, 567 F.3d 8, 15 (1st Cir. 2009). That is the case here where all claims[1] alleged against the Diocesan Defendants either are express fraud claims or based on allegedly fraudulent acts.[2] Rule 9(b) requires Plaintiffs to state with particularity "the circumstances constituting fraud or mistake." *Id.* at 13. That means Plaintiffs must plead the pertinent facts surrounding the "who, what, where, and when" of the fraud, including who made the statement or omission, and who received it and relied on it. *See Doyle v. Hasbro, Inc.*, 103 F.3d 186, 194 (1st Cir. 1996).

Documents. Courts on motions to dismiss may not only consider documents referenced or summarized in a complaint but may review those documents to determine whether the allegations regarding those documents are supported within them. If the document does not support the allegation, the document controls. *See Beddall v. State Street Bank & Tr. Co.*, 137 F.3d 12, 17-24 (1st Cir. 1998) (affirming the district court's grant of a motion to dismiss after considering a trust agreement referenced to and summarized in the complaint, but not attached

[1] When the Diocesan Defendants refer to "all claims" or "all counts," or use similar phrasing, they are referring to the substantive causes of actions leveled against them (Counts III, VII-IX, XVI-XIX, XXI-XXII) and not the requests for declaratory relief (Counts IV and XXIII). Count IV is irrelevant to this motion and Count XXIII is derivative and duplicative of the substantive claims.

[2] That all of Plaintiffs' claims against the Diocesan Defendants sound in fraud is obvious from the substantial overlap between the paragraphs incorporated in the express fraud counts and the other counts. *Compare* FAC ¶¶ 494, 498, 531, 535, 539, 543 (incorporating allegations within Counts VII-VIII, XVI-XIX) with *id.* ¶¶ 470, 503, 551, 554 (same for Counts III, IX, XXI-XXII). Paragraphs 55 and 203, for example, are just two of the many fraud-alleging paragraphs incorporated in all counts against the Diocesan Defendants.

therein, because the court found that the agreement did not make the defendant a fiduciary to the plaintiff, as alleged in the complaint); *Jones v. Bank of New York*, 542 F. Supp. 3d 44, 55 (D. Mass. 2021) (dismissing complaint after reviewing documents in the public record that contradicted plaintiff's allegations because "[w]hen [a] document[ ] contradict[s] an allegation in the complaint, the document trumps the allegation" (internal quotations omitted)).

ARGUMENT

I. THE FAC FAILS TO ALLEGE FACTS TO SUPPORT A CLAIM THAT THE DIOCESAN DEFENDANTS ARE LIABLE FOR THE ACTS OF OTHER DEFENDANTS OR ALLEGED AGENTS

The Court should dismiss RCB, DAC and DSC from this case under Rule 12(b)(6), because the FAC makes no allegations that any of those three separate corporate entities engaged in any wrongdoing. Instead, the FAC identifies these corporate entities, and asserts—without any factual allegations supporting the assertion—that Bishop Tobin "was acting within the scope of his employment . . . with respect to all of his actions and omissions alleged herein" as to all three entities. FAC ¶¶ 26-28. The FAC then goes on to repeat the formula "Corporation Sole, Diocesan Administration, and Diocesan Service" more than a hundred times in eleven counts of the FAC, but utterly fails to make any distinction between the three entities.[3] Plaintiffs never make any specific allegations directed to any of these entities independently. Every relevant allegation lumps RCB, DAC, and DSC together. There are zero descriptions of

[3] A brief comparison of the original Complaint to the FAC illustrates Plaintiffs' ongoing failure to make any distinction between the three separate corporate entities that the Plaintiffs sued. In the original Complaint, Plaintiffs pleaded that "Defendants Corporation Sole, Diocesan Administration, and Diocesan Service, are collectively referred to herein as the "Diocesan Defendants." Compl., ECF No. 1, ¶ 30. RCB, DAC and DSC noted this deficiency in their motion to dismiss the original Complaint. Mem. in Supp. of Diocesan Defs.' Mot. to Dismiss Pls.' Compl., ECF No. 54-1, at Part II.A. All Plaintiffs did in response was to perform a global "find and replace" changing the terminology from "Diocesan Defendants" found in the original Complaint to the FAC's more prolix—but equally imprecise—recitation of "Corporation Sole, Diocesan Administration, and Diocesan Service" for every instance. Of course, a global "find-and-replace" using more words without any improvement in precision or clarity does nothing to cure a fatal pleading defect.

actions taken or statements made solely by RCB, or by DAC, or by DSC in anything other than a conclusory way (or in a way that differentiates those particular corporations from the many others that Bishop Tobin is also President). This kind of pleading is defective and subject to dismissal.

A. Plaintiffs' Vague and Conclusory Allegations Regarding Actions of Lumped Together Parties Do Not Satisfy Rule 8 Notice Pleading Standards

Where, as here, a complaint purports to allege numerous claims against multiple defendants, the Court's role is to "determine whether, *as to each defendant*, a plaintiff's pleadings are sufficient to state a claim on which relief can be granted." *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 48 (1st Cir. 2009) (emphasis in original). Under traditional notice pleading requirements, a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). As this Court has previously recognized, "[t]o fulfill the demands of notice pleading, 'a plaintiff cannot 'lump' multiple defendants together and must state clearly which defendants committed each of the alleged wrongful acts.'" *Beta Grp., Inc. v. Streiker, Greenaple, & Croscut, P.C.*, C.A. No. 15-213 WES, 2018 WL 461097, at *1 (D.R.I. Jan. 18, 2018) (Smith, C.J.) (*quoting Canales v. Gatzunis*, 979 F. Supp. 2d 164, 170 (D. Mass. 2013)); *see also Bagheri v. Galligan,* 160 Fed. App'x 4, 5 (1st Cir. 2005) (per curiam) (affirming the district court's holding that the complaint was deficient because "it failed to state which defendant or defendants committed each of the alleged wrongful acts"); *Laurence v. Wall*, C.A. No. CA08-109 ML, 2010 WL 4137444, at *2 (D.R.I. Sept. 30, 2010), *adopted by* 2010 WL 4127295 (D.R.I. Oct. 10, 2010) (same).[4]

[4] Other federal courts in this Circuit and elsewhere are in accord. *See Atuahene v. City of Hartford*, 10 Fed. App'x 33, 34 (2d Cir. 2001) ("By lumping all the defendants together in each claim and providing no factual basis to distinguish their conduct, [the plaintiff's] complaint failed to satisfy this minimum [pleading] standard . . . ."); *La Casse v. Aurora Loan Servs., LLC*, No. 15-11672-MGM, 2016 WL 4535338, at *8 (D. Mass. Aug. 8, 2016) (dismissing claim asserted collectively for failure to comply with Rule 8); *Ochre LLC v. Rockwell Architecture Planning & Design, P.C.*, No. 12 Civ. 2837, 2012 WL 6082387, at *6 (S.D.N.Y. Dec. 3, 2012) (holding that when a

Applying those principles here, the Court should hold that there are no factual allegations tying RCB, DAC or DSC to the alleged wrongdoing. The FAC starts and stops at alleging that Bishop Tobin was an officer of RCB, DAC, and DSC. The FAC does not plead any facts supporting an inference that he was acting on behalf of those three corporations (or any of them) when he (or any of the other individuals identified in the FAC) did what he was alleged to have done. Rather, the FAC 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 alleged:

- "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).

- "On August 14, 2013, counsel for SJHSRI, CCCB, and RWH . . . together with CCCB 'senior leadership' . . . met at the offices of Corporation Sole, Diocesan Administration, and Diocesan Service to obtain their cooperation . . . . **Bishop Tobin, Rev. Timothy Reilly, and Msgr. Paul Theroux attended and participated in the meeting in their individual capacity and on behalf of Defendants Corporation Sole, Diocesan Administration, and Diocesan Service.**" *Id.* ¶ 141 (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."** *Id.* ¶ 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**

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complaint "names multiple defendants" it "must provide a plausible factual basis to distinguish the conduct of each of the defendants"), *aff'd*, 530 F. App'x 19 (2d Cir. 2013); *Sires v. Hefferman*, No. 10-11993, 2011 WL 2516093, at *5 (D. Mass. June 21, 2011) (dismissing claims against multiple defendants where plaintiff set forth only "vague and speculative allegations of participation and liability" as to those defendants).

Diocesan Service." *Id.* ¶ 166 (emphasis added).

Yet, among other things, the FAC does not plead:

- What, if any, connection RCB, DAC, or DSC had to the Plan in 2013-2014,
- How or why Bishop Tobin attended the meeting in August 2013,
- How or why Bishop Tobin was acting in his capacity as an officer of RCB, DAC, or DSC at that meeting,
- How or why anyone would believe that Bishop Tobin was speaking on behalf of RCB, DAC, or DSC when making the alleged statements,
- Why any of those three entities would be interested in forming the "understanding" allegedly reached at that meeting, or
- 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).

Likewise, the FAC fails to acknowledge or attempt to distinguish the other roles and capacities where Bishop Tobin took action – most notably as an individual in his religious role as the Most Reverend Bishop of the Diocese of Providence. Plaintiffs' assertion that Bishop Tobin "was acting within the scope of his employment" by each of these three particular entities "with respect to all of his actions and omissions alleged herein" is entirely conclusory in nature. *Id.* ¶¶ 26-28.

Mere assertion that Bishop Tobin must have been speaking on behalf of DAC, DSC, and RCB whenever he said anything—without any regard for the corporate form—is legally insufficient to state a claim. To the contrary, the Rhode Island Supreme Court has previously held that the corporate form matters when dealing with religiously affiliated corporations. *See Doe v. Gelineau*, 732 A.2d 43, 44, 49 (R.I. 1999). In that case, the plaintiffs sued RCB for certain alleged tortious acts that occurred to youth at a separate corporate entity affiliated with the Diocese of Providence. *Id.* at 45. The Rhode Island Supreme Court held that,

although Bishop Gelineau was the ecclesiastical head of the diocese, and served as the President, Treasurer, and Director at a separate corporate entity, "[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." *Id.* at 49 (*quoting Stratford Credit Corp. v. Berman*, 54 A.2d 404, 407 (R.I. 1947)).[5]

B. The FAC Fails to Allege Any Facts Supporting an Inference that Bishop Tobin and Other Individuals Were Acting on Behalf of the Diocesan Defendants

Boilerplate allegations that Bishop Tobin "was acting within the scope of his employment by [each of the Diocesan Defendants] with respect to all of his actions and omissions alleged herein," FAC ¶¶ 26-28, are legally insufficient for the additional, independent reason that the fraud and conspiracy claims raised here are subject to the heightened pleading standard of Fed. R. Civ. P. 9(b). Rule 9(b) provides that "in alleging fraud . . . a party must state with particularity the circumstances constituting fraud . . . ." "[W]here multiple defendants are involved, each person's role in the alleged fraud must be particularized in order to satisfy Rule 9(b)." *W. Reserve Life Assurance Co. of Ohio v. Caramadre*, 847 F. Supp. 2d 329, 343 (D.R.I. 2012) (internal quotation marks omitted); *see also* 2 Moore's Federal Practice § 9.03[1][f] ("[A] claimant usually may not group all wrongdoers together in a single set of allegations. Rather, the claimant is required to make specific and separate allegations against each defendant."). Other courts have explained this principal in the context of broad allegations of a conspiracy to deceive:

> In a case involving multiple defendants, Rule 9(b) mandates that the complaint inform each defendant of his alleged role in the deception. Broad allegations that several defendants participated in a scheme, or conclusory assertions that one defendant controlled another, or that some defendants are guilty because of their

[5] Courts applying *Gelineau* have likewise dismissed corporate entities of the Roman Catholic Church to the extent that those claims "rest[] on the Bishop's status as a corporation sole and the ecclesiastical head of the diocese." *Devaney v. Kilmartin*, 88 F. Supp. 3d 34, 58 (D.R.I. 2015).

> association with others, do not inform each defendant of its role in the fraud and do not satisfy Rule 9(b).

Kolbeck v. Lit America, Inc., 923 F. Supp. 557, 569 (S.D.N.Y. 1996) (granting defendants' motion to dismiss plaintiffs' complaint for fraud where complaint contained vague and conclusory allegations of agency and conspiracy).[6]

In this case, the FAC lumps RCB, DAC, and DSC together (and in many places with other defendants as well) without any differentiation, and the FAC fails to inform each of those defendants of its alleged role in the deception or conspiracy. While Bishop Tobin may be authorized to speak on behalf of RCB, DAC, and DSC in certain instances, the pleading defect of the FAC is that it does not plead any facts (as opposed to conclusory assertions) explaining why he was speaking on behalf of those entities (as opposed to himself or any other entities on whose behalf he may be authorized to speak) when making the alleged statements. Accordingly, the FAC fails to state a claim as a matter of law against RCB, DAC, and DSC.

II. THE FAC DOES NOT STATE A CLAIM UNDER ERISA

Plaintiffs have asserted that the Plan became subject to ERISA no later than April 29, 2013 and perhaps as early as 2009. FAC ¶¶ 75-79. Thus much, if not all, of the alleged conspiracy to orphan the Plan occurred after ERISA attached, especially as it concerns the purported role of the Diocesan Defendants (i.e., approving the asset sale and writing to the Vatican in August/September 2013, *id.* ¶¶ 141-79, writing to the Health Services Council in

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[6] District courts throughout the nation have recognized this principle, too. *Adams v. NVR Homes, Inc.*, 193 F.R.D. 243, 250 (D. Md. 2000) ("Where a plaintiff is seeking to hold a defendant vicariously liable for the acts of its agents, it must allege the factual predicate for the agency relationship with particularity"); *Gunderson v. ADM Investor Servs., Inc.*, 85 F. Supp. 2d 892, 905-06 (N.D. Iowa 2000) ("[P]leading of allegations of agency must also meet the requirements of Federal Rule of Civil Procedure 9(b) where the allegations of fraud are based on a claim of agency"); *Whitney Nat'l Bank v. Medical Plaza Surgical Ctr., LLP*, No. H-06-1492, 2007 WL 400094, at *3 (S.D. Tex. Feb. 1, 2007) ("[W]hen agency is an element of a fraud claim, agency must be pleaded with particularity required under Rule 9(b)."); *accord Hitachi Capital Am. Corp. v. Andress*, No. H-06-1959, 2007 WL 2752696, at *3 (S.D. Tex. Sept. 20, 2007).

February 2014, *id.* ¶¶ 320-22, and agreeing that SJHSRI could appear in the 2015-2017 editions of the Official Catholic Directory, *id.* ¶¶ 183-203). To the extent ERISA controls during this period, it precludes the relief Plaintiffs seek against non-fiduciaries like the Diocesan Defendants and significantly limits any potential recovery in this case.

A. Legal Standard – Count III Should Be Dismissed as an Inappropriate Request for Money Damages Not Cognizable Under § 1132(a)(3)

Section 1132(a)(3) authorizes lawsuits "(A) to enjoin any act or practice which violates any provision of [ERISA] or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of [ERISA] or the terms of the plan." The U.S. Supreme Court has explained that "the term 'equitable relief' in § [1132(a)(3)] is limited to 'those categories of relief that were *typically* available in equity' during the days of the divided bench (meaning, the period before 1938 when courts of law and equity were separate)." *Montanile v. Bd. of. Trs. Of Nat'l Elevator Indus. Health Benefit Plan*, 577 U.S. 136, 142 (2016) (emphasis in original) (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993)). "[L]egal remedies—even legal remedies that a court of equity could sometimes award—are not 'equitable relief' under § [1132(a)(3)]." *Id.* at 661. Suits for money damages, therefore, are not cognizable. *See Mertens*, 508 U.S. at 255; *see also Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002) (holding suits "to impose personal liability" on defendant and "compel the defendant to pay a sum of money to the plaintiff" not proper under § 1132(a)(3)); *Drinkwater v. Metro. Life Ins. Co.*, 846 F.2d 821, 824 (1st Cir. 1988) ("Other appropriate equitable relief should be interpreted to mean what it says—declaratory or injunctive relief, not compensatory and punitive damages.").

Rather, "[e]quitable remedies are, as a general rule, directed against some specific thing; they give or enforce a right to or over some particular thing . . . rather than a right to

recover a sum of money generally out of the defendant's assets." *Montanile*, 577 U.S. at 145 (internal quotation marks and citation omitted). A § 1132(a)(3) plaintiff, therefore, "must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Knudson*, 534 U.S. at 214. Where the defendant either spends funds on untraceable items or commingles funds with other monies—§ 1132(a)(3) ***does not permit*** the plaintiff to proceed against the defendant's general assets. *See Montanile*, 577 U.S. at 139 ("We hold that, when a participant dissipates the whole settlement on nontraceable items, the [plaintiff] cannot bring a suit to attach the [defendant's] general assets under § [1132(a)(3)] because the suit is not one for 'appropriate equitable relief.'").

B. Plaintiffs' Allegations

Plaintiffs' attempt to characterize the requested relief as "equitable" fails as a matter of law because the facts and remedy sought manifest that Plaintiffs are seeking money to make up a funding deficiency. FAC ¶ 39. No matter how couched, that is a claim for legal damages, a remedy unavailable against the Diocesan Defendants under ERISA. Specifically, Plaintiffs ask this Court to order the Diocesan Defendants:

- "to fund the Plan in accordance with ERISA's funding requirements," *Id.* (Count III, C);
- "make the Plan whole for all contributions that should have been made pursuant to ERISA funding standards, and for interest and investment income on such contributions," *Id.* (Count III, D);
- "disgorge any profits accumulated as a result of their fiduciary breaches"; *Id.* (Count III, D);
- "order declaratory and injunctive relief as necessary and appropriate, including enjoining . . . Corporation Sole, Diocesan Administration, [and] Diocesan Service. . . from further violating the duties, responsibilities, and obligations imposed on them by ERISA, with respect to the Plan;" *Id.* (Count III, E).

On top of that, Plaintiffs ask the Court to award, declare, or otherwise provide:

- "all relief under 29 U.S.C. § 1132(a), or any other applicable law, that the Court deems proper, and such appropriate relief as the Court may order, including an accounting, surcharge, disgorgement of profits, equitable lien, constructive trust, reformation of the Plan to conform to Defendants' promises and assurances to participants and beneficiaries, reformation of the Plan to comply with ERISA including but not limited to ***the minimum funding provisions of ERISA, equitable estoppel to fund the Plan***, or other remedy;"

Id. (Count III, F) (emphasis added).

C. The FAC Fails to Allege an Entitlement to Appropriate Equitable Relief

The FAC does not allege facts to indicate that the requested relief is "appropriate equitable relief" under § 1132(a)(3). It alleges that the Plan has tens of millions of dollars in unfunded liability, FAC ¶¶ 325-326; it does ***not*** allege that the Diocesan Defendants currently possess or retain specific monies or property from the Plan or the alleged fiduciary breaches; nor do they allege that the Diocesan Defendants are ERISA fiduciaries.[7] *Id.* ¶¶ 463-69 & Wherefore Clause (identifying only SJHSRI and CCCB as ERISA fiduciaries).

U.S. Supreme Court precedent forecloses efforts to collect money damages by simply using equitable buzzwords. In *Knudson*, the Court refused a benefit plan insurer's efforts to seek "restitution" from a plan participant's settlement with a tortfeasor, where the settlement funds had gone to the participant's attorneys and a restricted trust. 534 U.S. at 208-09, 213-14. Because the participant never held the settlement funds, the Court ruled that the insurer was seeking legal, as opposed to equitable relief. The Court reasoned: "Almost invariably . . . suits

[7]A person is an ERISA fiduciary to the extent

> (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A). Plaintiffs do not allege that the Diocesan Defendants held such authority at the time of the purported fiduciary breaches. If anything, they allege the opposite: "Corporation Sole, Diocesan Administration, and Diocesan Service share responsibility for the 2014 Asset Sale and the retention of the Plan by an insolvent SJHSRI, not because they controlled SJHSRI (*which they did not*), but because they participated" in an alleged conspiracy with SJSHRI. FAC ¶ 203 (emphasis added).

seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money . . . are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty." *Knudson*, 534 U.S. at 210.

Similarly, in *Mertens*, the Supreme Court rejected a § 1132(a)(3) claim against a non-fiduciary to make up a funding deficiency, where the non-fiduciary allegedly assisted a breach of fiduciary duty. 508 U.S. at 253, 261-63. The Court reasoned that the plaintiffs did not "seek a remedy traditionally viewed as equitable, such as an injunction or restitution." *Mertens*, 508 U.S. at 255. Instead, the Court observed that "[a]lthough they often dance around the word, what petitioners in fact seek is nothing other than compensatory *damages*—monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties." *Id.* (emphasis in original). Such relief, however, was not cognizable under § 1132(a)(3). *Id.* at 257.

Lower courts have heeded the Supreme Court's holdings and do not tolerate semantic subterfuge as a means of expanding the relief available under § 1132(a)(3) to reach money damages. *See, e.g.*, *Todisco v. Verizon Commc'ns, Inc.*, 497 F.3d 95, 99-100 (1st Cir. 2007) (finding that equitable estoppel cannot be a basis to provide plaintiff with benefits due under the terms of a plan under § 1132(a)(3), as it smacks of legal relief); *Knieriem v. Grp. Health Plan*, 434 F.3d 1058, 1064 (8th Cir. 2006) ("Merely re-labeling the relief sought as 'restitution' or 'surcharge'[8] does not alter the nature of a remedy from monetary to equitable. In

[8] Surcharge, moreover, is not available for the additional reason that Plaintiffs do not allege that the Diocesan Defendants were ERISA fiduciaries. *See Depot, Inc. v. Caring for Montanans, Inc.*, No. CV 16-74-M-DLC, 2017 WL 3687339, at *4-5 (D. Mont. Feb. 14, 2017); *see supra* note 7. The Ninth Circuit would agree with this conclusion when affirming in relevant part, and reversing on other grounds, a subsequent order from the district court granting a motion to dismiss an amended complaint. *See Depot, Inc. v. Caring for Montanans, Inc.*, 915 F.3d 643, 664 n.15 (9th Cir. 2019).

the present case, Knieriem seeks money damages which are unavailable under section 1132(a)(3)(B) of ERISA.").

The FAC's reference to the receipt of wholly separate loan proceeds allegedly received by the non-party Inter-Parish Loan Fund from the 2014 Asset Sale does not change the analysis. FAC ¶ 209. Plaintiffs do not allege that the Diocesan Defendants ever possessed these particular funds or that they are traceable to a particular asset. *See Montanile*, 577 U.S. at 139. Their request for an order to "fund the Plan" consistent with ERISA is detached from any specific property purportedly held by the Diocesan Defendants and instead represents a claim for money damages. FAC (Count III, C). The law is clear. The FAC fails to allege any facts or circumstances permitting equitable relief. *See Montanile*, 577 U.S. at 144-46. Accordingly, this Court should dismiss Count III.

III. PLAINTIFFS' CLAIMS ARE CONCLUSORY, INCONSISTENT, AND CONTRADICTED BY DOCUMENTS REFERENCED IN THE FAC AND IN THE PUBLIC RECORD AND SHOULD BE DISMISSED ON THE PLEADINGS AS IMPLAUSIBLE

After reviewing the well-pled facts alleged in the FAC, and comparing what the documents cited in the FAC or capable of judicial notice actually say as opposed to how Plaintiffs characterize them, it becomes apparent that the story Plaintiffs paint is implausible, conclusory and contradictory. Further, the (limited) actions ascribed to diocesan actors (not the Diocesan Defendants) were completely compatible with lawful conduct.

Although the Court must assess the individual frailties of the alleged conspiracy discussed in the Parts that follow, it also has an obligation to assess the plausibility of the alleged conspiracy overall and specifically whether it is more or equally plausible that the *facts* actually alleged – not conclusions and characterizations – point to lawful activity. This assessment is done at the pleading stage. The U.S. Supreme Court has 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.'" *Twombly*, 550 U.S. 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)). In that case, the Court went so far as to say that, while the allegations before it could be consistent with unlawful conduct, "given more likely explanations," the complaint did not plausibly allege a claim. *Id.* at 681. "Determining whether a complaint states a plausible claim to relief," then, will "be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679; *see 16630 Southfield Ltd. P'ship v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 504 (6th Cir. 2013) (explaining that plausibility "depends on a host of considerations, including common sense and the strength of competing explanations for the defendant's conduct.").

Here, Plaintiffs accuse the Diocesan Defendants of joining a conspiracy and rest that claim on substantially the same allegations that Plaintiffs rest their other claims. *Compare* FAC ¶ 503 (incorporating allegations in conspiracy count) *with id.* ¶¶ 470, 494, 498, 531, 535, 539, 543, 551, 554 (incorporating allegations in other counts). Thus, it is appropriate for the Court to consider whether the limited facts actually directed against the Diocesan Defendants are equally consistent with a lawful purpose or an obvious alternative explanation when considering the plausibility of Plaintiffs' conspiracy claim and those underlying it. *Twombly*, 550 U.S. at

567; *Stubbs v. Taft*, 149 A.2d 706, 708-09 (R.I. 1959). The Diocesan Defendants raise the components of the lawful alternative explanation at various points in this motion. They put them in one place here for the Court's convenience:

- From at least 1995 forward, no diocesan entity was either the sponsor nor the administrator of the Plan. FAC ¶¶ 215-17. The FAC does not allege any facts to support the assertion that any diocesan entity had any obligation to fund the Plan. Rather it places that obligation with SJHSRI. *Id.* ¶¶ 221, 225, 261, 467, 512.

- Plaintiffs allege that various defendants had been lying about the funded status of the Plan and their intent to fund the Plan since before the Great Recession, as far back as the 1970s. *See, e.g.*, FAC ¶¶ 63, 221, 259-84. As demonstrated *infra* at Part IV, documents cited in the FAC and posted to the Receiver's website demonstrate that the Plan was adequately funded until it (and the hospital) took a giant hit in the Great Recession, from which it never recovered.

- Prior to the 2014 Asset Sale, SJHSRI and the CharterCare system of which it was a part were in dire straits, as was the Plan. FAC ¶ 55(b); *infra* Part III.A.1. Plaintiffs allege this was concealed. FAC ¶ 54. The condition of the Plan and SJHSRI was actually known to the hospital workers, the regulators, and the public at large via public filings if nothing else. Indeed, the financial conditions of SJHSRI and the Plan were declared to be the driving forces behind the 2014 Asset Sale in the application to regulators. *Infra* Part III.A.1.

- Documents referenced in the FAC and public records show that, prior to the 2014 Asset Sale, RCB was the Class B member of SJHSRI and in that capacity had authority over the Catholicity of the hospital and the right to approve the transfer of hospital assets exceeding certain canonical thresholds. *Infra* Part III.A.7, V.E.2.a & VI.A.3 (discussing RCB's rights as set forth in SJHSRI's governing documents); *see also* FAC ¶ 237. SJHSRI was intended to

continue to exist as a separate corporate entity after the 2014 Asset Sale. FAC ¶¶ 355, 392. There is no allegation that RCB relinquished its Class B member rights.

- Also prior to the 2014 Asset Sale, SJHSRI was listed in the Official Catholic Directory, as it had been for decades. *Id.* ¶ 109. This listing meant that SJHSRI "was 'operated, supervised, or controlled by or in connection with the Roman Catholic Church' in the Diocese of Providence." *Id.* It did not mean the Plan qualified as a "church plan" under ERISA. *Infra* Part V.E.2.a & VI.A.2. Listing in the directory continued after the transaction. FAC ¶¶ 183, 190-91. Continued listing was proper in light of RCB's continuing Catholicity controls and because the for-profit Prospect had not acquired SJHSRI, as shown by public records and documents referenced in the complaint. *Infra* Part III.A.7, V.E.2.a, and VI.A.3.

- As part of the proposed asset sale, the parties to the transaction (not the Diocesan Defendants) agreed that the new hospital corporations to be formed upon the sale would maintain the Catholicity that had existed at Our Lady of Fatima Hospital prior to the sale. *Id.* ¶¶ 149-50; Ex. 11 (Asset Purchase Agreement) § 13.16. Plaintiffs paint this as an illicit quid pro quo. FAC ¶ 153. Yet, RCB already had the authority to control the Catholicity of Our Lady of Fatima under SJHSRI's governing documents. *Infra* III.A.7. Further, the statutory factors set forth by the Rhode Island General Assembly for hospital conversions include whether the proposal under consideration was mindful of carrying out the existing hospital's mission and purpose. R.I. Gen. Laws § 23-17.14-7(c)(3) & (5).

- As part of the proposed asset sale, the assets of SJHSRI's operating hospital (Our Lady of Fatima) were to be transferred from SJHSRI to a separate for-profit hospital. FAC ¶¶ 55(d)(i), 433. Plaintiffs assert that the Diocesan Defendants had a "veto" over the sale because of the latter's purported ability to maintain the Plan as a church plan. *Id.* ¶ 202. But documents

in the public record and referenced in the FAC establish that this "veto" was among RCB's rights under SJHSRI's governing documents. *Infra* Part III.A.7 & VI.A.3.

- Bishop Tobin and those who assisted him with approving the alienation sat through a presentation by CharterCare executives and their counsel explaining the proposed transaction. FAC ¶¶ 141-49, 153, 164-69. That same presentation—which Plaintiffs claim sets out an illicit "quid pro quo" conspiracy, *id.* ¶ 153—was prepared for the Board of Trustees of CCCB, SJHSRI, and RWH, *id.* ¶ 143, a constituency that included lawyers, businesspeople, health care experts, etc., among their number.[9] The presentation does not set forth a quid pro quo or obligations on the part of the Diocesan Defendants. *Infra* Part VI.A.3.

- Bishop Tobin and those who assisted him with approving the requested alienation ultimately agreed to seek approval from the Vatican to alienate the assets of SJHSRI, *id.* ¶ 179-80, as that approval was a requirement of the Code of Canon Law, 1983 Code c.1292, § 2.

- To effectuate that decision, Bishop Tobin set out the rationale for alienation in a letter to the Vatican.[10] FAC ¶ 179; Ex. 21 (Vatican Letter). That letter:

    - Stated: "in the wake of the global economic downturn, CharterCARE soon began to experience the need for increased capital and was confronted with a significant unfunded liability within its employee pension-system."[11] Ex. 21 at 1.

    - Explained that CharterCARE had "selected a capital partner that will better enable CharterCARE (and SJHSRI/Our Lady of Fatima Hospital) to meet the daily needs of its patients, and to provide assurances for its hundreds of employees and the security of their pension benefits." *Id.* at 2.

    - Provided a description of the transaction, including that the assets of SJHSRI and RWH would be sold in return for $45,000,000 and a 15% membership

[9] FAC ¶¶ 138, 163, 181, 239, 368, 434 (describing meetings attended by Edwin Santos, Kenneth Belcher, Elaine Jones, Donald McQueen, Sheri Smith, Daniel Ryan, Marshall Raucci, Rev. Kenneth Sicard, William Loehning, Charles Maynard, and Joseph DiStefano among others).

[10] Bishop Tobin sent a second letter to the Health Services Council that essentially makes the same statements. FAC ¶ 320; Ex. 24 at 1-2.

[11] As described, *infra* Part V.B.1, that is an accurate statement.

interest in the new Prospect system and that $14,000,000 of the proceeds would go to the Plan. *Id.* at 1.

- Opined that without the proposed transaction, "a consistent Catholic healthcare presence in the Diocese of Providence would be gravely compromised, and the financial future for employee-beneficiaries of the pension plan would be at significant risk." *Id.* at 2.

- The Vatican ultimately approved the alienation of the assets. FAC ¶ 182. So, too, did the Attorney General's Office and the Department of Health. *Id.* ¶¶ 391, 431(f).

The goals set out in the letter to the Vatican, and the actions described above are lawful: providing support for a transaction that would bring needed capital and pension contributions to a failing hospital and its pension plan; working to preserve a Catholic health care presence in Rhode Island; recognizing a continuing connection between SJHSRI and the Roman Catholic Church; seeking approvals needed to move forward a long-sought after solution to a hospital system in crisis. This Court must assess the facts alleged against the obvious, lawful alternative explanation set out above. "[P]leading trigger language like 'conspired,' 'schemed,' and 'calculated' is insufficient to establish a claim for conspiracy." *Hunter v. Ferebauer,* 980 F. Supp. 2d 1251, 1261-1262 (E.D. Wa. 2013). The FAC does not survive that analysis. *Iqbal*, 556 U.S. at 678-84; *Twombly*, 550 U.S. at 566-70; *Stubbs*, 149 A.2d at 708-09.

The remainder of Part III explains that the alleged scheme upon which Plaintiffs rest their case is not plausible because (A) it is premised on the non-disclosure of facts that were actually disclosed; (B) turns on a subject matter (the legal conclusion as to whether the Plan qualified as a church plan) that was incapable of fraud as a matter of law; and (C) contradicts itself as to what Plaintiffs understood as to the Plan's qualification as a church plan.

A. A Fraudulent Conspiracy Fails to State a Claim Where Documents Referenced in the FAC or in the Public Record Show that Facts Allegedly Concealed Were Disclosed to State Regulators and the Public

Part III.A will examine each segment of the so-called "plot" or "quid pro quo" conspiracy and demonstrate that every component was revealed to at least the regulators, and often more broadly, at the time of the proposed transaction. Even more bizarrely (in the context of an alleged fraud or illicit conspiracy) several of the alleged "deceptions" were actually identified to and by the regulators as the very crisis requiring approval of the transaction.

Plaintiffs' "conspiracy" allegations are as follows: (1) 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.*, FAC ¶ 148. (2) All of SJHSRI's assets would be transferred to a new separate company which would leave the Plan orphaned without any operating assets, having received "only" an additional $14 million. *Id.* ¶¶ 55, 147-48, 154. (3) The Diocesan Defendants would agree to continue to maintain SJHSRI in the Official Catholic Directory and therefore, according to Plaintiffs, the Plan could continue as a church plan. *Id.* ¶¶ 153-55. (4) The conspirators did this knowing that the Plan was actually an ERISA plan to trick the rest of the world into believing that ERISA did not apply.[12] *Id.* ¶ 55(d)(ii). (5) As their payoff, 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. (6) Via this scheme, and somehow unbeknownst to all but the schemers, the Plan participants—who were either deceived into thinking they had an ERISA plan, *id.* ¶ 318, or deceived into thinking they had a church plan, *id.* ¶¶ 55(d)(ii), 203—would not have the protection of ERISA.[13] *Id.* ¶ 154.

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[12] Though in other places in the FAC, Plaintiffs allege the Diocesan Defendants never told Plan participants that the Plan was a church plan to trick them into believing that ERISA did apply! FAC ¶ 318.

[13] All counts directed at the Diocesan Defendants incorporate paragraphs 55, 114-58, and 203 and, excluding Count XVI, the same goes for paragraph 318.

1. *No One Hid that the Plan Was Underfunded in 2013-2014; Knowledge that the Underfunded Plan Was at Risk Was a Key Driver Behind the 2014 Asset Sale*

Any suggestion that the underfunded status of the Plan[14] was hidden from the public or regulators fails when juxtaposed with the documents cited in the FAC and in the public record. References to funding deficits abound in the alleged conspirators' application to the regulators. The Change-in-Effective Control Application ("CEC Application")[15] attached SJHSRI's financial statements for the years 2009 through 2013.[16] That application is referenced in the FAC and also is public record, susceptible to judicial notice.[17] Each of those financial statements contains several pages of notes discussing the Plan. Each shows a negative funding status for the Plan. The year 2010 is illustrative. It shows the "[f]unded status of the Plan" as ($51,004,155). Ex. 12 at PCEC001543. The figures set forth in the reports submitted to the regulators for the other years go from ($50,871,072) in 2009, *id.*, to ($92,962,281)[18] in 2013, Ex. 16 at PCEC001297.

The CEC Application also attaches the Asset Purchase Agreement ("APA") between Prospect and CCCB, SJHSRI, and RWH (and not the Diocesan Defendants). Ex. 11 (APA). Section 4.29 of the APA addresses the Seller's (i.e., CCCB, SJHSRI, and RWH's) solvency and states that it is not insolvent "***[a]fter exclusion of Liabilities associated with the***

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[14] FAC ¶¶ 258(b), 282, 322, 356.
[15] The complete CEC Application is available through the Rhode Island Department of Health's website at https://drive.google.com/file/d/0B9lx-sHDAL9qczFyRkVfTmpoRVk/view.
[16] Ex. 12 (Excerpted 2009-2010 Financial Statements); Ex. 13 (Excerpted 2010 Government Auditors' Report); Ex. 14 (Excerpted 2010-2011 Financial Statements); Ex. 15 (Excerpted 2011-2012 Financial Statements); Ex. 16 (2012-2013 Financial Statements).
[17] *See* FAC ¶¶ 305, 431(f) (referencing application to Department of Health); *see In re Colonial Mortg. Bankers Corp.*, 324 F.3d 12, 15-16 (1st Cir. 2003) (discussing the consideration of "matters susceptible to judicial notice" on a motion to dismiss and recognizing "the hoary tenet that a court 'may look to matters of public record in deciding a Rule 12(b)(6) motion'" (internal citation omitted)).
[18] The valuations in the financial statements are pursuant to accounting principles and not the actuarial standards applied in ERISA or by actuaries and used in the Actuarial Reports discussed *infra* at Part IV.

Retirement Plan due to their uncertainty of amount[.]" Ex. 11 § 4.29 (PCEC000044) (emphasis added); *see* FAC ¶ 449.

The Attorney General's Decision[19] granting regulatory approval of the transaction similarly establishes that everyone involved understood the Plan's funding status:

> Of additional concern to [CCCB] is its pension funding (an issue that is impacting many hospitals around the country). If pension losses are taken into consideration, in fiscal year 2012, the [CCCB] system sustained losses of over $8 million dollars which are increasing without additional contributions. ***Such losses cannot be sustained*** by [CCCB].

Ex. 17 (Attorney General's Decision) at 9 (emphasis added); *see* FAC ¶ 391 (referring to the Attorney General's Decision). The regulators, thus, were told and ***understood*** that the Plan was falling further behind in funding each year—***unsustainable*** losses that exceeded $5 million annually. *See id.* at 8-9; *see also* Ex. 10 (Excerpted CEC Application) at 2 (conveying similarly).

2. *The Transfer of Assets Away from SJHSRI to a New Entity Was Not Hidden from the Regulators—It Was Expressly Revealed and Part of the Fundamental Architecture of the Entire Transaction*

The FAC also alleges that the Diocesan Defendants conspired with other defendants to strip away all of SJHSRI's assets but leave the Plan's liability with SJHSRI after the 2014 Asset Sale. FAC ¶¶ 154-55. As a threshold matter, the structure of the 2014 Asset Sale was a secret to no one. The very name of the governing agreement—Asset Purchase Agreement—screams out that this transaction is an ***asset purchase***. *See generally* Ex. 11. The structure of this deal was not lost on the regulators. *See* Ex. 17 at 20. The Attorney General's Decision declares: "As described in the Asset Purchase Agreement (APA), Prospect Medical Holdings (Prospect) through a series of subsidiaries, is acquiring substantially all of the assets of

[19] The Attorney General's decision is referenced in the FAC. FAC ¶ 391. It is also available on the Attorney General's website at http://www.riag.ri.gov/documents/5-16-14AGFinalDecision.pdf.

[CCCB].” *Id.* If that was not clear enough, numerous other public records and records referenced in the complaint, discussed below, disclosed the nature of the transaction.

3. *The APA Stated Expressly that Liabilities for the Plan "Shall Remain" and Were Not Being Assumed by the New Hospital Entities*

The APA[20] declares that the liability for the Plan will remain with SJHSRI. Section 2.4 of the APA states:

> 2.4 Excluded Liabilities of Sellers. Notwithstanding anything herein to the contrary, the Company and/or the Company Subsidiaries are assuming only the Assumed Liabilities and are not assuming and shall not become liable for the payment or performance of any other Liability of Sellers (collectively, the "Excluded Liabilities"). The Excluded Liabilities are and shall remain Liabilities of the Sellers. Without limiting the generality of the foregoing, the term "Excluded Liabilities" includes any Liability: … (iii) that is described on Schedule 2.4 . . . .

Ex. 11 at PCEC000017. Schedule 2.4, "Certain Excluded Liabilities," explicitly lists ***"All Liabilities related to the Retirement Plan."*** *Id.* at PCEC000274 (emphasis added); *see also id.* at PCEC000106 (indicating that "the Retirement Plan" is the Plan). That the Plan was staying with SJHSRI was known not just by the regulators, but also to employee unions. FAC ¶ 299.

4. *It Was Disclosed to Regulators that SJHSRI's Debt Vastly Exceeded the Estimated Value of SJHSRI's Assets*

Regulators were also aware that SJHSRI's estimated value was dwarfed by its debts (pension and non-pension). The parties to the 2014 Asset Sale provided the regulators with an estimated valuation of SJHSRI prepared by the investment banking firm, Cain Brothers & Company, LLC ("Cain Bros."). Ex. 25 (Cain Bros. Valuation of SJHSRI). Cain Bros. valued SJHSRI at between $15 million and $25 million, and observed that SJHSRI had approximately $16.5 million in secured debt. *Id.* at 9, 21. In contrast, regulators also knew from SJHSRI's 2013 financial statements that the Plan was underfunded by more than $90 million from an

[20] Referenced at paragraphs 140, 142, 148, 153, 172, 306, 417, 420, 429, 443, and 447-49 of the FAC.

accounting perspective. Ex. 16 at PCEC001297. Regulatory submissions thus made clear that, in the event of an insolvency, most of SJHSRI's going concern value and/or assets (value Plaintiffs claim the conspiracy was designed to keep from the Plan)[21] would have been gobbled up by SJHSRI's secured creditors, leaving nothing or, in a best-case scenario, about $8.5 million for the Plan to split with the rest of SJHSRI's unsecured creditors. In contrast, the 2014 Asset Sale resulted in $14 million being added to Plan assets.[22] Ex. 17 at 21.

5. *The Parties to the Transaction and Regulators Took Steps to Help the Plan Beyond the $14 million Payment and Set Out Mechanisms to Fund the Plan in the Future*

There was never any misapprehension or conspiracy to hide the amount of money that actually was going to be paid into the Plan upon the closing of the 2014 Asset Sale. The $14 million contribution was expressly identified in the Attorney General's Decision. *Id.* Despite Plaintiffs' conclusory claims to the contrary, there was never any misapprehension or conspiracy to hide that the Plan would not be fully funded, even after that $14 million contribution. The regulators asked questions specifically directed to this very issue. FAC ¶¶ 343-44, 355-57. The parties to the APA (not the Diocesan Defendants) submitted further information directed to this very question in response to direct inquiries from the regulators on that subject. *See Id.* ¶¶ 347-49; Ex. 26 (Confidential Final Supplemental Responses to the HCA Application) at SFC-PHCA00035.

While the FAC spends considerable time asserting what third parties knew or did not know, intended or did not intend, the *actual contents* of this regulatory submission makes plain that, even with the $14 million infusion *and* annual contributions, the Plan could be

[21] FAC ¶¶ 55, 130, 154-55, 177, 295, 321, 342, 451.

[22] As a result of actions taken in response to inquiries from the Attorney General's Office, the RWH/RWMC Board made another $6+ million available to the Plan as well. FAC ¶¶ 357-59; *infra* Part III.A.5.

exhausted as early as 2032, with millions remaining in unpaid benefits. Ex. 26 at SFC-PHCA00035. The same submission highlighted the transacting parties' position that there was no obligation to make future contributions: "Enclosed herein at Attachment 1 is a listing of the projected contributions necessary to keep the St. Joseph Health Services of Rhode Island Retirement Plan (the 'Pension Plan') funded at recommended levels. ***First, it is important to note that these contributions are not mandatory.***" Ex. 26 at SFC-PHCA00033 (emphasis added).

The parties to the APA (not the Diocesan Defendants) told regulators that investment income and profit distributions post-transaction would permit future contributions, but the regulators clearly understood that there was an "investment risk." FAC ¶¶ 355-58. That reality was a subject of discussion before the Health Services Council. *Id.* ¶ 355. Coterminous with those discussions, the Attorney General requested that CCCB establish mechanisms for additional funding and the Board of RWMC did exactly that, providing the regulators with a resolution of the RWMC Board of Trustees authorizing the use of ***an additional $6,666,874 in RWMC funds*** to help fund the Plan.[23] *Id.* ¶¶ 357-59, 391-93; Ex. 27 (Email from Patricia Rocha (counsel for CCCB) to Attorney General enclosing RWMC board resolution authorizing use of board designated funds to help satisfy Plan liabilities).

6. *The Plan's Treatment as a Church Plan Was Disclosed to Regulators and UNAP*

The FAC alleges that the parties to the 2014 Asset Sale agreed to continue the Plan as a church plan not subject to ERISA. *Id.* ¶¶ 55(d)(ii), 64, 128, 136, 139, 153-54, 317, 426. It claims that defendants concealed this. *Id.* ¶¶ 64, 275, 317-18. This is contradicted by documents referenced in the FAC—documents submitted to state regulators—and sworn

[23] Plaintiffs allege that RWH is "the survivor of a merger in 2010 with Roger Williams Medical Center, and has sometimes done business under that name." FAC ¶ 17.

statements by UNAP's general counsel submitted to the Court. For example, Section 4.17(i) of the APA states clearly that "The Retirement Plan is a Church Plan." Ex. 11 at PCEC000037. "Retirement Plan" is a defined term in the APA. *Id.* at PCEC000106. "Retirement Plan" means "the St. Joseph Health Services of Rhode Island Retirement Plan." *Id.*

The financial statements submitted with the CEC Application also explicitly identify the Plan as a "church plan." Ex. 15 at PCEC001474. The Notes to the Consolidated Financial Statements for September 30, 2012 and 2011 state:

> SJHSRI has a defined benefit pension plan which covers substantially all of the SJHSRI's employees. The Plan is a ***non-electing church plan*** under the Internal Revenue Service and is not subject to the participation, vesting, and provisions of the Internal Revenue Service code.

Id. (emphasis added).

And, despite Plaintiffs' allegations of ignorance, FAC ¶ 318, Plaintiffs have recently provided the Court with sworn testimony from Christopher Callaci, Esq., the General Counsel of the United Nurses and Allied Professionals union ("UNAP"), who was the representative for hundreds of putative class members in their union's negotiations with SJHSRI. Mr. Callaci averred: "During the period from 1998 up to June 20, 2014, senior executives from SJHSRI informed me on many occasions that the Plan was exempt from ERISA because it was a 'church plan.'"[24] Decl. of Christopher Callaci, ECF No. 226-13, ¶ 4; *see Jefferson v. Ansari*, No. 17-439WES, 2019 WL 5696291, at *6 (D.R.I. Nov. 4, 2019) (recommending dismissal and noting that, "while not essential to the decision . . . in considering the claim for injunctive relief against the official capacity Defendants, the Court may take judicial notice of Plaintiff's candid and appropriate representation in withdrawing the motion for preliminary injunction."); *Mohsen*

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[24] Plaintiffs' simultaneous and contradictory allegation that the defendants concealed the Plan's status as an ERISA Plan fails to state a claim for the reasons discussed *infra* at Parts III.B-C.

v. Morgan Stanley & Co., Inc., No. CV-13-07358-MWF (ASx), 2015 WL 13914801, at *5 (C.D. Cal. Oct. 2, 2015) ("The Court is not required to turn a blind eye to Plaintiff's prior pleadings that bear on the plausibility of the claims in *Mohsen II*.").

7. *The Continued Catholicity of the Hospitals Was Disclosed*

The fact that the new entities created as part of the 2014 Asset Sale would be subject to Catholicity requirements was disclosed in the APA, Ex. 11 at PCEC000075-PCEC000076, PCEC000263, and referenced in the Attorney General's Decision. Ex. 17 at 45. This continuation makes sense given that one of the criteria for regulatory approval was whether the transaction under review was mindful of the hospital's existing mission and purpose. R.I. Gen. Laws § 23-17.14-7(c)(3) & (5).

Nonetheless, the FAC's conclusory allegation is that ***if*** the Diocesan Defendants wanted Our Lady of Fatima Hospital to remain Catholic ***then*** they would have to knuckle under to the illicit demands of the other defendants. FAC ¶¶ 153-54. The FAC contradicts that assertion. Our Lady of Fatima was already under contractual restrictions to comply with various Catholicity requirements. *See id.* ¶ 150 ("These 'Catholic identity covenants' included essentially all the rights which the Diocesan Defendants were entitled to exercise over Old Fatima Hospital."). RCB, moreover, already had all the authority it needed to maintain Our Lady of Fatima as a Catholic Institution or approve or reject any sale by virtue of the terms of the Affiliation Agreement and SJHSRI's Articles of Incorporation. Ex. 19 at Ex. A (Articles of Amendment to Articles of Incorporation of SJHSRI) (requiring RCB's consent to actions that could impact SJHSRI's Catholicity and sales of SJHSRI's assets above canonical thresholds); Ex. 28 (Affiliation Agreement) § 2.4.7 (same).

RCB did not need to join some alleged scheme to obtain the benefit of that bargain. It already had that authority. Saying no to the deal would not divest RCB of those

rights. Certainly, this is no basis for claiming RCB joined a conspiracy. *Advanced Tech. Corp. v. Instron, Inc.*, 925 F. Supp. 2d 170, 180 (D. Mass. 2013) (dismissing conspiracy claim as implausible where defendants "had no apparent need to conspire to block an ABI standard when they could effectively accomplish this objective" individually); *see also Optronic Techs., Inc. v. Ningbo Sunny Elec. Co.*, No. 5:16-cv-06370-EJD, 2017 WL 4310767, at *7 (N.D. Cal. Sept. 28, 2017) (rejecting conspiracy claim because "Plaintiff's theory that [defendants] are involved in a conspiracy to restrain trade makes no economic sense in the face of allegations that [one defendant] is already a monopolist" in the relevant market).[25] Rather, motivation for allowing the transaction to proceed is "just as much," if not more, "in line with," the obvious alternative explanation of saving the hospital for the workers it employed and the communities it served, while also bolstering the Plan. *Twombly*, 550 U.S. at 554.

8. *The Disclosures Render the FAC Implausible*

Plaintiffs try to place the trappings of a conspiracy on a transaction that was on full display to the public, and heavily vetted by two state regulators that received substantial facts concerning the present and future of the Plan, as well as SJHSRI and the CharterCARE system. *See supra* Part III.A.1-7. They do so largely by assuming bad intent and using conclusory and pejorative word choice throughout the FAC, not by alleging particular facts. They cannot.

In assessing the plausibility of the FAC, the Court should note that the Rhode Island Attorney General's Office and Department of Health, together with their hired experts, undertook extensive administrative proceedings to assess the proposed transaction that Plaintiffs now claim was an unlawful fraud and conspiracy. FAC ¶¶ 319, 324, 339, 341, 343-44, 347, 350-

[25] Plaintiffs also allege that the Diocesan Defendants (who had nothing to do with the process) improperly listed SJHSRI in the Official Catholic Directory ("OCD") as part of the allege "quid pro quo". FAC ¶ 153-58. These allegations are equally implausible, although not on account of public disclosure. The OCD and the deficiencies of Plaintiffs' claims related thereto are discussed *infra* at Part V.E & VI.A.

53, 355-59, 369, 375-76, 391, 431(f). The regulators reviewed applications, financial statements, witness and expert testimony, appraisals, legal documents and agreements, as well as the allegedly concealed facts on which the conspiracy rests. *Id.* ¶¶ 324, 339, 341, 343-44, 347, 350, 355, 357-59, 369, 375-76; Ex. 10 (Excerpted CEC Application); *supra* Part III.A.1-7. They asked questions about the very issues Plaintiffs cite as instances of deception, including the status and funding of the Plan before and after the transaction. FAC ¶¶ 324, 343-44, 357-59, 369. They assessed this proposal against thirty (30) statutorily defined criteria, including whether the proposed conversion contemplates the appropriate and reasonable fair market value. Ex. 17 (Attorney General's Decision) at 3-6. Far from rejecting the 2014 Asset Sale and indicting the applicants for attempted fraud, the regulators found that the proposed transaction met the exhaustive statutory criteria and approved the sale. *See, e.g.*, *id.* at 1; FAC ¶¶ 391, 431(f).

These regulatory decisions and surrounding context certainly should give the Court pause in allowing Plaintiffs to frame the 2014 Asset Sale through surmise, conclusory language, and pejorative adjectives as a conspiracy prosecuted by various parties and non-parties. *Iqbal*, 556 U.S. at 679. Apart from the Rhode Island Attorney General and Department of Health and their advisors and experts, the Attorney General's Decision lists the other consultants involved in this transaction. Ex. 17 at 14. CCHP hired Cain Brothers & Company, an investment banking firm, Cambridge Research Institute, the Camden Group, Drinker Biddle & Reath, LLP, Canon Design, Angell Pension Group and Schulte Roth Zubel, LLC. *Id.* Prospect added BDO, Cardno ATC, Latham & Watkins LLP, Nixon Peabody, LLP, Rutan & Tucker, LLP, Groom Law Group, Chartered, Sills, Cummis & Gross P.C. and Ferrucci Russo PC

to the mix. *Id.* Add in the Union representatives who reviewed the APA in its entirety. Decl. of Christopher Callaci, ECF No. 226-13, ¶ 5.[26]

At its essence, the FAC asks this Court to conclude that the Diocesan Defendants somehow knew that the 2014 Asset Sale was "*really*" a fraudulent scheme to divert assets from the Plan and its beneficiaries when all of these other entities—with far more knowledge and expertise about the details of the transaction and far more reason to ferret out the true nature of the transaction—did not. (Or they were all in on the conspiracy and should all be named in this lawsuit as defendants.) This conclusion is simply not plausible. *See Twombly*, 550 U.S. at 564-70; *Instron, Inc.*, 925 F. Supp. 2d at 180; *Optronic*, 2017 WL 4310767, at *7; *Stubbs*, 149 A.2d at 708-09; *see also Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1277 (D.C. Cir. 1994) (affirming dismissal of securities fraud claim premised on defendants' failure to pejoratively characterize "disclosed factual matters"); *Precision Assocs., Inc. v. Panalpina World Transp. (Holding) Ltd.*, No. 08-CV-00042(JG)(VVP), 2015 WL 4987751, at *5 (E.D.N.Y. Aug. 19, 2015) (dismissing antitrust conspiracy claim where defendant was subject of regulatory inquiry because it was "not plausible that the antitrust regulators would have offered leniency to a defendant that continued to actively participate in the conspiracy.").

B. Whether the Plan Qualified for the Church Plan Exemption Was Not a Knowable Fact and Therefore Not Capable of Fraud

Plaintiffs' case against the Diocesan Defendants rests in large part on their contention that someone either lied to the Plan participants that the Plan was a church plan OR never told them that the Plan was a church plan. *Compare* FAC ¶ 55(d)(ii) (incorporated in every count alleged against the Diocesan Defendants) *with id.* ¶ 318 (incorporated in all such

[26] Authority for the Court's review of the Callaci Declaration on a motion to dismiss is discussed *supra* at Part III.A.6 and *infra* at Part III.C.1.

counts, except Count XVI). This contradiction renders Plaintiffs' conspiracy theory (and all claims reliant on it) implausible as explained *infra* at Part III.C. But their claims are implausible for another reason: How can a fraud rest on a legal conclusion drawn at a time when the law was so unsettled that the true answer could not be known to a factual certainty, but instead one could argue either position in good faith?[27]

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." *Cardinale*, 567 F.3d at 13 (emphasis added) (quotations and citations omitted); *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 *Iqbal*). Here, that means Plaintiffs must plausibly allege that the Diocesan Defendants (and their alleged co-conspirators) knew the Plan was covered by ERISA for any of the fraud claims to have any merit. Plaintiffs cannot do so, given the state of the law of church plan exemptions prior to 2017 (and beyond) and given their own admissions and actions since filing this lawsuit.

1. *The State of the Law Rendered the Plan's Qualification for the Church Plan Exemption Unknowable*

Any suggestion that the law of the church plan exemption was sufficiently clear at any time relevant to Plaintiffs' claims that the Plan's qualification for the exemption could be the subject of a fraud is belied by the caselaw. That is especially so as it concerns the law of the

[27] This is separate and apart from the additional reality that fraud claims cannot rest on statements of opinion, including legal opinions over whether a pension plan qualifies for ERISA's church plan exemption. Plaintiffs' fraud claim based on such an opinion fails for the same reasons their fraud claims premised on other opinions fail. *Infra* Part V.B.2.

principal purpose organization requirement, which is the ground on which Plaintiffs stake the alleged failure of the church plan exemption prior to the 2014 Asset Sale. FAC ¶¶ 65-81.

Although Plaintiffs paint the concept of a "principal purpose organization" as simple, defined, and well understood in 2013/2014, it was anything but. As late as 2019 (a year *after* this case was filed), the U.S. Court of Appeals for the Seventh Circuit declared that the proper construction of the principal purpose organization requirement—what matters in assessing the principal purpose organization, what can/must it do, how frequent/long should it meet, how much of its authority can it delegate, are corporate formalities enough, etc.—presented "genuine issues of material *law*." *Smith v. OSF HealthCare Sys.,* 933 F.3d 859, 868-70 (7th Cir. 2019) (emphasis in original).

Prior to the seminal U.S. Supreme Court case of *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017)—which substantially clarified the law concerning principal purpose organizations—decisions from courts across the country (including district courts in the First Circuit), held that church affiliated entities (like hospitals) could have church plans ***without*** a principal purpose organization.[28] No case controlling in the First Circuit even suggested that these lower court decisions might be incorrect until *Stapleton* in 2017. Neither the Diocesan Defendants, Bishop Tobin, nor any of the other alleged conspirators could have known the

[28] *See, e.g.*, *Hall v. USAble Life*, 774 F. Supp. 2d 953, 958 (E.D. Ark. 2011); *Ward v. Unum Life Ins. Co. of Am.*, No. 09-C-431, 2010 WL 4337821, at *2 (E.D. Wis. Oct. 25, 2010); *Welsh v. Ascension Health*, No. 3:08cv348/MCR/EMT, 2009 WL 1444431, at *5-7 (N.D. Fla. May 21, 2009); *Rinehart v. Life Ins. Co. of N. Am.*, No. Co8-5486 RBL, 2009 WL 995715, at *3 (W.D. Wash. Apr. 14, 2009); *Torres v. Bella Vista Hosp., Inc.*, CIVIL 06-2158 (JAG), 2009 WL 10717769, at *4-5 (D.P.R. Apr. 13, 2009), *adopting recommendation*, 639 F. Supp. 2d 188, 193 (D.P.R. 2009); *Catholic Charities of Me., Inc. v. City of Portland*, 304 F. Supp. 2d 77, 84-86 & n.4 (D. Me. 2004); *Friend v. Ancilla Sys. Inc.*, 68 F. Supp. 2d 969, 972-73 (N.D. Ill. 1999); *see also Overall v. Ascension*, 23 F. Supp. 3d 816, 827 (E.D. Mich. 2014) (addressing a plan maintained by a principal purpose organization but acknowledging: "Several courts have agreed that plans sponsored by non-church organizations, such as hospitals, can qualify for the 'church plan' exemption but have followed a simpler rule. Specifically, courts require only that the non-profit organization sponsoring the plan be controlled by or associated with a church"). The U.S. Court of Appeals for the First Circuit had not construed the church plan exemption before *Stapleton* (and has yet to do so after *Stapleton*). Likewise for courts in this district.

impact *Stapleton* would have on the law of principal purpose organizations and whether they were even required in 2009, 2011, 2013, or any other time germane to Plaintiffs' claims.[29] *See Casto v. Unum Life Ins. Co. of Am.*, 508 F. Supp. 3d 243, 247-48 (E.D. Tenn. 2020) (discussing line of cases permitting non-church entities to administer church plans absent a principal purpose organization and recognizing these courts did not have the benefit of *Stapleton*).

2. *Plaintiffs' Own Admissions and Conduct Since Filing <u>this Lawsuit Confirms the Implausibility of Their Contentions</u>*

But the Court does not need to take the Diocesan Defendants' word that the Plan's church plan status is not capable of fraud. The Court need only look at Plaintiffs' briefing and actions since they filed this lawsuit. To this day, Plaintiffs contend that they can, consistent with Rule 11, still argue either that the Plan qualified as a church plan or an ERISA plan:

> The fact that Plaintiffs filed their motion [for summary judgment that the Plan was an ERISA plan] in good faith and consistent with Rule 11 does not mean they would be unable to take the contrary position in good faith and consistent with Rule 11. The best illustration of that is that counsel for the Prospect Defendants in good faith and consistent with Rule 11 objected to Plaintiffs' motion and filed the cross-motion that asserted a position completely at odds with Plaintiffs' position.

Pls.' Mootness Reply, ECF No. 224, 17-18. Such an argument not only fails to square with Plaintiffs' simultaneous allegation that the facts and law were so clear years ago that the Plan's status as either a church plan or ERISA plan was a matter capable of fraud; it speaks to a fundamental reality of the law of the church plan exemption that reinforces the implausibility of

[29] To the extent Plaintiffs will argue that they are also alleging that it was equally obvious prior to the 2014 Asset Sale that SJHSRI was not "associated with a church" or tax-exempt and that this rendered representations as to the Plan's church plan status fraudulent, such arguments are as untenable as a fraud based on the principal purpose organization requirement. Plaintiffs' "lack of association" argument relies on *Lown v. Continental Casualty Insurance Co.*, 238 F.3d 543, 548 (8th Cir. 2001). Not only is *Lown* not controlling in the First Circuit, but the case also construed 29 U.S.C. § 1002(33)(C)(iv) so narrowly as to directly conflict with the broad statutory definition of "associated with a church." The Tenth Circuit recognized this in *Medina v. Catholic Health Initiatives*, 877 F.3d 1213, 1224 (10th Cir. 2017). The law on this issue, then, is not clear in the present day, let alone prior to the 2014 Asset Sale. The tax-exemption argument is derivative of the association argument, as it ultimately rests on a purported lack of connection between SJHSRI and the Church, FAC ¶¶ 94-113, a connection that Plaintiffs concede exists. *Id.* ¶ 88.

the alleged conspiracy and underlying claims. *See Jefferson*, 2019 WL 5696291, at *6 (taking judicial notice of filings on the court's own docket); *Munno v. Town of Orangetown*, 391 F. Supp. 2d 263, 269 (S.D.N.Y. 2005) ("The court takes judicial notice of the remaining documents, namely the affidavits and/or pleadings submitted by plaintiff and letters written by plaintiff's counsel in the state court action, as these public documents allegedly contain statements by plaintiff which contradict the factual allegations contained in the Complaint.").

Likewise, 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, as late as April 15, 2019, the Plan was arguably a church plan that was electing to be governed by ERISA.[30] 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* 26 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*,

[30] 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 February 3, 2022) ("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"). Copies of the Election and the signature page of the 2017 Form 5500 are on the Court's docket at ECF No. 126-1 and ECF No. 126-2 respectively. Both documents are public records that the Receiver filed with multiple federal agencies and can be considered on a motion to dismiss. *See Colonial Mortg. Bankers Corp.*, 324 F.3d at 15-16.

669 F.3d at 57 (affirming grant of motion to 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 expertise in ERISA and in dealing with the PBGC.[31] 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 2013, 2011, or 2009. *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. The FAC should be dismissed.

C. <u>Plaintiffs Are Not Entitled to Plead Alternative, Contradictory Facts</u>

Plaintiffs plead an alleged web of deceptions that turns on their possession of irreconcilable states of mind. Although Rule 8(d) permits Plaintiffs to plead conflicting legal theories in the alternative, it does not entitle them to assert alternative, conflicting facts in support of the same claim. *Gucwa v. Lawley*, No. 15-10815, 2017 WL 2831691, at *5 (E.D. Mich. Jun. 29, 2017) ("While Rule 8(d)(3) allows inconsistent claims ... it does not allow what Plaintiffs are attempting to do here—namely, to make 'clashing factual assertions ... in the context of the same claim." (ellipsis in original)); *see Gurwell v. Sea World Parks & Ent'mt LLC*, No. 2:20cv312, 2021 WL 4168503, at *10 (E.D. Va. Aug. 11, 2021) ("While Plaintiffs are permitted to plead alternating legal theories, the same facts must support those theories to withstand a motion to dismiss."). The FAC improperly crosses that line, alleging at the same time that Plaintiffs were deceived that the Plan was a church plan **and** an ERISA plan.

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

1. *Plaintiffs' Self-Contradictory Allegations and Actions*

Plaintiffs allege that they were never told that the Plan was a church plan and that the conspirators let Plaintiffs think that the Plan was an ERISA plan and that they had the protections of ERISA:

- "It was never 'public knowledge,' and Plan participants were never told that the Plan was being administered as a Church plan, or that the Plan participants' benefits were not protected under ERISA, or that Defendants SJHSRI, RWH, and CCCB reserved the right not to make recommended contributions to the Plan, and in fact in many years did not make recommended contributions to the Plan." FAC ¶ 318; *see also id.* ¶¶ 62, 64, 227, 230, 234, 257, 258, 275, 317.

In the same breath, however, Plaintiffs also allege that the defendants knew that the Plan was an ERISA plan, but conspired to keep that from Plaintiffs, implying that Plaintiffs were misled into thinking the Plan was a church plan:

- "Next, to evade federal law imposing liability on control groups and successors under ERISA, SJHSRI and Defendants CCCB, RWH, Prospect Chartercare, Prospect Chartercare St. Joseph, Prospect Chartercare Roger Williams, Prospect Medical Holdings, and Prospect East conspired with Corporation Sole, Diocesan Administration, and Diocesan Service to falsely claim that the Plan continued to qualify as a 'church plan,' which if true would have exempted it from ERISA." *Id.* ¶ 55(d)(ii).
- "Thus, Corporation Sole, Diocesan Administration, and Diocesan Service share responsibility for the 2014 Asset Sale and the retention of the Plan by an insolvent SJHSRI, not because they controlled SJHSRI (which they did not), but because they participated in a conspiracy with all of the other Defendants to fraudulently and falsely claim Church Plan status for the Plan . . . ." *Id.* ¶ 203; *see also id.* ¶¶ 65, 76-77, 154, 158, 165, 168, 174, 183, 189, 192, 202, 205, 426.

All counts of the FAC directed at the Diocesan Defendants incorporate various contradictory allegations, like those highlighted above and set out in detail at Exhibit 30. Paragraphs 55(d)(ii), 203 and 318, for example, are incorporated in all such counts, except Count XVI.

Since filing the FAC, Plaintiffs have doubled down on these contradictions in both directions. Contrary to paragraph 318 of their pleading, Plaintiffs have provided the Court with sworn testimony from the General Counsel of UNAP averring: "During the period from

1998 up to June 20, 2014, senior executives from SJHSRI informed me on ***many occasions*** that the Plan was exempt from ERISA because it was a 'church plan.'" Decl. of Christopher Callaci, ECF No. 226-13, ¶ 4 (emphasis added); *see Stockbridge-Munsee Cmty. v. Wisconsin*, 17-cv-249-jdp, 2018 WL 708389, *3-4 (W.D. Wis. Feb. 2, 2018) (referencing affidavit from plaintiff's president in support of decision denying leave to amend complaint to include alternative facts that would have contradicted other allegations and the affidavit). And contrary to paragraph 55(d)(ii) of the FAC, Plaintiff Receiver has made an election under federal law which he could only avail himself of if the plan was a church plan in 2019. *Supra* Part III.B.2.

2. *The Law Does Not Permit Such Internally Inconsistent Pleading*

The sort of self-contradictory pleading described above is not sustainable under Rule 8(d) or 9(b). Even before *Twombly* and *Iqbal*, courts recognized that Rule 8 did not grant "plaintiffs license to plead inconsistent *assertions of facts* within the allegations that serve as the factual predicates for an independent, unitary claim." *In re Livent, Inc. Noteholders Secs. Litig.*, 151 F. Supp. 2d 371, 407 (S.D.N.Y. 2001) (emphasis in original). This was especially so when the allegations concerned matters uniquely within the plaintiffs' control (i.e., their knowledge, reliance, or state of mind). Pleadings "stating both that plaintiffs had knowledge of a critical fact and that they had no such knowledge" or "that plaintiffs had no awareness of specific information revealed in some particular document, while at the same time asserting that they relied upon the contents of that same document" failed. *See id.* at 405, 407, 441. That is even more true post-*Iqbal*. *See Mrla v. Fed. Nat'l Mortg. Ass'n*, No. 15-cv-13370, 2016 WL 3924112, at *4 (E.D. Mich. Jul. 21, 2016) ("Accordingly, courts have held that Rule 8(d)(3)'s 'alternative pleadings rule' does not cover inconsistent assertions of fact when the pleader holds the knowledge of which of the inconsistent facts is the true one.").

When confronted with such allegations, "a court need not feel constrained to accept as truth conflicting pleadings . . . that are contradicted either by statements in the complaint itself or by documents upon which its pleadings rely, or by facts of which the court may take judicial notice." *In re Livent*, 151 F. Supp. 2d at 405-06; *see Ixotic AG v. Kammer*, No. 09-cv-4345, 2015 WL 270028, at *14 (E.D.N.Y. Jan. 21, 2015) ("But when they plead alternative claims based on mutually irreconcilable facts, as they have done here, their embrace of such internal inconsistency deprives them of the benefit of the rule that otherwise establishes as true their factual allegations.").

Ohio Midland, Inc. v. Proctor, No. 07-CV-415, 2006 WL 3793311, at *4-5 (S.D. Ohio Nov. 28, 2006), is instructive. In that case, the district court denied leave to amend and rejected the plaintiffs' contention that Rule 8 allowed them to plead facts as to their intent in the alternative. *Id.* at *4-5. The *Proctor* plaintiffs asked the court to permit them to plead that they either owned a bridge or, in the alternative, had abandoned the bridge. *Id.* at *3. Rejecting the request, the court recognized that the plaintiffs might plead inconsistent facts, but only when they "are legitimately in doubt about the facts in question." *Id.* at *4. And "[t]herein lies the rub," the court explained: "Plaintiffs cannot legitimately be in doubt about the facts relating to ownership or abandonment of the Bridge because abandonment lies *within Plaintiffs' own intentions*." *Id.* (emphasis in original). They could not maintain both positions "simply by labeling them as alternative theories of recovery." *Id.*

The court in *Great Lakes Higher Education Corp. v. Austin Bank of Chicago*, 837 F. Supp. 892, 895 (N.D. Ill. 1993), dismissed purportedly "alternative" claims in similar circumstances. "Plaintiffs may not plead alternative arguments involving both the drawer and drawee as plaintiffs," the court ruled, "when it is clearly within their own knowledge which of

them has suffered the loss of $273,152.88 to Austin." *Id.* This was not just "an inappropriate application of the alternative pleadings rule." *Id.* It was "a violation of Rule 11 to withhold relevant factual evidence within the knowledge of the pleading party in order to gain advantage of being able to plead more causes of action than are appropriate." *Id.*

3. *The FAC Fails*

The same conclusion is required here. As with the plaintiffs in *Proctor* and *Great Lakes*, Plaintiffs are the masters of their state of mind and what they knew or believed at the times relevant to their allegations. *See Proctor*, 2006 WL 3793311, at *4-5; *Great Lakes*, 837 F. Supp. at 895. Plaintiffs (and the putative class) either thought that they had the protections of ERISA or did not. They either were told the Plan was a church plan or were never told the Plan was a church plan. They cannot, at the same time, have thought the plan to be an ERISA plan **and** a church plan and relied on representations (or omissions) as to both to their detriment. They must have thought one or the other.

"There is a difference between a case involving certain facts where alternative relief may be afforded" and "a case where a set of facts is asserted which would lead to relief on one theory and at the same time another set of facts-inconsistent with the first set-is is [sic] alleged which would lead to relief on some other, inconsistent theory." *Proctor*, 2006 WL 3793311, at *5. "With respect to the latter," as the *Proctor* court explained, "the choice is not between alternative forms or theories of relief, but rather between two inconsistent cases altogether." *Id.* And that is what the FAC presents: a case where the Plaintiffs were never told the Plan was a church plan and thought it was an ERISA plan and another case where the reverse occurred. They "cannot legitimately be in doubt about the facts relating to" how they believe they were deceived. *Id.* "Under these circumstances, such conflicting allegations" are "admissions that undermine plaintiffs' statement of the elements of a sufficient claim." *See In re*

Livent, 151 F. Supp. 2d at 407, 441 (observing that Rule 8 "could not coherently contemplate that plaintiffs pressing a claim of fraud would be allowed to make a factual assertion . . . that they were not aware of some material information, and in another part of the same claim concede that they relied detrimentally upon that same factual representation."). The contradictions render the FAC implausible. It should be dismissed.[32]

IV. THE FAC DOES NOT SET FORTH A PLAUSIBLE CAUSATION CLAIM FOR ANY ACTS OR OMISSIONS PRIOR TO THE GREAT RECESSION IN 2008

The FAC asserts nefarious conduct concerning the Plan's funding as far back as 1995. For example, Plaintiffs allege that:

- "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." FAC ¶ 63.

- "During the period from 1995 to the present, SJHSRI and the other entities and individuals administering the Plan and communicating with Plan participants at no time informed Plan participants that . . . the Plan was underfunded, or that the Plan was not being funded in accordance either with ERISA or the recommendations of SJHSRI's actuaries . . . ."[33] *Id.* ¶ 64.

Indeed, Plaintiffs claim fraud even further back: to 1973! *Id.* ¶ 265. Such allegations of supposed ancient misconduct are incorporated in every count alleged against the Diocesan Defendants, except Count XVI. Compare *Id.* ¶¶ 258-84 (pre-Great Recession alleged

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[32] *See, e.g.*, *White v. Medtronic, Inc.*, No. 18-11590, 2019 WL 1339613, at *9 (E.D. Mich. Feb. 20, 2019) ("Plaintiff['s] fraud claim, therefore, depends on the inconsistent theory that his wife's doctors both knew and did not know the risks associated with the off-label use of the Infuse device. This violates the Rule 9(b) requirement that fraud be pled with specificity."); *Gucwa*, 2017 WL 2831691, at *4-5 (holding claim implausible that both alleged "AF knowingly chose to take part in the fraudulent scheme with the doctor defendants" and that "AF was not part of the conspiracy" and was induced by the doctor defendants to deny plaintiff benefits); *In re Livent*, 151 F. Supp. 2d at 441 (dismissing claim premised on alleged fraud in registration statement and prospectus concerning company's financial health where plaintiffs simultaneously alleged that they relied on a document "which disclosed that Livent's financials had been materially misstated").

[33] *See also* FAC ¶¶ 211-16 (alleging that splitting the Plan in 1995 was improper or nefarious); *id.* ¶¶ 219-24 (alleging that the so-called "Exculpatory Provisions" in the diocesan and SJHSRI plans were improperly hidden from the Plan participants, both before the split of the plans in 1995 and thereafter); *id.* ¶¶ 226-34 (alleging that SJHSRI did not adhere to funding obligations for various years, including years pre-dating the 2008 crash).

misrepresentations) *with id.* ¶¶ 470, 494, 498, 503, 535, 539, 543, 551, 554 (incorporating paragraphs 258-84 into Counts III, VII-IX, XVII-XIX, and XXI-XXII).

Yet documents only selectively quoted in the FAC demonstrate that actuaries consistently reported that the Plan was more than appropriately funded at least through 2008. *See infra* Part IV.A. It remained funded until the stock market crash in September 2008, the most serious economic crisis in this country since the Great Depression of the 1930s. *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 998 n.6 (9th Cir. 2014) ("We take judicial notice of the recession in the U.S. economy from December 2007 to June 2009."); *see In re Irving Tanning Co.*, 555 B.R. 70, 85 n.11 (Bankr. D. Me. 2016) ("A more likely culprit was the unforeseen, intervening, and devastating impact of the recession of late 2007 through 2009, about which several Defendants testified and of which I can take judicial notice."); *In re Merrill Lynch & Co., Inc. Research Reports Secs. Litig. ("Merrill Lynch II")*, 289 F. Supp. 2d 416, 420 n.6 (S.D.N.Y. 2003) (noting "[t]he Court may take judicial notice of the existence of the internet bubble and its subsequent crash" and collecting cases of similar exercises of judicial notice). To the extent Plaintiffs' claims rest on wrongdoing predating 2009, they should be dismissed.

A. <u>The Actuarial Reports</u>

Plaintiff Receiver has posted Actuarial Reports for the Plan on his public webpage for the years 2004 through 2013.[34] Seven of those reports from 2006 through 2012 are referenced in the FAC. FAC ¶¶ 230(c) & (d) (2006-2008); *id.* ¶ 240-44 (2009); *id.* ¶¶ 245-47 (2010-2012). Other Actuarial Reports are attached to this memorandum as Exhibits as set forth in note 35 below.[35]

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[34] The Actuarial Reports are posted at https://www.pierceatwood.com/receivership-filings-st-joseph-health-services-rhode-island-retirement-plan, under the heading: "Public Data Associated with this Matter."

[35] Ex. 1 (Actuarial Report as of July 1, 2004, for the Plan Year Ended June 30, 2005); Ex. 2 (Actuarial Report as of July 1, 2005, for the Plan Year Ended June 30, 2006); Ex. 3 (Actuarial Report as of July 1, 2006, for the Plan Year

Also attached as Exhibit 9 is a chart that collects the following information from the Actuarial Reports posted on the Receiver's website: Minimum Contribution; Maximum Contribution; Market Value of Assets; Present Value of Accrued Benefits; Assets Minus Present Value of Accrued Benefits; Annual Return on Assets; and Assets Divided by Present Value of Accrued Benefits expressed as a percentage. The key information from that chart for the years leading up to and including the Great Recession is summarized here:

	7/1/2009	7/1/2008	7/1/2007	7/1/2006	7/1/2005	7/1/2004	7/1/2003
Minimum Contribution	**$1,444,178**	**$0**	**$0**	**$0**	**$0**	**$0**	**$0**
Recommended Maximum Contribution	**$1,624,311**	**$2,118,043**	**$2,151,319**	**$2,052,351**	**$0**	**$0**	**$0**
Market Value of Assets	**$78,260,116**	**$104,417,252**	**$114,718,822**	**$102,323,479**	**$94,892,973**	**$89,475,173**	**$80,687,937**
Present Value of Accrued Benefits (PVAB)	**$94,770,770**	**$88,272,495**	**$82,413,392**	**$76,100,377**	**$71,820,978**	**$66,950,823**	**$60,221,708**
Assets minus PVAB	**-16,510,654**	**$16,144,757**	**$32,305,430**	**$26,223,102**	**$23,071,995**	**$22,524,350**	**$20,466,229**
Annual Return on Assets	**-20.8%**	**-7.4%**	**16.8%**	**11.7%**	**10.1%**	**14.9%**	**N/A**
Assets/PVAB (%)	**82.6%**	**118.3%**	**139.2%**	**134.5%**	**132.1%**	**133.6%**	**133.9%**

These Actuarial Reports contain facts contradicting the FAC. The Plan's actuaries told SJHSRI for at least six consecutive years prior to the 2008 Crash—in 2003, 2004, 2005, 2006, 2007, and 2008—that the Plan's assets exceeded its accumulated liabilities, and by a substantial margin. SJHSRI's actuaries also reported that *they applied ERISA funding guidelines* to their analysis and declared, for each of the six years from July 1, 2003 to July 1, 2008, that no minimum contribution was required.[36]

The 2007 Actuarial Report, quoted at paragraph 230(c) of the FAC, is illustrative. Ex. 4. This Report stated that the Total Value of Plan Assets as of July 1, 2007 was

Ended June 30, 2007) ("2006 Actuarial Report"); Ex. 4 (Actuarial Report as of July 1, 2007, for the Plan Year Ended June 30, 2008) ("2007 Actuarial Report"); Ex. 29 (Actuarial Report as of July 1, 2008, for the Plan Year Ended June 30, 2009) ("2008 Actuarial Report"); Ex. 5 (Actuarial Report as of July 1, 2009, for the Plan Year Ended June 30, 2010) ("2009 Actuarial Report"); Ex. 6 (Actuarial Report as of July 1, 2010, for the Plan Year Ended June 30, 2011); Ex. 7 (Actuarial Report as of July 1, 2011, for the Plan Year Ended June 30, 2012); Ex. 8 (Actuarial Report as of July 1, 2012, for the Plan Year Ended June 30, 2013).

[36] Ex. 1 (2004 Actuarial Report) at 1-3, 13-14, 16-17; Ex. 2 (2005 Actuarial Report) at 2, 11; Ex. 3 (2006 Actuarial Report) at 2, 11; Ex. 4 (2007 Actuarial Report) at 2, 11; Ex. 29 (2008 Actuarial Report) at 2, 11.

$114,718,822. *Id.* at 3. The Report further declared that the "Actuarial present value of accumulated plan benefits as of the current valuation date" was $82,413,392. *Id.* at 4. Plan assets thus exceeded the present value of accrued benefits by more than $32,000,000. *See id.* at 3-4.

The 2007 Actuarial Report also discussed "Recommended Funding Levels." Specifically, it declared:

> The recommended contribution is based on the Plan's Normal Cost plus an amortization of the Plan's unfunded liability. If the plan is projected to have no unfunded liability at the end of the Plan Year then no contribution is recommended. While the Plan is a church plan, and is not subject to the funding requirements of ERISA, the current funding policy follows the ERISA guidelines without regard to the current liability calculations.

Id. at 11. Having declared that they were following ERISA's funding guidelines, the actuaries then set forth a series of calculations to determine the minimum and maximum recommended contribution. *Id.* at 13 ("Development of Contributions"). The Report then declared that the minimum contribution was "$0."[37] *Id.* at 2.

This pattern repeats in every Report posted on the Receiver's website predating the Great Recession of 2008. *See* Exs. 1-5 (Actuarial Reports reflecting information from 2003-2008); *see also* Ex. 9.[38] Plan assets exceeded the present value of accrued benefits and the

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[37] When a defined benefit plan is overfunded, an "employer may reduce or suspend his contributions." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 440 (1999).

[38] The 2006 and 2007 Actuarial Reports cited in the FAC establish that the actuaries were telling SJHSRI that the Plan was adequately funded and no contributions were required. Case law in this and other jurisdictions makes clear that it is appropriate for the court to consider the entire array of such reports posted on the Receiver's website as matters of public record. *Colonial Mortg. Bankers Corp.*, 324 F.3d at 15-16 ("For one thing, matters of public record are fair game in adjudicating Rule 12(b)(6) motions[.]"); *see also Better Homes Realty, Inc. v. Watmore*, No. 3:16-cv-01607-BEN-MDD, 2017 WL 1400065, at *2 (S.D. Cal. Apr. 18, 2017) ("[T]he screenshots of searches run on the County's Fictitious Business Name Statement website, . . . are proper subjects of judicial notice because they are public records . . . ."); *Brown v. Sears Roebuck & Co.*, No. 02 C 3939, 2002 WL 31433395, at *1 (N.D. Ill. Oct. 29, 2002) ("In considering Sears' motion to dismiss, the licensing agreement is considered part of the pleadings . . . . In addition, the later agreements that modified the licensing agreement are considered under the doctrine of completeness.").

actuaries repeatedly reported that applying ERISA funding requirements resulted in a minimum contribution level of "0." *See* Exs. 1-5; *see also* Ex. 9.

That reality changes drastically as a result of the Great Recession of 2008. In the run-up to the market collapse, covered by the 2008 Actuarial Report, the Plan's assets fell 7.4%. Ex. 29 at 2. The next year was far worse. Plan assets cratered still further, by more than an additional 20%. Ex. 5 at 2. As a result, assets went from $114,718,822, as of the 2007 Actuarial Report, to $78,260,116, as of the 2009 Actuarial Report. *Compare* Ex. 4 at 3 *with* Ex. 5 at 3. The 2008 Actuarial Report recognized that it "takes into consideration a substantial asset loss realized during the period from July 1, 2007 to June 30, 2008," and also inserted a new line in the report, "Contribution to reach 100% funding level projected to the end of the plan year." Ex. 29 at 1-2. The next year's report indicated that it "takes into consideration a substantial asset loss realized during the period from July 1, 2008 to June 30, 2009," recommended a minimum contribution, and indicated that the actuarial present value of accumulated benefits exceeded the actuarial value of Plan assets. Ex. 5 at 3-5.

Tellingly, the FAC contains a section entitled, "Defendants Knew The Plan Was Underfunded." FAC ¶¶ 235-255. ***Each and every one of the allegations in that section reference facts from 2008 going forward.*** *Id.* Yet, the next few paragraphs of the FAC purport to identify "Misrepresentations to Plan Participants" dating back to the 1970s, 1980s, and 1990s. *See, e.g.*, *id.* ¶¶ 256-258, 265-269. The FAC also vaguely claims that "actuaries throughout the life of the Plan annually calculated the amount of money that SJHSRI should pay into the Plan" and further that "SJHSRI routinely disregarded their recommendations . . . with the result that the Plan became more and more underfunded over time." *Id.* ¶ 270.

Nowhere does the FAC reference, much less attempt to square those allegations with the recommendations or conclusions in the Actuarial Reports from 2003 through 2008, despite those reports being selectively quoted in the FAC and posted on the Receiver's website. Likewise, Plaintiffs do not try to explain how any alleged misconduct in the 1970s, 1980s and 1990s (which is denied) could have plausibly or causally been the source of their harm or damages, when the Plan had positive financial funding from at least 2003 through 2008. Nor could any such conduct be causally related to the Plan's financial condition in 2017 when SJHSRI petitioned the Plan into receivership. *Id.* ¶ 54 (discussing receivership).

The Actuarial Reports show that the Plan did not "become more and more underfunded over time." *Id.* ¶ 270; *see* Ex. 9. It was not underfunded until the stock market crash of 2008 crippled it, along with other businesses, and retirement plans all over the globe. *See Merrill Lynch II*, 289 F. Supp. 2d at 419 ("The burst of the bubble and the attendant market chaos are not chargeable to the defendants and represent intervening causes for which defendants are not responsible in the sequence of responsible causation.").

B. Any Causal Connection Between Acts or Omissions Prior to 2008 Was Broken Because There Were Many Intervening Years of Adequate Funding and the Great Recession of 2008 Constitutes a Separate Intervening Cause

To the extent any count of the FAC rests on allegations of wrongdoing predating the stock market crash of September 2008—which includes Counts III, VII-IX, XVII-XIX, and XXI-XXII—they must be dismissed. To establish causation, Plaintiffs must link the defendants' alleged wrongdoing to their alleged harm, which in this case is an underfunded Plan. "[I]t is only when the total amount of funding falls below the threshold level necessary to pay beneficiaries that beneficiaries' benefits are endangered." *Hill v. Vanderbilt Capital Advisors, LLC*, 834 F. Supp. 2d 1228, 1255 (D.N.M. 2011). Even if one assumes that the Diocesan

Defendants were somehow involved in missteps or misrepresentations from two or more decades ago (despite no allegations tying any such misrepresentations to these defendants), such conduct could not have caused any damages for two independent and dispositive reasons.[39]

First, for at least six years, the Plan was funded.[40] *See supra* Part IV.A. That is apparent not only from the actuarial reports, but also what is (and is not) in the FAC. FAC ¶ 63. Plaintiffs' delineation of specific years of alleged underfunding in the FAC—all of which are after 2009—implies sufficient funding prior to 2009, an implication confirmed by the Actuarial Reports.[41] As a result, the causal link between alleged earlier misrepresentations or decisions and any future impact on the retirement benefits that Plan participants might receive was broken.[42] *See Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992).

Second, alleged misconduct predating the 2008 Great Recession had nothing to do with any harm to Plaintiffs precisely because something else—global economic calamity—caused the Plan to become "underfunded." *See id.* (providing that proximate cause demands "some direct relation between the injury asserted and the injurious conduct alleged"). As an intervening force, the Great Recession cut off any liability for any alleged conduct of the Diocesan Defendants prior to 2008. *See First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 772 (2d Cir. 1994); *see also Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 342-43, 348 (2005)

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[39] In fact, Plaintiffs know the Plan was funded prior to 1995—they have the relevant records. They also know whether the Plan was adequately funded from 1995 through 2003. Tellingly, they have alleged no specific facts to indicate that the Plan was not adequately funded during these periods.

[40] Even ERISA does not require that defined benefit plans maintain full funding every year. Instead, ERISA permits plans to make contributions designed to address any underfunding issues over time. 29 U.S.C. § 1082(c); Angell's Mem. of Law in Supp. of its Mot. to Dismiss ("Angell Brief"), ECF No. 68-1, at 14.

[41] The FAC's inclusion of the phrase "including but not limited" does not change the calculus, as the FAC does not allege facts suggesting underfunding prior to 2009 and the Actuarial Reports cited in the FAC negate any such allegation. FAC ¶ 63.

[42] For example, if Plaintiffs had filed this lawsuit in 2002, the case would have been dismissed as moot in 2003 because, at that time, the Plan was funded and Plaintiffs could not demonstrate any "actual and imminent" threat as required to show injury-in-fact. *See Hill*, 834 F. Supp. 2d at 1255-56.

(affirming dismissal of a claim because other factors besides misrepresentations, such as "changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, or other events, which taken separately or together" could account for a lower price); *In re Merrill Lynch & co., Inc. (Merrill Lynch I)*, 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 . . . .").

Although often invoked in securities fraud cases, such causation principles are inherent to establishing causation for any garden variety tort. As the U.S. Court of Appeals for the Seventh Circuit explained decades ago: "'Loss causation' is an exotic name . . . for the standard rule of tort law that the plaintiff must allege and prove that, but for the defendant's wrongdoing, the plaintiff would not have incurred the harm of which he complains." *Bastian v. Petran Res. Corp.*, 892 F.2d 680, 685 (7th Cir. 1990). And that is precisely what the FAC does not establish. Ergo, the "trier of fact can have no confidence that the plaintiff would be better off if the defendant had refrained from the unlawful act[s]" alleged to have occurred prior to the Great Recession. *See id.* at 686.

This failure of causation is particularly critical to the claims against the Diocesan Defendants. Plaintiffs aver that "[a]s of 2009, SJHSRI had taken over the administration of the SJHSRI Plan, and SJHSRI's Finance Committee was administering the Plan and making its investment decisions." FAC ¶ 75; *see id.* ¶¶ 84, 87. Similarly, the FAC alleges that the Plan ceased to be a church plan sometime in or after 2009, *see, e.g., id.* ¶¶ 68-69, meaning that ERISA

funding obligations would not have attached until after the 2008 market collapse and SJHSRI's takeover of "the administration of the SJHSRI Plan."[43] *Id.* ¶ 75.

Those portions of Counts III, VII, VIII, IX, XVII, XVIII, XIX, XXI and XXII that rely upon and incorporate allegations respecting conduct or alleged misrepresentations predating September 2008 should be dismissed. *See Bastian*, 892 F.2d at 684-86 (describing loss causation "as an element of cause, period" and affirming dismissal where plaintiffs failed to sufficiently allege that their damages were caused by defendants' conduct, as opposed to "the collapse of oil prices"); *Merrill Lynch I*, 273 F. Supp. 2d at 365 (dismissing securities fraud claim because "plaintiffs' allegations utterly fail to take into account the intervening cause of the Internet market collapse").

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For the reasons set out *supra* at Parts I through IV, the Court can (and should) dispose of the FAC either in its entirety or in large part, without need to consider the various other deficiencies and lacunae in the complaint. Nonetheless, to the extent any part of the FAC remains, those individual counts fail for the additional reasons set out below.

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[43] The FAC claims that on December 5, 1984, the "Retirement Board for the predecessor to the Plan . . . disregarded their fiduciary duties to the Plan" by rejecting a proposal to make an election that would subject the Plan to ERISA "because they saw no benefit to SJHSRI in protecting employees and other Plan participants by making the election[.]" FAC ¶ 62. This allegation is meritless. First, the FAC contains no facts to suggest any funding issues with the Plan in December 1984, that the 1984 Retirement Board was not interested in "protecting employees and other Plan participants," or that the Plan was not a church plan in 1984. *Id.* Indeed, the FAC alleges that the Plan did not lose church plan status until sometime in 2009. *Id.* ¶¶ 68-69. Second, the FAC's supposition that the 1984 Retirement Board breached a fiduciary duty by continuing to avail itself of the "church plan" exemption to ERISA, 29 U.S.C. § 1003(b)(2), is absurd. Under this theory, every church plan administrator that does not elect to subject a church plan to ERISA—a decision that ERISA affords discretion over—would be in breach of a state law fiduciary duty. *Id.* The Supremacy Clause precludes such an outcome. *See PLIVA, Inc. v. Mensing*, 564 U.S. 604, 621-22 (2011) (holding conflicting state law claim preempted by federal regulation).

V. COUNT VII (FRAUD THROUGH INTENTIONAL MISREPRESENTATION AND OMISSION) MUST BE DISMISSED AGAINST THE DIOCESAN DEFENDANTS FOR FAILURE TO STATE A CLAIM

A. The Alleged Misrepresentations to Plan Participants from the 1970s Through the 2008 Market Crash Are Not Actionable

Plaintiffs allege that there were certain "Misrepresentations to Plan Participants" in the 1970s through the mid-2000s. FAC ¶¶ 256-84. However, the documents referenced in the FAC make clear that the Diocesan Defendants did not make these statements. Rather, such statements were made by SJHSRI, or "the Hospital," or employees thereof, as evidenced by the very language quoted in the FAC. *See, e.g.*, *id.* ¶¶ 266-69, 271, 280-81, 284.

Beyond that fatal issue, these statements are not actionable for three reasons. *First*, as set forth *supra* at Part IV, nothing prior to the 2008 market crash could have caused Plaintiffs' alleged harm. *See Dura*, 544 U.S. at 342-43.

Second, the alleged misrepresentations were not factually false and merely conveyed an intent to fund the Plan in a particular manner or make certain payments to Plan beneficiaries in the future and thus cannot be actionable misrepresentations. An alleged misrepresentation "'must relate to something that is a fact at the time the assertion is made in order to be a misrepresentation. Such facts include past events as well as present circumstances but do not include future events.'" *St. Paul Fire & Marine Ins. Co. v. Russo Bros., Inc.*, 641 A.2d 1297, 1299 n.2 (R.I. 1994) (quoting Restatement (Second) *Contracts* § 159, cmt c. at 428 (1981)). "[T]he general rule is that mere unfulfilled promises to do a particular thing in the future do not constitute fraud in and of themselves." *Cote v. Aiello*, 148 A.3d 537, 548 (R.I. 2016) (internal quotation marks omitted) (holding that, because a company owner's "statements regarding [the company] always revolved around the future disposition of the company, . . . [they] therefore could not form the basis for a claim of fraud" (underlining in original")).

For example, Plaintiffs allege that the Plan participants were provided booklets with information concerning the Plan. *E.g.*, FAC ¶ 266. The 1973 edition of this booklet stated: "The Hospital ***will*** pay the entire cost of the Plan beginning January 1, 1973 – not only your pension but also all actuarial, legal and investment expenses incurred in the administration of the Plan."[44] *Id.* (emphasis added). The FAC fails to allege facts to indicate this statement (and similar alleged ancient statements) were false when made or that SJHSRI did not pay such costs. Additionally, documents referenced in the FAC prove that the Plan was adequately funded through 2008. *See* Ex. 9; *supra* Part IV.A.

Third, as discussed in greater detail *infra* at Part V.C.2, Plaintiffs have not alleged any facts sufficient to establish that there was a lack of intent to keep any promises when they were made to the pensioners in the 1970s to 2008. *See Cardinale*, 567 F.3d at 13.

B. Plaintiffs' Claim for Fraud Fails Because the Alleged Statements in the Vatican and Health Services Council Letters Were Not False and Were Opinions

In support of their fraud claims, Plaintiffs also point to two letters signed by Bishop Thomas Tobin. FAC ¶¶ 170-79, 320. Nothing in the FAC or in the letters themselves indicates that Bishop Tobin wrote those letters on behalf of RCB, DAC, or DSC. Neither it, nor the letter to the Health Services Council ("HSC") referenced RCB, DAC, or DSC at all. *See* Ex. 21 (Vatican Letter); Ex. 24 (HSC Letter). Beyond these dispositive facts, these letters simply do not and cannot support a fraud claim as a matter of law.

[44] Note the quoted statement references "the Hospital" and not any of the Diocesan Defendants. FAC ¶ 266. Like other allegations, those in paragraphs 256-279 and 283 of the FAC do not sufficiently differentiate among the defendants, and the Diocesan Defendants cannot decipher which statements, if any, Plaintiffs attribute to them. To the extent Plaintiffs allege any such representations were made by the Diocesan Defendants, when these statements were made and by whom are important for the reasons set forth herein, but wholly absent from the FAC. *Supra* Standard of Review & Part I.

In the two letters, Bishop Tobin affirmatively declared that the Plan was at "***significant risk***" and in danger of "***failure,***" which would be "***catastrophic***." *See id*. ¶¶ 172, 320 (emphases added). The first letter, dated September 27, 2013, was directed to the Vatican ("Vatican Letter"). *Id.* ¶ 170-71. That letter stated:

> [W]ithout [approval of] this transaction, it appears that a consistent Catholic healthcare presence in the Diocese of Providence would be gravely compromised, and ***the financial future for employees-beneficiaries of the pension plan would be at significant risk.*** I believe that the APA [Asset Purchase Agreement] between CharterCARE and Prospect will help avoid ***the catastrophic implications of such a failure***, and at the same time, enhance the quality of care at SJHSRI/Our Lady of Fatima.

Id. ¶ 172 (emphasis added).[45] The letter also noted that "in the wake of the global economic downturn, CharterCARE soon began to experience the need for increased capital and was confronted with a significant unfunded liability within its employee pension-system." Ex. 21 at 1.

Bishop Tobin's second letter was to the HSC, dated February 14, 2014 ("HSC Letter"). Ex. 24. Plaintiffs allege that Bishop Tobin wrote the HSC Letter, "pursuant to the conspiracy in which Corporation Sole [RCB], Diocesan Administration [DAC], and Diocesan Service [DSC] were participating with [SJHSRI, RWH, CCCB, and Prospect] . . . to relieve Fatima Hospital of any liability under the Plan at the expense of the Plan participants . . . ." FAC ¶ 320. The HSC Letter, like the Vatican Letter, stated that, "[w]ithout this transaction, . . . **the financial future for employee-beneficiaries of the pension plan would be at a significant**

[45] Plaintiffs make much of the claim that SJHSRI's counsel suggested revisions to the draft Vatican Letter "*deleting* a reference to 'spiraling and gaping' liability, and substitut[ing] 'significant' liability[.]" FAC ¶ 175 (emphasis in original). However, none of the other above-quoted statements were changed. *Id.* ¶ 176. For reasons discussed *infra* at Part V.B.3, V.C.3, & VI.B.2, these changes make absolutely no difference to the analysis of Plaintiffs' fraud and conspiracy claims.

risk. I believe that this partnership will help avoid the catastrophic implications of such a failure . . . ." *Id.* (emphasis in FAC).

Plaintiffs allege that the HSC Letter contains misrepresentations because the Diocesan Defendants knew that "the Plan was at much more than a 'significant risk'", *id.* ¶ 322, and "that 'the proposed partnership between CharterCARE Health Partners and Prospect Medical Holdings' made pension failure much more likely, and, indeed, a virtual certainty . . . ." *Id.* ¶ 321. They make similar allegations concerning the Vatican Letter. *Id.* ¶ 177. Their allegations based on these letters fail to state a claim for fraud.

1. *The Statements in These Letters Are Not False*

Plaintiffs do not dispute that the Plan had a "significant unfunded liability," was at "significant risk" of failure or that such failure would have been "catastrophic." *See, e.g.*, FAC ¶ 55(b) (describing Plan as "grossly underfunded"). Those statements were made by Bishop Tobin in his letters, were not false and cannot be the basis for a fraud claim. *See Laccinole v. Assad*, C.A. No. 14-404 S, 2016 WL 868511, at *8 (D.R.I. Mar. 7, 2016). ("To establish a *prima facie* case of fraud in Rhode Island, a plaintiff must allege . . . the defendant made a ***false representation***[.]" (emphasis added)).

2. *The Two Letters Cannot Form the Basis of a Fraud Claim Because the Alleged False Statements are Opinions*

After quoting the language from the HSC Letter discussed above, FAC ¶ 320, the FAC literally alleges that Bishop Tobin should have formed ***a different opinion*** based upon what Plaintiffs claim he knew and the information that they claim he had. *Compare id. with id.* ¶ 321. Paragraph 321 of the FAC states:

> However, as explained above, rather than believing the 2014 Asset Sale would help avoid pension failure, Bishop Tobin personally, and, through him and other officials, Defendants Corporation Sole, Diocesan Administration, and Diocesan Service, knew that "the proposed partnership between CharterCARE Health

> Partners and Prospect Medical Holdings" made pension failure much more likely, and, indeed, a virtual certainty, absent unanticipated and extremely improbable investment gains, because it would cut the link between the Plan and an operating hospital, and would transfer assets from SJHSRI that otherwise would be available to help fund the Plan.

Id. ¶ 321; *see id.* ¶¶ 178-80, 322 (making similar assertions concerning the Vatican Letter). This paragraph is astonishing on many levels. First, every fact in paragraph 321 from which Plaintiffs assert that Bishop Tobin should have known that "pension failure" was "a virtual certainty" was also known to the public and to the regulators. *See supra* Part III.A. How then, can Bishop Tobin—or more accurately RCB, DSC, and DAC—be held liable for fraud or conspiracy for failing to form what Plaintiffs (now) consider to be the appropriate conclusions, when regulators and experts with training and expertise ultimately reached the same conclusion as Bishop Tobin and approved the transaction? *See, e.g.*, Ex. 17 at 20, 53 (discussing Attorney General's retention of experts). What is so apparent to Plaintiffs as to be described as a "virtual certainty" apparently eluded the regulators and their experts entirely. *Supra* Part III.A. Not plausible.

Second, the FAC is alleging that Bishop Tobin's ***opinion*** was wrong. FAC ¶ 322. An opinion—whether right or wrong or modified by a sufficiently severe adjective in the eyes of Plaintiffs or their counsel now (in hindsight)—does not a fraud claim make. *See St. Paul Fire*, 641 A.2d at 1299 n.2 ("The general rule is that a misrepresentation should take the form of an expression of fact and not the offering of an opinion or estimate."); *see also Siemens Fin. Servs., Inc. v. Stonebridge Equip. Leasing, LLC*, 91 A.3d 817, 822 (R.I. 2014) (Accordingly, "matter[s] of opinion, estimate, or judgment may not be the subject of misrepresentation claims[.]" (internal citation omitted))[46]; *see also Douse v. Boston Sci. Corp.*, 314 F. Supp. 3d 1251, 1263 (M.D. Fla.

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[46] Although the Rhode Island Supreme Court applied Massachusetts law in *St. Paul Fire*, it found that there was no conflict between Massachusetts and Rhode Island law. 641 A.2d at 1299 n.2. The same is true of *Siemens*, 91 A.3d at 820 n.4.

2018) (dismissing fraud claim because representations "were statements of opinion," which were "most readily indicated because they are introduced by subjective adjectives like 'trusted,' 'timeless,' 'proven,' and 'established.'").

Third, the opinions in these paragraphs are actually predictions about future events and what is likely or unlikely to happen. *See* FAC ¶ 320; *see id.* ¶¶ 170-80 (discussing similar language in Vatican Letter). As a matter of law, an opinion on how future events will play out cannot constitute a misrepresentation. *Siemens*, 91 A.3d at 822. An alleged misrepresentation "'must relate to something that is a fact at the time the assertion is made in order to be a misrepresentation. Such facts include past events as well as present circumstances but do not include future events.'" *St. Paul Fire*, 641 A.2d at 1299 n. 2 (quoting Restatement (Second) *Contracts* § 159, comment c. at 428 (1981)); *see also Hogan v. E. Enter./Boston Gas*, 165 F. Supp. 2d 55, 64-65 (D. Mass. 2001) (holding that statement about whether an office would remain open and expressing doubt as to the employer's future financial resources were "simply not factually verifiable" at the time they were made, and the employee could not have reasonably relied on them).

3. *Plaintiffs Cannot Base a Fraud Claim on a Choice of Adjectives*

Finally, Plaintiffs allege that the Diocesan Defendants misrepresented the extent to which the Plan was underfunded by changing the description of the Plan's liability from "spiraling and gaping" in the draft of the Vatican Letter to "significant" in the final version. *See* FAC ¶¶ 171, 175, 254, 322. Nonsense!

Bishop Tobin's statements that the Plan was at a "significant" risk because of its "significant" liability *indisputably and strongly* declare that an important problem existed and needed attention. *See id.* ¶¶ 175-77; Ex. 21 at 1-2. The FAC's attempt to rest a fraud or conspiracy claim on his choice of adjectives must be rejected. *See Merrill Lynch I*, 273 F. Supp.

2d at 378 ("Blodget's casual statement in October 2000 that the product was a 'pos,' cannot be construed as inconsistent with the total message of his reports that there were significant concerns about the rollout and functionality of the product which could have a dramatic impact on the 24/7 stock price.").

These types of statements simply cannot be the basis for a fraud claim as a matter of law. *See Wu v. Stomber*, 883 F. Supp. 2d 233, 261 (D.D.C. 2012) ("Plaintiffs first complain that what was absent were the adjectives ('dramatic' increase) and pejorative slang ('haircuts') that would have added color to the disclosure. But the use of 'more innocuous terms' does not give rise to a fraud claim."); *Poley v. Bender,* 347 P.2d 696, 699 (Ariz. 1959) (stating that "[i]t is obvious that the indefinite adjectives 'good', 'sufficient', and 'proper', are . . . too vague to be taken as anything other than reflections of the opinion of the speaker"); *see also Hogan*, 165 F. Supp. 2d at 65 (stating that, "[w]ith the use of the indefinite term 'much,' there is no way the . . . the truth of that statement" could be verified).

C. <u>Plaintiffs Have Failed to Plausibly Plead Scienter</u>

The FAC has not adequately pled fraudulent intent or knowledge as it concerns alleged misstatements by the Diocesan Defendants (even if one wrongly assumed the alleged statements were made by these defendants).

1. *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. *Iqbal*, 556 U.S. at 680-81, 686-87. 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.

Cardinale, 567 F.3d at 13 (internal quotation omitted) (emphasis in original); *accord Mourad v. Marathon Petroleum Co.*, 654 Fed. App'x 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 state 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 state 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.*

2. *The FAC Does Not Sufficiently Plead Scienter for Alleged Misstatements Preceding the Stock Market Crash of 2008*

Plaintiffs have not alleged any facts sufficient to establish that there was a lack of intent to keep promises made to the pensioners in the 1970s to 2008 when those communications occurred.[47] *See Cardinale*, 567 F.3d at 13. Although the FAC is rife with alleged misrepresentations from before the Great Recession, it pleads no ***facts*** about the Plan's funding when alleged promises were made decades ago.[48] Indeed, no specific allegations of underfunding in the FAC predate September 2008. FAC ¶¶ 235-55; *supra* Part IV. Without those averments, an inference that, prior to the stock market crash of 2008, any entity at all—much less the totally disconnected DAC, DSC, and RCB—intended to not fund the plan or make payments to Plan beneficiaries as allegedly represented is not possible.[49]

Instead, the FAC references statements from decades ago that do nothing to establish any entity's (much less RCB, DAC, or DSC's) state of mind prior to 2008. *See, e.g.,* FAC ¶¶ 259-84. Those paragraphs contain references to materials provided to Plan participants dated 1973, 1978, 1982, 1986, 1988, 1993, 1994, 1995, 1996, 1998, 2001, 2003, and 2004 paired with several other generic and conclusory allegations. *Id.* 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

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[47] Had such allegations been made, they would be belied by the reality that there was over $100 million in the Plan in 2007. *Supra* Part IV.A; Ex. 4 (2007 Actuarial Report) at 3.

[48] If anything, the FAC suggests adequate funding, the keeping of promises, and the truthfulness of such statements, when it alleges: "Defendants SJHSRI, RWH, and CCCB never informed Plan participants that the earlier assurances that the Plan was being funded in accordance with the recommendations of the Plan's actuaries were *no longer* true." FAC ¶ 270 (emphasis added).

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

> 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 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.

Id. ¶ 259; *see also id.* ¶ 260 (conclusory allegation of reliance); *id.* ¶¶ 261-62 (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.

To put this in perspective, Plaintiffs ask this Court to accept their conclusory allegations first that RCB, DAC, or DSC even made statements to Plan participants about the funding and operation of the Plan.[50] Second, assuming they ever made such statements, Plaintiffs ask this Court to assume that RCB, DAC, and/or DSC knew or intended that those representations would prove unreliable. One such representation is attributed to "the Diocese" from before 1973—during the Nixon Administration, more than twenty years before DAC or DSC were even formed. FAC ¶ 265. Plaintiffs offer no explanation how those not-yet existent corporate entities—or RCB for that matter—formed an intention in 1973 to make representations that would prove false not during the Ford, Carter, Reagan, Bush, Clinton, or the second Bush administrations, but in 2009, after the Great Recession and when President Obama was in the White House. *See Merrill Lynch I*, 273 F. Supp. 2d at 376 (dismissing securities fraud claim where plaintiffs failed to allege with sufficient particularity that Merrill Lynch "could have

[50] 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 FAC's characterizations in this regard are wrong, and the Court should ignore them on account of their generality and conclusory form. *Iqbal*, 556 U.S. at 686-87. Any fight on their substantive merit, if necessary, must await another day.

predicted the date and dimensions of the Internet market collapse; and that it knew that the Internet market would not rebound as it had in the past.").

Plaintiffs ask the Court to rely upon a generalized pleading of knowledge and intent that survives decades even as they also state in the FAC that the role of the Diocesan Defendants respecting SJHSRI and the Plan 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. *Iqbal*, 556 U.S. at 686-87.

3. *The FAC Does Not Sufficiently Plead Scienter for Alleged Misstatements in the Vatican and HSC Letters*

Plaintiffs' allegations of fraudulent intent and knowledge of falsity as it concerns the Vatican and HSC Letters also come up short. The best they do is make 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.

FAC ¶ 177.

But the FAC does not set out predicate facts from which to conclude (or even infer) that the inferences and conclusions allegedly drawn by the Diocesan Defendants, and specifically Bishop Tobin, in the Vatican and HSC letters were made with knowledge of falsity or 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 Bishop Tobin was privy to these communications).

Nor do Plaintiffs allege that the Diocesan Defendants had the financial savvy to make actuarial determinations to independently determine that rejecting the proposal would result in a better outcome for the pensioners. Regulators with expertise, training, and resources to study the 2014 Asset Sale far beyond Bishop Tobin came to a very different conclusion. *Supra* Part III.A.8. Where are the facts allowing Plaintiffs to hold Bishop Tobin to a higher standard of knowledge or intent? They are not in the FAC. *See Iqbal*, 556 U.S. at 680-84, 686-87; *see also Merrill Lynch I*, 273 F. Supp. 2d at 377 ("There are no allegations in the complaints to support an inference that [defendant]—either on the basis of hard information or a crystal ball—could have predicted with certainty how the future stock prices of any stock would fluctuate.").

D. Alleged Misrepresentations by the Diocesan Defendants to the Plan Participants and Third Parties Could Not Have Caused Plaintiffs Harm Because Plaintiffs Fail to Allege that They Received, Let Alone Relied on, Said Misrepresentations

1. *Statements to the Plan Participants*

The FAC lists various allegedly false statements to the Plan participants. FAC ¶¶ 256-318. Only three of these purported misrepresentations, all from well before September 2008—in 1973, 1994, and 1998—even arguably reference actors related to the Diocese of Providence (as opposed to "SJHSRI" or "the Hospital"). *Id.* ¶¶ 265, 272, 277.

The FAC, however, contains no allegations that either the Receiver or the putative class representatives received any of these three alleged misstatements to Plan participants.[51] Further, there are no allegations that Plaintiffs relied on such statements or would have behaved differently if information that was purportedly not disclosed was disclosed. Without such allegations, Plaintiffs have failed to sufficiently allege reliance 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. 11-12090-RWZ, 2013 WL 139765, at *1 (D. Mass. Jan. 10, 2013), (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 when and where to ***each named plaintiff***" which "fail[ed] to meet the heightened pleading standard of Rule 9(b)") (emphasis added)), *aff'd* 799 F.3d 62 (1st Cir. 2015).

The fact that the FAC contains several generalized and conclusory averments of reliance does not change the calculus. FAC ¶¶ 219, 260-62, 273, 496. Such allegations are not entitled to an assumption of truth. *See Iqbal*, 556 U.S. at 680-81; *Williams v. Johnson v. Johnson*, 1:20-CV-00544-MSM-LDA, 2022 WL 157929, at *6 (D.R.I. Jan. 18, 2022) ("Ms. Williams offers no specific statements, let alone assertions of where or when those statements were made, upon which she relied to her detriment. As a result, Ms. Williams' common law fraud claim fails as well.")

2. *Statements to Third Parties*

The FAC also fails to state a claim for fraud because the alleged misrepresentations to the Vatican, the HSC, the U.S. Conference of Catholic Bishops ("USCCB"), the Official Catholic Directory ("OCD"), and the IRS could not have been the cause

[51] The same goes for any statements by anyone preceding the Great Recession.

of any harm suffered by *Plaintiffs* as a matter of law.[52] None of the alleged misrepresentations were made to Plaintiffs or the Plan participants, and Plaintiffs have not alleged that they were the intended recipients of the information purportedly conveyed by the various Diocesan Defendants to the Vatican, the HSC, the USCCB, the OCD or the IRS. Furthermore, Plaintiffs have not alleged that they even knew of or relied on any of these statements.

a) Plaintiffs do not Allege that They were the Intended Recipients of Purported Misrepresentations

Fraud claims based on statements to persons other than the plaintiff claiming to have been defrauded generally do not survive judicial scrutiny, *Cliftex Clothing Co. v. Di Santo*, 148 A.2d 273, 276 (R.I. 1959), unless the plaintiff was an intended recipient of the misrepresentation. *Lifespan/Physicians Prof'l Servs. Org., Inc. v. Combined Ins. Co. of Am.*, 345 F. Supp. 2d 214, 226 (D.R.I. 2004) (noting that a "third party . . . *who is intended as a recipient* of the information and who foreseeably relies on such information is entitled to recovery if he or she does indeed rely" (emphasis added and internal quotation marks omitted)).[53]

Plaintiffs have not alleged any facts to show that the alleged misrepresentations (improperly) attributed to the Diocesan Defendants were received by and intended to deceive Plaintiffs. Plaintiffs allege that the "misrepresentations and omissions" in the Vatican Letter "were included because Defendants SJHSRI, RWH, CCCB, [and the Diocesan Defendants], ***all understood that Vatican approval was required for the transaction to proceed, and knew or were told that that [sic] the Vatican must approve specifically the 'pension restructuring.'***"

[52] FAC ¶¶ 170-180 (Vatican Letter); *id.* ¶¶ 320-321 (HSC Letter); *id.* ¶¶ 192-194 (representations to the USCCB and OCD); *id.* ¶¶ 198-202 (representations to the OCD and IRS). Plaintiffs' specific allegations concerning the Diocesan Defendants' alleged false statements regarding the OCD are discussed in detail *infra* at Part V.E and VI.A.

[53] *See also* 37 Am. Jur. 2d *Fraud & Deceit* § 281 ("Particular rules, however, may limit who is entitled to relief . . . such as . . . that the party seeking redress be the party the fraud was intended to deceive.[] That is, the fraud must have been directed toward the person bringing the fraud claim in the sense that this was the person intended to act upon it.").

FAC ¶ 180 (emphasis added). Thus, even assuming the Vatican Letter was written by any of the three Diocesan Defendants (which it was not), Plaintiffs are, in any event, alleging that the Diocesan Defendants intended to deceive the ***Vatican***—not Plaintiffs. *See id.*

Similarly, with respect to the HSC Letter, Plaintiffs allege that, "pursuant to the conspiracy in which [the Diocesan Defendants] were participating with Defendants SJHSRI, RWH, CCCB and [Prospect] to relieve Fatima Hospital of any liability under the Plan at the expense of the Plan participants," Bishop Tobin "(acting individually and as President of [the Diocesan Defendants] ***personally wrote to the Health Services Council to lobby in favor*** of regulatory approval of the for-profit hospital conversion[.]"[54] *Id.* ¶ 320 (emphasis added). Here, the intentional obfuscation of who is acting in making the allegedly fraudulent representation is even more egregious as Plaintiffs acknowledge that Bishop Tobin "personally" wrote to the HSC. *Id.* Ignoring that glaring and fatal acknowledgment, again, Plaintiffs are alleging intent to deceive the ***HSC***—not Plaintiffs. *Id.*

This is also true with respect to the alleged false statements to the USCCB, OCD and IRS. Ignoring that it was not any of the Diocesan Defendants that wrote to the USCCB, the editors of the OCD, or the IRS, Plaintiffs allege that the Diocesan Defendants "knew that continuing to list SJHSRI in the Catholic Directory was misrepresenting ***to the U.S. Conference of Bishops, the editors of the Catholic Directory, and the IRS***, that SJHSRI continued to be 'operated, supervised, or controlled by or in connection with the Roman Catholic Church.'" *Id.* ¶ 192 (emphasis added). Plaintiffs further allege that, "[t]hese false claims were material in that they ***hindered or had the potential for hindering the IRS's efforts*** to monitor and verify

[54] As per usual, Plaintiffs allege no facts to explain why the letter was written on behalf of these three specific corporations and not the hundreds of other corporations for which Bishop Tobin is president. *See Gelineau*, 732 A.2d at 44, 49; *supra* Part I.

Defendant SJHSRI's tax liability." *Id.* ¶ 199. Plaintiffs do not, however, allege that they were the intended recipients of these purported misrepresentations.

Rather, Plaintiffs only allege in conclusory fashion that the Diocesan Defendants even made these statements to ***third parties***, without making any effort to show that the Diocesan Defendants intended to deceive ***Plaintiffs* or *Plan participants*** with any of these statements. *See Gorbey ex. rel. Maddox v. Am. Journal of Obstetrics & Gynecology*, 849 F. Supp. 2d 162, 166 (D. Mass. 2010); *see also Cliftex Clothing Co.*, 148 A.2d at 344 (reversing judgment that plaintiff had established fraud where "the false representation was made not to the plaintiff but to the [third-party] purchaser"); *Ang v. Spidalieri*, No. WC-2006-0569, 2018 WL 810086, at *14 (R.I. Super. Ct. Feb. 5, 2018) (rejecting fraud claim premised on defendant's statements to third parties and reasoning "[a]t no time did [defendant] make a false statement of fact to [plaintiff] which [plaintiff] then relied upon"); *cf. Saffaf v. Ally Fin., Inc.*, No. 4:20-CV-276-SPM, 2021 WL 3089039, at *4 (E.D. Mo. Jul. 22, 2021) (collecting cases rejecting fraud claims premised on third-party reliance). Accordingly, their fraud claims should be dismissed.

b) Plaintiffs Fail to Allege Reliance on the Statements to Third-Parties

Finally, Plaintiffs have failed to allege that they or Plan participants knew of, let alone relied on, the purported statements to the Vatican, HSC, USCCB, OCD, or IRS. Failing to do so is fatal to Plaintiffs' fraud claim. *See St. Paul Fire*, 641 A.2d at 1299-1300 & n.2 ("It is further fundamental that a plaintiff must present evidence that shows he or she was induced to act because of the reliance upon the alleged false representation.").

Gorbey is particularly instructive. 849 F. Supp. 2d at 166. There, the court denied the plaintiffs' motion to amend their complaint to add a claim for fraud. *Id.* The court reasoned: "Plaintiffs here do not allege that they relied or acted upon any alleged misrepresentation but rather that third parties so relied and acted which, in turn, resulted in

plaintiffs' injury." *Id.* "Plaintiffs point to no case," the court added, "in support of a theory that third-party reliance on fraud is cognizable under Massachusetts law." *Id.* Rhode Island law recognizes no such action either. *Cliftex Clothing Co.*, 148 A.2d at 276 (reversing judgment in favor of plaintiff and explaining: "Since the representation was not made to the plaintiff to induce it to take or refrain from taking any action toward the defendant, the plaintiff could not rely upon it."); *see Ang*, 2018 WL 810086, at *14 (disposing of fraud claim concerning statements to third parties due to lack of reliance by plaintiff).

E. The Listing of SJHSRI in the Official Catholic Directory Was Proper and, in any Event, Cannot Be Challenged in These Circumstances; Accordingly No Fraud or Conspiracy Claim Can Be Based on that Inclusion

The FAC alleges that the Diocesan Defendants improperly agreed to maintain the Plan as a church plan by listing SJHSRI in the OCD (without pleading any facts that connect the Diocesan Defendants to that listing). *See, e.g.*, FAC ¶¶ 111-12, 153-59. Even assuming the listing of SJHSRI in the OCD was somehow attributable to DAC, DSC, or RCB, Plaintiffs cannot sustain Count VII (or any other claim) on this ground because (1) the allegations in the FAC, documents referenced therein, and public records show that SJHSRI was, in fact operated *in connection* with the Church and (2) the First Amendment to the United States Constitution precludes Plaintiffs from challenging the sufficiency of the Church's determination on this score.[55]

1. *The FAC's Allegations Regarding Listing a Subordinate Organization in the OCD*

Each year, the IRS issues a Group Ruling determination letter to the USCCB pertaining to the group tax-exempt status of the USCCB and its subordinate organizations. *Id.* ¶¶ 100, 106. The IRS accepts listing of a subordinate organization in the OCD as confirmation that

[55] And, as explained *infra* at Parts V.E.2.a and VI.A.2, the test for OCD listing is not equivalent to that required to maintain an organization's pension plan as a church plan.

the organization falls within the USCCB's group exemption. *Id.* ¶ 102. The FAC alleges that to be included under the USCCB group exemption the listed organization must be "operated, supervised, or controlled by or in connection with the Roman Catholic Church . . . ." *Id.* ¶ 101. The FAC also alleges in conclusory fashion, with no factual underpinnings, that all three of RCB, DSC, **and** DAC are responsible for assessing eligibility for OCD listing within "the Diocese of Providence." *Id.* ¶ 104. Listing in the OCD means an entity is (1) operated, supervised, or controlled by or in connection with the Catholic Church and (2) entitled to tax-exemption under the group ruling issued to the USCCB. *Id.* ¶ 103.

2. *Count VII Fails Because the FAC Acknowledges and Documents Cited Therein Show that SJHSRI Was Operated in Connection with the Diocese of Providence*

The FAC's allegation that SJHSRI was improperly listed in the OCD is flatly contradicted and disproven by Plaintiffs' own allegations and records referenced in the FAC and capable of judicial notice. SJHSRI was, in fact, operated in connection with the Catholic Church, even after the 2014 Asset Sale.

The FAC focuses on the purported lack of diocesan control over the corporate governance of SJHSRI beginning in 2011, *id*. ¶¶ 87-90. That is not the standard. The FAC quotes the memorandum from the USCCB that sets the standard. FAC ¶¶ 106-07; Ex. 18 at 2 (2017 Memo from USCCB). That memorandum provides that the USCCB's Group Ruling determination letter from the IRS applies to "the agencies and instrumentalities and educational, charitable, and religious institutions operated, supervised or controlled by **or** *in connection* with the Roman Catholic Church in the United States . . . ." (emphasis added)); *see* FAC ¶¶ 106-07 (quoting USSCB memorandum). Although Plaintiffs assert that SJHSRI had no *connection* with the Diocese of Providence, FAC ¶ 157, not only do they fail to plead sufficient facts to support the claim—they actually plead sufficient facts to establish there was a connection and that

SJHSRI actually met the USCCB standard.

a) SJHSRI's Diocesan Connection Post-2014 Asset Sale

SJHSRI was operated in connection with the Diocese of Providence. There is no dispute that SJHSRI survived the 2014 Asset Sale. Following the closing of the sale, SJHSRI retained a direct connection with the Roman Catholic Church and specifically, the Diocese of Providence, as expressly set forth in SJHSRI's corporate governance documents. SJHSRI's amended articles of incorporation, dated January 4, 2010, name RCB the Class B member of SJHSRI. Ex. 19 at Ex. A (Articles of Amendment to Articles of Incorporation of SJHSRI) ("The corporation [SJHSRI] shall have two classes of members . . . . The Class B member shall be the Roman Catholic Bishop of Providence, a body politic and corporation sole, or its designee."). These articles, as amended, are on file with the Rhode Island Secretary of State. *Id.* The Affiliation Agreement, referenced in the FAC at paragraph 237, contains similar provisions. Ex. 28 (Affiliation Agreement) § 2.4.6.

As Class B member, RCB possessed specific controls over the conduct of SJHSRI, even in wind-down. These included authority to, among other things, approve or reject:

- The dissolution of SJHSRI;
- All changes with respect to the SJHSRI charity care policy;
- All matters with respect to pastoral care including funding;
- Any amendment to the Articles of Incorporation, bylaws or other governing documents that adversely effects or diminishes the Catholicity of SJHSRI or relates to the Ethical and Religious Directives for Catholic Health Care Services ("ERDs")[56] or the performance of prohibited procedures;
- Any changes to the mission statement, the vision statement or the values statement as set forth in the Articles of Incorporation, bylaws or other governing documents of SJHSRI.

[56] The ERDs, attached at Exhibit 20, and referenced in the FAC. FAC ¶ 149 & n.3.

Ex. 19 at Ex. A (Articles of Amendment); *see* Ex. 28 (Affiliation Agreement) §§ 2.4.7-2.4.8. Accordingly, even after the 2014 Asset Sale, SJHSRI continued to be operated *in connection with* the Diocese of Providence. SJHSRI's listing in the OCD, therefore, was not fraudulent. *See Cote*, 148 A.3d at 548.

The FAC recognizes this connection. FAC ¶ 88 (recognizing that "the Diocese of Providence" had a role in SJHSRI's governance and rights over SJHSRI's Catholicity, but arguing that neither were significant or "meaningful"). Plaintiffs try to negate the connections inhering in the corporate governance documents by referencing statements to the press by diocesan personnel following the petitioning of the Plan into receivership. *Id.* ¶¶ 161-162. For example, the FAC quotes the following:

> St. Joseph Health Services of Rhode Island is not a diocesan entity. The pension plan was adopted, sponsored, operated, managed and funded by SJHSRI, an independent corporation, and not by the Diocese of Providence. Changes over the last decade, including the formation of CharterCARE Health Partners, sharply reduced diocesan involvement in SJHSRI and the hospitals. And upon the 2014 transaction with Prospect, that involvement essentially ended.

Id. ¶ 161; *see id.* ¶ 162. First, statements made years after the 2014 Asset Sale cannot negate the corporate governance documents in place at that time. Second, such statements are easily squared with continued ties between SJHSRI and the Church as a matter of law and corporate form. From its inception, SJHSRI was a separate corporate entity. That in no way prevented it from also operating pursuant to the teachings of the Catholic Church. From the perspective of managing the day-to-day business of SJHSRI, the Church's role had become quite limited to non-existent after the 2014 Asset Sale. But nothing in that statement precludes other associations with the Church, such as RCB's continuing role in major decisions affecting the operation or future of SJHSRI as set out above.

Some of those roles are not limited to solely enforcing Catholicity (e.g., the dissolution of SJHSRI, changes in its mission statement). Others are related to enforcing continued Catholicity as regards charity care policy and the ERDs. Plaintiffs seem to argue that these rights had no meaning after SJHSRI no longer operated a hospital. *Id.* ¶¶ 88, 156-58. But the transfer of hospital assets did not render meaningless the Church's continuing right to keep SJHSRI from using its resources in a manner that would diminish its Catholicity or its adherence to the ERDs. The ERDs, for example, state: "Catholic health care institutions are not to provide abortion services, even based upon the principle of material cooperation."[57] Ex. 20 at 18 (ERDs). Thus, even though SJHSRI had ceased to operate a hospital, if as part of winding up its affairs, SJHSRI sought to change its governing documents to permit the use of corporate resources to support abortion providers, the Church could have stopped SJHSRI from doing so. *See* Ex. 19 at Ex. A; Ex. 28 § 2.4.7(f). Because of these continuing connections there was nothing false in the post-2014 Asset Sale listing of SJHSRI in the OCD. Count VII should be dismissed. *See Cote*, 148 A.3d at 548; *see also Laccinole*, 2016 WL 868511 at *8.

Plaintiffs improperly conflate the standards necessary for listing in the OCD and qualification as a church plan. Beyond incorrectly minimizing the connection between the Church and SJHSRI after the 2014 Asset Sale, the FAC also confuses the standard for listing in the OCD pursuant to USCCB guidelines and for qualification as a church plan under ERISA. FAC ¶¶ 69(c), 128-29, 153-54, 156-58, 202-203. That is, Plaintiffs attempt to test SJHSRI's connection to the Church (and therefore entitlement for OCD listing) against a criticized, overly-

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[57] The ERDs provide:

> [C]ooperation is *material* if the one cooperating neither shares the wrongdoer's intention in performing the immoral act [in the example above, abortion] nor cooperates by directly participating in the act as a means to some other end, but rather contributes to the immoral activity in a way that is causally related but not essential to the immoral act itself.

Ex. 20 at 24 (emphasis in original).

strict standard chosen by a federal appeals court for assessing whether an organization is "controlled by or associated with a church" for the purposes of the church plan analysis. *Compare id.* ¶ 86 *with id.* ¶¶ 156, 158. The Court should reject this conflation. The two standards are not the same.

Plaintiffs appear to rely on the factors set out in *Lown v. Continental Casualty Co.*, 238 F.3d 543, 548 (4th Cir. 2003), to argue that SJHSRI was not controlled by or associated with a church for the purposes of their church plan ***and*** OCD qualification arguments. FAC ¶ 86 (quoting *Lown* factors); *see also id.* ¶¶ 87-90 (alleging purported lack of diocesan control or association). The *Lown* factors ask: (1) "whether the religious institution plays any official role in the governance of the organization"; (2) "whether the organization receives assistance from the religious institution"; and (3) "whether a denominational requirement exists for any employee or patient/customer of the organization." 238 F.3d at 548.

Plaintiffs' reliance on *Lown* as a standard for OCD inclusion is improper. The USCCB does not suggest adherence to *Lown* or anything approaching the *Lown* factors as the standard for listing an entity in the OCD. *See* Ex. 18. The USCCB makes clear that the test is whether a subordinate organization seeking listing in the OCD is operated, supervised or controlled by or *in connection with* the Roman Catholic Church. *Id.* at 2. Whether the organization does or not qualify for listing in the OCD rests with the local dioceses. *See id.; see also Overall v. Ascension*, 23 F. Supp. 3d 816, 832-33 (E.D. Mich. 2014) (identifying decisions as to challenges to "a church's polity, administration, and community" as beyond judicial inquiry).

Further, apart from having no relevance at all to the OCD listing question, *Lown* hardly represents a consensus standard, even as regards its holding concerning church plan

status. *Lown* has been criticized as out of step with ERISA's own definition of "associated with a church," which provides: "an organization . . . is associated with a church . . . if it shares common religious bonds and convictions with that church . . . ." 29 U.S.C. § 1002(33)(C)(iv); *see Medina v. Catholic Health Initiatives* ("*Medina II*"), 877 F.3d 1213, 1224 (10th Cir. 2017). As the U.S. Court of Appeals for the Tenth Circuit explained in *Medina II*:

> Setting aside their uncertain derivation, the *Lown* factors cannot be the exclusive means of determining whether an organization is "associated with a church." This is because the *Lown* factors are much narrower than the broad language of the definition in § 1002(33)(C)(iv). Under the statute, to be "associated with a church," a corporation need only share "common religious bonds and convictions with that church or convention or association of churches." The statute imposes no denominational requirements, corporate governance requirements, or funding requirements. Thus, an organization could share "common religious bonds and convictions" with a church while satisfying none of the *Lown* factors. Because the *Lown* factors are narrower than the statutory language, satisfying the *Lown* factors may *suffice* to establish that an organization is associated with a church. But an organization does not *need* to satisfy the *Lown* factors in order to be associated with a church.

877. F3d at 1224 (emphases in original). Two points on the passage quoted above. First, it eloquently explains why this Court should decline to follow *Lown* and defer to the wide discretion afforded to local dioceses by the USCCB. Second, to the extent church plan "association" standards are relevant at all to this inquiry, it is worth noting the facts regarding SJHSRI described above meet *Medina's* definition of "association" under 29 U.S.C. § 1002(33)(C)(iv) in spades. SJHSRI shared "common religious bonds and convictions" with the Roman Catholic Church before and after the 2014 Asset Sale. It did so pursuant to explicit provisions in its governing documents. Ex. 19 at Ex. A; Ex. 28 §§ 2.4.6-2.4.8. The Court should dismiss Count VII.

b) Plaintiffs Cannot Challenge the Sufficiency of the Connection Between SJHSRI and the Diocese of Providence for OCD Listing Purposes

Plaintiffs begrudgingly acknowledge that SJHSRI did indeed have a continued diocesan connection after the 2014 Asset Sale, but strive to minimize it, characterizing it as having "no meaningful role" or as "moot." FAC ¶ 88. Plaintiffs miss the mark. For OCD listing purposes, if there is a connection between SJHSRI and the Diocese of Providence (and there is), then Plaintiffs cannot challenge the sufficiency or meaningfulness of that connection as a matter of law. The First Amendment precludes judicial inquiry into "a church's polity, administration and community." *See Overall*, 23 F. Supp. 3d at 832 (citing *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713 (1976)). Plaintiffs' challenge to the sufficiency of SJHSRI's connection to the Diocese of Providence for the purposes of listing in the OCD, therefore, must fail.

In *Overall*, the court ruled that the First Amendment barred the plaintiff's argument contesting the sufficiency of a defendant hospital's connection with the Church (in the context of a church plan challenge). *See id.* at 832-33. The Court reasoned that, even assuming the plaintiff's "allegations are true, this argument regarding religious orthodoxy is prohibited by the Constitution because the First Amendment creates a protected zone for churches to decide these issues of religious doctrine free from government intrusion." *Id.* at 832 (internal quotation marks omitted). "This protected zone includes: (1) a church's law and doctrine; (2) a church's religious mission, and (3) a church's polity, administration, and community." *Id.* Here, as in *Overall*, Plaintiffs question SJHSRI's connection with the Diocese of Providence and the determination that this connection was sufficiently meaningful to list SJHSRI in the OCD. *See id.* This represents an improper challenge to the Diocese of Providence's assessment of "who is within [its] religious community." *See id.*; *see also Medina v. Catholic Health Initiatives*

("*Medina I*"), 147 F. Supp. 3d 1190, 1202 (D. Colo. 2015) (reasoning similarly as to a challenge of a Catholic hospital's "common religious bonds" with a church). As such, Count VII (and all other claims premised on purported OCD listing fraud) should be dismissed.

VI. THE FAC DOES NOT PLAUSIBLY ALLEGE THAT THE DIOCESAN DEFENDANTS ENTERED INTO AN AGREEMENT FOR AN UNLAWFUL ENTERPRISE AND SO PLAINTIFFS' CLAIM FOR CONSPIRACY (COUNT IX) SHOULD BE DISMISSED

To plead a claim for civil conspiracy under Rhode Island law, "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." *Stubbs*, 149 A.2d at 708-09 (internal quotation omitted); *see Smith v. O'Connell*, 997 F. Supp. 226, 241 (D.R.I. 1998). "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." *Stubbs*, 149 A.2d at 708-09. Rather, the "evidence must do more than raise a suspicion. It must lead to belief." *Id.* Civil conspiracy, moreover, "is not an independent basis of liability," and therefore "requires a valid underlying intentional tort theory." *Fogarty v. Palumbo*, 163 A.3d 526, 543 (R.I. 2017) (internal citation and quotation marks omitted)). Finally, because Plaintiffs' claim for civil conspiracy is based on their underlying claims of fraud and other counts sounding in fraud, Rule 9(b) applies to further test the sufficiency of the pleading. *See Hayduk v. Lanna*, 775 F.2d 441, 443-44 (1st Cir. 1985); *R.I. Res. Recovery Corp. v. Albert G. Brien & Assocs.*, C.A. No. PB 10-5194, 2012 R.I. Super. LEXIS 113, at *39 (R.I. Super. Ct. Jul. 16, 2012); *supra* note 2.

The factual underpinnings of Plaintiffs' "quid pro quo" fraud claims against the Diocesan Defendants were discussed at length, *supra* Part III.A & V, and those sections are incorporated here to the extent that they apply equally to any analysis of the alleged conspiracy. Having failed to allege any cognizable fraud, Plaintiffs' conspiracy claim must also fail.

Fogarty, 163 A.3d at 543. This section will address legal deficiencies in Count IX not previously discussed.

A. The FAC Does Not Allege Facts Suggesting an Improper Agreement Concerning the Listing of SJHSRI in the OCD

1. *There Was Nothing Unlawful About the Listing of SJHSRI in the OCD*

Plaintiffs contend that the Diocesan Defendants conspired with other defendants to maintain the Plan as a church plan by fraudulently listing SJHSRI in the OCD, following the sale of SJHSRI's hospital assets to Prospect. FAC ¶¶ 69(c), 129, 140, 157, 202-203. As discussed in detail *supra* at Part V.E there was nothing false about SJHSRI's listing in the OCD following the 2014 Asset Sale given the continuing connection between SJHSRI and the Church. Accordingly, even if one were to accept the false assertion that the Diocesan Defendants had anything to do with the OCD listing decision, there was no "intentional tort" that the Diocesan Defendants agreed to prosecute to support a conspiracy claim. *See Fogarty*, 163 A.3d at 543. Count IX should be dismissed.

2. *Listing in the OCD and Maintaining Church Plan Status Are Two Different Determinations Made by Different Entities on Different Bases*

As discussed *supra* at Part V.E.2.a, to make out its fraud claim, the FAC improperly conflates the connection with the Catholic Church required for listing in the OCD with the requirements for control or association needed to qualify for church plan status. The conspiracy claim depends on the same type of improper conflation: that the Diocesan Defendants' decision to list SJHSRI in the OCD preserved the Plan's church plan status. FAC ¶¶ 128-29, 153-54, 156-59, 165, 183-86, 188, 202-03, 205. The considerations and requirements for listing an organization in the OCD, however, are ***not*** equivalent to the complex legal requirements necessary to maintaining a pension plan as a church plan. The former involves inquiry into an organization's connection with a diocese and status as a "public charity" under

the Internal Revenue Code. *See* Ex. 18 at 2-3. The latter requires the presence of different and additional elements, meaning listing in the OCD could not convey church plan status. *See* 29 U.S.C. § 1002(33).

The FAC makes this distinction between OCD listing and church plan status clear. Plaintiffs allege that a pension plan of a non-church organization controlled by or associated with a church must be maintained by an organization that has a principal purpose of administering or funding the plan, which is also controlled by or associated with a church. *Id.* ¶ 70. There is no requirement for a principal purpose organization for listing in the OCD. *Compare* 29 U.S.C. § 1002(33)(A) & C(ii)(II) (defining church plan under ERISA); FAC ¶ 70 (describing principal purpose organization requirement for church plan status) *with* Ex. 18 (describing OCD listing considerations, without reference to principal purpose organization element). Accordingly, even under Plaintiffs' own alleged facts, the Diocesan Defendants—assuming that they had any role in the determination of whether the Plan was a church plan or SJHSRI was listed in the OCD, which they did not—could not ensure that the Plan would be treated as a church plan simply by listing SJHSRI in the OCD. Any unlawful agreement that rested on listing SJHSRI in the OCD to keep the Plan exempt from ERISA is legally flawed.

3. *Other Aspects of the FAC Undermine Plaintiffs' Claim that there Was an Agreement for an Illegal Undertaking Concerning the OCD*

On top of the improper conflation between qualifying for listing in the OCD and attaining church plan status, the FAC also undercuts Plaintiffs' contention that the Diocesan Defendants engaged in any sort of illegal agreement concerning the OCD to render the Diocesan Defendants' conduct inconsistent with lawful purposes. Plaintiffs assert that it is an annual responsibility to make submissions concerning the OCD, FAC ¶¶ 104-108, and that SJHSRI had a history of being listed in the OCD prior to 2015, *id.* ¶ 109. There was nothing out of the

ordinary then with the continued listing of SJHSRI in the OCD after the 2014 Asset Sale.

Any "agreement" between the Diocesan Defendants and others to fraudulently list SJHSRI in the OCD is belied, moreover, by Plaintiffs' claim that Chancellor Reilly—alleged to have been intimately involved in those dealings—challenged the ability of SJHSRI to remain in the OCD mere months after the 2014 Asset Sale.[58] *Compare id.* ¶¶ 141-159, 164-166 *with id.* ¶ 185. Rather, Chancellor Reilly's November 11, 2014 email was consistent with (and representative of) the Chancellor performing the function as gatekeeper to the OCD, so that no organization would be listed improperly. Ex. 22 (November 11, 2014 Email from Chancellor Reilly).[59]

The FAC mischaracterizes Chancellor Reilly's November 11, 2014 email to such a degree that it is barely recognizable.[60] *Id.* Obviously, the contents of the document trump any characterization of it. *See Bedall*, 137 F.3d at 17-24; *Jones*, 542 F. Supp. 3d at 55. The Chancellor's comment that "Fatima and SJHSRI are not eligible for listing" in the OCD was *not* an admission that SJHSRI was not connected with the Diocese of Providence, but driven by the Chancellor's then-held belief that SJHSRI was now owned by the for-profit Prospect, a mistaken belief, obvious from the face of the email, but not mentioned in the FAC. Ex. 22. If Prospect owned SJHSRI, the Chancellor warned, this would jeopardize SJHSRI's place in the OCD. *See id.* ("Except in exceptional circumstances, the USCCB group exemption policies and the IRS rules for public charities would not permit an organization owned by a *for-profit* to continue to

[58] "Chancellor" is a diocesan position recognized under the Code of Canon Law. 1983 Code c.482.
[59] *See Stubbs*, 149 A.2d at 708-09; *see also RSM Prod. Corp. v. Freshfields Bruckhaus Deringer U.S. LLP*, 682 F.3d 1043, 1050 (D.C. Cir. 2012) (dismissing conspiracy claim against law firm because, although alleged co-conspirators provided the funding for another co-conspirator's arbitration defense, it was implausible to infer law firm's provision of legal services at arbitration was intended to further conspiracy, where law firm's involvement in arbitration proceeding was "more likely explained by . . . its normal business practice of providing legal services.").
[60] They also make no attempt whatsoever to plead facts from which one could conclude that Chancellor Reilly was acting for any of the Diocesan Defendants when he wrote that email.

be listed in the Directory" (emphasis added)); *see also* Ex. 18 at 2-3 (discussing public charity requirement for USCCB's group ruling). The Chancellor's lack of understanding as to the structure of the transaction contrasts starkly with Plaintiffs' claim that diocesan actors engaged in a secretive and orchestrated corporate shell game. The Chancellor's question belies any such complex understanding and is, instead, consistent with his secondary role of ensuring compliance with the USCCB rubric as he understood it. And it totally undermines his (and any Diocesan Defendant's) alleged involvement in a fraud or conspiracy upon which the viability of the transaction rested. *See Stubbs*, 149 A.2d at 708-09.

Likewise, documents within the public record and referenced in the FAC indicate that the meetings/presentations to Bishop Tobin, Chancellor Reilly, and Monsignor Theroux in August 2013 and to the Diocesan Finance Council in September 2013 respectively were far more consistent with lawful business dealings than an unlawful plot against the Plan and its participants. Plaintiffs allege:

> Defendants SJHSRI, RWH, CCCB, Prospect Chartercare, Prospect Chartercare St. Joseph, Prospect Chartercare Roger Williams, Prospect Medical Holdings, and Prospect East, Corporation Sole, Diocesan Administration, and Diocesan Service all knew that the power of Corporation Sole, Diocesan Administration, and Diocesan Service to delete SJHSRI from the Catholic Directory gave Corporation Sole, Diocesan Administration, and Diocesan Service a complete veto over the asset sale, because claiming that the Plan was a Church Plan, although unlawful, was a requirement by SJHSRI, RWH, CCCB, and Prospect Chartercare, Prospect Chartercare St. Joseph, Prospect Chartercare Roger Williams, Prospect Medical Holdings, and Prospect East for the sale to proceed, as expressly set forth in the Overview of the Strategic Transaction shared with Corporation Sole, Diocesan Administration, and Diocesan Service on August 14, 2013.

FAC ¶ 202. Plaintiffs are correct in one respect: RCB (though not DAC or DSC) did hold a "complete veto over the asset sale." *Id.* But that authority had nothing to do with the "power to delete SJHSRI from" the OCD, *id.*, and everything to do with the direct legal authority afforded to RCB in SJHSRI's governing documents. Ex. 19 at Ex. A; Ex. 28 § 2.4.7(a). That is, the

Amended Articles of Incorporation for SJHSRI (and the Affiliation Agreement) expressly granted RCB a veto over "the sale, mortgaging, or leasing of any real or personal property of the corporation with a value in excess of the canonical threshold then in effect[.]" Ex. 19 at Ex. A ¶ D(i); *see* Ex. 28 § 2.4.7(a). As such, for any significant asset sale to go through, SJHSRI, CCCB, RWH, and Prospect would need to seek RCB's approval as a pure matter of corporate governance. *See Instron,* 925 F. Supp. 2d at 180 (dismissing conspiracy claim as implausible where defendants "had no apparent need to conspire to block an ABI standard when they could effectively accomplish this objective" individually).

Additionally, the presentation at the August 14, 2013 meeting with Bishop Tobin, Chancellor Reilly, and Msgr. Theroux, FAC ¶ 153, does not reflect an offer directed at the Diocesan Defendants, let alone the "quid pro quo" described in the FAC.[61] Ex. 23 ("Overview of Strategic Transaction" Presentation at August 14, 2013 meeting). Nor does the presentation suggest any affirmative obligation specific to the Diocesan Defendants relative to the Plan. *Id.* at 11. This is not surprising because the presentation, as Plaintiffs acknowledge, was originally a "Presentation to the Board of Directors," referring to the Boards of Trustees for SJHSRI, CCCB, and RWH. FAC ¶ 143. The presentation makes no reference to the OCD, let alone an agreement on the part of the Diocesan Defendants to list SJHSRI therein. *See* Ex. 23. Rather, it describes in detail the various covenants agreed to between Prospect, CCCB, SJHSRI, and RWH. *See id.* at 3-4, 9-10. The Diocesan Defendants were not signatories to the APA. *See* Ex. 11 at PCEC000089-PCEC000092.

[61] This presentation was allegedly identical to the one provided to the September 17, 2013 meeting of the Diocesan Finance Council, save for deletion of references to "Attorney-Client Privilege" and a title change. FAC ¶ 165. This later presentation is on the Court's docket at ECF No. 67-24.

The presentation, moreover, does not list "requirements" on the part of the Diocesan Defendants, but "Requirements of the post-Closing structure of CCHP":

Requirements of the post-Closing structure of CCHP
- Maintain the retirement plan of St. Joseph Health Services of Rhode Island as a "Church Plan"
- Maintain an organization to –
  - enforce the post-closing covenants of Prospect and Newco; and
  - hold the membership (ownership) interest in Newco

See Ex. 23 at 11. Although "maintain the retirement plan of St. Joseph Health Services of Rhode Island as a 'Church Plan'" appears beneath the "Requirements" heading, this hardly represents a "quid pro quo" to the Diocesan Defendants. *See id*. The other "requirement" describes the need to "Maintain an organization to enforce the post-closing covenants of Prospect and Newco" and "hold the membership (ownership) interest in Newco" (i.e., a reference to the need for CCCB to continue in existence to carry out those functions). *See id.* From the face of the document therefore, this is simply a list of obligations of *CCCB* in the agreement between *Prospect*, *CCCB*, *SJHSRI*, and *RWH*, and not a conspiracy with the Diocesan Defendants. This makes sense when the presentation is viewed as originally drafted for the purposes of the Boards of Trustees of SJHSRI, CCCB, and RWH; not the Diocesan Defendants' alleged (and non-existent) power to maintain the Plan as a church plan by listing SJHSRI in the OCD.[62] FAC ¶ 143; *see Twombly*, 550 U.S. at 564-70; *Stubbs*, 149 A.2d at 708-09.

Stubbs is instructive. In *Stubbs,* the Rhode Island Supreme Court considered whether the plaintiffs, heirs of an alleged victim of a conspiracy to deprive the victim of an

[62] Plaintiffs' allegation concerning the receipt of $638,838.25 in proceeds from the 2014 Asset Sale by the Inter-Parish Loan Fund does not change the analysis. FAC ¶ 209. SJHSRI had previously borrowed that money, through the Inter-Parish Loan Fund. *Id.* ¶¶ 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. Allegations concerning the Inter-Parish Loan Fund's lending activities cannot serve as a basis of liability for the Diocesan Defendants.

inheritance, asserted sufficient facts to support the conclusion of law that there was a conspiracy. 149 A.2d at 707. The Court held that a conspiracy claim must include facts that, if proved, would "lead to belief" of a conspiracy. *Id.* at 709. Alleging "[d]isconnected circumstances any 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. Observing that the plaintiffs had only alleged that the defendant had appointed others to positions of trust and asked the court to infer the defendant's involvement in a conspiracy against the alleged victim as a result of the purported harm that befell her, the court deemed this a bridge too far. *Id.* Rather, the court concluded that the plaintiffs did not allege facts supporting the elements of a conspiracy. *Id.*

Similar concerns exist here. When considered in light of the applicable law, the public record, the documents referenced in the FAC, and the FAC itself, Plaintiffs fail to plausibly cast the Diocesan Defendants' dealings with SJHSRI *et al.* concerning the OCD as "an unlawful undertaking." *Stubbs*, 149 A.2d at 708-09. As a matter of law, the Diocesan Defendants could not maintain the Plan as a church plan by listing SJHSRI in the OCD. *See supra* Part VI.A.2. Moreover, when taken in fuller context and divorced of Plaintiffs' pejorative gloss, the FAC describes circumstances that "are just as consistent with a lawful purpose." *Stubbs*, 149 A.2d at 708-09. Like the *Stubbs* plaintiffs who sued a defendant who had appointed others to positions of trust that were allegedly abused, Plaintiffs here ask this Court to infer the Diocesan Defendants' alleged involvement in the alleged conspiracy essentially because they were both the gatekeeper of the OCD (without pleading facts to support that conclusion at all) and had authority to veto the 2014 Asset Sale (which RCB had, although not for the reasons Plaintiffs ascribe). Such alleged circumstances are insufficient to establish a conspiracy. *See id.*;

see also RSM Prod. Corp. v. Freshfields Bruckhaus Deringer U.S. LLP, 682 F.3d 1043, 1050 (D.C. Cir. 2012); *Instron*, 925 F. Supp. 2d at 180; *supra* Part III.A.7-8.

B. The FAC Fails to Allege Facts Suggesting an Illegal Agreement Concerning the 2014 Asset Sale or Bishop Tobin's Communications in Support of that Transaction

The FAC does not allege sufficient facts to establish any sort of illegal agreement as it concerns the funding/church plan status of the Plan, the structure of the 2014 Asset Sale, the adoption of Catholicity rules at "New" Our Lady of Fatima Hospital and "New" Roger Williams Hospital, or Bishop Tobin's Letters to the Vatican or HSC. Plaintiffs try to place the trappings of a conspiracy on a transaction that was on full display to the public, and heavily vetted by two state regulators that received substantial facts concerning the present and future of the Plan. *See supra* Part III.A. They do so largely by assuming bad intent and using conclusory and pejorative word choice throughout the FAC, not by alleging particular facts. No claim for conspiracy can plausibly lie in such circumstances. *See Twombly*, 550 U.S. at 564-70; *Stubbs*, 142 A.2d at 708-09; *see also Eclectic Props.*, 751 F.3d at 994 (dismissing complaint for failing to contain adequate factual allegations to plausibly infer that the defendants specifically intended to defraud).

1. *Disclosure of Funding/Church Plan Status of the Plan, the Scope of the 2014 Asset Sale, and the Continued Catholicity of the Hospitals*

As discussed in detail *supra* at Part III.A, the funding and church plan status of the Plan, the scope of the 2014 Asset Sale, and the continued Catholicity of the hospitals were publicly disclosed, as was the fact that the Plan's status was a prime motivator for the 2014 Asset Sale. There was no predicate wrong, therefore, to support a conspiracy claim. *See Fogarty*, 163 A.3d at 543; *see also Precision Assocs., Inc.*, 2015 WL 4987751, at *5 (dismissing antitrust conspiracy claim where defendant was subject of regulatory inquiry because it was "not

plausible that the antitrust regulators would have offered leniency to a defendant that continued to actively participate in the conspiracy").

2. *Letters to the HSC and the Vatican*

Plaintiffs describe the letter to the HSC as written by Bishop Tobin "pursuant to the conspiracy in which" the Diocesan Defendants "were participating with Defendants SJHSRI, RWH, CCCB, and Prospect Chartercare, Prospect Chartercare St. Joseph, Prospect Chartercare Roger Williams, Prospect Medical Holdings, and Prospect East, to relieve Fatima Hospital of any liability under the Plan at the expense of the Plan participants . . . ." FAC ¶ 320. They make similar allegations concerning his letter to the Vatican. *Id.* ¶ 322. When considering plausibility however, courts must consider an "obvious alternative explanation" for a defendant's behavior. *Eclectic Props. E.*, 751 F.3d at 996; *see Read & Lundy, Inc. v. Wash. Tr. Co. of Westerly*, No. PC99-2859, 2002 WL 31867868, at *20 (R.I. Super. Ct. Dec. 13, 2002) (dismissing conspiracy claim and reasoning: "the facts . . . are all consistent with [defendant's] interest in making a lawful commercial loan"), *aff'd* 840 A.2d 1099 (R.I. 2004) (per curiam). The same obvious alternative explanation that vitiates the OCD prong of the conspiracy renders this prong implausible as well. *Supra* Part VI.A.

Moreover, both letters on their face are far more consistent with an additional obvious lawful purpose: Bishop Tobin was deeply interested in doing what he could to help a community hospital system that all agree was suffering unsustainable losses and desperately need capital. *See* Ex. 24 at 1-2 (HSC Letter); Ex. 21 at 1 (Vatican Letter); *supra* Part III.A. He sent a letter to a governmental authority and another to the Vatican in support of a transaction that was described to him—in a presentation that tracked information also provided to the regulators—as the last best hope of saving that floundering hospital system. *Compare* Ex. 23 ("Overview of Strategic Transaction" Presentation at August 14, 2013 meeting) *with* Ex. 10 &

supra Part III.A (describing information disclosed to regulators). He did so to help avoid the catastrophic impact closing that system would have on the system's employees, patients and especially the underserved members of the community that relied on the system. *See* Ex. 24 at 1-2; Ex. 21 at 2; *see also Eclectic Props.*, 751 F.3d at 999 ("Plaintiffs' fraud theory is not plausible when considered in light of the innocent explanation that failure of franchise businesses in making rental payments, and their abandonment of leases, took place in the context of a deep national recession.").

Now years later, after the sale and the influx of $14 million to the Plan, Plaintiffs are completely unconstrained and need not balance the many critically important interests that were at play in this decision: Whether that hospital system would survive? Whether the system would have access to sufficient capital to succeed? Whether its value exceeded its debt? Whether its thousands of employees would have jobs? Where and how healthcare would be delivered, if at all, to the underserved populations that had used that hospital system for decades? *See generally* Ex. 24 at 1-2 (reflecting Bishop Tobin's consideration of such interests); Ex. 21 at 1-2 (same).

With the benefit of hindsight, Plaintiffs (now) may not like the deal that was ultimately adopted, nor the support expressed by Bishop Tobin (and many others) in connection with that decision. Such retrospective disagreement does not mean that the Diocesan Defendants had assented to the prosecution of an unlawful enterprise. Rather, it is far more consistent with a lawful purpose and the furtherance of the interests described here. *Stubbs*, 149 A.2d at 708-09; *see Read & Lundy, Inc.*, 2002 WL 31867868, at *20. "When faced with two possible explanations, only one of which can be true and only one of which results in liability, plaintiffs cannot offer allegations that are merely consistent with their favored explanation but are also

consistent with the alternative explanation." *Eclectic Props. E.*, 751 F.3d at 996. "Something more is needed, such as facts tending to exclude the possibility that the alternative explanation is true, in order to render plaintiffs' allegations plausible." *Id.* at 996-97. Plaintiffs, therefore, must show more than a business deal that went contrary to their present tastes for some economic or non-fraudulent reasons. *Id.* at 997.

3. *Other Components of the Alleged Conspiracy in which the Diocesan Defendants Were Not Involved Are also Implausible*

There are several other aspects of the alleged conspiracy concerning statements to Plan participants, regulators, and the Rhode Island Superior Court which the Diocesan Defendants are not alleged to have participated in or have even been aware of. The motion to dismiss filed by Angell Pension Group, Inc. demonstrated in detail how these allegations are equally implausible. Mem. of Law of in Supp. of Def. The Angell Pension Group., Inc.'s Mot. to Dismiss the First Amend. Compl., ECF No. 68-1, at 6-10, 24-28, 33-37, 41-50. The Diocesan Defendants incorporate those arguments by reference.

C. The Court Should Disregard Conclusory Allegations Attempting to Impute Conduct of Other Parties to the Diocesan Defendants

Plaintiffs repeatedly try to tie the purported misconduct of other parties to the Diocesan Defendants without pleading facts to render plausible their assertion that the Diocesan Defendants unlawfully conspired with those actors. For example, when discussing statements by CCCB and Prospect executives in the press, the FAC alleges: "These statements constituted false statements of material fact by Defendants SJHSRI, RWH, CCCB, Prospect Chartercare, Prospect Chartercare St. Joseph, Prospect Chartercare Roger Williams, Prospect Medical Holdings, and Prospect East and their co-conspirators, Defendants Angell, CC Foundation, Corporation Sole, Diocesan Administration, and Diocesan Service." FAC ¶ 372. The FAC is rife with such

conclusory language.[63] The Court should discount these allegations for two reasons. First, as discussed in detail *supra* at Parts III, V.B-C, & VI.A-B, the FAC has failed to plead sufficient facts to establish a plausible conspiracy in light of the voluminous public disclosure, the state of the law of church plan exemptions, and obvious alternative explanations. *See 16630 Southfield Ltd. P'ship*, 727 F.3d at 505 ("[T]he existence of obvious alternative explanations simply illustrates the unreasonableness of the inference sought and the implausibility of the claims made."). The Court, therefore, should give no credence to these "legal conclusion[s] couched as a factual allegation." *RSM Prod. Corp.*, 682 F.3d at 1050.

Second, the FAC does not plead facts supporting an overarching conspiracy, meaning that Plaintiffs could not impute other defendants' conduct to the Diocesan Defendants, even if they had plausibly pled a conspiracy (which they have not). Rather, on its face, the FAC describes *separate* schemes, only one of which features any effort—albeit insufficient—to allege facts implicating the Diocesan Defendants. FAC ¶ 55. Plaintiffs allege that SJHSRI, RWH, CCCB, Prospect, and the Diocesan Defendants struck a "deal," where the Diocesan Defendants

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[63] *See, e.g.*, FAC ¶ 318 (arguing that failure of SJHSRI, RWH, and CCCB to disclose the Plan's status as a church plan should be imputed to Diocesan Defendants); *id.* ¶ 338 (alleging that fraud in HCA applications to regulators by SJHSRI, RWH, CCCB, and Prospect was "aided and abetted" by "co-conspirators" the Diocesan Defendants and should be imputed to them); *id.* ¶ 340 (asserting that statement to Department of Health by CCCB and Prospect executives that $14 million contribution would strengthen plan was "aided and abetted by their co-conspirators" the Diocesan Defendants); *id.* ¶ 342 (alleging that misrepresentation by CCCB executive regarding funding level of plan also constituted an "intentionally false statement" of "co-conspirators" the Diocesan Defendants); *id.* ¶¶ 354-355 (alleging that misrepresentations to the HSC by CCCB official were also "false statements of material facts" by "co-conspirators" the Diocesan Defendants); *id.* ¶ 361 (asserting misrepresentations by SJHSRI, RWH, and CCCB to the Attorney General concerning RWH's designated funds were also "false statements" of "co-conspirators" the Diocesan Defendants); *id.* ¶ 362 (claiming that SJHSRI, RWH, and CCCB's failure to disclose to state regulators a desire to abandon the Plan "constituted false statements" by "co-conspirators" the Diocesan Defendants); *id.* ¶ 370 (claiming that assurances to the Project Review Committee of the HSC by SJHSRI, RWH, and CCCB were "part of the conspiracy" by all defendants); *id.* ¶ 373 (asserting that statements by CCCB to employees regarding local control "constituted false statements" of "co-conspirators" the Diocesan Defendants); *id.* ¶ 377 (alleging that misrepresentations by SJHSRI, CCCB, RWH, and Prospect to regulators concerning governance of Prospect Chartercare were "false statements" of "their co-conspirators" the Diocesan Defendants); *id.* ¶ 402 (asserting that misrepresentations by SJHSRI, RWH, and CCCB to the Attorney General regarding satisfaction of Plan liability through other assets "were in furtherance of the common fraud and conspiracy" of all defendants, including the Diocesan Defendants).

would improperly maintain the Plan as a church plan in exchange for Catholicity controls over the hospitals, freeing New Fatima Hospital from Plan liability to the benefit of SJHSRI, RWH, CCCB, and Prospect. *Id.* ¶ 151; *see* ¶¶ 165, 168, 203-205. But, for example, the FAC also speaks of an entirely separate scheme concerning deceit of regulators and the state court, and the establishment of Chartercare Foundation, without reference to facts plausibly tying the Diocesan Defendants to that alleged conspiracy. *Id.* ¶¶ 319-409. Instead, the FAC relies on conclusory assertions to accomplish that goal.

Alleged misrepresentations to regulators and the state court by others, however, cannot be imputed to the Diocesan Defendants just because Plaintiffs say so. Plaintiffs must allege facts that plausibly suggest the Diocesan Defendants' knowledge and involvement in this separate scheme. Plaintiffs have not. They do not, for example, describe deception of regulators and the state court as part of any other defendant's "deal" with the Diocesan Defendants, except in the improper conclusory form listed *supra* at note 63. FAC ¶ 151. There is nothing, moreover, in the "Overview of Strategic Transaction" presentation—which allegedly reflects the "quid pro quo" between the Diocesan Defendants and SJHSRI, RWH, CCCB, and Prospect—concerning misrepresentations to regulators or state court proceedings or the establishment of Chartercare Foundation. *Id.* ¶ 153; *see* Ex. 23. This is hardly surprising, as the FAC fails to list the Diocesan Defendants, when defining the participants in this "fraudulent scheme." FAC ¶ 379. Allegations concerning Bishop Tobin's letter to the HSC, moreover, do not save the conspiracy claim for the reasons set out *supra* at Part V.B-C & VI.B. The Court, therefore, should discount the FAC's conclusory effort to impute other defendants' alleged misconduct to the Diocesan Defendants and dismiss Count IX as implausible. *See Eclectic Props. E.*, 751 F.3d at 996-97; *Stubbs*, 149 A.2d at 708-09.

VII. COUNT VIII (FRAUDULENT SCHEME) IS NOT AN INDEPENDENT CAUSE OF ACTION

Count VIII purports to state a claim for "fraudulent scheme." However, Plaintiffs fail to identify any supporting legal authority that this is a stand-alone cause of action, independent from their claims for fraud (Count VII) and conspiracy (Count IX). Rather, any supposed "fraudulent scheme" is simply an element of, and subsumed by Counts VII and IX. *See, e.g. Caramadre*, 847 F. Supp. 2d at 341 ("Plaintiffs are correct that the Sponsors' orchestration of the fraudulent scheme may support a claim for civil conspiracy."); *Schlesinger v. O'Rourke*, 124 A. 259, 259-60 (R.I. 1924) (addressing "action of deceit," where defendant was accused of "consummating" a "fraudulent scheme"). Thus, Count VIII should be dismissed for this reason alone.

In any event, for the reasons set forth above, Plaintiffs have not plausibly alleged the Diocesan Defendants' role in any "fraudulent scheme" to satisfy Rule 9(b). *Supra* Parts I, III-VI.

VIII. COUNTS XVI THROUGH XIX (CIVIL LIABILITY UNDER R.I. GEN. LAWS § 9-1-2) SHOULD BE DISMISSED

In Counts XVI through XIX, Plaintiffs allege that the Diocesan Defendants violated four criminal statutes (three state, one federal) and should, therefore, be subject to civil liability under R.I. Gen. Laws § 9-1-2. FAC ¶¶ 531-546. Plaintiffs' § 9-1-2 claims are premised on the underlying fraud and conspiracy. If those claims are dismissed, nothing remains to base § 9-1-2 liability. The § 9-1-2 claims also fail for three additional reasons. *First*, Plaintiffs' claims of violations of the Hospital Conversion Act ("HCA"), the Internal Revenue Code ("IRC") and R.I. Gen. Laws §§ 11-18-1 and 11-41-4 could not have "caused" Plaintiffs' alleged injuries as a matter of law. *Second*, federal law preempts Plaintiffs' "fraud on the IRS" claim. *Third*, the FAC does not sufficiently plead the elements of the crime of false pretenses.

A. The FAC Alleges Injuries that Were Not Caused "By Reason Of" the Alleged Violations of Criminal Law

1. *Counts XVI Through XIX Rest on Allegations of Events that Took Place After the Plan Was Allegedly Underfunded and Could Not as a Matter of Law (or Chronology) Have Caused the Alleged Underfunding*

Section § 9-1-2 provides that "[w]henever any person shall suffer any injury to his or her person, reputation, or estate *by reason of* the commission of any crime or offense, he or she may recover his or her damages for the injury in a civil action against the offender." (Emphasis added). This requires both actual and proximate causation. *Kelly v. Marcantonio*, 187 F.3d 192, 203 n.8 (1st Cir. 1999). The FAC fails to establish this causal connection because the Diocesan Defendants' alleged violations occurred *after* Plaintiffs' alleged injury.

The only facts described in the FAC that could constitute a violation of the HCA or R.I. Gen. Laws §§ 11-18-1 and 11-41-4 are alleged to have occurred in 2014. *See* FAC ¶ 193. Additionally, Plaintiffs plead that the Diocesan Defendants aided in the submission of two Form 990 tax returns that contained false information. *Id.* ¶¶ 196-197. Those two tax returns were for tax years ranging from October 1, 2014 to September 30, 2015[64] and October 1, 2015 to September 30, 2016. *Id.* But Plaintiffs claim that the Plan was underfunded long before any improper conduct alleged in Counts XVI through XIX. *Id.* ¶ 255. Indeed, the FAC explicitly states that the alleged violations were designed to cover up the underfunded liability of the Plan. *Id.* ¶¶ 205, 322.

[64] The FAC states that the Form 990 which was filed on August 16, 2016 was "for the tax year from October 1, 2014 to September 30, 2014." FAC ¶ 196. The Diocesan Defendants assume that the tax year end date contains a typographical error and should have read "September 30, *2015*", as opposed to 2014.

2. *The Alleged Harm to Plaintiffs Is Not Direct and Is Far Too Attenuated from the Alleged Criminal Violations to Constitute Proximate Causation*

Section 9-1-2 requires that a plaintiff's injury be caused "*by reason of*" the commission of a crime. (Emphasis added). The Rhode Island Superior Court has interpreted this provision to require proximate causation between the criminal conduct and the injury alleged and further equates the proximate cause requirement and the language "by reason of" to both the state and federal civil RICO statutes. *Cortellesso v. Cortellesso*, NO. P.C. 95-457, 1997 WL 839911, at *8 (R.I. Super. Ct. Apr. 29, 1997) ("this Court reads 'by reason of' in G.L. 7-15-4(c) and 9-1-2 to mean 'proximately caused by.'").

Turning to that guiding law, "by reason of" causation means a "*direct relation* between the injury asserted and the injurious conduct alleged." *Holmes*, 503 U.S. at 268 (emphasis added). "A link that is 'too remote,' 'purely contingent,' or 'indirec[t]' is insufficient." *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 9 (2010) (quoting *Holmes*, 503 U.S. at 271, 274). Moreover, "'[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step.'" *Holmes*, 503 U.S. at 271 (internal quotations omitted).

a) Counts XVI, XVIII & XIX

In *Holmes*, the defendant's fraudulent stock-manipulation scheme directly harmed stockbrokers by causing the prices of stock they owned to plummet. *Id.* at 262-63. After the stockbrokers' failure, the plaintiff, an insurer standing in the shoes of the stockbrokers' creditors, brought suit alleging that the defendant conspired in a fraudulent scheme causing injury to the creditors. *Id.* at 262. The Court held that "the link [wa]s too remote between the stock manipulation alleged and the [creditor]s' harm, being purely contingent on the harm suffered by the [stockbrokers]," and, therefore, plaintiffs failed to demonstrate proximate cause. *Id.* at 271. The Court further stated that the creditors and their insurer were "secondary victims" who were

"injured only indirectly," and, consequently, were "not proper plaintiffs." *Id.* at 274. Thus, if the causal chain from a defendant's acts to a plaintiff's injury requires a court to "go beyond the first step," the chain is too long to establish proximate causation. *Id.* at 271.

Applying *Holmes*, Plaintiffs could, at most, be "injured only indirectly" by alleged violations of the HCA. *Id.* at 274. The underlying statute prohibits misrepresentations to state regulators. R.I. Gen. Laws § 23-17.14-30. The statute itself defines whom it exclusively protects, and it is not the Plaintiffs. *Id.* If Plaintiffs were harmed as a result of the alleged violations somewhere down the line, then they are, at most, "secondary victims," because the Court would be required to look "beyond the first step" to reach their harm, which is "purely contingent" on harm to state regulators. *See Holmes*, 503 U.S. at 271, 274. Likewise, any alleged violation of R.I. Gen. Laws §§ 11-18-1 and 11-41-4 based on alleged misrepresentations to state regulators would also fail. *See Holmes*, 503 U.S. at 271, 274.

b) <u>Count XVII</u>

Plaintiffs' § 9-1-2 claim premised on aiding and abetting the filing of a false tax return with the IRS (Count XVII) fails for the same reasons. *Supra* Part VIII.A.2.a. There is no link between the direct victim and the Plaintiffs on this claim. The allegedly false tax returns submitted to the IRS did not cause the underfunded pension—the alleged underlying crime and harm are unconnected. Instead, Plaintiffs' theory is that the conduct constituting the alleged crime against the IRS (inclusion of SJHSRI in the OCD) also—separate and apart from the allegedly fraudulent tax returns—led to Plaintiffs' injury by allowing SJHSRI to claim church plan status under ERISA. FAC ¶ 188. However, if this causal chain does not run through the victim of the alleged crime (the IRS), then Plaintiffs' harm cannot be linked to the offense (and is, at most, tangentially related to the underlying crime). This is insufficient. *In re McNulty*, 597 F.3d 344, 352 (6th Cir. 2010).

Furthermore, a finding of "direct" injury requires "that the harm to the victim be closely related to the conduct *inherent to the offense*." *Id.* (emphasis added). The underfunding of a pension plan is in no way inherent to the offense of filing a false tax return. *See id.* Count XVII should be dismissed.

3. *The Alleged Violations in Counts XVI through XIX Are Based on Alleged Misrepresentations to Regulators, Not the Plaintiffs, and They Cannot Be a Basis for Relief Under § 9-1-2*

Where the alleged criminal violation is based on misrepresentations to a regulator—and not the plaintiffs—harm to those plaintiffs cannot have been caused "by reason of" the underlying violation. *Hemi Grp.*, 559 U.S. at 10. In *Hemi Group*, New York City sued an out of state cigarette seller for failing to file customer lists with the State of New York, in violation of state law. *Id.* at 6. The City claimed that the business' failure to file its customer report constituted mail fraud and allowed the business' customers to evade City excise taxes, thereby causing lost revenue for the City. *Id.* The Court held, in reversing a denial of a motion to dismiss, that the City could not show proximate cause, because the business' fraudulent conduct was directed at a third-party—the State of New York—and the City was only indirectly injured as a result. *Id.* at 9-11. The Court refused to extend civil liability "to situations where the defendant's fraud on the third party (the State) has made it easier for a fourth party (the taxpayer) to cause harm to the plaintiff (the City)." *Id.* at 11. Here, Plaintiffs ask the Court to impose liability "where the defendant's [alleged misrepresentation] on the third party (the [regulators]) has made it easier for a fourth party ([SJHSRI]) to cause harm to the plaintiff[s]." *Id.*

4. *Plaintiffs also Fail to Allege Facts Sufficient to Establish Proximate Cause Because There Are More Direct Victims of the Alleged Crimes Who Have the Exclusive Right to Remedy the Alleged Violation*

Courts have held that where "those directly injured . . . could be counted on to bring suit for the law's vindication" plaintiff's claims based on "by reason of" causation should be dismissed. *Holmes*, 503 U.S. at 273. "The requirement of a direct causal connection is especially warranted where the immediate victims of an alleged . . . violation can be expected to vindicate the laws by pursuing their own claims." *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 458-60 (2006) (granting motion to dismiss where plaintiff-storeowner alleged that the defendants filed fraudulent tax returns with the State of New York to allow them to lower their prices and gain competitive advantage over the plaintiff, as "[t]he direct victim of this conduct was the State of New York, not [the plaintiff] and it was the State that was being defrauded and the State that lost tax revenue as a result"). This principle is based, in part, on a policy determination that "[i]f the allegations are true, the State can be expected to pursue appropriate remedies" and "[t]here is no need to broaden the universe of actionable harms to permit . . . suits by parties who have been injured only indirectly." *Id.* at 460.

The alleged direct victims here (the state regulators and the IRS) are perfectly capable of pursuing appropriate remedies under their regulatory and statutory authority, without broadening the universe of civil actions to indirect victims. 26 U.S.C. § 7206; R.I. Gen. Laws § 23-17.14-30; *see Anza*, 547 U.S. at 460. As the direct victims, the government actors are better suited to vindicate the law. *Anza*, 547 U.S. at 460; *see also Fortunet Inc. v. Gametech Ariz. Corp.*, No. 206-CV-00393, 2008 WL 5083812, at *1-6 (D. Nev. Nov. 26, 2008) (holding that plaintiff's claim that a company making and selling gaming devices without a Nevada gaming license caused alleged lost sales and revenue for plaintiff failed for lack of proximate cause

because "a more direct victim of the alleged wrongful conduct [the Nevada Gaming Control Board and Commission] exists that can be counted on to vindicate Nevada's gaming laws").

Similarly, here, the HCA and the IRC are comprehensive statutory schemes, which govern the conduct that Plaintiffs allege violated those schemes. State regulators and the IRS are "well suited to address any such violations." *See Fortunet Inc.*, 2008 WL 5083812, at *6. Accordingly, if those laws must be vindicated, the direct victims—not Plaintiffs—are the proper parties to do so. *Anza*, 547 U.S. at 460; *see James Cape & Sons Co. v. PCC Constr. Co.*, 453 F.3d 396, 404 (7th Cir. 2006) (holding that plaintiff's claim for damages caused by defendants' bid-rigging scheme that defrauded the Wisconsin Department of Transportation (WisDOT) was properly dismissed because "WisDOT is fully capable of pursuing appropriate remedies" and, therefore, plaintiff "has not shown that its injuries were proximately caused by the bid-rigging scheme").

Furthermore, not only are the direct victims of the alleged crimes capable of vindicating the law, the HCA and the IRC provide that ***only*** those direct victims have a right to seek remedies. The HCA provides no private right of action and, instead, grants to the Attorney General and the Director of the Department of Health the exclusive right "to take corrective action necessary to secure compliance under this chapter." R.I. Gen. Laws § 23-17.14-30. Additionally, 26 U.S.C. § 7206 provides no private right of action for violations of that section. *See, e.g.*, *I-Remiel Azariah: Ibn Yahweh v. Shelby Cty. Gen. Sessions Court*, No. 12-3073-JDT-CGC, 2014 WL 1689297, at *8 (W.D. Tenn. Apr. 29, 2014) ("Section 7206 is a criminal statute prohibiting fraud and false statements under the Internal Revenue Code and grants no explicit private right of action."); *see also Rezner v. Baverische Hypo-Und Vereinsbank AG*, 630 F.3d 866, 873-74 (9th Cir. 2010) (holding that fraud on the IRS and filing a false tax return cannot be

used as a basis for civil liability because the IRS is the direct victim of those crimes, not a private plaintiff suing under RICO for tax fraud, and holding "that [plaintiff] cannot show proximate causation based on [defendant]'s fraud against the United States").

B. Count XVII Must Be Dismissed Because R.I. Gen. Laws § 9-1-2 Is Preempted by Federal Law and Would Constitute an Impermissible End Run Around the Lack of a Private Right of Action Under the Internal Revenue Code

Count XVII asserts a claim under a state statute (R.I. Gen. Laws § 9-1-2) and calls for the imposition of civil liability based solely on an alleged violation of federal law (26 U.S.C. § 7206(2)). FAC ¶¶ 536-537. This argument, however, must fail, because the use of R.I. Gen. Laws § 9-1-2 to enforce the IRC impermissibly conflicts with federal law and is preempted. Additionally, § 9-1-2 cannot create a private right of action under a federal statute that does not itself provide such a right.

1. *Section 9-1-2 is Preempted by Federal Law*

Without a clear intent by Congress to preempt state law, a presumption against preemption generally exists in cases involving a field traditionally governed by the states. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). However, "[p]olicing fraud against federal agencies is hardly 'a field which the States have traditionally occupied' such as to warrant a presumption against finding federal pre-emption of a state-law cause of action." *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001) (internal citation omitted). "To the contrary," the U.S. Supreme Court has observed, "the relationship between a federal agency and the entity it regulates is inherently federal in character because the relationship originates from, is governed by, and terminates according to federal law."[65] *Id.* Thus, there exists "no presumption against

[65] There are other areas of unique federal concern, in which the States are not permitted to act. For example, States may not punish perjury that occurred in federal courts. *Thomas v. Loney*, 134 U.S. 372, 375 (1890). Additionally, like perjury in a federal court, "a State has no legitimate interest in enforcing a federal scheme" against "fraud in a federal administrative process." *Arizona v. United States*, 567 U.S. 387, 430 (2012) (Scalia, J., concurring in part and dissenting in part).

pre-emption" in such cases. *Id.* at 347-48. Therefore, the burden falls upon Plaintiffs to show that federal law does not preempt their attempt to use R.I. Gen. Laws § 9-1-2 to police fraud against a federal agency. *See Buckman*, 531 U.S. at 347. They cannot make such a showing.

In *Buckman*, the Supreme Court set forth the framework for determining whether a state law claim for fraud on a federal agency could stand, or whether it "conflict[ed] with, and [was] therefore impliedly pre-empted by, federal law." 531 U.S. at 348. In that case, the plaintiffs were patients who purportedly sustained injuries resulting from the use of orthopedic bone screws. *Id.* at 343. The plaintiffs alleged that the defendant made fraudulent representations to the Food and Drug Administration ("FDA") in order to obtain approval to market the screws. *Id.* After determining that no presumption against preemption existed for state law "fraud-on-the-FDA" claims, the Court examined several factors in determining that a conflict existed between the state and federal laws. *Id.* First, the Court stated that:

> The conflict stems from the fact that the federal statutory scheme amply empowers the FDA to punish and deter fraud against the Administration, and that this authority is used by the Administration to achieve a somewhat delicate balance of statutory objectives. The balance sought by the Administration can be skewed by allowing fraud-on-the-FDA claims under state tort law.

Id. at 348. The Court went on to say that:

> State-law fraud-on-the-FDA claims inevitably conflict with the FDA's responsibility to police fraud consistently with the Administration's judgment and objectives. As a practical matter, complying with the FDA's detailed regulatory regime in the shadow of 50 States' tort regimes will dramatically increase the burdens facing potential applicants-burdens not contemplated by Congress . . . . Would-be applicants may be discouraged from seeking . . . approval of devices with potentially beneficial off-label uses for fear that such use might expose the manufacturer or its associates (such as petitioner) to unpredictable civil liability.

Id. at 350. The Court also reasoned that fraud-on-the-FDA claims would increase the administrative burdens on the FDA due to increased disclosures and submissions by applicants from fear of civil lawsuits by private citizens. *Id.* at 351. Thus, a conflict existed because of the

additional burdens to both the regulator and the regulated as a result of state claims, along with the strong potential that these claims would disrupt the "delicate balance of statutory objectives" administered by the federal agency if regulated entities were subject to fifty inconsistent state tort regimes.[66] *Id.* at 350-51.

This claim is a state-law-fraud-on-the-IRS claim and *Buckman* applies. FAC ¶¶ 195-198. Allowing the claim to proceed here would have the detrimental effects of frustrating the administrative efficiencies associated with group rulings that the IRS has established under its statutory and regulatory authority. *See* IRS Publication 4573, Group Exemptions ("Group exemptions are an administrative convenience for both the IRS and organizations with many affiliated organizations."). If these state law claims were permitted, non-profit entities (at least in Rhode Island) would be forced "to satisfy not only the standards imposed by that agency under federal law, but also the potentially heterogeneous standards" propounded by Rhode Island in order to avoid liability for statements made to the IRS. *See Nathan Kimmel, Inc. v. DowElanco*, 275 F.3d 1199, 1207 (9th Cir. 2002) (fraud-on-the-Environmental Protection Agency claim preempted).

This concern is no less troubling for the IRS in this case and especially true given that the IRC grants Plaintiffs no private right of action. *I-Remiel Azariah: Ibn Yahweh*, No. 12-3073-JDT-CGC, 2014 WL 1689297, at *8; *see Offshore Serv. Vessels, L.L.C. v. Surf Subsea, Inc.*, No. CIV.A. 12-1311, 2012 WL 5183557, at *13 (E.D. La. Oct. 17, 2012) (Where "the statutory enforcement provisions noticeably 'do[ ] not provide a private right of action for

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[66] This Court has followed the *Buckman* decision in holding that a plaintiff's claims for fraud on the FDA were preempted. *Koch v. I-Flow Corp.*, 715 F. Supp. 2d 297, 305 (D.R.I. 2010). Additionally, state law "fraud-on-the-agency" claims have been dismissed where the fraud was committed against other federal agencies. *See Nathan Kimmel, Inc. v. DowElanco*, 275 F.3d 1199, 1208 (9th Cir. 2002) (fraud-on-the EPA); *Offshore Serv. Vessels, L.L.C. v. Surf Subsea, Inc.*, No. CIV.A. 12-1311, 2012 WL 5183557, at *3 (E.D. La. Oct. 17, 2012) (fraud-on-the-Coast Guard); *see also Morgan v. Brush Wellman, Inc.*, 165 F. Supp. 2d 704, 722 (E.D. Tenn. 2001) (applying *Buckman* to the Department of Energy).

damages' . . . plaintiffs' claims are an improper attempt to supplement the express remedies provided by federal law."). Count XVII is preempted and should be dismissed.[67]

2. *Count XVII Seeks an Impermissible End Run Around the Lack of a Private Right of Action under the Internal Revenue Code*

As stated above, Count XVII is an attempt by Plaintiffs to bring a private right of action to enforce a federal law that does not permit private enforcement. *Levy v. World Wrestling Entm't, Inc.*, No. CIV.A.308-01289(PCD), 2009 WL 455258, at *2 (D. Conn. Feb. 23, 2009) ("[T]here is no private action to enforce the tax code."). Where a federal statute provides for no private right of action, plaintiffs cannot utilize a state law to do that which the federal law does not allow. *Astra USA, Inc. v. Santa Clara Cty., Cal.*, 563 U.S. 110, 117-19 (2011). "Recognition of any private right of action for violating a federal statute . . . must ultimately rest on congressional intent to provide a private remedy." *Id.* at 117 (quoting *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991)). "The absence of a private right to enforce the statutory . . . obligations would be rendered meaningless if [plaintiffs] could overcome that obstacle by suing to enforce" the federal statute under state law. *Astra USA*, 563 U.S. at 118.

The dangerous implications of allowing state law to operate this way are manifest: "[r]ecognizing [a plaintiff's] right to proceed in court could spawn a multitude of dispersed and uncoordinated lawsuits. . . . With [the federal agency] unable to hold the control rein, the risk of conflicting adjudications would be substantial." *Id.* at 120. Therefore, such claims must be dismissed whether a creature of state statutory or common law. *Id; see Grochowski v. Phoenix Constr.*, 318 F.3d 80, 86 (2d Cir. 2003) (where "no private right of action exists under the relevant [federal] statute, the plaintiffs' efforts to bring their claims as state common-law claims are clearly an impermissible 'end run' around the [federal statute]."); *see also Cooper v. Charter*

[67] Plaintiffs' other state law claims are similarly preempted to the extent they rely on a "fraud-on-the-IRS" theory.

Commc'ns Entm'ts I, LLC, 760 F.3d 103, 110 n.6 (1st Cir. 2014) (holding similarly); *Brissenden v. Time Warner Cable of New York City*, 25 Misc. 3d 1084, 1091 (N.Y. Sup. Ct. 2009) (A "plaintiff cannot use [a state statute] to circumvent the lack of a private right of action under [a] federal statute.").

C. Count XIX Must Be Dismissed Because Plaintiffs Have Failed to Plead Sufficient Facts to Demonstrate a Violation of R.I. Gen. Laws § 11-41-4

Plaintiffs have failed to plead sufficient facts to support any element of the crime of obtaining property by false pretenses vis-à-vis the Diocesan Defendants, and therefore, there can be no liability under R.I. Gen. Laws § 9-1-2. *See Laccinole*, 2016 WL 868511, at *9 ("[T]o plead a claim under § 9–1–2, [a plaintiff] must sufficiently plead an underlying criminal offense."). A violation of R.I. Gen. Laws § 11-41-4 requires proof of four elements:

> First, the defendant must obtain property from another person or entity. Second, the defendant must make a false representation. Third, the victim must actually rely on the false representation in surrendering the property. Finally, the statute requires proof of the defendant's intent to cheat or defraud.

Nat'l Credit Union Admin. Bd. v. Regine, 795 F. Supp. 59, 70–71 (D.R.I. 1992). No facts have been alleged that could support any of these elements.

First, Plaintiffs have not alleged that the Diocesan Defendants obtained any property from Plaintiffs. As such, this claim fails on its face. *See 32 Am. Jur. 2d False Pretenses* § 1 ("False pretenses is the unlawful *acquisition* of property pursuant to a false representation.") (emphasis added); *see also 35 C.J.S. False Pretenses* § 27 ("In order for the offense to arise, property must have been actually obtained . . . . *Thus, where the accused does not obtain title to the property he or she is not guilty of the offense.*") (emphasis added).

Likewise, Plaintiffs have failed to allege facts to support the third element under R.I. Gen. Laws § 11-41-4, which requires actual reliance by a victim in surrendering property. Logic dictates that there can be no actual reliance on any representation in surrendering that

which was never surrendered. *See Regine*, 795 F. Supp. at 70; *supra* Part V.D (discussing failure of the FAC to allege reliance).

Finally, the second and fourth elements require proof of a false representation and intent to defraud. *Regine*, 795 F. Supp. at 70-71. These elements must be plead with particularity under Rule 9(b)'s heightened standard. *Hayduk*, 775 F.2d at 443-44; *see Brien*, 2012 R.I. Super. LEXIS 113, at *77-79, *127-28 (dismissing claims brought under § 9-1-2 for alleged violations of § 11-41-4 because the plaintiff failed "to state a claim compliant with the Rule 9(b) standard"). They were not for the reasons discussed at length *supra* at Parts III and V.

IX. COUNT XXI (RHODE ISLAND LAW, BREACH OF FIDUCIARY DUTY) MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM

Plaintiffs' common law breach of fiduciary duty claim under Rhode Island law must be dismissed because Plaintiffs fail to allege sufficient facts to establish that any of the Diocesan Defendants are fiduciaries. Plaintiffs' allegations that the Diocesan Defendants are fiduciaries, rather, remain limited and conclusory. FAC ¶¶ 552-553. Plaintiffs only make two direct allegations: (1) "Defendants SJHSRI, CCCB, Angell, Corporation Sole, Diocesan Administration, and Diocesan Service all owed Plaintiffs fiduciary duties;" and (2) "Defendants SJHSRI, CCCB, Angell, Corporation Sole, Diocesan Administration, and Diocesan Service all breached their fiduciary duties to Plaintiffs, causing damages." *Id.* These wholly conclusory allegations must be disregarded. *See Iqbal*, 556 U.S. at 678 (stating that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to defeat a Rule 12(b)(6) motion).

Plaintiffs have pled no factual allegations that would establish a fiduciary relationship between the Diocesan Defendants and the Plaintiffs or Plan participants. Under Rhode Island law, an essential element of a breach of fiduciary duty claim is "the existence of a

fiduciary duty." *Pope v. City of Providence*, No. PB133634, 2014 WL 2134482, at *3 (R.I. Super. Ct. May 15, 2014). "A fiduciary duty arises when the facts show a special relationship of trust and confidence that requires a fiduciary to act in the other party's best interest, rather than in its own best interest." *Fraioli v. Lemcke*, 328 F. Supp. 2d 250, 267 (D.R.I. 2004). Whether a fiduciary duty exists involves "a variety of factors, including the reliance of one party upon the other, the relationship of the parties prior to the incidents complained of, the relative business capacities or lack thereof between the parties, and the readiness of one party to follow the other's guidance in complicated transactions." *Poletti v. Glynn*, 234 A.3d 941, 945-46 (R.I. 2020).

Plaintiffs do not allege *when* each or any of the Diocesan Defendants owed a fiduciary duty or *how* or *why* they each owed such a duty. Given the allegations in the FAC of the "diminished or nonexistent roles of Bishop Tobin and the Diocese" from 2009 onward, the absence of factual allegations demonstrating the existence of a special relationship especially warrant close judicial scrutiny. FAC ¶ 87; *see id.* ¶ 203. Moreover, the FAC's assertion that the Diocesan Defendants and other parties "made or provided statements to Plan participants, on different occasions, in many different contexts, [and] over many years . . . that assured Plan participants" concerning the security of the Plan, *id.* ¶ 259, and that such statements "created a culture of trust and reliance" do not change the equation. *Id.* ¶ 261. These conclusory statements are insufficient to establish a fiduciary relationship, and the FAC is otherwise devoid of any allegations concerning facts that would support the existence of such a relationship.[68] *Sterman v. Brown Univ.*, 513 F. Supp. 3d 243, 255-56 (D.R.I. 2021) ("Brown compellingly argues that Plaintiffs are trying to 'unilaterally transform their relationship with Brown into a fiduciary

[68] Moreover, even if Plaintiffs sufficiently alleged facts establishing a fiduciary relationship, unless they can establish one *after 2009*, Plaintiffs claim for breach of fiduciary duty still fails as a matter of law because the assets of the Plan exceeded the present value of the accrued benefits up until the market crash in 2008. *Supra* Part IV.

relationship simply by alleging they trusted and relied on Brown's statements.' Indeed, beyond Plaintiffs' claims of trust and reliance in Brown, they allege no plausible facts showing a fiduciary relationship." (internal citations omitted)); *Coccoli v. D'Agostino*, No. 19-489 WES, 2020 WL 1848032, at *4 (D.R.I. Apr. 13, 2020) ("This Count also fails to allege who did what to whom, what contractual obligation arose, and what fiduciary duty was created and therefore breached, particularly in light of the fact that fiduciary duties go beyond ordinary contractual duties."). Count XXI should be dismissed.

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

The Rhode Island Supreme Court has yet to recognize "aiding and abetting breach of a fiduciary duty" as an independent tort. Assuming such a claim is cognizable in this jurisdiction however, the FAC does not allege sufficient facts to establish that the Diocesan Defendants aided and abetted a breach of a fiduciary duty. In considering aiding and abetting claims, Rhode Island's superior courts have looked to Massachusetts law. *See e.g.*, *Brien*, 2012 R.I. Super. LEXIS 113, at *45. Under Massachusetts law, "the elements of the tort of aiding and abetting a breach of fiduciary duty are: '(1) there must be a breach of fiduciary duty, (2) the defendant must know of the breach, and (3) the defendant must actively participate or substantially assist in or encourage the breach to the degree that he or she could not reasonably be held to have acted in good faith.'" *Id.* at *45-46 (quoting *Arcidi v. Nat'l Ass'n of Gov't Emps., Inc.*, 856 N.E.2d 167, 174 (Mass. 2006)).

Here, Plaintiffs have not pled any facts sufficient to show that the Diocesan Defendants either knew that a co-defendant was breaching a fiduciary duty or actively participated, assisted, or encouraged a breach to such a degree that the Diocesan Defendants "could not reasonably be held to have acted in good faith." *Id.*; *supra* Part III.A, V, & VI. First,

the FAC's conclusory allegation that the Diocesan Defendants "knowingly aided, abetted, and participated in, breaches of fiduciary duty by [the other defendants]," FAC ¶ 555, does not suffice, *see Twombly*, 550 U.S. at 555, especially as this claim sounds in fraud and is subject to Rule 9(b)'s heightened pleading standard. *See Hayduk*, 775 F.2d at 441-43; *Brien*, 2012 R.I. Super. LEXIS 113, at *47-48 (applying Rule 9(b) to aiding and abetting claim sounding in fraud and dismissing claim); *supra* note 2. Rather, as set out *supra* at Part III.A, V.C, VI.A-B and Exhibit 23, to the extent the Diocesan Defendants had knowledge, it was that SJHSRI, RWH, CCCB and Prospect were trying to save the hospitals, preserve hospital jobs, *and* bolster the Plan with a $14 million contribution. To the extent Bishop Tobin took action, he sent two letters that called out the serious risk faced by the Plan.

Second, Plaintiffs' assertion that the Diocesan Defendants "participated" in other defendants' breaches of fiduciary duty does not establish the final element of the tort. FAC ¶ 555. The allegation that the Diocesan Defendants were made aware of the terms of the 2014 Asset Sale, and Bishop Tobin expressed support for the 2014 Asset Sale does not, without more, constitute active participation or substantial assistance or encouragement of a breach. *See Brien*, 2012 R.I. Super. LEXIS 113, at *48 (dismissing aiding and abetting claim and observing: "Simply being involved in a transaction that constitutes a breach by another does not automatically make that involved third party liable under a theory of aiding and abetting").

Moreover, the FAC does not plausibly allege that the Diocesan Defendants' conduct could not "reasonably be held to have [been] in good faith." *Id.* at *46. As discussed *supra* at Part III.A, there was no fraud or conspiracy to hide the funding and church plan status of the Plan, the scope of the 2014 Asset Sale, and the continued Catholicity of the hospitals—that was publicly disclosed. Nor was there a fraud or conspiracy to list SJHSRI in the OCD—the

listing was proper. *Supra* Part V.E & VI.A. Again, in expressing his support for the 2014 Asset Sale to various third parties, Bishop Tobin emphasized that the Plan was at substantial risk in the hopes of saving the floundering hospital system *and* the Plan. *Supra* Part V.B and VI.B. The FAC, therefore, does not allege facts plausibly establishing that the Diocesan Defendants' conduct was not equally consistent with a lawful purpose, *Stubbs*, 149 A.2d at 708-09, or precluding that it was in good faith, *Brien*, 2012 R.I. Super. LEXIS 113, at *45. Count XXII should be dismissed.

CONCLUSION

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

LOCAL RULE 7(c) STATEMENT

Pursuant to Local Rule 7(c), the Diocesan Defendants respectfully request oral argument on their Motion to Dismiss and estimate that ninety (90) minutes will be needed.

Respectfully Submitted,

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

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of February 2022, 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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