UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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

PLAINTIFFS' OBJECTION TO THE MOTION TO DISMISS FILED BY DEFENDANT THE ANGELL PENSION GROUP, INC.

Plaintiffs hereby object to the Motion to Dismiss filed by Defendant The Angell Pension Group, Inc. Plaintiffs rely in support on their memorandum of law filed herewith and on their Omnibus Memorandum.

Respectfully submitted,
All Plaintiffs,
By their Attorney,

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Dated: February 4, 2019

REQUEST FOR ORAL ARGUMENT

Pursuant to LR Cv 7(c), Plaintiffs request oral argument and estimate that approximately 1 hour will be required to address The Angell Pension Group, Inc.'s motion to dismiss.

CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the within document was electronically filed on the 4th day of February, 2019 using the Electronic Case Filing system of the United States District Court and is available for viewing and downloading from the Electronic Case Filing system. The Electronic Case Filing system will automatically generate and send a Notice of Electronic Filing to the following Filing Users or registered users of record:

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UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

STEPHEN DEL SESTO, AS RECEIVER AND ADMINISTRATOR OF THE ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND RETIREMENT PLAN, ET AL.	:
Plaintiffs	:
v.	: C.A. No:1:18-CV-00328-WES-LDA
PROSPECT CHARTERCARE, LLC, ET AL.	:
Defendants.	:

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR OBJECTION TO THE MOTION TO DISMISS FILED BY DEFENDANT THE ANGELL PENSION GROUP, INC.

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February 4, 2019

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Plaintiffs Stephen Del Sesto (as Receiver and Administrator of the St. Joseph Health Services of Rhode Island Retirement Plan) (the "Receiver"), and Gail J. Major, Nancy Zompa, Ralph Bryden, Dorothy Willner, Caroll Short, Donna Boutelle, and Eugenia Levesque, individually as named plaintiffs ("Named Plaintiffs") and on behalf of all class members[1] as defined herein (the Receiver and the Named Plaintiffs are referred to collectively as "Plaintiffs"), submit this memorandum in support of their objections to the motion to dismiss filed by Defendant The Angell Pension Group. Inc. ("Angell").

I. COMMON PREFACE TO NON-OMNIBUS MEMORANDA

Although this memorandum is filed in opposition to Angell's motion to dismiss, it does *not* contain Plaintiffs' arguments addressing those portions of Angell's motion that seek dismissal of Plaintiffs' claims under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), on the following grounds asserted by Angell:

- alleged lack of standing and ripeness;
- alleged failure to join indispensable parties (Pension Benefit Guaranty Corporation);
- the allegation that Plaintiffs' state law claims are preempted under ERISA;
- the allegation that Angell cannot be sued for aiding and abetting breach of fiduciary duties based upon ERISA; and
- the allegation that Plaintiffs have no remedies under ERISA on the claim of aiding and abetting.

All of the other defendants who has filed motions to dismiss make these same arguments in their separate memoranda, apparently having declined the Court's

[1] Contingent upon the Court certifying the Class and appointing them Class Representatives.

invitation to consolidate their arguments.[2] Rather than burdening the Court with further repetition in the form of separate replies, Plaintiffs concurrently file their consolidated response to these arguments, through an omnibus opposition memorandum that addresses all of the Defendants' motions to dismiss on those grounds concerning ERISA.

In addition, the omnibus memorandum sets forth the facts from the Complaint that are relevant to all of the motions to dismiss, rather than setting them forth in separate memoranda, because of the enormous extent to which they overlap in relevance to multiple defendants. These facts are absolutely crucial to Plaintiffs' separate opposition memoranda, and, therefore, we incorporate them *in toto* by reference.

Plaintiffs are also concurrently filing separate memoranda in support of their opposition to the motions to dismiss filed by the Diocesan Defendants[3] and by the Prospect Entities.[4] Plaintiffs have made every effort to avoid repetition. For example, each of the defendants who have filed motions to dismiss make many legal arguments on non-ERISA issues that are the same as those raised by at least one other movant. To limit repetition, Plaintiffs fully respond to those arguments once, and simply make reference to that argument in their memoranda in opposition to the motions to dismiss

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[2] Indeed, they make matters worse by each addressing the same issues, and then incorporating by reference all of the other defendants' arguments on those issues, leaving Plaintiffs with the unsatisfactory choice of responding by merely incorporating Plaintiffs' responses to the other defendants' arguments ("dueling incorporations by reference"), or addressing those arguments twice (or sometimes thrice).

[3] Defendants Roman Catholic Bishop of Providence, Diocesan Administration Corporation, and Diocesan Service Corporation.

[4] Defendants Prospect Medical Holdings, Inc. ("Prospect Medical"), Prospect East Holdings, Inc. ("Prospect East"), Prospect Chartercare, LLC ("Prospect Chartercare"), Prospect Chartercare SJHSRI, LLC ("Prospect SJHSRI"), and Prospect Chartercare RWMC, LLC ("Prospect RWH").

filed by the other defendants, identifying where they are fully addressed. Similarly, Plaintiffs summarize the law applicable to motions to dismiss and the elements of their claims only once, identifying in other memoranda where they have been addressed.

Plaintiffs have chosen this method to respond to the motions to dismiss to avoid having to submit memoranda that would otherwise contain hundreds of pages of repetition, further lengthening what are already necessarily lengthy submissions.

II. INTRODUCTION

Angell attempts to convert its right to file a motion to dismiss into a one-sided trial on the merits, with assumed free rein for Angell to offer documents into evidence, "testify" to the facts and the standard of care, and argue its case to the finder of fact. Angell also criticizes Plaintiffs for not offering their own documents and testimony into evidence. Perhaps appropriate at trial, the process Angell seeks to impose certainly makes a travesty of a motion to dismiss. Consequently, a great deal of Plaintiffs' opposition to that motion is pointing out all of Angell's arguments that cross the line marking the limit of proper motion practice under Rule 12(b)(6).

The rest of Plaintiffs' opposition memorandum consists of refuting Angell's legal argument and assertions concerning the sufficiency of the allegations in Plaintiffs' Complaint[5] which support Plaintiffs' claims against Angell.

[5] The references herein to the Complaint are to Plaintiffs' First Amended Complaint ("FAC") filed on October 5, 2018 (Dkt. #60).

III. THE FACTS RELEVANT TO ANGELL'S MOTION TO DISMISS

Plaintiffs incorporate by reference the summary of the facts alleged in the Complaint set forth in Plaintiffs' Omnibus Opposition Memorandum ("Plaintiffs' Omn. Memo.").

IV. ARGUMENT

A. The Standard Applicable to Motions to Dismiss under Fed. R. Civ. P. 12(b)(1)

Plaintiffs incorporate by reference this section of their memorandum in support of their objections to the motion to dismiss filed by the Prospect Entities ("Plaintiffs' Opp. Prospect MTD").

B. The Standard Applicable to Motions to Dismiss under Fed. R. Civ. P. 12(b)(6)

Plaintiffs incorporate by reference their argument on this issue in Plaintiffs' Opp. Prospect MTD.

C. Count III (Aiding and Abetting Breach of Fiduciary Duty under ERISA)

In Count III, Plaintiffs assert a claim against Angell for aiding and abetting breaches of fiduciary duties under ERISA. The grounds upon which Angell seeks dismissal of this claim include the following legal arguments that are addressed in Plaintiffs' Omn. Memo.:

- There is no cause of action against a non-fiduciary under ERISA for "aiding and abetting" a fiduciary breach (Count III)[6]; and

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[6] See Angell Memo. at 19-21.

- Plaintiffs are not entitled to any monetary recovery from Angell because 29 U.S.C. § 1132(a)(3) limits Plaintiffs to "appropriate equitable relief."[7]

The only additional argument that Angell makes is to dispute the adequacy of Plaintiffs' factual allegations concerning whether "Angell was 'aiding,' 'abetting,' or otherwise 'participating' in any breach by the Plan's fiduciaries." Angell's Memo. at 21.

Angell's full argument concerning the alleged factual insufficiency of Plaintiffs' claim is as follows:

> Plaintiffs have not stated a claim against Angell that is "plausible on its face." *Iqbal*, 556 U.S. at 678. The FAC is replete with allegations that Angell affirmatively, and repeatedly, advised the Plan's fiduciaries to make the minimum funding contributions, but these recommendations were ignored or "disregarded." This is fundamentally inconsistent with any notion that Angell was "aiding," "abetting," or otherwise "participating" in any breach by the Plan's fiduciaries. Similarly, Angell provided its client with numerous calculations and projections – none of which are alleged to be inaccurate – but Plaintiffs attempt to hold Angell responsible for ensuring that its client provide all of the projections to regulators in connection with the asset sale. Indeed, if this court were to accept Plaintiffs' theory, then any non-fiduciary lawyer, actuary or consultant who provides advice to a Plan fiduciary that is ignored, could subsequently be liable for "aiding and abetting" a fiduciary breach.[20] [8]

Angell Memo. at 21 (citations to FAC omitted).

Angell does not in its memorandum identify the elements necessary to support Plaintiffs' claim that Angell participated in SJHSRI's breach of fiduciary duty. They are well established:

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[7] See Angell Memo. at 22.

[8] Angell's footnote 20 is a citation to and extended paraphrase from Mellon Bank, N.A. v. Levy, No. 01-1493, 2002 WL 664022, at *11 (W.D. Pa. Apr. 22, 2002). Angell Memo. at 22 n.20. That case deals with the issue of whether there was any equitable remedy that could be applied against an individual or entity who knowingly assisted a breach of fiduciary duty but did not handle trust assets. That issue is addressed in Plaintiffs' Omn. Memo.

> The elements of a cause of action for participation in a breach of fiduciary duty are "1) breach by a fiduciary of a duty owed to plaintiff, (2) defendant's knowing participation in the breach, and (3) damages." *Upstate N.Y. v. Eng'rs Pension Fund v. Ivy Asset Mgmt.*, 131 F. Supp. 3d 103, 131 [(S.D.N.Y. 2015)] (quoting *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 281-82 (2d Cir. 1992)). To allege the second element of "knowing participation," a Plaintiff must allege that the Company Defendants "affirmatively assist[ed], help[ed] conceal," or "fail[ed] to act when required to do so." *Upstate*, 131 F. Supp. 3d at 131.

In re M&T Bank Corp. ERISA Litig., No. 16-CV-375 FPG, 2018 WL 4334807, at *11 (W.D.N.Y. Sept. 11, 2018).

It must be emphasized at the outset that Angell has not disputed that Defendant SJHSRI breached its fiduciary duties under ERISA, assuming ERISA applies.[9] Accordingly, that first element of "breach by a fiduciary of a duty owed to plaintiff" is not at issue in the adjudication of Angell's motion to dismiss. Plaintiffs are not required and cannot be expected to address arguments or issues that Angell does not raise, especially since Angell has the burden of proof on a motion to dismiss under Rule 12(b)(6). See Directv, Inc. v. Treesh, 487 F.3d 471, 476 (6th Cir. 2007) ("The defendant has the burden of showing that the plaintiff has failed to state a claim for relief.") (citing Carver v. Bunch, 946 F.2d 451, 454–55 (6th Cir. 1991)); Gayot v. Perez, No. 16-CV-8871 (KMK), 2018 WL 6725331, at *3 (S.D.N.Y. Dec. 21, 2018) ("[T]he movant bears the burden of proof on a motion to dismiss under Rule 12(b)(6).") (citation omitted).

Although not at issue at this stage, SJHSRI's breaches of its fiduciary duties need to be identified, in order to demonstrate how Angell aided and abetted or

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[9] Although Plaintiffs do not allege in the Complaint that Angell was also an ERISA fiduciary, Plaintiffs do claim that Angell was a fiduciary under state law, and have asserted state law claims of breach of fiduciary duty against Angell.

knowingly participated in those breaches. In addition to alleging that SJHSRI had a fiduciary duty to fund the Plan, Plaintiffs have specifically alleged that SJHSRI's fiduciary duties included informing Plan participants whether SJHSRI was funding the Plan, the extent of SJHSRI's unfunded liability under the Plan, and the security of the Plan participant's benefits under the Plan.[10] Moreover, as an ERISA fiduciary, SJHSRI was under an affirmative duty to inform Plan participants concerning its failure to comply with ERISA minimum contribution standards and the funding status of the Plan. 29 C.F.R. § 2520.104(b)-10(d).

With respect to the requirement that participation be "knowing," it does not matter whether Angell believed that ERISA did not apply because the Plan was a church plan, because in that case, Angell would have or should have known that SJHSRI then would have been a fiduciary under state law, based upon SJHSRI's role as Plan administrator and responsibility over the Plan assets, which imposed on SJHSRI the duty of utmost good faith and candor. As stated in In re Estate of Ross, 131 A.3d 158, 167 (R.I. 2016):

> "If a fiduciary duty is found, such duty 'is one of trust and confidence and imposes the duty on the fiduciary to act with the utmost good faith.'" *Notarantonio v. Notarantonio*, 941 A.2d 138, 145 (R.I. 2008) (quoting *Hendrick v. Hendrick*, 755 A.2d 784, 789 (R.I. 2000)). "A fiduciary duty is a duty of loyalty; it is a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." 37 Am. Jur. 2d Fraud and Deceit § 35 at 64 (2013).

In re Estate of Ross, *supra*, 131 A.3d at 167.

The evidence supporting Plaintiffs' claim that Angell participated in SJHSRI's fiduciary breaches is set forth in Plaintiffs' Omnibus Memorandum (drawn from the

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[10] FAC ¶ 467.

Complaint), and is the same evidence that is extensively discussed *infra* at 9-48 in opposition to Angell's motion to dismiss Plaintiffs' claims of intentional misrepresentation, fraudulent omissions, fraudulent scheme, and conspiracy. To avoid repetition, Plaintiffs refer to and incorporate that latter discussion by reference.

These allegations must be accepted as true and all reasonable inferences drawn in Plaintiffs' favor. They are more than sufficient to support a reasonable inference that Angell knowingly participated in SJHSRI's breach of fiduciary duty, so as to state a claim under ERISA.

D. Count IV, ERISA Declaratory Relief

Angell does not seek dismissal of Plaintiffs' claim for declaratory relief under ERISA (Count IV). It appears that Angell does not consider that Plaintiffs are seeking such relief as to Angell. See Angell Memo. at 3 n.4 (listing Plaintiffs' claims against Angell and not including Count IV). However, Plaintiffs seek declaratory relief under Count IV as to all Defendants, as both the Diocesan Defendants and the Prospect Entities acknowledge in their motions to dismiss. Since Angell makes no argument, its motion to dismiss this claim should not even need to be discussed, and must be denied for failure to meet its burden of proof. However, to the extent any opposition is required, Plaintiffs incorporate by reference their argument in support of their opposition to the Prospect Entities' motion to dismiss this Claim. See Plaintiffs' Opp. Prospect MTD at 127.

E. Count VII (Fraud Through Intentional Misrepresentations and Omissions)

The Complaint alleges four separate and independent sets of fraudulent misrepresentations by Angell to Plan participants which are detailed in the statement of facts in Plaintiffs' omnibus memorandum, which is drawn from the Complaint. In addition, the Complaint identifies fraudulent misrepresentations that Angell made to third parties whose reliance on the representations caused Plaintiffs to be injured. Finally, Plaintiffs contend that Angell intentionally failed to provide the Plan participants with information that Angell had a duty to disclose.

1. The 2014 PowerPoint Contained Fraudulent Misrepresentations

One series of misrepresentations is contained in a PowerPoint presentation that Angell gave to Plan participants two months before the closing of the 2014 Asset Sale,[11] which informed them that the terms of agreement for SJHSRI's joint venture with CCCB and Prospect Medical "includes a $14 Million contribution to the Pension Plan to stabilize plan assets," showed them a sample final benefit statement that again acknowledged that "[y]our pension benefit is an important part of your future retirement income," and reassured them that "[t]he Hospital pays the entire cost of the Plan," with payment options that included annuity payments for life.[12]

Plaintiffs allege that these statements in the 2014 PowerPoint were "grossly misleading and false on multiple levels."[13] Angell "already knew that the $14 million

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[11] Plaintiffs' Omn. Memo. at 27-29.

[12] FAC ¶ 292.

[13] FAC ¶ 293.

contribution was not even remotely sufficient 'to stabilize plan assets,' but nevertheless chose to falsely state that it was their opinion that it would stabilize plan assets."[14] Angell "knew that 'the entire cost of the Plan' includes funding the Plan, and, therefore, the statement was false because no one was funding the Plan."[15] The employees reasonably concluded that the 'Hospital' referred to was New Fatima Hospital, especially since SJHSRI was no longer a hospital after the 2014 Asset Sale, but Angell knew that New Fatima Hospital never accepted any obligations under the Plan, and the obligations still belonged to SJHSRI whose assets were grossly insufficient to fund the Plan.[16] Finally, Angell "already knew that the Plan, which this PowerPoint presentation referred to as an 'important part of [the Plan participants'] future retirement income' was grossly underfunded, and the option to choose annuity payments for life was illusory if not an outright lie, because Plan assets would run out long before most of the Plan participants or their designated beneficiaries would have passed away."[17]

Angell's entire response to Plaintiffs' allegations concerning that PowerPoint presentation is as follows:

> None of the statements are false. To the extent they are in any way misleading, it is only because of the inability of the Plan sponsor to make future contributions to the Plan. Plaintiffs have not alleged any facts from which it could be inferred that Angell knew that future contributions would not be forthcoming. And even if these statements were false, Plaintiffs allege only that Angell "participated" in the presentation, but do not allege that Angell actually made any particular statements. This is insufficient to

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[14] FAC ¶ 294.

[15] FAC ¶ 295.

[16] FAC ¶ 296.

[17] FAC ¶ 297.

> state a claim against Angell under Rule 9(b). *See* cases cited *supra* at pp. 31-32.

Angell Memo. at 35.

Angell's claim that "none of these statements are false" is pure *ipse dixit*, in that Angell does not offer any explanation whatsoever for that conclusion, notwithstanding the detailed discussion in the Complaint as to exactly why such statements were false. Thus, Angell has failed to meet its burden of proof on that issue. Given that failure, all Plaintiff can do is refer to that detailed discussion in the omnibus memorandum drawn from the Complaint that Angell has chosen not address.[18]

Next Angell claims that "[t]o the extent [the statements] are in any way misleading, it is only because of the inability of the Plan sponsor to make future contributions to the Plan. Plaintiffs have not alleged any facts from which it could be inferred that Angell knew that future contributions would not be forthcoming." Angell Memo. at 35. The first problem with that statement is that under Rule 9(b), Plaintiffs are not required to plead the basis for Angell's knowledge with particularity. Instead, the Rule states that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally."

The second problem is that the Complaint contains many allegations establishing the bases for Angell's knowledge that future contributions would not be forthcoming. For example, Plaintiffs allege:

> They [Prospect Entities and Angell] knew they could very well 'speak to the future [in]solvency of the plan,' because their own calculations predicted that the Plan would not have sufficient funds to pay Plan participants the benefits to which they were entitled, and knew that

[18] FAC ¶¶ 292-97.

> SJHSRI for years had been disregarding Angell's funding recommendations and making no contributions, and that once the asset sale went through, SJHSRI would have insufficient funds to make the actuarial-recommended contributions even if it wanted to.

FAC ¶ 309.

Moreover, the test for deceit does not require that the speaker "know" that the statement is false. To the contrary, it would be deceit for Angell to state that the $14 million would "stabilize" the Plan if Angell either did not believe that future contributions would be forthcoming, or knew it had had no reasonable basis for believing that SJHSRI would fund the Plan in the future. Restatement (Second) Torts § 526(b) and (c) make clear that parties cannot make representations contrary to their own beliefs, or without reasonable basis:

> § 526 Conditions Under Which Misrepresentation Is Fraudulent (Scienter)
>
> A misrepresentation is fraudulent if the maker
>
> * * *
>
> (b) does not have the confidence in the accuracy of his representation that he states or implies, or
>
> (c) knows that he does not have the basis for his representation that he states or implies.

Restatement (Second) Torts § 526. Comment e explains:

> In order that a misrepresentation may be fraudulent it is not necessary that the maker know the matter is not as represented. Indeed, it is not necessary that he should even believe this to be so. It is enough that being conscious that he has neither knowledge nor belief in the existence of the matter he chooses to assert it as a fact. Indeed, since knowledge implies a firm conviction, a misrepresentation of a fact so made as to assert that the maker knows it, is fraudulent if he is conscious that he has merely a belief in its existence and recognizes that there is a chance, more or less great, that the fact may not be as it is represented. This is

> often expressed by saying that fraud is proved if it is shown that a false representation has been made without belief in its truth or recklessly, careless of whether it is true or false.

Restatement (Second) Torts § 526, cmt. e.

The allegations in the Complaint certainly give rise to a reasonable inference that it would have been unreasonable for Angell to believe that SJHSRI would fund the Plan. As such, those allegations alone would provide a sufficient basis from which it can be inferred that Angell had no such belief. Comment d explains

> The fact that the misrepresentation is one that a man of ordinary care and intelligence in the maker's situation would have recognized as false is not enough to impose liability upon the maker for a fraudulent misrepresentation under the rule stated in this Section, but it is evidence from which his lack of honest belief may be inferred. So, too, it is a matter to be taken into account in determining the credibility of the defendant if he testifies that he believed his representation to be true.

Restatement (Second) Torts § 526, cmt. d. This principle applies not only to a motion to dismiss, but also to a motion for summary judgment and at trial.

Angell claims that Plaintiffs' contention that Angell "participated in the PowerPoint presentation" is insufficient because Plaintiffs "do not allege that Angell actually made any particular statements." Angell Memo. at 35. The actual allegation is that Angell and the other defendants "participated in PowerPoint Presentations to SJHSRI employees intended to reassure them that the sale of the hospital to Prospect Medical would not affect their pension benefits."[19] That allegation is another way of saying that Angell, together with others, made the presentations. That is certainly sufficient for Rule 9(b)

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[19] FAC ¶ 292.

even if Plaintiffs were required to prove that Angell made the statements contained in the presentations.

However, Plaintiffs have no such obligation, because the law is clear that all parties who act in concert have liability even for the specific actions taken by others. Rhode Island has adopted the Restatement (Second) Torts § 876 (1979) for determining whether individuals or entities act in concert such that they are liable for each other's wrongdoing. Ames v. Oceanside Welding and Towing Co., Inc., 767 A.2d 677, 681 (R.I. 2001) ("This Court has adopted the Restatement (Second) Torts § 876 (1979) for determining whether individuals or entities act in concert.") (citing Curtin v. Lataille, 527 A.2d 1130, 1132 (R.I. 1987)). Restatement (Second) of Torts § 876 provides:

> Restatement (Second) Torts § 876 Persons Acting in Concert
>
> "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
>
> (a) does a tortious act in concert with the other or pursuant to a common design with him, or
>
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
>
> (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person."

Ames v. Oceanside Welding and Towing Co., Inc., *supra*, 767 A.2d at 681 (quoting Restatement (Second) of Torts § 876). "Parties are acting in concert when they act in accordance with an agreement to cooperate in a particular line of conduct or to accomplish a particular result. The agreement need not be expressed in words and may

be implied and understood to exist from the conduct itself." Restatement (Second) of Torts § 876 cmt. a. Plaintiffs' allegations that Angell participated with other defendants in making the presentation is more than sufficient to support a reasonable inference that Angell acted in concert.

Thus, it would be irrelevant even if it were demonstrated that someone other than Angell put the objectionable statements up on the screen. Restatement (Second) of Torts § 876(b) provides that Angell is liable in tort if it "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." See Restatement (Second) of Torts § 876 cmt. a ("Whenever two or more persons commit tortious acts in concert, each becomes subject to liability for the acts of the others, as well as for his own acts."). Angell's participation in making the presentation certainly supports a reasonable inference that Angell gave "substantial assistance," even if Angell was not running the computer. Angell had responsibility to deal directly with Plan participants regarding the Plan, as alleged in the Complaint[20] and demonstrated in the Service Agreement that Angell has attached to its motion to dismiss as Exhibit A.

Although Angell states "[s]ee cases cited supra at pp. 31-32" in support of its claim that the allegations that Angell participated in the presentation are insufficient under Rule 9(b), in fact those cases have nothing to do with the imposition of liability for concerted action. They concern "lumping in" groups of defendants in factual allegations. See King v. Wells Fargo Home Mortg., No. 11-10781-GAO, 2013 WL 1196664, at *2 (D. Mass. Mar. 25, 2013) (cited in Angell Memo. at 31-32) ("Moreover,

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[20] FAC ¶¶ 29, 288, 311-12.

where there are multiple defendants whose participation in underlying events may differ, it is incumbent on a plaintiff to specify the particulars as to each defendant. Lumping these parties all together as "defendants," as the plaintiff does, is not sufficient."). Plaintiffs expressly allege that "[o]n April 29 & 30, 2014, shortly before the sale of Fatima Hospital was approved, representatives of Angell (including at least Mary Pat Moran), SJHSRI, RWH, and CCCB (including at least Darlene Souza) again participated in PowerPoint Presentations to SJHSRI employees intended to reassure them that the sale of the hospital to Prospect Medical would not affect their pension benefits." That allegation identifies the Defendants that participated in concert in a particular event, and cannot be criticized as "lumping in".

2. The Misrepresentations in the Annual Benefit Statements

In addition, Plaintiffs assert that Angell committed fraudulent misrepresentations in the benefit statements it created and provided to plan participants annually. The statement a) note that "[y]our pension benefit is an important part of your future retirement income," b) state "Security—Benefits are paid from a secure trust fund," c) state that pension benefits are "Company Paid—The plan is entirely paid for by St. Joseph Health Services of RI. There is no cost to you," and d) state that "The Hospital pays the entire cost of the plan."[21]

Angell makes the following argument concerning its role in providing Plan participants with statements concerning the Plan:

> Plaintiffs allege that Angell provided Plan participants with "statements" setting forth "specific projected lifetime benefits," despite knowing that the

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[21] FAC ¶ 280.

> Plan was underfunded. (FAC ¶ 291; see also Ex. E.) However, as the FAC makes clear, the participant statements begin by saying, "St. Joseph Health Services of Rhode Island is pleased to give you this statement showing your estimated benefits." (FAC ¶ 280.) (emphasis added). There is no allegation that Angell was in in any way responsible for the text in the statements provided by SJHSRI.

Angell Memo. at 33 (quoting Angell Exhibit E (benefit statement)).

Angell does not dispute Plaintiffs' allegation that it distributed these statements to Plan participants,[22] nor does Angell deny that it actually drafted these statements.[23] Thus, to the extent that the statement that "St. Joseph Health Services of Rhode Island is pleased to give you this statement" is even true, it only means that *Angell on behalf of SJHSRI* "gave" the Plan participants statements that Angell drafted.

In any event, Angell became responsible for the contents of these statements when Angell distributed those statements to Plan participants knowing they contained false and misleading information. "It is fraud to knowingly provide false information to another person, regardless of who originally drafted the words." In re National Century Financial Enterprises, Inc., 846 F. Supp. 2d 828, 862 (S.D. Ohio 2012). "One doesn't have to be the inventor of a lie to be responsible for knowingly repeating it to a dupe." U.S. S.E.C. v. Lyttle, 538 F.3d 601, 604 (7th Cir. 2008). "It is equally true that a misrepresentation may be the product of the intentional suppression of the truth, and may be effected by words, conduct or the exhibition of documents." Lukowsky v. Shalit, 110 A.D.2d 563, 567 (N.Y. App. 1985) (citation omitted).

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[22] FAC ¶ 291.

[23] Indeed, the Service Agreement it provides as Exhibit A is evidence that it did draft all these statements. See Angell Exhibit A (Service Agreement) at 2.

Angell then argues that the information in the statements that Angell gave to Plan participants is either true, or is expressed as estimates which are not actionable in fraud:

> Further, Plaintiffs highlight the fact that these participant statements included the following language: "Benefits are paid from a secure trust fund" and "The Plan is entirely paid for by St. Joseph Health Services of RI. There is no cost to you." Such statements are accurate and, therefore, cannot form the basis of any misrepresentation claim. Moreover, the statements expressly state: "These figures are not a promise or guarantee of any future benefits." Such language was conveniently omitted from Plaintiffs' FAC. Plaintiffs cannot seriously contend these participant statements were part of a conspiracy to fraudulently convince participants that their benefits are guaranteed.
>
> Finally, as shown on the face of these statements, they clearly identified that the projections were "estimates." Such "estimates" are merely "opinions" and "cannot form the basis for a misrepresentation claim" as a matter of law.

Angell Memo at 33 (quoting Angell Exhibit E (benefit statement)) (other citations omitted).

The statements in the annual benefit statements that Plaintiffs highlight in the Complaint are *not* "accurate." The statement - "Company Paid—The plan is entirely paid for by St. Joseph Health Services of RI. There is no cost to you." – is false or misleading since Angell knew that the "Company" had not "paid" what was due the Plan, and knew that the Plan participants believed SJHSRI was doing so.

Similarly, the statement – "Security—Benefits are paid from a secure trust fund." – is false or misleading since Angell knew that SJHSRI was not funding the "secure trust fund." It is misleading to say the money the employer has contributed is "secure" but not to say that the employer is not making necessary contributions.

Moreover, the statement – "The Hospital pays the entire cost of the plan." – is false or misleading because Angell knew that SJHSRI was only paying a small part (administrative expenses) of what should have been the complete cost (including necessary contributions) of the Plan, and that SJHSRI claimed not to be obligated to fund the Plan.

We submit that these statements were false and misleading. Moreover, they would be actionable in fraud if the statements were merely ambiguous, based upon Plaintiffs' allegations that Angell intended to deceive or even if Angell had no belief how it would be understood or was recklessly indifferent to how it would be understood. See Restatement (Second) of Torts § 527 ("A representation that the maker knows to be capable of two interpretations, one of which he knows to be false and the other true is fraudulent if it is made: (a) with the intention that it be understood in the sense in which it is false, or (b) without any belief or expectation as to how it will be understood, or (c) with reckless indifference as to how it will be understood.").

Finally, and conclusively, these statements were certainly misleadingly incomplete, and, therefore, actionable in fraud. Restatement (Second) of Torts § 529 states as follows:

> § 529 Representation Misleading Because Incomplete
>
> A representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter is a fraudulent misrepresentation.

As noted in the comment:

> A statement containing a half-truth may be as misleading as a statement wholly false. Thus, a statement that contains only favorable matters and omits all reference to unfavorable matters is as much a false representation as if all the facts stated were untrue.

Restatement (Second) Torts § 529 cmt. a. Although the above-described analyses of the benefit statements demonstrate they contain misrepresentations, it does not take detailed analyses of what the statements say to conclude that, by definition, benefit statements that represent that the Plan participants can expect to receive certain sums are at best half-truths, when Angell knew that those expectations were baseless because the Plan was grossly underfunded and that SJHSRI was not funding the Plan.

Angell attempts to defend itself by attaching a copy of the statement to its motion to dismiss as Exhibit E, and pointing to the following additional information from these statements that is not specifically alleged in the Complaint, that "the statements expressly state: 'These figures are not a promise or guarantee of any future benefits.'" Angell Memo. at 33. Angell also notes that "as shown on the face of these statements, they clearly identified that the projections were 'estimates.' Such 'estimates' are merely 'opinions' and 'cannot form the basis for a misrepresentation claim' as a matter of law." Angell Memo. at 33.

Although parties opposing motions to dismiss typically are not permitted to file documents, Plaintiffs welcome Angell's choice to attach this complete statement. Angell's memorandum merely paraphrases it. Here is that portion of the statement in full:

> This statement has been prepared to let you know the status and value of your pension plan benefit. **These figures are not a promise or guarantee of any future benefits. They are only estimates based on the assumption that you continue to work and earn service credit each year until the indicated retirement date at your current compensation rate.** Information in this statement is subject to provisions of the plan document in effect on July 2004. At retirement, your benefit will be calculated exactly based on the plan provisions in effect at that time. Since there is always the possibility of error in data, you should

> contact the Human Resource Department if any information appears to be incorrect.

Exhibit E (emphasis supplied). The bolded text explains *why* the benefit figures were "not a promise or guarantee," and what is meant by "estimates." The benefit figures are "not a promise or guarantee" because "they are only estimates based on the assumption that you continue to work and earn service credit each year until the indicated retirement date at your current compensation rate." In other words, Angell is explaining that there is "no promise or guarantee," and that the benefit amounts quoted are merely "estimates," because of two contingencies; 1) they are dependent on the Plan participant working until a specific date, and 2) that such work is at the current compensation rate.

Thus, the very language that Angell quotes in defense of Plaintiffs' claims clinches Plaintiffs' argument. It states the contingencies for why the benefit figures were "not a promise or guarantee" and merely "estimates," and fails to mention the much more significant "contingencies" (more like certainties) affecting the benefits, that SJHSRI was not funding the Plan, and the Plan was grossly underfunded. Accordingly, it is another misrepresentation. Moreover, as discussed below, such partial disclosures of risk create a duty to disclose all risks.

The cases that Angell cites for the proposition that "estimates" are not actionable in fraud are inapplicable for two reasons, the first having to do with this specific language from the benefit statements, and the second concerning "estimates" generally. First, none of the cases Angell cites involved a misrepresentation such as in the case *sub judice*, in which the statement specifically identifies the contingencies that renders it

an "estimate," but the statement is alleged to be false for omitting much more significant contingencies.

Second, none of the cases address the well-established exception to the general rule that "estimates" are not actionable, which is in the circumstance that the party making the estimate in fact does not believe it. Such false statements support a claim for fraudulent misrepresentation. Swift v. Rounds, 35 A. 45, 46 (R.I. 1896) ("The state of a man's mind at a given time is as much a fact as is the state of his digestion.") (action for deceit could be maintained where "defendant made it to appear, by the act of buying on credit, that he intended to pay for the goods in question, while in fact he intended to cheat the plaintiffs out of them"); Hoefer v. Wisconsin Educ. Ass'n Ins. Trust, 470 N.W.2d 336, 340 (Iowa 1991) ("A mere statement of an honest opinion, as distinguished from an assertion of fact will not amount to fraud, even though such opinion be incorrect. When the statements become representations of fact, or the expression of opinion is insincere and made to deceive or mislead they may be treated as fraudulent. Whether such is their quality and character is ordinarily a jury question.") (emphasis supplied) (quoting International Milling Co. v. Gish, 137 N.W.2d 625, 631 (Iowa 1965)).

This exception to the general rule that opinions are not actionable is recognized in Restatement (Second) Torts § 539, which states:

> § 539 Representation of Opinion Implying Justifying Facts
>
> (1) A statement of opinion as to facts not disclosed and not otherwise known to the recipient may, if it is reasonable to do so, be interpreted by him as an implied statement
>
> > (a) that the facts known to the maker are not incompatible with his opinion; or

> (b) that he knows facts sufficient to justify him in forming it.
>
> (2) In determining whether a statement of opinion may reasonably be so interpreted, the recipient's belief as to whether the maker has an adverse interest is important.

Thus, Angell's provision of benefit estimates constituted implied statements that Angell both had no facts incompatible with the benefit estimates, and had facts sufficient to justify them, neither of which were true.

Indeed, there are a series of Restatement sections that address when statements of opinion constitute intentional misrepresentations. The Restatement (Second) Torts § 543 also establishes that Plaintiffs were entitled to rely on Angell's benefit statements, notwithstanding the statement that they were estimates:

> § 543 Opinion of Apparently Disinterested Person
>
> The recipient of a fraudulent misrepresentation of opinion is justified in relying upon it if the opinion is that of a person whom the recipient reasonably believes to be disinterested and if the fact that such person holds the opinion is material.

Angell certainly held itself out as a disinterested party and subject to professional standards.

Moreover, under Restatement (Second) Torts § 542, the Plan participants would be entitled to rely on Angell's benefit statements even if they perceived Angell as an adverse party:

> § 542 Opinion of Adverse Party
>
> The recipient of a fraudulent misrepresentation solely of the maker's opinion is not justified in relying upon it in a transaction with the maker, unless the fact to which the opinion relates is material, and the maker
>
> (a) purports to have special knowledge of the matter that the recipient does not have, or

> (b) stands in a fiduciary or other similar relation of trust and confidence to the recipient, or
>
> (c) has successfully endeavored to secure the confidence of the recipient, or
>
> (d) has some other special reason to expect that the recipient will rely on his opinion.

Restatement (Second) Torts § 542.

All four of these sub-sections apply. Angell had special knowledge of the Plan assets and liabilities based upon its role as Plan actuary. Moreover, as discussed below concerning Angell's duty to disclose, as the entity designated by SJHSRI to deal directly with Plan participants, Angell had a fiduciary relationship to the Plan participants, or at least a "similar relation of trust and confidence" with them. Angell obviously endeavored to secure their confidence by providing them with professional work product. Indeed, it is absurd to suggest that Angell did not care whether the Plan participants had confidence in them. As for the fourth factor of a "special reason," there are plenty, including that Angell was the entity to whom Plan participants were told to turn for information, and who agreed to make themselves available to answer Plan participants' inquiries seven[24] days a week, from 8:30 a.m. until 5:00 p.m.[25]

The First Circuit has applied this exception to performance forecasts. See Glassman v. Computervision Corp., 90 F.3d 617, 627 (1st Cir. 1996) ("While forecasts are not actionable merely because they do not come true, they may be actionable to the extent they are not reasonably based on, or are inconsistent with, the facts at the time

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[24] Angell Exhibit A (Service Contract) at 2 ("APG will maintain a 1-800 number and dedicated e-mail address to field all active, vested terminated, and retiree inquiries and questions regarding plan options and distribution election packages (based on EST 8:30pm to 5pm)").

[25] FAC ¶¶ 288-89; Angell Exhibit A (Service Contract) at 2.

the forecast is made."); Cummings v. HPG Int'l, Inc., 244 F.3d 16, 22 (1st Cir. 2001) ("Even a statement that in form is one of opinion may constitute a statement of fact if it may reasonably be understood by the recipient as implying that there are facts to justify the opinion or at least that **there are no facts that are incompatible with it**.") (emphasis supplied). At the very least, the fact that SJHSRI was not funding the Plan and it was grossly underfunded are "facts that are incompatible" with the statements advising the Plan participants of the amount of the benefits they could expect to receive.

None of the cases that Angell cites for the proposition that "estimates" and "opinions" are not actionable as false statements involved estimates and opinions for which the speaker lacked a reasonable basis, much less actually disbelieved.

Similarly, the cases that Angell cites for the proposition that there can be no reasonable reliance on such opinions or estimates do not address whether the recipient is entitled to rely on the speaker's genuine belief in the estimates and opinions, or to assume that the speaker is not withholding information that contradicts the estimates and opinions. Angell cites Livick v. The Gillette Co., 524 F.3d 24, 32-33 (1st Cir. 2008) for the proposition that "employee could not reasonably rely on erroneous pension benefit 'estimates'." Angel Memo. at 32. That case has no application here, since the First Circuit based its holding on the fact that the informal estimates the plan participant received contradicted information the participant had received from the employer, including "clear, accurate, and complete information in multiple documents." Livick v. The Gillette Co., *supra*, 524 F.3d at 30.

Similarly, Green v. ExxonMobil Corp., 413 F. Supp. 2d 103 (D.R.I. 2006), which Angell also cites, involved an estimated benefit calculation that conflicted with the Plan

terms, which expressly stated that it was subject to the terms of the Plan, and which was corrected within one month of its issuance. Green v. ExxonMobil Corp., *supra*, 413 F. Supp. 2d at 119. Moreover, the finding of no reasonable reliance was after completion of a five day bench trial, not in connection with a motion to dismiss.

In any event, whether there was justifiable reliance is not an issue that can be addressed in connection with a motion to dismiss. See Samia Companies LLC v. MRI Software LLC, 898 F. Supp. 2d 326, 343 (D. Mass. 2012) (issue of plaintiff's reliance on oral representations was not ripe for decision at motion to dismiss stage despite existence of integration clause in written contract); Bayerische Landesbank, New York Branch v. Barclays Capital, Inc., 902 F. Supp. 2d 471, 474 (S.D.N.Y. 2012) ("Whether or not reliance on alleged misrepresentations is reasonable in the context of a particular case is intensely fact-specific and generally considered inappropriate for determination on a motion to dismiss.").

3. The Misrepresentations in August of 2014

Plaintiffs also allege that as part of a continued cover-up, Angell made fraudulent misrepresentations to Plan participants beginning two months after the 2014 Asset Sale, when Angell notified Prospect Chartercare that Plan participants "were seeking information concerning the solvency of the plan,"[26] to which Angell wanted instructions how to respond. That query provoked internal communications at Prospect Chartercare that included one employee telling the other "I think the less 'formal' communication on

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[26] FAC ¶ 306

this the better."[27] In response Prospect Chartercare instructed Angell *not* to provide Plan participants with the information they were seeking concerning the solvency of the Plan, and instead instructed Angell to tell Plan participants that "the plan administrators review the annual recommended funding as advised by the plan's actuaries each year. There is also an investment committee that reviews and monitors the plan on an ongoing basis."[28] The Complaint alleges that "Angell accepted and followed these instructions."[29]

The Complaint explains precisely how Angell's agitprop script for responding to Plan participants was misleading and calculated to deceive. The parties to those emails, including Angell, knew they very well could "speak to the future [in]solvency of the plan," because their own calculations predicted that the Plan would not have sufficient funds to pay Plan participants the benefits to which they were entitled."[30] Moreover, Angell, "knew that SJHSRI for years had been disregarding Angell's funding recommendations and making no contributions, and that once the asset sale went through, SJHSRI would have insufficient funds to make the actuarial-recommended contributions even if it wanted to."[31]

Thus, it was misleading "for Angell to fail to disclose to Plan participants that Angell knew the Plan was grossly underfunded, and that SJHSRI for years had been disregarding Angell's funding recommendations and making no contributions, while at

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[27] FAC ¶ 307.

[28] FAC ¶ 308.

[29] FAC ¶ 310.

[30] FAC ¶ 309.

[31] FAC ¶ 309.

the same time reassuring Plan participants that 'plan administrators review the annual recommended funding as advised by the plan's actuaries each year,' and that [t]here is also an investment committee that reviews and monitors the plan on an ongoing basis.'"[32]

Angell's response to these allegations is as follows:

> Plaintiffs do not identify any specific individual or participant who was "told" this statement, or specific contents of any such conversation, and Plaintiffs do not allege that Angell ever made the statement to anyone. Therefore, this allegation cannot form the basis of any "fraudulent misrepresentation" claim because Plaintiffs have not alleged that the statement was ever made, nor have Plaintiffs alleged the "who, what, where, and when" to meet the heightened pleading standards for fraud under Rule 9(b). *Doyle*, 103 F.3d at 194.
>
> Furthermore, despite Plaintiffs' conclusory allegation to the contrary (FAC ¶ 309), these statements are demonstrably true. Angell was not authorized to speak to the future solvency of the Plan, because it was instructed not to do so. The Plan administrators did review the annual recommended funding as advised by the Plan's actuaries each year and there was an investment committee that reviews and monitors the Plan on an ongoing basis. (Id ¶¶ 233, 240-247.)
>
> Moreover, it is unclear how these statements would lull participants into complacency about the concerns they already had about the Plan's solvency. The three representations taken together are more likely to be alarming than comforting. They pointedly do not suggest the Plan will be solvent, or even that the Hospital was making the recommended contributions. If anything, such statements are a clear signal that Angell was not assuring participants of the solvency of the Plan.

Angell Memo. at 36-37.

Angell's defense that the statement is true because "Angell was not authorized to speak to the future solvency of the Plan, because it was instructed not to do so" (Angell

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[32] FAC ¶ 309.

Memo. at 37) is the defense of "following orders" rejected in the trials at Nuremberg and ever since. See Itofca, Inc. v. Hellhake, 38 F.3d 1202, 1205 (7th Cir. 1993) ("[Defendant] asks this court to find that 'following orders' is an affirmative defense to tort liability. He offers no case, and this court is aware of no case, that supports this position. A corporate officer or director may not seek shelter from tort liability in the widely-discredited defense that he was 'only following orders.'"). Angell was not compelled to mislead Plan participants simply because it was instructed to do so; it had the right and duty to either refrain from fraud or quit.

As for the defense that it was true that "[t]he Plan administrators did review the annual recommended funding as advised by the Plan's actuaries each year and there was an investment committee that reviews and monitors the Plan on an ongoing basis," that is a very good example of why partial disclosures and half-truths are actionable. The allegations concerning this statement are more than sufficient to support the reasonable inference that it was intended to mislead, and was indeed misleading, because it is falsely reassuring in the absence of disclosure that the recommendations were routinely disregarded.

Angell claims that these allegations lack the particularity required by Rule 9(b), because Plaintiffs have not provided the names of the Angell employee who carried out these instructions, or the names of Plan participants who were misled by this information. Angell carries Rule 9(b) too far. The statements are quoted, and the dates of and parties to the emails are provided. The Complaint states that Angell's employee Mary Pat Moran received the instructions, because she wanted to know what to say to Plan participants. Any additional information containing who said what to whom is

contained in Angell's files, which pursuant to the Service Agreement were required to include a work log,[33] and the memory of Mary Pat Moran, all of which must await discovery.

Angell does not need more detail to frame a responsive pleading. Wright, Miller, *et al.*, Federal Practice and Procedure: Civil 3d § 1298 (3d ed.) ("Perhaps the most basic consideration for a federal court in making a judgment as to the sufficiency of a pleading for purposes of Rule 9(b) is the determination of how much detail is necessary to give adequate notice to an adverse party and to enable that party to prepare a responsive pleading.") (citing cases). Moreover, Plaintiffs' allegations satisfy the requirement of particularity, because Plaintiffs have pled a complex fraud and provide numerous details as to how it worked in particular instances, and the remaining details are in the possession of Angell. See Berk v. Tradewell, Inc., No. 01 CIV. 10068 (MBM), 2003 WL 21664679, at *13 (S.D.N.Y. July 16, 2003) ("In their complaints, plaintiffs plead a complex fraud and provide numerous details as to how it worked in particular instances. Plaintiffs allege that Tyner is in possession of further information concerning the fraud, and Tyner is a corporate insider. Plaintiffs have provided Tyner with sufficient notice of the fraud claims to satisfy the requirements of Rule 9(b).").

Moreover, the requirement of particularity is relaxed for bankruptcy trustees (and, by extension, receivers), who perforce have only secondhand knowledge. See Wright, Miller, *et al.*, Federal Practice and Procedure: Civil 3d § 1298 (3d ed.) ("The heightened pleading required under Rule 9(b)—which is applicable to bankruptcy proceedings —

[33] Angell Exhibit A (Service Agreement) at 2.

tends to be relaxed when fraud allegations are made by a bankruptcy trustee based on second-hand information.") (case cited).

4. The Misrepresentations in April 2016

Plaintiffs allege a fourth set of fraudulent misrepresentations Angell made to Plan participants, on or about April 13, 2016, nearly two years after the asset sale, when Angell made another PowerPoint presentation, this time at New Fatima Hospital, concerning the Plan and the rights of Plan participants, which again acknowledged that "[y]our pension benefit is an important part of your future retirement income," and again reassured them that "[t]he Hospital pays the entire cost of the Plan," with payment options that included annuity payments for life.[34]

With respect to those allegations, Angell's defense in its entirety consists of the following:

> Plaintiffs then allege that Angell "worked with" other Defendants to prepare and make another PowerPoint presentation in 2016, two years after the sale of the hospital and all regulatory approvals. (Id. ¶¶ 315-318.) Regarding this presentation, Plaintiffs complain that the statement, "the hospital pays the entire cost of the Plan" was no longer accurate because SJHSRI no longer owned the hospital. (Id. ¶ 316). However, Plaintiffs again conveniently fail to attach the actual document, which shows that this statement was contained in a reproduction of a statement issued two years prior, when the statement was true. (Ex. C, at 7.) Moreover, the entirety of the presentation (about the mechanics of Plan benefits and the application process) did not hide who was responsible for Plan funding, as it also stated that "[t]he Plan is entirely paid for by St. JosephHealth Services of Rhode Island." (Ex. C, at 5.) Plaintiffs also allege that the 2016 PowerPoint was fraudulent in failing to alert Plan participants that their Plan benefits were not protected by ERISA. (Id. ¶ 317.) However, this allegation is particularly bizarre, considering that:

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[34] FAC ¶ 315.

> - Plaintiffs do not allege that any defendant ever represented to any Plan participant that the Plan was covered by ERISA; and
>
> - Plaintiffs also allege that Plan benefits are protected by ERISA.
>
> It cannot possibly be fraudulent to fail to make an untrue statement. Since Plaintiffs allege that the Plan benefits are protected by ERISA, it cannot be fraudulent to fail to state that they are not protected by ERISA.

Angell Memo. at 36-37.

Angell justifies the false statement that "the hospital pays the entire cost of the Plan" by arguing that the PowerPoint "shows that this statement was contained in a reproduction of a statement issued two years prior, when the statement was true." Angell Memo. at 36 (citing Angell Ex. C). First, the statement was not even true prior to the 2014 Asset Sale, for the reasons previously discussed that SJHSRI was not funding the Plan. Second, there is nothing in Exhibit C that informs the reader that it is simply "a reproduction of a statement issued two years prior," of only historical and vestigial significance.

Angell also contends that the statement that "the Hospital pays the entire cost of the Plan" was attributed only to SJHSRI. Not so. First, the cover of the PowerPoint slide deck bears the logos of both Defendant SJHSRI and Defendant Prospect Chartercare,[35] indicating that statements contained therein could be attributed to both parties. In addition, as the First Amended Complaint alleges—and Angell does not deny—the presentation was being presented by Angell to the hospital employees nearly

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[35] See Angell Exhibit D (2016 PowerPoint) at 1. Prospect Chartercare was doing business as CharterCARE Health Partners during (and prior to) 2016. FAC ¶ 415.

two years after the sale.[36] It is certainly a permissible inference, and, Plaintiffs submit, the only permissible inference, that employees believed Prospect Chartercare stood behind the presentation being made at its hospital under its name, ascribing responsibility to the "Hospital," rather than concluding that SJHSRI was the "Hospital" even though SJHSRI no longer operated a hospital.

Angell's final line of defense is that there was nothing wrong in failing to tell Plan participants that the Plan was not governed by ERISA, because in this litigation Plaintiffs are contending it is covered by ERISA. Angell Memo. at 37. That is a fine example of specious reasoning. The allegations in the Complaint give rise to the reasonable inference that Angell and the other Defendants engaged in a fraudulent conspiracy to preserve church plan status for the Plan right through the filing for receivership in August 2017, in order to avoid the obligations imposed by ERISA, while at the same time failing to inform the Plan participants that their benefits were insecure because they were not protected by ERISA. If it turns out that the Plan was covered by ERISA, it will be because that fraudulent scheme ultimately failed. That will not excuse Angell and others from misleading Plan participants in furtherance of the attempted fraud.

5. Third Party Reliance

In Plaintiffs' opposition memorandum to the Prospect Defendants, Plaintiffs contend that the Prospect Entities' misrepresentations to state regulators and UNAP are misrepresentations upon which Plaintiffs can rely for proving that the Prospect Entities

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[36] FAC ¶ 316.

are liable to Plaintiffs for intentional misrepresentation, based on case law from many other states, and a decision of the Rhode Island Supreme Court that indicates that Rhode Island allows third party reliance in fraud cases, or at least that it is highly likely that the Rhode Island Supreme Court would so rule. See Plaintiffs' Opp. Prospect MTD at 58-63.

That argument applies equally to Angell, since Angell also participated in making false representations to state regulators. Plaintiffs allege that Angell provided the other defendants with a truncated calculation for them to submit to the Rhode Island Attorney General in order to demonstrate that the $14 million payment "will stabilize the plan,"[37] that the calculation was in fact submitted,[38] and indeed deceived the Attorney General into accepting that the payment would stabilize the Plan.[39]

Plaintiffs allege that Angell knew that the complete calculation (prior to being truncated) demonstrated that the $14,000,000 contribution would *not* "stabilize" the Plan, since the complete calculation showed that, notwithstanding that contribution, the Plan would run out of money in 2036 with over $98,000,000 in liabilities to Plan participants even at the high assumed rate of return of 7.75%, or in 2030 with the rate of return of 5.75%."[40] Plaintiffs also allege that the calculation did not disclose that the funding percentage of 94.9% was based on assumed investment returns that Angell (and other Defendants) knew were nearly 70% above market rates of return (*i.e.*,

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[37] FAC ¶¶ 324-37.

[38] FAC ¶ 333.

[39] FAC ¶ 336.

[40] FAC ¶ 332.

Angell's projected rate of return of 7.75% was over 68% greater than the market rate of 4.6%).[41]

In addition, Plaintiffs allege that the conclusion in the calculation that the effect of the $14 million payment was that the plan would be 94.9% funded was also false and misleading, because Angell knew that the use of any funding level percentage as a measure of the Plan's funding progress was contrary to and deviated from the standards of actuarial practice, and that according to those standards the funding progress of a pension plan should not be reduced to a funding percentage at a single point in time, or that pension plans should have a strategy in place to attain and maintain a funded status of 100% or greater over a reasonable period of time, not merely at a single point in time.[42]

These allegations further support Plaintiffs' intentional misrepresentation claim against Angell, and are sufficient to give rise to a reasonable inference that Angell is liable to Plaintiffs on that claim.

6. Fraudulent Omissions

Plaintiffs' contention is that Angell had a duty of disclosure based upon its status as a fiduciary, and because, even if it had no pre-existing duty, Angell voluntarily made disclosures to Plaintiffs and, therefore, was obligated to provide all information necessary so that those disclosures were not misleading.

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[41] FAC ¶ 334.

[42] FAC ¶ 335.

a. The Duty of Disclosure

Under the law of Rhode Island, whether a party has a duty to disclose depends upon the circumstances. As stated in Western Reserve Life Assur. Co. of Ohio v. Conreal LLC, 715 F. Supp. 2d 270 (D.R.I. 2010):

> Rhode Island courts allow actions for fraudulent concealment in circumstances where the defendant bears "a duty to speak." *Home Loan*, 255 A.2d at 168. Whether or not the duty arises—in other words, whether a fact is material, such that it must be disclosed—depends on the "circumstances of [the] case." Id. at 168. The duty generally obligates a party to divulge facts that, if withheld, render other affirmative representations misleading. See *Nisenzon v. Sadowski*, 689 A.2d 1037, 1046 (R.I.1997) (finding a letter from an attorney that "not only ... fail[ed] to disclose [the attorney's] ownership" of disputed property, but also "affirmatively sought to induce" the recipients to take no action against his client, supported a fraud claim).

715 F. Supp. 2d at 285.

Even in the absence of a pre-existing duty to disclose, volunteering information creates a duty to insure that the information volunteered is not misleading. The Restatement (Second) Torts § 551(2)(b) sets forth the rule that partial disclosure gives rise to a duty to disclose all material facts:

> § 551 Liability for Nondisclosure
>
> (2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,
>
> * * * *
>
> > (b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading;

This obligation to make disclosure is a corollary to the rule that partial disclosures that are misleading constitute fraudulent misrepresentations even if they are true as far as they go. See Restatement (Second) Torts § 529 ("A representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter is a fraudulent misrepresentation."). It is also a corollary of the rule that intentionally ambiguous statements are fraudulent misrepresentations if the speaker intends to deceive, is indifferent to whether the recipient is deceived, or is recklessly indifferent to how the statements are understood. See Restatement (Second) of Torts § 527 ("A representation that the maker knows to be capable of two interpretations, one of which he knows to be false and the other true is fraudulent if it is made: (a) with the intention that it be understood in the sense in which it is false, or (b) without any belief or expectation as to how it will be understood, or (c) with reckless indifference as to how it will be understood.").

b. Angell Was a Fiduciary

Plaintiffs have asserted a state law claim against Angell that asserts that Angell was a fiduciary and breached its fiduciary duties to the Plan participants.[43] A fiduciary relationship "'arises whenever confidence is reposed on one side, and domination and influence result on the other' or 'when there is a reposing of faith, confidence and trust, and the placing of reliance by one upon the judgment and advice of the other.'" Rhode Island Resource Recovery Corp. v Van Liew Trust Co., No. PC-10-4503, 2011 WL

[43] FAC ¶¶ 551-53.

1936011, at *7 (R.I. Super. May 13, 2011) (Silverstein, J.) (emphasis supplied) (citing Lyons v. Midwest Glazing, 265 F. Supp. 2d 1061, 1076 (N.D. Iowa 2003)).

The criteria for finding a confidential or fiduciary relationship are highly factual:

> There are no hard and fast rules about when a confidential relationship will be found. The court may consider 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. Bogert, *Trusts and Trustees* § 482 at 280-336 (2d rev. ed. 1978). There is no requirement in this jurisdiction that a defendant must occupy a position of dominance over a plaintiff.

Simpson v. Dailey, 496 A.2d 126, 129 (R.I. 1985).

Acting as an actuary can give rise to a fiduciary duty depending on the circumstances. See New York State Workers' Compensation Bd. v. SGRisk, LLC, 116 A.D.3d 1148, 1152 (N.Y. App. 2014) (actuaries who acted as third party administrators owed fiduciary duties) ("[A]ctuaries can still develop relationships of trust and confidence sufficient to give rise to a fiduciary duty. Courts must conduct a fact-specific inquiry to determine whether a fiduciary relationship exists based on confidence on one side and 'resulting superiority and influence on the other.'") (quoting AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co., 896 N.E.2d 61, 68 (N.Y. 2008)).

This is not a case in which employees are suing an actuary for advice the actuary gave their employer. Here the relevant statements were given directly to Plan participants, and were based on Angell's actuarial calculations. Moreover, Angell did not limit its role to providing actuarial services. As noted, to its motion to dismiss Angell has attached a copy of its service contract with SJHSRI, under which Angell agreed to act as a third party administrator and "to perform certain administrative services."

Angell Exhibit A. Those services included "preparing and distributing directly to all Plan participants" all benefit statements. Angell Exhibit A, Addendum A at 2. It also obligated Angell to create a "Participant Interface Service Bureau" which obligated Angell to perform a range of tasks involving the Plan participants, including maintaining an "1-800 [phone] number and dedicated email address to field all active, vested, terminated, and retiree questions regarding plan options and distribution election packages." Id.

Thus, Angell can be held to have fiduciary duties based upon its direct communications with Plan participants both as an actuary and in the role of third party administrator. See New York State Workers' Compensation Bd. v. Consolidated Risk Services, Inc., 125 A.D.3d 1250, 1252-53 (N.Y. App. 2015) (third party administrator had fiduciary duties); Heim v. Madison Nat. Life Ins. Co., No. 1:13-CV-00130-SEB, 2013 WL 5274275, at *2 (S.D. Ind. Sept. 18, 2013) ("In *Sieveking v. Reliastar Life Insurance Co.*, No. 4:08–cv–0045–DFH–WGH, 2009 WL 1795090 (S.D. Ind. June 23, 2009), our court recognized that a third party administrator of an insurance claim in some cases may have a fiduciary relationship with the insured which gives rise to a duty of good faith and fair dealing. In *Sieveking*, the court held that, as the administrator of the plaintiff's claim and the employer of the individuals who made the denial decision, the third party administrator owed the plaintiff a fiduciary duty to administer her claim in good faith.").

Plaintiffs have pleaded sufficient allegations to support the reasonable inference that Angell had a fiduciary relationship with Plan participants. Angell had infinitely superior access to information and business sophistication, compared to the Plan

participants, who relied on the benefit statements and other information Angell provided to make life-altering decisions such as whether to seek other employment, when to retire, what benefit elections to make, and how best to protect their loved ones.[44] Moreover, it is indisputable that most if not all communications Angell had with the Plan participants concerning their pension were both confidential and personal to Plan participants by their very nature. These facts are sufficient to give rise to the reasonable inference that Angell and the Plan participants had a relationship of trust and confidence that imposed on Angell the duties of a fiduciary in oral and written communications to Plan participants in the course of that relationship.

In any event, the determination of fiduciary status is not susceptible to being addressed on a motion to dismiss. See Impax Media, Inc. v. Ne. Advert. Corp., No. 17 CIV. 8272, 2018 WL 3962841, at *7 (S.D.N.Y. Aug. 17, 2018) (applying New York law) ("To determine whether a party in a business relationship has a fiduciary duty depends on an inquiry into the 'nature and quality of that relationship' which is an issue of fact that is ill-suited for resolution on a motion to dismiss.") (quoting Kidz Cloz, Inc. v Officially For Kids, Inc., No. 00 Civ. 6270 (DC), 2002 WL 392291, at *4-5 (S.D.N.Y. Mar. 13, 2002)); Lorenz v. E. W. Bancorp, Inc., No. 215CV06336CASFFMX, 2016 WL 199392, at *10 (C.D. Cal. Jan. 14, 2016) (applying California law) ("First, the Court notes that '[t]he existence of a fiduciary duty is generally a question of fact which cannot be resolved at the motion to dismiss stage.'") (quoting Cruz v. United States, 219 F. Supp. 2d 1027, 1039 (N.D. Cal. 2002)); NExTT Solutions, LLC v. XOS Technologies, Inc., 113 F. Supp. 3d 450, 458 (D. Mass. 2015) (applying Massachusetts law) (question

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[44] FAC ¶¶ 278-81, 292-93.

of whether licensee owed a fiduciary duty to creator was a question of fact that could not be resolved on a motion to dismiss); Desert Buy Palm Springs, Inc. v. DirectBuy, Inc., No. 2:11-CV-132 RLM, 2012 WL 2130558, at *6 (N.D. Ind. June 12, 2012) ("The parties' disagreement about whether a fiduciary relationship could or did exist raises a question of fact not properly resolved in connection with a motion to dismiss."); Institutional Deposits Corp. v. Pac. Coast Bankers' Bank, No. 09-23253-CIV, 2010 WL 11601557, at *2 (S.D. Fla. May 12, 2010) (applying California law) ("In addition, whether PCBB had fiduciary obligations, or 'moral or social obligation[s]' to IDC's investors is a disputed question of fact and may not be resolved on a motion to dismiss."); Madison v. Rightway Partners, LLC, No. 3:10CV1912 VLB, 2012 WL 90156, at *4 (D. Conn. Jan. 11, 2012) (applying Connecticut law) ("[T]he question of whether a fiduciary duty exists under the circumstances of a given case is usually a question of fact that cannot be decided on a motion to strike or motion to dismiss.").

Angell argues that it "had no 'duty' other than to its client (SJHSRI) which it fully informed about the funding status of the Plan." Angell Memo. at 51. That contention is also an issue of fact that cannot be addressed in connection with Angell's motion to dismiss. Moreover, there is nothing that absolutely prohibits a fiduciary from having fiduciary duties to two separate sets of clients, in the absence of a conflict. Indeed, that was especially appropriate here since Angell's client SJHSRI also owed fiduciary duties to the Plan participants. Thus, there should have been no conflict for Angell to have SJHSRI as its "client" and to owe fiduciary duties to the Plan participants, since whatever Angell had a fiduciary duty to disclose to the Plan participants, SJHSRI also had a fiduciary duty to disclose to them, and Angell's disclosures would actually assist

SJHSRI's performance of its fiduciary duties. Angell could and should have fulfilled its duties to both SJHSRI and the Plan participants. The fact that Angell acted unlawfully to favor one client over the other is the essence of Angell's breach of fiduciary duty.

Angell claims that it "was not involved in any secret 'meetings' or decisions." Angell Memo. at 51-52. It was, however, involved in many "secret" email communications, in the sense that they were not shared with Plan participants. Angell claims it "had no discretion over communications with participants." The extent of Angell's discretion cannot be decided on a motion to dismiss. However, the Service Agreement that Angell attached to its motion to dismiss confirms that Angell actually drafted the notices to the Plan participants, and that Angell was involved in extensive informal communications with Plan participants over the phone and by email, which are inconsistent with having no discretion whatsoever.

Angell argues that actuaries are not the type of profession that is automatically considered to be a fiduciary as a matter of law. Angell Memo. at 51 That is not in dispute. Similarly, Angell argues that "something 'more' needs to be established 'before elevating actuaries and accountants to fiduciary or other special status.'" Angell Memo. at 51 (quoting Erlich v. Oulette, Labonte, Roberge and Allen, P.A., 637 F.3d 32, 36 (1st Cir. 2011)). The principle that "something more is required" is also not in dispute.

However, Angell mischaracterizes the case law as to what that "something more" may be. Angell cites Geo. Knight & Co., Inc. v. Watson Wyatt & Co., 170 F.3d 210 (1st Cir. 1999) as "holding, under Massachusetts law, that an actuary did not occupy a position of trust and confidence with its client retirement plan in part because there was 'nothing in the record to suggest that [the plan's] trust in [the actuary] resulted in its

ceding control of [the plan's] management or assets to [the actuary].'" Angell Memo. at 51. In that case the court cited Massachusetts cases concerning fiduciary status, and commented that "[t]hese cases emphasize that the circumstances creating such fiduciary obligations as a duty to disclose are varied, and no universally-applicable rule distinguishes those circumstances which give rise to a duty to disclose from those that do not." Geo. Knight & Co., Inc., 170 F.3d at 216 (citations omitted). That fully supports Plaintiffs' position that Angell's fiduciary status and obligations cannot be determined on a motion to dismiss.

Moreover, the First Circuit did not hold that the actuary in that case was *not* a fiduciary, or that the actuary did *not* occupy a position of trust and confidence, as Angell implies. The case involved an appeal from the trial court's grant of summary judgment dismissing claims for negligent misrepresentation and breach of fiduciary duty based on the expiration of the applicable statute of limitations, in which the plaintiff claimed to be entitled to tolling based on fraudulent concealment arising out of the actuary's fiduciary duty of disclosure. See Geo. Knight & Co., Inc., 170 F.3d at 215. The First Circuit affirmed on the grounds that the plaintiff knew the facts that were allegedly misrepresented, and that a claim for negligent misrepresentation did not give rise to a cause of action for breach of fiduciary duty absent proof that the fiduciary was guilty of fiduciary misconduct as opposed to mere negligent misrepresentation. Geo. Knight & Co., Inc., 170 F.3d at 216-17. The court stated:

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

> enough in this case that the essence of Knight's claim is the alleged negligent performance of actuarial services and not misappropriation or disloyalty in violation of fiduciary duties; that Knight had adequate information in the form of the annual AVR disclosures to put it on notice of such a negligence claim; and that the special circumstances which would trigger section 12's equitable tolling provisions, see Burns, 394 F.2d at 419, are simply not present in this case.

170 F.3d at 217 (emphasis supplied). The bolded language establishes either that the court considered the actuary to be a fiduciary, or chose not to decide that issue because the alleged misconduct did not involve dishonesty or disloyalty.

Indeed, the court's citation to Burns v. Massachusetts Institute of Technology, 394 F.2d 416, 419 (1st Cir. 1968) is revealing, because that case also stands for the principle that breach of fiduciary duty will not toll the statute of limitations for a known breach. See Burns, 394 F.2d at 420 ("The fact that, as plaintiff now says, he may not have known the full extent of the use MIT may have made of his ideas, cannot mean that the cause of action was not apparent. Although thereafter plaintiff may have explored, and MIT considered, the possibility that MIT would review the matter, such discussions subsequent to a known breach do not toll the statute."). The fact that the holdings in Burns v. Massachusetts Institute of Technology and Geo. Knight & Co., Inc. were the same, together with the fact that the court in Burns v. Massachusetts Institute of Technology clearly was dealing with a fiduciary, demonstrate that the holding in Geo. Knight & Co., Inc. did not depend on a finding that Watson Wyatt was not a fiduciary.

Angell cites Fleet Nat'l Bank v. H & D Entm't, Inc., 926 F. Supp. 226 (D. Mass. 1996), aff'd, 96 F.3d 532 (1st Cir. 1996), "for the proposition that an accountant takes on fiduciary obligations only where he or she recommends transactions, structures deals, and provides investment advice, such that he or she exercises some managerial control

over the assets in question," not merely when "tasks performed . . . were ministerial in nature" and did not involve "management advice" or "discretionary control'." Angell Memo. at 51. That case concerned accountants, not actuaries, and insofar as Angell suggests it establishes the rule that an actuary is not a fiduciary unless he "exercises some managerial control over the assets in question," that is squarely contradicted by the First Circuit's decision in Geo. Knight & Co., Inc. v. Watson Wyatt & Co., in which the court certainly did not rule out fiduciary status for that actuary notwithstanding that there was "nothing in the record to suggest that Knight's trust in Watson Wyatt resulted in its ceding control of the Plan's management or assets to Watson Wyatt …" Geo. Knight & Co., Inc., 170 F.3d at 216.

Moreover, and more importantly, none of the cases cited by Angell involved actuaries who also acted as third party administrators. Thus, these cases are not inconsistent with the principle that Angell's fiduciary status cannot be decided against Plaintiffs in connection with Angell's motion to dismiss.

c. Angell's Professional Obligations Gave Angell a Duty of Full Disclosure

As discussed *infra* at 49-63, Angell's professional obligations also imposed on Angell the duty to make accurate representations.

d. Angell's Partial Disclosure Gave Angell a Duty of Full Disclosure

Plaintiffs' allegations are sufficient to support the inference that Angell's partial disclosures to the Plan participants obligated Angell to disclose that SJHSRI was not funding the Plan and that the Plan was grossly underfunded. For example, if not simply

outright false, Angell statements that the $14 million would "stabilize" the Plan were sufficiently misleading as to obligate Angell to disclose that SJHSRI was not funding the Plan and that the Plan was grossly underfunded. Similarly, Angell's disclaimer that explained why its benefit calculations were "estimates" was misleading in the absence of disclosure that the real problem with estimating benefits was that SJHSRI was not funding the Plan and that the Plan was grossly underfunded. Indeed, the contingencies that Angell referred to as explanation for why the benefit calculations were estimates pertained to the actions of the Plan participants themselves (length of service and rate of compensation), ignoring that the estimates were in fact baseless because the Plan was grossly underfunded and SJHSRI had stopped making contributions.

F. Plaintiffs' Claim Alleging Fraudulent Scheme (Count VIII)

Angell objects to Plaintiffs' claim for fraudulent scheme because "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)." Angell Memo. at 40. Angell's suggestion that Plaintiffs' complaint should set forth "legal authority" is clearly mistaken.

In Plaintiffs' opposition to the Prospect Entities' motion to dismiss, Plaintiffs fully address the claim that fraudulent scheme is not a stand-alone cause of action, not duplicative of any of Plaintiffs' other claims. See Plaintiffs' Opp. Prospect MTD at 82-85. Plaintiffs refer to that argument to address Angell's motion to dismiss Plaintiffs' claim against Angell for fraudulent scheme.

G. Plaintiffs' Claim Alleging Conspiracy (Count IX) Should Not Be Dismissed as to Angell

1. The Law of Civil Conspiracy

In Plaintiffs' opposition to the Prospect Entities' motion to dismiss, Plaintiffs set forth the relevant principles from the law of civil conspiracy. See Plaintiffs' Opp. Prospect MTD at 85-87. Plaintiffs rely on that discussion to address Angell's motion to dismiss Plaintiffs' claim against Angell for civil conspiracy.

2. Plaintiffs Have Stated a Claim for Conspiracy as to Angell

Angell seeks dismissal of Plaintiffs' conspiracy claim (Count IX), and argues that Plaintiffs' complaint is insufficient because "[t]here are no factual allegations that Angell 'agreed' to violate the law, or had any 'specific intent' to do so." Angell Memo. at 38. However, the complaint alleges that Angell and the other defendants "participated in a conspiracy to injure the Plaintiffs, which involved the combination of two or more persons to commit an unlawful act or to perform a lawful act for an unlawful purpose."[45] Plaintiffs are not obligated to allege direct evidence proving Angell's agreement to commit an unlawful act or to perform a lawful act for an unlawful purpose. See State v. Disla, 874 A.2d 190, 196 (R.I. 2005) (There "seldom will be direct evidence of an explicit agreement to commit an unlawful act, and that the existence and scope of a conspiracy often must be 'inferentially established by proof of the relations, conduct, circumstances, and actions of the parties.'") (quoting State v. Lassiter, 836 A.2d 1096, 1104 (R.I. 2003)).

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[45] FAC ¶ 504.

Angell contends that "the facts alleged demonstrate that Angell made no effort – let alone had any specific intent – to violate the law." Angell Memo. at 39. According to Angell, "[s]uch factual allegations demonstrate that Angell was acting with a lawful purpose –i.e., advising its client to comply with the law, not disobey it." Id. This advice may be seen as a wink and a nod, or papering the file with self-serving statements, in light of Angell's misrepresentations and omissions to the Plan participants and third parties. In any event, the complaint contains extensive allegations setting forth Angell's actions pursuant to that conspiracy, involving Angell's statements to the Plan participants, and Angell's assistance in deceiving state regulators.[46] Moreover, even if Angell recommended in good faith that SJHSRI fund the Plan, that would not absolve Angell of liability for SJHSRI's failure to do so. See State v. Mastracchio, 612 A.2d 698, 706 (R.I. 1992) (Rhode Island "has adopted the rule that 'where several persons combine or conspire to commit an unlawful act . . . each is responsible for everything done by one or all of his confederates, in the execution of the common design, as one of its probable and natural consequences, even though the act was not a part of the original design or plan, **or was even forbidden by one or more of them**.'") (emphasis supplied) (quoting State v. Gordon, 508 A.2d 1339, 1349 (R.I. 1986)).

[46] See FAC ¶¶ 291-97, 324-37, 315.

H. Plaintiffs' Claim of Professional Malpractice (Count X) Should Not be Dismissed

Plaintiffs have asserted a claim against Angell for professional malpractice, which first incorporates all of the factual allegations of the complaint,[47] and then states as follows:

> 507. Defendant Angell undertook, for a good and valuable consideration, to provide actuarial and administrative services to the Plan which included communicating directly with Plan participants concerning the Plan and the interests of Plan participants concerning the Plan.
>
> 508. At all times mentioned herein, Defendant Angell had a duty to Plaintiffs to conform to the standard of care exercised by the average actuary and provider of administrative services to pension plan participants holding itself out as a specialist in pension plans.
>
> 509. Nevertheless, Defendant Angell breached its duty in that it negligently provided actuarial and administrative services to the Plan and negligently communicated directly with Plan participants concerning the Plan and the interests of Plan participants concerning the Plan.
>
> 510. As a direct and proximate result of the negligence of Defendant Angell, Plaintiffs suffered damages.

FAC ¶¶ 507-10. At trial, Plaintiffs' will offer expert testimony that Angell deviated from the applicable standard of care in its dealings with the Plan participants.

Angell's first objection is that the "Class Participants" lack standing. Angell Memo. at 23 ("The Class Plaintiffs do not have standing to assert an actuarial malpractice claim against Angell."). Although described as an argument for lack of standing, in fact Angell's argument is that it owed no duties to the Plan participants.

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[47] FAC ¶ 506.

In the absence of precedent establishing a duty, the process for establishing a duty requires the Court to engage in "an *ad hoc* approach that turns on the particular facts and circumstances of a given case":

> We do not have a "set formula for finding [a] legal duty," and thus "such a determination must be made on a case-by-case basis." *Wells*, 102 A.3d at 653 (quoting Willis, 954 A.2d at 130). Consequently, we engage in "an ad hoc approach that turns on the particular facts and circumstances of a given case[.]" *Gushlaw*, 42 A.3d at 1256 (quoting *Ouch v. Khea*, 963 A.2d 630, 633 (R.I. 2009)). In *Banks v. Bowen's Landing Corp.*, 522 A.2d 1222, 1225 (R.I. 1987), we adopted the following list of factors to consider when deciding whether to impose a duty:
>
> > "(1) the foreseeability of harm to the plaintiff, (2) the degree of certainty that the plaintiff suffered an injury, (3) the closeness of connection between the defendant's conduct and the injury suffered, (4) the policy of preventing future harm, and (5) the extent of the burden to the defendant and the consequences to the community for imposing a duty to exercise care with resulting liability for breach." See also *Woodruff v. Gitlow*, 91 A.3d 805, 815 (R.I. 2014).
>
> In addition, "[t]he 'relationship between the parties' * * * [is also a consideration] in our duty analysis." *Gushlaw*, 42 A.3d at 1257 (quoting *Selwyn v. Ward*, 879 A.2d 882, 887 (R.I. 2005)).

Flynn v. Nickerson Community Center, 177 A.3d 468, 477 (R.I. 2018).

All of these factors warrant the imposition of a legal duty on Angell to exercise reasonable care in its dealings with the Plan participants. It clearly was foreseeable that the Plan participants would be injured if they were not told that SJHSRI was failing to fund the Plan and that the Plan was grossly underfunded. It goes without saying that it is foreseeable that a Plan participant would rely on pension benefits being paid when due, and that information from the Plan's actuary and third party administrator bearing

on the likelihood of that happening would be a factor in a host of life altering decisions, as previously mentioned.

As for the second factor - the degree of certainty that the Plan participants suffered an injury, it is undisputed that the Plan's assets are grossly insufficient to pay the Plan participants the benefits to which they are entitled.

With respect to the third factor, the closeness of connection between Angell's conduct and the injury suffered, Plaintiffs allege that Angell communicated directly with them, and that they were not otherwise provided with reliable information concerning whether SJHSRI was funding the Plan and the degree to which the Plan was underfunded. Under those circumstances, there is a close connection between Angell's conduct and the injury the Plan participants suffered.

Concerning the fourth factor, the policy of preventing future harm, it seems inarguable that obligating entities such as Angell to exercise reasonable care in their communications with Plan participants would prevent future harms.

Finally, as concerns the fifth factor—the extent of the burden to the defendant and the consequences to the community for imposing a duty to exercise care—it would impose no additional burden whatsoever on entities such as Angell who already have a professional obligation to the employer and entered into an affirmative undertaking to communicate with Plan participants, whereas the community is greatly served by accurate disclosure of pension information, such that the consequences for the community can only be positive.

Indeed, imposing a professional duty on Angell in the context of the facts of this case would impose no new burden whatsoever on Angell, because the law in Rhode

Island is already established that whether or not Angell had a pre-existing duty to exercise due care in dealing with Plan participants, its partial disclosures imposed on it the duty to refrain from making negligent misrepresentations. See Mallette v. Children's Friend and Service, 661 A.2d 67, 71, 73 (R.I. 1995) ("When CFS began allegedly volunteering information concerning Christopher's and his biological mother's medical and genetic background, the agency assumed a duty to refrain from making negligent misrepresentations. . . . We are of the opinion that in order to avoid liability, an adoption agency needs simply to refrain from making representations, or if it does begin making representations it must do so in a nonnegligent manner."). Thus, whether Plaintiffs' negligence claim is viewed through the lens of malpractice of an actuary and third party administrator, or negligent misrepresentation, Angell had a duty not to mislead the Plan participants.

Moreover, the Court may properly look to the Restatement (Second) Torts § 552 for guidance. Estate of Braswell by Braswell v. People's Credit Union, 602 A.2d 510, 512 (R.I. 1992) ("Furthermore, the absence of any relevant statutory or case law in this jurisdiction with respect to negligent misrepresentation and the applicability of contributory negligence presents this court with an issue of first impression. Indeed the trial justice was aware of that fact and properly looked to the Restatement (Second) Torts, § 552 (1977) for guidance."). Restatement (Second) Torts § 552 states:

> § 552 Information Negligently Supplied for the Guidance of Others
>
> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> > (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
> >
> > (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
>
> (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

Angell clearly had a duty to Plan participants under this provision. In the course of its profession, Angell supplied false information for the guidance of the Plan participants in their business transactions in connection with making decisions regarding their pension benefits which Angell intended the information to influence, and the Plan participants were members of a limited group of persons for whose benefit and guidance Angell intended to supply the information.

Thus, the fact that an actuary has a contractual duty to someone else does not relieve him of liability to a person to whom the actuary directly provides information. In Sabey v. Howard Johnson & Co., 5 P.3d 730 (Wash. App. 2000), an actuary for a company's pension plan sent a letter to the attorney for a prospective purchaser of the company, advising that he estimated that the plan's unfunded liability was between $200,000 and $350,000, but when the purchaser acquired the company, PBGC assessed the unfunded liability as being in the amount of $1.75 million to $3.72 million, depending on the termination date. Sabey v. Howard Johnson & Co., *supra*, 5 P.3d at 733. The purchaser sued the actuary for professional malpractice and negligent

misrepresentation. The trial court granted summary judgment to the actuary, but the Court of Appeals reversed, holding that the facts established that the actuary had a special duty to the purchaser:

> The purpose of the letter was to confirm previous discussions between Howard Johnson and Sabey's personal counsel. Under the RESTATEMENT, this representation, and those that preceded it, could be found to create (and breach) a duty to Sabey personally.

Sabey v. Howard Johnson & Co., *supra*, 5 P.3d at 736 (citing Restatement (Second) Torts § 552(2)(a)). The court also rejected the actuary's argument that the connection with the purchaser was too remote because the actuary's duty was to the company, stating:

> "One of the requirements for recovery under that section is that the loss be suffered by the 'person or one of the limited group of persons for whose benefit and guidance [the defendant] intends to supply the information or knows that the recipient intends to supply it.' " Here, Sabey alleges Howard Johnson advised him personally as to the pension plan's funding. Whether Sabey falls in the class of persons for whose benefit and guidance Howard Johnson intended to supply information is a question of fact. But his claim is direct, not derivative, and is therefore not remote.

Sabey v. Howard Johnson & Co., *supra*, 5 P.3d 730 (quoting Schaaf v. Highfield, 896 P.2d 665 (Wash. 1995) (quoting Restatement (Second) Torts § 552(2)(a))) (other citation omitted).

Moreover, professional actuaries such as Angell are subject to standards of practice and professional codes of conduct, which Plaintiffs' experts will address at trial. See MVP Health Plan, Inc. v. Optuminsight, Inc., No. 113CV1578BKSCFH, 2017 WL 3669558, at *2 (N.D.N.Y. Aug. 24, 2017) ("The Actuarial Standards of Practice ('ASOPs') are a set of rules pertaining to professional actuarial work."). "'[A]ctuaries are

required to observe' the ASOPs." Id. (quoting the Introduction to the October 2008 ASOPs).

The current ASOP 41 (2013) pertains to actuarial communications, and defines an actuarial communication as "[a] written, electronic, or oral communication issued by an actuary with respect to actuarial services." (P-1, § 2.1). The rule provides:

> The performance of a specific actuarial engagement or assignment typically requires significant and ongoing communications between the actuary and the intended users regarding the following: the scope of the requested work; the methods, procedures, assumptions, data, and other information required to complete the work; and the development of the communication of the actuarial findings.
>
> **The actuary should take appropriate steps to ensure that the form and content of each actuarial communication are appropriate to the particular circumstances, taking into account the intended users. The actuary should take appropriate steps to ensure that each actuarial communication is clear and uses language appropriate to the particular circumstances, taking into account the intended users**....
>
> An actuarial communication should identify the party responsible for each material assumption and method. Where the communication is silent about such responsibility, the actuary who issued the communication will be assumed to have taken responsibility for that assumption or method.

ASOP 41 at §§ 3.1–3.1.2, 3.1.4 (internal numeration and formatting omitted and emphasis supplied).

In addition to the ASOPs, actuaries are required to comply with the Code of Professional Conduct. The Code consists of "Precepts" which "identify the professional and ethical standards with which an Actuary must comply in order to fulfill the Actuary's responsibility to the public and to the actuarial profession." American Academy of Actuaries, Code of Professional Conduct, at www.actuary.org.

Precept 1 states:

> PRECEPT 1. An Actuary shall act honestly, with integrity and competence, and in a manner to fulfill the profession's responsibility to the public and to uphold the reputation of the actuarial profession.

Each Precept is followed by "Annotations which provide additional explanatory, educational, and advisory material on how the Precepts are to be interpreted and applied." The Annotations to Precept 1 state:

> ANNOTATION 1-1. An Actuary shall perform Actuarial Services with skill and care.
>
> ANNOTATION 1-2. An Actuary shall not provide Actuarial Services for any Principal if the Actuary has reason to believe that such services may be used to violate or evade the Law or in a manner that would be detrimental to the reputation of the actuarial profession.
>
> ANNOTATION 1-3. An Actuary shall not use a relationship with a third party or with a present or prospective Principal to attempt to obtain illegal or materially improper treatment from one such party on behalf of the other party.
>
> ANNOTATION 1-4. An Actuary shall not engage in any professional conduct involving dishonesty, fraud, deceit, or misrepresentation or commit any act that reflects adversely on the actuarial profession.

Precept 8 states:

> PRECEPT 8. An Actuary who performs Actuarial Services shall take reasonable steps to ensure that such services are not used to mislead other parties.

The Annotations to Precept 8 state:

> ANNOTATION 8-1. An Actuarial Communication prepared by an Actuary may be used by another party in a way that may influence the actions of a third party. The Actuary should recognize the risks of misquotation, misinterpretation, or other misuse of the Actuarial Communication and should therefore take reasonable steps to present the Actuarial

> Communication clearly and fairly and to include, as appropriate, limitations on the distribution and utilization of the Actuarial Communication.

Based on these professional standards and codes of conduct, it is clear that Angell has a professional obligation to exercise due care in its communications with the Plan participants concerning their benefits.

Angell criticizes Plaintiffs for failing to allege in the Complaint that "any specific Actuarial Standards of Practice ("ASOP") were violated." Angell Memo. at 2. Plaintiffs are not required to plead violations of specific ASOPs. See Smith v. Frontera Produce, Ltd., No. 3:13-CV-832, 2014 WL 4536566, at *5 (N.D. Ind. Sept. 11, 2014) ("'Federal courts focus on the pleading of claims, not the pleading of facts.' Thus, while it is true that the complaint does not plead the auditor's required standard of care or the specifics surrounding how that standard was allegedly not complied with, the complaint is not required to contain that information.") (quoting Hutchinson v. Spink, 126 F.3d 895, 900 (7th Cir. 1997)). Plaintiffs are not required to plead evidence even in support of claims with heightened pleading requirements. ACA Financial Guaranty Corp. v. Advest, Inc., 512 F.3d 46, 63 (1st Cir. 2008) (applying heightened pleading standards under Private Securities Litigation Reform Act of 1995) ("It is true, as the plaintiffs argue, that the PSLRA does not require plaintiffs to plead evidence."). Count X is an ordinary professional negligence claim.

In support of its claim that it has no duty of care, Angell cites two cases, Clark v. Feder Semo & Bard, P.C., 634 F. Supp. 2d 99, 108 (D.D.C. 2009) and Dill v. Wood Shovel & Tool Co., No. 4110, 1972 WL 795, at *5 (S.D. Ohio Apr. 20, 1972). Angell Memo. at 24. Neither case supports Angell's position. In Clark, the court dismissed the plaintiff's claims because she failed to allege she was either in privity of contract or the

direct and intended beneficiary of the actuary's services. Clark v. Feder Semo & Bard, P.C., 634 F. Supp. 2d at 108 ("Clark has not alleged that she was in privity of contract with PAF, nor has she alleged facts that would demonstrate she was the direct and intended beneficiary of PAF's services… Accordingly, Clark cannot sue PAF for professional malpractice."). In Dill, the plaintiffs did not allege any communications whatsoever with the actuary, and the court stated the issue as whether "actuaries are liable to a third person for negligence in advising their employer as to what amounts should be paid into a pension fund," concluding that they were not. Dill v. Wood Shovel & Tool Co., 1972 WL 795, at *5.

On the other hand, many courts have held that plan participants who receive negligent advice from actuaries can sue them for professional negligence, even if the actuary's formal client is the employer. See Saffo v. Occidental Life Ins. Co. of California, 602 F.2d 1265 (8th Cir. 1979) (pension retirees entitled to recover on claim of malpractice against actuary who failed to provide required notices to the IRS); Orthopaedic Clinic of Monroe v. Ruhl, 786 So.2d 323, 331 (La. App. 2001) (participants in defined benefit plan permitted to recover against actuary retained by company whose faulty advice caused them substantial economic loss) ("Wyatt breached its duty to communicate or provide actuarial calculations to plaintiffs with reference to the 1989 plan decision."). Similarly, there are numerous cases holding third party administrators liable to the persons with whom they deal. See Metro. Life Ins. Co. v. Bialik, No. 3-99-CV-2679-M, 2001 WL 169600, at *4 (N.D. Tex. Jan. 16, 2001) (third party administrator of group insurance plan liable for negligent misrepresentations concerning procedure for changing beneficiary) ("To the extent that Seabury affirmatively misled the Bialiks about

the status of their coverage, Diana has stated a claim for negligence and negligent misrepresentation.") (citation to complaint omitted).[48]

Indeed, actuaries may be held liable under a third party beneficiary theory even if they have no communications with employees, upon evidence that they breached their duty of care to the employer. See Paulsen v. CNF Inc., 559 F.3d 1061, 1080 (9th Cir. 2009) (reversing District Court's dismissal of employees' claims against plan actuary for professional negligence) ("[W]e hold that Towers Perrin may owe a duty to the Employees if they can be considered intended third party beneficiaries of Towers Perrin's service agreement. Because the record on appeal is insufficient to allow us to evaluate whether the Employees are indeed intended third party beneficiaries, we remand this question to the district court so that it may make the determination on a more complete factual record.").

In this case, the allegations are more than sufficient to give rise to a reasonable inference that the Plan participants were third party beneficiaries of the Service Agreement between SJHSRI and Angell, under the law of Rhode Island:

> In order to prevail on a contract claim as a third-party beneficiary, the claimant must prove that he or she is an intended beneficiary of the contract. See *Cathay Cathay, Inc.,* 962 A.2d at 745; see also *Davis*, 576 A.2d at 1242 ("If the third party is an intended beneficiary, the law implies privity of contract."). An intended beneficiary of a contract "stands in the shoes" of the promisee. *Cathay Cathay, Inc.*, 962 A.2d at 746 (quoting *Campione v. Wilson*, 422 Mass. 185, 661 N.E.2d 658, 664 (1996)).

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[48] See also Berry v. National Medical Services, Inc., 205 P.3d 745, 750 (Kan. App. 2009) (third party administrator hired by state to run alcohol testing program owes duty of care to party tested) ("Here, the defendants solicited business from the Board to test nurses whose licenses were at risk because of claims of alcohol abuse. The defendants could clearly foresee that a positive test result could result in the loss of the test subject's license. The exact harm Berry claims to have experienced here was a foreseeable consequence of negligence in the testing and reporting of the test results to the Board.").

> When discussing the rights of third-party beneficiaries, this Court has looked to the *Restatement (Second) Contr*acts § 302 (1981). See *Cathay Cathay, Inc.*, 962 A.2d at 745. Section 302 of the Restatement delineates in part:
>
> > "Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
> >
> > "(a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
> >
> > "(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance."

Glassie v. Doucette, 157 A.3d 1092, 1097-98 (R.I. 2017). That the Plan participants were the intended beneficiaries of the Service Agreement is apparent on the face of the contract, which identifies the Plan participants as the recipients of the services provided therein.[49] Moreover, SJHSRI had a fiduciary duty to provide the Plan participants with the information that Angell undertook to provide them. Clearly, SJHSRI intended that the Plan participants would have the benefit of those services when they were provided by Angell.

Angell also claims that the complaint is insufficient to give rise to a reasonable inference that Angell was negligent:

> The gist of Plaintiffs' FAC is that the annual maximum and minimum contributions to the Plan recommended by Angell each year were not actually contributed to the Plan by those who had responsibility to fund the

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[49] It is certainly ironic that the document Angell provides to support its motion to dismiss actually helps establish Plaintiffs' rights as third party beneficiaries. However, there is no inconsistency between Plaintiffs' use of the document for that purpose while maintaining their objections to the Court referring to the Service Agreement to support Angell's motion to dismiss. Having brought the document forward and vouched for its authenticity and applicability, Angell cannot oppose Plaintiffs' right to refer to it. On the other hand, Plaintiffs do not vouch for the document and are entitled to object when it is used to support Angell's motion to dismiss.

> Plan. (FAC ¶¶ 63, 270, 309, 346.) However – to be clear – it is not Angell's responsibility, as the Plan's actuary, to ensure that any such funding obligations are met. See, e.g., *Bd. of Trs. New Orleans Emp'rs Int'l Longshoremen's Ass'n v. Gabriel, Roeder, Smith & Co.*, 529 F.3d 506 (5th Cir. 2008) (actuary who provided actuarial services for union pension board did not commit actuarial malpractice under ASOP of the Actuarial Standards Board in failing to affirmatively state her opinion on whether board should adopt proposals for additional benefits; once actuary provided the board with estimates regarding actuarial cost of paying the additional benefits, and advised the board it should take into account recent market decline in making its decision, she met her duty under the ASOP). And nowhere do Plaintiffs suggest, in any way, that any of Angell's calculations were inaccurate.

Here Angell definitely crosses the line from proper practice for a motion to dismiss, and argues the facts. To the extent that the Court even addresses these arguments, however, it must be noted that the "gist" of Plaintiffs' negligence claim against Angell is *not* "that the annual maximum and minimum contributions to the Plan recommended by Angell each year were not actually contributed to the Plan by those who had responsibility to fund the Plan." The "gist" of Plaintiff's malpractice claim against Angell is *that it made negligent misrepresentations and negligently failed to disclose to the Plan participants* "that the annual maximum and minimum contributions to the Plan recommended by Angell each year were not actually contributed to the Plan by those who had responsibility to fund the Plan." Moreover, Plaintiffs' do not allege that Angell's calculations were inaccurate. Angell's liability is based upon its negligent misrepresentations and failures to disclose the facts that made its calculations meaningless.

Angell addresses those allegations as follows:

> Instead, Plaintiffs complain that Angell "negligently communicated directly with Plan participants concerning the Plan and the interests of Plan

> participants concerning the Plan." (FAC ¶ 509.) Plaintiffs are unclear on which communications are supposedly negligent, but presumably they are: (i) the truthful warning that Angell could not speak to the future solvency of the Plan, which Angell agreed to give over the phone if asked, but which Plaintiffs have not alleged was ever given to any Plan participant; (ii) the PowerPoint presentations of 2014 and 2016; or (iii) the statements given to participants estimating their benefits in the Plan. Each of these communications is discussed in detail in Section (C), infra, relating to supposedly fraudulent communications. For the same reasons that these communications were not fraudulent or harmful, they also do not constitute actuarial malpractice, and caused Plan participants no harm that is alleged in the FAC.

Angell Memo. at 25. Again Angell is improperly inviting the Court to accept Angell's version of the facts and the inferences to be drawn therefrom, contrary to the requirements for motions to dismiss for failure to state a claim.

To the extent this line of argument is even addressed, it must be noted that Angell mischaracterizes its communications as a "truthful warning" when Plaintiffs have already demonstrated the opposite. As for the other communications to the Plan participants, Plaintiffs have fully explained how those communications constituted misrepresentations and obligated Angell to disclose that the Plan was grossly underfunded and SJHSRI was not making contributions.

Angell also seeks to defend its conduct in connection with the application for regulatory approval of the conversion of the hospitals to for-profit entities in 2014. Angell Memo. at 25-26. For a third time in connection with this claim, Angell exceeds the proper bounds of a motion to dismiss by arguing the facts. In any event, in connection with Plaintiffs' claims against Angell for fraud, Plaintiffs have also fully explained how that conduct deceived the state regulators. The only difference for

purposes of Plaintiffs' negligence claim is that Angell is alleged to have acted negligently as an alternative claim to intentional misrepresentation.

I. Plaintiffs' Count Alleging Civil Liability under R.I. Gen Laws § 9-1-2 (Count XVI) Should Not Be Dismissed as to Angell

Count XVI states a claim against Angell under R.I. Gen. Laws § 9-1-2 which creates a civil cause of action, against an "offender," for damages suffered as a result of the commission of a crime. Plaintiffs allege that "Defendants' conduct constituted crimes or offenses under R.I. Gen. Laws § 23-17.14-30" for failure to comply with Rhode Island's Hospital Conversions Act ("HCA").[50]

Angell claims that "Count XVI fails because the Plaintiffs do not allege any violation of the HCA by Angell." Angell Memo. at 41. Here Angell is relying on the fact that the calculation it prepared and gave to SJHSRI and the other Defendants for submission to the Rhode Island Attorney General was submitted to the Attorney General by SJHSRI (as well as the Prospect Defendants) and not by Angell. However, Angell does not dispute that it prepared and delivered the calculation to SJHSRI knowing and intending that the other Defendants would file it with the Attorney General. Moreover, R.I. Gen. Laws § 23-17.14-30 makes it a crime "[i]f any person knowingly violates or fails to comply with any provision of this chapter or willingly or knowingly gives false or incorrect information." The statute does not expressly state *to whom* such information must be given. In other words, it does not expressly require that such person directly provide incorrect false information to the Attorney General.

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[50] FAC ¶ 533.

However, it really is irrelevant whether Angell committed the crime, because under the aiding and abetting statute, Angell could be convicted as a principal even if SJHSRI was the person who actually committed the crime. See R.I. Gen. Laws § 11-1-3 ("Every person who shall aid, assist, abet, counsel, hire, command, or procure another to commit any crime or offense, shall be proceeded against as principal or as an accessory before the fact, according to the nature of the offense committed, and upon conviction shall suffer the like punishment as the principal offender is subject to by this title."). Plaintiffs' allegations are sufficient to give rise to a reasonable inference of Angell's liability under R.I. Gen. Laws § 23-17.14-30 in combination with R.I. Gen. Laws § 11-1-3.

Angell then falls back upon the following argument:

> With respect to whether Angell's calculations were knowingly false or inaccurate, the 94.9% Projection accurately showed that the contribution of $14 million to the Plan would result in the Plan being less than fully funded such that it would necessarily run out of money if the assumptions used in the calculations proved correct. (FAC ¶¶ 333, 342.) Plaintiffs complain that Angell did not specifically disclose that the assumed rate of return used in its calculation was higher than that used to calculate the unfunded liability of other pension plans. (Id. ¶ 334.) However, the FAC itself shows that this does not make the calculation provided false or inaccurate. The assumed rate of return (7.75%) was disclosed in the 94.9% Projection, and the committee of regulators evaluating the HCA applications specifically inquired regarding the "investment risk" that is inherent in any calculation of future Plan liabilities, and asked what would happen if "investment returns don't match up to predictions." (Id. ¶ 355.) (emphasis added). A prediction cannot be knowingly false or incorrect since it is, by its very nature, an unknown.

Angell Memo. at 43-44.

Plaintiffs have alleged in the complaint in detail how Angell's calculations were false, and certainly incomplete,[51] but Angell has chosen not to address those allegations. Instead, Angell argues that "the 94.9% Projection accurately showed that the contribution of $14 million to the Plan would result in the Plan being less than fully funded such that it would necessarily run out of money if the assumptions used in the calculations proved correct." Angell Memo. at 43. This is one of many times that Angell seeks to dismiss Plaintiffs' complaint based upon inferences favorable to Angell, contrary to the rule that all reasonable inference should be drawn in Plaintiffs' favor. Angell again and again improperly invites the Court to weigh Angell's set of permissible inferences against the Plaintiffs' set of permissible inferences, and decide which to credit.

Angell also insists the 94.9% Projection is "shockingly misrepresented in the FAC" insofar as "it shows the funded percentage in three successive years, not at a single point in time." Angell's Memo. at 27. This is a misleading quibble. The 94.9% Projection showed the funding percentage of 94.9% at a single point in time: July 1, 2014. The two other funding percentages listed were historical figures for July 1, 2012 and July 1, 2013, i.e. two sequential years *in the past*.

Moreover, contrary to Angell's assertion that the assumed rate of return of 7.75% was disclosed in the 94.9% Projection that was given to the regulators, that is not alleged in the Complaint, and although Angell has supplied a document with this information that it claims was given to the state regulators, in fact the document it has chosen to attach is not the document that was provided to the Attorney General. See

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[51] FAC ¶¶ 333-35.

Plaintiffs' Memorandum in Support of Their Objection to Defendant The Angell Pension Group's Request for Judicial Notice at 8 ("Angell attaches what it contends are the April 11, 2014 calculations as Exhibit D. It is not. Exhibit D appears to be an earlier draft of the calculations, circulated by Angell employee Brian Corbett by email to other Angell personnel at 3:43 PM on April 11, 2014. There is no indication the 3:43 PM version ever left Angell's building, much less was submitted to the state regulators."). Accordingly, Angell's assertion that the assumed rate of return of 7.75% was disclosed in the 94.9% Projection that was given to the regulators is dehors the record and must be disregarded.

J. Plaintiffs' Claim for Civil liability for Violation of R.I. Gen. Laws § 11-18-1 (Count XVIII) Should Not Be Dismissed as to Angell

Plaintiffs' claim against Angell under R.I. Gen. Laws §§ 9-1-2 and 11-18-1(a) (Count XVIII) is founded on Angell's participation in providing false and misleading documents. R.I. Gen. Laws § 11-18-1 states

> (a) No person shall knowingly give to any agent, employee, servant in public or private employ, or public official any receipt, account, or other document in respect of which the principal, master, or employer, or state, city, or town of which he or she is an official is interested, which contains any statement which is false or erroneous, or defective in any important particular, and which, to his or her knowledge, is intended to mislead the principal, master, employer, or state, city, or town of which he or she is an official.

Angell seeks dismissal of this claim based on the following argument:

> The claim that Angell is civilly liable under R.I. Gen. Laws § 9-1-2 for a violation of this statute fails for two reasons. First, the FAC does not allege that Angell distributed any documents that it knew to be false, erroneous or defective in any way. *See* R.I. Gen. Laws § 11-18-1. Second, the FAC does not allege that those documents that were given by Angell to others

> were intended to deceive a principal that was a public or private entity as required for culpability under R.I. Gen. Laws § 11-18-1.

Angell Memo. at 45.

Angell is wrong. Plaintiffs indeed did "allege that Angell distributed any documents that it knew to be false, erroneous or defective in any way." For example, with respect to the misleadingly truncated calculations Angell provided for submission to the Attorney General, Plaintiffs allege that "[t]hese misrepresentations and omissions concerning the Plan's funding level were made with an intent to deceive and succeeded in deceiving both the Rhode Island Department of Health and the Rhode Island Attorney General in approving the asset sale, and to prevent SJHSRI's employee unions, the general public, and Plan participants from learning of the grossly underfunded status of the Plan."[52]

Similarly, the Complaint does "allege that those documents that were given by Angell to others were intended to deceive a principal that was a public or private entity as required for culpability under R.I. Gen. Laws § 11-18-1." See FAC ¶ 540 ("Angell . . . committed violations of R.I. Gen. Laws § 11-18-1 by knowingly giving to an agent, employee, servant in public or private employ, or public official a document in respect of which the principal, master, or employer was interested, which contained a statement which was false or erroneous, or defective in an important particular, and which, to said Defendants' knowledge, was intended to mislead the principal, master, employer, or state."). Moreover, in the paragraphs of the Complaint concerning Angell's submission

[52] FAC ¶ 336.

of the April 11, 2014 calculations, Plaintiffs specifically allege the conduct upon which this allegation is made.

K. Plaintiffs' Claim for Civil Liability for Obtaining Money or Property under False Pretenses (Count XIX) Should Not Be Dismissed as to Angell

Angell's sole argument for dismissal of Plaintiffs' claim for obtaining property under false pretenses is that the "FAC simply does not contain a single allegation concerning Angell's receipt of money or property." Under Rhode Island law, however, persons who conspire to commit an unlawful act or who aid and abet its commission are equally criminally liable. See R.I. Gen. Laws § 11-1-6; R.I. Gen. Laws § 11-1-3. Plaintiffs have sufficiently alleged that other Defendants (especially the Prospect Defendants) obtained property under false pretenses, and that Angell aided and abetted and/or conspired with those other Defendants.

L. Plaintiffs State Law Claim for Breach of Fiduciary Duty (Count XXI) Should Not Be Dismissed as to Angell

Plaintiffs have previously addressed all of Angell's arguments as to why Plaintiffs' claim for breach of fiduciary duty should be dismissed. See *supra* at 4-8.

M. Plaintiffs' State Law Claim for Aiding and Abetting Breach of Fiduciary Duty (Count XXII) Should Not Be Dismissed as to Angell

1. Rhode Island Law

Plaintiffs' summarize the Rhode Island law in their memorandum in opposition to the Prospect Entities' motion to dismiss. See Plaintiffs' Opp. Prospect MTD at 123-24. Plaintiffs are only obligated to make sufficient allegations to support the reasonable inference that Angell "actively participated or substantially assisted in or encouraged the

breach to the degree that he or she could not reasonably be held to have acted in good faith." Rhode Island Resource Recovery Corp. v Van Liew Trust Co., No. PC-10-4503, 2011 WL 1936011, at *8 (R.I. Super. May 13, 2011) (quoting Professional Servs. Grp., Inc. v. Town of Rockland, 515 F. Supp. 2d 179, 192 (D. Mass. 2007)) (citation omitted).

2. Plaintiffs' State Law Claim for Aiding and Abetting Breach of Fiduciary Duty (Count XXII) Should Not Be Dismissed as to Angell

Angell's entire argument in support of its motion to dismiss Plaintiffs' claim for aiding and abetting breach of fiduciary duty is as follows:

> Moreover, as discussed above: (1) Angell had no "duty" other than to its client (SJHSRI) which it fully informed about the funding status of the Plan; (2) Angell was not involved in any secret "meetings" or decisions; and (3) Angell had no discretion over communications with participants. Thus, Count XXII for "aiding and abetting a fiduciary breach" similarly fails as alleged against Angell.

Angell Memo. at 51-52. Plaintiffs have already addressed and refuted these specific arguments. See *supra* at 41-42.

N. Plaintiffs' Count Seeking a Declaratory Judgment on Plaintiffs' State Law Claims (Count XXIII) Should Not Be Dismissed

Angell's motion to dismiss Plaintiffs' claim for declaratory relief is based upon the contention that it seeks declaratory relief concerning Plaintiffs' state law claims. See Angell Memo. at 52 ("Plaintiffs have no right to a declaratory judgment under Rhode Island law (Count XXIII) because this action was filed in federal court."). Angell cites no authority for the proposition that federal courts cannot issue declaratory judgments concerning issues controlled by state law. Indeed, federal courts can and do. See NGM Ins. Co. v. Evans, 642 F. Supp. 2d 511, 515 (W.D.N.C. 2009) (declaratory

judgment pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201) ("The fact that all issues of insurance coverage raised are governed by state substantive law is not sufficient to decline exercising federal jurisdiction.").

Indeed, a federal court may grant a declaratory judgment on issues of state law even if the remedy of declaratory judgment would not be available in the courts of the state. See Wright, Miller, *et al.*, Federal Practice and Procedure: Civil 3d Civ. § 2756 (4th ed.) ("The Supreme Court has said, though only by way of dictum, 'that the declaratory remedy which may be given by the federal courts may not be available in the State courts is immaterial,' and there are some lower-court decisions to the same effect.") (quoting Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 674 (1950)) (other citations omitted).

O. If Any Portion of the First Amended Complaint Should Be Dismissed, It Should be Dismissed Without Prejudice and with Leave to Re-Plead

Angell refers repeatedly to the fact that Plaintiffs have exercised their right to amend as of course, and concludes its memorandum with the contention that if Angell prevails, "dismissal of Plaintiffs' FAC should be with prejudice." Angell Memo. at 53 (quoting Hochendoner v. Genzyme Corp., 823 F.3d 724, 736 (1st Cir. 2016) ("the normal presumption is that a Rule 12(b)(6) dismissal is with prejudice. After all, such a judgment constitutes 'a final decision on the merits.'") (citing Fed. R. Civ. P. 41(b)). However, the court in Hochendoner v. Genzyme Corp. did not suggest that dismissal with leave to re-plead should be with prejudice, which obviously would be a contradiction in terms. See Hochendoner v. Genzyme Corp., 823 F.3d 724, 736 (1st Cir. 2016) (approving dismissal with prejudice where plaintiffs did not even request

leave to amend). See also Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago and Northwest Indiana, 786 F.3d 510, 522 (7th Cir. 2015) ("In other words, a district court cannot nullify the liberal right to amend under Rule 15(a)(2) by entering judgment prematurely at the same time it dismisses the complaint that would be amended.").

Angell's real argument is that if the Court dismisses any part of Plaintiffs' complaint, the Court should not grant Plaintiffs the opportunity to attempt to cure any deficiencies through amending the complaint:

> Plaintiffs should not be permitted to try to reformulate their allegations, yet again, to avoid their legal and factual deficiencies. Any proposed amendment "would serve no useful purpose, the district court need not allow it."

Angell Memo. at 54 (citing Aponte–Torres v. Univ. of Puerto Rico, 445 F.3d 50, 58 (1st Cir. 2006)).

This is premature, to say the least. Plaintiffs cannot be said to have failed to cure deficiencies before the Court has "had the opportunity to point out and address any of these claimed deficiencies." Nodd v. Integrated Airline Servs., Inc., 41 F. Supp. 3d 1355, 1368 (S.D. Ala. 2014) ("While IAS argues that Nodd has failed to correct deficiencies in her allegations despite repeated notice of these deficiencies provided by IAS in both its communications between counsel and its motions to dismiss, the Court has not previously had the opportunity to point out and address any of these claimed deficiencies. Thus, Nodd has not 'repeatedly had failed to cure deficiencies through previously allowed amendments.'").

To the contrary, the Court has not ruled on the Movant Defendants' motions. Plaintiffs' right to amend will be irrelevant if the Court denies the motions *in toto*. Moreover, even if it were certain that the Court would grant the motion (which is far from

the case), it would be impossible to know in advance the grounds upon which that dismissal would be based, much less whether they likely can be cured by amendment. Thus, it is certainly premature to decide now that such a motion should be denied. Angell relies on Aponte–Torres v. Univ. of Puerto Rico, *supra*, 445 F.3d at 58, but the First Circuit in that case affirmed the District Court's exercise of discretion to deny leave to amend where the plaintiffs did not offer a proposed amended complaint with their motion, and "made no attempt to supplement their bare request for leave to amend, nor did they preview what additional facts or legal claims might be included in a second amended complaint (should one be allowed)." Id. That is completely different from precluding a party in advance from even seeking leave to amend, as Angell is requesting.

There also has been no discovery in this case. While Plaintiffs have obtained substantial productions of documents outside this lawsuit, those productions arrived only after litigating numerous motions[53] to compel responses to subpoenas, and even now appear incomplete. Nor have there been any interrogatories, requests for admission, or depositions. In addition, while Plaintiffs have certainly labored mightily to uncover the facts after SJHSRI placed the Plan into receivership, it should not be overlooked that Angell has had nearly fifteen years of familiarity with the Pension and the Plan participants.

Angell places special emphasis on the fact that in Aponte–Torres v. Univ. of Puerto Rico, the District Court had allowed the plaintiffs "to have access to key files and

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[53] Including a second motion to hold Prospect CharterCare, LLC in contempt filed as recently as November 15, 2018.

ordered the plaintiffs to inspect them and decide whether they wished to move forward with the case" prior to denying the motion for leave to amend. Angell Memo. at 53 (quoting Aponte–Torres v. Univ. of Puerto Rico, *supra*, 445 F.3d at 58). Again, the First Circuit in that case affirmed the District Court's exercise of discretion to deny leave to amend where the plaintiffs did not offer a proposed amended complaint with their motion, and make any attempt to explain why they should be granted leave to amend. Moreover, the sufficiency of the Receiver's efforts to obtain documents in the receivership proceedings is (at the very least) in dispute.

While Plaintiffs contend that no portion of the First Amended Complaint should be dismissed, if (*arguendo*) the Court is inclined to dismiss any portion (which Plaintiffs respectfully believe it should not), the Court should allow Plaintiffs leave to re-plead, and order that the dismissal shall be without prejudice provided Plaintiffs do so within a reasonable time. Courts considering the question have concluded that an amendment "as a matter of course" under Fed. R. Civ. P. 15 does not prevent a plaintiff from ordinarily receiving an additional opportunity to amend in response to the court's ruling on the sufficiency (*vel non*) of his complaint. See In re Verilink Corp., 410 B.R. 697, 701 (N.D. Ala. 2009) ("When a plaintiff has amended a complaint once as a 'matter of course,' it cannot be said that he has been given opportunity to amend by leave of court or that he has repeatedly failed to cure deficiencies through previously allowed amendments."); Nodd v. Integrated Airline Servs., Inc., 41 F. Supp. 3d 1355, 1368 (S.D. Ala. 2014) (same result).

Circuit Courts considering the question have held that denial of leave to amend on this basis is an abuse of discretion:

> Ronzani's original complaint was amended, pursuant to Rule 15(a), "as a matter of course ... before a responsive pleading [was] served." In his supplemental memorandum in opposition to the motion to dismiss, Ronzani offered to amend his pleading to correct any perceived deficiencies with respect to his claims under the federal securities laws. In dismissing the amended complaint, however, the district court did not mention Ronzani's offer to amend and gave no reason for denying it. Since Ronzani had not previously been given leave to amend, and had offered to amend his complaint, we hold that the court abused its discretion in dismissing the complaint without leave to amend.

Ronzani v. Sanofi S.A., 899 F.2d 195, 198 (2d Cir. 1990).

> [T]he district court stated that the plaintiffs already had been "given one opportunity to amend their complaint." This assertion apparently refers to the plaintiffs' Amended Complaint, filed in response to the defendants' original motion to dismiss. Under Rule 15(a), an amendment may be made either as "a matter of course" or "by leave of court." See Fed.R.Civ.P. 15(a). The Amended Complaint was filed as a matter of course, and until the renewed motion to dismiss came before the court, the plaintiffs had not asked for leave to amend. Therefore, it cannot be said that the plaintiffs already had been given an opportunity to amend or that the plaintiffs repeatedly had failed to cure deficiencies through previously allowed amendments.

Bryant v. Dupree, 252 F.3d 1161, 1163–64 (11th Cir. 2001).

Accordingly, while Plaintiffs contend that no portion of the First Amended Complaint should be dismissed, if (*arguendo*) the Court is inclined to dismiss any portion, the Court should allow Plaintiffs leave to re-plead, and order that the dismissal shall be without prejudice provided Plaintiffs do so within a reasonable time.

V. CONCLUSION

Angell's motion to dismiss should be denied.

Respectfully submitted,

Plaintiffs,

By their Attorney,

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Dated: February 4, 2019

CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the within document was electronically filed on the 4th day of February, 2019 using the Electronic Case Filing system of the United States District Court and is available for viewing and downloading from the Electronic Case Filing system. The Electronic Case Filing system will automatically generate and send a Notice of Electronic Filing to the following Filing Users or registered users of record:

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