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 DEFENDANTS ROMAN CATHOLIC BISHOP OF PROVIDENCE, DIOCESAN ADMINISTRATION CORPORATION AND DIOCESAN SERVICE CORPORATION'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Plaintiffs hereby object to the Motion to Dismiss filed by Defendants Roman Catholic Bishop of Providence, Diocesan Administration Corporation and Diocesan Service Corporation's. Plaintiffs rely in support on their memorandum of law filed herewith and on their Omnibus Memorandum.

Respectfully submitted,
All Plaintiffs,
By their Attorney,

/s/ Max Wistow

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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 Defendants Roman Catholic Bishop of Providence, Diocesan Administration Corporation and Diocesan Service Corporation'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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PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR OBJECTION TO DEFENDANTS ROMAN CATHOLIC BISHOP OF PROVIDENCE, DIOCESAN ADMINISTRATION CORPORATION AND DIOCESAN SERVICE CORPORATION'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

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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 Defendants Roman Catholic Bishop of Providence, Diocesan Administration Corporation, and Diocesan Service Corporation (collectively the "Diocesan Defendants") to dismiss the First Amended Complaint ("FAC").

COMMON PREFACE TO NON-OMNIBUS MEMORANDA

Although this memorandum is filed in opposition to the Diocesan Defendants' motion to dismiss, it does *not* contain Plaintiffs' arguments addressing those portions of the Diocesan Defendants' 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 the Diocesan Defendants:

- 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 they cannot be sued for aiding and abetting breach of fiduciary duties based upon ERISA; and

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

- the allegation that Plaintiffs have no remedies under ERISA on the claim of aiding and abetting.

All of the other defendants who have filed motions to dismiss make these same arguments in their separate memoranda, apparently having declined the Court's 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 facts from the Complaint that are relevant to all of the motions to dismiss are contained in the omnibus memorandum, rather than in the 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 Prospect Entities[3] and Defendant The Angell Pension Group, Inc. 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

[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 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").

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 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.

FACTS

Plaintiffs have set forth the facts relevant to the Diocesan Defendants' motion to dismiss in Plaintiffs' separate Omnibus Memorandum. In the interest of brevity, Plaintiffs incorporate that discussion herein by reference.

ARGUMENT

I. Standard of review

A. The applicable standard for a Rule 12(b)(6) motion to dismiss

The standard of review is set forth in Plaintiffs' Opp. Prospect Memo. and, for the sake of brevity, incorporated herein by reference.

B. The Court should not look to the Diocesan Defendants' documents outside the First Amended Complaint

The Diocesan Defendants attach a raft of exhibits to their motion and insist the Court should look at them without converting their motion to dismiss into a motion for summary judgment. See Diocesan Defendants' Memo. at vi-vii ("Table of Exhibits"). As

to eight of these twenty five exhibits, Diocesan Defendants do not even pretend they are even *referenced* in Plaintiffs' First Amended Complaint, much less incorporated into or forming the basis for any of Plaintiffs' claims. For these[4], the Diocesan Defendants contend it is sufficient if someone posted documents somewhere on the Internet. It is not.

As to other exhibits, the Diocesan Defendants do pretend they are incorporated or referenced in Plaintiffs' First Amended Complaint, but they are not or are not sufficiently. For example, the Diocesan Defendants seize upon two passing references[5] to the existence of the Change in Effective Control application that Defendants submitted to the Rhode Island Department of Health, to attach as slew of excerpts from that Change in Effective Control application and the exhibits thereto.[6] None of these

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[4] Primarily actuarial reports, nearly all of which were generated by Defendant Angell (who stands accused of committing actuarial malpractice in this case) and which were obtained from the Defendants. See Diocesan Defendants' Exhibits 1, 2, 5, 6, 7, 8, 9. None of these is even referred to in the First Amended Complaint. The Diocesan Defendants also attach a 2010 Articles of Amendment to SJHSRI's articles of incorporation, their Exhibit 19, which is not the operative articles and is likewise not even referred to in the First Amended Complaint.

[5] See Diocesan Defendants' Memo. at vi (citing FAC ¶¶ 305 and 431(f)). These paragraphs state:

> Defendants SJHSRI, RWH, CCCB, Angell, Prospect Chartercare, Prospect Chartercare St. Joseph, Prospect Chartercare Roger Williams, Prospect Medical Holdings, and Prospect East made these misrepresentations and omitted this material information because they knew that such disclosure would create so much negative publicity and outcry that the applications to the Department of Health and the Attorney General for approval of the asset sale without fully funding the Plan would be denied or at the very least would be in serious jeopardy.

FAC ¶ 305.

> A May 20, 2014 email blast from CCCB's president Kenneth Belcher states: "Today Dr. Michael Fine, Director of the Department of Health, followed Friday's decision by the Attorney General and approved our Hospital Conversion[s] Act and Change in Effective Control applications. This was the final regulatory hurdle toward the successful completion of our joint venture agreement with Prospect Medical Holdings. . . . We are now prepared to plan the final closing which involves executing the financial and legal documents to make the joint venture agreement official."

FAC ¶ 431(f).

[6] Diocesan Defendants' Exhibits 10, 12, 13, 14, 15, 16, 24.

exhibits has anything to do with Plaintiffs' actual claims. The Diocesan Defendants also attach other documents which received passing references in other documents that were quoted by Plaintiffs for another purpose.[7]

None of this is appropriate practice on a Rule 12(b)(6) motion to dismiss. The Diocesan Defendants' argument that "sorting out the true roles (or non-roles) of the separate corporate entities . . . in the Amended Complaint requires reference to facts beyond those pled," Diocesan Defendants' Memo. at 6, is a rationale for conducting discovery and eventually moving for summary judgment, not a method for prosecuting a motion to dismiss.

The Diocesan Defendants contend that the Change in Effective Control application "is public record, susceptible to judicial notice" inasmuch as it "is available through the Rhode Island Department of Health's website." Diocesan Defendants' Memo. at 26. However that is not the rule in the First Circuit, where district courts are not permitted to take judicial notice of documents simply by virtue of their being held in public repositories:

> The Freemans also claim that three submissions should have been considered as public records. These include a transcript of 911 calls and two Hudson Police incident reports. The Freemans ask us to adopt the expansive view that any document held in a public repository falls within the category of extrinsic materials that may be considered. It is true that, when reviewing a motion to dismiss for failure to state a claim, a court may "consider 'matters of public record.' " *Haley v. City of Boston*, 657 F.3d 39, 46 (1st Cir.2011). But there are limits to that license. **Many documents in the possession of public agencies simply lack any indicia of**

[7] For example, the Diocesan Defendants attach Exhibit 20 (Ethical and Religious Directives of the United States Conference of Catholic Bishops) because a 2013 PowerPoint slide quoted in the First Amended Complaint refers to "Catholic covenants". See also n.5, *supra* (discussing paragraph 431(f) which happened to mention the Change in Control application).

> **reliability whatsoever.** In that regard, they are unlike official records, such as birth or death certificates and other similar records of vital statistics. The Freemans cite no authority—other than *Watterson*—for their broad interpretation, and we have found none. **Rather, the phrase "official public records" when used in the present context, appears limited, or nearly so, to documents or facts subject to judicial notice under Federal Rule of Evidence 201.** *Watterson*, in holding that a court could consider public records on a motion to dismiss, relied on the Ninth Circuit case *Mack v. S. Bay Beer Distributors, Inc.*, 798 F.2d 1279 (9th Cir.1986), abrogated on other grounds by *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107, 111 S.Ct. 2166, 115 L.Ed.2d 96 (1991). The public record at issue in that case was a state administrative proceeding, *id.* at 1282, and the Ninth Circuit used the term "public records" synonymously with a document susceptible to judicial notice. *Id.* (citing *Phillips v. Bureau of Prisons*, 591 F.2d 966, 969 (D.C.Cir.1979) ("We are mindful, too, that when passing on a motion attacking the legal efficacy of the plaintiff's statement of his claim, the court may properly look beyond the complaint only to items in the record of the case or to matters of general public record.")).

Freeman v. Town of Hudson, 714 F.3d 29, 36–37 (1st Cir. 2013) (emphasis supplied). See also Victoria v. City of San Diego, 326 F. Supp. 3d 1003, 1012 (S.D. Cal. 2018) ("Despite the fact that some records of a state agency may be proper subjects of judicial notice, a district court may not take judicial notice of documents filed with an administrative agency to prove the truth of the contents of the documents.") (citation omitted) (declining to take judicial notice of disputed facts recited in police report for purposes of motion to dismiss).

As another district court recently observed:

> Further, to consider documents outside of the pleadings on a motion to dismiss, "[i]t must ... be clear that there exist no material disputed issues of fact regarding the relevance of the document[s]." *Faulkner v. Beer*, 463 F.3d 130, 134 (2d Cir. 2006); *see DiFolco v. MSNBC Cable LLC*, 622 F.3d 104, 112 (2d Cir. 2010) (reversing district court's dismissal of breach of contract claim where the parties raised factual issues regarding documents the court considered). In their motion papers, the parties raise

> a number of issues regarding these emails, such as whether UTA intended them to constitute notice of breach, whether UTA was entitled to provide such notice, and whether Counterclaimants should have interpreted them as such. Those issues underscore why consideration of the email chains is improper at this stage. "The purpose of Rule 12(b)(6) is to test, in a streamlined fashion, the formal sufficiency of the plaintiff's statement of a claim for relief without resolving a contest regarding its substantive merits." *Glob. Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 155 (2d Cir. 2006) (emphasis original). "[W]hen a district court considers ... extra-pleading materials and excludes others, it risks depriving the parties of a fair adjudication of the claims by examining an incomplete record." *Chambers*, 282 F.3d at 155.

Mirage Entm't, Inc. v. FEG Entretenimientos S.A., 326 F. Supp. 3d 26, 33 (S.D.N.Y. 2018). "Where a document's contents are disputed by a party, it is improper to permit defendants to simply attach documents referenced in a complaint to their motions to dismiss and ask courts to consider the contents of those documents when they contradict the allegations of a complaint." Pledger v. Reliance Tr. Co., 240 F. Supp. 3d 1314, 1330 (N.D. Ga. 2017).

In addition, even as to the documents that Plaintiffs did reference in the First Amended Complaint, parties are permitted to refer to documents in a pleading without adopting every statement contained therein:

> Furthermore, Plaintiffs' antitrust claims are not based upon or integral to these documents, or vice versa. In circumstances when courts do look beyond a pleading to entire documents that are merely cited in the complaint through isolated statements excerpted from such documents, only those documents that are central to the claim at issue, such as contracts for breach of contract claims or public offering documents containing alleged fraudulent statements in securities misrepresentation suits, are appropriate for that purpose.

In re Processed Egg Prod. Antitrust Litig., 821 F. Supp. 2d 709, 740 (E.D. Pa. 2011).

> Richards' complaint walks a fine line when using the examiner's decision. On the one hand, she plainly wants to make the Court aware of the

> examiner's conclusions, which she believes "support" her constitutional claims. Compl. ¶ 6. She also wants the Court to know that the examiner reached her conclusions after a "full investigation" of the facts, including conducting interviews and gathering evidence. Id. ¶ 5; see also id. ¶¶ 39, 59, 72. But that does not mean that Richards has implicitly adopted all of the decision's factual content into her complaint. Richards' view of the arrest, and her related allegations, are the foundation of her complaint—"no portion of any of [her] claims is dependent upon the truth of any statements contained in" the examiner's decision.

Richards v. Gelsomino, 240 F. Supp. 3d 173, 178 (D.D.C. 2017). See also Casey v. Odwalla, Inc., No. 17-CV-2148 (NSR), 2018 WL 4500877, at *4 (S.D.N.Y. Sept. 19, 2018) (court could not take judicial notice of an FDA letter on motion to dismiss, where plaintiffs disputed the assertions contained therein).

> . . . Ordinarily, a "district court is not permitted to consider matters beyond the complaint." *Mediacom Southeast LLC v. BellSouth Telecomm., Inc.*, 672 F.3d 396, 399 (6th Cir. 2012). There is an exception, however, for exhibits attached to a motion to dismiss, "so long as they are referred to in the Complaint and are central to the claims contained therein." *Bassett v. Nat'l. Collegiate Athletic Ass'n.*, 528 F.3d 426, 430 (6th Cir. 2008). But the Court may only consider such materials if it is clear that they involve no disputed issues of material fact. *See MediaCom Southeast*, 672 F.3d at 400.
>
> That is not the case here. . . .

Reliable Carriers Inc. v. Moving Sites LLC, 309 F. Supp. 3d 473, 477 (E.D. Mich. 2018).

> Defendant requests the Court to take judicial notice of portions of a book written by her ex-husband that have been attached to defendant's Motion to Dismiss as Exhibit 1. (Docs. ## 252–1; 253, pp. 3–8.) Defendant asserts that portions of the book were referenced and relied upon in plaintiffs' Amended Complaint and attached to plaintiffs' request for a temporary restraining order, thus making judicial notice appropriate. (Doc. # 253, pp. 4, 6–7.) The Court disagrees.
>
> The Homm Book was referenced in plaintiffs' Amended Complaint in two brief areas. (See Doc. # 196, ¶¶ 141, 229(h)). Plaintiffs cite to the Homm Book for statements Florian Homm made about his abrupt departure in

> 2007 and about defendant's involvement in Florian Homm's first company. (Id.) The Court finds that these portions of the Homm Book are not central to plaintiffs' claims and, even if they were, Exhibit 1 to defendant's Motion to Dismiss is admittedly only a portion of the Homm Book, and does not even contain the portions referenced in plaintiffs' Amended Complaint. (Doc. # 252–1.)
>
> Additionally, the Court declines to take judicial notice of the excerpts of the Homm Book pursuant to Federal Rule of Evidence 201(b) because the "facts" fail the "not subject to reasonable dispute" component of Rule 201(b). The portion of the Homm Book of which defendant seeks judicial notice contains information regarding the "sham" marriage between Susan Devine and Florian Homm, a matter which is disputed by the parties. . . .

Absolute Activist Value Master Fund Ltd. v. Devine, 233 F. Supp. 3d 1297, 1316–17 (M.D. Fla. 2017).

> While arguing that several of Plaintiffs' claims should be dismissed under Rule 12(b)(6), Defendants have attached and made reference to exhibits that fall outside of the scope of the materials that the Court may consider. **For instance, to prove that "[t]here are numerous areas within the City where the Petersons' business could be conducted," Defendants have attached an exhibit of a highlighted zoning map created by the City of Grand Rapids** (ECF No. 15-8). **There is no indication that this is a public record, and Plaintiffs dispute that there are areas within the City where their business can be conducted.** Further, to prove that "notices were posted on the Petersons' door," Defendants have attached photographs taken by Carolyn Forsythe. (ECF No. 15-7.) And to prove that Plaintiffs never exercised their rights to a hearing of the violation that is at issue in this case, Plaintiffs have attached notices of a nuisance complaint, notice to abate, a nuisance work order between Pit Crew and the City, and other notices sent by the City to Defendant. (ECF Nos. 15-2, 15-3, 15-4.) Some of these documents, such as the nuisance work order, clearly may not be considered when deciding a Rule 12(b)(6) motion. Others, such as the notice to abate, may potentially be considered. It is not clear to the Court, however, whether the City stores these notices internally, or whether the notices are, as Defendants assert, public records.
>
> [Emphasis supplied]

Peterson v. City of Grand Rapids, 182 F. Supp. 3d 750, 756–57 (W.D. Mich. 2016).

Moreover, as alleged in the Amended Complaint, the regulatory submissions contain affirmative misrepresentations and other inaccuracies and therefore should be properly excluded from the Court's consideration on a motion to dismiss on that basis alone. See Foley v. Wells Fargo Bank, N.A., 772 F.3d 63, 74 (1st Cir. 2014) (on a Rule 12(b)(6) motion, district court improperly considered documents that the plaintiff alleged were "untrustworthy" and contained "unreliable" statements); Gammel v. Hewlett-Packard Co., 905 F. Supp. 2d 1052, 1062 (C.D. Cal. 2012) (refusing to take judicial notice of press release on motion to dismiss, where "Plaintiffs dispute the accuracy of this document"). Indeed, undermining their own position, the Diocesan Defendants point to a statement of uncertainty about the Pension liabilities:

> Other references to Plan deficits abound in the CEC [Change in Effective Control] Application. For example, the CEC Application attaches the Asset Purchase Agreement ("APA") between Prospect and CCCB, SJHSRI, and RWH. Ex. 11 (APA). Section 4.29 of the APA addresses the Seller's (i.e., CCCB, SJHSRI, and RWH's) solvency and states that it is not insolvent "[a]fter exclusion of Liabilities associated with the Retirement Plan due to their uncertainty of amount[.]" Ex. 11 § 4.29 (PCEC000044) (emphasis added); see FAC ¶ 449.

Diocesan Defendants' Memo. at 34.

The Diocesan Defendants assert that "the pension deficit and what was to be done with the pension deficit was [sic] discussed at various public hearings." Diocesan Defendants' Memo. at 28. However, for that proposition they cite paragraphs 341, 350, and 370 of the Amended Complaint which quoted misrepresentations were made at those hearings. See FAC ¶ 341 (quoting testimony that the 2014 Asset Sale would "stabilize the pension fund"), ¶ 350 (quoting testimony that the Plan's "recommended

contributions going forward" would be paid), and ¶ 351 (quoting testimony that the Plan would receive funds from profit sharing when none was anticipated in the indefinite future). The Diocesan Defendants paper over these distinctions by selectively citing paragraphs of the Amended Complaint that recite the Defendants' statements while avoiding the ensuing paragraphs that explain why the Defendants' statements were misrepresentations. See, e.g., Diocesan Defendants' Memo. at 28 (citing Amended Complaint ¶ 344 but not ¶ 345).

Moreover, even if (*arguendo*) the "facts" recited in Defendants' documents were accepted as true (which they should not be, especially on a motion to dismiss), they would not establish that Plaintiffs were informed of those "facts".

For example, the Diocesan Defendants point to paragraph 317 of the First Amended Complaint, which alleges that other Defendants drafted a PowerPoint slide deck for presentation to hospital employees but, before presenting it to employees, and "as part of a long history of concealment from the Plan participants," deleted a discussion of how "the Plan participants' benefits were not protected under ERISA." FAC ¶ 317. The Diocesan Defendants assert that it is untrue that Defendants concealed this lack of ERISA protection, because (the Diocesan Defendants contend) the Defendants stated in "documents submitted to state regulators" that the Plan was a Church Plan. See Diocesan Defendants' Memo. at 30-31. This is an utter non sequitur, because the state regulators are not the Plaintiffs. Moreover, none of the references that the Diocesan Defendants cobble together in this portion of their memorandum even mention the significance of a plan being an ERISA-exempt (and thus uninsured) church plan. See id.

The Diocesan Defendants also copy and paste an organizational chart that they contend was submitted to the Attorney General in connection with regulatory approval of the 2014 Asset Sale which the Diocesan Defendants characterize as "a graphic representation of the end result of the completed transaction" that shows "SJHSRI off by itself, with the words 'Church Plan' written underneath it." Diocesan Defendants' Memo. at 29. Putting aside whether the Court should even consider this document in connection with the motion to dismiss, it is contested. This document does not accurately depict the transaction, not least because it portrays the "Retirement Board" as being a separate entity from "St. Joseph Health Services of RI", when in fact the Bishop himself had previously dissolved the Retirement Board in April 2013. See FAC ¶¶ 78-79.[8]

Other times the Diocesan Defendants appear to engage in willful misreading of the First Amended Complaint. One of the Amended Complaint's important allegations against the Diocesan Defendants is that the other Defendants' entering into the 2014 Asset Sale was "'subject to' if Bishop signs off on the pension piece," FAC ¶ 139, and that they obtained this sign off at a meeting on August 14, 2013 by offering "the promise that New Fatima Hospital and New Roger Williams Hospital would remain as Catholic as Old Fatima Hospital and Old Roger Williams Hospital had been before the asset sale." FAC ¶¶ 141-50. In other words, the Diocesan Defendants had certain rights vis-à-vis the legacy hospitals, and through an improper and tortious agreement injuring the

[8] The Diocesan Defendants' chart is also erroneous in other respects. For example it incorrectly portrays Prospect Medical Holdings, Inc. as a subsidiary of Prospect East Holdings, Inc. instead of vice versa. See FAC ¶ 13.

Plan, obtained *the continuation* of those rights vis-à-vis the new Prospect-owned hospitals.

The Diocesan Defendants characterize that allegation as "absurd and implausible" by inaccurately citing paragraph 150 for the proposition that "Our Lady of Fatima was already under contractual restrictions to comply with various Catholicity requirements," and insist that "saying no to the deal would not divest them of those rights."[9] Diocesan Defendants' Memo. at 31-32. In doing so, the Diocesan Defendants elide the difference between Old Fatima Hospital (i.e. the Fatima hospital facility as it existed pre-sale, which was burdened by pension obligations) and New Fatima Hospital (i.e. the hospital facility as it would exist post-sale under the aegis of Prospect Chartercare, which Defendants intended to set free of the pension obligations). By participating in the other Defendants' scheme to rob Peter to pay Paul, the Diocesan Defendants were obtaining something they very much valued: a "Catholic" hospital whose financial viability and "consistent Catholic healthcare presence in the Diocese of Providence"[10] would not depend on an ability to pay these pensions.

The Diocesan Defendants also argue, essentially, that Plaintiffs should have been on inquiry notice as to Defendants' misdeeds and misrepresentations. See Diocesan Defendants' Memo. at 32-33. But as discussed *supra* and *infra*, the Diocesan Defendants can point to no facts within the proper scope of their motion to dismiss to

[9] The Diocesan Defendants' quoted assertion omits the fact that the corporation owning Old Fatima Hospital would cease to own a hospital at the closing. Any prior control over Old Fatima would be meaningless in terms of the hospital operated as New Fatima.

[10] FAC ¶ 172 (quoting Bishop Tobin's 2014 letter to the Vatican).

establish such opportunity for inquiry notice, much less establish that such inquiry notice defeats Plaintiffs' claims.

All of the Diocesan Defendants' disputes of fact simply underscore the futility of their motion to dismiss.

II. The pre-2008 allegations alleged in the Amended Complaint are properly pled and actionable

The Diocesan Defendants contend that all claims based on pre-2008 allegations should be dismissed, because the Diocesan Defendants contend the Plan was fully funded until 2008 and *ipso facto* anything that may have happened pre-2008 is irrelevant.

Factually, there is no basis for the Diocesan Defendants' argument in the First Amended Complaint. They base it on actuarial valuation analyses prepared by Defendant Angell[11], which the Receiver obtained from Defendant SJHSRI and posted on his website in the interest of public transparency but without necessarily adopting their veracity. See Diocesan Defendants' Memo. at 12. Angell is not only a Defendant in this action, but is alleged to have committed actuarial malpractice (in addition to various intentional torts) in connection with the Plan generally and in connection with the preparation of these valuation analyses in particular. They are unreliable, and the Court cannot simply accept the Diocesan Defendants' characterizations of their contents, especially without expert testimony. See Rollins v. Dignity Health, 338 F. Supp. 3d 1025, 1033 (N.D. Cal. 2018) ("When a non-governmental entity to seek judicial notice of

[11] Five of the six actuarial reports were prepared by Defendant Angell. The sixth states it was prepared by Angell's predecessor, AON.

its paper records, the request is properly rejected because such documents are subject to reasonable dispute. That the same entity posts them on a 'publicly available' website does not change that essential fact and does not make them 'public records" for purposes of the judicial notice rules.'") (declining to take judicial notice of webpages).

The Diocesan Defendants' argument also lacks a logical basis. Even if (*arguendo*) facts outside the pleadings suggested the Plan was fully funded at some point in history (which is not established), that would only indicate that Plaintiffs' injuries have recently arisen, not that prior misrepresentations or other misconduct are somehow irrelevant. The Diocesan Defendants were under a continuing obligation to inform others who were relying on the prior misrepresentations and correct them. See, e.g., George Joseph Assets, LLC v. Chenevert, 557 S.W.3d 755, 766 (Tex. App. 2018) ("[W]e [have] identified three circumstances other than a fiduciary relationship in which a duty to disclose exists. . . . Second, if a party makes a representation, he has a duty to disclose new information when he is aware the new information makes the earlier representation misleading or untrue.") (citation omitted); Druckzentrum Harry Jung GmbH & Co. KG v. Motorola Mobility LLC, 774 F.3d 410, 418 (7th Cir. 2014) ("[A] party who had made a statement which at that time is true, but who subsequently acquires new information which makes it untrue or misleading, must disclose such information to anyone whom he knows to be acting on the basis of the original statement or be guilty of fraud.") (citing St. Joseph Hosp. v. Corbetta Const. Co., 316 N.E.2d 51, 71 (Ill. App. 1974) ("It is also well established that where one has made a statement which at that time is true but subsequently acquires new information which makes it untrue or misleading, he must disclose such information to anyone whom he knows to be acting

on the basis of the original statement—or be guilty of fraud or deceit.")); In re Wayport, Inc. Litig., 76 A.3d 296, 323 (Del. Ch. 2013) ("The fact that a statement was true when made does not enable the speaker to stand silent if the speaker subsequently learns of new information that renders the earlier statement materially misleading.").

A. The Diocesan Defendants improperly refer to other facts outside the Amended Complaint, especially "facts" requiring expert testimony

1. The "Great Recession of 2008"

The Diocesan Defendants contend the Court should take judicial notice of the nationwide economic downturn in 2008. See Diocesan Defendants' Memo. at 11 (citing Eclectic Properties E., LLC v. Marcus & Millichap Co., 751 F.3d 990, 998 n.6 (9th Cir. 2014) and In re Irving Tanning Co., 555 B.R. 70, 85 n.11 (Bankr. D. Me. 2016)). By "take judicial notice", the Diocesan Defendants evidently request that the Court rule, as a matter of law, that economic events outside the control of the Diocesan Defendants' control broke any chain of causation between the Diocesan Defendants' prior misrepresentations and the Plan's underfunding.

It is one thing to take judicial notice that a historical event occurred. It's another to draw inferences in Defendants' favor from those facts on a motion to dismiss, as the Diocesan Defendants invite the Court to do. The two cases cited by the Diocesan Defendants certainly do not require the Court to do so.

The first, In re Irving Tanning Co. involved a bench trial,[12] not a motion to dismiss. In that case, in the course of weighing witness testimony about whether a

[12] As the reader might surmise from the Diocesan Defendants' quotation referring to witness testimony. See Diocesan Defendants' Memo. at 11.

corporate merger transaction involved an exchange of reasonably equivalent value, the bankruptcy court determined that such testimony comported with its understanding of prevailing economic conditions at the time. See id. at 85 n.11. Such weighing of evidence is of course entirely proper during a bench trial but completely inappropriate on a motion to dismiss.

In Eclectic Properties, the Ninth Circuit affirmed dismissal of RICO claims based on a series of commercial real estate transactions in which plaintiffs purchased property whose value had been allegedly fraudulently inflated by the defendants. The Ninth Circuit noted that the only factual basis for inferring any intent to defraud was the comparison of fair market values before and after the after the recession. See Eclectic Properties, 751 F.3d at 999. The Ninth Circuit concluded these differences in real estate values were equally consistent with the innocent explanation that real estate prices had actually generally appreciated prior to the recession but subsequently collapsed—a fact of which they took judicial notice—especially in light of the fact that the Defendants had been making proportionately large lease payments for years (pursuant to a sale-leaseback arrangement) based on the same valuations. See id.

The Diocesan Defendants' argument appears to be that the bear markets of 2008 rendered everything that had happened—or failed to happen—irrelevant as a matter of law. That argument makes no sense even for a claim of actuarial malpractice, let alone claims of fraud. Defined benefit pension plans are meant to weather both good economic times and bad.

2. The Actuarial Reports

The Diocesan Defendants contend that actuarial reports referenced in the Amended Complaint conclusively establish that the Plan was properly funded prior to 2008. See Diocesan Defendants' Memo. at 10-11. However, the First Amended Complaint, simply by referring to these documents for one purpose, did not adopt every statement or conclusion therein for all purposes. This is especially true here, where the accuracy (*vel non*) of assertions contained in the actuarial reports is a matter that can only be properly tested through expert evidence,[13] and where most[14] of the actuarial reports the Diocesan Defendants point to were created by one of their co-defendants whom Plaintiffs have accused in this suit of committing actuarial malpractice.[15]

For example, the Diocesan Defendants state regarding a 2007 actuarial report:

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

Diocesan Defendants' Memo. at 13. In other words, the Diocesan Defendants insist the Court must—on a motion to dismiss, no less—accept Defendant Angell's *ipse dixit* that

[13] For example, the Diocesan Defendants' own "summary" of the actuarial reports indicates that Angell was recommending that SJHSRI make contributions to the Plan between 2006-2008 (recommendations that SJHSRI spurned), notwithstanding the Diocesan Defendants' contention that the Plan was fully funded during those years. Expert testimony is required to explain how Angell arrived at these various calculations or miscalculations, which are based on assumptions and other factors. Expert testimony is even necessary to test the Diocesan Defendants' fundamental proposition that a pension plan that is not receiving recommended contributions is nevertheless fully funded.

[14] From 2005 onward.

[15] Count X (actuarial malpractice), lodged against Defendant Angell.

it was "following ERISA's funding guidelines" accurately when rendering actuarial advice. That is, of course, disputed.

The Diocesan Defendants complain that the First Amended Complaint alleges that the Diocesan Defendants knew the plan was underfunded but only specifically alleges facts supporting that allegation from 2008 forward. See Diocesan Defendants' Memo. at 14. Under Rule 9(b), however, knowledge may be alleged generally and need not be alleged with specificity. See Fed. R. Civ. P. 9(b) (". . . Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.").

B. Misrepresentations can be actionable no matter how longstanding, and contractual promises can be actionable no matter how recently broken

Recapitulating their prior argument, the Diocesan Defendants contend, based on "what is (and is not) in the Amended Complaint" that "[e]ach and every allegation of wrongdoing predating the stock market crash of September 2008 must be dismissed". Diocesan Defendants' Memo. at 16. However, it is claims upon which relief is sought that may be dismissed pursuant to a motion to dismiss, not "allegations." A court in deciding a motion to dismiss does not strike allegations. Moreover, none of the Diocesan Defendants' cited cases stand for the propositions for which they have been cited.

For the proposition that the "Great Recession cut off any liability for the Diocesan Defendants for conduct prior to 2008", they cite In re State St. Bank & Tr. Co. Fixed Income Funds Inv. Litig., 772 F. Supp. 2d 519, 544 (S.D.N.Y. 2011) which does not

remotely support that proposition. In that case, which was commenced prior to the recession[16], the court denied summary judgment for a third party defendant, who had argued that the defendant's (i.e. third-party plaintiff's) decision to withhold material information about bond funds from fund investors was a superseding cause of the investors' losses. See id. at 546.

The Diocesan Defendants contend "the causal link between alleged earlier misrepresentations or decisions and any future impact on the retirement benefits that Plan participants might receive was broken." Diocesan Defendants' Memo. at 17 (citing Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258, 268 (1992)). In Holmes, defendant Holmes had allegedly "conspired in a stock-manipulation scheme that disabled two broker-dealers from meeting obligations to customers, thus triggering SIPC's [Securities Investor Protection Corporation's] statutory duty to advance funds to reimburse the customers." Holmes, 503 U.S. at 261. In an effort to recoup these payments, SIPC asserted RICO claims against Holmes. The Supreme Court affirmed summary judgment entered in Holmes's favor, concluding that since RICO incorporated a "direct-injury limitation," id. at 272, and since SIPC's injuries were only "indirectly" caused by the stock-manipulation scheme—the direct injuries had been suffered by the broker dealers—SIPC could not assert a statutory RICO claim for its indirect injuries. Holmes does not stand for the Diocesan Defendants' proposition about breaks in causation.

The Diocesan Defendants also cite Dura Pharm., Inc. v. Broudo, 544 U.S. 336 (2005) for the proposition that "other factors besides misrepresentations, such as

[16] See In re State St. Bank, 772 F. Supp. 2d at 523 (noting the suit had been commenced in October 2007).

'changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, or other events, which taken separately or together' could account for a lower price". Diocesan Defendants' Memo. at 17 (quoting Dura Pharm.). In that case, the Supreme Court held that merely alleging that stock shares were sold at a loss after having been purchased for an artificially inflated price failed to state a claim under the Securities and Exchange Act, where the investor made no effort to disentangle how much of the change in stock price was due to the manipulation and how much was due to other factors.

The Diocesan Defendants cite In re Merrill Lynch & Co., Inc., 273 F. Supp. 2d 351, 362 (S.D.N.Y. 2003), which is both factually and legally inapposite. In that case, non-client investors, whose holdings declined after the Internet stock bubble burst at the end of the 1990s, sued Merrill Lynch on a fraud-on-the-market theory for having issued investment bulletins containing allegedly false statements. The court dismissed these claims as failing to meet the Private Securities Litigation Reform Act's special heightened pleading standard for loss causation. Plaintiffs here, of course, are not asserting any PSLRA claims.

The Diocesan Defendants also later[17] cite Bendaoud v. Hodgson, 578 F. Supp. 2d 257 (D. Mass. 2008), which applied Dura Pharm. to a fact pattern where the plaintiff had not suffered *any* losses due to stock price manipulation, because he had sold his stock when its value was still artificially inflated:

[17] Plaintiffs note that the Diocesan Defendants' habit of repeating the same arguments throughout their memorandum but adding additional string citations each time makes their memorandum unnecessarily cumbersome to respond to. Instead of charting a straight course, the Diocesan Defendants keep circling back as if hoping to lose any pursuing readers attempting to follow their argument.

> On the facts of this case, *Dura* forecloses the plaintiff's claims of economic loss to his Analog Stock Fund holdings. Bendaoud's theory of causation of how the defendants' acts caused his loss is as follows: the purchase of the stock took place at an artificial high because of the defendants' actions; subsequent disclosures to the market of the defendants' financial malfeasance caused the price to fall; and he sold the stock at a loss that would not have been incurred but for the defendants' actions. **But Bendaoud was not still holding his stock when the price fell due to the disclosures. Thus, he only alleges that he both bought and sold ADI stock at an inflated price.** After *Dura*, that alone does not demonstrate that the defendants' actions proximately caused his position in the Analog Stock Fund to lose value.
>
> [Emphasis supplied]

Bendaoud v. Hodgson, 578 F. Supp. 2d 257, 270 (D. Mass. 2008). This case does not support the Diocesan Defendants' contention that "none of Plaintiffs' statements concerning the state of the Plan prior to the 2008 market crash could have caused Plaintiffs' alleged harm." Diocesan Defendants' Memo. at 21.

III. Count VII (fraud through intentional misrepresentation and omission) should not be dismissed

A. The Diocesan Defendants are not improperly lumped together

The Diocesan Defendants contend that Plaintiffs have engaged in impermissible "group pleading" by expressly alleging that each of the three Diocesan Defendants, acting in concert with the other two, committed various acts or incurred various liabilities. The Diocesan Defendants[18] no longer complain, as they did in connection with their prior motions to dismiss Plaintiffs' original Complaint, that Plaintiffs have

[18] Plaintiffs note that the Diocesan Defendants refer to themselves collectively throughout their own memorandum as the "Diocesan Defendants".

referred to them by one collective moniker.[19] See Diocesan Defendants' Memo. at 19-20. Instead, since the Amended Complaint specifies which Diocesan Defendants performed which conduct, they now contend those now-particularized allegations are somehow likewise impermissible.

The Diocesan Defendants cite no case law actually supporting that argument. They cite Beta Grp., Inc. v. Steiker, Greenaple, & Croscut, P.C., No. CV 15-213 WES, 2018 WL 461097 (D.R.I. Jan. 18, 2018) (Smith, C.J., accepting recommendation of Almond, U.S.M.J.), in which the Court denied dismissal of two individual defendants who *were* named in allegations of wrongdoing, while granting dismissal of six other individual defendants who were alleged only to be "potentially liable":

> **After a careful review of the allegations, the Court notes that Plaintiffs Amended Complaint contains allegations specifically tied to Defendants Wurpts and Kossow, but no detailed information as to any of the other Individual Defendants.** For example, Plaintiffs assert that they were instructed to raise all issues with the Plan or its operation with Defendant Wurpts and that he would ensure that all issues were addressed by SES or SGC Law Firm. Plaintiffs also claim they contacted Defendant Wurpts in 2007 and he responded by stating that the 4% MPPP has not been in the Plan since 2001. As to Defendant Kossow, he is alleged to have submitted a letter to the IRS in 2008 that included the 4% MPPP. **The alleged actions of these two Defendants form a significant part of the Plaintiffs' claims, and at this stage, are sufficient to withstand the Motion to Dismiss.**
>
> As to the remainder of the Individual Defendants, however, the allegations are not "sufficiently precise" at this juncture to raise a right to proceed on this claim. **Plaintiffs concede that although they "cannot definitively allege...which of the individual defendants are liable..." they have**

[19] While Plaintiffs believe such use of collective monikers in the Complaint (for affiliated defendants performing the same conduct) was appropriate, Plaintiffs in the First Amended Complaint abandoned that convenient shorthand in favor of extra specificity, out of an abundance of caution.

> **alleged enough to state a plausible claim that each Defendant is potentially liable as a fiduciary. This Court disagrees. This type of speculative, catch-all pleading simply fails to meet the applicable plausibility standard established by the Twombly/Iqbal decisions.** As a result, I recommend that the District Court DENY the Motion to Dismiss Count I alleging Breach of Fiduciary Duty against Defendants Wurpts and Kossow and GRANT the Motion to Dismiss as to the remaining Individual Defendants without prejudice.
>
> [Emphasis supplied and citations omitted]

Beta Grp., Inc., 2018 WL 461097, at *9. The Diocesan Defendants' other two cases are even less apposite. See Laurence v. Wall, No. CA08-109ML, 2010 WL 4137444, at *2 (D.R.I. Sept. 30, 2010) (Hagopian, U.S.S.M.J.) (dismissing Complaint for containing "no references to, or assertions against, any of the Moving Defendants by name"); W. Reserve Life Assur. Co. of Ohio v. Caramadre, 847 F. Supp. 2d 329, 342 (D.R.I. 2012) (Smith, J.) (dismissing claims that "all Defendants" committed or concealed forgeries, for failure to specify which of the defendants "put pen to paper and executed the forgeries").

It is unsurprising that the Diocesan Defendants cannot cite any case law supporting their argument, since even the subsidiary argument—that the use of collective monikers when discussing affiliated corporate defendants who all participated in the same conduct is inherently inappropriate—is incorrect.

The Bishop was president of all three Diocesan Defendants[20] and is alleged to have engaged in misconduct within the scope of his employment on behalf of all three. Plaintiffs are not obligated to surmise that he was only acting on behalf of one of the

[20] FAC ¶¶ 26-28.

Diocesan Defendants at any particular time.[21] To the contrary, the fact that he had this authority for all three Diocesan Defendants is sufficient to give rise to a reasonable inference that he was acting on behalf of all three, such that his conduct and statements can be attributed to all of the Diocesan Defendants, at least for purposes of the motion to dismiss. Issues relating to scope of employment are, of course, extraordinarily fact-specific and inappropriate for determination on a motion to dismiss or even summary judgment. See Fontana v. New Econo Laundromat Inc., 51 Misc. 3d 510, 514 (N.Y. Sup. Ct. 2016) ("[B]ecause the determination of whether a particular act was within the scope of the servant's employment is so heavily dependent on factual considerations, the question is ordinarily one for the jury.") (denying summary judgment); Weaver-Ferguson v. Bos. Pub. Sch., No. CV 15-13101-FDS, 2016 WL 1626833, at *4 (D. Mass. Apr. 22, 2016) ("BPS further contends that it is not liable in tort because its employees were not acting within the scope of their employment. The evidence may well prove those facts are true. Those contentions, however, involve questions of fact and law that may not be resolved on a motion dismiss, where the Court is required to take any

[21] The Diocesan Defendants' argument is also waived here, where they have never complied with R.I. Gen. Laws § 9-1-49:

> Whenever a corporation is served with a complaint it shall notify the plaintiff within twenty (20) days of service of its correct corporate name, its state of incorporation, its business address as designated in its state of incorporation, its registered agent, and the address of its registered agent, and if the corporation is aware that a subsidiary or affiliate is a proper party to the civil action, the corporation shall also provide the correct name and address of the subsidiary or affiliate. Failure of the corporation to so notify the plaintiff shall result in a defense on these issues being waived by the corporation, and the corporation shall be estopped from asserting that the complaint failed to identify the corporation by its correct corporate name, or that the corporation is not a proper party to the civil action.

R.I. Gen. Laws § 9-1-49(b). By failing to comply with this statute, each of the Diocesan Defendants is estopped from denying liability for claims asserted against the other Diocesan Defendants or any other affiliates. Under Rhode Island law, corporate defendants cannot escape liability by hiding behind opaque and byzantine networks that obscure on whose particular behalf individual officers or agents were acting.

plausible factual allegations by the plaintiff as true.") (denying motion to dismiss claims relating to off-worksite after-hours party); Doe v. St. Clair Cty., No. 18-CV-380-SMY-SCW, 2018 WL 3819102, at *4 (S.D. Ill. Aug. 10, 2018) (denying motion to dismiss respondeat superior claims); Hurd v. Clark Cty. Sch. Dist., No. 216CV02011GMNNJK, 2017 WL 4349231, at *5 (D. Nev. Sept. 29, 2017) ("[T]he Court cannot determine at this time that Doran's actions fell outside the scope of his employment.") (denying motion to dismiss vicarious liability claims).

Certainly there is nothing wrong with making an allegation that applies to all three Diocesan Defendants, where the Bishop is the actor or making the statement. See In re Duramax Diesel Litig., 298 F. Supp. 3d 1037, 1056 (E.D. Mich. 2018) (plaintiff did not engage in impermissible group pleading by referring to the "Bosch Defendants" collectively, where various Bosch subsidiaries' employees had held themselves out as simply working for "Bosch" when acting in furtherance of the fraudulent scheme); Commonwealth of Kentucky v. Marathon Petroleum Co. LP, No. 3:15-CV-354-DJH-CHL, 2018 WL 4620621, at *9 (W.D. Ky. Sept. 26, 2018) ("Despite Defendants' contention, the Commonwealth's reference to Marathon as an integrated corporate unit implies that 'Marathon' often acts as a single entity rather than as separate corporate organizations. In light of that allegation, the government's use of 'Marathon' is sufficiently specific at this stage to inform Defendants that the Commonwealth alleges that the various Marathon entities at times acted together to commit the alleged antitrust actions.") (denying motion to dismiss).

When affiliated corporations commit the same misconduct, it is entirely appropriate to refer to them collectively, especially when distinguishing those affiliated defendants from other defendants:

> . . . .Both this Court and the Eleventh Circuit have on many occasions condemned the practice of referring to multiple parties in a general, collective manner.
>
> **Here, however, TTCP has not grouped all Defendants together, but only the Sany Defendants, which are related entities alleged to have engaged in the same misconduct.**
>
> In addition, TTCP's practice of grouping is not pervasive throughout the complaint such that it is impossible to know which claims are being asserted against which Defendant(s). TTCP has referred collectively to the "Sany Defendants" in only a handful of paragraphs. Those allegations are also supported by the averments that "the Sany Defendants collectively developed the marketing materials," and more specifically, that the materials "were branded by Sany Electric, contain Sany America's contact information, ... contain information provided by Sany Heavy and Sany Group," and "utilize the Sany logo which is common to all Sany Defendants." **Stated differently, TTCP's allegation is not that some Sany Defendant made certain misrepresentations, but that all the Sany Defendants made those misrepresentations.**
>
> At the motion-to-dismiss stage, TTCP is not required to articulate the precise role that each Defendant played. **Indeed, without discovery, it would be impossible for TTCP to more precisely describe the respective conduct of four related entities.**[22] It is enough for now that TTCP specifies the manner in which each of the four Sany Defendants was involved in the development of the marketing materials and then generally avers that the Sany Defendants collectively are responsible for the misrepresentations contained therein.
>
> [Emphasis supplied]

[22] Depositions and interrogatories in the instant case will undoubtedly assist in that regard.

TTCP Energy Fin. Fund II, LLC v. Ralls Corp., 255 F. Supp. 3d 1285, 1289–90 (N.D. Ga. 2017) (citations omitted).

> The defendants here point out numerous instances in which the complaint uses the phrase "the Conspirators," but they also disregard the extensive specific allegations of the complaint where, unlike in *Hoover [v. Langston Equip. Assocs., Inc.*, 958 F.2d 742 (6th Cir. 1992)], the plaintiffs named individual defendants associated with all but one of the fourteen acts of misrepresentation and concealment that they describe. Even with the collective references in the complaint, the pleading attributes specific false statements to identified individual defendants, and therefore the allegations satisfy Rule 9(b)'s specificity requirements.

JAC Holding Enterprises, Inc. v. Atrium Capital Partners, LLC, 997 F. Supp. 2d 710, 728 (E.D. Mich. 2014).

B. The Diocesan Defendants' longstanding misrepresentations which recently injured Plaintiffs, are actionable

As to fraudulent misrepresentations, "[t]o establish a prima facie damages claim in a fraud case, the plaintiff must prove that the defendant made a false representation intending thereby to induce plaintiff to rely thereon and that the plaintiff justifiably relied thereon to his or her damage." Bitting v. Gray, 897 A.2d 25, 34 (R.I. 2006) (quotations omitted). A misrepresentation is "any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts." Travers v. Spidell, 682 A.2d 471, 473 n.1 (R.I. 1996); Stebbins v. Wells, 766 A.2d 369, 372 n.1 (R.I. 2001) (quoting Travers).

"[T]he concept of misrepresentation includes a false representation as to one's intention, such as a promise to act." Palmacci v. Umpierrez, 121 F.3d 781, 786 (1st Cir. 1997). "A representation of the maker's own intention to do a particular thing is fraudulent if he does not have that intention" at the time he makes the representation."

Id. Thus, a false statement of understanding or intention will 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)).

Other Rhode Island cases make clear that misrepresentation claims can be maintained as to statements of the future that also touch upon facts about the past and present, especially the speaker's subjective beliefs about the future. See Cheetham v. Ferreira, 56 A.2d 861, 864 (R.I. 1948) ("Upon such findings the assertions by the respondent amounted to more than a seller's 'puffing' or mere estimate as to possible future profit. They constituted positive representations of existing material facts that were known by her to be false and were made for the purpose of inducing the complainants to purchase the business. "); Robinson v. Standard Stores, 160 A. 471, 472 (R.I. 1932) ("Defendant's motion for a directed verdict was based on the ground that the statements made by its agents to plaintiff were promissory in character and were not shown to have been falsely made, and therefore were insufficient to sustain an action

for deceit. The contention cannot be sustained.") (finding actionable the statements "that defendant would take back the stock any time plaintiff wished to dispose of it, and that defendant would loan money on the stock"); Bloomberg v. Pugh Bros. Co., 121 A. 430, 431 (R.I. 1923) ("The plaintiff should have been permitted to introduce evidence as to the fraudulent representations of Frey which induced the plaintiff to enter into the contract of purchase, and the accompanying promises which Frey knew that neither he nor the defendant could perform and which they had no intention of performing. Accompanying these representations of a promissory nature were false statements of existing facts, and the latter, if established, would constitute actionable fraud, provided such statements were material.").

The First Circuit has also recognized that forecasts can constitute fraudulent misrepresentations. 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 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.").

The Diocesan Defendants contend that the misrepresentations allegedly made "in the 1970s through the mid 2000s" were "not factually false and merely conveyed an intent to fund the Plan in a particular manner or make certain payments to Plan beneficiaries in the future (i.e., merely statements to do a particular thing in the future,

and thus cannot be actionable misrepresentations)." This blanket assertion that the statements were "not factually false" does not actually address the particular allegations of the First Amended Complaint, which not only sets forth particular misrepresentations but explains how they were deceptive.[23] The assertion that statements of intent cannot be actionable misrepresentations under Rhode Island law is, as noted, incorrect. In any event, as discussed *supra* at 15-16, the Diocesan Defendants were under a continuing duty to correct such prior misrepresentations and inform employees and other Plan participants that the statements were no longer reliable.

Incredibly, the Diocesan Defendants eventually single out a statement that "[t]he Hospital will pay the entire cost of the Plan beginning January 1, 1973 – not only your pension but also all actuarial, legal and investment expenses incurred in the administration of the Plan" and assert it is unaccompanied by allegations of "facts to indicate this statement was false or that SJHSRI did not pay such costs." Diocesan Defendants' Memo. at 22. In fact, the First Amended Complaint is replete with allegations that SJHSRI has failed to fund the Plan.

The Diocesan Defendants also argue that statements that "conveyed an intent to fund the Plan in a particular manner or make certain payments to Plan beneficiaries in the future" cannot be actionable. Diocesan Defendants' Memo. at 21. However, as noted *supra*, insincere expressions of intent to perform actions in the future are actionable. The Diocesan Defendants cite a footnote of St. Paul Fire & Marine Ins. Co.

[23] See, e.g., FAC ¶ 277 ("The statement that Plan assets were held in a trust established by the Diocese was intentionally false and deceptive, since in connection with the separation of the two plans in 1995, a new trust was established by SJHSRI, but SJHSRI did not inform Plan participants of the separation, much less that only a portion of the Diocesan Plan assets were transferred to the new trust for the Plan alone.")

v. Russo Bros., 641 A.2d 1297, 1299 n.2 (R.I. 1994) for the proposition that alleged misrepresentations "must relate to something that is a fact at the time the assertion is made". That is true, but as discussed *supra*, false statements of intention relate to the state of the speaker's present state of mind, and "[t]he state of a man's mind at a given time is as much a fact as is the state of his digestion.". Swift v. Rounds, *supra*, 35 A. 45, 46 (R.I. 1896).

The Diocesan Defendants also cite Cote v. Aiello, 148 A.3d 537, 548 (R.I. 2016) for the proposition that "the general rule is that mere unfulfilled promises to do a particular thing in the future do not constitute fraud in and of themselves." That case itself noted the exception to that "general rule" discussed above. See id. at 549 (R.I. 2016) ("The record is devoid of any evidence that indicates that Aiello's statements were 'made without any intention of performing them at the time of making them.'") (affirming judgment for defendant following bench trial). The Diocesan Defendants recognize this principle in the course of incorrectly asserting that "Plaintiffs have not alleged any facts sufficient to establish there was a lack of intent to keep promises made to the pensioners in the 1970s. . . ." See Diocesan Defendants' Memo. at 23 (citing In re DeRosa, 103 B.R. 382, 386 (Bankr. D.R.I. 1989)). See id. at 386 ("An additional factor to consider is that these statements involve promises to perform in the future. Such promises 'may be actionable where the maker did not intend to perform the promise at the time of making it.'"). Plaintiffs have indeed alleged such lack of intent. See, e.g., FAC ¶¶ 259-67.

C. Reliance is adequately pled and cannot be disproven on a motion to dismiss

The Diocesan Defendants contend that, notwithstanding the allegations of the First Amended Complaint to the contrary, various disclosures were actually made to state regulators in 2014, and therefore Plaintiffs cannot maintain claims sounding in fraud or conspiracy. See Diocesan Defendants' Memo. at 24.[24] This argument ignores the simple fact that Plaintiffs are not the state regulators, and Plaintiffs did not receive any of the disclosures that the Diocesan Defendants—referring to (and often misconstruing) facts outside the pleadings—contend the regulators received.

Moreover, issues of reasonable reliance on misrepresentations are highly fact-specific and cannot properly be decided on 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); Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC, 797 F.3d 160, 186 (2d Cir. 2015) ("In general, the reasonableness of a plaintiff's reliance is a 'nettlesome' and 'fact-intensive' question, which we, like our Circuit's many district courts, will not lightly dispose of at the motion-to-dismiss stage.") (citation omitted); Koesler v. Beneficial Fin. I, Inc., 267 F. Supp. 3d 873, 889 (W.D. Tex. 2016) ("In the context of common law fraud, courts have uniformly treated the issue of justifiable reliance as a question for the factfinder. The question of

[24] The Diocesan Defendants offer a bowdlerized summary of Plaintiffs' claims at pages 23-24. The true extent of Plaintiffs' claims is set forth in their 163-page First Amended Complaint. The cases string-cited by the Diocesan Defendants on pages 24-25 of their memorandum are discussed *supra* at 16-18 and infra at 55-56, 63-64. See *supra* at 21 n.17 (noting the Diocesan Defendants' unfortunate habit of scattering redundant and overlapping discussions of the same irrelevant cases throughout their memorandum).

justifiable reliance depends heavily on the relationship between the parties and their relative sophistication."); EUSA-Allied Acquisition Corp. v. Teamsters Pension Tr. Fund of Philadelphia & Vicinity, No. CIV.A. 11-3181 JBS, 2012 WL 1033012, at *5 (D.N.J. Mar. 26, 2012) ("As to Defendant's argument that no dispute of fact exists as to Plaintiff's justifiable reliance on Defendant's representatives' statements, the Court finds that this element of the claim is not properly decided on a motion for summary judgment because whether a plaintiff's reliance was "reasonable" is a question of fact for the jury.") (denying summary judgment, much less a motion to dismiss); 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."); Luther v. Kia Motors Am., Inc., No. CIVA 08-386, 2008 WL 2397331, at *4 (W.D. Pa. June 12, 2008) ("We agree with Plaintiffs that 'the issue of whether reliance on a representation is reasonable (or justifiable) is generally a question of fact that should be presented to the jury.' Therefore, even if we were to consider the Franchise Agreement, it is not the role of the Court at this point to determine if Plaintiffs' reliance on the oral representations of the Kia Agents was justifiable.") (citations omitted); George v. McClure, 266 F. Supp. 2d 413, 419 (M.D.N.C. 2001) ("Whether Plaintiff did in fact rely on these statements and whether such reliance was reasonable are questions of fact.") (denying motion to dismiss).

In addition, although the Court need not decide the issue now, it is not necessary to prove individualized reliance in pension class actions. See Osberg v. Foot Locker, Inc., No. 07-CV-1358 (KBF), 2014 WL 5800501, at *2–6 (S.D.N.Y. Nov. 7, 2014).

The Diocesan Defendants cite Ang v. Spidalieri, No. WC-2006-0569, 2018 WL 810086, at *14 (R.I. Super. Feb. 05, 2018), in which the Superior Court conducted a bench trial and concluded that allegedly concealed title defects had been disclosed by the defendant to the plaintiff and therefore could not support a claim for fraud. See Diocesan Defendants' Memo. at 33. Ang does not support the Diocesan Defendants' motion to dismiss.

The Diocesan Defendants also cite Soft Stuff Distributors, Inc. v. Ryder Truck Rental, Inc., No. CCB-11-2605, 2012 WL 3111679, at *5 (D. Md. July 30, 2012), in which the court dismissed fraud claims lodged against a truck rental company by alleging that the latter improperly rounded its fuel charges up without disclosing that fact to its "sophisticated business customers." Id. at *4. The court noted the referenced invoices cannot be characterized as [containing] affirmative misrepresentations." Id. The court subsequently noted that Maryland law "recognizes no general duty upon a party to a transaction to disclose facts to the other party," and the plaintiff had failed to make any allegation that it fell within the narrow exception under Maryland law where defendants have committed "affirmative action to conceal." Id. Neither finding has any bearing on the instant facts, in which the First Amended Complaint alleges affirmative misrepresentations, unsophisticated Pension participants, and application of Rhode Island law rather than Maryland law. Rhode Island law imposes greater duties on participants in business transactions to speak fully and correctly. See, e.g., Stebbins v.

Wells, 766 A.2d 369, 373 (R.I. 2001) (selling party has "a duty to disclose in situations where he or she has special knowledge not apparent to the buyer and is aware that the buyer is acting under a misapprehension as to facts which would be important to the buyer and would probably affect its decision."); Cruz v. DaimlerChrysler Motors Corp., 66 A.3d 446, 453 (R.I. 2013) (used car dealership "assumed duty not to misinform" customers through even negligent misrepresentations when it "began volunteering information as to the vehicle in question") (affirming entry of summary judgment where the record contained no evidence of any actual misrepresentations).

Finally for now, the Diocesan Defendants also cite In re Ford Motor Co. Bronco II Prod. Liab. Litig., 982 F. Supp. 388 (E.D. La. 1997), in which the court entered summary judgment on fraudulent concealment and *redhibition* claims (essentially Louisiana lemon law claims), because the Defendants had disclosed the alleged vehicle rollover defect on product warning stickers and in owners' manuals. See Diocesan Defendants' Memo. at 33 (citing In re Ford, 982 F. Supp. at 397). The Diocesan Defendants do not link that ruling in any way to the facts of our case, and, as even they observe, that case was decided on summary judgment, not a motion to dismiss.

1. The Amended Complaint does indeed allege facts establishing that the Plan's dire condition was concealed in 2014

The Diocesan Defendants quote a portion of the Change in Effective Control Application submitted to the Department of Health, which the Diocesan Defendants only halfheartedly pretend is incorporated into the First Amended Complaint[25], stating that

[25] See *supra* at 4, 4 n.5.

the hospital system would "over the long term, incur significant losses" if "pension losses are taken into consideration."[26] Diocesan Defendants' Memo. at 26. This statement, which they do not contend was shared with Plaintiffs, does not even indicate that the Plan itself was underfunded, but rather that the hospitals were underfunded (assuming they were paying the pensions). Likewise, even if the Department of Health might have combed the Change in Effective Control Application for references to the Plan's funding status in notes to financial statements incorporated in exhibits to that Application, see Diocesan Defendants' Memo. at 26-27 (describing a reticulated process of correlating different documents), there is no suggestion that such materials were actually disclosed to Plaintiffs.

The Diocesan Defendants similarly cherry-pick a statement from the Attorney General's May 2014 decision approving the 2014 Asset Sale:

> Of additional concern to [CCCB] is its pension funding (an issue that is impacting many hospitals around the country). If pension losses[27] are taken into consideration, in fiscal year 2012, the [CCCB] system sustained losses of over $8 million dollars which are increasing without additional contributions. Such losses cannot be sustained by [CCCB].
>
> [Bracketed references to "CCCB" inserted by the Diocesan Defendants]

Diocesan Defendants' Memo. at 27. To the extent this statement even discusses the funding status of the Plan, it is a misrepresentation suggesting that CCCB was suffering losses *because CCCB was funding the Plan*. CCCB was not funding the Plan. Nor was SJHSRI.

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[26] This does not suggest that payments were not to be made into the Plan, let alone explain what is meant by "pension losses."

[27] See the prior footnote.

Finally, the Diocesan Defendants characterize various paragraphs of the First Amended Complaint as revealing that "the pension deficit and what was to be done with the pension deficit was discussed at various public hearings" and that "pensioners were surely aware that there were issues in the funding of their pension because it had been frozen on four separate occasions leading up to the 2014 transaction." Diocesan Defendants' Memo. at 28. The referenced paragraphs of the First Amended Complaint actually discuss how assurances were given, during the hearings and in connection with the prior freezes, about how vested pension benefits were thereby becoming secure because of the freezes.[28] The Diocesan Defendants certainly do not explain why unsophisticated pensioners should have drawn the Diocesan Defendants' inferences about pension insecurity from those statements.

2. The Diocesan Defendants are not exculpated by the structuring of the 2014 Asset Sale or any disclosure of that structure to regulators

The Diocesan Defendants spend several pages insisting that "The Structure Of The 2014 Asset Sale, Including That Prospect Was Not Assuming Any liabilities For The Plan, Was Disclosed And Public". Diocesan Defendants' Memo. at 28-30 (noting that the Asset Purchase Agreement was called an "asset purchase" agreement, that the Asset Purchase Agreement contained intervolving liability exclusion provisions buried in

[28] See FAC ¶¶ 287, 297.

the agreement and its exhibits, and that the Change in Effective Control Application contains a diagram whose accuracy the Diocesan Defendants dispute[29]).

The Diocesan Defendants do not explain what any of that filibustering has to do with Plaintiffs' allegations of reasonable reliance on the misrepresentations they actually received.

3. The Plan's true funding status and the impropriety of its claim of church-plan status were not disclosed to Plan participants

The Diocesan Defendants insist that they did not conceal that under the 2014 Asset Sale, "the Plan would remain a church plan not subject to ERISA". Diocesan Defendants' Memo. at 30. They point to disclosures they contend were made by other Defendants to state regulators in the Asset Purchase Agreement and the Change in Effective Control Application (which is still not part of the First Amended Complaint), stating that "The Retirement Plan is a Church Plan" and "The Plan is a non-electing church plan under the Internal Revenue Service [sic] and is not subject to the participation, vesting, and provisions [sic] of the Internal Revenue Service code." Diocesan Defendants' Memo. at 31. Neither of these statements actually indicates that the Plan was exempt from ERISA or uninsured by PBGC, and there is no suggestion that either statement was shared with Plaintiffs. In any event, the issue of whether the Plan was actually exempt from ERISA itself is one of the central issues of disputed fact,

[29] See Diocesan Defendants' Memo. at 30 n.28 ("The Diocesan Defendants had no role in drafting Exhibit 24 and reserve the right to contest its accuracy."). Nor did Plaintiffs have any such role. In any event, this disputed document has no relevance to, and cannot properly be considered in connection with, the motions to dismiss.

such that for purposes of the motion to dismiss, these statements were themselves misrepresentations.

4. The allegations of desired post-2014 hospital Catholicity support a plausible claim of conspiracy

The Diocesan Defendants contend that it is "absurd and implausible" to suggest that "if the Diocesan Defendants wanted Our Lady of Fatima to remain Catholic then they would have to knuckle under to the illicit demands of other defendants," because "Our Lady of Fatima was already under contractual restrictions to comply with various Catholicity requirements" and "saying no to the deal would not divest them of those rights". Diocesan Defendants' Memo. at 31-32 (characterizing FAC ¶¶ 150, 153-54). As discussed *supra* at 13-13, this argument factually conflates the Our Lady of Fatima hospital facility with the corporations that sold and purchased it (the former going out of the hospital business and the latter coming into existence), and obscures the Diocesan Defendants' objective of obtaining a "Catholic" hospital within the Diocese of Providence that was free of the pension obligations. The Diocesan Defendants were not "knuckling under"; they wanted a "Catholic" hospital with a clean balance sheet, and they were motivated to sacrifice pensioners for what the Diocesan Defendants considered a higher purpose, i.e. establishing a "Catholic hospital" illicitly freed (or so they sought) from the Pension liabilities.

5. Reasonable reliance has not been disproven as a matter of law, especially on this motion to dismiss

The Diocesan Defendants circle back to their earlier arguments that the above-discussed disclosures to state regulators disprove Plaintiffs' reliance on any fraudulent

statements as a matter of law. These arguments fail for the reasons discussed above. Notwithstanding the Diocesan Defendants' rhetorical moving of goalposts, the disclosures referred to by the Diocesan Defendants were not made to Plaintiffs. Moreover, even if (*arguendo*) the particular disclosures referred to by the Diocesan Defendants had been made to Plaintiffs (which they were not), such fact-intensive issues cannot be properly decided on a motion to dismiss.

D. The Vatican and Health Services Council letters contain misrepresentations and omissions and do not contain only non-tortious "opinions"

The Diocesan Defendants misconstrue the letters that Bishop Tobin sent on their behalf to the Vatican[30] and the Health Services Council[31] seeking approval of the 2014 Asset Sale. The Diocesan Defendants recite snippets of what was said in those letters and quibble about the veracity of those snippets, see Diocesan Defendants' Memo. at 33-35. They ignore those letters' other context, including other statements and omissions. The Diocesan Defendants also draw factual inferences in their own favor about these letters and the circumstances and motivations surrounding them, something that is inappropriate for movants to do on a motion to dismiss. All of this parsing and re-parsing of what Bishop Tobin meant, what he said, and what he should be excused for having not said, would be unavailing on a motion for summary judgment, much less on a motion to dismiss.

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[30] Vatican approval was a condition of 2014 Asset Sale, which included sale of SJHSRI's assets. See FAC ¶¶ 139, 180.

[31] The Health Services Council is an entity that advises the Rhode Island Department of Health on regulatory issues. "Bishop Tobin (acting individually and as President of Corporation Sole, Diocesan Administration, and Diocesan Service) personally wrote to the Health Services Council to lobby in favor of regulatory approval of the for-profit hospital conversion. . . ." FAC ¶ 320.

The Diocesan Defendants insist that "[t]he statements in these letters are not false." Diocesan Defendants' Memo. at 35. However, in making that assertion, they only point to one sentence of one of the letters, in which Bishop Tobin stated that the Pension would be "at significant risk" if the 2014 Asset Sale were not approved. As alleged in the First Amended Complaint, that statement was incomplete and misleading, especially inasmuch as the next sentence expressly and falsely stated his belief that the 2014 Asset Sale "will help avoid the catastrophic implications of such a failure." FAC ¶ 172. As the First Amended Complaint explains:

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

FAC ¶ 177.

The Diocesan Defendants also insist that the letters contain non-actionable "opinions" which they contend cannot be actionable regardless of their falsity. See Diocesan Defendants' Memo. at 36. This argument proceeds on an incorrect premise, since "opinions" may be actionable as false statements of fact. As the U.S. Supreme Court has recognized:

> [A] reasonable investor may, depending on the circumstances, understand an opinion statement to convey facts about how the speaker has formed the opinion—or, otherwise put, about the speaker's basis for holding that

> view. And if the real facts are otherwise, but not provided, the opinion statement will mislead its audience.

Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund, 135 S. Ct. 1318, 1322 (2015). See 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.") (quoting International Milling Co. v. Gish, 137 N.W.2d 625, 631 (Iowa 1965)). See also *supra* at 28-30 (discussing other cases).

E. The Vatican and Health Services Council letters are an actionable component of the Diocesan Defendants' schemes

1. Plaintiffs were harmed by the Vatican and Health Services Council letters

The Diocesan Defendants baldly assert, without explanation, that Plaintiffs could not have been harmed by Bishop Tobin's letters to the Vatican and the Health Services Council, as well as misrepresentations made to the IRS in connection with listing SJHSRI in the Official Catholic Directory.

The First Amended Complaint sets forth in detail how Plaintiffs were harmed by the 2014 Asset Sale (which, inter alia, fraudulently dissipated the assets of SJHSRI, RWH, and CCCB otherwise available to pay pension) and the efforts to preclude application of ERISA to the Plan. As discussed *supra*, Vatican approval of the 2014 Asset Sale was a prerequisite to its closing, and support of the Health Services Council

was at least helpful. Likewise, as discussed infra, misrepresentations to the IRS and the fraudulent listing of SJHSRI in the Official Catholic Directory were a means to the end of freeing Fatima Hospital from pension liabilities, and facilitated the mistreatment of the Plan as an exempt church plan.

2. It is unnecessary to allege that Plaintiffs were intended recipients of these particular misrepresentations

The Diocesan Defendants contend the letters to the Vatican and to the Health Services Council were allegedly intended to deceive those entities, not Plaintiffs, and therefore cannot be the basis for claims for fraud. See Diocesan Defendants' Memo. at 39. This argument, even if credited, would not result in dismissal of any counts, since the Diocesan Defendants do not dispute that they made other misrepresentations directly to Plaintiffs, and in any event are liable for their coconspirators' misrepresentations.

This argument also ignores that the First Amended Complaint alleges separate counts for fraudulent misrepresentations and omissions (Count VII) and fraudulent scheme (Count VIII). Rhode Island recognizes a cause of action in fraud at common law for scheme liability. See Rhode Island Economic Development Corp. v Wells Fargo Securities, LLC, No. PB-12-5616, 2013 WL 4711306, at *35 (R.I. Super. Aug. 28, 2013) ("Thus, the Complaint states a claim against MacLean for fraudulent misrepresentation and her participation in the greater fraud scheme.") (denying dismissal of separate counts for fraudulent scheme and fraudulent misrepresentations and omissions); H.J. Baker & Bro., Inc. v. Orgonics, Inc., 554 A.2d 196, 202 (R.I. 1989) (scheme to stall collection of debt from debtor company in order to unload its assets); E. Providence

Const. Co. v. Simon, 172 A. 251, 252 (R.I. 1934) (scheme to obtain real property improvements by transferring property to minor wife, contracting and mortgaging property to obtain improvements, and subsequently disaffirming contracts and mortgage); Kroener v. Pancoast, 134 A. 6 (R.I. 1926) (scheme to defraud corporation by causing it to issue bonds for improper purpose). The letters to the Vatican and Health Services Council are actionable components of the scheme to consummate the 2014 Asset Sale[32] regardless of whether Plaintiffs were among the intended recipients.

It is also difficult to reconcile the Diocesan Defendants' argument that Plaintiffs could not have relied on these letters with their argument that Plaintiffs had constructive notice of every scrap of paper submitted, or every oblique statement of fact made, to the state regulators. The Attorney General received a copy of the Health Services Council letter and inquired about the Vatican approvals, which were required under the Asset Purchase Agreement.

In support of their contention that Plaintiffs were not intended recipients of these letters, the Diocesan Defendants cite only Ang v Spidalieri, No. WC-2006-0569, 2018 WL 810086 (R.I. Super. Feb. 05, 2018) (entering judgment on fraud claims after bench trial) and Gorbey ex rel. Maddox v. Am. Journal of Obstetrics & Gynecology, 849 F. Supp. 2d 162 (D. Mass. 2012) (dismissing Massachusetts statutory consumer fraud

[32] Both the Diocesan Defendants' approval and Vatican approval were required under APA § 7.5(e). See id. ("(e) Church Approvals. Sellers shall promptly apply for and use commercial reasonable efforts to obtain those ecclesiastical approvals required from officials within the Roman Catholic Church (the 'Church') in order to consummate the Transactions, including the authorization of the Bishop of the Roman Catholic Diocese of Providence, Rhode Island, and the permission of the Holy See through the Vatican Congregation of Bishops (the 'Church Approvals'). The Parties shall cooperate in the preparation and prosecution of such application(s). Each of the Parties shall timely submit all information and documents requested in connection therewith by Church officials.").

claims and denying motion to amend complaint to add common law fraud claims for failure to allege reliance). Neither case involved any discussion of whether the plaintiffs were intended recipients of any misrepresentations.

3. Plaintiffs have alleged sufficient reliance on misrepresentations to third parties

In addition to the relevance of Defendants' various misrepresentations made to third parties for purposes of other counts such as Count VIII (fraudulent scheme) and Counts XVI through XIX (for civil liability for crimes under R.I. Gen. Laws § 9-1-2), Plaintiffs assert claims for such misrepresentations under Count VII (fraud through intentional misrepresentations and omissions).

The Diocesan Defendants contend that Rhode Island does not recognize so-called "third party reliance" claims, in which a plaintiff did not rely on any misrepresentation but instead was injured by a third party's reliance on such misrepresentation. See Diocesan Defendants' Memo. at 40-41. The cases cited by the Diocesan Defendants do not stand for the proposition that Rhode Island rejects such third-party reliance claims, which have been recognized in jurisdictions outside Rhode Island.[33] In Ang v Spidalieri, No. WC-2006-0569, 2018 WL 810086, at *5 (R.I. Super.

[33] See, e.g., Bardes v. Massachusetts Mut. Life Ins. Co., 932 F. Supp. 2d 636, 640 (M.D.N.C. 2013) ("It is difficult to believe that North Carolina courts would not provide redress to an innocent citizen who was victimized by a malicious person or company providing false W2s to governmental entities.") (denying dismissal of fraud claims); Wheat v. Sofamor, S.N.C., 46 F. Supp. 2d 1351, 1365 (N.D. Ga. 1999) (recognizing but granting summary judgment on claim for fraud on the Food & Drug Administration, in absence of evidence that defendants intended to deceive the FDA); Hynix Semiconductor Inc. v. Rambus Inc., No. C-05-02298RMW, 2007 WL 4209399, at *8 (N.D. Cal. Nov. 26, 2007) ("Under the Restatement, one who misrepresents creditworthiness to a credit agency can be liable for fraud when a third party relies on the agency's representation that a person is creditworthy.") (citing Restatement Second of Torts § 533, comment f); Gregory v. Brooks, 35 Conn. 437, 449 (Conn. 1868) (jury should have been instructed that plaintiff was entitled to recover for fraud if defendant intended to harm plaintiff by impersonating wharfmaster and instructing third-party ship captain to unmoor from plaintiff's wharf).

Feb. 05, 2018), discussed *supra*, the court concluded following a bench trial that the plaintiff was aware of the allegedly concealed facts. In Siemens Fin. Servs., Inc. v. Stonebridge Equip. Leasing, LLC, 91 A.3d 817 (R.I. 2014), the court entered summary judgment on a first-party misrepresentation claim, because the counterclaim-plaintiff testified at deposition it did not actually rely on the misrepresentation. See id. at 823. St. Paul Fire & Marine Ins. Co. v. Russo Bros., 641 A.2d 1297 (R.I. 1994) does not, as the Diocesan Defendants incorrectly assert, contain any comparison of Massachusetts law to Rhode Island law. See Diocesan Defendants' Memo. at 41 n.36 (citing St. Paul Fire, 641 A.2d at 1300 n.2). Instead, it affirmed entry of summary judgment on the plaintiffs' contract claims under Rhode Island law, because the defendants failed to present any evidence of anyone's reliance on fraudulent misrepresentations which defendants had alleged in an effort to circumvent the parol evidence rule to a written indemnity agreement. See id. at 1300.

The issue of whether evidence of reliance by a third party is sufficient to meet a plaintiff's burden of proof has not been addressed by the Rhode Island Supreme Court in the specific context of common law fraud. However, that court has held that reliance by a third party is sufficient to meet a plaintiff's burden of proof in proving apparent authority. See Vucci v. Meyers Bros. Parking System, Inc., 494 A.2d 53, 54 (R.I. 1985) ("The insurer argues that evidence about ASI's apparent authority to act on its own behalf was irrelevant and should have been excluded because Vucci failed to allege or prove that she personally relied upon such apparent authority. We disagree. The absence of personal reliance by a plaintiff does not necessarily preclude her from introducing evidence relating to apparent authority. **A trial justice may permit a**

plaintiff to introduce such evidence when the evidence indicates that a third party relied on the appearance of authority and a plaintiff was injured thereby.") (emphasis supplied) (citations omitted).

That is the essence of third party reliance in fraud cases. Thus, under Rhode Island law, unlike the law of some jurisdictions, a plaintiff may prove apparent authority based upon a third party's reliance. We submit that the holding in Vucci is either controlling that Rhode Island also allows third party reliance in fraud cases, or at least strongly persuasive that the Rhode Island Supreme Court would so rule.

Plaintiffs have adequately alleged third party reliance. FAC ¶ 336 ("These 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."). Moreover, issues of reasonable reliance on misrepresentations are highly fact-specific and cannot properly be decided on 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); Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC, 797 F.3d 160, 186 (2d Cir. 2015) ("In general, the reasonableness of a plaintiff's reliance is a 'nettlesome' and 'fact-intensive' question, which we, like our Circuit's many district courts, will not lightly dispose of at the motion-to-dismiss stage.") (citation omitted); Koesler v. Beneficial Fin. I, Inc., 267 F. Supp. 3d 873, 889 (W.D. Tex.

2016) ("In the context of common law fraud, courts have uniformly treated the issue of justifiable reliance as a question for the factfinder. The question of justifiable reliance depends heavily on the relationship between the parties and their relative sophistication."); George v. McClure, 266 F. Supp. 2d 413, 419 (M.D.N.C. 2001) ("Whether Plaintiff did in fact rely on these statements and whether such reliance was reasonable are questions of fact.") (denying motion to dismiss).

F. The Amended Complaint sufficiently alleges that the listing of SJHSRI in the Official Catholic Directory was improper and fraudulent

1. The Amended Complaint alleges that there was insufficient connection between SJHSRI and the Diocese of Providence for OCD listing, especially after 2009

The Diocesan Defendants contend that the First Amended Complaint "focuses on the purported lack of diocesan control over the corporate governance of SJHSRI, rather than the lack of a diocesan connection in the operation of SJHSRI." Diocesan Defendants' Memo. at 42 (citing FAC ¶¶ 87-90). In fact, the First Amended Complaint alleges both lack of control and lack of connection. See FAC ¶ 112 ("At least since the 2014 Asset Sale, which included the transfer of all of SJHSRI's operating assets, SJHSRI was not 'operated, supervised, or controlled by or in connection with the Roman Catholic Church,' either in the Diocese of Providence or anywhere else."). That allegation, which would be sufficient standing alone, is supported by other detailed allegations throughout the First Amended Complaint, including quotes from public statements by Diocesan Defendants' representatives that the Diocese's "involvement" with SJHSRI "essentially ended" by 2014, and that "the Bishop's very limited role at SJHSRI – maintaining Catholicity at the hospitals – was mooted by the fact that SJHSRI

no longer owned or ran any hospitals." FAC ¶¶ 161-62 (quoting the Diocese's Chancellor and Spokesperson, respectively).

Apparently seeking to impeach the credibility of its own admissions—a curious and utterly inappropriate exercise on a motion to dismiss—the Diocesan Defendants point to moribund provisions of amendments to SJHSRI's articles of incorporation filed with the Rhode Island Secretary of State's office in 2010, for the proposition that the Bishop maintained veto rights over Catholicity matters at SJHSRI. See Diocesan Defendants' Memo. at 42-43. This document is outside the pleadings, is not in any way referred to therein, and cannot be considered on a motion to dismiss insofar as it pertains to disputes of fact between the parties. See Rollins v. Dignity Health, 338 F. Supp. 3d 1025, 1038 (N.D. Cal. 2018) ("Defendants cite to Dignity Health's website, bylaws, membership of its Board of Directors, and Sponsorship Council, and financial support of the Sponsoring Congregations. The majority of these materials cannot properly be considered on a motion to dismiss because they pertain to disputes of fact between the parties."). It is also disputed by other documents quoted by Plaintiffs in the pleadings. See FAC ¶ 87 ("Starting in 2011, SJHSRI has filed its Form 990 with the IRS stating that CCCB was SJHSRI's 'sole member.' This confirms the diminished or nonexistent roles of Bishop Tobin and the Diocese of Providence in SJHSRI's governance after the 2009 merger.").

In addition, if the Court examines this Article of Amendment offered by the Diocesan Defendants (which is beyond the pleadings and therefore should not be considered), the Court will see that these Catholicity provisions are simply the same provisions that the First Amended Complaint quotes Diocesan personnel as stating

were "mooted" by the 2014 Asset Sale. The Diocesan Defendants contend such statements "are easily squared" with its arguments that SJHSRI continued—perhaps continues?[34]—to be operated in connection with the Catholic Church. See Diocesan Defendants' Memo at 43. Plaintiffs obviously disagree, and in any event the Court cannot be asked to perform such weighing of evidence on a motion to dismiss.

2. Plaintiffs do not confuse the fraudulent listing of SJHSRI in the Official Catholic Directory with exemption from ERISA as a church plan

In an apparent act of projection, the Diocesan Defendants contend that the First Amended Complaint commits "conflation" of "the OCD listing inquiry with that for church plan qualification." Diocesan Defendants' Memo. at 44. They contend that the U.S. Conference of Catholic Bishops does not require subordinate organizations wishing to be listed in the Official Catholic Directory to meet the Lown factors applicable to organizations seeking to operate ERISA-exempt church plans. See Diocesan Defendants' Memo. at 44-45 (discussing Lown v. Cont'l Cas. Co., 238 F.3d 543 (4th Cir. 2001)). This argument is an obtuse misreading of the First Amended Complaint, whose allegation that SJHSRI was improperly listed in the Official Catholic Directory does not depend in any way on whether SJHSRI also failed to meet those particular factors.[35] There is certainly no basis for asking the Court "to defer to the wide discretion afforded to local dioceses by the [U.S. Conference of Catholic Bishops" (Diocesan Defendants' Memo. at 46) on these issues, especially on a motion to dismiss. Cf. Rollins v. Dignity

[34] According to the Diocesan Defendants, even now, they stand at the ready to prevent SJHSRI from "support[ing] abortion providers" while it "wind[s] up its affairs". Diocesan Defendants' Memo. at 44.

[35] The Lown factors remain relevant to whether the Plan is an ERISA-exempt church plan.

Health, 338 F. Supp. 3d 1025, 1038 (N.D. Cal. 2018) ("Defendants urge the Court not to adopt the test in *Lown v. Continental Casualty Co.*, 238 F.3d 543, 548 (4th Cir. 2001) to determine association. . . . However, Defendants provide this Court with no test, other than the statutory language and the Oxford English Dictionary, for evaluating whether Dignity Health and the sub-committee is associated with a church.") (denying motion to dismiss).

Listing SJHSRI in the Official Catholic Directory after 2014 facilitated the mistreatment of the Plan as an ERISA-exempt church plan. Indeed, that was the primary reason why SJHSRI was even being listed at all, after it transferred its hospital assets in 2014. Regardless of whether the Defendants' own legal analysis was correct in December 2014, they expressly concluded that if SJHSRI were not listed in the Official Catholic Directory, that would "mean that the SJHSR[RI] pension would no longer be treated as a church plan." FAC ¶ 186 (quoting Prospect's statement on December 2, 2014 to the Diocesan Defendants).

3. Plaintiffs can challenge the sufficiency of SJHSRI's connection with the Diocese of Providence (here none) for purposes of listing SJHSRI in the Official Catholic Directory

The Diocesan Defendants contend that any inquiry into whether SJHSRI met Internal Revenue Service criteria for listing in the Official Catholic Directory as a subsidiary organization of the Catholic Church is barred by the First Amendment. See Diocesan Defendants' Memo. at 46-47. They contend that the Dioceses is the sole arbiter of "who is within its religious community." Id. at 47.

This argument ignores that the Diocese itself, as quoted in the First Amended Complaint, has publicly declared that SJHSRI lacked any legitimate connection with the

Diocese after the 2014 Asset Sale. When the Diocese Defendants insist that Plaintiffs "strive to minimize" the connection with the Diocese "as 'moot' after the 2014 Asset Sale," Diocesan Defendants' Memo. at 46, they omit that such "striving" consists of quoting the Diocese's own spokesperson who described the Bishop's role at SJHSRI as "mooted". See FAC ¶¶ 161-62.

The only authority cited for the Diocesan Defendants' constitutional argument is Overall v. Ascension, 23 F. Supp. 3d 816 (E.D. Mich. 2014). While there is some dicta in Overall cautioning against judicial inquiry into "a church's polity, administration, and community," id. at 832, the court found that plaintiffs lacked Article III standing to challenge their pension plan's purported church plan status, because they failed to allege any injury caused by the plan's claim of exemption from ERISA. See id. at 833 ("The [Complaint] does not allege any specific or concrete injury suffered by plaintiff as a consequence of being a participant in a church plan. The ERISA allegations, which are incorporated by reference, are of the same order. The allegations are not specific as to harms allegedly suffered by plaintiff as a result of the alleged ERISA violations."). Here, in contrast, Plaintiffs have amply alleged numerous such injuries. The logical extension of the Diocesan Defendants' argument is that no one could ever second guess the Diocese's declarations of religious affiliation (no matter how absurd), and the Diocese would be free to sell tax or ERISA exemptions to supermarkets, bus terminals, and driving ranges.

IV. Count VIII (Fraudulent Scheme) should not be dismissed

The Diocesan Defendants, without making any separate arguments, join Angell's arguments that "'fraudulent scheme' is not an independent cause of action under Rhode

Island Law." Diocesan Defendants' Memo. at 8. For the reasons briefly stated *supra* and more extensively stated in opposition to the Prospect Entities' motion to dismiss, "fraudulent scheme" is a valid cause of action in Rhode Island and should not be dismissed. See Plaintiffs' Opp. Prospect MTD at 82-85.

V. Count IX (Conspiracy) should not be dismissed

A. Elements of civil conspiracy

"Conspiracy is an agreement by 'two or more persons to commit an unlawful act or to perform a lawful act for an unlawful purpose.'" State v. Disla, 874 A.2d 190, 196 (R.I. 2005). Civil conspiracy is "a means for establishing joint liability for other tortious conduct; therefore, it 'requires a valid underlying intentional tort theory.'" Read & Lundy, Inc. v. Washington Trust Co. of Westerly, 840 A.2d 1099, 1102 (R.I. 2004). "'Once an agreement has been made, no further action in furtherance of the conspiracy is necessary to find a defendant guilty of the crime of conspiracy.'" State v. Tully, No. 2013-282-C.A., 2015 WL 1012366, at *10 (R.I. Mar. 9, 2015) (quoting State v. Disla, 874 A.2d 190, 197 (R.I. 2005) (quoting State v. Lassiter, 836 A.2d 1096, 1104 (R.I. 2003))). Each conspirator "'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.'" State v. Mastracchio, 612 A.2d 698, 706 (R.I. 1992) (quoting State v. Gordon, 508 A.2d 1339, 1349 (R.I. 1986)). "It is not necessary, to render one criminally liable as a conspirator, that he should have participated in the fraudulent scheme with the view of obtaining any pecuniary advantage for himself." State v. Bellin, 181 A. 804, 814 (R.I. 1935).

"A tacit understanding or a wink and a nod can be sufficient" to form a conspiracy. Steward Health Care Sys., LLC v. Blue Cross & Blue Shield of Rhode Island, 311 F. Supp. 3d 468, 494 (D.R.I. 2018) (Smith, C.J.). Even on summary judgment, courts should not "slice and dice the record in a way that scrutinizes each individual piece of evidence for conspiratorial motive." Steward Health Care Sys., 311 F. Supp. 3d at 494. "Rather, the Court must evaluate the evidence based on its aggregate effect, and draw reasonable inferences from the evidence as a whole." Id. Conspirators generally do not take faithful notes of their conspiracies. See Zorzit v. Comptroller, 123 A.3d 627, 629 n.1 (Md. App. 2015) (quoting The Wire: Straight + True, Season 3, Episode 5) ("SHAMROCK: Robert Rules say we gotta have minutes for a meeting, right? These the minutes. STRINGER BELL: [I]s you taking notes on a criminal ... conspiracy?").

In addition:

> A defendant cannot escape criminal responsibility on the grounds that he or she did not join the conspiracy until well after its inception. Thus, one who joins a conspiracy after its formation is equally culpable with the original members and is deemed to have adopted prior acts and declarations of the conspirators made after the formation and in furtherance of the conspiracy. In other words, one who comes into a conspiracy after it has been formed with knowledge of its existence and with a purpose of forwarding its designs is as guilty as though he or she had participated in its original formation, and this is true even if he or she played only a minor role in the conspiracy.

16 Am. Jur. 2d Conspiracy § 21 (footnotes omitted).

The Diocesan Defendants contend that the pleading standard for conspiracy is governed by Stubbs v. Taft, 149 A.2d 706, 708 (R.I. 1959) and Smith v. O'Connell, 997 F. Supp. 226, 230 (D.R.I. 1998). See Diocesan Defendants' Memo. at 47, 53-54.

Stubbs, however, predated Rhode Island's adoption in 1966 of the modern Superior Court Rules of Civil Procedure, patterned on the Federal Rules.[36] Smith v. O'Connell was decided on summary judgment. See id., 997 F. Supp. at 241. For obvious reasons, the standards for pleading of evidence under the pre-modern rules, as well as production of evidence at the summary judgment stage under the modern rules, are different from the applicable pleading rules at the motion to dismiss stage.

B. The Amended Complaint sufficiently alleges an improper agreement concerning the listing of SJHSRI in the Official Catholic Directory

1. The OCD listing was improper

The Diocesan Defendants incorporate their prior argument and contend that "there was nothing false about SJHSRI's listing in the OCD following the 2014 Asset sale". Diocesan Defendants' Memo. at 48. Plaintiffs, for the reasons set forth in the First Amended Complaint and discussed *supra*, completely disagree. The listing was even false on its face, since the Diocesan Defendants listed the Prospect Defendants' agent Otis Brown as the contact person for SJHSRI, so that the Prospect Defendants could help run interference on any inquiries into the Plan's falsely claimed church plan status.[37]

[36] See Kent, Simpson, Flanders, Wollin, Rhode Island Civil Procedure § 1:1 (Superior Court Rules of Civil Procedure "became effective on January 10, 1966.").

[37] FAC ¶¶ 186-87, 194.

2. The Diocesan Defendants continue to misunderstand the significance of the allegations regarding the Official Catholic Directory listing

The Diocesan Defendants reiterate their prior argument that "the Amended Complaint improperly conflates listing in the OCD with the ability of the Plan to remain a church plan." Diocesan Defendants' Memo. at 48. As previously discussed, this purported conflation is a figment of the Diocesan Defendants' imagination. Listing SJHSRI in the Official Catholic Directory after 2014 facilitated the mistreatment of the Plan as an ERISA-exempt church plan. Indeed, that was the reason why SJHSRI was even being listed at all, after it disposed of its hospital assets in 2014.[38]

The Diocesan Defendants also contend: "There is no requirement for a principal purpose organization for listing in the OCD." Diocesan Defendants' Memo. at 49. This observation is reminiscent of Alice's observation that a book "had no pictures nor conversations in it, 'and what is the use of a book,' thought Alice, 'without pictures or conversations?'"[39] The Official Catholic Directory, as the official listing of organizations entitled to tax exemption under 501(c)(3) of the Internal Revenue Code pursuant to the group ruling issued by the IRS to the U.S. Conference of Catholic Bishops, has criteria for being listed. SJHSRI did not meet those criteria, but nevertheless was listed, accomplishing a tortious result.

[38] See FAC ¶ 188 (quoting 2014 email correspondence between SJHSRI's attorney and the Diocesan Defendants, stating: "SJHSRI believes that if it is not included in the 2015 issue of the directory that the pension plan will no longer qualify as a church plan and that the loss of that status will require that they immediately notify the applicable governmental authorities that the plan is currently underfunded."); FAC ¶ 189 ("In response, Corporation Sole, Diocesan Administration, and Diocesan Service on December 31, 2014 again improperly agreed that SJHSRI would remain in the Catholic Directory. . . .".

[39] Lewis Carroll, Alice's Adventures in Wonderland (1886 ed.) at 1.

3. Other allegations do not undermine Plaintiffs' allegations concerning the OCD, and in any event Plaintiffs are permitted to plead in the alternative

The Diocesan Defendants contend since "SJHSRI had a history of listing in the OCD prior to 2015," there "was nothing out of the ordinary then with the continued listing of the SJHSRI in the OCD after 2014 Asset Sale." Diocesan Defendants' Memo. at 49. This assertion rests on improperly ignoring all the allegations of the First Amended Complaint explaining in detail why it was wrongful. See FAC ¶¶ 183-94. The First Amended Complaint sets forth in detail, with respect to specific communications among specific persons on specific dates, how SJHSRI came to still[40] be listed in the Official Catholic Directory after the 2014 Asset Sale and the reasons for doing so.

The Diocesan Defendants point to an email that Chancellor Reilly sent to Prospect's agent Otis Brown on November 11, 2014[41] initially indicating that SJHSRI was "not eligible for listing," and infer from this email that Chancellor Reilly was "performing the function as gatekeeper to the OCD, so that no organization would be listed improperly." Diocesan Defendants' Memo. at 50. This email is discussed in the First Amended Complaint, see id. ¶ 185, and actually supports Plaintiffs' claims. It is an admission that the Diocesan Defendants (as well as the other Defendants) actually knew that SJHSRI was not eligible for listing, and yet later performed an about-face.

[40] The Diocesan Defendants' reference to "continued listing" ignores that SJHSRI's listing was modified from that of a "hospital" to that of a "miscellaneous entity," and that a representative of Prospect (not SJHSRI) was listed as the contact person since 2015. See FAC ¶¶ 190, 194.

[41] The Diocesan Defendants attach an incomplete email chain to their motion, omitting the identity of the email's respondent who insisted that SJHSRI was still eligible for listing.

Despite their insistence, the Diocesan Defendants are not entitled to have any contrary inferences drawn in their favor on a motion to dismiss.

The Diocesan Defendants insist that Chancellor Reilly's email stemmed from his mistaken understanding of various facts regarding SJHSRI's ineligibility for listing in the Official Catholic Directory. See Diocesan Defendants' Memo. at 50 n.39. That is an argument for the jury, certainly not an argument that belongs in a motion to dismiss.

The Diocesan Defendants also reiterate their prior argument, based on amended Articles of Incorporation that are outside the pleadings on this motion to dismiss, that Defendant Roman Catholic Bishop of Providence had a complete veto over SJHSRI's sale of hospital assets and therefore did not need an additional veto over SJHSRI's listing in or deletion from the Official Catholic Directory in order to be able to veto the 2014 Asset Sale. See Diocesan Defendants' Memo. at 51. This argument, as discussed *supra* at 13-13 and 40, obscures that, far from wanting to veto the 2014 Asset Sale, the Diocesan Defendants desired its consummation as means of getting Fatima into the hands of an entity who (fraudulently) would claim to have no pension liability. The fact that the Diocesan Defendants could extract $638,838.25 in proceeds from the sale, see FAC ¶¶ 206-10, was simply the cherry on top.[42]

The Diocesan Defendants also contend that "the presentation at the September 12, 2013 meeting to the Diocesan Finance Council . . . does not reflect an offer directed

[42] The Diocesan Defendants characterize this receipt of $638,838.25 as "hardly an improper 'kickback,' but simply in satisfaction of a preexisting debt to a lender." Diocesan Defendants' Memo. at 52 n.42. "Kickback" is the Diocesan Defendants' term, not Plaintiffs'. In any event, Plaintiffs are entitled to a contrary inference, based on the allegations in the First Amended Complaint, that this money was recoupment of a bad debt, i.e. money that the Diocesan Defendants would not have obtained from SJHSRI (which was insolvent) if the 2014 Asset Sale had not been consummated with the Diocesan Defendants' blessing.

at the Diocesan Defendants, let alone the 'quid pro quo' described in the Amended Complaint." Diocesan Defendants' Memo. at 51. Plaintiffs are unaware of the September 12, 2013 meeting to which the Diocesan Defendants are referring.[43] The meeting discussed in the First Amended Complaint occurred on September 17, 2013. See FAC ¶ 166.

In any event, the Diocesan Defendants immediately undercut their contention that Diocesan Finance Council did not discuss any "quid pro quo". The PowerPoint presentation[44] that they improperly attach to their motion discussed both the Catholicity covenants and rights that the Diocesan Defendants would obtain in the post-sale for-profit hospitals, but also "Requirements" that included "Maintain the retirement plan of St. Joseph Health Services of Rhode Island as a 'Church Plan'". See Diocesan Defendants' Memo. at 51-52 (copying and pasting a portion of their exhibit). In other words, while this document sets forth both a "quid" and a "quo," the Diocesan Defendants insist the two should not be considered a "quid pro quo".

After attempting "to put a more positive spin on the allegations,"[45] the Diocesan Defendants return to insisting that Stubbs v. Taft, 149 A.2d 706 (R.I. 1959) governs the

[43] Plaintiffs suspect, but do not know, that the Diocesan Defendants are misreading the date of the PowerPoint deck that they have attached to their motion to be the date of the subsequent Diocesan Finance Council meeting. Such misreadings are one of the dangers of the Diocesan Defendants' inappropriate tactic of basing their motion to dismiss on wads of paper they have attached to their motion instead of basing it on the actual allegations of the First Amended Complaint.

[44] Of course, while a PowerPoint presentation prepared in advance of a meeting is some evidence of what was expected to be discussed at such a meeting, it does not and cannot purport to be a transcription of the meeting's actual discussions.

[45] Cf. U.S. ex rel. Barko v. Halliburton Co., 952 F. Supp. 2d 108, 113 (D.D.C. 2013) ("Although KBR attempts to put a more positive spin on the allegations, Barko gives sufficient facts to survive a motion to dismiss."). The Diocesan Defendants, for their part, insist it is Plaintiffs who are engaging in "spin". See Diocesan Defendants' Memo. at 53. Motions to dismiss are not a figure skating competition, however, and it is unnecessary for the Court at this juncture to determine which parties are spinning the most.

pleading standard for conspiracy claims. As discussed *supra* at 55-56, Stubbs predated Rhode Island's adoption of the modern Superior Court Rules of Civil Procedure and does not even govern the pleading standard under those rules, much less under the Federal Rules of Civil Procedure.

The other cases the Diocesan Defendants string-cite without explanation are likewise distinguishable. See Diocesan Defendants' Memo. at 54 (citing RSM Prod. Corp. v. Freshfields Bruckhaus Deringer U.S. LLP, 682 F.3d 1043 (D.C. Cir. 2012) and Advanced Tech. Corp. v. Instron, Inc., 925 F. Supp. 2d 170 (D. Mass. 2013)). In RSM Prod. Corp., the plaintiff failed to allege any facts suggesting the defendant was aware of the alleged bribery scheme, much less participated in it,[46] whereas here the First Amended Complaint details specific discussions in which the Diocesan Defendants' participated on particular dates. In Instron, the alleged conspiracy to rig the vote of an industrial standards committee was implausible for various reasons, including because the plaintiff had alleged that either defendant, acting alone, could dictate the outcome of the committee's vote without the participation of the other defendant. See Instron, 925 F. Supp. 2d at 180. Here, the Diocesan Defendants could not accomplish their objectives of "a consistent Catholic health care presence in the Diocese" unburdened by the pension obligations, in addition to extraction of almost $640,000 in sale proceeds, if the 2014 Asset Sale were not consummated with the participation of the other coconspirators. See FAC ¶¶ 320, 206.

[46] See RSM Prod. Corp., 682 F.3d at 1050-51.

C. The Amended Complaint alleges sufficient facts concerning the Diocesan Defendants' tortious conduct concerning the 2014 Asset Sale

1. Disclosure to the state regulators is still not disclosure to Plaintiffs, and Plaintiffs have sufficiently alleged underlying predicate wrongs to support a claim for conspiracy

The Diocesan Defendants reiterate their earlier argument that various disclosures about the 2014 Asset Sale were given to the state regulators. See *supra* at 11, 33. This argument continues to mistake Plaintiffs, who did not receive any disclosures, for the state regulators, who were also misled.

The Diocesan Defendants also add citations to Eclectic Properties E., LLC v. Marcus & Millichap Co., 751 F.3d 990 (9th Cir. 2014), Fogarty v. Palumbo, 163 A.3d 526 (R.I. 2017), and Precision Assocs., Inc. v. Panalpina World Transp. (Holding) Ltd., No. 08-CV-00042 JG VVP, 2015 WL 4987751 (E.D.N.Y. Aug. 19, 2015), all of which are distinguishable.

Eclectic Properties E., LLC is addressed *supra* at 16-18, in connection with the Diocesan Defendants' "Great Recession" argument.

In Fogarty, the plaintiff alleged that the defendant attorney tortiously interfered with a contract or contractual expectations, committed legal malpractice, fraudulently breached fiduciary duties, and conspired with a codefendant to commit those various alleged tortious acts. The Rhode Island Supreme Court affirmed summary judgment for the defendant attorney on the grounds that there was no contract[47] or contractual

[47] See Fogarty, 163 A.3d at 539.

expectations,[48] that the attorney had no attorney-client relationship[49] with the plaintiff, that he owed plaintiff no fiduciary duties,[50] and that accordingly he had neither committed any wrongful acts nor conspired with anyone to do so. See Fogarty, 163 A.3d at 543. As noted, all of this was decided on summary judgment, not a motion to dismiss, and on wildly distinguishable facts.

In Precision Associates, Inc., the district court dismissed antitrust conspiracy claims against one set of defendants (the DHL defendants) relating to alleged acts occurring after the date the plaintiffs' pleadings indicated the DHL defendants had withdrawn from the alleged conspiracy. According to Plaintiff's own allegations (asserted in a "Corrected Third Amended Complaint"), the DHL defendants had "turned [themselves] in" to "multiple antitrust enforcers around the world in exchange for cooperating against other co-conspirators," 2015 WL 4987751, at *4, and accordingly had withdrawn from the alleged conspiracy, thereby severing their liability for subsequent acts.[51] Here, there is no allegation that the Diocesan Defendants abandoned the alleged conspiracy, either before or after the 2014 Asset Sale. See FAC ¶¶ 109-10 (listing SJHSRI in the Official Catholic Directory in years before and after 2015).

[48] See Fogarty, 163 A.3d at 540.

[49] See Fogarty, 163 A.3d at 541.

[50] See Fogarty, 163 A.3d at 543.

[51] The district court also, as an independent basis for dismissal, concluded the plaintiffs' pleadings did not allege any facts suggesting that the alleged conspiracy continued to exist after the DHL defendants started cooperating with law enforcement. See Precision Assocs., Inc., 2015 WL 4987751, at *5 ("While the allegations in the CTAC that establish DHL's withdrawal in October 2007 are fatal to the plaintiffs' position, so too is the dearth of factual allegations that the conspiracy extended until January 2011.")

The Diocesan Defendants baldly accuse Plaintiffs of basing their claims on "pejorative word choice throughout the Amended Complaint." Diocesan Defendants' Memo. at 54. They refer back to an earlier portion of their memorandum citing Kowal v. MCI Commc'ns Corp., 16 F.3d 1271, 1277 (D.C. Cir. 1994), which stands for the obviously correct but utterly irrelevant principle that securities market participants have a duty to make public disclosures of facts but have no duty to also offer "pejorative characterizations" of those facts. See Kowal v. MCI Commc'ns Corp., No. CIV. A. 90-2862 JGP, 1992 WL 121378, at *4 (D.D.C. May 20, 1992) ("The law simply does not impose a duty to disclose 'pejorative characterizations' of a company's operations or business prospects."), aff'd, 16 F.3d 1271, 1277 (D.C. Cir. 1994) ("We agree with the district court that many of plaintiffs' allegations called for pejorative characterizations of disclosed factual matters. Since the use of a particular pejorative adjective will not alter the total mix of information available to the investing public, such statements are immaterial as a matter of law and cannot serve as the basis of a 10b–5 action under any theory."). Thus the Diocesan Defendants have taken a case holding that defendants are not required to use pejorative words and transmogrified it into a holding that Plaintiffs are not allowed to use pejorative words. That is a complete non sequitur and a good indication of how far the Diocesan Defendants will misstate the applicability of their string-cited cases.

2. Plaintiffs have still sufficiently pled that the Bishop's letters to the Health Services Council and to the Vatican were wrongful

The Diocesan Defendants reiterate their prior self-serving characterizations of the Bishop's letters to the Health Services Council and to the Vatican, discussed *supra*

at 41-43. This time they also add the following *argumentum ad consequentiam*[52] about their impermissible motives, which Plaintiffs utterly dispute:

> And here, both letters on their face are far more consistent with a lawful purpose: the Bishop was deeply interested in doing what he could to help a community hospital system that all agree was suffering unsustainable losses.
>
> Plaintiffs are completely unconstrained and need not balance the many critically important interests that were at play in this decision: whether that hospital system would survive? whether the system would have access to sufficient capital to succeed? where and how healthcare would be delivered, if at all, to the underserved populations that had used that hospital system for decades?

Diocesan Defendants' Memo. at 55 (insisting Bishop Tobin's letters reflected "consideration of such interests") (citations to the Diocesan Defendants' own papers omitted). The Diocesan Defendants will perhaps have an opportunity to present such vainglories—about why they felt compelled to sacrifice pensioners to maintain a Catholic healthcare presence in the Diocese—to the jury. Fraud committed to "save the business"[53] is still fraud, and no ends justify unlawful means. They certainly do not belong in a motion to dismiss.

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[52] Like all improper arguments, argumenta *ad consequentiam* are disfavored in the First Circuit. See, e.g., United States v. Coker, 433 F.3d 39, 52 n.13 (1st Cir. 2005) (Howard, J. concurring) ("I acknowledge the merit of our concurring colleague's well articulated prudential concerns, but I cannot join his analysis of whether there has been a Sixth Amendment violation, because the analysis is in my view *argumentum ad consequentiam*.")

[53] See Eagle Pac. Ins. Co. v. Christensen Motor Yacht Corp., 959 P.2d 1052, 1060 (Wash. 1998) (en banc) "Because the assets were transferred to CSL to avoid the reach of the creditors, the transaction is fraudulent and successor liability attaches to CSL. The fact that the transaction was designed to 'save the business' does not defeat imposition of successor liability."); In re Blake-Ware, 155 B.R. 476, 478 (Bankr. N.D. Ill. 1993) ("[Debtor] intentionally embarked on a check kiting scheme in a desperate effort to save her business. The effort failed, and she got caught. Now she must face the consequences of her fraudulent scheme.") (debt held nondischargable because of fraud). See also In re MarketXT Holdings Corp., 426 B.R. 467, 474–75 (Bankr. S.D.N.Y. 2010) ("If the Debtor, which was in obvious financial distress, wished to attempt to avoid the Softbank Payoff Agreement and benefit its creditors other than

The Diocesan Defendants proceed again to cite Eclectic Properties E., distinguished *supra* at 16-18. The Diocesan Defendants also cite Read & Lundy, Inc. v. Washington Tr. Co. of Westerly, No. PC99-2859, 2002 WL 31867868 (R.I. Super. Dec. 13, 2002)[54] in which the Superior Court entered summary judgment on the plaintiff's civil conspiracy claims, after having previously entered summary judgment on most of the underlying tort claims, and after plaintiff failed to produce competent evidence of any remaining tort claims. See id., 2002 WL 31867868, at *18-19. In the instant case, the Diocesan Defendants' motion is a motion to dismiss, not a motion for summary judgment, and certainly not a second motion for summary judgment.

D. Since Plaintiffs have sufficiently alleged conspiracy, the conduct and knowledge of the Diocesan Defendants' coconspirators may properly be imputed to the Diocesan Defendants

Under Rhode Island law, as elsewhere, co-conspirators' conduct and knowledge are imputed to other coconspirators. See *supra* at 54 (quoting *inter alia* State v. Mastracchio, 612 A.2d 698 (R.I. 1992)).

The Diocesan Defendants again contend that Plaintiffs have not sufficiently alleged any conspiracy, a contention that is still incorrect no matter how many times the Diocesan Defendants reiterate it. This time, they again cite RSM Prod. Corp. v.

Softbank, its remedy was not to conceal assets by transferring them to EIF but to file a Chapter 11 petition or take other lawful action.").

[54] Curiously, the Diocesan Defendants do not cite the Rhode Island Supreme Court's decision affirming the Superior Court's decision. See Read & Lundy, Inc. v. Washington Tr. Co. of Westerly, 840 A.2d 1099 (R.I. 2004).

Freshfields Bruckhaus Deringer U.S. LLP, 682 F.3d 1043 (D.C. Cir. 2012), discussed *supra* at 61-61.

The Diocesan Defendants also cite 16630 Southfield Ltd. P'ship v. Flagstar Bank, F.S.B., 727 F.3d 502 (6th Cir. 2013). See Diocesan Defendants' Memo. at 57. In that case, after having already refinanced a business loan once because of the borrowers' inability to pay, a bank declined to refinance a business loan for a second time, and, subsequently, was accused (in conclusory fashion) of discriminatory treatment of the borrowers because of their Iraqi origin in violation of the Equal Credit Opportunity Act. See 16630 Southfield Ltd. P'ship, 727 F.3d at 503. The Sixth Circuit affirmed dismissal of this discrimination claim as inadequately pled, because the plaintiffs "ha[d] not identified any similarly situated individuals whom [Defendant] Flagstar treated better" but instead "merely alleged their 'belief' that such people exist[ed]." Id. at 506. Noting "[t]o be sure, the mere existence of more likely alternative explanations does not automatically entitle a defendant to dismissal," id. at 505, the Sixth Circuit affirmed the district court's conclusion that in light of the "obvious alternative explanation" that the second refinancing had been denied in light of the prior history surrounding the first refinancing, the court concluded that plaintiffs were required to produce more than "naked assertions devoid of further factual enhancement" which they could not. Id. at 506.

Here, of course, Plaintiffs have offered well more than a hundred pages of factual enhancement in support of the First Amended Complaint which, together with its causes of action, comprises 558 paragraphs across 163 pages.

The Diocesan Defendants also contend that regardless of their alleged involvement in the conspiracy to consummate the 2014 Asset Sale, Plaintiffs have not adequately alleged the Diocesan Defendants' involvement in what they insist must have been "separate" schemes to "deceive regulators" and to accomplish the Cy Pres transfers. Diocesan Defendants' Memo. at 57-58. This contention about "separate" schemes has no basis in the First Amended Complaint, which alleges an overarching conspiracy to shield hospital assets from the pension liabilities. Obviously deceiving regulators was a component of Defendants' consummation of the 2014 Asset Sale, since regulatory approval was a precondition to closing. There is also no factual basis, and certainly none alleged in the First Amended Complaint, for suggesting the Diocesan Defendants had withdrawn from the Defendants' conspiracy by 2015 when the Cy Pres transfers occurred, which also protected assets from pension liabilities, by transferring them to Defendant Chartercare Foundation. Indeed, the Diocesan Defendants "saw to it" that SJHSRI was still improperly listed in the Official Catholic Directory in 2015 and in years thereafter.[55]

The Diocesan Defendants also insist that "there is nothing" in the September 2013 PowerPoint presentation, attached to their motion, concerning "the establishment of Chartercare Foundation." Diocesan Defendants' Memo. at 58. Of course not. Chartercare Foundation had already been established in 2007. Why would anyone be discussing establishing it in 2013?

[55] FAC ¶¶ 190-91.

VI. Counts XVI through XIX (civil liability under R.I. Gen. Laws § 9-1-2 for particular crimes) should not be dismissed

R.I. Gen. Laws § 9-1-2 provides:

> Whenever any person shall suffer any injury to his or her person, reputation, or estate by reason of the commission of any crime or offense, he or she may recover his or her damages for the injury in a civil action against the offender, and it shall not be any defense to such action that no criminal complaint for the crime or offense has been made; and whenever any person shall be guilty of larceny, he or she shall be liable to the owner of the money or articles taken for twice the value thereof, unless the money or articles are restored, and for the value thereof in case of restoration.

R.I. Gen. Laws § 9-1-2.

"The purpose of § 9–1–2 is to provide an injured party civil remedies regardless of whether the defendant has been convicted of the underlying offense." Cady v. IMC Mortg. Co., 862 A.2d 202, 215 (R.I. 2004). "To prevail in a civil action, a plaintiff is required to prove his case by a preponderance of the evidence." Id.

R.I. Gen. Laws § 9-1-2 provides a civil remedy for violations of federal criminal law no less than for violations of Rhode Island criminal law. See Mello v. DaLomba, 798 A.2d 405, 411 (R.I. 2002) ("Furthermore, the trial justice erred by assuming that defendants' could not be civilly liable for federal criminal conduct under § 9–1–2 because there is no such limitation within the statute.") (reversing entry of judgment as a matter of law in favor of defendants for violations of federal anti-kickback statute). See also Transamerica Life Ins. Co. v. Caramadre, No. CV 09-470 S, 2017 WL 752145, at *3 (D.R.I. Feb. 27, 2017) (Smith, C.J.) (entering judgment in favor of plaintiffs on claims under § 9-1-2 for criminal violations of both federal and state law); Cady v. IMC

Mortg. Co., 862 A.2d 202, 215 (R.I. 2004) (affirming judgment under R.I. Gen. Laws § 9-1-2 in favor of plaintiff for violations of federal anti-wiretapping statute).

Under Rhode Island law, 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;[56] R.I. Gen. Laws § 11-1-3.[57] Likewise, whoever aids and abets or procures the commission of an offense against the United States is criminally liable as a principal. See 18 U.S.C. § 2.

As to the Diocesan Defendants, Plaintiffs allege they were injured by four sets of crimes:

- The Diocesan Defendants' participation in violations of R.I. Gen. Laws § 23-17.14-30, which makes it a crime to "knowingly violate[ ] or fail[ ] to comply with any provision of this chapter or willingly or knowingly give[ ] false or incorrect information" (Count XVI);
- The Diocesan Defendants' aiding and assisting SJHSRI's filing of false tax returns, in violation of 26 U.S.C. § 7206(2) (Count XVII);
- The Diocesan Defendants' participation in "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," in violation of R.I. Gen. Laws § 11-18-1 (Count XVIII); and
- The Diocesan Defendants' participation in obtaining property by false pretenses, in violation of R.I. Gen. Laws § 11-41-4 (Count XIX).

[56] R.I. Gen. Laws § 11-1-6 provides: "Except as otherwise provided by law, every person who shall conspire with another to commit an offense punishable under the laws of this state shall be subject to the same fine and imprisonment as pertain to the offense which the person shall have conspired to commit, provided that imprisonment for the conspiracy shall not exceed ten (10) years."

[57] R.I. Gen. Laws § 11-1-3 provides: "Every person who shall aid, assist, abet, counsel, hire, command, or procure another to commit any crime or offense, shall be proceeded against as principal or as an accessory before the fact, according to the nature of the offense committed, and upon conviction shall suffer the like punishment as the principal offender is subject to by this title."

In other words, in the course of committing the other alleged torts, the Diocesan Defendants also participated in committing various crimes injuring Plaintiffs, for which Rhode Island provides a civil cause of action.

1. Violations of the Rhode Island Hospital Conversions Act and/or giving false or incorrect information

a. Elements of violations of the Rhode Island Hospital Conversions Act and/or giving false or incorrect information

R.I. Gen. Laws § 23-17.14-30 provides in relevant part:

> If any person **knowingly violates or fails to comply with any provision of this chapter** [The Hospital Conversions Act] **or willingly or knowingly gives false or incorrect information**:
>
> * * *
>
> (2) The Superior Court may, after notice and opportunity for a prompt and fair hearing, may impose a fine of not more than one million dollars ($1,000,000) **or impose a prison term** of not more than five (5) years.

R.I. Gen. Laws § 23-17.14-30 (emphasis supplied).

There is no case law yet applying R.I. Gen. Laws § 23-17.14-30. According to the plain meaning of the statute, it criminalizes "knowingly violat[ing] or fail[ing] to comply" with any provision of the Hospital Conversion Act and/or "willingly or knowingly giv[ing] false or incorrect information" in connection with hospital conversions. Reliance or deception is not mentioned—and therefore is not—an element of this statutory crime. Cf. Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 648 (2008) ("If petitioners' proposed requirement of first-party reliance seems to come out of nowhere, there is a reason: Nothing on the face of the relevant statutory provisions imposes such a requirement.").

b. Diocesan Defendants' violations of the Rhode Island Hospital Conversions Act and/or giving false or incorrect information

The First Amended Complaint alleges the Diocesan Defendants committed this crime, causing injuries to Plaintiffs for which there is civil liability under R.I. Gen. Laws § 9-1-2. See FAC ¶¶ 531-34. Their violations include sending Bishop Tobin's February 14, 2014 letter to the Health Services Council, in which the Diocesan Defendants gave false or incorrect information about their beliefs concerning the impact of the 2014 Asset Sale on the Plan. FAC ¶¶ 320-21. They also include participating in the other Defendants' violations in connection with the overall scheme and conspiracy. All of these violations caused injuries to Plaintiffs.

2. Aiding or assisting the filing of false tax returns

a. Elements of aiding or assisting the filing of false tax returns

26 U.S.C. § 7206 provides in relevant part:

> Any person who--
>
> * * *
>
> (2) Aid or assistance.--Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document;
>
> * * *
>
> **shall be guilty of a felony** and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or

> imprisoned not more than 3 years, or both, together with the costs of prosecution.

26 U.S.C. § 7206(2) (emphasis supplied). "[T]he elements of a violation of § 7206(2) include, inter alia, that the document in question was false as to a material matter and that the defendant acted willfully." Kawashima v. Holder, 565 U.S. 478, 484 (2012). "The identity of the principal need not be established, nor need the principal be convicted." United States v. Campa, 679 F.2d 1006, 1013 (1st Cir. 1982) (discussing aiding and abetting generally); United States v. Salerno, 330 F. Supp. 1401, 1402 (M.D. Pa. 1971) (it is "not a prerequisite to the conviction of the aider and abettor that the principal be convicted or even, in fact, identified") (discussing violations of 26 U.S.C. § 7206(2)). "Reliance by the government on the fraudulent information provided cannot be an element of a criminal tax offense." United States v. Monteiro, 871 F.2d 204, 210 (1st Cir. 1989) (noting that if reliance were required, "no undercover operation in this area would be effective because government knowledge that the information provided was false would preclude a conviction").

Section 7206(2) is "not limited to tax return 'preparers'." United States v. Wolfson, 573 F.2d 216, 225 (5th Cir. 1978). See id. ("If it is proved on remand that [defendant] knowingly gave a false appraisal [of donated yachts' value] with the expectation it would be used by the donor in taking a charitable deduction on a tax return, it would constitute a crime."). A "person can be convicted of aiding the filing of a false return even though he did not actually prepare it. All that is required is that he "knowingly participate in providing information that results in a materially fraudulent tax return, whether or not the taxpayer is aware of the false statements." United States v. Nealy, 729 F.2d 961, 963 (4th Cir. 1984). See, e.g., United States v. Fumo, 628 F.

Supp. 2d 573, 595 (E.D. Pa. 2007) (denying motion to dismiss indictment, where state senator made false statements to university's accountants misstating the purpose of university's polling expenditures).

The false or fraudulent document prepared by the defendant need not itself be filed with the IRS. See United States v. Monteiro, 871 F.2d 204, 210–11 (1st Cir. 1989). ("[T]he offense of aiding or assisting the preparation or presentation of a false or fraudulent tax document is certainly complete when the document has been presented to a person or entity which is required by law to transmit the information thereon to the IRS.") See also United States v. Cutler, 948 F.2d 691, 694–95 (10th Cir. 1991) (affirming conviction of defendant who "willfully provided false information to an intermediary required by law to file an informational return pertaining to the defendant") (citing Monteiro).

b. The Diocesan Defendants' aiding or assisting of SJHSRI's filing of false tax returns

The First Amended Complaint alleges the Diocesan Defendants violated 26 U.S.C. § 7206(2) in connection with SJHSRI's filing of Form 900 tax returns, causing injuries to Plaintiffs for which there is civil liability under R.I. Gen. Laws § 9-1-2. See FAC ¶¶ 183-205, 535-38. The Diocesan Defendants participated in fraudulently listing SJHSRI in the Official Catholic Directory under the Diocesan Defendants' sponsorship, so that SJHSRI could falsely claim the U.S. Conference of Catholic Bishops' 501(c)(3) exemption. This injured Plaintiffs by facilitating SJHSRI's improper claim of ERISA-exempt church plan status for the Plan before, during, and after the 2014 Asset Sale.

3. Giving false or erroneous documents

a. Elements of giving false or erroneous documents

R.I. Gen. Laws § 11-18-1 states as follows:

> § 11-18-1. Giving false document to agent, employee, or public official
>
> (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.
>
> (b) **Any person who violates any of the provisions of this section shall be deemed guilty of a misdemeanor**, and, upon conviction, shall be imprisoned, with or without hard labor, for a term not exceeding one year or be fined not exceeding one thousand dollars ($1,000).

R.I. Gen. Laws § 11-18-1 (emphasis supplied).

"The purpose of the statute is to protect the public and private entities named in the statute from fraud and deceit and the perversion which might result from the deceptive practices described." State v. Salvatore, 763 A.2d 985, 990 (R.I. 2001). To prove a violation, it is sufficient to prove that a "defendant caused a document to be prepared that was false or erroneous with an intent to mislead." State v. Smith, 662 A.2d 1171, 1177 (R.I. 1995). A violation is punishable as a crime, see R.I. Gen. Laws § 11-18-1(b), and is therefore actionable pursuant to R.I. Gen. Laws § 9-1-2. Here, again, reliance is not an element of the crime.

b. Diocesan Defendants' giving of false or erroneous documents

All of the false written statements disseminated by the Diocesan Defendants fall within the ambit of this statute. These include the Diocesan Defendants' direction to the editors of the Official Catholic Directory that SJHSRI remain listed, FAC ¶ 190, as well as the letters sent by Bishop Tobin to the Health Services Council and the Vatican seeking approval of the 2014 Asset Sale. FAC ¶¶ 320, 180. These violations also include participating in the other Defendants' violations in connection with the overall scheme and conspiracy. All of these violations caused injuries to Plaintiffs for which there is civil liability under R.I. Gen. Laws § 9-1-2.

4. Obtaining property by false pretenses

a. Elements of obtaining property by false pretenses

The crime of obtaining property by false pretenses is defined by R.I. Gen. Laws § 11-41-4 as follows:

> § 11-41-4. Obtaining property by false pretenses or personation
>
> Every person who shall obtain from another designedly, by any false pretense or pretenses, any **money**, goods, wares, **or other property**, with intent to cheat or defraud, and every person who shall personate another or who shall falsely represent himself or herself to be the agent or servant of another and shall receive any money or other property intended to be delivered to the person so personated, or to the alleged principal or master of that agent or servant, shall be deemed guilty of larceny.

R.I. Gen. Laws § 11-41-4 (emphasis supplied).

As quoted, the statute proscribes acquisition of either money or other property by false pretense(s). "The elements of obtaining money by false pretenses under § 11-41-4 are that the accused: (1) obtain money from another designedly, by any false

pretense or pretenses; and (2) with the intent to cheat or defraud." State v. Grant, 840 A.2d 541, 549 (R.I. 2004) (internal quotations omitted). "Under the statute, a false pretense may be a misrepresentation of a past or existing fact. A promise to perform a future act may also constitute a false pretense." State v. Letts, 986 A.2d 1006, 1011 (R.I. 2010) (citation omitted). The "intent to permanently deprive a victim of his or her money or property" is not an essential element under Rhode Island law. State v. LaRoche, 683 A.2d 989, 997 (R.I. 1996). Obtaining money or property by false pretenses is a statutory crime, hence "the language of the statute setting forth the crime contains all the essential elements of the offense." State v. Markarian, 551 A.2d 1178, 1180 (R.I. 1988). Since "neither the word victim nor its synonym appears" in the statute, even the existence of a victim is "not an essential element" of "obtaining property by false pretenses." Id. "Further, even proof that a victim has suffered no loss whatsoever or that the money fraudulently obtained has been repaid will not suffice as a defense." State v. Letts, 986 A.2d at 1012.

b. The Diocesan Defendants' obtaining money or property by false pretenses

The Diocesan Defendants committed the crime of obtaining property by false pretenses by participating in the fraudulent consummation of the 2014 Asset Sale, pursuant to which they obtained $638,838.25 in proceeds, and in which other Defendants obtained real estate and other property. Such crime caused injuries to Plaintiffs for which there is civil liability under R.I. Gen. Laws § 9-1-2.

B. The Amended Complaint sufficiently alleges injuries caused "by reason of" the violations of criminal law

1. The Diocesan Defendants' temporal arguments do not disprove causation

The Diocesan Defendants contend that because the Plan was already underfunded prior to 2014, none of the Diocesan Defendants' alleged crimes beginning in 2014 could have injured the Plan. Diocesan Defendants' Memo. at 60.

First, as a matter of chronological fact, the Diocesan Defendants are incorrect to assert that these crimes began in 2014. Defendants' violations of the Hospital Conversion Act began in 2013 when they first submitted their application for conversion.

Second, and more significantly, Defendants (including the Diocesan Defendants) injured the Plan by diverting assets that were available to pay pensions and by furthering SJHSRI's improper claim of ERISA-exempt church plan status for the Plan. The underfunding of the Plan and improper claim of ERISA exemption were not one-time events but ongoing wrongs as to which that the Diocesan Defendants conspired with other Defendants to perpetuate. Those wrongs also persisted during the three years of delay between the 2014 Asset Sale and the filing of the Receivership Petition, resulting in damages for that period (in addition to the period prior to the 2014 Asset Sale).

2. Plaintiffs' injuries are not too attenuated from Defendants' crimes

R.I. Gen. Laws § 9-1-2 provides a remedy for injuries caused "by reason of the commission of any crime or offense." The Diocesan Defendants contend that the phrase "by reason of" requires a "direct" link between the crime and the injury, not an

"indirect" link. Diocesan Defendants' Memo. at 61. This distinction between "direct" and "indirect" links does not have any basis in the statute, which "is an enabling act giving a person *injured as a result of* a crime or offense a right of action" for such injuries. Lyons v. Town of Scituate, 554 A.2d 1034, 1036 (R.I. 1989) (emphasis supplied); Mello v. DaLomba, 798 A.2d 405, 411 (R.I. 2002) (same).[58] That is certainly demonstrated by the allegations of the First Amended Complaint, which alleges that Defendants specifically intended to divert the assets away from paying Plan liabilities and specifically intended to deprive the Plan of ERISA protections. See, e.g., FAC ¶¶ 154-55.

a. Causation for Counts XVI, XVIII, and XIX

The Diocesan Defendants contend that Plaintiffs' injuries are too distant from the crimes relating to violations of the Hospital Conversion Act, giving of false documents, and obtaining of property by false pretenses to be compensable under R.I. Gen. Laws § 9-1-2. Diocesan Defendants' Memo. at 61. As noted above, these injuries were not only foreseeable but were the intended results of Defendants' crimes. They were directly inflicted by at least some of the Defendants (including SJHSRI) with the participation of the other Defendants.

The Diocesan Defendants again cite Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258 (1992), discussed *supra* at 20-20, in which the U.S. Supreme Court concluded that

[58] The Diocesan Defendants cite Cortellesso v. Cortellesso, No. C.A. NO. P.C. 95-457, 1997 WL 839911, at *8 (R.I. Super. Apr. 29, 1997) (Israel, J.), a Superior Court decision construing R.I. Gen. Laws § 9-1-2's phrase "by reason of" to mean "proximately caused by". Assuming (*arguendo*) that ordinary proximate causation is the correct standard, it is different from the standard that the Diocesan Defendants ask the Court to adopt here.

Congress, in creating a civil RICO cause of action, adopted the "direct-injury" limitation of the Clayton Act and therefore did not allow subrogees (plaintiffs subrogated to other victims' claims) to obtain treble damages. See Holmes, 503 U.S. at 272. Plaintiffs have not asserted any RICO claims in this action, whether federal RICO or state RICO. There can be no legitimate suggestion that the Rhode Island General Assembly, in enacting R.I. Gen. Laws § 9-1-2 in 1905, intended to adopt a standard from the Clayton Act which was enacted in 1914. In any event, Plaintiffs have alleged injuries directly flowing from Defendants' conduct which would satisfy even the standard articulated in Holmes. Plaintiffs are not merely "secondary victims" of Defendants' crimes, Holmes, 503 U.S. at 274, whose injuries were inflicted by other more direct victims.

b. Causation for Count XVII

The Diocesan Defendants contend that the IRS is the victim of the alleged tax crimes, not Plaintiffs. Diocesan Defendants' Memo. at 62. This is *ipse dixit* unsupported by any actual citation to applicable case law. The only citation the Diocesan Defendants offer is In re McNulty, 597 F.3d 344, 352 (6th Cir. 2010), in which a whistleblower who was fired for not participating in his employer's crimes was denied a writ of mandamus to enforce rights to restitution under the Crime Victims' Rights Act, 18 U.S.C. § 3771. In re McNulty, 597 F.3d at 349. The court reasoned that being wrongly fired was itself a tort claim rather than a criminal offense, and noted that the Crime Victims' Rights Act "was not enacted to short circuit civil litigation to those with valid civil remedies available." In re McNulty, 597 F.3d at 352, 352 n.8 (6th Cir. 2010). The court concluded McNulty was free to pursue those civil remedies against his former employer without being granted restitution in connection with criminal proceedings. See

id. Here, of course, Plaintiffs are seeking to enforce their civil remedies under a state statute that gives them a cause of action to recover damages caused by commission of a crime. Moreover, there are no pending criminal proceedings in which Plaintiffs could even ask for restitution, must less be granted it. And regardless, Plaintiffs do not assert claims under the Crime Victims' Rights Act and certainly do not seek mandamus under it.

The Diocesan Defendants contend that "a finding of 'direct injury' requires 'that the harm to the victim be closely related to the conduct inherent to the offense'" and that the "underfunding of a pension plan is in no way inherent to the offense of filing a false tax return". Diocesan Defendants' Memo. at 63 (quoting In re McNulty out of context). Again, Plaintiffs are not asserting rights under the Crime Victim Rights Act. The Court is not being asked to make any "finding of 'direct injury'" under that statute. The fact that *not every* filing of a false tax return is related to the underfunding of a pension plan does not foreclose that *this* filing was so related.

3. The alleged criminal violations are based on misrepresentations both to Plaintiffs and to the Regulators, and the latter are indeed actionable under R.I. Gen. Laws § 9-1-2

The Diocesan Defendants contend: "Where the alleged criminal violation is based on misrepresentations to a regulator—and not the plaintiffs—harm to those plaintiffs cannot have been caused 'by reason of' the underlying violation." Diocesan Defendants' Memo. at 63. This assertion lacks even a factual basis here, much less a legal basis, inasmuch as the Defendants' crimes included misrepresentations made directly to Plaintiffs.

The only purported legal support the Diocesan Defendants offer is yet another RICO case, Hemi Grp., LLC v. City of New York, N.Y., 559 U.S. 1 (2010), notwithstanding that Plaintiffs are still not asserting any RICO claims. In Hemi Grp., LLC, the City of New York attempted to assert the following RICO claim:

> According to the City, Hemi committed fraud by selling cigarettes to city residents and failing to submit the required customer information to the State. Without the reports from Hemi, the State could not pass on the information to the City, even if it had been so inclined. Some of the customers legally obligated to pay the cigarette tax to the City failed to do so. Because the City did not receive the customer information, it could not determine which customers had failed to pay the tax. The City thus could not pursue those customers for payment. The City thereby was injured in the amount of the portion of back taxes that were never collected.

Hemi Grp., LLC, 559 U.S. at 2. The Supreme Court rejected that RICO claim:

> Here, the City's theory of liability rests not just on separate actions, but separate actions carried out by separate parties. The City's theory thus requires that the Court extend RICO liability to situations where the defendant's fraud on the third party (the State) has made it easier for a fourth party (the taxpayer) to cause harm to the plaintiff (the City). Indeed, the fourth-party taxpayers here only caused harm to the City in the first place if they decided not to pay taxes they were legally obligated to pay. Put simply, Hemi's obligation was to file Jenkins Act reports with the State, not the City, and the City's harm was directly caused by the customers, not Hemi. The Court has never before stretched the causal chain of a RICO violation so far, and declines to do so today.

Hemi Grp., LLC, 559 U.S. at 2–3.

The Diocesan Defendants seize upon Hemi Grp., LLC's discussion of "different parties" and insist that Defendant SJHSRI is a "fourth party" who caused Plaintiffs' injuries. Diocesan Defendants' Memo. at 63. This is wrong. SJHSRI is not only the Diocesan Defendants' co-Defendant but their coconspirator. These are not "separate actions caused by separate parties" but the same action (assisting SJHSRI in filing a

fraudulent Form 990 to facilitate its pretense that the Plan was exempt from ERISA) caused by the same parties.

4. R.I. Gen. Laws § 9-1-2 grants Plaintiffs a remedy as victims of criminal conduct regardless of whether state actors have acted to seek any remedy

The Diocesan Defendants contend that Plaintiffs are barred from asserting claims under R.I. Gen. Laws § 9-1-2 for any of the alleged crimes, because "[t]he alleged direct victims here (the state regulators and the IRS) are perfectly capable of pursuing appropriate remedies under their regulatory and statutory authority, without broadening the universe of civil actions to indirect victims." Diocesan Defendants' Memo. at 64. This is apparently a public policy argument in favor of repealing R.I. Gen. Laws § 9-1-2, improperly directed to this Court instead of to the General Assembly. As noted *supra* at 69-69, "[t]he purpose of § 9-1-2 is to provide an injured party civil remedies regardless of whether the defendant has been convicted of the underlying offense." Cady v. IMC Mortg. Co., 862 A.2d 202, 215 (R.I. 2004). These civil remedies do not depend in any way on whether governments separately seek to enforce the criminal laws and impose criminal sanctions on the Defendants. Certain misrepresentations were made to the state regulators and the IRS, but the "victims" include the Plan participants.

The Diocesan Defendants' series of citations to cases declining to imply a civil remedy into various other statutes, see Diocesan Defendants' Memo. at 64-66, simply ignore that R.I. Gen. Laws § 9-1-2 expressly creates a civil remedy for violations of all Rhode Island and federal statutes. See *infra* at 85-92 (treating this argument in connection with the Diocesan Defendants' preemption arguments).

5. Plaintiffs' claims under R.I. Gen. Laws § 9-1-2 are not foreclosed by the Administrative Procedures Act or public policy

The Diocesan Defendants contend that violations of R.I. Gen. Laws § 23-17.14-30 relating to misrepresentations made to state regulators in Hospital Conversions Act proceedings cannot be actionable under R.I. Gen. Laws § 9-1-2, because that would permit an end-run around the procedures of the Rhode Island Administrative Procedures Act ("RIAPA"), R.I. Gen. Laws §§ 42-35-1 *et seq.* Diocesan Defendants' Memo. at 66-67.

This argument ignores that the Rhode Island Attorney General's insistence that the RIAPA does not even apply to Hospital Conversions Act proceedings, in which case there would be no RIAPA procedures to be circumvented:

> In reviewing the memoranda and attachments filed by the parties in this action on or about September 27, 2018, the Attorney General noted that certain defendants appear to have assumed that the Attorney General's power of review under the Hospital Conversions Act ("HCA"), R.I. Gen. Laws § 23-17.14-1 et seq., is subject to the requirements of the Administrative Procedures Act ("APA"), R.I. Gen. Laws § 42-35-1 et seq. For the reasons stated below, the Attorney General respectfully disagrees.

Exhibit 1[59] (elaborating upon the Attorney General's reasoning).

Moreover, the Diocesan Defendants' argument does not make sense even on its own terms. Why criminalize misrepresentations made in connection with a hospital conversion proceeding at all? Why even enact R.I. Gen. Laws § 23-17.14-30 in the first

[59] Exhibit 1 hereto is a brief that the Rhode Island Attorney General filed with the Superior Court making this legal argument on October 5, 2018, nearly two months before the Diocesan Defendants filed their motion to dismiss. The Court may consider this document in evaluating the meritless of the Diocesan Defendants' red-herring legal argument concerning the RIAPA, which has nothing to do with the First Amended Complaint or any of Plaintiffs' claims.

place? One reason is to have a remedy against suppliers of misinformation such as the Diocesan Defendants who were not themselves applicants and who, despite their participation, were not formal parties to the proceedings.

C. Count XVII is not preempted by federal law

1. R.I. Gen. Laws § 9-1-2 is not preempted by federal law

R.I. Gen. Laws § 9-1-2 provides a civil remedy for violations of federal criminal law no less than for violations of Rhode Island criminal law. See *supra* at 69-70 (discussing Mello v. DaLomba, 798 A.2d 405 (R.I. 2002), Transamerica Life Ins. Co. v. Caramadre, No. CV 09-470 S, 2017 WL 752145, at *3 (D.R.I. Feb. 27, 2017) (Smith, C.J.), and Cady v. IMC Mortg. Co., 862 A.2d 202 (R.I. 2004)). The Diocesan Defendants do not address any of this case law addressing the particular statute in question.

Instead, much of the Diocesan Defendants' memorandum is devoted to erecting and dismantling straw-man arguments about whether Congress intended to provide a private cause of action for violations of other various federal statutes (other than ERISA). These arguments misconceive Plaintiffs' crime-related claims, which are not brought directly under any federal statute but rather are brought under R.I. Gen. Laws § 9-1-2, which provides a private cause of action for persons injured by criminal violations regardless of whether Congress also intended to provide one. In other words, the question is not whether Congress has created a private cause of action but whether Congress has foreclosed Rhode Island from doing so. "[T]he absence of a private right of action in a federal statute actually weighs *against* preemption." Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 582 (7th Cir. 2012) (emphasis in the original).

As the Seventh Circuit has explained, the Diocesan Defendants' "preemption" / "end run"[60] argument is mistaken at its core:

> In addition to its formal preemption argument, USA Funds argues that Bible's state law claim is **"preempted"** because it is nothing more than a "disguised claim" for a violation of the HEA [Higher Education Act of 1965], and the HEA does not provide a private right of action. We considered and rejected this same theory in *Wigod* [*v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012)]. There the defendant-lender referred to it as an **"end-run"** theory rather than a "disguised claim" theory. The difference is merely semantic. **The defense theory in both cases is that the lack of a private right of action under a regulatory statute necessarily preempts or otherwise displaces a state law cause of action that makes the violation of that regulatory statute an element of the claim. This theory is mistaken at its core**: "The absence of a private right of action from a federal statute provides no reason to dismiss a claim under a state law just because it refers to or incorporates some element of the federal law. To find otherwise would require adopting the novel presumption that where Congress provides no remedy under federal law, state law may not afford one in its stead." *Wigod*, 673 F.3d at 581 (citation omitted).
>
> * * *
>
> We reiterate the lesson from *Wigod*. The absence of a private right of action under federal law provides no reason to dismiss a state law claim just because the claim refers to or incorporates some element of the federal law. **Congress's decision not to supply a remedy under federal law does not necessarily mean that it also intended to displace state law remedies.** The lack of a private right of action under the HEA itself does not preclude Bible's breach of contract claim.
>
> [Emphasis supplied]

Bible v. United Student Aid Funds, Inc., 799 F.3d 633, 654–55 (7th Cir. 2015).

[60] Diocesan Defendants' Memo. at 67 ("Count XVII Must Be Dismissed Because R.I. Gen. Laws § 9-1-2 Is Preempted By Federal Law And Would Constitute An Impermissible End Run Around The Lack Of A Private Right Of Action Under The Internal Revenue Code") (emphasis supplied).

The Diocesan Defendants' argument has also been rejected in the specific context of states' regulation of the submitting of false documents to the federal Internal Revenue Service. In State v. Radzvilowicz, 703 A.2d 767 (Conn. App. 1997), the defendant was convicted under state criminal law for forgery of federal income tax documents submitted to the federal Internal Revenue Service. On appeal, the defendant unsuccessfully argued that his criminal prosecution was preempted by federal law. See id. at 784. Like the Diocesan Defendants, Radzvilowicz argued that 26 U.S.C. § 7206 provides the exclusive remedy for submitting false documents to the Internal Revenue Service. That argument was rejected.

> It has been said that "[s]ince the Federal Criminal Code confers upon the District Courts of the United States original jurisdiction, exclusive of state courts, of 'all offenses against the laws of the United States,' such courts by virtue of such provision of course have original and exclusive jurisdiction of prosecutions for offenses against the tax laws of the United States or more specifically, in violation of the Internal Revenue Code." 35 Am.Jur.2d 175, Federal Tax Enforcement § 125 (1967). Under 18 U.S.C. § 3231, "[t]he district courts of the United States shall have original jurisdiction, exclusive of the Courts of the States, of all offenses against the laws of the United States. Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof." **The defendant suggests that this section of the United States Code, which denominates the federal jurisdictional predicate for those federal crimes, i.e., 26 U.S.C. § 7206 (fraud and false statements)** and § 7207 (fraudulent returns, statements or other documents), **preempts the state prosecution of the forgery charges in this case**. Both of those sections provide for imprisonment or fines or both. The defendant maintains, citing 26 U.S.C. §§ 7801 through 7805, that the "administration" of the federal tax code is exclusively the responsibility of Congress and the IRS and that "federal courts and U.S. Tax Courts have exclusive jurisdiction over all criminal and civil actions involving federal tax laws," referring to "26 U.S.C. § 7401 et. seq; 28 U.S.C. § 1340." He does not, however, point to any specific language in any of these sections that appears to remove from the District Courts the

> jurisdiction given them over "all offenses against the laws of the United States."
>
> There can be little, if any, question that the Internal Revenue Code is a most comprehensive regulatory code, both in its statutory and regulatory aspects. As is almost any complex federal statute, it is national in its application and impact. Despite the complex statutory and regulatory scheme of the code, the subjects of certain regulation "often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem." (Internal quotation marks omitted.) *Hillsborough County v. Automated Medical Labs., Inc.*, 471 U.S. 707, 717, 105 S.Ct. 2371, 2377, 85 L.Ed.2d 714 (1985). Moreover, Connecticut has a legitimate interest in enforcing its criminal statutes. In this case, the state, in our view, is not transgressing any specific statutory provision of the code nor any regulation under it. We do not infer any Congressional intent to make "the scheme of federal regulation ... so pervasive as to make reasonable [any] inference that Congress left no room for the States to supplement it." . . .
>
> * * *
>
> Here, the crime at issue is forgery. In pursuing that charge in this particular case, the state is not at all trenching upon the IRS' pursuit of the code violations by the defendant. The IRS, as the witness Reheault explained, was pursuing the violations by its filing of tax liens and assessment of penalties. It chose not to proceed, although it could have, on the forgery and specifically not on 26 U.S.C. §§ 7206 and 7207. **The state's legitimate interest in enforcing its forgery statute is not at all incompatible with the federal regulatory scheme in this instance.**
>
> [Emphasis supplied]

State v. Radzvilowicz, 703 A.2d 767, 786–87 (Conn. App. 1997). See also State v. Diaz-Rey, 397 S.W.3d 5, 8–9 (Mo. Ct. App. 2013) (criminal conviction under Missouri forgery statute for use of false social security card not preempted by federal law).

2. Rhode Island has permissibly created a private cause of action for violation of federal criminal law

The Diocesan Defendants resume citing various cases mentioning the lack of implied private causes of action in various federal statutes. See Diocesan Defendants' Memo. at 70-71 (citing Levy v. World Wrestling Entm't, Inc., No. CIV.A.308-01289(PCD), 2009 WL 455258, at *2 (D. Conn. Feb. 23, 2009), Astra USA, Inc. v. Santa Clara Cty., Cal., 563 U.S. 110, 117-19 (2011), Grochowski v. Phoenix Const., 318 F.3d 80, 86 (2d Cir. 2003)). The Diocesan Defendants ignore that here it is R.I. Gen. Laws § 9-1-2 that creates these causes of action, and it does so expressly.

The first three of these cases also involved claims for breach of contract[61] and an "inability to assert a statutory right of action," Astra USA, Inc., 563 U.S. at 117, neither of which is present as to the Diocesan Defendants. A fourth case they cite, Cooper v. Charter Commc'ns Entertainments I, LLC, 760 F.3d 103, 110 n.6 (1st Cir. 2014), not only did *not* involve any federal statute, but actually concluded that the plaintiffs *did* have a claim under one Massachusetts statute for violations of the other (Massachusetts) statute:

> Although third-party beneficiary principles provide no basis on which the plaintiffs can sue Charter for breach of its promise to municipalities, Massachusetts' legislature has provided an alternative path to a similar

[61] Astra USA, Inc., Grochowski, and Cooper involved third-party beneficiary claims, i.e. breach of contract claims asserted by plaintiffs who were not even parties to the contract. See Astra USA, Inc., 563 U.S. at 117 ("Notwithstanding its inability to assert a statutory right of action, the County maintains that the PPAs implementing the 340B Program are agreements enforceable by covered entities as third-party beneficiaries."); Grochowski, 318 F.3d at 85 (2d Cir. 2003) ("Here, the plaintiffs did not bring a § 1983 action. Nor did they allege claims directly under the DBA [Davis-Bacon Act], but instead brought state-law claims for breach of contract as third party beneficiaries of the contracts and for quantum meruit."); Cooper, 760 F.3d at 110 ("We are nevertheless persuaded by the language of the contract as a whole that the parties did not intend individuals to hold power to enforce it."). Such claims require a multi-stage process of heaping implied contractual causes of action on top of implied statutory causes of action.

> destination, without requiring any inquiry into common law notions of intended beneficiaries. Specifically, Chapter 93A of the Massachusetts code authorizes consumers to sue for "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Mass. Gen. Laws ch. 93A, § 2(a).
>
> * * *
>
> A recent decision by the Massachusetts Supreme Judicial Court makes clear that a failure by Charter to pay a credit in accord with its statutorily-imposed[62] contractual obligation would likely violate Chapter 93A. . . .
>
> * * *
>
> We acknowledge that this conclusion seems at first blush at odds with our conclusion regarding the third party beneficiary claim. Any such appearance is misleading. To the extent a duty is merely created by contract, it makes sense that Massachusetts law would leave it to the contracting parties to decide who can enforce it. To the extent that the duty also emanates from a legislative judgment that it reflects fair treatment of customers, however, the state legislature by enacting Chapter 93A has opted to let consumers seek relief in court. In short, the Massachusetts legislature created two potential causes of action in the event of a breach by Charter: an action for breach of contract, and an action under Chapter 93A, each subject to different procedures and remedies. The fact that Massachusetts, like other states, allows the contracting parties to decide who can maintain an action for breach of the contract does not mean that Massachusetts has allowed the contracting parties to take away the consumers' rights under Chapter 93A.

Cooper v. Charter Commc'ns Entertainments I, LLC, 760 F.3d 103, 111-12 (1st Cir. 2014).

The Diocesan Defendants also cite Brissenden v. Time Warner Cable of New York City, 25 Misc. 3d 1084, 1091 (N.Y. Sup. Ct. 2009) as purportedly stating: "A

[62] Referring to a statutory obligation imposed by Mass. Gen. Laws ch. 166A, § 5. See Cooper, 760 F.3d 103, 108 (1st Cir. 2014)

'plaintiff cannot use [a state statute] to circumvent the lack of private right of action under [a] federal statute." Diocesan Defendants' Memo. at 71 (such bracketed language being inserted by the Diocesan Defendants). This use of brackets is so egregious that Plaintiffs wonder how it can be reconciled with the Diocesan Defendants' duty of candor to the Court. The Brissenden decision actually stated:

> Plaintiff argues that Time Warner has violated the Cable Television Consumer Protection and Competition Act of 1992 (47 USC §§ 521-559), which prohibits a cable company from engaging in negative option billing, defined therein as charging a subscriber for any service or equipment that the subscriber has not affirmatively requested by name (47 USC § 543 [f]). **By installing and billing for optional converter boxes and remotes without the subscriber's affirmative consent, plaintiff alleges that Time Warner has committed a per se violation of General Business Law § 349. However, there is no private right of action for a violation of 47 USC § 543 (f), and plaintiff cannot use General Business Law § 349 to circumvent the lack of private right of action under this federal statute.** (Cf. *Broder v Cablevision Sys. Corp.*, 418 F3d 187, 199 [2d Cir 2005] [no private right of action for violation of the uniform rate requirement of 47 USC § 543 (d)].) Plaintiff must still prove each of the elements of an unfair trade practice, including actual injury.
>
> [Emphasis supplied]

Brissenden, 25 Misc. 3d at 1091–92 (citing Broder v. Cablevision Sys. Corp., 418 F.3d 187, 199 (2d Cir. 2005)). In other words, the question was whether the violation of *a particular* federal statute constituted a per se violation of *a particular* state statute prohibiting unfair and deceptive business practices. The answer to that question turned on the intent of the New York legislature. See Broder, 418 F.3d at 199 ("Neither the text of GBL § 349 nor any other authority cited by Broder suggests that the New York legislature intended to cast its net so broadly."). Here, we do not need to guess at the Rhode Island General Assembly's intent in enacting R.I. Gen. Laws § 9-1-2, because

we have Rhode Island Supreme Court decisions, and a prior decision of this Court, expressly concluding it incorporates violations of federal criminal law.

D. Count XVIII (obtaining property by false pretenses) should not be dismissed for failure to plead satisfaction of its elements

The Diocesan Defendants contend that Plaintiff has failed to plead facts alleging that the Diocesan Defendants obtained property by false pretenses. As noted *supra* at 77, Plaintiffs have indeed done so.

The Diocesan Defendants contend that "Plaintiffs have not alleged that the Diocesan Defendants obtained any property *from Plaintiffs*." Diocesan Defendants' Memo. at 72 (emphasis supplied). That is not an element of R.I. Gen. Laws § 11-41-4, which merely requires that property be obtained "from another". There is no dispute that the Diocesan Defendants obtained proceeds from the 2014 Asset Sale, as well as their participation in other Defendants' obtaining real estate and other hospitals. Rather than needing to demonstrate ownership of the property, Plaintiffs need only demonstrate the "alter[ing] or terminat[ion]" of "rights or powers concerning the money or property." State v. Letts, 986 A.2d 1006, 1011 (R.I. 2010). While Plaintiffs do need to demonstrate an injury for purposes of their false-pretenses R.I. Gen. Laws § 9-1-2 claim, there is no need to demonstrate that Plaintiffs or anyone else was the victim of the crime. See State v. Markarian, 551 A.2d 1178, 1181 (R.I. 1988) ("[F]or the statutory crimes of obtaining property by false pretenses and forgery, a victim is not an essential element as neither the word victim nor its synonym appears in either statute.").

The Diocesan Defendants also contend that Plaintiffs have failed to establish "actual reliance" which they contend is an element of obtaining property by false

pretenses. See Diocesan Defendants' Memo. at 72 (citing Nat'l Credit Union Admin. Bd. v. Regine, 795 F. Supp. 59, 70–71 (D.R.I. 1992)). Reliance is not an element, as the Rhode Island Supreme Court made clear in 2010:

> Section 11–41–4 provides that "[e]very person who shall obtain from another designedly, by any false pretense or pretenses, any money, goods, wares, or other property, with intent to cheat or defraud, * * * shall be deemed guilty of larceny." **"[T]he essential elements of obtaining property by false pretenses are that the accused (1) obtain property from another designedly, by any false pretense or pretenses; and (2) with the intent to cheat or defraud."** *State v. Markarian*, 551 A.2d 1178, 1180 (R.I. 1988).
>
> [Emphasis supplied]

State v. Letts, 986 A.2d 1006, 1010–11 (R.I. 2010). In any event, Plaintiffs have alleged reliance on the Diocesan Defendants' misrepresentations, as discussed *supra*. Of course, the injury to Plaintiffs under R.I. Gen. Laws § 9-1-2 has already been discussed and will not be repeated.

Finally the Diocesan Defendants contend that Plaintiffs have failed to plead "a false representation and intent to defraud" with particularity under Fed. R. Civ. P. 9(b). See Diocesan Defendants' Memo. at 72 (referring back to their earlier arguments). This contention fails for the reasons previously discussed.

VII. Count XXI (breach of fiduciary duty) should not be dismissed for failure to state a claim

A. The elements of breach of fiduciary duty under Rhode Island law

The elements of a claim for breach of fiduciary duty under Rhode Island law are "(1) the existence of a fiduciary duty; (2) breach of that duty; and (3) damage proximately caused by the breach." Filippi v Filippi, No. WC/KB-2016-0627, 2017 WL

6513602, at *18 (R.I. Super. Dec. 14, 2017) (Stern, J.); Rhode Island Resource Recovery Corp. v. Van Liew Trust Co., No. PC-10-4503., 2011 WL 1936011 (R.I. Super. May 13, 2011) (Silverstein, J.); Chain Store Maint., Inc. v. Nat'l Glass & Gate Serv., Inc., No. PB 01-3522, 2004 WL 877599, at *13 (R.I. Super. Apr. 21, 2004) (Silverstein, J.). Claims for breach of fiduciary duty are inherently fact-intensive. Filippi, 2017 WL 6513602, at *19 ("A breach of fiduciary duty claim is factually intensive, taking into consideration all the facts relevant to the action undertaken by the fiduciary.") (denying summary judgment).

The criteria for finding a confidential or fiduciary relationship are also 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). "Divining the existence of a fiduciary duty is a fact-intensive enterprise." Cafe La France, Inc. v. Schneider Securities, Inc., 281 F. Supp. 2d 361 (D.R.I. 2003) (Lagueux, J.) (citing A. Teixeira & Co., Inc., 699 A.2d at 1387). "Among the relevant factors are the degree to which one party relies upon the other, the history of the parties' relationship preceding the incident spawning the alleged breach, the parties' relative levels of business sophistication, and the willingness of one party to accept guidance from the other." Id. (citing Simpson v. Dailey, *supra*, 496 A.2d at 129).

The First Amended Complaint sets forth extensive and specific allegations whereby Plaintiffs placed trust and confidence in the Diocesan Defendants which they breached, causing damages. This trust and confidence stemmed from decades of communications to SJHSRI's employees and Plan participants, through the Bishop, assuring them that their pensions were secure and their interests were being protected by the Diocese.

B. Plaintiffs' claims for breach of fiduciary duty should not be dismissed

The Diocesan Defendants contend that Plaintiffs "have pled no factual allegations that would establish a fiduciary relationship between the Diocesan Defendants and the Plaintiffs or Plan participants." Diocesan Defendants' Memo. at 73. That contention is incorrect as discussed *supra*.

The Diocesan Defendants also contend that the existence of fiduciary duties is in tension with Plaintiffs' allegation of "'diminished or nonexistent roles of Bishop Tobin and the Diocese' from 2009 onward." Diocesan Defendants' Memo. at 74 (quoting a portion of FAC ¶ 87 out of context). The allegation that the Diocesan Defendants have amputated from Plaintiffs' Complaint (and now attempt to engraft onto the issue of fiduciary obligation) actually concerned their role *in SJHSRI's governance*:

> Starting in 2011, SJHSRI has filed its Form 990 with the IRS stating that CCCB was SJHSRI's "sole member." This confirms the diminished or nonexistent roles of Bishop Tobin and the Diocese of Providence **in SJHSRI's governance after the 2009 merger**.
>
> [Emphasis supplied]

FAC ¶ 87. There is no suggestion in the First Amended Complaint (or anywhere else, until the filing of the Receivership) that Plan participants' trust and reliance both before

and after 2009 had been should have ceased. There is certainly no suggestion that any such untrustworthiness was communicated to Plaintiffs prior to the breaches of fiduciary duty.

VIII. Count XXII (aiding and abetting breaches of fiduciary duty) should not be dismissed

Under Rhode Island law, the elements of a claim for aiding and abetting a breach of fiduciary duty are: "'(1) there was a breach of fiduciary duty; (2) the defendant knew of the breach; and (3) the defendant 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.'" Martin v Pascarella & Gill P.C., No. PC-2014-6336, 2017 WL 1195896, at *16 (R.I. Super. Mar. 24, 2017) (Silverstein, J.) (quoting 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) (Silverstein, J.)). Like claims for breach of fiduciary duty, see *supra* at 93-95, claims for aiding and abetting breaches of fiduciary duty are extremely fact-intensive and are ill-suited for summary judgment, let alone a motion to dismiss. See In re Good Tech. Corp. Stockholder Litig., No. CV 11580-VCL, 2017 WL 2537347, at *2 (Del. Ch. May 12, 2017) ("Aiding-and-abetting claims are fact intensive and ill-suited for summary judgment.").

The Diocesan Defendants contend that Plaintiffs have not alleged sufficient facts to establish their knowledge of other Defendants' breaches of fiduciary duty or their active participation, assistance, or encouragement of such breach. Diocesan Defendants' Memo. at 75. That is incorrect for the reasons previously discussed. Plaintiffs have alleged specific details with respect to specific meetings on specific

dates, as well as other communications, where these issues were discussed with the Diocesan Defendants and their agreement was reached.

The Diocesan Defendants also contend: "The fact that the Diocesan Defendants were made aware of the terms of the 2014 Asset Sale, and expressed their support for it does not, without more, constitute active participation or substantial assistance or encouragement of a breach." Diocesan Defendants' Memo. at 76. Of course, the First Amended Complaint alleges "more", including the Diocesan Defendants' participation in a scheme to deprive the Plan and Plan beneficiaries of the protections of ERISA by ensuring SJHSRI was not deleted from the Official Catholic Directory. All of these allegations, for purposes of the motion to dismiss, are sufficient to establish that the Diocesan Defendants were not passive participants in other Defendants' breaches of fiduciary duty.

Finally, the Diocesan Defendants circle back to their fraud and conspiracy arguments. These are addressed elsewhere.

IX. Plaintiffs incorporate their separate arguments in opposition to the Diocesan Defendants' ERISA arguments

The Diocesan Defendants assert two ERISA-related arguments, which are addressed in Plaintiff's separate Omnibus Memorandum. These arguments are: (1) that Plaintiffs' First Amended Complaint seeks inappropriate equitable relief; and (2) that Plaintiffs have failed to state a claim for equitable estoppel under ERISA.

Because these arguments overlap with other ERISA arguments asserted by the other Defendants, Plaintiffs treat them in their separate Omnibus Memorandum, which treatment is incorporated herein by reference.

X. If any portion of the First Amended Complaint should be dismissed, it should be dismissed *without* prejudice and with leave to re-plead, since Pleadings amended once "as a matter of course" do not receive any sort of heightened scrutiny, and any dismissal with prejudice would be an abuse of discretion

The Diocesan Defendants improperly contend that the Court should apply heightened scrutiny under Rule 12 to the Amended Complaint simply because it is an amended pleading. Diocesan Defendants' Memo. at 9. The Diocesan Defendants also litter their memorandum with exhortations to the Court to dismiss the First Amended Complaint with prejudice. See Diocesan Defendants' Memo. at 1, 7, 8, 9, 21. Their argument is that since Plaintiffs have already amended their pleading once as of right under Fed. R. Civ. P. 15, Plaintiffs should not get another "bite at the apple". Id. at 8.

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 do so without prejudice and with leave to re-plead.

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).

The Diocesan Defendants' cited decisions do not support their contention that the First Amended Complaint should be dismissed with prejudice. U.S. ex rel. Gagne v. City of Worcester, 565 F.3d 40 (1st Cir. 2009) involved a complaint that had already been amended *three* times before. See id. at 48 ("The original complaint was filed in 2006; the First Amended Complaint was filed in 2007; the Second Amended Complaint in January 2008. The district court's opinion was on June 20, 2008. Plaintiffs do not get a fourth chance to try to get it right."). Weimer v. Int'l Flavors & Fragrance, 240 F.R.D.

431 (N.D. Iowa 2007) involved a complaint that had already been amended once with leave of court, and where the motion for leave to amend a second time was filed five (5) months "out of time." See Weimer v. Int'l Flavors & Fragrances, Inc., No. C05-4138-MWB, 2006 WL 3422161, at *1 (N.D. Iowa Nov. 28, 2006).[63] Tapogna v. Egan, 141 F.R.D. 370 (D. Mass. 1992) did involve dismissal with prejudice of a complaint that had been amended once as of course, but that was a securities fraud case where the allegedly false statements consisted of "accurate historical facts, i.e., quarterly revenue reports" along with other statements that were too "generalized" to be actionable. See id. at 377. Because of the obvious futility, in that context, even Rumplestiltskin would have been denied the chance to keep grasping at straws so as to try to spin them into gold.

The Diocesan Defendants incorrectly contend that "Plaintiffs already have had many months to conduct substantial discovery." Diocesan Defendants' Memo. at 9. There 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[64] to compel responses to subpoenas—including a motion to compel the Roman Catholic Bishop of Providence—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

[63] Examination of the PACER docket sheet in Weimer indicates the second motion to amend was filed approximately five (5) months after the "Deadline for motions to amend pleadings" set by an earlier scheduling order. See Weimer et. al. v. International Flavors and Fragrances Inc. et al., 05-cv-04138-MWB (N.D. Iowa) dktsdkt ## 3 (complaint), 25 (motion to amend complaint), 35 (first amended complaint) 41 (scheduling order), and 61 (motion to amend first amended complaint).

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

Defendants placed the Pension into receivership, it should not be overlooked that the Diocesan Defendants have had more than half a century of familiarity with the Plan and more than a century of familiarity with St. Joseph Hospital, whereas the Receiver is even now still picking through the rubble.[65]

XI. Conclusion

The Diocesan Defendants' motion to dismiss should be denied.

Respectfully submitted,
All Plaintiffs,
By their Attorney,

/s/ Max Wistow

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[65] Moreover, the requirement of particularity in pleadings is relaxed for bankruptcy trustees (and, by extension, receivers), who perforce have only secondhand knowledge. See Wright, Miller, et al., 5A Fed. Prac. & Proc. Civ. § 1298 (3d ed.) ("The heightened pleading required under Rule 9(b)—which is applicable to bankruptcy proceedings —tends to be relaxed when fraud allegations are made by a bankruptcy trustee based on second-hand information.") (case cited).

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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Exhibit 1

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.		**SUPERIOR COURT**
ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND	:	
v.	:	**C.A. No. PC-2017-3856**
ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND RETIREMENT PLAN, as amended.	:	

REPLY OF THE RHODE ISLAND ATTORNEY GENERAL TO CERTAIN PARTIES' OBJECTIONS TO THE RECEIVER'S PETITION FOR SETTLEMENT INSTRUCTIONS

In reviewing the memoranda and attachments filed by the parties in this action on or about September 27, 2018, the Attorney General noted that certain defendants appear to have assumed that the Attorney General's power of review under the Hospital Conversions Act ("HCA"), R.I. Gen. Laws § 23-17.14-1 *et seq.*, is subject to the requirements of the Administrative Procedures Act ("APA"), R.I. Gen. Laws § 42-35-1 *et seq.* For the reasons stated below, the Attorney General respectfully disagrees.

These defendants have assumed that the Attorney General's actions under the HCA are governed by the APA's criteria, timing, process for judicial review, and related doctrines such as that of administrative finality. For example, in arguing that the CharterCARE Community Board ("CCCB") remains bound by Condition #8 of the Attorney General's 2014 HCA Decision, the CharterCARE Foundation ("the Foundation") contends that Condition #8 is a binding order and relies upon *Pina v. Dos Anjos*, 755 A.2d 838, 839 (R.I. 2000) (*mem.*), which involves the application of § 42-35-15 of the APA. *See* Corrected Objection of CharterCARE Foundation To

Receiver's Petition For Settlement Instructions, at 15 ("Foundation's Corrected Objection, at __").[1]

Similarly, the Prospect Entities[2] have petitioned the Attorney General for a declaratory order pursuant to R.I. Gen. Laws § 42-35-8. *See* Prospect Entities' Memorandum, at 12; Petition for Declaratory Order under R.I. Gen. Laws § 42-35-8 ("Prospect Entities' Petition").[3] In their Petition, the Prospect Entities claim *inter alia* that the Court's approval of the Proposed Settlement Agreement would violate the doctrine of administrative finality. *See* Prospect Entities' Petition, ¶¶ 28, 47(c), 60, and 65. The Prospect Entities further presume that the Attorney General's 2014 decision resulted from a "contested case" subject to APA requirements. Prospect Entities' Petition, ¶¶ 69-70.

Contrary to these defendants' assumptions, the Attorney General is not bound by the requirements of the APA when he exercises his jurisdiction under the HCA. First, as the Attorney General previously indicated in his September 27th filing, the HCA contains its own process for

[1] The Foundation correctly points out that it was not created as a direct result of the application of § 23-17.14-22 of the HCA because the CharterCARE Health Partners Foundation (the Foundation's predecessor in name), already existed at the time of the 2014 hospital conversion. Foundation's Corrected Objection, at 6-7 & n.3; 2014 HCA Decision, at 31-32. Nevertheless, as the Foundation itself recognizes, *see* Foundation Corrected Objection, at 6-7, the Foundation is bound by the applicable conditions of the HCA Decision. The Attorney General has entrusted the Foundation with stewarding the charitable assets transferred to it as part of the conversion process. *See* HCA Decision, Conditions ## 1-2, 8 and 9.

[2] The Attorney General will use the collective term "Prospect Entities" to refer to Prospect Medical Holdings, Inc., Prospect East Medical Holdings, Inc., Prospect Chartercare, LLC, Prospect Chartercare SJHSRI, LLC, and Prospect Chartercare RWMC. *See* Memorandum in Support of Joint Objection of Prospect Medical Holdings, Inc., Prospect East Medical Holdings, Inc., Prospect Chartercare, LLC, Prospect Chartercare SJHSRI, LLC and Prospect Chartercare RWMC, LLC to Receiver's Petition for Settlement Instructions, at 1 ("Prospect Entities' Memorandum, at __").

[3] The Prospect Entities attached a copy of their petition to their Memorandum as Exhibit B, and formally served a copy of the Petition upon the Attorney General on September 27, 2018.

judicial review independent of that in the APA. *Compare* R.I. Gen. Laws § 23-17.14-34 *with* R.I. Gen. Laws § 42-35-15. Unlike the limited judicial review of an administrative ruling available under § 42-35-15, the HCA provides for more thorough and independent "judicial review by original action filed in the superior court." R.I. Gen. Laws § 23-17.14-34(a). *See East Greenwich Yacht Club v. Coastal Res. Mgmt. Council*, 118 R.I. 559, 568, 376 A.2d 682, 686 (1977) (distinguishing between the type of judicial review available under the APA from that available in the context of an "original action").

Yet another clear indication that the APA does not apply to the Attorney General's authority under the HCA lies in the absence of a contested case for this Court to review. R.I. Gen. Laws § 42-35-15(a) provides that "[a]ny person * * * who is aggrieved by a final order in a contested case is entitled to judicial review under [the APA]." A "contested case" is defined by the APA as a "proceeding, including but not restricted to ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a specific party are required by law to be determined by an agency after an opportunity for hearing." R.I. Gen. Laws § 42-35-1(3). A hearing of the sort contemplated under the APA requires providing the parties with an opportunity to present evidence and make legal arguments, and requires the agency to provide a hearing officer whose statutory role is to render factual findings and legal rulings. *See* R.I. Gen. Laws § 42-35-9.

Because the applicable statute must require a hearing as a matter of law in order for an administrative matter to constitute a contested case, the availability of a statutory hearing is therefore the linchpin of APA applicability. *See, e.g., Property Advisory Group, Inc. v. Rylant*, 636 A.2d 317, 318 (R.I. 1994). Conversely, when no hearing is required, no contested case exists. In such circumstances the APA simply does not apply. *See, e.g., id*. (review under the APA was improper given "clear absence" of a contested case); *Mosby v. Devine*, 851 A.2d 1031, 1049-50

(R.I. 2004) (Because the applicable firearms statute did not require a hearing, filing an application to carry a concealed weapon under that statute did not create a contested case.); *Bradford Assoc. v. R.I. Div. of Purchases*, 772 A.2d 485, 489 (R.I. 2001) (since no hearing required by statute, § 42-35-15 not applicable).

Because the HCA neither provides for, nor requires, the Attorney General to conduct the hearing described in § 42-35-9 before issuing a decision on a proposed hospital conversion,[4] the defendants in this case cannot invoke the APA in seeking review of any aspect of the HCA Decision.[5] *Bradford Assoc.*, 772 A.2d at 489 (where the APA provision concerning judicial review of contested cases does not apply, "any exercise of jurisdiction predicated" on that section by the superior court is "invalid").

Additionally, the Attorney General observes that the Prospect Entities incorrectly assume that consummation of the Proposed Settlement Agreement is precluded by the doctrine of administrative finality. *See* Prospect Entities' Petition, ¶¶ 28, 47(c), 60, and 65. Under the doctrine of administrative finality, "when an administrative agency receives an application for relief and

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[4] The Attorney General's practice in past HCA conversion proceedings with respect to reviewing a condition has been to consider the applicant's written inquiry, gather relevant information, consult with experts as needed, and decide based on such an investigation whether any modification is appropriate.

[5] R.I. Gen. Laws § 23-17.14-30(1) requires that the Attorney General or Department of Health ("DOH") provide notice and a hearing before denying, suspending, or revoking an applicant's license or otherwise "tak[ing] corrective action necessary to secure compliance" under the HCA. The Attorney General does not typically involve himself in the DOH's licensing proceedings under the HCA and has no independent power to revoke an applicant's license.

In any event, the existence of a potential contested case under one section of the HCA does not *ipso facto* impose APA procedures upon the Attorney General in every area of its hospital conversion responsibilities. *See Bonnet Shores Beach Club Condominium Ass'n, Inc. v. R.I. Coastal Res. Mgmt. Council*, No. C.A. PC00-3255, 2003 WL 22790826, at *3-*4 (R.I. Super. Ct. Oct. 28, 2003) (under R.I. Gen. Laws § 42-35-1(c), existence of contested case is defined by the "proceeding" and therefore, while judicial review under the APA did not apply to CRMC's ability to grant permit extensions, it did apply to the CRMC's decision on a declaratory ruling petition).

denies it, a subsequent application for the same relief may not be granted absent a showing of a change in material circumstances during the time between the two applications." *Johnston Ambulatory Surgical Assoc. Ltd. v. Nolan*, 755 A.2d 799, 808 (R.I. 2000).

Despite the Prospect Entities' argument otherwise, the doctrine of administrative finality appears inapplicable to the instant circumstances for at least two reasons. First, the doctrine applies only when circumstances have remained the same, *see Johnston Ambulatory*, 755 A.2d at 808, yet the parties are now in court due to an alleged "change in material circumstances during the time between the two applications." *Id.* Second, although the doctrine requires that the initial application to the administrative agency be *denied*, the Prospect Entities' original application for hospital conversion was *approved*. *deBourgknecht v. Rossi*, 798 A.2d 934, 938 (R.I. 2002) ("The doctrine of administrative finality does not apply to the instant proceeding. The doctrine requires that the initial application for tax relief be denied. In this case, the plaintiff's request for tax relief initially had been granted.").

For the reasons set forth above, the Attorney General does not consider any party's reliance on the APA to be dispositive of the outcome in the pending proceeding because the Attorney General's role in approving a proposed hospital conversion under the HCA is not subject to the requirements of the APA.

Respectfully submitted,

STATE OF RHODE ISLAND
OFFICE OF ATTORNEY GENERAL
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Dated: October 5, 2018

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 5th day of October 2018, I electronically filed and served this document through the electronic filing system to all on record. The document electronically filed is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

/s/ Diane B. Milia