UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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

PLAINTIFFS' OBJECTION TO THE MOTIONS TO DISMISS FILED BY DEFENDANTS PROSPECT MEDICAL HOLDINGS, INC., PROSPECT EAST HOLDINGS, INC., PROSPECT CHARTERCARE, LLC, PROSPECT CHARTERCARE SJHSRI, LLC AND PROSPECT CHARTERCARE RWMC, LLC

Plaintiffs hereby object to the Motion to Dismiss filed by Defendants Prospect Medical Holdings, Inc., Prospect East Holdings, Inc., Prospect Chartercare, LLC, Prospect Chartercare SJHSRI, LLC and Prospect Chartercare RWMC, LLC. 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 Prospect Medical Holdings, Inc., Prospect East Holdings, Inc., Prospect Chartercare, LLC, Prospect Chartercare SJHSRI, LLC and Prospect Chartercare RWMC, LLC's motion to dismiss.

CERTIFICATE OF SERVICE

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PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR OBJECTION TO THE MOTIONS TO DISMISS FILED BY DEFENDANTS PROSPECT MEDICAL HOLDINGS, INC., PROSPECT EAST HOLDINGS, INC., PROSPECT CHARTERCARE, LLC, PROSPECT CHARTERCARE SJHSRI, LLC AND PROSPECT CHARTERCARE RWMC, LLC

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February 4, 2019

TABLE OF CONTENTS

I. COMMON PREFACE TO NON-OMNIBUS MEMORANDA 1

II. INTRODUCTION 3

III. THE FACTS RELEVANT TO THE MOTION TO DISMISS 4

IV. ARGUMENT 5

A. The Standard Applicable to Motions to Dismiss under Fed. R. Civ. P. 12(b)(1) 5

B. The Standard Applicable to Motions to Dismiss under Fed. R. Civ. P. 12(b)(6) 8

C. Failure to Make Contributions under ERISA (Count I) 10

1. Summary of Argument 10

2. SJHSRI's Duty to Make Minimum Funding Contributions 11

3. The Prospect Entities Have Successor Liability under ERISA 12

a. Plaintiffs' Contention 12

b. Successor Liability under ERISA 13

c. All of the Prospect Entities Have Successor Liability Because They Belong to the Same Controlled Group 20

D. Count II, Breach of Fiduciary Duty 25

E. Count III, Aiding and Abetting Breach of Fiduciary Duty under ERISA 26

F. Count IV, ERISA Declaratory Relief 29

G. ERISA Preemption of State Law Claims 30

H. Plaintiffs' Claims for Actual Fraudulent Transfer (Count V) Should Not Be Dismissed as to the Prospect Entities 30

1. R.I. Gen. Laws § 6-16-4(a)(1) 30

2. Fraudulent Transfer Claims Are Not Preempted By ERISA 31

3. Plaintiffs' Claims Based on R.I. Gen. Laws § 6-16-4(a)(1) (Count V) Are Claims upon Which Relief Can Be Granted, and, Therefore, Satisfy the Requirements of Rule 12(b)(6) 33

I. Plaintiffs' Claims (Count VI) for Constructive Fraudulent Transfer (R.I. Gen. Laws § 6-16-4(a)(2)(i) and R.I. Gen. Laws § 6-16-5(a)) Should Not Be Dismissed as to the Prospect Entities 45

1. Pleading Standards Applicable to These Claims 45

2. Plaintiffs' Claims Based on R.I. Gen. Laws §§ 6-16-4(a)(2) or 6-16-5(a) (Count VI of the Complaint) Are Claims upon Which Relief Can Be Granted, and, Therefore, Satisfy the Requirements of Rule 12(b)(6) 46

J. Count VII (Fraud Through Intentional Misrepresentations and Omissions) Should Not Be Dismissed as to the Prospect Entities 53

K. Plaintiffs' Claim Alleging Fraudulent Scheme (Count VIII) Should Not Be Dismissed as to the Prospect Entities 82

L. Plaintiffs' Claim Alleging Conspiracy (Count IX) Should Not Be Dismissed as to the Prospect Entities 85

1. The Law of Civil Conspiracy 85

2. Plaintiffs' Claim Alleging Conspiracy (Count IX) Should Not Be Dismissed as to the Prospect Entities 87

M. Plaintiffs' Alter Ego Claim (Count XII) Should Not Be Dismissed as to the Prospect Entities 91

N. Plaintiffs' *De Facto* Merger Claim (Count XIII) Should Not Be Dismissed as to the Prospect Entities 93

O. Plaintiffs' State Law Claim (Count XV) for Successor Liability Should Not Be Dismissed as to the Prospect Entities 97

1. Plaintiffs Have Stated a State Law Claim for Successor Liability on the Grounds That the Transfer Was Made in Bad Faith to Defraud Creditors 98

2. Plaintiffs Have Stated a State Law Claim for Successor Liability on the Grounds That the Prospect Entities Are a Mere Continuation of Defendants SJHSRI and RWH 107

P. Plaintiffs' Joint Venture Count (Count XIV) Should Not Be Dismissed as to the Prospect Entities 109

Q. Plaintiffs' Count Alleging Civil Liability under R.I. Gen. Laws § 9-1-2 for Violations of the Hospital Conversion Act (Count XVI) Should Not Be Dismissed as to the Prospect Entities 115

R. Plaintiffs' Count Alleging Civil Liability under R.I. Gen. Laws § 9-1-2 for Violations of R.I. Gen. Laws § 11-18-1 (Count XVIII) Should Not Be Dismissed as to the Prospect Entities 118

S. Plaintiffs' Count Alleging Civil Liability under R.I. Gen. Laws § 9-1-2 for Violations of R.I. Gen. Laws § 11-41-4 (Count XIX) Should Not Be Dismissed as to the Prospect Entities 120

T. Plaintiffs State Law Claim for Aiding and Abetting Breach of Fiduciary Duty (Count XXII) Should Not be Dismissed as to the Prospect Entities 123

1. Rhode Island law 123

2. Plaintiffs State Law Claim for Aiding and Abetting Breach of Fiduciary Duty (Count XXII) Should Not Be Dismissed as to the Prospect Entities 124

U. Plaintiffs' Count Seeking a Declaratory Judgment on Plaintiffs' State Law Claims (Count XXIII) Should Not Be Dismissed as to the Prospect Entities 127

V. If Any Portion of the First Amended Complaint Is Dismissed, It Should Be Without Prejudice and with Leave to Amend 127

V. CONCLUSION 128

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 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") (collectively the "Prospect Entities").

I. COMMON PREFACE TO NON-OMNIBUS MEMORANDA

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

- 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 has 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 these 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 Diocesan Defendants[3] and by Defendant The Angell Pension Group, Inc. ("Angell"). Plaintiffs have made every effort to avoid repetition. For example, each of the Defendants who have filed motions to dismiss make many legal arguments on non-ERISA issues that are the same as those raised by at least one other movant. To limit repetition, Plaintiffs fully respond to those

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

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

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.

II. INTRODUCTION

The Prospect Entities begin their memorandum with the statement that "[t]his is a lawsuit that should never have been filed. . . ." Prospect Memo. at 1. To the contrary, the long history of lies and fraudulent omissions by St. Joseph Health Services of Rhode Island ("SJHSRI"), culminating in the abandonment of the underfunded Plan and the 2,729 Plan participants in connection with the 2014 Asset Sale, was a lawsuit waiting to happen.

The Prospect Entities repeat again and again that they are "strangers to the Plan." Saying something doesn't make it so.[4] Although they were relative latecomers to the conspiracy, they made up for it by their wholehearted and crucial contributions to the concerted scheme to sacrifice the Plan and the Plan participants to their own economic interests. As such, they are liable for all of their co-conspirators' earlier statements and actions concerning the Plan and the Plan participants in support of the

---

[4] As discussed herein, *infra* at 27-29, they were anything but "strangers to the plan."

fraud. Moreover, they have successor liability for the debts of SJHSRI to the Plan and the Plan participants, under federal common law if the Plan is governed by ERISA, or under state law if it is not.

The Prospect Entities are not entitled to have Plaintiffs' claims dismissed on the pleadings. Indeed, although resolution of Plaintiffs' fraud claims will probably require trial, Plaintiffs reasonably anticipate summary judgment against the Prospect Entities in due course on the successor liability claims and the claim that the Prospect Entities acquired the hospitals through a fraudulent transfer in which over $15,000,000 worth of consideration was improperly diverted to SJHSRI's controlling member. In other words, this is a case in which a controlling shareholder illicitly obtained proceeds from the sale of an insolvent corporation's assets, to the detriment of the corporation's creditors. The statutory remedy in such cases is clear: Plaintiffs are entitled to avoid the 2014 Asset Sale and recover their damages from the assets of the two hospitals, without offset for the Prospect Entities' payment or for any appreciation in value of those assets since 2014.

III. THE FACTS RELEVANT TO THE MOTION TO DISMISS

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

IV. ARGUMENT

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

Fed. R. Civ. P. 12(b)(1) applies to motions to dismiss for lack of subject matter jurisdiction. The Prospect Entities dispute that the Court has subject matter jurisdiction, on the grounds that Plaintiffs' allegedly lack constitutional standing and/or their claims are not ripe. These issues are separately addressed in Plaintiffs' omnibus memorandum.

Apart from that, however, the Prospect Entities do not contend that the Court lacks subject matter jurisdiction, or, specifically, that the Court lacks federal question jurisdiction because the Plan is not subject to ERISA. To the contrary, they contend that the Plan is governed by ERISA at least as of its placement under the control of the Receiver commencing in August of 2017. Prospect Memo. at 14 n.6 ("The Plan presently fails to qualify as a 'church plan" because it no longer is maintained by a church or by a convention or association of churches exempt from tax under Code § 501. ERISA § 3(33)."). Thus, there is no dispute that the Court has federal question subject matter jurisdiction.

However, the Court must be satisfied that it has subject matter jurisdiction, regardless of whether the parties raise that issue. It is, therefore, appropriate to address that issue. Federal district courts have original jurisdiction over "federal question" cases, that is, civil actions "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331; Viqueira v. First Bank, 140 F.3d 12, 17 (1st Cir. 1998). "Generally, a claim arises under federal law within the meaning of section 1331 if a federal cause of action emerges from the face of a well-pleaded complaint."

Viqueira v. First Bank, *supra*, 140 F.3d at 17 (citing City of Chicago v. International College of Surgeons, 522 U.S. 156, 163, 118 S.Ct. 523, 529 (1997), Gully v. First Nat'l Bank, 299 U.S. 109, 113, 57 S.Ct. 96, 97–98 (1936), and BIW Deceived v. Local S6, 132 F.3d 824, 831 (1st Cir. 1997)). Federal causes of action under ERISA clearly "emerge" from the face of Plaintiffs' complaint, which specifically identifies the alleged statutory violations and the conduct upon which the claims are based.

When issues of federal question subject matter jurisdiction are raised, the rule is that the court has federal question jurisdiction if the complaint alleges a federal cause of action, regardless of whether those allegations are sufficient to state a claim. As stated in Carlson v. Principal Fin. Group, 320 F.3d 301 (2d Cir. 2003):

> [T]he question of whether a federal statute supplies a basis for subject matter jurisdiction is separate from, and should be answered prior to, the question of whether the plaintiff can state a claim for relief under that statute.
>
> The jurisdictional inquiry is rather straightforward and depends entirely upon the allegations in the complaint: "where the complaint ... is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions later noted, must entertain the suit." The two exceptions occur "where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous."' Thus, in order to sustain federal jurisdiction, the complaint must allege a claim that arises under the Constitution or laws of the United States and that is neither made solely for the purpose of obtaining jurisdiction nor wholly insubstantial and frivolous.

Carlson, 320 F.3d at 306 (quoting Bell v. Hood, 327 U.S. 678, 681–83 (1946)). Neither of these two exceptions is remotely applicable here.

The conclusion that the Court has federal question subject matter based upon Plaintiffs' assertion of an ERISA claim in the complaint is not affected by Plaintiffs having pleaded state law claims in the alternative. The Federal Rules of Civil Procedure explicitly allow a party to include in its pleadings demands for "relief in the alternative," to "set out 2 or more statements of a claim or defense alternatively or hypothetically," and "state as many separate claims or defenses as it has, regardless of consistency." Fed. R. Civ. P. 8(a)(3); id. 8(d)(2) & (3). Accordingly, parties are entitled to assert claims based upon ERISA, and, in the alternative, claims based upon state law that would be preempted if ERISA were applicable. Coleman v. Standard Life Ins., Co., 288 F. Supp. 2d 1116, 1121 (E.D. Cal. 2003) (court allowing plaintiff to set forth state law claims and ERISA claims in the alternative, because "there has been no determination as to whether ERISA applies."); Schiffli Embroidery Workers Pension Fund v. Ryan Beck & Co., 869 F. Supp. 278 (D.N.J. 1994) (court denying motion to dismiss and allowing plaintiff to plead ERISA claims and state law claims in the alternative on the grounds that it was unclear at that point whether the movants fell within the scope of ERISA); Young v. Reconstructive Orthopedic Assocs., II, P.C., No. CIV.A. 03-2034, 2004 WL 350508, at *2 (E.D. Pa. Feb. 24, 2004) (allowing pleading in the alternative where "it is questionable whether ERISA will apply in this matter"); Duncanson v. Northwire, Inc., No. CV 10-2300 (PAM/JIB), 2010 WL 11565543, at *3 (D. Minn. Sept. 30, 2010) ("Count II is an alternative claim. In other words, if the Court determines that ERISA applies to the alleged new benefit plan, then Count I is the operative claim. If the Court determines that ERISA does not apply, Count II is the operative claim. Northwire argues that Count II is duplicative of Count I and should therefore be

dismissed. But the Federal Rules of Civil specifically provide for pleading in the alternative. Fed. R. Civ. P. 8(d)(2). Count II cannot be dismissed merely because it is an alternative to Count I.").

It should be noted that the Court would retain federal question subject matter jurisdiction even if Plaintiffs' ERISA claims ultimately were dismissed. Lawless v. Steward Health Care System, LLC, 894 F.3d 9, 19 (1st Cir. 2018) (fact that pretrial discovery established absence of federal claim did not deprive court of federal question jurisdiction to hear remaining state claim) ("After all, it is common ground that when a federal court may validly exercise federal-question jurisdiction over at least one claim, it may also exercise supplemental jurisdiction over pendent state-law claims. And once such supplemental jurisdiction has attached, the mere fact that the anchoring federal claim subsequently goes up in smoke does not, without more, doom all pendent state-law claims.") (citation omitted). The issue then would be whether or not the Court exercises its discretion to decline to hear such state law claims, in accordance with the factors set forth in 28 U.S.C. § 1367 (Supplemental Jurisdiction).

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

The Court must "accept as true all the factual allegations in the complaint and construe all reasonable inferences in favor of the plaintiff." Sanchez v. Pereira-Castillo, 590 F.3d 31, 41 (1st Cir. 2009) (citations omitted). The complaint "must contain sufficient factual matter to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citation omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference

that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citation omitted).

"The plausibility inquiry necessitates a two-step pavane." García-Catalán v. United States, 734 F.3d 100, 103 (1st Cir. 2013) (citing Rodríguez–Reyes v. Molina–Rodríguez, 711 F.3d 49, 53 (1st Cir. 2013)). "First, the court must distinguish 'the complaint's factual allegations (which must be accepted as true) from its conclusory legal allegations (which need not be credited).'" Id. (citation omitted). "Second, the court must determine whether the factual allegations are sufficient to support 'the reasonable inference that the defendant is liable for the misconduct alleged.'" Id. (quoting Ashcroft v. Iqbal, *supra*, 556 U.S.at 678).

"[T]he complaint must be read as a whole," and "there need not be a one-to-one relationship between any single allegation and a necessary element of the cause of action." García-Catalán v. United States, *supra*, 734 F.3d at 103 (1st Cir. 2013) ("We emphasize that the complaint must be read as a whole. As we have explained, '[t]here need not be a one-to-one relationship between any single allegation and a necessary element of the cause of action.'") (quoting Rodríguez–Reyes v. Molina–Rodríguez, *supra*, 711 F.3d at 55). The motion to dismiss should be denied if "the array of circumstances described in the complaint suffices to support an inference." Rodríguez-Reyes v. Molina-Rodríguez, *supra*, 711 F.3d at 57.

C. Failure to Make Contributions under ERISA (Count I)

1. Summary of Argument

The Prospect Entities seek dismissal of Plaintiffs claim against them for failure to make minimum funding contributions to the Plan required by ERISA (Count I), based on three arguments:

> First, relevant federal statute makes plain, multiple times, that the SJHSRI Group Defendants, as "the employer[s] responsible for making contributions to or under the plan," alone bear the statutory obligation to satisfy ERISA's minimum funding obligations with respect to a defined benefit plan like the Plan. Second, a claim brought for "appropriate equitable relief" under ERISA § 502(a)(3), where remedies are limited to those traditionally available in equity, cannot possibly lie against complete strangers to the Plan (here, the Prospect Entities) that cannot be shown to have had any financial dealings with the Plan, or to have ever served as a fiduciary or party-in-interest to the Plan, or to have had any direct dealings with the Plan. Third, Plaintiffs' attempt to hold the Prospect Entities liable as "successors" to the SJHSRI Group Defendants is nothing more than a cynical attempt to find a way past the "appropriate equitable relief" limitation placed on actions predicated on ERISA § 502(a)(3) in order to reach (and pick) a supposed deep pocket, despite there not being any viable legal or proper equitable basis to do so.

Prospect Memo. at 24-25. They also argue that dismissal of Count I is especially required "with respect to Prospect Medical Holdings and Prospect East as Plaintiffs simply allege that Prospect Medical Holdings 'owns all of the shares of Prospect East' and that Prospect East holds an 85% ownership interest of Prospect Chartercare." Prospect Memo. at 31-32.

However, as discussed below, the Prospect Entities that received assets in connection with the 2014 Asset Sale (*i.e.*, Prospect Chartercare, Prospect SJHSRI, and Prospect RWH) are liable under Count I based upon the federal common law of successor liability. As also discussed below, both of the other Prospect Entities

(Prospect Medical and Prospect East) are liable under Count I because all of the Prospect Entities are members of the same "controlled group" as defined by ERISA, and because ERISA imposes minimum funding obligations on all members of a "controlled group" if any member of the "controlled group" has liability to make minimum funding obligations.

2. SJHSRI's Duty to Make Minimum Funding Contributions

Count I of the Complaint alleges that SJHSRI failed to make contributions in satisfaction of the minimum funding standards of 29 U.S.C. § 1082.[5] 29 U.S.C. § 1082(a)(1) establishes a statutory obligation for employers to meet minimum funding standards:

> (a) Requirement to meet minimum funding standard
>
> (1) In general
>
> A plan to which this part applies shall satisfy the minimum funding standard applicable to the plan for any plan year.
>
> * * *
>
> (b) Liability for contributions
>
> (1) In general
>
> Except as provided in paragraph (2), the amount of any contribution required by this section (including any required installments under paragraphs (3) and (4) of section 1083(j) of this title or under section 1085a(f) of this title) shall be paid by the employer responsible for making contributions to or under the plan.

29 U.S.C. § 1082.

[5] FAC ¶ 456.

29 U.S.C. § 1132(a)(3) authorizes Plan participants, and the Receiver as ERISA fiduciary, to "bring an action to garner the amounts needed to satisfy ERISA's minimum funding requirement." Gastronomical Workers Union Local 610 & Metropolitan Hotel Ass'n Pension Fund v. Dorado Beach Hotel Corp., 617 F.3d 54, 63 (1st Cir. 2010) ("This suit is not an action to collect under, or enforce, the CBA.[6] Rather, it is an action to garner the amounts needed to satisfy ERISA's minimum funding requirement. The trustees have the right to pursue such an action.") (citing 29 U.S.C. § 1132(a)(3)) (other citation omitted).

3. The Prospect Entities Have Successor Liability under ERISA

a. Plaintiffs' Contention

The Prospect Entities do not dispute that SJHSRI has liability for failing to make minimum required contributions under ERISA, if ERISA applies. In Count I, Plaintiffs allege that "Prospect Chartercare, Prospect East, Prospect Medical Holdings, Prospect Chartercare St. Joseph, and Prospect Chartercare Roger Williams are the **successors of SJHSRI**, CCCB,[7] and RWH,[8] and are members of the same control group, and are liable for SJHSRI's failure to make contributions."[9] In the wherefore clause to Count I, Plaintiffs seek various forms of relief against the Prospect Entities, including ordering them "to fund the Plan in accordance with ERISA's funding requirements;" and ordering them "to make the Plan whole for all contributions that should have been made pursuant

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[6] Collective Bargaining Agreement.

[7] Chartercare Community Board.

[8] Defendant Roger Williams Hospital.

[9] FAC ¶ 461 (emphasis supplied).

to ERISA funding standards, and for interest and investment income on such contributions. . . ."[10]

b. Successor Liability under ERISA

The elements of the federal common law doctrine of successor liability in ERISA cases involving asset sales are very simple:

> In sum, we hold that a purchaser of assets may be liable for a seller's delinquent ERISA fund contributions to vindicate important federal statutory policy where the buyer had notice of the liability prior to the sale and there exists sufficient evidence of continuity of operations between the buyer and seller.

Einhorn v. M.L. Ruberton Const. Co., 632 F.3d 89, 99 (3d Cir. 2001); Pension Benefit Guaranty Corporation v. Findlay Industries, Inc., 902 F.3d 597, 611-612 (6th Cir. 2018) ("Not only does successor liability promote fundamental policies of ERISA, refusal to apply the principles of successor liability here would frustrate ERISA policies. If there is no successor liability here, this case will provide an incentive to find new, clever financial transactions to evade the technical requirements of ERISA and, thus, escape any liability—a result that flies in the face of § 1001(b).");[11] Resilient Floor Covering Pension Trust Fund Bd. of Trustees v. Michael's Floor Covering, Inc., 801 F.3d 1079, 1095 n.4 (9th Cir. 2015) (applying federal common law of successor liability to ERISA) ("No circuit has held otherwise."); Chicago Truck Drivers, Helpers and Warehouse

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[10] FAC at 147.

[11] 29 U.S.C. § 1001(b) states as follows:

> It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

Workers Union (Independent) Pension Fund v. Tasemkin, Inc., 59 F.3d 48, 49 (7th Cir. 1995) ("The successorship doctrine provides an exception from the general rule that a purchaser of assets does not acquire a seller's liabilities. Most states have adopted exceptions to the general no-liability rule that allow creditors to pursue the successor if the 'sale' is merely a merger or some other type of corporate reorganization that leaves real ownership unchanged. Successor liability under federal common law is broader still: in order to protect federal rights or effectuate federal policies, this theory allows lawsuits against even a genuinely distinct purchaser of a business if (1) the successor had notice of the claim before the acquisition; and (2) there was 'substantial continuity in the operation of the business before and after the sale.'") (quoting E.E.O.C. v. G-K-G, Inc., 39 F.3d 740, 748 (7th Cir. 1994)) (other citation omitted); Upholsterers' Int'l Union Pension Fund v. Artistic Furniture, 920 F.2d 1323, 1329 (7th Cir. 1990) (The "predicates to the imposition of successor liability are as follows: to hold a successor liable we must find that there exist sufficient indicia of continuity between the two companies and that the successor firm had notice of its predecessor's liability.").

The complaint contains sufficient factual allegations from which is can be reasonably concluded that the Prospect Entities have successor liability under ERISA. With respect to the requirement of notice, Plaintiffs allege (and it is undisputed) that the Prospect Entities purchased the assets of SJHSRI knowing that SJHSRI had a (grossly underfunded) defined benefit pension plan.[12] With respect to the requirement to allege continuity of operations, Plaintiffs allege (and it is undisputed) that the Prospect Entities

[12] FAC ¶ 410.

operated the two hospitals at the same locations,[13] under the same names;[14] identified themselves to employees, patients, and the public under the fictitious name which was the same name under which SJHSRI, RWH, and CCCB had operated Old Fatima Hospital and Old Roger Williams Hospital;[15] that all of SJHSRI's and RWH's employees were transferred to the employment of the Prospect Entities, with their starting wages and salaries based on their final wages and salaries while employed by SJHSRI and RWH, and with seniority based on their original date of hire by SJHSRI and RWH;[16] and that the Asset Purchase Agreement actually defined Prospect Chartercare, Prospect Chartercare St. Joseph, Prospect Chartercare Roger Williams, Prospect Medical Holdings, and Prospect East as "successor employer[s]," at least for tax purposes.[17]

Moreover, after the 2014 Asset Sale, Prospect Chartercare accepted responsibility to address issues involving the Plan raised by employees who had worked at Old Fatima,[18] including instructing Angell how to respond to questions from Plan participants in August of 2014,[19] making PowerPoint presentations to Plan participants dealing solely with the Plan in April of 2016, having its own pension consultants monitor

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[13] FAC ¶ 411-12.

[14] FAC ¶ 413-15.

[15] FAC ¶ 413.

[16] FAC ¶ 416.

[17] FAC ¶ 420.

[18] FAC ¶ 418.

[19] FAC ¶¶ 306-10.

the underfunded status of the Plan in early 2016,[20] and advising SJHSRI to put the Plan into receivership in June of 2017.[21]

These factual allegations supporting successor liability are also buttressed by Prospect Chartercare's litigation conduct in Prospect CharterCARE, LLC v. Conklin, 185 A.3d 538 (R.I. 2018). Shortly after the completion of the 2014 Asset Sale, CCCB's former Chief Financial Officer Michael Conklin requested severance pay from Prospect Chartercare under the terms of his employment contract with *CCCB*. See Prospect CharterCARE, LLC v. Conklin, 185 A.3d at 540. When Prospect Chartercare failed to pay, Mr. Conklin brought arbitration proceedings, resulting in an arbitration award that was later confirmed by the Superior Court and Rhode Island Supreme Court. Prospect CharterCARE, LLC v. Conklin, 185 A.3d at 543, 547. During the approximate year and a half that Prospect Chartercare was arbitrating the case—including pre-arbitration briefing, three days of arbitration hearings, and post-arbitration briefing, all conducted by some of the same legal counsel representing Prospect Chartercare in this suit—it never occurred to Prospect Chartercare even to argue that it should not be held liable on an agreement between Mr. Conklin and *CCCB*. After all, the 2014 Asset Sale had "closed in June of 2014, **thereby creating PCC** [Prospect Chartercare] **as the successor entity**" of CCCB. Prospect CharterCARE, LLC v. Conklin, 185 A.3d at 540 (emphasis supplied). When Prospect Chartercare later made that argument for the first time in court, the Superior Court rejected it as waived, and the Rhode Island Supreme Court affirmed. See Prospect CharterCARE, LLC v. Conklin, 185 A.3d at 547.

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[20] FAC ¶¶ 315-318.

[21] FAC ¶ 313.

In Massachusetts Carpenters Cent. Collection Agency v. Belmont Concrete Corp., 139 F.3d 304 (1st Cir. 1998), the First Circuit explained the rationale for applying the federal common law of successor liability in ERISA cases:

> The rationale is that "an employer who evades his pension responsibilities gains an unearned advantage in his labor activities. Moreover, underlying congressional policy behind ERISA clearly favors the disregard of the corporate entity in cases where employees are denied their pension benefits."

139 F.3d at 308 (quoting Chicago Dist. Council of Carpenters Pension Fund v. P.M.Q.T., Inc., 169 F.R.D. 336, 342 (N.D. Ill. 1996)).

The Prospect Entities acknowledge "[t]he federal common law doctrine of successor liability routinely invoked by ERISA-regulated multiemployer pension plans to enforce judgments obtained in collection actions involving delinquent contributions (and more recently, withdrawal liability)." Prospect Memo. at 33. However, they contend:

> It is inappropriate to use that doctrine in a situation not involving a multiemployer pension plan (the Plan unquestionably is a single employer plan), where the doctrine is being used as a bootstrap to avoid ERISA § 502(a)(3)'s "appropriate equitable relief" limitation(s).

Prospect Memo. at 34.

Insofar as the Prospect Entities are contending that the federal common law doctrine of successor liability does not apply to single-employer plans, they are simply wrong. The Sixth Circuit in November 2018 rejected such an argument:

> But the goal of stopping employers from splitting their assets to escape liability is equally as important for single-employer plans as it is for multiemployer plans. Neither the district court nor defendants provided any reason why multiemployer plans should be treated any differently; thus, neither provided any grounds for limiting the extensive case law outlined above to cases arising under the specific portions of ERISA that address multiemployer plans. And upon reflection, we cannot think of any. After all,

> the rules against dissipating assets are meant to protect both "ERISA **and** MPPAA[22] obligations."

Pension Benefit Guaranty Corporation v. Findlay Industries, Inc., *supra*, 902 F.3d at 609 (quoting Mason & Dixon Tank Lines, Inc. v. Cent. States, Se. & Sw. Areas Pension Fund, 852 F.2d 156, 159 (6th Cir. 1988)) (emphasis supplied by court).

Moreover, that is not a new development in the law. See Brend v. Sames Corp., No. 00 C 4677, 2002 WL 1488877, at *4 (N.D. Ill. July 11, 2002) (applying federal common law doctrine of successor liability to single-employer top-hat plan[23] to impose liability on purchaser of corporate assets) ("We agree with plaintiffs that the reasoning of *Artistic Furniture* and *Moriarty* for applying the federal common law of successor liability to multiemployer plan contribution actions applies with equal force to actions seeking enforcement of top hat plans.") (citing Artistic Furniture, *supra*, and Moriarty v. Svec, 164 F.3d 323, 329 (7th Cir. 1998)).

Second, the Prospect Entities seek to dismiss Count I because they allegedly are "strangers to the plan." Prospect Memo. at 24 ("Count I simply is styled as an enforcement action under ERISA § 502(a)(3) to enforce ERISA's minimum funding obligation(s) under ERISA § 302. Because the Prospect Entities all are strangers to the Plan, and have never had any direct or indirect dealings with the Plan, there is no 'appropriate equitable relief' capable of being obtained from or against any of them in connection with Count I. Accordingly, the Prospect Entities should be dismissed from

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[22] Multiemployer Pension Plan Amendments Act of 1980.

[23] A top-hat plan is: "[a] plan which is [1] unfunded and [2] is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly trained employees." Ahearn v. Marsh & McLennan Companies, Inc., 124 F. App'x 118, 119 (3d Cir. 2005) (citations omitted).

Count I of the Amended Complaint.") (citation omitted). As discussed below concerning Plaintiffs' ERISA claims against the Prospect Entities for aiding and abetting breach of fiduciary duty, *infra* at 27-29, the Prospect Entities were anything but strangers to the Plan.

However, the Prospect Entities' direct involvement with the Plan is irrelevant to its successor liability under ERISA, which is based upon the continuity between SJHSRI's business operations and Prospect Chartercare's business operations, not the Prospect Entities' dealings with the Plan. The Prospect Entities are not "strangers to the Plan" because their predecessor SJHSRI is not a "stranger to the Plan." Indeed, the characterization of an entity with successor liability for the predecessor company's pension plan as a "stranger to the plan" is an oxymoron. "By definition, successor liability claims derive from the liability of the predecessor entity." In re Motors Liquidation Company, 590 B.R. 39, 63 (Bankr. S.D.N.Y. 2018). See City of Syracuse v. Loomis Armored US, LLC, 900 F. Supp. 2d 274, 290 (N.D.N.Y. 2012) ("'[S]uccessor liability' is not a separate cause of action but merely a theory for imposing liability on a defendant based on the predecessor's conduct."). This is equally true under ERISA. See Auto. Indus. Pension Tr. Fund v. Ali, No. C-11-5216 JCS, 2012 WL 2911432, at *8 (N.D. Cal. July 16, 2012) (rejecting successor's argument that successor was not an ERISA employer) ("Successor liability, however, has not been shown to itself be an independent cause of action under those sections, or any section, of ERISA. Instead, successor liability has been treated as merely a theory for imposing liability on a defendant based on some other person's or entity's ERISA violation.").

c. All of the Prospect Entities Have Successor Liability Because They Belong to the Same Controlled Group

Plaintiffs' claim for successor liability on Count I is initially against those Prospect Entities that acquired and now operate SJHSRI's assets. They have direct successor liability. Plaintiffs' claims for successor liability against the rest of the Prospect Entities is based upon their membership in the same controlled group as those entities that have direct successor liability.

29 U.S.C. § 1082(b) provides that all members of a "controlled group" are liable for funding a single-employer plan:

> (b) Liability for contributions
>
> (1) In general
>
> Except as provided in paragraph (2), the amount of any contribution required by this section (including any required installments under paragraphs (3) and (4) of section 1083(j) of this title or under section 1085a(f) of this title) shall be paid by the employer responsible for making contributions to or under the plan.
>
> (2) Joint and several liability where employer member of controlled group
>
> **If the employer referred to in paragraph (1) is a member of a controlled group, each member of such group shall be jointly and severally liable for payment of such contributions**.
>
> * * *
>
> [Emphasis supplied]

29 U.S.C. § 1082(d)(3) defines "controlled group":

> (d) Miscellaneous rules
>
> * * *
>
> (3) Controlled group

> For purposes of this section, the term “controlled group” means any group treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of Title 26.

The Prospect Entities are a “controlled group” because they are treated as a single employer under 26 U.S.C. § 414(b) (corporations) and under 26 U.S.C. § 414(c) (“trades or businesses” including limited liability companies).

26 U.S.C. § 414(b) applies to Prospect Medical Holdings, Inc. and Prospect East Holdings, Inc. because they are corporations, and provides:

> (b) Employees of controlled group of corporations.--For purposes of sections 401, 408(k), 408(p), 410, 411, 415, and 416, **all employees of all corporations which are members of a controlled group of corporations** (within the meaning of section 1563(a), determined without regard to section 1563(a)(4) and (e)(3)(C)) **shall be treated as employed by a single employer**.

26 U.S.C. § 414(b) (emphasis supplied). 26 U.S.C. § 1563(a)(1) states:

> (a) Controlled group of corporations.--For purposes of this part, the term “controlled group of corporations” means any group of—
>
>> (1) Parent-subsidiary controlled group.--One or more chains of corporations connected through stock ownership with a common parent corporation if—
>>
>> (A) stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of each of the corporations, except the common parent corporation, is owned (within the meaning of subsection (d) (1)) by one or more of the other corporations; and
>>
>> (B) the common parent corporation owns (within the meaning of subsection (d) (1)) stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of at least one of the other corporations, excluding, in computing such

voting power or value, stock owned directly by such other corporations.

26 U.S.C. § 414(c) applies to "trades or businesses" such as Prospect Chartercare, LLC, Prospect Chartercare SJHSRI, LLC, and Prospect Chartercare RWMC, LLC, which are limited liability companies,[24] and provides:

> (c) Employees of partnerships, proprietorships, etc., which are under common control.--
>
> (1) In general.--Except as provided in paragraph (2), for purposes of sections 401, 408(k), 408(p), 410, 411, 415, and 416, under regulations prescribed by the Secretary, **all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer**. The regulations prescribed under this subsection shall be based on principles similar to the principles which apply in the case of subsection (b).

26 U.S.C. § 414(c) (emphasis supplied).

The "regulations prescribed by the Secretary" include 26 C.F.R. § 1.414(c)-2, which provides:

> (a) In general. For purposes of this section, the term "two or more trades or businesses under common control" means any group of trades or businesses which is either a "parent-subsidiary group of trades or businesses under common control" as defined in paragraph (b) of this section, a "brother-sister group of trades or businesses under common control" as defined in paragraph (c) of this section, or a "combined group of trades or businesses under common control" as defined in paragraph (d) of this section. For purposes of this section and §§ 1.414(c)–3 and

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[24] Although the Treasury Regulations under § 414(c) do not define "trade or business," see New Jersey Bldg. Laborers' Statewide Pension Fund & Trustees Thereof v. CID Constr. Servs., LLC, No. 15CV3412SRCCLW, 2015 WL 5965627, at *5 (D.N.J. Oct. 14, 2015), it has been held to encompass for-profit limited liability companies. See Cent. States, Se. & Sw. Areas Pension Fund v. SCOFBP, LLC, 668 F.3d 873, 879 (7th Cir. 2011). See also Sun Capital Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund, 724 F.3d 129, 145 (1st Cir. 2013) (treating for-profit LLCs as "trades or businesses" for purposes of controlled group liability for multiemployer plan withdrawal liability under the Multi-Employer Pension Plan Amendments Act); Plumbers & Steamfitters Local No. 150 Pension Fund v. Custom Mech. CSRA, LLC, No. CV 107-142, 2009 WL 3294793, at *4 (S.D. Ga. Oct. 13, 2009) (two LLCs were under common control where three individuals each held a one-third interest in both).

1.414(c)–4, the term “organization” means a sole proprietorship, a partnership (as defined in section 7701(a)(2)), a trust, an estate, or a corporation.

(b) Parent-subsidiary group of trades or businesses under common control—

(1) In general. The term “parent-subsidiary group of trades or businesses under common control” means one or more chains of organizations conducting trades or businesses connected through ownership of a controlling interest with a common parent organization if—

(i) A controlling interest in each of the organizations, except the common parent organization, is owned (directly and with the application of § 1.414(c)–4(b)(1), relating to options) by one or more of the other organizations; and

(ii) The common parent organization owns (directly and with the application of § 1.414(c)–4(b)(1), relating to options) a controlling interest in at least one of the other organizations, excluding, in computing such controlling interest, any direct ownership interest by such other organizations.

(2) Controlling interest defined—

(i) Controlling interest. For purposes of paragraphs (b) and (c) of this section, the phrase “controlling interest” means:

(A) In the case of an organization which is a corporation, ownership of stock possessing at least 80 percent of total combined voting power of all classes of stock entitled to vote of such corporation or at least 80 percent of the total value of shares of all classes of stock of such corporation;

* * *

(C) In the case of an organization which is a partnership, ownership of at least 80 percent of the profits interest or capital interest of such partnership; and

* * *

26 C.F.R. § 1.414(c)-2 (immaterial sections omitted).

Plaintiffs allege that Prospect Medical has a 100% ownership interest in Prospect East, that Prospect East owns 85% of Prospect Chartercare, and that Prospect Chartercare owns all of Prospect SJHSRI and Prospect RWH.[25] Thus, they all qualify as a controlled group under the tests set forth in 26 U.S.C. §§ 414(b) & (c), and the regulations promulgated thereunder, and all of the Prospect Entities are treated as a single employer with successor liability for SJHSRI's pension obligations.

The Prospect Entities argue that Prospect Medical and Prospect East in particular are entitled to dismissal of Plaintiffs' claims for liability on Count I:

> Finally, it should be noted that while all the Prospect Entities should be dismissed from Count I of the Amended Complaint, this is particularly true with respect to Prospect Medical Holdings and Prospect East as Plaintiffs simply allege that Prospect Medical Holdings "owns all of the shares of Prospect East" and that Prospect East holds an 85% ownership interest of Prospect Chartercare." This is not nearly enough to assert any viable claim, let alone an actionable ERISA § 502(a)(3) claim.

Prospect Memo. at 31-32 (citation omitted). However, as noted above, it is precisely those ownership interests that include them in the same "controlled group" with Prospect Chartercare, and result in the imposition of liability under 29 U.S.C. § 1082 for having failed to make the minimum funding contributions required by ERISA.

Before leaving the topic of the federal common law of successor liability, a response is in order to the comment of the Prospect Entities that "Plaintiffs' attempt to hold the Prospect Entities liable as 'successors' to the SJHSRI Group Defendants is

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[25] See FAC ¶¶ 11, 13-14, 20-21. The First Amended Complaint attached a flow chart showing corporate relationships.

nothing more than a cynical attempt to find a way past the 'appropriate equitable relief' limitation placed on actions predicated on ERISA § 502(a)(3) in order to reach (and pick) a supposed deep pocket, despite there not being any viable legal or proper equitable basis to do so." Prospect Memo. at 24-25.

In fact, the observation of the Sixth Circuit in Pension Benefit Guaranty Corporation v. Findlay Industries, Inc., 902 F.3d 597, 611-12 (6th Cir. 2018) applies equally here, that "[i]f there is no successor liability here, this case will provide an incentive to find new, clever financial transactions to evade the technical requirements of ERISA and, thus, escape any liability. . . ."

D. Count II, Breach of Fiduciary Duty

Count II of the Complaint alleges that "[a]t all times that the Plan failed to qualify as a Church Plan, SJHSRI and CCCB were fiduciaries of the Plan under ERISA." FAC ¶ 463. Count II specifically alleges as follows:

> Defendants SJHSRI and CCCB's fiduciary duties included but were not limited to providing truthful and accurate information concerning the Plan and administration of the Plan, including information to help Plan participants decide whether to remain with the Plan by accepting and continuing employment with SJHSRI, and specifically whether SJHSRI was obligated to fund the Plan and was in fact funding the Plan, the extent of SJHSRI's unfunded liability under the Plan, the security of the Plan participant's benefits under the Plan, and SJHSRI's rights to terminate the Plan.
>
> Defendants SJHSRI and CCCB committed breaches of fiduciary duty, including but not limited to misrepresenting the funding status and security of the Plan, failures to fund the Plan, failures to demand that others fund the Plan, failures to administer the Plan in the best interests of its beneficiaries, failures to act honestly and loyally, and failures to act in

> good faith in the best interests of the Plan and its participants and with the necessary level of care.[26]

However, Count II does not expressly claim that any of the Prospect Entities have successor liability for SJHSRI's breach of fiduciary, or seek relief against any Prospect Entities in the wherefore clause. Consequently, the Prospect Entities' motion to dismiss does not address Count II.

E. Count III, Aiding and Abetting Breach of Fiduciary Duty under ERISA

In Count III Plaintiffs assert claims against the Prospect Entities for aiding and abetting breaches of fiduciary duties under ERISA. Although the Prospect Entities' opposing arguments are far from clear, two things are absolutely certain: 1) they do not dispute SJHSRI's liability for breach of fiduciary duty, and 2), with the exception of their "strangers to the plan" argument that is discussed below, the Prospect Entities make no attack whatsoever on the factual sufficiency of the allegations in the Complaint to state a claim that they knowingly participated in, and aided and abetted, Defendant SJHSRI's breaches of fiduciary duties imposed by ERISA. Instead, their efforts to dismiss this claim are based solely on legal arguments concerning whether ERISA allows claims for aiding and abetting breaches of fiduciary duty, and, if so, who may be sued and what remedies are available.

As movants under Rule 12(b)(6), the Prospect Entities have the burden of showing that Plaintiffs have failed to state a claim for relief. See Directv, Inc. v. Treesh, 487 F.3d 471, 476 (6th Cir. 2007) ("The defendant has the burden of showing that the plaintiff has failed to state a claim for relief.") (citing Carver v. Bunch, 946 F.2d 451,

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[26] FAC ¶¶ 467-68.

454–55 (6th Cir. 1991)); Gayot v. Perez, No. 16-CV-8871 (KMK), 2018 WL 6725331, at *3 (S.D.N.Y. Dec. 21, 2018) ("[T]he movant bears the burden of proof on a motion to dismiss under Rule 12(b)(6).") (citation omitted). Their decision to focus their attack on technical legal arguments means that the factual sufficiency of Plaintiffs' claim is established for purposes of their motion to dismiss, other than their "strangers to the plan argument," to which Plaintiffs now turn.

As noted in that Plaintiffs' Omn. Memo., liability under ERISA for aiding and abetting breaches of fiduciary duty is based on the law of trusts. However, rather than addressing the law of trusts, the Prospect Entities base their argument on the disputed factual contention that they were "strangers to the plan":

> Second, a claim brought for "appropriate equitable relief" under ERISA § 502(a)(3), where remedies are limited to those traditionally available in equity, **cannot possibly lie against complete strangers to the Plan (here, the Prospect Entities) that cannot be shown to have had any financial dealings with the Plan, or to have ever served as a fiduciary or party-in-interest to the Plan, or to have had any direct dealings with the Plan.**

Prospect Memo. at 24 (emphasis supplied). The claim that only fiduciaries and parties-in-interest may be sued under 29 U.S.C. § 1132(a)(3) for aiding and abetting breach of fiduciary duty is addressed in Plaintiffs' Omn. Memo.

However this is the place to rebut the Prospect Entities' factual assertion that they are "strangers to the Plan." That is simply false, based upon the allegations in the Complaint that must be accepted as true for purposes of the Prospect Entities' motion to dismiss. Those allegations include the following.

The Prospect Entities through Prospect Medical's President Thomas Reardon and Senior Vice President Von Crockett participated in misleading UNAP's Christopher

Callaci in August and September 2013 that the $14 million would "stabilize" the Plan, and that SJHSRI would make the required contributions after the 2014 Asset Sale.[27] Both of those issues deal directly with the Plan. All of the Prospect Entities participated with SJHSRI in repeatedly misleading state regulators on those very same issues in the spring of 2014, in order to secure approval of their common application for hospital conversion.[28]

Then, after the 2014 Asset Sale closed on June 20, 2014, the Prospect Entities ramped up their misconduct concerning the Plan. In August of 2014, Prospect Chartercare instructed Angell to mislead Plan participants who were seeking information concerning the solvency of the Plan, notwithstanding that Prospect Chartercare claimed to have no responsibility for the Plan.[29] Then in December 2014, Prospect Chartercare's employee Otis Brown emailed the Diocesan Defendants insisting that SJHSRI be listed in the Catholic Directory, because otherwise it would "mean that the SJHS[RI] pension would no longer be treated as a church plan."[30] Indeed, starting in 2015 it was the same Otis Brown who was listed in the Catholic Directory as SJHSRI's representative, as part of the Prospect Entities' scheme to improperly perpetuate the Plan's church plan status.[31]

Then in early 2016, more than eighteen months after the 2014 Asset Sale, and notwithstanding their purported lack of responsibility for the Plan, the Prospect Entities

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[27] FAC ¶¶ 298-303.

[28] FAC ¶¶ 324-36.

[29] FAC ¶¶ 306-10.

[30] FAC ¶¶ 185-87.

[31] Even though he worked for Prospect Chartercare, not SJHSRI. FAC ¶ 194.

had the Plan's funding status evaluated by BCG Pension Risk Consultants, Inc., who provided them with a report confirming that the plan remained grossly underfunded.[32] Then in April of 2016, Prospect Chartercare participated in a PowerPoint presentation to Plan participants devoted solely to the subject of the Plan, which made misleading and deceptive statements about the Plan.[33] Then on June 23, 2017, three years after the 2014 Asset Sale, the Prospect Entities through Von Crockett urged Defendants SJHSRI, RWH, and CCCB to take steps to terminate the Plan and deprive the Plan participants of pension benefits, such as by filing for bankruptcy, or by placing the Plan into a state court receivership to obtain a court order significantly reducing the benefits of Plan participants.[34]

The Prospect Entities cite no case law or other legal authority even addressing the phrase "strangers to the plan," much less defining or applying it. However, under the ordinary meaning of the phrase, it clearly does not apply to them.

F. Count IV, ERISA Declaratory Relief

The Prospect Entities seek to be dismissed from the adjudication of Plaintiffs' ERISA claim for declaratory relief (Count IV), on the grounds that they are "strangers to the Plan who have not directly or indirectly received anything from the Plan…" Prospect Memo. at 37-38. That argument is foreclosed by the factual dispute over their involvement with the Plan, the previous discussion of successor and controlled group

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[32] FAC ¶ 313.

[33] FAC ¶¶ 315-18.

[34] FAC ¶ 314.

liability, and the discussion in Plaintiffs' Omn. Memo. concerning liability for aiding and abetting breach of fiduciary duty.

G. ERISA Preemption of State Law Claims

The Prospect Entities contend that "all of the state law claims should be dismissed as they are preempted by ERISA." Prospect Memo. at 38. In fact, none of Plaintiffs' state law claims can be dismissed on preemption grounds at this stage of the case, for the reasons set forth in Plaintiffs' Omn. Memo.

H. Plaintiffs' Claims for Actual Fraudulent Transfer (Count V) Should Not Be Dismissed as to the Prospect Entities

1. R.I. Gen. Laws § 6-16-4(a)(1)

Plaintiffs' claims in Count V are based on Rhode Island's Uniform Fraudulent[35] Transactions Act ("RIUFTA"), specifically R.I. Gen. Laws § 6-16-4(a)(1), which states as follows:

> § 6-16-4. Transfers fraudulent as to present and future creditors
>
> (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) With actual intent to hinder, delay, or defraud any creditor of the debtor;

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[35] When this action was commenced, Rhode Island had the Uniform Fraudulent Transfer Act, but on July 18, 2018, Rhode Island adopted the Uniform Voidable Transfer Act ("RIUVTA"). See 2018 Rhode Island Laws Ch. 18-141 (18-H 7334). The RIUVTA was effective upon passage but only applies transfers made after the effective date. 2018 Rhode Island Laws Ch. 18-141 § 4. Accordingly, Plaintiffs' fraudulent transfer claims are governed by the RIUFTA, not the RIUVTA. **This distinction is lost on the Prospect Entities, who have mis-cited to the Rhode Island Uniform Voidable Transfer Act in their memorandum.** See, e.g., Prospect Memo. at 82 (quoting the presently amended text of R.I. Gen. Laws § 6-16-5).

Plaintiffs’ claim under R.I. Gen. Laws § 6-16-4(a)(1) is based on the allegation that SJHSRI used the 2014 Asset Sale to transfer proceeds from the sale to its controlling member, CCCB, while retaining the liability for the Plan in a grossly undercapitalized corporation, intending thereby to hinder, delay, and defraud the Plan and the Plan participants by putting assets beyond their reach.

2. Fraudulent Transfer Claims Are Not Preempted By ERISA

As discussed in Plaintiffs’ Omn. Memo., the Prospect Entities’ preemption arguments are inapplicable because Plaintiffs have alleged and asserted ERISA claims and state law claims in the alternative, such that the issue of whether ERISA applies cannot be decided in connection with a motion to dismiss. However, Plaintiffs’ fraudulent transfer claims would not be preempted even if it were *predetermined that they arose when the Plan was governed by ERISA*, because ERISA does not preempt state law fraudulent transfer claims.

The Prospect Entities contend that “all of the [Plaintiffs] state law claims should be dismissed as they are preempted by ERISA.” Prospect Memo. at 38. The Prospect Entities base their argument on 29 U.S.C. § 1144(a), which states that ERISA “shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan…” Prospect Memo. at 38 (“Congress provided for the preemption of all state laws that ‘relate to’ any employee benefit plan governed by ERISA.”) (citing 29 U.S.C. § 1144(a)) (other citations omitted). However, the Prospect Entities fail to cite any case law or other authority concerning whether state law fraudulent transfer claims “relate to” any employee benefit plan governed by ERISA, or are preempted by ERISA for any other reason.

That omission is inexcusable, since, with the possible exception of claims based upon withdrawal liability from multi-employer plans, which does not even remotely apply to this case, the law is clear that ERISA does *not* preempt fraudulent transfer claims asserted on behalf of an ERISA plan. See Cent. States, Se. & Sw. Areas Pension Fund v. LaCasse, 254 F. Supp. 2d 1069, 1072 (N.D. Ill. 2003) ("Whether it is viewed as a state or a federal common law claim, then, the plaintiffs' fraudulent conveyance claim is not preempted by ERISA."); Oregon Laborers-Employers Health & Welfare Tr. Fund v. All State Indus. & Marine Cleaning, Inc., 850 F. Supp. 905, 910 (D. Or. 1994) ("The claims of the Trusts for fraudulent conveyance are not preempted by ERISA."); Planned Consumer Mktg., Inc. v. Coats & Clark, Inc., 522 N.E.2d 30, 36 (N.Y. 1988) (claims for fraudulent conveyance and corporate wrongdoing not preempted by ERISA); Spero, Fraudulent Transfers, Prebankruptcy Planning and Exemptions § 11:5 (2018) ("Whether fraudulent transfer laws apply relative to an ERISA plan depend on the circumstances. ERISA provides that '[a]n employee benefit plan may sue or be sued.' Thus it is clear that ERISA's preemption provision does not apply to bar a plan from bringing [a fraudulent transfer] claim.") (citing 29 U.S.C.A. § 1132(d)(1)).

This is because ERISA does not preempt state laws of general application which only incidentally affect an ERISA plan. See Carpenters Local Union No. 26 v. U.S. Fidelity & Guar. Co., 215 F.3d 136, 144 (1st Cir. 2000) ("It is common ground that state laws of general application are safe from ERISA preemption even if they impose some incidental burdens on the administration of covered plans."). A "law of general application" is a law that applies to a wide variety of situations, many of which have no connection with ERISA. Carpenters Local Union, *supra*, 215 F.3d at 144-155 ("A state

law that applies to a wide variety of situations, including an appreciable number that have no specific linkage to ERISA plans, constitutes a law of general application for purposes of 29 U.S.C. § 1144(a).”).

Fraudulent transfer statutes are debtor-creditor statutes of general application that only incidentally affect an ERISA plan:

> Nevada's fraudulent transfer statute does not have a connection with or refer to employee benefit plans because it does not act immediately and exclusively upon the plans and the plans are not essential to the fraudulent transfer statute's operation. Rather, Nevada's fraudulent transfer statute is a law of general applicability governing the debtor-creditor relationship that functions irrespective of the existence of ERISA plans. While ERISA may provide the context in which the debtor becomes liable to the creditor, the fraudulent transfer statute is a procedural mechanism by which a creditor may attempt to ensure assets exist against which to enforce a judgment. As such, it is similar to other state laws of general application relating to the enforcement of judgments which ERISA does not preempt, such as garnishment or a payment bond remedy.

Klemme v. Shaw, No. 2:05CV01263PMP-LRL, 2007 WL 838958, at *2 (D. Nev. Mar. 16, 2007. See also Central States, Southeast and Southwest Areas Pension Fund v. LaCasse, 254 F. Supp. 2d 1069, 1072 (N.D. Ill. 2003) (“In particular, as ERISA provides no mechanism for the enforcement of judgments, ‘state-law methods for collecting money judgments must, as a general matter, remain undisturbed by ERISA.’”) (quoting Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825, 843 (1988)).

3. Plaintiffs’ Claims Based on R.I. Gen. Laws § 6-16-4(a)(1) (Count V) Are Claims upon Which Relief Can Be Granted, and, Therefore, Satisfy the Requirements of Rule 12(b)(6)

Apart from their preemption argument, the Prospect Entities make only two contentions: 1) “Plaintiffs have failed to plausibly allege that the 2014 Asset Sale was entered into with actual intent to hinder, delay, or defraud any creditor of the debtor”

(Prospect Memo. at 85); and 2) "the Amended Complaint fails to assert any plausible allegations that the consideration received by the debtor was not reasonably equivalent to the value of the asset transferred." Prospect Memo. at 87.[36] However, Plaintiffs are entitled to plead intent generally, because the argument is focused exclusively on SJHSRI's intent. See Fed. R. Civ. P. 9(b) ("Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.").

In addition to being alleged generally, intent can be proven by circumstantial evidence, in recognition that rarely will there be direct evidence of the intent of parties to a fraud. See Kaye v. Lone Star Fund V (U.S.), L.P., 453 B.R. 645, 671 (N.D. Tex. 2011) ("Because proof of 'actual intent to hinder, delay, or defraud' creditors may rarely be accomplished by direct proof, courts may infer fraudulent conduct from the circumstantial evidence and the surrounding circumstances of the transactions.") (quoting the Alabama UFTA).

The seminal[37] case in the First Circuit concerning the type of circumstantial evidence that will support a reasonable inference of actual intent in a fraudulent transfer case is Max Sugarman Funeral Home, Inc. v. A.D.B. Investors, 926 F.2d 1248 (2d Cir. 1991). Sugarman involved fraudulent transfers in a bankruptcy case, under 11 U.S.C. §548(a)(1). Sugarman, *supra*, 926 F.2d at 1254 (quoting 11 U.S.C. §548(a)(1)). That statute concerns transfers made "'with actual intent to hinder, delay, or defraud," just as

[36] The latter argument, however, consists entirely of that quoted phrase, and is offered apparently as a reiteration of the same argument that the Prospect Entities make (and to some extent develop) in their motion to dismiss Plaintiffs' claims based upon constructive fraud, which are discussed *infra* at 47-53.

[37] See In re Chiang, 562 B.R. 559, 574–75 (Bankr. D. Mass. 2016) ("The United States Court of Appeals for the First Circuit considered avoidance of a transfer under 11 U.S.C. § 548(a)(1) made with actual intent to hinder, delay, or defraud any creditor of the debtor in the seminal case of *Max Sugarman Funeral Home, Inc. v. A.D.B. Investors*, 926 F.2d 1248 (1st Cir. 1991).").

does R.I. Gen. Laws § 6-16-4(a)(1)(2014). Indeed, in Sugarman the First Circuit equated the standard of proof for showing fraudulent intent under 11 U.S.C. §548(a)(1) with "the common law of fraudulent conveyance." Sugarman, *supra*, 926 F.2d at 1254 ("It is often impracticable, on direct evidence, to demonstrate an actual intent to hinder, delay or defraud creditors. Therefore, as is the case under the common law of fraudulent conveyance, courts applying Bankruptcy Code § 548(a)(1) frequently infer fraudulent intent from the circumstances surrounding the transfer, taking particular note of certain recognized indicia or badges of fraud.") (citations omitted). See also F.D.I.C. v. Anchor Properties, 13 F.3d 27, 32 n.11 (1st Cir. 1994) (It is unclear whether 12 U.S.C. § 1821(d)(17) 'embodies a separate federal fraudulent conveyance law, or whether it merely codifies Massachusetts law.' In the present action, the parties have proceeded, as did the district court, on the shared assumption that there is no substantive difference between the two statutes.") (quoting Resolution Trust Corp. v. Cruce, 972 F.2d 1195, 1201 (10th Cir. 1992)).

The First Circuit identified the following "indicia or badges of fraud" as being "[a]mong the more common circumstantial indicia of fraudulent intent at the time of the transfer":

> (1) actual or threatened litigation against the debtor;
>
> (2) a purported transfer of all or substantially all of the debtor's property;
>
> (3) insolvency or other unmanageable indebtedness on the part of the debtor;
>
> (4) a special relationship between the debtor and the transferee;
>
> (5) retention by the debtor of the property involved in the putative transfer.

Sugarman, *supra*, 926 F.2d at 1254 (citations omitted). The court also addressed the significance to be placed upon the number of factors present in a particular case:

> The presence of a single badge of fraud may spur mere suspicion; the confluence of several can constitute conclusive evidence of an actual intent to defraud, absent "significantly clear" evidence of a legitimate supervening purpose.

Sugarman, 926 F.2d at 1254-1255 (citation omitted).

The First Circuit in Sugarman applied those factors to the undisputed facts, and concluded that "[u]nmistakable indicia of fraud abounded in the circumstances surrounding the…transfers," and affirmed the District Court's grant of summary judgment that the transfers involved "were fraudulent and void." Sugarman, 926 F.2d at 1255-56. Similarly, in F.D.I.C. v. Anchor Properties, *supra*, 13 F.3d at 32-33, the First Circuit applied these factors and affirmed the District Court's grant of summary judgment that the transfers involved in that case were voidable fraudulent transfers under both federal law and Massachusetts' enactment of the Uniform Fraudulent Transfer Act.

Although both Sugarman and F.D.I.C. v. Anchor Properties considered these factors in the context of motions for summary judgment, they also apply to motions to dismiss under Rule 12(b)(6). See, e.g., De Prins v. Michaeles, 236 F. Supp. 3d 482, (D. Mass. 2017 (citing Sugarman factors in support of denying motion to dismiss) ("The issue of fraudulent intent, however, should be evaluated on the basis of a factual record and cannot be decided on a motion to dismiss. 'Because the issue [of actual malice] inevitably turns on motivations and intent, it is ill-suited for resolution in a motion to dismiss.'") (quoting Edsall v. Assumption Coll., 367 F. Supp. 2d 72, 85 (D. Mass. 2005));

In re Editorial Flash, Inc., No. 13-08014 BKT, 2016 WL 3638471, at *4 (Bankr. D.P.R. June 29, 2016) (citing Sugarman factors in support of granting motion to dismiss).

From the allegations in the complaint it is clear that enough of these factors are present in this case to show fraudulent intent. With respect to the factor of existing or anticipated litigation, the Complaint identifies a specific email communication between Defendant SJHSRI's Director of Personnel and Chief Executive Officer noting the "potential good news" that SJHSRI "could improve SJHSRI's balance sheet by over $29,000,000 by eliminating its liability for the unfunded portion of the Plan," but the consequence would be that "we are exposed to a class action lawsuit" by the Plan participants who received no benefits, which could expose SJHSRI to "$30-$35m" as damages, which "would potentially erode the $29m fiscal savings" resulting from eliminating SJHSRI's funding liability by termination of the Plan.[38] The Complaint alleges that the 2014 Asset Sale was a fraudulent scheme to get around that potential liability.

With respect to the second factor, of "a purported transfer of all or substantially all of the debtor's property," the Complaint alleges (and it is undisputed) that the 2014 Asset Sale included all of SJHSRI's operating assets.[39] The third factor, of "insolvency or other unmanageable indebtedness on the part of the debtor," is also both alleged in the Complaint and undisputed.[40]

The fourth factor, of "a special relationship between the debtor and the transferee," is satisfied if there is a closer relationship between the debtor and the

[38] FAC ¶¶ 364-366.

[39] FAC ¶ 16.

[40] FAC ¶ 448.

transferee than the debtor has to its other creditors. Sugarman, *supra*, 946 F.2d at 1254 (citing In re Fitzpatrick, 73 B.R. 655, 657 (Bankr. W.D. Mo. 1985) for the proposition that the "special relationship" included a "closer financial relationship between debtor and transferee than with other creditors"). That is certainly present here, since SJHSRI's controlling member was a 15% owner of the transferee after the 2014 Asset Sale. The fifth factor, of "retention by the debtor of the property involved in the putative transfer" is also alleged and undisputed in the sense that an insider[41] of SJHSRI would receive a 15% interest in the company that would own the assets that SJHSRI transferred in connection with the 2014 Asset Sale.[42]

Thus, Plaintiffs have clearly alleged sufficient facts to plausibly support their claim that the Prospect Entities have liability for Plaintiffs' claims based on R.I. Gen. Laws § 6-16-4(a)(1) (2014). However, the Prospect Entities fail to cite Sugarman, and fail to address the sufficiency of the Complaint in light of the indicia and badges of fraud referred to therein. Instead, they analyze the Complaint under the eleven indicia or badges of fraud listed in R.I. Gen. Laws 6-16-4(b).[43] Prospect Memo. at 84-87.

R.I. Gen. Laws 6-16-4(b) (2014) states as follows:

> (b) In determining actual intent under subsection (a)(1), consideration may be given, among other factors, to whether:
>
> > (1) The transfer or obligation was to an insider;
> >
> > (2) The debtor retained possession or control of the property transferred after the transfer;

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[41] The RIUFTA defines "insider" to include an entity "in control of the debtor." R.I. Gen. Laws § 6-16-1(8)(ii)(c).

[42] FAC ¶ 445.

[43] Except that they quote the RIUVTA, not the RIUFTA. See *supra* at 30 n.35.

> (3) The transfer or obligation was disclosed or concealed;
>
> (4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
>
> (5) The transfer was of substantially all the debtor's assets;
>
> (6) The debtor absconded;
>
> (7) The debtor removed or concealed assets;
>
> (8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
>
> (9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
>
> (10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and
>
> (11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

The Prospect Entities argue that ten of these factors are not applicable to the case *sub judice.* Prospect Memo. at 85-87. In fact, the allegations in the Complaint support inferences that all but two of these eleven factors are present, and that the absence of those two factors is meaningless in the context of this case.

The Prospect Entities state that "[a]s to the first factor, the transfer of the assets was not to an insider, but rather to Prospect Chartercare, a company formed without any prior affiliation to SJHSRI, CCCB, or RWH." Prospect Memo. at 85. They omit that the proceeds from the sale of SJHSRI and RWH's assets were also transferred to CCCB, in the form of a 15% interest in the company that owned these assets. CCCB was a quintessential "insider" in that it was the controlling member of SJHSRI and sole

member of RWH, whose assets were being transferred.[44] See R.I. Gen. Laws § 6-16-1(7) (2014) (defining "Insider" to include a "person" (defined to include any corporation or legal or commercial entity) who is "in control of the debtor").

The Prospect Entities state without citation to any authority that "[a]s to the second factor, the debtor/seller (CCHP) did not retain possession or control of the property transferred after the transfer and in fact only retained a minority fifteen percent interest in Prospect Chartercare." However, R.I. Gen. Laws 6-16-4(b) (2014) does not require "direct" possession or control of the property transferred. Prospect Chartercare owns all of the stock or membership units of the two companies that own Fatima and Roger Williams Hospital. Similarly, R.I. Gen. Laws § 6-16-4(b) (2014) does not refer to retention of "exclusive" possession, or "exclusive" control. CCCB's 15% interest in Prospect Chartercare constitutes *shared* possession and *shared* control over the subject assets.

The Prospect Entities cite no authorities for the position that R.I. Gen. Laws § 6-16-4(b) (2014) should be construed to require "direct" and "exclusive" control. The RIUFTA should be liberally construed in support of its underlying policy of protecting creditors. See Taylor v. Cmty. Bankers Sec., LLC, No. CIV.A. H-12-02088, 2013 WL 3166336, at *5 (S.D. Tex. June 20, 2013) ("[T]he underlying policy for the enactment of laws against fraudulent transfers is the protection of creditors.") (citation omitted); Badger State Bank v. Taylor, 688 N.W.2d 439, 448 (Wis. 2004) ("The Uniform Fraudulent Transfer Act reflects a strong desire to protect creditors and to allow for the smooth functioning of our credit-based society. It is a creditor-protection statute.");

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[44] See *supra* at 38 n.41 (citing R.I. Gen. Laws § 6-16-1(7) (2014)).

Sigmon v. Goldman Sachs Mortg. Co., 539 B.R. 221, 215 (Bankr. S.D.N.Y. 2015) ("Furthermore, the Fraudulent Transfer Act is remedial in nature and should be liberally construed."). The significance of this particular badge of fraud is that the asset seller is on both sides of the transaction, such that the transaction constitutes self-dealing, and that is certainly also true when the seller's control is indirect and shared. Accordingly, CCCB's interest in Prospect Chartercare is sufficient to qualify.

The Prospect Entities address the third and fourth factors jointly, and argue that "[r]elative to the third and fourth factors, the 2014 Asset Sale was conducted in a fully transparent way, and was fully vetted and approved by the RIDOH and RIAG. Furthermore, there are no allegations in the Amended Complaint that, prior to the transfer, the debtor/seller (CCHP) had been sued or threatened with suit." Prospect Memo. at 86. However, the statutory criteria that RIDOH and RIAG applied did not include consideration of the impact of the transaction on the Plan and Plan participants.[45] More importantly, the Complaint alleges that the parties to the 2014 Asset Sale obtained approval by RIDOH and RIAG by concealing the impact on the

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[45] Subsequent to the Receivership, the Rhode Island Senate passed legislation to correct that deficiency, which did not pass the House. See State of Rhode Island General Assembly Press Release (dated May 11, 2018) attached hereto at Exhibit 1 ("STATE HOUSE – Sen. Daniel Da Ponte's (D-Dist. 14, East Providence) legislation (2018-S 2467aa) that would require the general treasurer to conduct a review of any defined pension plans involved in the sale and acquisition of any hospital that are not covered by The Employee Retirement Income Security Act of 1974 was passed by the Senate. 'As we have witnessed with the orphaning and collapse of the St. Joseph Health Services pension fund, the retirees who had selflessly worked their whole lives to help others were cruelly left out in the cold after the sale of the hospital. **The law regarding hospital conversions did not protect them and that is simply not fair and not right.** This bill will amend the law and give the general treasurer the authority to review these pension funds and assess the health and stability of the plans before and after the proposed sale. This will protect workers and retirees so that hopefully another hospital pension collapse like St. Joseph's never happens in the state again,' said Senator Da Ponte…Senator Da Ponte's legislation states that prior to any hospital sale in Rhode Island, the general treasurer will conduct a review of any defined pension plans associated with the sale that are not covered by The Employee Retirement Income Security Act of 1974. The general treasurer will then report to the General Assembly, indicating any current or potential issues that may affect the health of the pension plans and what impact the pension plans may have on the sale of the hospital.") (emphasis supplied).

Plan and misrepresenting the sufficiency of SJHSRI's assets to fund the Plan. As for factor four, risk of litigation, as noted above, SJHSRI was acutely aware that ignoring its obligations to Plan participants would expose it to a class action.[46]

The Prospect Entities state that "[t]he Amended Complaint fails to allege facts sufficient to satisfy the fifth and sixths [sic] factors because, while the Amended Complaint alleges that the transfer was of substantially all the debtor's assets, there is no plausible allegation that adequate consideration was not provided." Prospect Memo at 86. However, adequacy of consideration is factor eight, and has nothing to do with either factor five (transfer of substantially all of the debtor's assets), or factor six (absconding). More to the point, the issue under the RIUFTA (including factor eight[47]) is the consideration "**received by the debtor**," not whether "adequate consideration was provided," and the Complaint in great detail alleges facts that support the reasonable inference that SJHSRI received inadequate consideration because the consideration should have included at least some portion[48] of the 15% interest in Prospect Chartercare that was re-directed to CCCB.

Plaintiffs agree that SJHSRI did not "abscond" as referred to in factor six, but not because SJHSRI lacked intent to defraud, but, rather, because this factor is inapplicable to corporations.

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[46] Which is why this was a lawsuit waiting to happen.

[47] R.I. Gen. Laws 6-16-4(b)(8) ("The value of the consideration **received by the** debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;") (emphasis supplied).

[48] The precise allocation must await discovery, but some portion of the 15% interest also should have gone to RWH which also sold its operating assets in the 2014 Asset Sale.

The Prospect Entities state that "[a]s to the seventh factor, CCHP did not remove or conceal assets." "CCHP" here refers to the prior acronym for CCCB. The transferors of the assets that were fraudulently conveyed were SJHSRI and RWH. *They* did "remove or conceal assets," by agreeing that the 15% interest in Prospect Chartercare which was being paid in exchange for their assets would be re-directed to CCCB. The Prospect Entities attach great significance to "the fact that the Seller was to retain a 15% interest on behalf of all the selling entities was fully disclosed." Prospect Memo. at 86. However, the seventh factor looks to whether "[t]he debtor removed **or** concealed assets" (emphasis supplied), not "removed **and** concealed." In other words, removal of assets is a badge of fraud whether or not the removal is concealed. Moreover, the Asset Purchase Agreement conveniently fails to note (*i.e.*, conceals) that the consideration for the 15% interest came from SJHSRI and RWH. Instead, CCCB, RWH, and CCCB are all identified as asset sellers, notwithstanding that CCCB owned no assets (apart from its controlling interests in SJHSRI and RWH, which were expressly excluded from the sale).

The Prospect Entities state that "[w]ith regard to the eighth factor, the debtor received reasonably equivalent value for the assets transferred, and the Plaintiffs cannot plausibly allege otherwise." Prospect Memo. at 86. At least the Prospect Entities did not misquote the eighth factor as referring to what the *transferee provided*, rather than what the *debtor received*, but any credit for honesty they earn for that they quickly squander by asserting that "the Plaintiffs cannot plausibly allege otherwise," since that is exactly what Plaintiffs have alleged and provided specific facts to support.[49]

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[49] FAC ¶¶ 442-44.

The conclusion that SJHSRI did *not* receive reasonably equivalent value is discussed in connection with the Prospect Entities' motion to dismiss Count VI, *infra* at 47-53. As will be seen, that conclusion is much more than merely reasonable. It is compelling; hence Plaintiffs anticipate moving for summary judgment on Count VI.

The Prospect Entities admit that the ninth factor of insolvency is met. Prospect Memo. at 82 (". . . Plaintiffs have alleged sufficient facts to be entitled to an inference with respect to the insolvency prong. . . .").

The Prospect Entities state that "[a]s to the tenth and eleventh factors, the transfer did not occur shortly before or shortly after a substantial debt was incurred." Prospect Memo. at 87. However, there was a risk (Plaintiffs contend it was a certainty) that the Plan would cease to be a church plan upon conclusion of the 2014 Asset Sale. In that event, SJHSRI would be indebted under ERISA to fund the Plan. Accordingly, the transfer took place shortly before a substantial debt was incurred. As for the eleventh factor, we agree that SJHSRI "did not transfer the essential assets of the business to a lienor who transferred the assets to an insider of the debtor," but as with factor six, concerning absconding, the absence of this factor does not disprove intent to defraud.

In short, Plaintiffs' complaint has alleged sufficient facts to support the reasonable inference that nine out of a possible eleven badges of fraud are present, and the absence of the remaining two factors does not disprove intent to defraud.

I. Plaintiffs' Claims (Count VI) for Constructive Fraudulent Transfer (R.I. Gen. Laws § 6-16-4(a)(2)(i) and R.I. Gen. Laws § 6-16-5(a)) Should Not Be Dismissed as to the Prospect Entities

1. Pleading Standards Applicable to These Claims

R.I. Gen. Laws §§ 6-16-4(a)(2) and 6-16-5(a) (2014) pertain to constructive fraudulent transfer. See In re Jackson, 459 F.3d 117, 122 (1st Cir. 2006) (referring to New Hampshire statute identical to R.I. Gen. Laws § 6-16-4(a)(2)) ("This is a case involving constructive fraud."); In re Felt Mfg. Co., Inc., 371 B.R. 589, 635 (Bankr. D.N.H. 2007) (describing, as "constructive" fraud claims," New Hampshire statutes identical to R.I. Gen. Laws §§ 6-16-4(a)(2) or 6-16-5(a)). "Constructive fraud allows creditors to void a transfer without having to prove actual fraudulent intent." Spero, Fraudulent Transfers, Prebankruptcy Planning and Exemptions § 2:15 (August 2018).

Claims alleging constructive fraudulent transfers are only subject to the notice pleading requirements of Rule 8, not the heightened pleading standards of Rule 9(b). See In re Fisher, 575 B.R. 640, 646 (M.D. Pa. 2017) ("Further, it should be noted that constructive fraudulent transfer claims are not subject to the heightened pleading requirements of F.R.C.P. 9(b), made applicable by F.R.B.P. 7009.") (citations omitted); Renasant Bank, Inc. v. Smithgall, No. 1:15-CV-0459-SCJ, 2016 WL 4502374, at *2 (N.D. Ga. June 13, 2016) ("The Eleventh Circuit has not addressed whether the heightened pleading standard of Rule 9(b) applies to Georgia's UFTA. In dealing with similar UFTA statutes in other states, a 'great majority' of courts have drawn a distinction between actual fraud claims and constructive fraud claims—holding that Rule 9(b) does not apply in cases alleging constructive fraud.") (citations omitted). "Thus, to state a claim for constructive fraud, Plaintiff need only allege 'a short and plain

statement of the claim' that is plausible on its face.'" Renasant Bank, Inc., *supra*, 2016 WL 4502374, at 2 (citing Fed. R. Civ. P. 8(a)(2) and Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)).

In other words, specific factual allegations are unnecessary, and the complaint need only give the Prospect Entities fair notice of what the claim is and the grounds upon which it rests. See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (1997) ("Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'") (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

2. Plaintiffs' Claims Based on R.I. Gen. Laws §§ 6-16-4(a)(2) or 6-16-5(a) (Count VI of the Complaint) Are Claims upon Which Relief Can Be Granted, and, Therefore, Satisfy the Requirements of Rule 12(b)(6)

R.I. Gen. Laws § 6-16-5(a) states as follows:

> § 6-16-5. Transfers fraudulent as to present creditors
>
> (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation **without receiving a reasonably equivalent value** in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

R.I. Gen. Laws § 6-16-5(a) (2014) (emphasis supplied). Plaintiffs' claim based on R.I. Gen. Laws § 6-16-5(a) (2014) is that SJHSRI transferred its assets without receiving a reasonably equivalent value in exchange, at a time that SJHSRI was insolvent.

R.I. Gen. Laws § 6-16-4(a)(2)(i) (2014) states as follows:

> § 6-16-4. Transfers fraudulent as to present and future creditors
>
> (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> * * *
>
> > (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
> >
> > > (i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction;

Plaintiffs' claim under R.I. Gen. Laws § 6-16-4(a)(2)(i) is based on the undisputed fact that, both before and after the 2014 Asset Sale, SJHSRI had and would continue to have responsibility for the Plan, and that, after the 2014 Asset Sale, its remaining assets would be and were unreasonably small to meet its obligations to the Plan and the Plan participants.

The Prospect Entities seek dismissal of Plaintiffs' constructive fraudulent transfer claims (Count VI) on preemption grounds, which have already been addressed,[50] and make one argument on the merits, *viz.*, that Plaintiffs allegedly "have failed to allege any plausible facts, either direct or inferential, with respect to the requirement that the transaction be made without receiving reasonably equivalent value." Prospect Memo. at 82.

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[50] Their ERISA preemption argument on Count VI is foreclosed for the same reasons that apply to their ERISA preemption argument on Count V, discussed *supra* at 31-33.

Plaintiffs have pled more than sufficient specific facts from which it can be reasonably inferred that Defendants SJHSRI and RWH failed to receive reasonably equivalent value in connection with the 2014 Asset Sale, by alleging that approximately $15,000,000 of the consideration being paid for SJHSRI's and RWH's assets went not to SJHSRI and RWH, but, rather, to Defendant CCCB, who was RWH's sole member and SJHSRI's controlling member, and who contributed virtually no assets to the sale.

The Complaint alleges that "SJHSRI and RWH, not CCCB, owned the real estate and all of the assets used in operating Old Fatima Hospital and Old Roger Williams Hospital;"[51] "such that virtually all of the actual consideration provided by the sellers came from CCCB's subsidiaries, including SJHSRI and RWH, not from CCCB;"[52] that the "consideration that Prospect East provided at the closing on or about June 20, 2014 included 15% of the shares of Prospect Chartercare;"[53] that "[t]he Asset Purchase Agreement had provided that CCCB would receive those shares,"[54] and concluded with the following allegation:

> Thus, notwithstanding that CCCB provided virtually none of the consideration for the transaction, the parties consummated the transaction so that CCCB obtained all of the 15% interest in Prospect Chartercare, totaling a fair market value of at least $15,919,000. Although it was and should have been their property, SJHSRI and RWH kept none of that interest, and, therefore, that valuable asset was not available to satisfy claims of Plan participants, the Plan, or any other creditors of SJHSRI.[55]

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[51] FAC ¶ 439.

[52] FAC ¶ 440.

[53] FAC ¶ 441.

[54] FAC ¶ 443.

[55] FAC ¶¶ 445.

These allegations and all inferences therefrom that are favorable to Plaintiffs must be accepted as true in connection with the Prospect Entities' Motion to Dismiss. These allegations clearly state a claim that SJHSRI failed to receive reasonably equivalent value that is plausible on its face.

"[A] reasonably equivalent value determination should be based on all of the facts and circumstances of the case." In re Tri-Star Technologies Co., Inc., 260 B.R. 319, 325 (Bankr. D. Mass. 2001) (citations omitted). Thus, the determination of whether SJHSRI received reasonably equivalent value is based upon the totality of the circumstances. In re Wojtkun, 534 B.R. 435, 455 (Bankr. D. Mass. 2015) ("Courts look to the totality of the circumstances, which may include '(1) the 'fair market value' of the benefit received as a result of the transfer, (2) 'the existence of an arm's-length relationship between the debtor and the transferee,' and (3) the transferee's good faith.'") (quoting Pension Transfer Corp. v. Beneficiaries under the Third Amendment to Fruehauf Trailer Corp. Retirement Plan No. 003 (In re Fruehauf Trailer Corp.), 444 F.3d 203, 213 (3rd Cir. 2006)).

Moreover, the factual inquiry required to determine reasonably equivalent value under the totality of the circumstances is not appropriate on a motion to dismiss. In re Liquid Holdings Grp., Inc., No. 16-10202 (KG), 2018 WL 2759301, at *18 (Bankr. D. Del. June 6, 2018) ("Moreover, 'the Third Circuit utilizes a totality of the circumstances test in determining whether reasonably equivalent value was given, and that factual inquiry is not suitable for determination on a motion to dismiss.'") (quoting Miller v. Greenwich Capital Fin. Products, Inc. (In re Am. Bus. Fin. Servs., Inc.), 361 B.R. 747, 760 (Bankr. D. Del. 2007)); In re Actrade Financial Technologies Ltd., 337 B.R. 791, 804 (Bankr.

S.D.N.Y. 2005) ("[T]the question of 'reasonably equivalent value' and 'fair equivalent' is fact intensive, and usually cannot be determined on the pleadings.").

The Prospect Entities base their motion to dismiss on the following claim:

> Plaintiffs fail to allege that the **Prospect Entities did not provide** adequate consideration in the 2014 Asset Sale.

Prospect Memo. at 83 (emphasis supplied). In fact Plaintiffs expressly alleged that the 2014 Asset Sale involved "a transfer of assets for less than adequate consideration…"[56]

Moreover, the Complaint alleges specific facts that support the specific conclusion that "the Prospect Entities did not provide adequate consideration in the 2014 Asset Sale." The LHP Hospital Group, Inc. ("LHP") offered to purchase the hospitals for $33,000,000 to pay off SJHSRI and RWH's bonded indebtedness, an additional $72,000,000 to fund the Plan, and committed an additional approximately $50,000,000 for future capital improvements and network expansion.[57] However, CCCB did not want that much of the purchase money to go to the Plan, and instead turned to the Prospect Entities who were similarly disinclined.[58] The Prospect Entities paid $45 million (of which $14 million was deposited into the Plan) and committed to invest another $50,000,000 in the new hospitals over four years.[59] Thus, both LHP and the Prospect Entities made the same commitment for future capital contributions. However, the total up-front cash of $105,000,000 offered by LHP *exceeded by $60 million* the $45 million that the Prospect Entities paid in up-front cash.

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[56] FAC ¶ 529.

[57] FAC ¶¶ 119-21.

[58] FAC ¶ 122.

[59] FAC ¶ 124.

Thus the Complaint supports the reasonable inference that the Prospect Entities paid inadequate consideration. However, as a matter of law, that is irrelevant to their motion to dismiss. Unless they are being disingenuous, the Prospect Entities' focus on whether the *Prospect Entities provided* adequate consideration (rather than that *SJHSRI received* adequate consideration) suggests that, even now, they fail to understand one of the key problems they have in the 2014 Asset Sale, and the reason why Plaintiffs reasonably anticipate obtaining summary judgment on this claim. The fraudulent transfer statute looks at whether the *debtor received* reasonably equivalent value, not whether the other party *gave* reasonably equivalent value. See R.I. Gen. Laws § 6-16-5(a) (2014) ("A transfer made . . . by a debtor is fraudulent . . . if the debtor made the transfer or incurred the obligation without **receiving a reasonably equivalent value** in exchange for the transfer or obligation…") (emphasis supplied); R.I. Gen. Laws § 6-16-4(a)(2)(i) (2014) ("A transfer made . . . is fraudulent . . . if the debtor made the transfer or incurred the obligation . . . **[w]thout receiving a reasonably equivalent value** in exchange for the transfer or obligation. . . .") (emphasis supplied).

The statutory focus on what SJHSRI received is not an accident, since if the focus were on what the recipient of assets from the debtor paid for the assets, regardless of to whom payment was made, then debtors could fraudulently transfer their assets by directing their buyers to make payments to related parties, as Plaintiffs allege happened here. The cases that support this point are legion. As stated by the Fourth Circuit:

> "The focus is on the consideration received by the debtor, not on the value given by the transferee. The purpose of fraudulent transfer law is the preservation of the debtor's estate for the benefit of its unsecured

> creditors. Consequently, what constitutes reasonably equivalent value must be determined from the standpoint of the debtor's creditors...."

In re Jeffrey Bigelow Design Group, Inc., 956 F.2d 479, 484 (4th Cir. 1992) (quoting Jack F. Williams, "Revisiting the Proper Limits of Fraudulent Transfer Law," 8 Bankr. Dev. J. 55, 80 (1991)) (footnotes and emphasis omitted). See also In re Hinsley, 201 F.3d 638, 644 (5th Cir. 2000) ("The value of consideration given for a transfer alleged to be in fraud of creditors is determined from the standpoint of creditors. 'The proper focus is on the net effect of the transfers on the debtor's estate, the funds available to the unsecured creditors.'") (quoting Viscount Air Svcs, Inc. v. Cole (In re Viscount Air Servs., Inc.), 232 B.R. 416, 435 (Bankr. D. Ariz. 1998)) (interpreting Arizona UFTA) (other citations omitted).

The consequence is that value received by CCCB, and not by SJHSRI and RWH, cannot be considered in determining whether SJHSRI and RWH received reasonably equivalent value. See In re Candor Diamond Corp., 76 B.R. 342, 349 (Bankr. S.D.N.Y. 1987) (rejecting request that payment to shareholder be considered in determining value to the corporation Candor Diamond Corp.) ("That would be inappropriate. The money having never benefitted the corporation, it cannot be said to be value flowing to Candor."). See also In re Chicago, Missouri & Western Ry. Co., 24 B.R. 769, 773 (Bankr. N.D. Ill. 1991) ("In addition, when it is the debtor-subsidiary which makes a transfer resulting in consideration passing to the parent corporation, the benefit to the debtor is presumed to be nominal unless there is proof of a specific benefit to it.").

In fact, SJHSRI's interest in the consideration paid to CCCB was non-existent. The transaction was portrayed as an asset sale because if the Prospect Entities purchased CCCB's controlling interests in SJHSRI and RWH, rather than SJHSRI and

RWH's assets, then the Prospect Entities would have had to accept SJHSRI and RWH's liabilities, including liability to fund the Plan. However, if it were a real asset sale, the consideration would have been paid to SJHSRI and RWH, with no payment to CCCB, and that consideration would have been available to pay SJHSRI and RWH's creditors. In short, the transaction was neither a real asset sale nor a sale of CCCB's controlling interest. Instead, it was a fraud on creditors.

Thus, the 2014 Asset Sale was for inadequate consideration on two levels: 1) the Prospect Entities paid inadequate consideration, such that SJHSRI and RWH would have failed to receive reasonably equivalent value even if they had received all the consideration that the Prospect Entities paid; and 2) to make matters significantly worse, over $15,000,000 worth of that consideration was not received by the actual asset sellers, SJHSRI and RWH. With respect to the first point, the Prospect Entities no doubt will labor mightily to raise issues of fact to make it difficult for Plaintiffs to prevail on summary judgment. However, Plaintiffs intend to move for summary judgment based on the latter point because it is indisputable.

J. Count VII (Fraud Through Intentional Misrepresentations and Omissions) Should Not Be Dismissed as to the Prospect Entities

The Prospect Entities seek dismissal of Plaintiffs' fraud claim against them (Count VII) based on the allegation that "the Amended Complaint fails to allege with the requisite particularity that any of the Prospect Entities made any false representations of material fact regarding the funding status of the Plan." Prospect Memo. at 45.

That is clearly incorrect. Although it claimed to have no liability for the Plan, Prospect Chartercare on April 13, 2016 participated in a PowerPoint presentation to

Plan participants devoted solely to the subject of the Plan, which made misleading and deceptive statements about the Plan.[60] For example, the presentation reassured them that "[t]he Hospital pays the entire cost of the Plan," with payment options that included annuity payments for life.[61] Prospect Chartercare knew that the "Hospital," which for nearly two years had been owned and operated by Prospect Chartercare and its subsidiary Prospect SJHSRI, claimed it had no obligations whatsoever to Plan participants.[62] Moreover, Prospect Chartercare had just completed its own assessment of the Plan and knew that the Plan was grossly underfunded and that SJHSRI had failed to make any contributions since the 2014 Asset Sale.[63]

An earlier internal draft of the April 13, 2016 PowerPoint presentation stated that the Plan was a "Church Plan" and, therefore, that the Plan participants' benefits were not protected under ERISA. However, as part of a long history of concealment from the Plan participants, and in order to continue to deceive Plan participants, this disclosure was deleted by Prospect Chartercare, and did not appear in the presentation actually given.[64] Indeed, the Plan participants were never informed that the Plan was purported to be a Church Plan, or that the Plan participants' benefits were not protected under ERISA.[65]

The Prospect Entities take issue with the sufficiency of these allegations, and claim that the April 2016 PowerPoint was both innocent and after the fact. Prospect

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[60] FAC ¶¶ 315-18.

[61] FAC ¶ 315.

[62] FAC ¶ 316.

[63] FAC ¶¶ 177, 344.

[64] FAC ¶ 317.

[65] FAC ¶ 317.

Memo. at 55-56. Moreover, they claim that the Plan participants must have known that the Plan was a "church plan" because "this was public knowledge; the 2014 APA, which was publicly disclosed to the RIDOH and RIAG, expressly stated that the Plan was a Church Plan: 'The Retirement Plan has been a Church Plan since the date on which the Retirement Plan was established, and has continuously maintained such status since that date…'" Prospect Memo. at 55-56.

The Prospect Entities' tactic of offering explanations or alternative inferences is impermissible in support of a motion to dismiss, in which the Plaintiffs' allegations are accepted as true, and all reasonable inferences are drawn in favor of the Plaintiffs. In any event, these allegations are not after the fact, because they prevented Plaintiffs from discovering the fraud in early 2016, and damaged Plaintiffs at least to the extent of sums expended by SJHSRI, RWH, and CCCB between then and the onset of suit in June of 2018, since Plaintiffs have a claim against all of SJHSRI, RWH, and CCCB's assets.[66]

They also are relevant to proving the Prospect Entities' fraudulent intent notwithstanding they occurred two years after the 2014 Asset Sale. See Shoals Ford, Inc. v. McKinney, 605 So.2d 1197, 1199 (Ala. 1992) (evidence of similar fraudulent acts is admissible to show a fraudulent intent, plan, or scheme, provided that the acts sought to be proven meet the requirements of similarity in nature and proximity in time) ("[A]ll of the acts testified to by these witnesses occurred within a period extending from

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[66] The proposed settlement between Plaintiffs and SJHSRI, RWH, and CCCB gives Plaintiffs over 95% of their liquid operating assets, transfers to the Receiver their interests in Prospect Chartercare and CC Foundation, and will put them in liquidation with Plaintiffs in line to receive their remaining assets. However, it does not cover sums these entities expended between 2016 and 2018, because that money is gone.

approximately five months before the McKinney transaction to approximately nine months after the McKinney transaction; we consider this sufficiently close in time to the McKinney transaction to create a reasonable inference that Shoals Ford was engaging in a pattern or practice of fraud at the time of the McKinney transaction."), overruled on other grounds, Life Ins. Co. of Georgia v. Smith, 719 So.2d 797 (Ala. 1997); Scott v. State, 467 S.E.2d 348, 350 (Ga. App. 1996) ("Moreover, this Court has previously held that similar transactions which occur subsequent to the charge being tried are admissible when the State satisfies the applicable test for similar transactions.").

They also show that the Prospect Entities were directly communicating with Plan participants concerning the Plan, and were not "strangers to the plan" as they now allege, which is relevant to both Plaintiffs' claim for successor liability and aiding and abetting breach of fiduciary duty under ERISA, discussed *supra* at 26-29, and Plaintiffs' state law claims for aiding and abetting breach of fiduciary duty and successor liability based upon mere continuation, both of which are discussed *infra* at 97-109, 123-127.

Moreover, the 2014 APA was not provided to Plan participants, and even if it had been, they could not have been expected to discover, much less understand the significance of the mere statement buried in hundreds of pages of legal documents that the Plan was a "church plan," without someone telling them it meant that SJHSRI was not required by ERISA to fund the Plan.

The Prospect Entities also made intentional misrepresentations and failed to disclose information that made their statements misleading in their dealings with the United Nurses & Allied Professionals ("UNAP"). Beginning in August 2013, Christopher Callaci of UNAP had discussions with representatives from Prospect Medical, including

its President Thomas Reardon and Senior Vice President Von Crockett concerning the impact of the proposed asset sale on UNAP's members who were Plan participants.[67] Mr. Callaci was told that if the acquisition transaction closed, $14 million would be paid into the Plan in connection with the closing, and thereafter CCCB and its subsidiaries would make the annual actuarially recommended contributions to the Pension Plan.[68] Mr. Callaci was given a calculation prepared by Angell that represented that even as of July 1, 2032, the Pension Fund would remain more than 70% funded under that promise.[69]

At the same time, a second calculation was prepared by Angell for internal use by the Defendants, including Prospect Chartercare, Prospect SJHSRI, Prospect RWH, Prospect Medical, and Prospect East, which showed the impact on the Plan from not making those annual contributions in the future, which showed that the Pension Fund would be 0% funded by July 1, 2032.[70] These Prospect Entities knew that was the scenario SJHSRI actually intended to follow.[71] It is also exactly what happened.[72]

There is good reason to hold that Plaintiffs may rely upon misrepresentations that the Prospect Entities made to Attorney Callaci of UNAP. Those misrepresentations were being made to Plan participants through Attorney Callaci as their representative or conduit.

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[67] FAC ¶ 298.

[68] FAC ¶ 299.

[69] FAC ¶ 301.

[70] FAC ¶ 302.

[71] FAC ¶ 302.

[72] FAC ¶ 302.

The complaint specifically alleges (and it is obvious) that the Prospect Entities "knew and understood that UNAP was acting on behalf of the Plan participants who belonged to the union," and that the reason that information concerning the treatment of the Plan in connection with the proposed sale was provided to Attorney Callaci was because of "the impact of such acquisition on UNAP's members."[73]

Moreover, the Prospect Entities' misrepresentations to third parties (such as Attorney Callaci) upon which the third parties relied and which resulted in injury to the Plan participants are actionable under Plaintiffs' claim against the Prospect Entities of intentional misrepresentation, under the doctrine of third-party reliance. Third-party reliance claims have been recognized in jurisdictions outside Rhode Island.[74] 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

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[73] FAC ¶¶ 297-98.

[74] 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 cmt. 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).

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 and citations omitted).

That is the essence of third party reliance in fraud cases. Thus, under Rhode Island law, 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.

The Prospect Entities claim that they cannot be liable in fraud for misrepresentations and omissions they made to third parties rather than directly to the Plan participants. Prospect Memo. at 56-57 ("Plaintiffs have not—and cannot as a matter of law—sustain a plausible claim for fraud against the Prospect Entities for representations that were made to third parties because there is no basis for a claim based upon a purported fraudulent representation to a third party.") (citing Mendez Internet Mgmt. Servs. v. Banco Santander de P.R., 621 F.3d 10, 15 n.5 (1st Cir. 2010) and Gorbey v. Am. Journal of Obstetrics & Gynecology, 849 F. Supp. 2d 162, 166 (D. Mass. 2012)).

However, neither of the cited cases purport to address Rhode Island law. Indeed, Mendez is a civil RICO case involving Puerto Rico, in which the First Circuit merely made the general statement in *dicta* that "unlike common-law fraud, mail and

wire fraud does not require first-party reliance…" Id. The decision in Gorbey was based on Massachusetts law. Gorbey, *supra*, 849 F. Supp. 2d at 166. The plaintiff claimed to have been injured by misrepresentations made by opposing counsel to the jury in a medical malpractice trial. In rejecting that claim, the court merely noted that neither the Plaintiffs nor the court had found any case "in support of the theory that third-party reliance on fraud is cognizable under Massachusetts law." Gorbey, *supra*, 849 F. Supp. 2d at 166. The court held, however, that the availability of the doctrine of third party reliance was "academic" because, even if it were available, the plaintiff had failed to demonstrate that the jury relied upon the alleged misrepresentation. Gorbey, *supra*, 849 F. Supp. 2d at 166 ("Plaintiffs here do not allege that they relied or acted upon any alleged misrepresentation but rather that third parties so relied and acted which, in turn, resulted in plaintiffs' injury. Plaintiffs point to no case, however, and the Court has found none, in support of a theory that third-party reliance on fraud is cognizable under Massachusetts law. In any event, the question is academic because, as discussed above, the allegations do not give rise to an inference of reliance, reasonable or otherwise, on the part of the jury which resulted in plaintiffs' loss.").

The Prospect Entities take issue with the sufficiency of Plaintiffs' allegations concerning their misrepresentations and omissions to Attorney Callaci, starting with Plaintiffs' alleged failure to provide the "who, what, where, when, and how" of those misrepresentations and omissions. Prospect Memo. at 50 ("First, inconsistent with Fed. R. Civ. P. 9(b), the Plaintiffs fail to specify the time, place, and content of the alleged false representation or omission. As a result, Plaintiffs have failed to plead 'the who, what, when, where, and how' of the alleged misrepresentation.").

However, "the particularity requirement of Rule 9(b) should be read in conjunction with Rule 8(a)'s 'short and plain statement' pleading requirement." In re Yotis, 521 B.R. 625, 633 (Bankr. N.D. Ill. 2014) (citation omitted). Thus, "it is not necessary that a plaintiff plead each fraudulent detail, so long as the circumstances constituting fraud have been set forth adequately." Id. (citation omitted). "[T]he who, what, when, and where aspects of the fraud need not be related with exact details in the complaint as a journalist would hope to relate them to general public." Id., 521 B.R. at 634 (quoting Zamora v. Jacobs (In re Jacobs), 403 B.R. 565, 573 (Bankr. N.D. Ill. 2009)).

Here Plaintiffs have identified who received the misrepresentations (Attorney Callaci), who made the misrepresentations ("representatives from Prospect Medical, including Thomas Reardon and Von Crockett"), when the misrepresentations were made ("[b]egining in August 2013" and continuing "[o]n September 8, 2013), and what the misrepresentations were (he was told "that $14 million would be paid into the Plan in connection with the closing, and thereafter CCCB and its subsidiaries would make the annual actuarially recommended contributions to the Pension Plan" and the bar graph received on September 8, 2013 "indicated that even as of July 1, 2032, the Pension Fund would remain more than 70% funded under the "$14M Contribution and then Recommended" contributions scenario). A key element of the misrepresentation is contained on that bar graph, and Plaintiffs have specifically identified who sent it, what it said, and when it was sent. All that is missing is detail as to exactly "where" face-to-face discussions took place. That is hardly insufficient pleading.

The Prospect Entities do not need more detail to frame a responsive pleading. Wright, Miller, et al., 5A Fed. Prac. & Proc. Civ. § 1298 (3d ed.) ("Perhaps the most basic consideration for a federal court in making a judgment as to the sufficiency of a pleading for purposes of Rule 9(b) is the determination of how much detail is necessary to give adequate notice to an adverse party and to enable that party to prepare a responsive pleading.") (citing cases). Plaintiffs' allegations satisfy the requirement of particularity, because Plaintiffs have pled a complex fraud and provide numerous details as to how it worked in particular instances, and the remaining details are in the possession of the Prospect Entities and the other Defendants. See Berk v. Tradewell, Inc., No. 01 CIV. 10068 (MBM), 2003 WL 21664679, at *13 (S.D.N.Y. July 16, 2003) ("In their complaints, plaintiffs plead a complex fraud and provide numerous details as to how it worked in particular instances. Plaintiffs allege that Tyner is in possession of further information concerning the fraud, and Tyner is a corporate insider. Plaintiffs have provided Tyner with sufficient notice of the fraud claims to satisfy the requirements of Rule 9(b).").

Moreover, the requirement of particularity is relaxed for bankruptcy trustees (and, by extension, receivers), who perforce have only secondhand knowledge. See Wright, Miller, et al., 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).

The Prospect Entities' second objection to the sufficiency of this allegation is that it concerns statements to Attorney Callaci, not the Plan participants. Prospect Memo. at

50 ("Second, the alleged misrepresentation was not even made to the Plaintiffs; it was made to UNAP. Plaintiffs cannot plausibly allege that a statement made to UNAP was made with the intent to deceive Plaintiffs, or with the intent that Plaintiffs rely upon it, or that Plaintiffs could have reasonably relied upon it."). Plaintiffs have already stated two reasons why those arguments are unavailing: Attorney Callaci was a representative for Plan participants, and, even if he were not, Rhode Island recognizes third-party reliance. 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 Prospect Entities' third objection to the sufficiency of this allegation is that the representation that the $14 million contribution would "stabilize" the Plan was a mere statement of opinion, and, therefore, not actionable. Prospect Memo. at 51 ("Third, to the extent that the Amended Complaint is alleging that someone represented (to someone other than Plaintiffs) that the $14 million contribution would 'stabilize the Plan,' such statement cannot be the basis of a claim for fraud. It is axiomatic that [a] statement on which liability for fraud may be based must be one of fact; it may not be one of opinion, or conditions to exist in the future, or matters promissory in nature.") (internal quotations and case citations omitted).

However, the Complaint alleges that at the time these statements were made, "Prospect Chartercare, Prospect Chartercare St. Joseph, Prospect Chartercare Roger Williams, Prospect Medical Holdings, and Prospect East already knew that the $14 million contribution was not even remotely sufficient to stabilize plan assets, and

that the Plan assets would run out many years before most of the Plan participants' rights to benefits were satisfied."[75] Thus, at the very least, the statements misrepresented the Prospect Entities' actual state of mind concerning the effect of that contribution.

Such false statements support a claim for fraudulent misrepresentation. Swift v. Rounds, 35 A. 45, 46 (R.I. 1896) ("The state of a man's mind at a given time is as much a fact as is the state of his digestion.") (action for deceit could be maintained where "defendant made it to appear, by the act of buying on credit, that he intended to pay for the goods in question, while in fact he intended to cheat the plaintiffs out of them"); Hoefer v. Wisconsin Educ. Ass'n Ins. Trust, 470 N.W.2d 336, 340 (Iowa 1991) ("A mere statement of an honest opinion, as distinguished from an assertion of fact will not amount to fraud, even though such opinion be incorrect. When the statements become representations of fact, or the expression of opinion is insincere and made to deceive or mislead they may be treated as fraudulent. Whether such is their quality and character is ordinarily a jury question.") (emphasis supplied) (quoting International Milling Co. v. Gish, 137 N.W.2d 625, 631 (Iowa 1965)).

Moreover, the test for deceit does not require proof that the Prospect Entities "knew" that the statement that $14 million would stabilize the Plan was false, or that SJHSRI did not intend to fund the Plan. To the contrary, it would be deceit for the Prospect Entities to state that the $14 million would stabilize the Plan, on the assumption that SJHSRI would fund the Plan, if they either did not believe that future contributions would be forthcoming, or knew they had had no reasonable basis for believing that SJHSRI would fund the Plan in the future. Restatement (Second) Torts §

[75] FAC ¶ 304.

526(b) & (c) make clear that parties cannot make representations contrary to their own beliefs, or without reasonable basis:

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

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

> In order that a misrepresentation may be fraudulent it is not necessary that the maker know the matter is not as represented. Indeed, it is not necessary that he should even believe this to be so. It is enough that being conscious that he has neither knowledge nor belief in the existence of the matter he chooses to assert it as a fact. Indeed, since knowledge implies a firm conviction, a misrepresentation of a fact so made as to assert that the maker knows it, is fraudulent if he is conscious that he has merely a belief in its existence and recognizes that there is a chance, more or les less great, that the fact may not be as it is represented. This is often expressed by saying that fraud is proved if it is shown that a false representation has been made without belief in its truth or recklessly, careless of whether it is true or false.

Restatement (Second) Torts § 526 cmt. e.

The First Circuit has so held with respect to performance forecasts. See Glassman v. Computervision Corp., 90 F.3d 617, 627 (1st Cir. 1996) ("While forecasts are not actionable merely because they do not come true, they may be actionable to the extent they are not reasonably based on, or are inconsistent with, the facts at the time the forecast is made."); Cummings v. HPG Int'l, Inc., 244 F.3d 16, 22 (1st Cir. 2001) ("Even a statement that in form is one of opinion may constitute a statement of fact if it

may reasonably be understood by the recipient as implying that there are facts to justify the opinion or at least that **there are no facts that are incompatible with it**.") (emphasis supplied).

Here Plaintiffs allege that the Defendants had a second bar graph which was completely "incompatible" with the conclusion that $14 million would "stabilize" the Plan, because it showed that even with that $14 million, "the Plan assets would run out many years before most of the Plan participants' rights to benefits were satisfied."[76]

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

> § 539 Representation of Opinion Implying Justifying Facts
>
> (1) A statement of opinion as to facts not disclosed and not otherwise known to the recipient may, if it is reasonable to do so, be interpreted by him as an implied statement
>
> > (a) that the facts known to the maker are not incompatible with his opinion; or
> >
> > (b) that he knows facts sufficient to justify him in forming it.
>
> (2) In determining whether a statement of opinion may reasonably be so interpreted, the recipient's belief as to whether the maker has an adverse interest is important.

Thus, the statement that the contribution of $14 million would "stabilize" the Plan constituted implied statements that the Prospect Entities both had no facts incompatible with that conclusion, and had facts sufficient to justify them, neither of which was true.

In support of their claim that statements of opinion are not actionable, the Prospect Entities cite <u>Siemens Fin. Servs. v. Stonebridge Equip. Leasing, LLC</u>, 91 A.3d

[76] FAC ¶ 304.

817, 823 (R.I. 2014) and Nisenzon v. Sadowski, 689 A.2d 1037, 1045 n.11 (R.I. 1997). Neither of these cases questions the long-standing principle that misrepresentations of belief are actionable. Seimens was based upon Massachusetts law, specifically Russell v. Cooley Dickinson Hospital, Inc., 772 N.E.2d 1054, 1066 (Mass. 2002). See Seimens, *supra*, 689 A. 2d at 823 (Thus, "matter[s] of opinion, estimate, or judgment" may not be the subject of misrepresentation claims.") (quoting Russell v. Cooley Dickinson Hospital, Inc.). However, in a later case also controlled by Massachusetts law, the court in Goldthwaite v. Sensear, Inc., No. 15-CV-13143-MLW, 2016 WL 5329635 (D. Mass. Aug. 25, 2016) cited Russell v. Cooley Dickenson Hosp. in support of the proposition that "[i]t is true that projections are ordinarily not actionable statements of fact," Goldthwaite v. Sensear, Inc., *supra*, at *3, but noted that "a fraud claim can be premised on projections and qualified statements if the defendant knew those statements were false when made." Id. (citing Bhammer v. Loomis, Sayles & Co., Inc., No. 15-14231-FDS, 2016 WL 3892371, at *5 (D. Mass. Jul. 14, 2016) and Kenda Corp., Inc. v. Pot O'Gold Money Leagues, Inc., 329 F.3d 216, 226 (1st Cir. 2003)).

Nisenzon v. Sadowski only stands for the principle that "'[t]he general rule is that a misrepresentation should take the form of an expression of fact and not the offering of an opinion or estimate.'" Nisenzon, 689 A.2d 1037, 1045 n.11 (R.I. 1997) (quoting St. Paul Fire & Marine Insurance Co. v. Russo Brothers, Inc., 641 A.2d 1297, 1299 n.2 (R.I. 1994)). Plaintiffs herein are relying on the exception to that "general rule."

The Prospect Entities' fourth objection is a straw man that cannot be ascribed to Plaintiffs. Prospect Memo. at 51 ("Fourth, to the extent that Plaintiffs allege that the 2014 Asset Sale would result in the Plan being fully funded, such an allegation lacks

any semblance of plausibility. There is no allegation, nor could there be, that anyone represented to anyone that the $14 million payment to the Plan would be sufficient to fully satisfy SJHSRI's long-term pension liability. The well-known extent to which the Plan was underfunded and the impact of the 2014 Asset Sale on SJHSRI's long-term pension liability was considered by the RIDOH and RIAG in the administrative proceeding to determine whether the transaction complied with the HCA."). That is not Plaintiffs' claim. Plaintiffs allege that Attorney Callaci was told that the Plan would be fully funded through the *combination* of the deposit of $14 million into the Plan in connection with the 2014 Asset Sale *and* the payment in the future of the actuarially recommended contributions.

The Prospect Entities' claim that "[t]here is no allegation, nor could there be, that anyone represented to anyone that the $14 million payment to the Plan would be sufficient to fully satisfy SJHSRI's long-term pension liability" ignores their own response (along with their co-applicants) to the Attorney General stating that "[t]he use of $14M to strengthen the St. Joseph Pension Plan will be of significant benefit to the community as it will **assure** that the pensions and retirement of many former employees, who reside in the community, are protected."[77] That statement is more fully discussed infra at 75-77. Plaintiffs contend it was completely misleading, because the Prospect Entities knew the $14 million payment to the Plan would not be sufficient to fully satisfy SJHSRI's long-term pension liability. The Prospect Entities admit they did not believe that, but argue that the statement was not misleading because all it means is that the $14 million would

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[77] FAC ¶ 339 (emphasis supplied).

"help strengthen the Plan." Prospect Memo. at 59. That is an issue the finder of fact will have to resolve.

As for how "well known" was the extent of the Plan's underfunding, it bears emphasizing that *there is no evidence that the Plan participants were ever informed that the Plan was underfunded at all!* Not only is it reasonable to draw the inference that this omission was both deliberate and intentionally misleading, in fact it is highly implausible (to put it mildly) that this omission was not deliberate, especially since the extent to which the Plan was grossly underfunded was well known to the *parties to the 2014 Asset Sale*. They all knew, but no one thought that was information the Plan participants might want and need to have? The Prospect Entities can make that claim to the jury, if they dare, but it has no place in a motion to dismiss.

The Prospect Entities' final objection to the sufficiency of this allegation concerning misleading UNAP is that Plaintiffs could not have reasonably relied upon any assurance from any of the Prospect Entities relating to the funding status of the Plan. Prospect Memo at 52 ("Finally, Plaintiffs could not have reasonably relied upon any assurance from any of the Prospect Entities relating to the funding status of the Plan. Plaintiffs do not allege, nor could they, that the Prospect Entities had any role in the evaluation of the Plan or its funding level after the 2014 Asset Sale, other than being provided with information by Angell. Whether the $14 million payment would assure that the pensions of many former employees were protected depended upon whether SJHSRI or CCCB would continue to fund the Plain going forward, something completely outside the control of the Prospect Entities.").

However, Plaintiffs expressly allege that the Prospect Entities evaluated the Plan and its funding level *before* the 2014 Asset Sale.[78] Moreover, the Complaint expressly alleges that prior to the 2014 Asset Sale, the Prospect Entities were provided with complete financial statements for SJHSRI, RWH, and CCCB.[79] The Prospect Entities knew what they were buying and what they were attempting to leave with SJHSRI. That certainly put them in a superior position to Attorney Callaci to estimate SJHSRI's ability to make minimum funding contributions going forward. As for the argument that they could not control SJHSRI, in that case they should have declined to subscribe to the claim that $14 million would stabilize the Plan and that SJHSRI would make the recommended contributions in the coming years. That argument now is too little and too late.

The next allegations from the Complaint that the Prospect Entities claim is insufficient to allege fraud concern communications two months after the 2014 Asset Sale, when Angell sought instructions *from the Prospect Entities* (not SJHSRI) on how

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[78] See FAC ¶¶ 248-49 ("On or about December 2, 2013, Prospect Chartercare, Prospect Chartercare St. Joseph, Prospect Chartercare Roger Williams, Prospect Medical Holdings, and Prospect East (through Barbara Groux) requested that Angell provide them with an updated estimate of the amount of unfunded benefits if the Plan were terminated. On December 10, 2013, Angell advised that the updated estimate of the amount of unfunded benefits if the Plan were terminated was over $98,000,000."); FAC ¶ 252 ("Angell prepared revised calculations and met with Prospect Chartercare, Prospect Chartercare St. Joseph, Prospect Chartercare Roger Williams, Prospect Medical Holdings, and Prospect East on or about January 8, 2014 and shared with them the facts concerning the unfunded status of the Plan and the cost of terminating the Plan and purchasing annuities. This meeting was attended by persons including Jeff Bauer, Kenneth Belcher, Michael Conklin, Barbara Groux, Peter Karlson, Brenda Ketner, Darleen Souza, and David Ward."); FAC ¶ 255 ("Thus, prior to and at the time of the 2014 Asset Sale, CCCB, SJHSRI, RWH, Prospect Chartercare, Prospect Chartercare St. Joseph, Prospect Chartercare Roger Williams, Prospect Medical Holdings, Prospect East, Corporation Sole, Diocesan Administration, Diocesan Service, and Angell all had actual knowledge of the full extent of the Plan's unfunded liabilities.").

[79] FAC ¶ 447 ("The due diligence performed by Prospect Chartercare, Prospect Chartercare St. Joseph, Prospect Chartercare Roger Williams, Prospect Medical Holdings, and Prospect East in connection with the Asset Purchase Agreement included requiring that CCCB provide consolidated financials reporting on the assets and liabilities of CCCB and its various subsidiaries, and buyers in fact received such financials prior to entering into the Asset Purchase Agreement.").

to "respond to Plan participants who were seeking information concerning the solvency of the plan."[80] In response, two Prospect employees cautioned each other that the less said in writing on that issue the better.[81] Then Prospect Chartercare's employee Brenda Ketner "instructed Angell not to provide Plan participants with the information they were seeking concerning the solvency of the Plan," and instead instructed Angell to tell Plan participants that "the plan administrators review the annual recommended funding as advised by the plan's actuaries each year. There is also an investment committee that reviews and monitors the plan on an ongoing basis."[82] The Complaint further alleges that the Prospect Entities through Brenda Ketner:

> knew that this statement was false, incomplete and misleading, and intended to mislead. They knew they could very well "speak to the future [in]solvency of the plan," because their own calculations predicted that the Plan would not have sufficient funds to pay Plan participants the benefits to which they were entitled, and knew that SJHSRI for years had been disregarding Angell's funding recommendations and making no contributions, and that once the asset sale went through, SJHSRI would have insufficient funds to make the actuarial-recommended contributions even if it wanted to.[83]

The Prospect Entities object that these allegations concern events that took place after the 2014 Asset Sale such that Plaintiffs could not have relied upon them (Prospect Memo. at 54), and that these allegations were not false because "[t]he future solvency of the Plan depended on SJHSRI or CCCB's willingness to fund the Plan

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[80] FAC ¶ 306.

[81] FAC ¶ 307 ("I think the less 'formal' communication on this the better.").

[82] FAC ¶ 308.

[83] FAC ¶ 309.

going forward and was not within the control of any of the Prospect Entities or Angell." Prospect Memo. at 53.

However, Plaintiffs are entitled to show that if the Prospect Entities had not made these misrepresentations, the fraudulent transaction would have been discovered in 2014, not very late in 2017, and that Plaintiffs are entitled to recover damages attributable to the delay, which include the years of expenditures by SJHSRI, RWH, and CCCB between 2014 and 2018 which would have been avoided if Plaintiffs brought this suit in 2014. Thus these misrepresentations are directly involved in Plaintiffs' fraud claim against the Prospect Entities.

Moreover, these misrepresentations are relevant to Plaintiffs' claims of successor liability both under state law and federal common law, because they demonstrate the Prospect Entities' involvement in administering the Plan after the 2014 Asset Sale.

Similarly, as previously discussed with reference to the April 13, 2016 PowerPoint, such fraudulent acts that occurred after the 2014 Asset Sale are also admissible to show fraudulent intent prior to the 2014 Asset Sale.

Special attention is due the Prospect Entities' argument that these statements were not false because "[t]he future solvency of the Plan depended on SJHSRI or CCCB's willingness to fund the Plan going forward and was not within the control of any of the Prospect Entities or Angell." Prospect Memo. at 53. Plaintiffs have alleged sufficient facts from which it can reasonably be inferred that the Prospect Entities were involved with SJHSRI, CCCB, and others, in a fraudulent conspiracy and a fraudulent scheme. As such, the conduct of any of them is ascribed to them all "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, *supra*, 612 A.2d at 706 (quoting State v. Gordon, *supra*, 508 A.2d at 1349).

Thus, whether one conspirator or schemer has or lacks the power to control other conspirators or schemers is irrelevant. What is important is that they are engaged in a common enterprise, not that they are each subject to the others' control. For that reason, latecomers to the conspiracy are liable for actions that occurred before they joined. See 16 Am. Jur. 2d Conspiracy § 21 ("[O]ne 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.") (footnotes omitted).

Next, the Prospect Entities question the sufficiency of allegations concerning a statement they made in response to the Rhode Island Attorney General's request that they provide "documentation as to the determination that $14 m will stabilize the plan."[84] In fact, those allegations are extremely detailed and specific as to "who, what, when, and where," and document an intentional decision *not* to provide a complete calculation which demonstrated that "the $14,000,000 contribution would not 'stabilize' the Plan, since the complete calculation showed that, notwithstanding that contribution, the Plan would run out of money in 2036 with over $98,000,000 in liabilities to Plan participants even at the high assumed rate of return of 7.75%, or in 2030 with the rate of return of 5.75%."[85]

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[84] FAC ¶¶ 324-36.

[85] FAC ¶ 332.

Instead, the Prospect Entities permitted counsel for SJHSRI, in support of their joint application, to provide the Attorney General with a calculation that "purported to show that the immediate effect of the $14 million contribution would be to increase the funding percentage of the Plan to 94.9%," and without disclosing that the projected rate of return on which that calculation was based was inflated, or that "use of any funding level percentage as a measure of the Plan's funding progress was contrary to and deviated from the standards of actuarial practice."[86]

The Prospect Entities focus on the fact that counsel for SJHSRI and not their counsel actually gave the calculation to the Attorney General, and claim that "Plaintiffs fail to state a claim for fraud by misrepresentations because the Amended Complaint fails to allege that the Prospect Entities made any statements to regulators as to the funding level or the immediate effect of the $14 million contribution." Prospect Memo. at 58. However, the Complaint demonstrates that the Prospect Entities were provided with both the complete calculation and the truncated calculation, and were notified in advance that in support of their joint application only the latter would be provided to the Attorney General to document that the $14 million would "stabilize" the Plan. FAC ¶¶ 329-33.

Moreover, as noted, the Complaint alleges that all of the Prospect Entities were co-applicants with SJHSRI in seeking regulatory approval. FAC ¶ 319. Under those circumstances, it certainly can reasonably be inferred from the Complaint that SJHSRI was acting in concert with the Prospect Entities. See Ames v. Oceanside Welding and Towing Co., Inc., 767 A.2d 677, 681 (R.I. 2001) ("This Court has adopted the

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[86] FAC ¶¶ 333-34.

Restatement (Second) Torts § 876 (1979) for determining whether individuals or entities act in concert.") (citing Curtin v. Lataille, 527 A.2d 1130, 1132 (R.I. 1987)). Restatement (Second) of Torts § 876 provides:

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

Ames v. Oceanside Welding and Towing Co., Inc., *supra*, 767 A.2d at 681 (quoting Restatement (Second) of Torts § 876). "Parties are acting in concert when they act in accordance with an agreement to cooperate in a particular line of conduct or to accomplish a particular result. The agreement need not be expressed in words and may be implied and understood to exist from the conduct itself." Restatement (Second) of Torts § 876 cmt. a. Plaintiffs' allegations that the Prospect Entities participated with other defendants in submitting Angell's calculation to the Attorney General is more than sufficient to support a reasonable inference that the Prospect Entities acted in concert with SJHSRI.

Next the Prospect Entities question the sufficiency of the allegations concerning the letter their counsel submitted to the Attorney General on March 7, 2014, stating that "[t]he use of the sale proceeds . . . will benefit the community in three ways . . . The use

of $14M to strengthen the Plan will be of significant benefit to the community as it will **assure** that the pensions and retirement of many former employees, who reside in the community, are protected." FAC ¶ 339 (emphasis supplied). Those responses were signed and attested to be "complete, accurate, and correct" by CCCB's CEO Kenneth Belcher and Prospect Medical's CEO Sam Lee.[87] Plaintiffs allege that the Prospect Entities believed at the time that the $14 million "would not 'assure' that the benefits of the Plan participants were 'protected', even according to the calculations that Angell shared with all of those other Defendants" (including the Prospect Entities).[88]

The Prospect Entities contend that "The statement in question cannot be held to be 'false or incorrect' because there is no question that contributing $14 million to the Plan strengthened and benefited the Plan." Prospect Memo. at 60. The actual statement was that "[t]he use of $14M to strengthen the St. Joseph Pension Plan will be of significant benefit to the community as it will **assure** that the pensions and retirement of many former employees, who reside in the community, are protected."[89] "Assure" is not synonymous with "strengthen" or benefit." The word "assure" means "to make sure or certain",[90] "to make (a future event) sure",[91] "to tell someone that something will definitely happen or is definitely true, especially in order to remove doubt about it",[92] and "to cause something to be certain".[93] <u>See also</u> <u>Colonial Tr. Co. v. Elmer C. Breuer, Inc.</u>,

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[87] FAC ¶ 340.

[88] FAC ¶ 340.

[89] FAC ¶ 340 (emphasis supplied).

[90] https://www.merriam-webster.com/dictionary/assure

[91] https://www.dictionary.com/browse/assure

[92] https://www.macmillandictionary.com/us/dictionary/american/assure

[93] https://dictionary.cambridge.org/us/dictionary/english/assure

69 A.2d 126, 128 (Pa. 1949) ("To 'assure' means to render safe, to make secure, but it also means 'to give confidence to'; 'to make (one) sure or certain;' 'to put (a person) beyond doubt' (Webster's New International Dictionary, 2d Ed.); 'to cause to feel certain;' 'give confidence to;' 'convince' (Funk & Wagnalls' New Standard Dictionary).").

The Prospect Entities contend that "this allegation cannot constitute a misleading misrepresentation because it constitutes nothing more than an opinion, estimate, forecast or prediction." Prospect Memo. at 60 (citations omitted). In support, they cite the same cases previously discussed, of Siemens Fin. Servs. v. Stonebridge Equip. Leasing, LLC, 91 A.3d 817, 823 (R.I. 2014) and Nisenzon v. Sadowski, 689 A.2d 1037, 1045 n.11 (R.I. 1997), which state a general rule to which the Rhode Island Supreme Court has recognized the exception that misrepresentations of belief are actionable. See, e.g., Swift v. Rounds, 35 A. 45, 46 (R.I. 1896).

The Prospect Entities next dispute the sufficiency of Plaintiffs' allegations concerning testimony of Kenneth Belcher at a public hearing on May 6, 2014, at a time when Mr. Belcher was CCCB's President and Chief Executive Officer and was designated to continue in those roles on behalf of Prospect Chartercare when the Asset Sale closed on June 20, 2014. Mr. Belcher testified that if the pension plan assets did not achieve the expected rate of return, that CCCB, RWH, and SJHSRI would be "on the hook" to fund the Plan.[94] Plaintiffs allege that those entities for whom Mr. Belcher was already an officer, and the Prospect Entities for whom he had agreed to become an officer if the deal went through, knew that CCCB, RWH, and SJHSRI never intended to

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[94] FAC ¶ 355.

fund the Plan under any circumstances, and that these false assurances were given to secure approval of the sale of the hospitals.[95]

The Prospect Entities claim that regardless of their intent not to fund the Plan, the statement that CCCB, RWH, and SJHSRI were "on the hook" was true. Prospect Memo. at 64 ("Therefore, because the statement that SJHSRI was responsible for the Plan's liabilities was true, the Prospect Entities did not make any misrepresentations to the RIAG."). However, Plaintiffs allege that SJHSRI was already contemplating putting the Plan into receivership and seeking an order reducing benefits.[96] Moreover, Plaintiffs allege that SJHSRI drafted the Plan documents to relieve itself of any obligation to fund the Plan.[97] The combination of a plan for cutting benefits, attempts to preclude legal obligation, and no intent to fund the Plan made the statement false and misleading. In fact, notwithstanding these solemn assurances to state regulators, no contributions were made to fund the Plan over the next three years.

The Prospect Entities also argue that Plaintiffs' allegations that they were aware of SJHSRI's intentions lack the specificity required by Fed. R. Civ. P. 9(b). Prospect Memo. at 64 n.28 ("Other than conclusory statements, Plaintiffs make no allegations as to the Prospect Entities' **knowledge** of SJHSRI's future ability or **intent** to make contributions to the Plan, as required by Fed. R. Civ. P. 9(b).") (emphasis supplied). Once again, they get an elementary legal issue dead wrong. Rule 9(b) expressly states that "[m]alice, intent, knowledge, and other conditions of a person's mind may be

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[95] FAC ¶ 355.

[96] FAC ¶ 368.

[97] FAC ¶ 218.

alleged generally." Thus, Plaintiffs are entitled to make "conclusory statements" concerning the Prospect Entities' knowledge and intent.

In any event, Plaintiffs' allegations of knowledge and intent have factual support, in that the same individuals were in charge of both companies, as was the case with Mr. Belcher. Indeed, the Complaint alleges that Michael Conklin, who was CCCB's Chief Operating Officer and already designated to have that role in six weeks for Prospect Chartercare, affirmatively misrepresented SJHSRI's financial capability of making the minimum funding contributions projected in the future.[98] Moreover, as previously noted, the Complaint alleges that the Prospect Entities had full knowledge of SJHSRI's assets, which were insufficient to pay the minimum funding contributions projected in the future. FAC ¶ 447.

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

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[98] FAC ¶¶ 372-77.

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).

The Prospect Entities next question the sufficiency of Plaintiffs' allegations that they secured regulatory approval for the 2014 Asset Sale by misrepresenting that there would be local control over the new hospitals, in that CCCB would have 50% control over Prospect Chartercare.[99] Plaintiffs allege that, in fact, the corporate by-laws provide that in the event of deadlock involving most important board decisions, the board members appointed by the Prospect Entities had the power to break the deadlock.[100] The Prospect Entities do not dispute Plaintiffs' point concerning deadlock, or that those representations were instrumental in securing approval. Instead, their objection is that "there is no causal relationship between the purported failure to disclose information regarding deadlocks (that was not asked for) to the RIAG, and CCCB's failure to fund the Plan." Prospect Memo. at 65. However, the misrepresentations concerning the

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[99] FAC ¶¶ 372-77.

[100] FAC ¶ 372.

extent of local control misled the state regulators into approving the 2014 Asset Sale, which was a proximate cause of Plaintiffs' injuries, because it divorced the Plan from the operating hospitals and thereby severely limited the assets to which they could look upon default. One of Plaintiffs' primary criticisms of the Prospect Entities is that they participated in an asset sale that was intended to defraud Plaintiffs.

The Prospect Entities' final objection to Plaintiffs' factual allegations of intentional misrepresentations and omissions is that Plaintiffs improperly fail to differentiate between the Prospect Entities. In fact, all of the Prospect Entities were participants in the common application for regulatory approval, and represented that the submissions made in support of that application were "complete, accurate, and correct". FAC ¶ 339. Accordingly, they all have responsibility for the statements made in support of that application.

Moreover, the use in pleadings of collective monikers when discussing affiliated corporate defendants who all participated in the same conduct is appropriate. 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.**

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

K. Plaintiffs' Claim Alleging Fraudulent Scheme (Count VIII) Should Not Be Dismissed as to the Prospect Entities

The Prospect Entities' motion to dismiss Plaintiffs' claim of fraudulent scheme (Count VIII) is set forth in a footnote, as follows:

> Count VIII alleging "Fraudulent Scheme" relies on the same allegations as Count IX alleging Conspiracy. Amend. Compl. at ¶¶ 498, 503. Fraudulent Scheme has not been recognized by Rhode Island courts as a cognizable claim. To the extent that Count VIII alleging Fraudulent Scheme attempts to state a claim under state law, it should be dismissed for failure to state a claim. Furthermore, counts within a complaint may be dismissed if they are legally and factually "indistinguishable from [a] previously pled claim" and therefore "unnecessarily duplicative" of other causes of action asserted therein. *514 Broadway Trust, UDT 8/22/05 ex rel Blechman v. Rapoza*, 816 F. Supp. 2d 128, 140 (D.R.I. 2011). Count VIII should be dismissed for the same reasons as Count IX alleging Conspiracy. *See* discussion *infra*.

Prospect Memo. at 75 n.32. The statement that Rhode Island courts do not recognize fraudulent scheme as a cognizable claim is simply wrong. 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 Prospect Entities' contention that Plaintiffs' claim for fraudulent scheme is "unnecessarily duplicative" of other claims Plaintiffs are asserting is also wrong. The Prospect Entities cite 514 Broadway Trust, UDT 8/22/05 ex rel Blechman v. Rapoza,

816 F. Supp. 2d 128 (D.R.I. 2011) for their claim that Plaintiffs' fraudulent scheme and fraud claims should be dismissed. Prospect Memo. at 75 n.32. The defendants in the 38 Studios case relied on the same precedent in making the same argument in support of their motions to dismiss, which Judge Silverstein rejected on the grounds that the precedent was limited to its circumstances and the context of summary judgment, as follows:

> The full quote from *Broadway Inv. Trust* is the following: "In these circumstances, [the tort of deceit] is indistinguishable from the previously-pled fraud claim, as are the allegations forming the basis of the claim. Consequently, because it is unnecessarily duplicative, D'Amico's motion for summary judgment on this count is granted, pursuant to Fed. R. Civ. P. 56(f)(2)." Broadway Inv. Trust, 816 F. Supp. 2d at 140. Thus, *Broadway Inv. Trust* does not apply here as it was decided under specific circumstances and on summary judgment. See *id*.

Rhode Island Economic Development Corp. v Wells Fargo Securities, LLC, *supra*, 2013 WL 4711306, at *30 (R.I. Super. Aug. 28, 2013)

Moreover, the claim of fraudulent scheme is not duplicative of the claim for intentional misrepresentation because liability for fraudulent scheme can be imposed where liability for fraud may not be provable because no one party performed all of the acts required to prove fraud. See Kuo Feng Corp. v. Ma, 248 A.D.2d 168, 168-69 (N.Y. App. 1998) ("While it is true that none of the appellants individually committed all of the acts constituting the fraud, this is not, as appellants contend, an exculpating circumstance. It is well established that liability for fraud may be premised on knowing participation in a scheme to defraud, even if that participation does not by itself suffice to constitute the fraud."); 37 Am. Jur. 2d Fraud and Deceit § 292 ("It is not necessary for a single person to perform all the acts constituting fraud where two persons participate

in a fraudulent scheme, and, as in the case of torts, generally, two or more persons may be jointly liable in damages for deceit.") (citations omitted).

In addition, liability for fraudulent scheme can be found even if there is insufficient evidence to prove an agreement, which is an essential element of conspiracy. 37 Am. Jur. 2d Fraud and Deceit § 292 ("One who ratifies the fraudulent act of another and makes it his or her own also becomes liable therefor although there is no combination or conspiracy between them. A person who joins in the consummation of a transaction known to have been negotiated by fraud becomes a party to the fraud.") (citations omitted); 37 C.J.S. Fraud § 122 ("In actions for damages for fraud, all persons who participated in the alleged fraud may properly be joined as defendants, even though there was no previous conspiracy.") (citation omitted). Thus, a party may dismiss claims of civil conspiracy and still proceed on claims of fraudulent scheme. See Korn Family Ltd. P'ship v. Harbor Bldg. Co., No. 272813, 2008 WL 239651, at *7 (Mich. Ct. App. Jan. 29, 2008) ("While both sides dismissed independent tort claims of civil conspiracy before submitting the case to the jury, this did not lessen the principle of *Kefuss* regarding joint liability of codefendants for each other's acts (in this case co-plaintiffs) when engaged in a common fraudulent scheme.") (citing Kefuss v. Whitley, 189 N.W. 76 (Mich. 1922)).

L. Plaintiffs' Claim Alleging Conspiracy (Count IX) Should Not Be Dismissed as to the Prospect Entities

1. The Law 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). There "seldom will be direct evidence of an explicit agreement to commit an unlawful act, and that the existence and scope of a conspiracy often must be 'inferentially established by proof of the relations, conduct, circumstances, and actions of the parties.'" Id. (quoting State v. Lassiter, 836 A.2d 1096, 1104 (R.I. 2003)). 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). "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). "'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)).

Rhode Island "has adopted the rule that 'where several persons combine or conspire to commit an unlawful act . . . each is responsible for everything done by one or all of his confederates, in the execution of the common design, as one of its probable and natural consequences, even though the act was not a part of the original design or plan, or was even forbidden by one or more of them.'" State v. Mastracchio, 612 A.2d 698, 706 (R.I. 1992) (quoting State v. Gordon, 508 A.2d 1339, 1349 (R.I. 1986)).

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).

As noted, Rhode Island has adopted the Restatement (Second) Torts § 876 (1979) for determining whether individuals or entities act in concert such that they are liable for each other's wrongdoing. Ames v. Oceanside Welding and Towing Co., Inc., *supra*, 767 A.2d at 681. Sub-section (b) is clearly applicable (imposing liability on one "who knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself. . . .").

2. Plaintiffs' Claim Alleging Conspiracy (Count IX) Should Not Be Dismissed as to the Prospect Entities

The Prospect Entities seek dismissal of Plaintiffs' conspiracy claim (Count IX) "for failure to plausibly allege an unlawful enterprise and for failure to plausibly allege a valid underlying intentional tort theory." Prospect Memo. at 81. Both claims are false.

That Plaintiffs set forth sufficient allegations to permit the reasonable inference of the commission of an underlying intentional tort is established by the Prospect Entities' strategic decision not to dispute that the allegations in the Complaint support the reasonable inference that SJHSRI has liability for making fraudulent misrepresentations and omissions to the Plan participants concerning the Plan.

Instead, they attack Plaintiffs' conspiracy claims for failing to plausibly allege that *the Prospect Entities* committed an underlying intentional tort:

> Plaintiffs' conspiracy claims with respect to (1) purported false assurances to the RIAG and/or RIDOH, and (2) purportedly concealing the fact that the Plan was underfunded from Plan participants, are based upon their

> underlying fraud claims alleged in Count VII. Thus, for the same reasons that the Court should dismiss the Plaintiffs' fraud claims in Count VII, the Court must also dismiss Plaintiffs' claims of civil conspiracy (Count IX) that are based on such claims. As set forth supra, Plaintiffs have failed to state a plausible claim against the Prospect Entities for fraud for both (1) alleged misrepresentations and omissions to state regulators, and (2) concerning the underfunded status of the Plan.

Prospect Memo. at 77.

Thus it appears that the Prospect Entities are contending that they cannot be liable for civil conspiracy unless the Complaint also demonstrates that *they* committed the underlying intentional tort. Indeed, in over five pages of argument they repeatedly contend that Plaintiffs' civil conspiracy claims must be dismissed because of the absence of evidence that the *Prospect Entities* made intentional misrepresentations, or aided and abetted breach of fiduciary duty, whereas not even once do they argue that Plaintiffs have failed to demonstrate an underlying intentional tort by another defendant with whom Plaintiffs specifically allege the Prospect Entities were conspiring. Prospect Memo. at 77-81. See, e.g., Prospect Memo. at 78 ("Plaintiffs fail to set forth any allegations with particularity or otherwise that the Prospect Entities made any false representations that the Plan remained qualified as a Church Plan.") and Prospect Memo. at 80 ("[T]his allegation fails to state a plausible claim for fraud as it does not even allege that any of the Prospect Entities made any misrepresentation to anyone regarding the status of the Plan. Moreover, the allegation that the contact person listed in the Directory is an agent for the Prospect Entities does not state a plausible claim that the Prospect Entities actively participated or substantially assisted in or encouraged a breach of fiduciary duty to the degree that they could not reasonably be held to have acted in good faith.").

The Prospect Entities' argument that Plaintiffs must prove that they committed an underlying intentional tort for them to be liable for conspiracy is unavailing because Plaintiffs have sufficiently alleged that the Prospect Entities committed fraud and aided and abetted breaches of fiduciary duty. However, it also fails because again the Prospect Entities state a fundamental rule of law backwards: civil conspiracy renders them liable for torts *committed by others* in furtherance of the conspiracy. See Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 869 P.2d 454, 457 (Cal. 1994) (*en banc*) ("Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, **although not actually committing a tort themselves**, share with the immediate tortfeasors a common plan or design in its perpetration. By participation in a civil conspiracy, a coconspirator effectively adopts as his or her own the torts of other coconspirators within the ambit of the conspiracy. In this way, a coconspirator incurs tort liability co-equal with the immediate tortfeasors.") (emphasis supplied and citation omitted). The rule for which they advocate boils down to the proposition that only parties who commit underlying intentional torts can be guilty of civil conspiracy, which really would render liability based upon conspiracy duplicative and unnecessary.

That leaves the Prospect Entities with only the argument that Plaintiffs have failed to allege facts from which it can reasonably be inferred that the Prospect Entities entered into an agreement to commit an unlawful act or to perform a lawful act for an unlawful purpose. However, as noted above, there "seldom will be direct evidence of an explicit agreement to commit an unlawful act, and that the existence and scope of a conspiracy often must be 'inferentially established by proof of the relations, conduct, circumstances, and actions of the parties.'" State v. Disla, *supra*, 874 A.2d at 196.

It could be argued that this is the rare case in which there is direct evidence of the conspiratorial agreement, but it is certain that it can be inferred circumstantially. The circumstances here include that the Prospect Entities joined with SJHSRI, CCCB, and RWH in a common application to the Attorney General, pursuant to which they made fraudulent misrepresentations and omissions to the Attorney General after running them by each other. That common application and action is sufficient evidence of their agreement to participate in the fraudulent scheme, satisfying the first prong of civil conspiracy that there was an agreement. The same facts prove the second prong of “unlawful conduct” or “unlawful purpose,” because this conduct was unlawful. Thus, the Prospect Entities’ misrepresentations to the Attorney General are relevant to prove conspiracy to commit fraud, which makes the Prospect Entities derivatively liable for fraud.[101]

In addition, the circumstances here also include the Prospect Entities, CCCB, RWH, and SJHSRI having participated in the 2014 Asset Sale in which all of the parties agreed that the consideration of the 15% ownership interest in Prospect Chartercare would be diverted to CCCB in (actual and constructive) fraud of SJHSRI’s creditors. That by definition was an unlawful agreement, and pursuant to that agreement they performed the unlawful act of making that fraudulent and voidable transfer to CCCB.

Moreover, this analysis of the intricacies of the various transactions ignores the big picture of the conspiracy, which is highly suggestive of fraud. At least at the pleadings stage, the Court should come to the same conclusion as the court did in

[101] That conclusion is not affected even if the Court declines to adopt third party reliance to allow Plaintiffs to directly rely upon this conduct to prove intentional misrepresentation (Count VII), since the law of conspiracy does not require that Plaintiffs somehow prove reliance on the conspirators’ unlawful acts.

Parental Guide of Texas, Inc. v. Samsung, No. 701CV074-R, 2002 WL 1461933, at *2 (N.D. Tex. July 3, 2002), when the court stated that "[b]esides all this, I smell a rat arising from the purport of the asset purchase agreement. . . ."

M. Plaintiffs' Alter Ego Claim (Count XII) Should Not Be Dismissed as to the Prospect Entities

Plaintiffs allege that "[t]here is a unity of interest and ownership among Defendants SJHSRI, RWH, CCCB, CC Foundation, Prospect Chartercare, Prospect Medical Holdings, Prospect Chartercare St. Joseph, and Prospect Chartercare Roger Williams (the "Alter Ego Group"), such that the separate personalities of the entities and their members do not exist," and that "[o]bservance of the corporate form would sanction a fraud, promote injustice, or result in inequity."[102]

The "alter ego doctrine" is an "equitable" doctrine. Heflin v. Koszela, 774 A.2d 25, 30 (R.I. 2001). Whether "the observance of the corporate form would sanction a fraud, promote injustice, or an inequitable result would follow" is "addressed to the conscience of the court". Heflin v. Koszela, 774 A.2d 25, 30 (R.I. 2001). "Alter ego determinations are highly fact-based, and require considering the totality of the circumstances in which the instrumentality functions." Legacy Wireless Servs., Inc. v. Human Capital, L.L.C., 314 F. Supp. 2d 1045, 1058 (D. Or. 2004).

Plaintiffs have sufficiently alleged a unity of interest ownership within the Alter Ego Group. Although the Prospect Entities, CCCB, RWH, and CCCB attempted to observe corporate formalities, even strict observance of corporate formalities will not

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[102] FAC ¶¶ 516-517.

prevent imposition of "alter ego" liability, where SJHSRI was left an "empty shell" because of the dissipation of its assets:

> We are satisfied that the trial justice erred in finding that there was no basis to impose liability for CSI's debts upon O. Ahlborg, its parent corporation, and further, her conclusion that CSI was not operated as a mere conduit or instrumentality of O. Ahlborg was also erroneous. The evidence disclosed that although defendants scrupulously adhered to the usual corporate formalities, thus endeavoring to preserve the corporate protections afforded by law, CSI wound up an empty shell, unable to pay this judgment because its assets were dissipated for the benefit of Richard and O. Ahlborg. Accordingly, we are of the opinion that CSI was dominated and controlled by Richard as an alter ego of O. Ahlborg, all to the detriment of NHA, its victim and judgment creditor.

Nat'l Hotel Assocs. ex rel. M.E. Venture Mgmt., Inc. v. O. Ahlborg & Sons, Inc., 827 A.2d 646, 653 (R.I. 2003). "Strict reliance on a corporation's adherence to certain formalities is, therefore, not dispositive." Stanley Weiss Assocs., LLC v. Energy Mgmt. Inc., No. CIV.A. 02-1794, 2004 WL 877540, at *7 (R.I. Super. Apr. 7, 2004) (Silverstein, J.) (citing Nat'l Hotel Assocs.) (denying summary judgment).

Disregard of corporate formalities is also present here, inasmuch as the Prospect Entities' employee and agent Otis Brown was listed as the representative of SJHSRI in the Catholic Directory. Moreover, after the 2014 Asset Sale, the Prospect Entities continued to treat SJHSRI as a mere instrumentality, by taking over direct dealings with Plan participants,[103] and directing SJHSRI to put the Plan into receivership.[104]

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[103] FAC ¶¶ 306-10; 315-18.

[104] FAC ¶ 314.

N. Plaintiffs' *De Facto* Merger Claim (Count XIII) Should Not Be Dismissed as to the Prospect Entities

Although the Rhode Island Supreme Court has not adopted a specific test for determining whether there has been a *de facto* merger, there are three Superior Court decisions addressing what factors courts commonly "consider":

> Courts consider the following factors to determine whether the "*de facto* merger" exception has been met:
>
> > "1. that there was a continuation of the enterprise of the selling corporation vis a vis a continuation of management, personnel, physical location, assets, and general business operation;
> >
> > 2. that there is a continuity of shareholders resulting from the purchase of the assets with shares of stock, rather than cash;
> >
> > 3. that the selling corporation ceases operations, liquidates, or dissolves as soon as possible; and
> >
> > 4. that the purchasing corporation assumes the obligations of the selling corporation necessary for uninterrupted continuation of business."

Blouin v Surgical Sense, Inc., No. PC07-6855, 2008 WL 2227781, at *5–6 (R.I. Super. May 12, 2008) (quoting Kleen Laundry and Dry Cleaning v. Total Waste Management, 817 F. Supp. 225, 230-231 (D.N.H. 1993)). See also Asea Brown BOVERI, S.A. (d/b/a ABB Venezuela) v ALCOA FUJIKURA LTD., No. PC02-1084, 2007 WL 1234523 (R.I. Super. Apr. 11, 2007); Richmond Ready-Mix v. Atl. Concrete Forms, Inc., No. CIV.A. 92-0960, 2004 WL 877595, at *9 (R.I. Super. Apr. 21, 2004).

"Significantly, however, the factors 'are analyzed in a flexible manner that disregards mere questions of form and asks whether, in substance, it was the intent of the successor to absorb and continue the operation of the predecessor.'" In re Gen. Motors LLC Ignition Switch Litig., No. 14-MC-2543 (JMF), 2017 WL 6509256, at *7

(S.D.N.Y. Dec. 19, 2017) (quoting AT & S Transp., LLC v. Odyssey Logistics & Tech. Corp., 803 N.Y.S.2d 118, 120 (N.Y. App. Div. 2005)).

The issue of successor liability based upon *de facto* merger is highly fact-specific and typically cannot be determined as a matter of law. Commercial Lubricants, LLC v. Safety-Kleen Sys., Inc., No. 14-CV-7483 (MKB), 2017 WL 3432073, at *21 (E.D.N.Y. Aug. 8, 2017) (addressing the *de facto* merger doctrine) ("The successor issue is 'highly fact-specific' and typically cannot be determined as a matter of law.") (citing Aguas Lenders Recovery Grp. v. Suez, S.A., 585 F.3d 696, 703 (2d Cir. 2009)).

Moreover, the complaint need not allege the elements for *de facto* merger beyond alleging that the Prospect Entities are continuing SJHSRI's business. Cent. Nat. Gottesman v. Pemcor, Inc., No. CIV. A. 01-3203, 2001 WL 1198659, at *1 (E.D. Pa. Oct. 5, 2001) ("Count I alleges that Pemcor is continuing to operate Steckel's business, and, as a result of a *de facto* merger, Pemcor is responsible for Steckel's debt to plaintiff. Under Pennsylvania law, where there has been a *de facto* merger, a company may be liable for debts incurred by a predecessor. While defendants contend that the necessary *Philadelphia Electric Co.*[105] elements for imputing liability to a successor company are missing, these elements need not be established at this early stage. Therefore, as to this point, the motion will be denied.") (citations omitted); Sweatland v. Park Corp., 181 A.D.2d 243, 245 (N.Y. App. 1992) (holding that where the

[105] Citing Philadelphia Electric Co. v. Hercules, 762 F.2d 303, 310 (3d Cir. 1985) (listing the following factors: "(1) There is a continuation of the enterprise of the seller corporation, so that there is continuity of management, personnel, physical location, assets, and general business operations. (2) There is a continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock, this stock ultimately coming to be held by the shareholders of the seller corporation so that they become a constituent part of the purchasing corporation. (3) The seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible. (4) The purchasing corporation assumes those obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation.").

successor corporation "acquired all of Bertsch's fixed assets and many of its intangible assets such as good will, engineering, patents, copyrights, and customer lists, as well as the right to use the trade name" and advertises under the predecessor corporation's name, the "plaintiff should be allowed to conduct further discovery to determine whether the transaction constituted a de facto merger"); Kidz Cloz, Inc. v. Officially for Kids, Inc., No. 00–CV–6270, 2002 WL 1586877, at *5 (S.D.N.Y. July 17, 2002) (holding that the plaintiffs were entitled to discovery on the issue of a *de facto* merger where the plaintiff alleged that the buyer "took complete control of [the seller's] entire ongoing business", and "allege[d] at least some of the elements of a *de facto* merger").

The Prospect Entities quote Blouin but take liberties in the process, omitting Judge Gibney's preface that courts "consider" these factors, and instead prefacing the list with their own claim that "[t]o sufficiently allege a claim of de facto merger, a plaintiff must allege the following." Prospect Memo. at 94. There is a difference between "courts consider" and "a plaintiff must allege." Moreover, the Prospect Entities' combination of "must allege" with the conjunctive "and" makes it appear that all factors must be present. Many courts have held that is not the case. See Devine & Devine Food Brokers, Inc. v. Wampler Foods, Inc., 313 F.3d 616, 619 (1st Cir. 2002) ("Under Virginia law, no one factor is dispositive in determining whether an asset purchase transaction is in fact a merger. Instead, courts have identified four factors that serve as useful analytical guideposts…"); Funai Elec. Co., Ltd. v. Daewoo Electronics Corp., 616 F.3d 1357, 1381 (Fed. Cir. 2010) ("Not all of these factors need be present in order for the successor to assume the liabilities of the predecessor.") (citation omitted) (New Jersey law); In re Gen. Motors LLC Ignition Switch Litig., No. 14-MC-2543 (JMF), 2017

WL 6509256, at *7 (S.D.N.Y. Dec. 19, 2017) (New York law) ("Plaintiffs do not have to meet all four factors in order to invoke the exception. . . .").

The allegations in the complaint are sufficient to reasonably infer that Plaintiffs have alleged the first factor from Blouin, of continuation of the enterprise of the selling corporation. Indeed, Plaintiffs have specifically alleged the facts demonstrating a "continuation of management, personnel, physical location, assets, and general business operation." Blouin, *supra*. Plaintiffs have also alleged facts sufficient to implicate the second factor, of continuity of shareholders. Blouin, *supra*. CCCB continued as shareholder in the new entity, and the Prospect Entities to a significant extent "purchase[d] the assets with shares of stock [actually, LLC membership units], rather than cash." Plaintiffs have also satisfied the third factor, that the selling corporation ceases operations, liquidates, or dissolves as soon as possible, by demonstrating that SJHSRI ceased business operations as a hospital immediately upon the transfer. Blouin, *supra*. Moreover, Plaintiffs have alleged facts sufficient to reasonably infer that Plaintiffs have satisfied the fourth factor, that the purchasing corporation assumes the obligations of the selling corporation necessary for uninterrupted continuation of business. Blouin, *supra*. See Prospect CharterCARE, LLC v. Conklin, 185 A.3d at 540 (Prospect Chartercare accepted liability under Mr. Conklin's contract with CCCB). Moreover, the Asset Purchase Agreement itself provided that SJHSRI's and RWH's employees would be seamlessly hired by the Prospect Entities "as of the Closing Date" with the same seniority status, salaries, and benefits that they had previously received. FAC ¶¶ 416-17.

In addition, Plaintiffs have made sufficient allegations to directly show, or at least support the reasonable inference, that the Prospect Entities were involved in the administration of the Plan, in continuation of SJHSRI's role.

O. Plaintiffs' State Law Claim (Count XV) for Successor Liability Should Not Be Dismissed as to the Prospect Entities

Plaintiffs have asserted a claim (Count XV) that the Prospect Entities are liable for the debts owed to the Plan participants by Defendant SJHSRI, under state law successor liability. Under that doctrine, the successor corporation has liability for the debts of the predecessor. It is in that respect different from the Rhode Island Fraudulent Transfers Act, under which Plaintiffs' remedy is avoidance of the asset sale, because under the successor liability doctrine, the creditor is entitled to levy judgment against all of the assets of the successor corporation, not merely the assets acquired in the transaction. See Springer v. Nohl Electric Products Corporation, 912 N.W.2d 1, 11 (Wis. 2018) ("So, whereas the [Fraudulent Transfer] Act focuses on recovering the asset or its value, the fraudulent transaction exception [for successor liability] focuses on the business entity itself and its liability for its predecessor's obligations.").

Applied to our facts, if Plaintiffs are successful on the claims under the RIUFTA, Plaintiffs will be entitled to levy judgment against the assets that Defendants SJHSRI and RWH transferred to the Prospect Entities.[106] Under the doctrine of successor liability, however, Plaintiffs can levy against those same assets plus all of the other assets of the Prospect Entities.

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[106] Together with any appreciation of value of those assets. [cite]

1. Plaintiffs Have Stated a State Law Claim for Successor Liability on the Grounds That the Transfer Was Made in Bad Faith to Defraud Creditors

There are five exceptions to the general rule that asset transferees will not be held liable for the debts of the transferor:

> Exceptions to the general rule of nonliability in the event of a transfer of corporate assets include where there is an express agreement to assume the liabilities, where an agreement to assume the liabilities can be implied, where there is a de facto consolidation or merger of the corporations, where the transaction was fraudulent, or where the purchasing company is a mere continuation of the selling company.

15 Fletcher Cyclopdia of the Law of Corporations § 7122 (September 2018). See generally G. Kuney, "A Taxonomy and Evaluation of Successor Liability," 6 Fla. St. U. Bus. L. Rev. 9 (2007).

Sometimes the first two exceptions are treated as one. See Blouin v. Surgical Sense, Inc., *supra*, 2008 WL 2227781, at *5 ("There are four traditional exceptions to the general rule: 1) the corporate seller dissolved and the corporate buyer is so similar to the corporate seller that it is in reality a "mere continuation" of the old corporation, 2) a contract or agreement binds the buyer to assume the seller's tort liabilities, 3) the transaction amounted to a de facto merger, and 4) the transfer was made in bad faith to avoid creditors.") (quoting 10 Fletcher, Corporations § 4880 at 315-316). These exceptions are widely accepted. Raytech Corp. v. White, 54 F.3d 187, 192 (3d Cir. 1995) ("The parties dispute neither the nation-wide applicability of the general rule nor the presence in every jurisdiction of the four exceptions.").

Rhode Island recognizes these exceptions. See H.J. Baker & Bro. v. Orgonics, Inc., 554 A.2d 196, 205 (R.I. 1989) (recognizing both the mere continuation exception

and the exception for fraudulent schemes to delay and hinder creditors); Asea Brown BOVERI, S.A. (d/b/a ABB Venezuela) v ALCOA FUJIKURA LTD., No. PC02-1084, 2007 WL 1234523 (R.I. Super. Apr. 11, 2007) (Silverstein, J.) ("Successor liability is generally divided into four theories: 1) when the transferor's debts are assumed by agreement, either express or implied; 2) when the facts or circumstances warrant a finding of de facto merger or consolidation between the companies; 3) when the asset sale amounts to a fraudulent transfer; and 4) when the purchasing company is a "mere continuation" of the selling company.") (citing 15A Fletcher, Corporations, § 7122 at 227-43); Angell v. Parrillo, No. 77-521, 1986 WL 716005, at *1 (R.I. Super. Feb. 14, 1986) (noting four exceptions to general rule of non-liability) ("There are, however, four recognized exceptions to this rule: (1) where there is an express or implied agreement of assumption; (2) where the transaction amounts to a consolidation or merger of the two corporations; (3) where the purchasing corporation is a "mere continuation" of the seller; and (4) where the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts.") (citing Leannais v. Cincinnati, Inc., 565 F.2d 437 (7th Cir. 1977)).

The elements of successor liability based on fraud under Rhode Island law can be extracted from H.J. Baker & Bro. v. Orgonics, Inc., *supra*. In H.J. Baker & Bro., the Supreme Court upheld the trial justice's grant to plaintiff of a new trial after a defense verdict on the plaintiff's statutory fraudulent transfer claim, that the defendant had with actual intent hindered and delayed creditors, set forth as Count 2 of the plaintiff's complaint. See H.J. Baker & Bro., supra, 554 A.2d at 202 ("Count 2 alleges that defendant James M. O'Donnell engaged in a fraudulent scheme intended to delay and

prohibit plaintiff from collecting the debt owed to it by Orgonics, Inc.") and 554 A.2d at 203-04 ("The trial justice saw an obvious "scenario" to defraud Baker and hinder it in the collection of its debt while ridding Orgonics of its corporate assets. In reaching this decision, the justice did not overlook or misconstrue any material evidence. His conclusion that the verdict was against the weight of the evidence and did not do substantial justice to the parties is not clearly wrong.").

However, the Rhode Island Supreme Court reversed the trial justice's denial of the plaintiff's request for a new trial on the claim of successor liability based on fraud, which was count 4 of Plaintiffs' complaint, stating as follows:

> COUNT 4: SUCCESSOR LIABILITY BASED UPON FRAUD
>
> In conclusion we address the plaintiff's cross-appeal on count 4. We consider the trial justice's silence on this count to be a denial of the plaintiff's motion. Count 4 alleges that O'Donnell is liable for the debt of Orgonics to the plaintiff under the doctrine of successor liability based upon fraud. Because of the limited scope of the special interrogatories that were submitted to the jury and the failure to submit a general verdict form to the jury, it is unclear whether the jury rendered a verdict on this count. In any event, the trial justice's grant of a new trial on count 2, claiming actual fraud, is inconsistent with a denial of the plaintiff's count 4 claim of liability as a successor based upon fraud. We remand for a new trial because of the inadequacy of the jury's verdict and because the trial court's denial goes against the weight of the evidence and the court's ruling on count 2.

H.J. Baker & Bro., Inc., 554 A.2d at 205. From the court's conclusion that the evidence which entitled plaintiff to a new trial on the fraudulent conveyance claim served the same function for plaintiff's claim of successor liability based on fraud, it is clear that under Rhode Island law as pronounced by the Rhode Island Supreme Court, successor liability based upon fraud will be imposed if the plaintiff proves that corporate assets were transferred with the actual intent to hinder, delay, or defraud creditors. In other

words, successor liability based on fraud can be based on the same evidence as a claim for fraudulent transfer under the RIUFTA based on actual intent.

Thus, it is not surprising that Judge Silverstein in a later case held that the criteria for finding successor liability based upon fraud are set forth in the RIUFTA. Asea Brown Boveri, *supra*, 2007 WL 1234523, *1 n.29 ("Criteria for finding [successor liability based on] a fraudulent transfer are set forth in the Uniform Fraudulent Transfer Act, G.L. 1956 §§ 6-16-1 to 6-16-12.").

This analysis is complicated somewhat by the fact that in 2000, in a case in which the District Court had stated that it was "unable to locate a single Rhode Island decision that expressly adopts the fraud theory of successor liability," the First Circuit held that the requirements of common law fraud or deceit, including justified reliance, apply to what the First Circuit referred to as the "actual fraud theory of successor liability." Ed Peters Jewelry Co. v. C & J Jewelry Co., 215 F.3d 182, 191-92 (1st Cir. 2000). However, the First Circuit failed to even note that H.J. Baker & Bro. involved a fraud-based claim for successor liability, perhaps relying on the District Court's characterization of H.J. Baker & Bro. as "declining to make any holding on the legal merits of the fraud-based claim. . . ." Ed Peters Jewelry Co. v. C & J Jewelry Co., 51 F. Supp. 2d 81, 97 (D.R.I. 1999). As previously discussed, however, the Rhode Island Supreme Court in H.J. Baker & Bro expressly held that the evidence which entitled plaintiff to a new trial on his RUIFTA claim also entitled him to new trial on his claim for successor liability based on fraud. That is a "holding on the legal merits of the fraud-based claim" for successor liability.

In addition, both the District Court and the First Circuit overlooked the 1987 decision of the Superior Court in Angell v. Parrillo, *supra*, which noted there is successor liability "when the asset sale amounts to a fraudulent transfer."

Since the First Circuit's decision in 2000 in Ed Peters, there have been two more Rhode Island cases; Judge Silverstein's decision in Asea Brown Boveri, *supra*, that notes that successor liability attaches "when the asset sale amounts to a fraudulent transfer," and Judge Gibney's decision in Blouin, *supra*, which refers to successor liability when "the transfer was made in bad faith to avoid creditors." These Superior Court decisions are entitled to consideration, along with H.J. Baker & Bro. See Westport Ins. Corp. v. Atchley, Russell, Waldrop & Hlavinka, L.L.P., 267 F. Supp. 2d 601, 615 (E.D. Tex. 2003) ("Instead of relying exclusively on older circuit opinions, the Court looks to recent trends in the jurisprudence of the Texas Supreme Court and Texas' lower courts for guidance in making this Erie guess."); Ridglea Estate Condo. Ass'n v. Lexington Ins. Co., 309 F. Supp. 2d 851, 855 (N.D. Tex. 2004), overruled on other grounds, 398 F.3d 332 (5th Cir. 2005), vacated and remanded, 415 F.3d 474 (5th Cir. 2005) ("However, if a panel of the Fifth Circuit has settled on the state law to be applied in a diversity case, that precedent should be followed 'absent a subsequent state court decision or statutory amendment that rendered [the Fifth Circuit's] prior decision clearly wrong.'").

Moreover, characterizing the successor liability fraud exception as a fraud on creditors generally, rather than a fraud perpetrated on a specific creditor with the requirement of a misrepresentation and detrimental reliance, is consistent with the law around the United States.

> To impose liability on the successor corporation [under the fraudulent transfer exception], the law in every jurisdiction ... requires a finding that the corporate transfer of assets "is for the fraudulent purpose of escaping liability."

Raytech Corp. v. White, 54 F.3d 187, 192 (3d Cir. 1995) (quoting 15 William M. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 7122 at 232).

Indeed, defining the elements of successor liability based on fraud by the elements of common law fraud ignores the fact that successor liability is not a creature of tort law. See George W. Kuney, A Taxonomy and Evaluation of Successor Liability (Revisited), 18 Transactions: Tenn. J. Bus. L. 732, 744 (2017) ("First, our current judge-made successor liability law is a product of the rise of corporate law in the last half of the 19th century and early part of the 20th century. In fact, it appears to have developed because of, and in reaction to, the rise of corporate law. It may be better to characterize it as a part of that body of law, much like the '"alter ego' or 'piercing the corporate veil' doctrines, rather than as a simple creature of tort law, despite it being used as a tool by plaintiffs who are involuntary tort claimants."). Successor liability based on fraud and common law fraud are very different. See Springer v. Nohl Elec. Prod. Corp., 912 N.W.2d 1, 12-13 (Wis. 2018) ("A claim that a company is liable for the torts of a predecessor company is not the same as a claim of liability for the torts themselves. Tort claims comprise the familiar elements of duty, breach, causation, and damage. A claim that a successor company bears responsibility for the torts of its predecessor is entirely different.").

Thus, a creditor of an asset seller is entitled to proceed against the asset purchaser on a claim for successor liability based upon evidence that the asset seller had the fraudulent purpose of escaping liability, notwithstanding that the creditor fails to

state a claim for fraud. See Oak Acres Nursery, LLC v. Stinchcomb Nursery Sales, Inc., No. 3:11 CV 609, 2013 WL 391175, at *13 (N.D. Ohio Jan. 30, 2013) (denying motion to dismiss claim for successor liability while granting motion to dismiss claim of fraud).

In short, the common law doctrine of successor liability for fraudulent transfers does not require proof of a misrepresentation to the creditor and/or justified reliance. Although it is Plaintiffs' contention that this conclusion is sufficiently clear such that certification of this issue to the Rhode Island Supreme Court is unnecessary, Plaintiffs have no objection to and indeed request that the Court certify this issue under Article I, Rule 6(a) of the Supreme Court Rules of Appellate Procedure if the Court disagrees with the Plaintiffs' position that the law is already clear on this issue. See Mancini v. City of Providence, No. CA 13-92 S, 2013 WL 5423717, at *3 (D.R.I. Sept. 26, 2013) (Smith, C.J.) ("Because the proper scope and meaning of R.I. Gen. Laws § 28–5–7(6) with respect to individual liability is not clear, this Court believes that an answer to the question certified above would greatly assist it in resolving the matter currently pending before it, and would assist this and other courts in rendering decisions related to FEPA in the future.").

As noted, under Rhode Island law, the criteria for applying successor liability based upon a fraudulent transfer are set forth in the Uniform Fraudulent Transfer Act. Asea Brown Boveri, *supra*, 2007 WL 1234523, at *1 n.29. Plaintiffs have satisfied those criteria, as discussed in connection with Plaintiffs' claims based on R.I. Gen. Laws § 6-16-4(a)(1) (2014). Accordingly, the Prospect Entities' motion to dismiss Plaintiffs' claim of successor liability based upon a fraudulent transfer should also be denied. See, e.g., A.J. Heel Stone, L.L.C. v. Evisu Int'l, S.R.L., No. 03 CIV. 1097 (DAB), 2006 WL

1458292, at *4 (S.D.N.Y. May 25, 2006) (denying motion to dismiss statutory fraudulent conveyance claim, and claim for successor liability based on fraud) ("Because the Court has found that Petitioner has adequately pled fraudulent conveyance, Respondents' Motion to Dismiss the Successor Liability claim is DENIED.").

The Prospect Entities, however, do not address the sufficiency of Plaintiffs' allegations that the transfer was made in bad faith to avoid creditors. Instead, they argue that Plaintiffs' claim for successor liability must be denied because Plaintiffs have failed to plausibly allege lack of adequate consideration. See Prospect Memo. at 96 ("However, Count XV should be dismissed because Plaintiffs have failed to plausibly allege, nor could they, that any of the Prospect Entities paid inadequate consideration for the assets obtained in the 2014 Asset Sale."). That argument loses right out of the gate because adequacy of consideration is measured by what the transferor received, for reasons already discussed. Moreover, Plaintiffs have alleged that the Prospect Entities paid inadequate consideration. See supra at 47-53.

The argument is also foreclosed for the same reasons that their motion to dismiss Plaintiffs' claims under the RIUFTA for actual fraudulent transfer should be denied. Since inadequate consideration is not an independent element that must be demonstrated for liability under the RIUFTA for actual fraud,[107] and since the criteria for applying successor liability based upon a fraudulent transfer are set forth in the RIUFTA, then inadequate consideration is not an independent element that must be

[107] Instead, it constitutes an affirmative defense for which the Prospect Entities would have the burden of also proving their good faith. See R.I. Gen. Laws § 6-16-8(a) (2014).

demonstrated for successor liability on the grounds that the transfer was made in bad faith to avoid creditors.

Indeed, even in those jurisdictions that do not rely on their version of the UFTA for the elements of successor liability, proof that the transferor received inadequate consideration is *not* a *sine qua non* for successor liability on the grounds that the transfer was made in bad faith to avoid creditors. See Eagle Pac. Ins. Co. v. Christensen Motor Yacht Corp., 959 P.2d 1052, 1056 (Wash. 1998) (imposing successor liability based upon fraud, notwithstanding absence of proof of inadequate consideration) ("Eagle Pacific's inability to establish inadequate consideration does not preclude a court from finding the transfer of assets was fraudulent. None of the cases cited by CSL hold insufficient consideration is a necessary element for a finding of fraud.").

In Eagle Pacific, the full Washington Supreme Court canvassed cases across the nation and leading treatises and, after citing numerous supporting authorities and not a single opposing authority, held that the purchaser who pays full consideration may nevertheless be liable if the purchaser lacked good faith. Eagle Pacific Ins. Co., *supra*, 959 P.2d at 1059 ("CSL is simply incorrect in its claim that adequate consideration precludes a finding of fraudulent transfer of assets. The fraudulent transfer theory has always required consideration and good faith. . . ."). "Good faith, or the lack thereof, ultimately rests upon the intent of the parties involved in the transaction." Id., 959 P.2d at 1059.

2. Plaintiffs Have Stated a State Law Claim for Successor Liability on the Grounds That the Prospect Entities Are a Mere Continuation of Defendants SJHSRI and RWH

As already mentioned, in H.J. Baker & Bro., *supra*, 554 A.2d at 205, the Rhode Island Supreme Court also acknowledged the "mere continuation" basis for successor liability. The court noted with approval that "[a] New Jersey Superior Court has succinctly noted five persuasive criteria in finding a 'continuing' entity: (1) there is a transfer of corporate assets; (2) there is less than adequate consideration; (3) the new company continues the business of the transferor; (4) both companies have at least one common officer or director who is instrumental in the transfer; and (5) the transfer renders the transferor incapable of paying its creditors because it is dissolved either in fact or by law." Id. at 205 (citing Jackson v. Diamond T. Trucking Co., 241 A.2d 471, 477 (N.J. Super. 1968)). The court also noted that "[o]ther courts have examined criteria such as the common identity of officers, directors, and stockholders, and the continued use of the same office space and service to the same client base." H.J. Baker & Bro., Inc., *supra*, 554 A.2d at 205 (citations omitted). "After considering all these factors," the court concluded that the acquiring company "was a mere continuation" of the company whose assets had been acquired.

In the Complaint, Plaintiffs expressly allege the existence of these "five persuasive criteria":

> Both in connection with the 2014 Asset Sale and the transfer of approximately $8,200,000 to CC Foundation in connection with the 2015 Cy Pres Petition, there was a transfer of corporate assets **for less than adequate consideration**, the new companies continued the business of the transferors; both the transferors and the transferees had at least one common officer or director who was instrumental in the transfer; and the

> transfers rendered the transferors incapable of paying their creditors because the transferors dissolved either in fact or by law.[[108]

The body of the Complaint sets forth specific factual allegations that are more than sufficient to permit a reasonable inference that all of these criteria are met in this case. Moreover, in the body of the Complaint, Plaintiffs also allege sufficient facts demonstrating that what the court in H.J. Baker & Bro., Inc. referred to as additional factors applied by some courts, specifically the continued use of the same office space and service to the same client base.[109] H.J. Baker & Bro., Inc., *supra*, 554 A.2d at 205 (citations omitted).

Notwithstanding the allegations in the Complaint substantiating that all of these factors are present in this case, the *only* factor that the Prospect Entities contest in their motion to dismiss Plaintiffs' claim for successor liability based upon the "mere continuation" doctrine is the issue of inadequate consideration. Prospect Memo. at 96 ("Count XV should be dismissed because Plaintiffs have failed to plausibly allege, nor could they, that any of the **Prospect Entities paid inadequate consideration** for the assets obtained in the 2014 Asset Sale.") (emphasis supplied).

However, the Prospect Entities case no case law or other authority in support of the proposition that the adequacy of consideration is measured by what the buyer paid, and not by what the seller received. In any event, Plaintiffs have provided sufficient factual allegations to support both the claim that the Prospect Entities paid inadequate consideration and that SJHSRI received inadequate consideration.[110]

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[108] FAC ¶ 529 (emphasis supplied).

[109] FAC ¶¶ 410-19.

[110] Discussed *supra* at 47-53.

But clearly the focus should be on the consideration the predecessor entity received. Just as is the case with the law of fraudulent conveyances, the doctrine of successor liability is intended to protect creditors. Columbia State Bank v. Invicta Law Grp. PLLC, 402 P.3d 330, 345 (Wash. App. 2017) ("Moreover, successor liability exists in equity to protect creditors from debtors that attempt to change corporate form, sell off their assets, or merge with another company in an attempt to avoid their debts."). From the point of view of creditors, adequacy of consideration is determined by the assets the seller receives in the transaction. Eagle Pacific Ins. Co. v. Christensen Motor Yacht Corp., *supra*, 959 P.2d at 902-03 ("If the buying corporation pays sufficient consideration for the seller's assets, the selling corporation's creditors can then seek to satisfy their judgments from the sale proceeds. If the sale proceeds are equivalent in value to the transferred assets, then, assumedly, but not necessarily, no harm has been done to the creditors of the selling corporation.").

P. Plaintiffs' Joint Venture Count (Count XIV) Should Not Be Dismissed as to the Prospect Entities

The determination whether a joint venture exist is a question of fact, to be decided based upon the totality of the circumstances. See Surplec, Inc. v. Maine Public Service Co., 501 F. Supp. 2d 195, 200 (D. Me. 2007) ("Moreover, Surplec's allegations are bottomed on assertions of fact, which at this stage must be accepted as true. *See Nancy W. Bayley, Inc. v. Me. Employment Sec. Comm'n*, 472 A.2d 1374, 1377 (Me. 1984) (stating that to determine if a joint venture exists, 'the finder of fact must consider the conduct of the parties and the surrounding circumstances before reaching

a conclusion as to their intent.'). Whether the allegations match the evidence must be left for a later day.").

Moreover, even if a joint venture does not exist in fact, the parties may be estopped to deny their joint venture if they hold themselves out to third parties as joint venturers and the third parties can show detrimental reliance. See Tiffany Const. Co. v. Hancock & Kelley Const. Co., 539 P.2d 978, 983 (Ariz. App. 1975) ("[I]n the absence of a joint venture agreement, either express or implied, elements of estoppel must be shown in order to hold a non-contracting party liable as a joint venturer. Such elements must include, (1) a holding out by the parties sought to be charged, or permitting another to hold himself out as a joint venturer, and (2) reliance on or a changing of position by the third party on the holding out."). The parties entitled to allege estoppel are not limited to persons who provide credit to the putative joint venture, but include anyone injured thereby. White v. Sirago, 14 A.2d 690, 692 (R.I. 1940) ("It appears to be well settled that a person holding himself out as a partner, or permitting himself to be so held out, is liable only to those who have been misled and who have acted on the faith of the appearance thus produced; **or** have given credit to an apparent partnership in ignorance of the actual facts and in the belief that the one so held out was a partner in fact. The liability in such case is predicated on the doctrine of estoppel.") (emphasis supplied).

Indeed, the requirement of detrimental reliance does not even apply if the parties make public statements that they are joint venturers, in which case it not even need be alleged that the third party heard that statement. Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A., 290 F.3d 42, 56 (1st Cir. 2002). In Daynard, the First Circuit

quoted the following provision from the Uniform Partnership Act, which is also the law of Rhode Island,[111] as setting forth the test for proving joint venture by estoppel:

> When a person ... represents himself, or consents to another representing him to any one, as a partner ... he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership, and **if he has made such representation or consented to its being made in a public manner he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made.**

290 F.3d at 56 (emphasis added) (quoting Unif. P'ship Act § 16(1), 6 U.L.A. 125, 501 (1995)). See Antonic Rigging and Erecting of Missouri, Inc. v. Foundry East Ltd. Partnership, 773 F. Supp. 420, 431 (S.D. Ga. 1991) ("Creditor reliance is unnecessary if the limited partner makes or consents to a public representation that he is a general partner.") (construing Alabama's identical provision, O.C.G.A. § 14–8–16 (1989)).

Plaintiffs' complaint includes the following specific allegations concerning the Prospect Entities' participation with SJHSRI, RWH, and CCCB in a joint venture:

> Notwithstanding the formal documentation creating a limited liability company controlled primarily by Prospect East, Prospect Chartercare, Prospect Chartercare St. Joseph, Prospect Chartercare Roger Williams, Prospect Medical Holdings, and Prospect East have repeatedly referred to the relationship between CCCB and Prospect Medical Holdings and held themselves out as joint venturers, in statements to employees, to the public, to the regulatory agencies that approved the 2014 Asset Sale, and to the court that approved the 2015 *Cy Pres* Petition. For example:
>
> a. Prospect Medical Holdings's website states: "Through a **joint venture agreement**, Prospect became the majority owner of CharterCARE but shares governance of the hospitals equally with CharterCARE Community Board."

[111] R.I. Gen. Laws § 7-12-27(a).

b. The cy pres petition filed on January 13, 2015 by CC Foundation, RWMC, and SJHSRI states: "On June 20, 2014, a closing on the transaction approved by the Rhode Island Department of Health ('DOH') and Rhode Island Attorney General's Office ('AG') occurred in which certain of the assets of CCCB, RWH and SJHSRI were transferred to **the newly formed for-profit joint venture between CCCB and Prospect Medical Holdings, Inc. ('PMH') known as Prospect CharterCARE, LLC, and its affiliates (the 'Joint Venture')."**

c. A June 17, 2014 letter from the U.S. Department of Health and Human Services to SJHSRI states: "As described in your letter [of May 15], CharterCARE Health Partners (CCHP), the parent of SJHSRI, **will enter into a joint venture arrangement with Prospect Medical Holdings, Inc. (PMH),** pursuant to a September 24, 2013 arrangement that has now been approved by the Rhode Island Attorney General and the Rhode Island Department of Health. As part of this arrangement, all operating assets held by members of the CCHP system, including SJHSRI, **will be transferred to limited liability companies owned by Prospect CharterCARE, LLC, the joint venture entity. . . ."**

d. CCCB's 2013 Form 990 states: "THE BOARD OF DIRECTORS BELIEVES THAT SUFFICIENT SAFEGUARDS EXIST TO ENSURE THAT THEIR EXEMPT STATUS IS PROTECTED BOTH THROUGH THE APPOINTMENT PROVISIONS IN THE **PROSPECT CHARTERCARE LLC JOINT VENTURE AGREEMENT** AND CONDITIONS IMPOSED BY THE RHODE ISLAND ATTORNEY GENERAL AND THE RHODE ISLAND COMMISSIONER OF HEALTH."

e. The March 18, 2013 Letter of Intent executed by both CCCB and Prospect Medical Holdings states: "The purpose of this letter of intent (the 'Letter') is to set forth certain non-binding understandings and certain binding agreements by and between CharterCARE Health Partners ('Seller') and Prospect Medical Holdings, Inc. ('Prospect') **with respect to the creation of a joint venture** ('Newco') whereby Seller will sell certain assets and operations of Seller to Newco, as more particularly described in the attached term sheet (the 'Term Sheet'), incorporated herein by reference."

f. 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**."[112]

The Complaint also alleges that the Prospect Entities made these representations in order to misled Plan participants into believing that there would be local control over the New Fatima Hospital.[113]

Moreover, the Complaint alleges that before the closing of the 2014 Asset Sale, CCCB President and Chief Executive Officer Belcher and Thomas M. Reardon (President of Prospect Medical) made a statement which the Providence Journal published as an op-ed on May 12, 2014, which stated:

> The development and pursuit of innovation in health delivery should not come at the cost of one of the most cherished values in Rhode Island health care - that of local control. We are pleased that our proposal will assure preservation of local governance, as our **joint venture** board will have equal representation from CharterCare and Prospect with a local board chair, with real veto powers.[114]

That same day CCCB sent a copy of the statement to all employees, stating, "[w]e want to share the following op-ed that appeared in today's Providence Journal."[115]

In addition, the Complaint alleges that on April 13, 2016, Prospect Chartercare made a PowerPoint presentation to Plan participants, informing them that "the Hospital

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[112] FAC ¶ 431 (emphasis supplied).

[113] FAC ¶ 317.

[114] FAC ¶ 371 (emphasis supplied).

[115] FAC ¶ 373.

pays the entire cost of the Plan," with payment options that included annuity payments for life, at a time when Prospect SJHSRI (not SJHSRI) owned the hospital.[116] This is certainly consistent with Prospect Chartercare accepting joint responsibility under the Plan, as a joint venture.

These allegations that the Prospect Entities publically proclaimed their status as joint venturers with CCCB are sufficient to eliminate the need of demonstrating detrimental reliance in connection with the Prospect Entities' motion to dismiss. Indeed, even if reliance were required, the direct communications to the Plan participants would be sufficient to give rise to a reasonable inference that Plan participants did not object to the proposed sale in reliance on those statements.[117]

In any event, Plaintiffs' allegation of joint venture by estoppel raise issues of fact that cannot be addressed in connection with the Prospect Entities' motion to dismiss. Deb v. SIRVA Inc., No. 113CV01245TWPDML, 2017 WL 3980574, at *6 (S.D. Ind. Sept. 11, 2017) ("The Court need not rehash the briefing in detail, because as the parties' arguments themselves demonstrate, whether a joint venture has been created is a fact-specific inquiry that is ill-suited to resolution on a motion to dismiss."); Campbell v. Wells Fargo Bank, N.A., No. 6:13-CV-01558-AA, 2014 WL 1030525, at *4 (D. Or. Mar. 17, 2014) ("Ultimately, defendant's arguments raise questions of fact that are not appropriate to resolve at this stage in the litigation. With all facts and inferences construed in favor of plaintiffs, plaintiffs' claim for promissory estoppel survives

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[116] FAC ¶ 315.

[117] FAC ¶ 354 ("These public misrepresentations and material omissions were made on behalf of Defendants SJHSRI, CCCB, RWH, Prospect Chartercare, Prospect Chartercare St. Joseph, Prospect Chartercare Roger Williams, Prospect Medical Holdings, and Prospect East in order to fraudulently secure regulatory approval and to deceive Plan participants concerning the funded status of the Plan, and the state regulators and the Plan participants were in fact deceived.").

defendant's motion to dismiss."). So too issues of reliance cannot be addressed in a motion to dismiss under Rule 12(b)(6). See Samia Companies LLC v. MRI Software LLC, 898 F. Supp. 2d 326, 343 (D. Mass. 2012) (issue of plaintiff's reliance on oral representations was not ripe for decision at motion to dismiss stage despite existence of integration clause in written contract); Bayerische Landesbank, New York Branch v. Barclays Capital, Inc., 902 F. Supp. 2d 471, 474 (S.D.N.Y. 2012) ("Whether or not reliance on alleged misrepresentations is reasonable in the context of a particular case is intensely fact-specific and generally considered inappropriate for determination on a motion to dismiss.").

Q. Plaintiffs' Count Alleging Civil Liability under R.I. Gen. Laws § 9-1-2 for Violations of the Hospital Conversion Act (Count XVI) Should Not Be Dismissed as to the Prospect Entities

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.

"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. 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; R.I. Gen. Laws § 11-1-3.

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 construing 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 Act proceedings. Reliance on false information 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.").

The Prospect Entities seek dismissal of this claim on the grounds that Plaintiffs suffered no damages from the false statements that the Prospect Entities provided to state regulators. Prospect Memo. at 102 ("Moreover, Plaintiffs have failed to plausibly allege, because they cannot, that they suffered any damages that were caused by any alleged false information provided to state regulators."). R.I. Gen. Laws § 9-1-2

provides a remedy for injuries caused "by reason of the commission of any crime or offense." Plaintiffs allege that the Prospect Entities succeeded in misleading state regulators into approving the 2014 Asset Sale.[118] Plaintiffs also allege that the approval of the 2014 Asset Sale injured them "because it . . . cut the link between the Plan and an operating hospital. . . ."[119] It also permitted SJHSRI to transfer assets to CCCB, hindering creditors such as the Plan participants.

The Prospect Entities state:

> Plaintiffs cannot establish a causal connection between the alleged false statements to state regulators and the underfunding of the Plan for the simple reason that, as Plaintiffs allege, the underfunding had been going on for years prior to the proposed hospital conversion. The actions they allege violate the HCA occurred after their alleged injury.

Prospect Memo. at 103-04. However, Plaintiffs' injuries include SJHSRI's failure to fund the Plan from 2014 to the present, after the Prospect Entities' violation of the Hospital Conversion Act ("HCA"). As previously discussed, Plaintiffs contend that if SJHSRI's failure to fund the Plan had been disclosed, they would have brought suit back in 2014, when SJHSRI had more assets to be reached. Moreover, Plaintiffs contend that such disclosure would have caused such public outcry as to prevent the 2014 Asset Sale from being approved.[120]

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[118] FAC ¶¶ 354 ("These public misrepresentations and material omissions were made on behalf of Defendants SJHSRI, CCCB, RWH, Prospect Chartercare, Prospect Chartercare St. Joseph, Prospect Chartercare Roger Williams, Prospect Medical Holdings, and Prospect East in order to fraudulently secure regulatory approval and to deceive Plan participants concerning the funded status of the Plan, and the state regulators and the Plan participants were in fact deceived.").

[119] FAC ¶¶ 321.

[120] FAC ¶¶ 305 (The Prospect Entities "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.").

The Prospect Entities state:

> Furthermore, to the extent that Plaintiffs are basing their claim under § 9-1-2 on an alleged cover-up, that claim likewise fails. The First Circuit has stated, "to the extent plaintiff-appellants are asserting a claim under § 9-1-2 for an alleged cover-up, their claim also fails because of the lack of any nexus between the alleged cover-up and the injuries (and damages) that they claim. Thus, Plaintiffs' purported injuries were not proximately caused by any statements made to state regulators in connection with the HCA.

Prospect Memo. at 104 (quoting Kelly v. Marcantonio, 187 F.3d 192, 203 n.8 (1st Cir. 1999)). Noticeably absent from that statement is any explanation *why* the Prospect Entities contend there is no nexus between Plaintiffs' injuries and their cover-up. In fact, the Prospect Entities' cover-up permitted the 2014 Asset Sale to go forward and resulted in SJHSRI having at least three additional three years of operating expenses by the time the deceit was finally discovered. This case, therefore, is completely unlike Kelly, in which all of the plaintiffs' injuries preceded the cover-up. Kelly, 187 F.3d at 195 ("Plaintiff-appellants further allege that the hierarchy defendants knew that O'Connell and Marcantonio previously had committed sexual assaults and…engaged in a 'cover-up' **after the fact** by transferring the priests to different parishes.") (emphasis supplied).

R. Plaintiffs' Count Alleging Civil Liability under R.I. Gen. Laws § 9-1-2 for Violations of R.I. Gen. Laws § 11-18-1 (Count XVIII) Should Not Be Dismissed as to the Prospect Entities

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).

The Prospect Entities' argue that Plaintiffs' factual allegations are insufficient to state a claim:

> Plaintiffs have failed to plausibly allege that any of the Prospect Entities submitted any false documents with the intent to deceive. Moreover, as the elements of § 11-18-1 are substantially similar to those of fraud—a false statement made with the intent to deceive—for the same reasons that Plaintiffs fraud claims fail, so too should Plaintiffs' claim under § 11-18-1.

Plaintiffs are entitled under Rule 9(b) to allege intent generally, but in fact Plaintiffs have specifically alleged, and provided chapter and verse in support, that the Prospect Entities deceived state regulators and UNAP in order to secure approval of the 2014 Asset Sale.[121]

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[121] FAC ¶¶ 305 (The Prospect Entities "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

S. Plaintiffs' Count Alleging Civil Liability under R.I. Gen. Laws § 9-1-2 for Violations of R.I. Gen. Laws § 11-41-4 (Count XIX) Should Not Be Dismissed as to the Prospect Entities

R.I. Gen. Laws § 11-41-4 is a statutory crime, which includes obtaining property under false pretenses:

> § 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).

"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). Because obtaining property by false pretenses is a statutory crime, "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.

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approval of the asset sale without fully funding the Plan would be denied or at the very least would be in serious jeopardy.").

The Prospect Entities seek to dismiss this Count on the grounds that the Complaint does not support it with sufficient particularity:

> Here, as an initial matter, to the extent that Plaintiffs make claims under § 11-41-4, those claims sound in fraud and Plaintiffs have failed to plead facts with enough particularity to satisfy Rule 9(b).

Prospect Memo. at 106. The Prospect Entities apparently forget that their frauds were in writing, and attested to be "complete, accurate and correct" by Prospect Medical's CEO.[122]

Equally baseless is the Prospect Entities' claim that

> As to the acquisition of the Hospitals, the Amended Complaint makes no allegation that they were obtained with false pretenses, or with the intent to deceive. Rather, the converse is true: to effect the acquisition of the Hospitals, the Prospect Entities paid $45 million in cash to CCHP, as the seller, $14 million of which would be contributed to the Plan, and issued CCCB fifteen percent of Prospect Chartercare. There are no allegations that such payment structure included any false or material misrepresentations that amounted to false pretenses.

Prospect Memo. at 106-107. The Complaint is truly rife with such allegations.[123] The payment structure was a fraud on creditors, to enable the Prospect Entities to obtain the hospitals inexpensively by buying off CCCB.

The Prospect Entities' next argument shows a fundamental misunderstanding of the crime of obtaining property under false pretences:

> Even if the Court were to find that the Amended Complaint alleges that the Prospect Entities made material misrepresentations arising to false

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[122] FAC ¶ 340.

[123] See, e.g., FAC ¶¶ 305 (The Prospect Entities "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.").

> pretenses, it should nonetheless find that the Amended Complaint contains no allegations that the Prospect Entities proposed to purchase the Hospitals with the intent to deceive CCHP, SJHSRI, or RWH. Simply put, there are no allegations that the Prospect Entities intended to deceive CCHP, SJHSRI, or RWH in connection with the 2014 Asset Sale. Such conclusion is bolstered by the fact that the Prospect Entities retained a relationship with CCCB (previously CCHP (the seller)) by granting it an interest in Prospect Chartercare, and the fact that the 2014 Asset Sale was thoroughly vetted by the RIDOH and RIAG. Plaintiffs have not alleged, nor can they, that the 2014 Asset Sale was consummated as a result of false pretenses or that the Prospect Entities made any false pretenses with the intent to deceive CCHP, SJHSRI, or RWH.

Prospect Memo. at 106.

The Prospect Entities' argument is that Plaintiffs must demonstrate that they intended to deceive CCHP, SJHSRI, or RWH. However, obtaining money 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). All that must be demonstrated is that the Prospect Entities "obtain[ed] from another designedly, by any false pretense or pretenses any money, goods, wares, or other property, with intent to cheat or defraud…" R.I. Gen. Laws § 11-41-4. That fact that SJHSRI knew that the Prospect Entities were guilty of false pretenses did not make the pretenses any less false. SJHSRI is not required to have been the victim. As stated in State v. Markarian,

> Hence, for 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. At oral argument, however, defendant's counsel asserted that implicit in the phrase "intent to defraud" is the concept of a victim, and that based upon this implication, we should require an identifiable victim as an essential element. However, we find that this interpretation would transmute the phrase "intent to defraud" into "intent to defraud a particular person or entity." This interpretation would

> deviate from the plain meaning of the statute, and we decline to subscribe to such an interpretation.

State v. Markarian, 551 A.2d at 1180.

Thus the Prospect Entities could be held liable even if there was no victim of their crime. However, there was a victim of the Prospect Entities' crime – the Plan participants. Through their false statements to state regulators, the Prospect Entities obtained the hospitals with the intent to cheat and defraud the Plan participants.

T. Plaintiffs State Law Claim for Aiding and Abetting Breach of Fiduciary Duty (Count XXII) Should Not be Dismissed as to the Prospect Entities

1. Rhode Island law

In 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.), the Rhode Island Superior Court held that:

> It is well settled that "[a]iding and abetting a breach of fiduciary duty requires proof that: (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."

Rhode Island Resource Recovery Corp., 2011 WL 1936011, at *8 (quoting Professional Servs. Grp., Inc. v. Town of Rockland, 515 F. Supp. 2d 179, 192 (D. Mass. 2007)) (citation omitted).

The elements of a claim for breach of fiduciary duty are "(1) the existence of a fiduciary duty; (2) breach of that duty; and (3) damage proximately caused by the breach." Rhode Island Resource Recovery Corp. v. Van Liew Trust Co., *supra*, 2011 WL 1936011 (R.I. Super. May 13, 2011); 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.). A fiduciary relationship "'arises whenever confidence is reposed on one side, and domination and influence result on the other' or 'when there is a reposing of faith, confidence and trust, and the placing of reliance by one upon the judgment and advice of the other.'" Rhode Island Resource Recovery Corp., *supra*, 2011 WL 1936011, at *7 (emphasis supplied) (citing Lyons v. Midwest Glazing, 265 F. Supp. 2d 1061, 1076 (N.D. Iowa 2003)).

The criteria for finding a confidential or fiduciary relationship are 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).

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

The Prospect Entities do not dispute that Defendant SJHSRI owed fiduciary duties to the Plan participants, nor could they, given the relationship between SJHSRI as Plan Administrator and employer and the Plan participants, and the Plan participants' complete reliance upon SJHSRI for all matters concerning the Plan, including their rights thereunder, all of which is alleged in great deal in the Complaint. Moreover, although Bank of America was the custodian of the Plan assets, SJHSRI retained

authority to direct the investment of those assets and the distribution of those assets to Plan participants, such that SJHSRI, in fact had the duties of a trustee.

The Prospect Entities do dispute that that they aided and abetted such breaches. See Prospect Memo. at 70 ("Plaintiffs fail to allege any 'active participation" by the Prospect Entities in furtherance of this purported breach.") (referring to SJHSRI's drafting the Plan documents to exculpate itself from any obligation to fund the Plan); Prospect Memo. at 71-72 ("There is no plausible allegation that the Prospect Entities were aware that SJHSRI was in breach of any fiduciary duties less than two (2) months after the 2014 Asset Sale or that the Prospect Entities actively participated in any breach.") (referring to the instruction to Angell not to discuss the Plan's (in)solvency with Plan participants); Prospect Memo. at 74 ("Plaintiffs do not allege, nor could they, that the Prospect Entities had any role in the evaluation of the Plan or its funding level after the 2014 Asset Sale. Whether or not the payment would assure that the pensions of many former employees were protected depended upon whether SJHSRI or CCCB would continue to fund the pension going forward, which was completely outside the control of the Prospect Entities.") (referring to the misinformation provided Christopher Callaci that the $14 million would "stabilize" the Plan).

For obvious reasons the Prospect Entities cherry-pick wrongdoing by SJHSRI that occurred before they came on the scene, or took place after the 2014 Asset Sale, with the exception of the events involving Christopher Callaci. With respect to the latter their disclaimers of active participation ring especially hollow. The complaint specifically alleges (and it is obvious) that SJHSRI (along with the Prospect Entities) "knew and understood that UNAP was acting on behalf of the Plan participants who belonged to

the union." As already discussed at length, the Prospect Entities' joinder in that misrepresentation prior to the 2014 Asset Sale aided and abetted SJHSRI's breach of fiduciary duty.

More importantly, the Prospect Entities overlook other core breaches of fiduciary duty by SJHSRI in which they actively participated. Plaintiffs allege that SJHSRI's breach of fiduciary duty included its failure to inform Plan participants that the Plan was grossly underfunded, and that SJHSRI was not making contributions. The Prospect Entities also did not inform Plan participants that the Plan was grossly underfunded, and that SJHSRI had not been making contributions, notwithstanding that the Prospect Entities were about to become the employer for many of the Plan participants. The Prospect Entities also made no public statements to that effect, which undoubtedly would have gotten back to the Plan participants. Indeed, they made active misrepresentations at public hearings and in written submissions to the Attorney General, such as that the $14 million would "assure that the pensions and retirement of many former employees, who reside in the community, are protected." All of that aided and abetted SJHSRI's breach of fiduciary duty.

The complaint also alleges that SJHSRI and the Prospect Entities worked together to misrepresent to the Plan participants that the hospitals would remain under local control. That aided and abetted SJHSRI's breach of fiduciary duty.

In short, Plaintiffs' allegations are sufficient to support the reasonable inference that the Prospect Entities aided and abetted SJHSRI's breach of fiduciary duty, such that their motion to dismiss this claim should be denied.

U. Plaintiffs' Count Seeking a Declaratory Judgment on Plaintiffs' State Law Claims (Count XXIII) Should Not Be Dismissed as to the Prospect Entities

The Prospect Entities argument for dismissing this Count is that they have no liability on Plaintiffs' state law claims:

> As outlined supra, Counts V-XX should be dismissed as to the Prospect Entities; therefore so too should Count XI.

Prospect Memo. at 108. In short, there need be no judicial determination because they are innocent. With that argument they give the defense version of the Red Queen's demand for "first the sentence, and then the evidence!"[124] Of course, declaratory relief is sought to determine culpability.

The Prospect Entities only other argument is that none of Plaintiffs have a claim for declaratory relief because their claims are not ripe and they lack standing. Prospect Memo. at 109. Thus, they close the circle, ending where they began,[125] claiming the Plan participants have no injury, notwithstanding that the Plan participants are looking down the barrel of a requested 40% cut in their benefits, or worse. That argument is as faulty in closing as it was in opening their memorandum.

V. If Any Portion of the First Amended Complaint Is Dismissed, It Should Be Without Prejudice and with Leave to Amend

Although the Prospect Entities do not join in, both Angell and the Diocesan Defendants asked the Court to dismiss Plaintiffs' Complaint with prejudice, and without

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[124] Lewis Carroll, Alice's Adventures in Wonderland (1886 ed.) at 88 ("'Now for the evidence,' said the King, 'and then the sentence." 'No!' said the Queen, 'first the sentence, and then the evidence!' 'Nonsense!' cried Alice, so loudly that everybody jumped, 'the idea of having the sentence first!'").

[125] The Prospect Entities' opening argument that Plaintiffs lack standing is addressed in Plaintiffs' Omn. Memo. at 79-123.

leave to amend. Plaintiffs disagree for the reasons stated in Plaintiffs' memoranda in opposition to their motions to dismiss. While Plaintiffs contend that no portion of the First Amended Complaint should be dismissed, if (*arguendo*) the Court is inclined to dismiss any portion, the Court should allow Plaintiffs leave to re-plead, and order that the dismissal shall be without prejudice provided Plaintiffs do so within a reasonable time.

V. CONCLUSION

The Prospect Entities motion to dismiss should be denied.

Respectfully submitted,
Plaintiffs,
By their Attorney,

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Dated: February 4, 2019

CERTIFICATE OF SERVICE

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

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Exhibit 1

State of Rhode Island General Assembly

News

Press Releases

5/11/2018

Sen. Da Ponte bill that protects pensions during hospital sales passed Senate

STATE HOUSE – Sen. Daniel Da Ponte's (D-Dist. 14, East Providence) legislation (2018-S 2467aa) that would require the general treasurer to conduct a review of any defined pension plans involved in the sale and acquis t on of any hospital that are not covered by The Employee Retirement Income Security Act of 1974 was passed by the Senate.

"As we have witnessed with the orphaning and collapse of the St. Joseph Health Services pension fund, the retirees who had selflessly worked their whole lives to help others were cruelly left out in the cold after the sale of the hospital. The law regarding hospital conversions did not protect them and that is simply not fair and not right. This bill will amend the law and give the general treasurer the author ty to review these pension funds and assess the health and stability of the plans before and after the proposed sale. This will protect workers and retirees so that hopefully another hospital pens on collapse like St. Joseph's never happens in the state again," said Senator Da Ponte.

The $85 million St. Joseph pens on plan covers about 2,700 current and former employees of Our Lady of Fatima and Roger Williams hospitals, but was left insolvent when contributions to it ceased following the sale of Fatima and Roger Williams to Prospect Medical Holdings in 2014.

Senator Da Ponte's legislat on states that pr or to any hosp tal sale in Rhode Island, the general treasurer will conduct a review of any defined pension plans associated w th the sale that are not covered by The Employee Retirement Income Security Act of 1974. The general treasurer will then report to the General Assembly, indicating any current or potential issues that may affect the health of the pension plans and what impact the pension plans may have on the sale of the hospital.

The bill now goes to the House of Representatives for consideration.

For more informat on, contact:
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