UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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

PLAINTIFFS' REPLY TO THE SUPPLEMENTAL MEMORANDUM SUBMITTED BY DEFENDANTS ROMAN CATHOLIC BISHOP OF PROVIDENCE, DIOCESAN ADMINISTRATION CORPORATION, AND DIOCESAN SERVICE CORPORATION ON THEIR MOTIONS TO DISMISS

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July 8, 2019

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Plaintiffs Stephen Del Sesto (as Receiver and Administrator of the St. Joseph Health Services of Rhode Island Retirement Plan) (the "Receiver"), and Gail J. Major, Nancy Zompa, Ralph Bryden, Dorothy Willner, Caroll Short, Donna Boutelle, and Eugenia Levesque, individually as named plaintiffs ("Named Plaintiffs") and on behalf of all class members[1] as defined herein (the Receiver and the Named Plaintiffs are referred to collectively as "Plaintiffs"), submit this memorandum in reply to the supplemental memorandum ("Reply Memorandum") (Dkt #126) filed by Defendants Roman Catholic Bishop of Providence, Diocesan Administration Corporation, and Diocesan Service Corporation (collectively the "Diocesan Defendants"), pursuant to the Court's allowance of "supplemental briefing in connection with the motions to dismiss, concerning the significance *vel non* of the Receiver's ERISA election and payment of premium to Pension Benefit Guaranty Corporation ["PBGC"] on or about April 15, 2019"[2] (hereinafter the "Receiver's Post-Complaint Regulatory Filings"[3]).

For the reasons stated more fully in reply to the joint supplemental brief filed by the Prospect Entities and The Angell Pension Group, Inc. (Dkt #127), it would be procedurally inappropriate for the Court to consider the Receiver's Post-Complaint Regulatory Filings in connection with the pending motions to dismiss. The Receiver's Post-Complaint Regulatory Filings post-date the filing of the First Amended Complaint, and subsequently developed facts are not properly the subject of a motion to dismiss under Fed. R. Civ. P. 12(b)(1) (on grounds of alleged lack of constitutional standing) or

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

[2] Dkt # 125 (Stipulation Establishing Schedule for Supplemental Briefing) ("Briefing Stipulation and Order") dated June 7, 2019 and entered as an order of the Court on June 10, 2019.

[3] Unless otherwise noted, referring to *both* the Form 5500 filing, the payment of a premium to PBGC, and the Receiver's § 410(d) filing, all of which occurred on April 15, 2019.

Fed. R. Civ. P. 12(b)(6) (for failure to state a claim). Because ERISA does not apply retroactively, the Receiver's Post-Complaint Regulatory Filings have no effect on Plaintiffs' claims, all of which accrued prior to the Receiver's Post-Complaint Regulatory Filings.

For their part, the Diocesan Defendants do not join in the arguments put forth by the Prospect Entities and The Angell Pension Group, Inc. (Dkt # 127). Instead, the Diocesan Defendants have filed their separate brief (Dkt # 126) limited to two arguments: (1) that the Receiver's Post-Complaint Regulatory Filings improperly and invalidly "hedged" by stating they were without prejudice to the Receiver's litigation positions; and (2) that the Receiver's Post-Complaint Regulatory Filings conclusively establish that the Retirement Plan was an ERISA-exempt church plan until April 2019. Both arguments are wrong.

I. ARGUMENT

A. The Receiver's Post-Complaint Regulatory Filings do not conclusively establish that the Retirement Plan was an ERISA-exempt church plan at the time the Receiver's Post-Complaint Regulatory Filings were made

1. The Election Statement properly preserves Plaintiffs' litigation positions

The Plaintiffs' position is and always has been that the Plan ceased to qualify as a church plan years ago, before the Receiver was appointed. However, that determination is a mixed question of law and fact.[4] That is especially the case given

[4] One key issue here is whether St. Joseph Health Services of Rhode Island ("SJHSRI") was associated with a church. 29 U.S.C.A. § 1002(33)(C)(iv). Although the First Circuit has not addressed the issue, two Courts of Appeals have applied a three part test to make that determination, which is heavily factual. See Chronister v. Baptist Health, 442 F.3d 648, 653 (8th Cir. 2006) ("'[T]hree factors bear primary

that the Plan was purported to be a church plan ostensibly exempt from ERISA, right up until the time the Plan was put into Receivership on August 17, 2017. As previously noted,[5] the Receiver as litigant in this proceeding must await the determination of the finder of fact and the Court as decider of the law on the issue of when and whether the Plan became subject to ERISA, and, therefore, is entitled to plead in the alternative. Accordingly, Plaintiffs have asserted their claims in the alternative, both on the assumption that the Plan ceased to qualify as a church plan and became subject to ERISA years ago, and on the assumption that the Plan continues to qualify as a church plan exempt from ERISA. The Receiver's Post-Complaint Regulatory Filings embody that duality, in that it makes the ERISA § 410(d) election "without prejudice to the position taken [in this litigation] that the Plan ceased to qualify as a church plan (and became subject to ERISA) on or prior to the Effective Date, possibly as of 2009 or earlier." Dkt # 127-1 at § 3.

Not inconsistently, the Receiver has chosen to administer the Plan as an ERISA plan, which requires, *inter alia*, the filing of the 2017 Form 5500 and payment of a premium to PBGC. However, mere payment of a premium to PBGC does not ensure coverage. To the contrary, to obtain coverage the Plain will have to be shown to be

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consideration: (1) whether the religious institution plays an official role in the governance of the organization, (2) whether the organization receives assistance from the religious institution, and (3) whether a denominational requirement exists for any employee or patient/customer of the organization.' ") (quoting Lown v. Cont'l Cas. Co., 238 F.3d 543, 548 (4th Cir. 2001)).

[5] See Dkt # 100 (Plaintiffs' Omnibus Memorandum in in Support of Their Objection to Defendants' Motions to Dismiss) at 160-61.

governed by ERISA.[6] The Receiver filed the § 410(d) Election to increase the likelihood that the Plan will be determined to be subject to ERISA going forward, and that the premium was not paid in vain. In other words, the Receiver did not want to pay a premium for coverage that might not exist.

The Diocesan Defendants, however, continue to refuse to accept that Plaintiffs are entitled to plead in the alternative. Any "blame" for the uncertainties surrounding mixed questions of fact and law in Plaintiffs' pleadings rests with the Defendants, who mistreated the Plan for years and left it to the Receiver to piece together, based on fragmentary document production, what happened and when. The Diocesan Defendants suggest Plaintiffs have had "almost two years" since his appointment to conduct discovery. Dkt # 126 (Diocesan Defendants' Supp. Memo.) at 2. In fact, while the Receiver did previously obtain some documents from Defendants pursuant to receivership subpoenas prior to filing this suit in June 2018, Plaintiffs have not yet had the benefit of any pre-trial discovery in this case: not one interrogatory and not one deposition. Moreover, even the documents provided in the Superior Court were subject to claims of privilege and confidentiality.

As the Diocesan Defendants eventually acknowledge,[7] the Receiver's Post-Complaint Regulatory Filings expressly state:

> This 410(d) Election is made without prejudice to the position taken by the Plan Administrator in the litigation styled *Stephen Del Sesto, As Receiver and Administrator of the St. Joseph Health Services of Rhode Island Retirement Plan, et al., v. Prospect Chartercare, LLC, et al.*, Civil Action

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[6] Payment of a premium to PBGC does not ensure coverage: PBGC coverage is predicated on the Plan being subject to ERISA. 29 U.S.C. § 1321(a).

[7] Dkt # 126 (Diocesan Defendants' Supp. Memo.) at 5.

> No. 1:18-cv-00328-WES-LDA, pending in the U.S. District Court for the District of Rhode Island, that the Plan ceased to qualify as a Church Plan (and became subject to ERISA) on or prior to the Effective Date, possibly as of 2009 or earlier.

Dkt # 126-1 (Form 5500 Attachment, Election Statement) ¶ 3.

The Diocesan Defendants call this a "hedge," contend that the Election has "fatal implications," and insist that "[s]uch a self-serving statement cannot insulate Plaintiffs' claims" from those imagined consequences. Dkt # 126 (Diocesan Defendants' Supp. Memo.) at 6. None of this is supported by any legal authority, be it statute, rule, or judicial decision. The Diocesan Defendants' pronouncement that the Receiver "cannot avoid the costs" of the Election, id., is simply a question-begging *ipse dixit*.

2. Even if (*arguendo*) the Receiver's litigation positions had not been expressly preserved (which they were), the Receiver's Post-Complaint Regulatory Filings would not estop him from taking those positions

The Diocesan Defendants contend that the Receiver's Post-Complaint Regulatory Filings, standing alone, conclusively establish that the Plan was a church plan at the time of the Receiver's Post-Complaint Regulatory Filings. The only two legal authorities the Diocesan Defendants cite in purported support for that contention are the ERISA statute itself, 26 U.S.C. § 410(d) (permitting otherwise exempt church plans to elect to become ERISA plans), and one sentence of Story v. Aetna Life Ins. Co., No. 4:13-CV-149-A, 2013 WL 4050160 (N.D. Tex. Aug. 8, 2013), which these Defendants have, not surprisingly, taken out of context.

Story v. Aetna Life Ins. Co., No. 4:13-CV-149-A, 2013 WL 4050160 (N.D. Tex. Aug. 8, 2013) arose out of a secular sponsor's employee disability benefit plan, and on summary judgment, the court examined all the evidence and determined the plan was

indeed not a church plan, rendering the absence of any election utterly irrelevant to the plan's ERISA status. See id., 2013 WL 4050160, at *3 ("Not only has plaintiff failed to adduce summary judgment evidence that Texas Health Resources is a church or a convention or association of churches, the record affirmatively establishes that it is neither."). In granting the defendant partial summary judgment on the plaintiff's state law claims as preempted by ERISA, the court out-of-hand dismissed the plaintiff's argument that it was significant that the secular sponsor had failed to make an election to have the plan be treated as an ERISA plan:

> At several places in her responsive documents, plaintiff makes the point that there is no evidence that Texas Health Resources made an election of the kind contemplated by 26 U.S.C. § 410(d)(1), which reads as follows:
>
> > If the church or convention or association of churches which maintains any church plan makes an election under this subsection (in such form and manner as the Secretary may by regulations prescribe), then the provisions of this title relating to participation, vesting, funding, etc. (as in effect from time to time) shall apply to such church plan as if such provisions did not contain an exclusion for church plans.
>
> Plaintiff's reliance on 26 U.S.C. § 410(d)(1) assumes in favor of plaintiff the main issue that the court must decide—was the disability plan under which plaintiff is making a claim a "church plan"? Only if it was a "church plan" was there any occasion for an election under § 410(d)(1). Inasmuch as the court has concluded that plaintiff has failed to provide evidence that it was a church plan, § 410(d)(1) simply has no role in this litigation.

Story v. Aetna Life Ins. Co., 2013 WL 4050160, at *4–5. . In contrast, the instant motions are motions to dismiss a Complaint that properly contains allegations (in the alternative) concerning church plan status.

Although the Diocesan Defendants do not say so in so many words, their argument is essentially one based on estoppel, i.e. that the Receiver's Post-Complaint

Regulatory Filings conclusively establish certain facts and that the Receiver is therefore precluded from taking contrary positions in this litigation. See Dkt # 126 (Diocesan Defendants' Memo. at 4).

The Diocesan Defendants do not explicate the legal basis for their estoppel argument, because there is none. Tax return filings are not a basis for judicial estoppel. See Espinoza v. Galardi S. Enterprises, Inc., No. 14-21244-CIV-GOODMAN, 2018 WL 1729757, at *5 (S.D. Fla. Apr. 10, 2018) ("Finally, a person's subjective opinion of his or her employee status does not modify his or her FLSA status. If Plaintiffs are in fact determined to be employees under the economic reality test, then their previous subjective belief (as indicated on their tax filings, for example) is of little consequence.") (on summary judgment, rejecting argument that employees were estopped from claiming employee status by virtue of any tax returns asserting independent-contractor status). This is especially so where the IRS has never ruled on the effect of such filings:

> . . . [T]he problem with defendants' argument is that there was no resolution from the IRS on whether the Trust was valid. Plaintiffs filed annual tax returns for the Trust, but plaintiffs' experts testified that the Trust was defective, would have to be amended, and will incur adverse tax consequences as a result. There was no conclusive evidence that plaintiffs gained an advantage by filing annual returns based on the supposition that the Trust was valid.

Bailey v. Duling, 827 N.W.2d 351, 362–63 (S.D. 2013) (trustee's claims against fiduciary relating to alleged trust defects not estopped by filing trust tax returns). Here too, as in Bailey, no federal agency has ruled on the effect of the Receiver's Post-Complaint Regulatory Filings.

ERISA, 26 U.S.C. § 410(d), does not accord any significance to elections filed by *non*-exempt ERISA plans. If the Plan was already subject to ERISA at the time of the

Receiver's Post-Complaint Regulatory Filings, then the election to be treated as an ERISA plan is a mere redundancy.

B. The Diocesan Defendants misconstrue Plaintiffs' fraud and conspiracy claims, which are not foreclosed if (*arguendo*) the Diocesan Defendants succeeded in their objective of convincing third parties to treat the Plan as an exempt church plan

Finally, the Diocesan Defendants offer a gutted and self-serving portrayal of Plaintiffs' fraud and conspiracy claims, which are set forth in their entirety in the First Amended Complaint and addressed in considerable detail in Plaintiffs' prior briefing in opposition to the motions to dismiss. The Diocesan Defendants contend that "Plaintiffs must plausibly allege that the Diocesan Defendants (and their alleged co-conspirators) knew the Plan was covered by ERISA"[8] and that if the Receiver (without further discovery) cannot "say definitively and clearly when the Plan ceased to qualify as a church plan,"[9] it must follow that the Diocesan Defendants committed no fraud and joined no conspiracy. Here too, the Diocesan Defendants produce no actual legal support, except repeated talismanic incantations of the adjective "implausible" from Ashcroft v. Iqbal, 556 U.S. 662 (2009) and cases discussing the general pleading standard for scienter.

Plaintiffs' conspiracy claims encompass all of Plaintiffs' state-law claims against the Diocesan Defendants and the other Defendants. Although those conspiracy claims include allegations that the Diocesan Defendants "conspired to misrepresent that the Plan remained qualified as a Church Plan, in violation of federal tax laws and ERISA..."

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[8] Dkt #126 (Diocesan Defendants' Supp. Memo.) at 4.

[9] Dkt # 126 (Diocesan Defendants' Supp. Memo. at 6).

(First Amended Complaint ¶ 65), they are not limited to that allegation. Likewise, Plaintiffs' fraud claims encompass misrepresentations of various facts to various persons—class members, state regulators, federal agencies, and the like—sometimes subsidiary to but other times completely independent of the issue of the Plan's ERISA status. Such claims include the Diocesan Defendants' role in assisting St. Joseph Health Services of Rhode Island to commit tax fraud (in connection with its fraudulent listing in the Official Catholic Directory) and the Diocesan Defendants' role in consummating the 2014 Asset Sale through misrepresentations to state regulators and the Vatican whose approvals were required. See, e.g., Complaint ¶¶ 129, 180, 338.

Moreover, the logical premise of the Diocesan Defendants' argument is no more sound than its factual predicate, even on the Diocesan Defendants' improperly truncated description of Plaintiffs' conspiracy and fraud claims. Even if (*arguendo*) various federal agencies may have continued to regard the Plan as an exempt church plan in 2018 (which is not established on the pleadings), that fact would not negate the Diocesan Defendants' conspiracy or fraud: to the contrary, it would demonstrate that the conspiracy and fraud succeeded.

II. CONCLUSION

Defendants' motions to dismiss should be denied.

Respectfully submitted,

Plaintiffs,
By their Attorney,

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Dated: July 8, 2019

CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the within document was electronically filed on the 8th day of July, 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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