

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. :

PROSPECT CHARTERCARE, LLC, ET AL. :

Defendants. :

C.A. No:1:18-CV-00328-WES-LDA

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO THE PROSPECT
ENTITIES' CROSS MOTION FOR SUMMARY JUDGMENT ON COUNT IV OF THE
FIRST AMENDED COMPLAINT**

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TABLE OF CONTENTS

I. SUMMARY OF ARGUMENT 1

II. RELATIONSHIP OF PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT TO PROSPECT’S CROSS MOTION FOR SUMMARY JUDGMENT 4

III. FACTS 6

A. Facts establishing that at least by April 23, 2013 the Plan was not maintained by an organization the principal purpose of which was to administer or fund the Plan 6

B. Facts concerning whether CCHP was controlled by the Catholic Church..... 8

C. Facts concerning CCHP’S Finance, Audit & Compliance Committee’s lack of association with the Catholic Church..... 16

D. Facts concerning the Catholic Church’s lack of control over CCHP’S Investment Committee 18

E. Facts concerning CCHP’s Investment Committee’s lack of association with the Catholic Church 18

F. Facts concerning the Catholic Church’s lack of control over SJHSRI..... 21

G. Facts concerning SJHSRI’s lack of association with the Catholic Church..... 22

H. Facts concerning SJHSRI’S lack of tax-exempt status 25

IV. ARGUMENT 26

A. Applicable Legal Standard 26

B. The Plan was subject to ERISA unless it qualified for an express statutory exemption..... 26

1. Under the plain statutory language, the Plan was covered by ERISA unless it qualified for certain statutory exemptions 26

2. The exemption from ERISA for church plans is subject to the rule of narrow construction for statutory exceptions from ERISA 27

C. Church plan status depends on compliance with four requirements..... 27

D. CCHP’s Finance Audit & Compliance Committee and CCHP’s Investment Committee were not “Principal Purpose Organizations,” because they did not have Plan administration or funding as their principal purpose or function 28

E. The meaning of “controlled by or in connection with” a church..... 29

1. The phrase “controlled by” 29

2. The phrase “associated with” 32

F. CCHP was not controlled by the Bishop 35

G. CCHP’s Finance Audit & Compliance Committee was not a “Principal Purpose Organization,” because it was not controlled by or associated with a church 43

- 1. CCHP’s Finance Audit & Compliance Committee was not controlled by a church 43
- 2. CCHP’s Finance Audit & Compliance Committee was not associated with a church..... 43
- H. CCHP’s Investment Committee was not a “Principal Purpose Organization,” because it was not controlled by or associated with a church 44
 - 1. The Investment Committee was not controlled by a church 44
 - 2. The Investment Committee was not associated with a church 45
- I. SJHSRI was not controlled by or associated with a church 45
 - 1. SJHSRI was not controlled by a church 45
 - 2. SJHSRI was not associated with a church 47
- J. SJHSRI was not tax-exempt 49
- K. ERISA’s “cure” provisions are irrelevant 56
- V. CONCLUSION..... 58

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, Carol Short, Donna Boutelle, and Eugenia Levesque, individually as named plaintiffs (“Named Plaintiffs”) and on behalf of all class members¹ (the Receiver and the Named Plaintiffs being referred to collectively as “Plaintiffs”), submit this memorandum in support of their opposition to the Cross Motion for Summary Judgment on Count IV of the Complaint filed by Defendants Prospect Medical Holdings, Inc., Prospect East Holdings, Inc., Prospect Chartercare, LLC, Prospect Chartercare SJHSRI, LLC, and Prospect Chartercare RWMC, LLC (collectively “Prospect”).

Plaintiffs’ Supplemental Response to Prospect’s Statement of Undisputed Facts (“Plaintiffs’ Supp. Response to Prospect’s SUF”) is served and filed herewith.

Plaintiffs’ Motion for Summary Judgment on Count IV of the Complaint has been fully briefed. Plaintiffs have requested oral argument.

I. SUMMARY OF ARGUMENT

Prospect asks the Court to enter summary judgment finding that “the Plan lost its church plan status on, and as of, December 15, 2014, but in any event no later than April 15, 2019.”² Prospect bases its claim that the Plan remained a church plan until December 15, 2014 on the contention that the Finance, Audit & Compliance Committee

¹ Contingent upon the Court certifying the Class and appointing them Class Representatives. The individual plaintiffs have previously been certified as class representatives but only for purposes of two settlements.

² Memorandum of Law in Support of Opposition to Plaintiffs’ Motion for Summary Judgment on Count IV of the First Amended Complaint and Cross Motion for Summary Judgment by the Prospect Defendants (ECF # 193-1) (“Prospect Memo.”) at 71.

and the Investment Committee of CharterCARE Health Partners (“CCHP”³) qualified as principal purpose organizations under 29 U.S.C. § 1002(33)(C)(i), until December 15, 2014.⁴ However, neither of these committees qualified as principal purpose organizations, because administration or funding of the Plan was not their principal purpose or function, for the reasons stated in Plaintiffs’ motion for summary judgment. While Plaintiffs submit that is clear based upon the undisputed facts, at the very least that issue involves disputed questions of fact concerning whether this particular requirement for church plan status set forth in 29 U.S.C. § 1002(33)(C)(i) was satisfied, that preclude Prospect’s motion for summary judgment. If the Court agrees, there is no need for the Court to consider any other issues.

In addition, Prospect is not entitled to summary judgment because there are at least disputed issues of material fact concerning whether the Plan met any (much less all) of the additional requirements for church plan status set forth in 29 U.S.C. § 1002(33)(C)(i) after April 23, 2013, i.e., the requirements that *both* the principal purpose

³ From its inception in 2009 until June 20, 2014, Plaintiff CharterCARE Community Board (“CCCB”) was named CharterCARE Health Partners (“CCHP”). However, upon it commencing to operate the hospitals, Prospect wanted to do business under the name of CCHP. Accordingly, as required in the Asset Purchase Agreement, CCHP changed its name to CCCB on June 20, 2014, and, minutes later, Prospect Chartercare, LLC filed a fictitious name certificate with the Rhode Island Secretary of State authorizing it to do business under the name of CharterCARE Health Partners. To avoid confusion, Plaintiffs always refer to Prospect Chartercare, LLC as “Prospect Chartercare”, rather than by its fictitious name CharterCARE Health Partners or CCHP. In other words, the entity referred to herein as CCHP is CCCB under its prior name.

⁴ Prospect Memo. (ECF # 193-1) at 50-51 (“At various points in time, two different organizations were able to each qualify as a PPO [Principal Purpose Organization]: the CCHP Finance Committee qualified as a PPO, when designated, by making the handling of Plan administrative matters either its principal purpose, or one of its functions; and the CCHP Investment Committee qualified as a PPO by making the funding of the Plan, and the maintenance of the Plan’s funded status, its principal purpose or at least one of its functions. The ability of the two CCHP committees to sustain this period of compliance lasted for more than three years. Once the 2014 Assets Sale was consummated, however, those left in charge of the SJHSRI and CCHP boards of trustees apparently rejected the principal-purpose organization blueprint provided to them by former SJHSRI and CCHP executives and outside counsel, and ultimately caused the Plan to relinquish its church plan status on December 15, 2014.”) (footnotes omitted).

organization *and* the Plan sponsor (here St. Joseph Health Services of Rhode Island (“SJHSRI”)) were controlled by or associated with a church, and that the Plan sponsor qualified as a tax exempt organization under 26 U.S.C. § 501(c)(3).

Indeed, the Court should find as a matter of law that neither CCHP’s Finance, Audit & Compliance Committee nor CCHP’s Investment Committee was controlled by or associated with the church. Prospect does not even contend that either of these committees was *associated with* the church. Accordingly, that argument is foreclosed. Prospect does contend they were *controlled by* the church. However, Prospect predicates that argument entirely on the contention that CCHP itself was controlled by the Bishop.⁵ That argument fails because, based on the undisputed facts and as a matter of law, it is clear CCHP was not controlled by the Bishop. Instead, CCHP was a secular entity pursuant to its articles of incorporation and Bylaws; the Bishop never had the power to appoint a majority⁶ of CCHP’s Trustees; and the Bishop had no authority to appoint any of CCHP’s officers. At the very least, the question of whether CCHP was controlled by a church involves disputed issues of fact.

Finally, Prospect’s cross-motion for summary judgment is also precluded because the questions whether the Plan sponsor (SJHSRI) was tax exempt and either controlled by or associated with the Catholic Church, as required for church plan status

⁵ See Prospect Memo. (ECF # 193-1) at 63-64 (arguing that the “controlled by or associated with” test is satisfied because the Bishop allegedly controlled CCHP, and the “Bishop’s control over CCHP [allegedly] extended to control over the CCHOP Board and its constituent committees...”).

⁶ As discussed herein, Prospect contends that the Bishop had the power to appoint a majority of CCHP’s Board of Trustees. However, that contention is based entirely upon a blatant misreading of CCHP’s Bylaws, which clearly and unambiguously provided that the Bishop never had the power to appoint a majority of the members of the Board of Trustees.

under 29 U.S.C. § 1002(c)(33)(C)(i), at the very least involve disputed issues of fact.

Specifically, there are disputed issues of fact suggesting that

- SJHSRI was not tax exempt because it neither obtained its own tax exemption nor qualified for tax exempt status under the group exemption for the United States Conference of Catholic Bishops (“USCCB”), because neither the Diocese of Providence nor SJHSRI were subject to USCCB’s “general supervision or control” as required for SJHSRI to qualify under that group exemption;
- SJHSRI was not controlled by the church as required under 29 U.S.C. § 1002(33)(C)(i); and
- SJHSRI ceased to be associated with the church after January 4, 2010, which was the effective date of the merger between Roger Williams Hospital (“RWH”) and SJHSRI under the control of CCHP as parent and holding company.^[7]

II. RELATIONSHIP OF PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT TO PROSPECT’S CROSS MOTION FOR SUMMARY JUDGMENT

As noted, Prospect in its cross motion for summary judgment asks the Court to enter summary judgment finding that “the Plan lost its church plan status on, and as of, December 15, 2014, but in any event no later than April 15, 2019.”⁸ These dates are significant because they are after the closing of the 2014 Asset Sale on June 20, 2014, when the Prospect Entities began operating Fatima Hospital (as well as Roger Williams Hospital).

On the other hand, Plaintiffs’ motion for summary judgment seeks a judgment “declaring that by April 29, 2013 at the latest, the Plan was not a Church Plan within the

⁷ It has been Plaintiffs’ position since the outset of this case that all four of the requirements for church plan status were lacking after the effective date of the merger between SJHSRI and RWH. Indeed, the complaint makes detailed factual allegations in support of that position. See Plaintiffs’ First Amended Complaint (ECF # 60) ¶¶ 58–210.

⁸ ECF # 193-1 (Prospect Memo.) at 71.

meaning of 29 U.S.C. § 1002(33) and, therefore, was subject to ERISA.” That date is significant because it is prior to Prospect’s acquisition of and commencement of operations at Fatima Hospital.⁹

The merits of Plaintiffs’ motion for summary judgment and Prospect’s cross motion for summary judgment are interdependent in two ways. First, if Plaintiffs’ motion is granted, Prospect’s cross motion is foreclosed. By its very terms, summary judgment “declaring that by April 29, 2013 at the latest, the Plan was not a Church Plan within the meaning of 29 U.S.C. § 1002(33) and, therefore, was subject to ERISA” precludes the declaration the Prospect Entities are seeking that the Plan instead lost church plan status on or after December 15, 2014.

Second, Prospect’s motion would be foreclosed even if the Court were to deny Plaintiffs’ motion for summary judgment, if the grounds for that denial were that there are disputed issues of material fact concerning whether the Plan lost church plan status by April 23, 2013 at the latest. If that issue cannot be resolved by summary judgment,

⁹ Although successor liability is not before the Court in connection with either of the pending motions for summary judgment, the Prospect Entities hope that the finding they seek through their cross motion for summary judgment that the Plan retained church plan status until after Prospect began to operate Fatima Hospital will limit if not eliminate the risk that, in subsequent proceedings, it may be determined that the Prospect Entities have successor liability for the Plan under ERISA. Conversely, if Plaintiffs’ motion for summary judgment is granted, and the Court concludes that church plan status was lost by April 23, 2013 at the latest, Plaintiffs contend that Prospect is liable for the failure to fund the Plan from that day forward, under the doctrine of successor liability that is applicable to ERISA plans. See Einhorn v. M.L. Ruberton Const. Co., 632 F.3d 89, 99 (3d Cir. 2001) (“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.”); Pension Benefit Guaranty Corporation v. Findlay Industries, Inc., 902 F.3d 597, 611-12 (6th Cir. 2018) (applying federal common law of successor liability for a single employer defined benefit plan). The fact that the Asset Purchase Agreement expressly provided Prospect would not have liability for the Plan does not shield it from the legal doctrine of successor liability if the other requirements for successor liability are satisfied. See, e.g., Sugartown Worldwide LLC v. Shanks, 150 F. Supp. 3d 470, 478 (E.D. Pa. 2015) (“As a matter of equity, we do not allow entities to succeed in this transparent attempt to avoid obligations.”) (summary judgment of successor liability on guaranty where asset purchaser expressly assumed certain liabilities but expressly did not assume seller’s liabilities for a guaranty to a third party).

neither can Prospect's claim that the Plan did not lose church plan status until or after December 15, 2014.

However, Prospect's cross motion for summary judgment must overcome additional hurdles that are not involved in Plaintiffs' motion for summary judgment. Plaintiffs' motion for summary judgment addresses only one of the requirements for church plan status—that the Plan must be maintained by an organization “the principal purpose or function of which is the administration or funding of” the Plan. There are three additional requirements that also must be satisfied for a pension plan to have church plan status.¹⁰ Although failure to meet any one of the requirements for church plan status means the Plan has *lost* church plan status, proving that the Plan *retained* church plan status for purposes of summary judgment requires a showing as a matter of law that each and every one of the requirements therefor was satisfied.

III. FACTS

A. **Facts establishing that at least by April 23, 2013 the Plan was not maintained by an organization the principal purpose of which was to administer or fund the Plan**

In Prospect's cross motion for summary judgment, Prospect identifies two (and only¹¹ two) organizations that Prospect contends had administration or funding of the

¹⁰ Under 29 U.S.C. § 1002(33)(C)(i), Prospect must also demonstrate that the principal purpose organization was controlled by or associated with a church, that the Plan sponsor (SJHSRI) was controlled by or associated with a church, and that SJHSRI was tax exempt under 26 U.S.C. § 501.

¹¹ Plaintiffs recognize that Prospect at various points contends that more than two organizations had at least some responsibility concerning the Plan. See Memorandum of Law in Support of Opposition to Plaintiffs' Motion for Summary Judgment on Count IV of the First Amended Complaint and Cross Motion for Summary Judgment by the Prospect Defendants (“Prospect's Memo.”) (ECF # 193-1) at 48-49 (“[T]he administration of the Plan, and the discharge of various matters pertaining to its funding and funded status, were handled by the SJHSRI Board and by two (and perhaps, three) committees of CCHP trustees that were providing important support to SJHSRI, and to the Plan, during that same period.”) (referring to the time period from July 1, 2011 until June 20, 2014). However, as discussed below,

Plan as their principal purpose: (1) the Finance, Audit & Compliance Committee¹² of the Board of Trustees of CharterCARE Health Partner (“CCHP”); and (2) the Investment Committee of the Board of Trustees of CCHP.¹³

The papers filed in support of Plaintiffs’ motion for summary judgment set forth the facts establishing that from the outset of their existence on January 4, 2010, neither the CCHP Finance, Audit & Compliance Committee nor the CCHP Investment Committee maintained the Plan, and neither had administration or funding of the plan as its principal purpose or function. Plaintiffs made that showing in support of their motion for summary judgment, “declaring that by April 29, 2013 at the latest, the Plan was not a Church Plan within the meaning of 29 U.S.C. § 1002(33)(C)(i) and, therefore, was subject to ERISA.” Plaintiffs incorporate those submissions by reference, rather than burdening the record with a complete reiteration.

The Court need go no further if the Court concludes, either as a matter of law or as a matter of disputed fact, that neither the CCHP Finance, Audit & Compliance Committee nor the CCHP Investment Committee maintained the Plan, or that neither had administration or funding of the plan as its principal purpose or function. In that

Prospect contends that only two of those organizations had administration or funding of the Plan as their principal purpose or function.

¹² Although Prospect refers to this committee as the “Finance Committee,” it is undisputed that the full name of this committee was the “Finance, Audit & Compliance Committee,” and that the committee’s actual responsibilities included audit and compliance, as well as finance. See CCHP’s Bylaws (ECF # 174-24) at 7-8. Prospect’s label is not a mere technical misnomer. Prospect’s omission of the audit and compliance functions of this committee obscures the committee’s broad responsibility which is in contradiction to Prospect’s claim that the principal purpose or function of this committee was merely administration or funding of the Plan.

¹³ See Prospect’s Memo. (ECF # 193-1) at 50 (“At various points in time, two different organizations were able to each qualify as a PPO: the CCHP Finance Committee qualified as a PPO, when designated, by making the handling of Plan administrative matters either its principal purpose, or one of its functions; and the CCHP Investment Committee qualified as a PPO by making the funding of the Plan, and the maintenance of the Plan’s funded status, its principal purpose or at least one of its functions.”).

event, Prospect's cross motion should be denied regardless of whether Prospect can demonstrate that the Plan satisfied any of the other requirements of U.S.C. § 1002(33)(C)(i). Plaintiffs advocate for that result. Nevertheless, the facts relevant to the remaining issues are presented assuming, *arguendo*, that the CCHP Finance, Audit & Compliance Committee and the CCHP Investment Committee maintained the Plan, and had administration or funding of the plan as their principal purpose or function.

B. Facts concerning whether CCHP was controlled by the Catholic Church

In addition to contending that the Plan was maintained by CCHP's Finance, Audit & Compliance Committee and/or Investment Committee, and that administration of funding of the Plan was the principal purpose of those committees, Prospect also contends that CCHP's Finance, Audit & Compliance Committee and/or Investment Committee were controlled by the Catholic Church. However, the only support Prospect offers for that additional claim is the allegation that CCHP itself allegedly was controlled by the Catholic Church (through the Bishop) from the inception of operation of these committees.¹⁴ Prospect's cross motion cannot succeed if the facts are disputed or the undisputed facts lead to the opposite conclusion, that CCHP was not controlled by the Catholic Church.

The initial Memorandum of Understanding between RWH and SJHSRI dated May 12, 2008 states as follows:

- 1. Vision.** The Parties have identified a common vision of a seamless, integrated delivery system (the "System") that would be

¹⁴ See Prospect Memo. (ECF # 193-1) at 63–64 (arguing that the "controlled by or associated with" test is satisfied because the Bishop allegedly controlled CCHP, and the "Bishop's control over CCHP [allegedly] extended to control over the CCHP Board and its constituent committees...").

overseen by a unified governing board and management team dedicated to providing quality health care in a cost effective manner, which System would provide acute medical/surgical, behavioral health, rehabilitation, and post acute care (including home health care, nursing home and skilled nursing), as well as residency training programs in affiliation with an academic medical center, appropriate sited across both campuses.

2. Structure. The Parties have agreed, and the Definitive Agreement will provide, that the structure that best meets their objectives while preserving the individual identities of their facilities (i.e., a Catholic and a secular entity, respectively) is a so-called parent (holding company) model under which: (1) a non-profit, tax-exempt corporation (which will be a secular entity) ("**Newco**") will be formed and will become the sole corporate member of RWMC and the "Class A" corporate member of SJHSRI; and (2) The Catholic Bishop of Rhode Island or an entity he controls (the "**Bishop**"), shall become the "Class B" member of SJHSRI.

3. Newco Governance. The initial Board of Trustees of Newco shall consist of fifteen (15) members, eight (8) of whom shall be appointed by the Bishop and seven (7) of whom shall be appointed by the Board of Trustees of RWMC (the "Initial Board"). The initial appointees to the Board of Trustees shall each serve a three (3) year term. At the expiration of the three (3) year term of the Initial Board, their successors shall be elected to staggered terms such that five (5) of the individuals shall serve two (2) terms, five (5) shall serve three (3) year terms and five (5) shall serve four year terms. The Parties further agree that the successors to the initial members of the Board shall be appointed without regard to any historical allegiance to SJHSRI, the Bishop or RWMC. The Definitive Agreement and Bylaws of Newco shall establish a nominating committee for the election of successors to the Initial Board. The Nominating Committee, in its selection of Board Candidates, shall assure itself that such candidates understand that Newco, while secular, is the owner and operator of a Catholic hospital and that such candidates are able to support Newco's mission/philosophy and values related to such ownership and operation and to comport themselves accordingly as Board members.

ECF # 174-11 (Memo. of Under.) at 2.

The definitive agreement between and among SJHSRI, RWH and the Bishop was called the "HEALTHCARE SYSTEM AFFILIATION AND DEVELOPMENT

AGREEMENT” (the “Affiliation Agreement”) and was entered into on February 2, 2009.¹⁵ The Affiliation Agreement includes the following recitals:

Through these discussions the Parties have determined that by joining the RWMC Group and the SJHSRI Group together to create a new healthcare system (which will be known as “CharterCARE Health Partners”), they can enhance their respective charitable purposes and missions and better serve the health care needs of the communities they serve in a manner in that will preserve the Catholicity of SJHSRI and enhance RWH’s historic mission of medical research and education.

The parties anticipate that the reorganization of the RWMC Group and the SJHSRI Group into a new System to be known as CharterCARE Health Partners (sometimes referred to herein as “CharterCARE” or the “System”) will be effective upon the closing (the “Effective Date”) by the Parties, in accordance with the provisions of this Agreement, (a) causing CharterCARE to become (i) the sole member of RWH, (ii) the sole member, or sole shareholder of each RW Affiliate, (iii) the sole member of SJH Energy, LLC, (iv) the sole member of Our Lady of Fatima Ancillary Services, Inc., and (iv) the Class A Member of SJHSRI; and (B) at the same time, causing the Bishop to become the Class B member of SJHSRI, with certain reserved powers relating to the continued Catholicity of SJHSRI.^{16]}

The Affiliation Agreement provided as follows concerning the formation of CCHP:

ARTICLE 2
FORMATION OF SYSTEM

2.1 Formation of CharterCARE. Provided that the conditions precedent to the Closing have been satisfied or waived as of the "Closing" (as defined in Section 4.1), the Parties hereby agree to establish the System, effective as of the Effective Date (as defined in Section 4.1), in accordance with the provisions of this Agreement. Prior to the "Closing" (as defined in Section 4.1), the Parties will cause CharterCARE to be formed as a Rhode Island nonprofit corporation with articles of incorporation ("Articles") in the form of Exhibit 2.1.A of this Agreement and corporate bylaws in the form of Exhibit 2.1.B ("Bylaws"). The Articles or Bylaws, of CharterCARE shall include,

¹⁵ ECF # 174-14 (Aff. Agmt.).

¹⁶ ECF # 174-14 (Aff. Agmt.) at 2-3.

among other terms, the applicable provisions of Section 2.1.1-2.1.8 of this Agreement. Upon the formation of CharterCARE, and continuing until the Effective Date, CharterCARE's Board of Trustees (the "Pre-Closing Board"), corporate officers ("Officers"), and Chief Executive Officer ("CEO") and Chief Operating Officer ("COO") shall be the individuals listed in Exhibit 2.1.C.^[17]

On the same date as the Affiliation Agreement was entered into, CCHP was formed by the filing of the Articles of Incorporation in the form attached to the Affiliation Agreement as Exhibit 2.1.A.¹⁸

CCHP's Bylaws were adopted effective January 4, 2010.¹⁹ The Affiliation Agreement and the Bylaws affirmatively declared that CCHP was a secular organization. ECF # 174-14 (Aff. Agmt) §§ 2.1.3, 3.2. See ECF # 174-24 (CCHP Bylaws) § 5.1(k) ("Secular Member' means CharterCARE and each affiliate of the CharterCARE System that is not Under Catholic Sponsorship."). CCHP was not required to adhere to the Ethical and Religious Directives ("ERDs") of the United States Conference of Catholic Bishops.²⁰ There was no denominational requirement for members of the CCHP Board.²¹

¹⁷ ECF # 174-14 (Aff. Agmt.) § 2.1.

¹⁸ ECF # 174-14 (Aff. Agmt.), Ex. 2.1.A (date stamped June 20, 2014).

¹⁹ The members of SJHSRI approved the CCHP Bylaws on December 9, 2009. See ECF # 174-15 (Secretary's Certificate) at 1-3, 5-7. The SJHSRI Board of Trustees did the same on December 10, 2009. Id. at 5-6. CCHP's Bylaws are dated January 4, 2010. ECF #174-24 (CCHP Bylaws) at 1. January 4, 2010 was the "effective date" of the merger between RWH and SJHSRI. See ECF # 174-15 (Secretary's Certificate) at 3 (recognizing CCHP as SJHSRI's Class A Member "effective January 4, 2010"); ECF # 196-5 (Ltr. from Mr. Belcher to Attorney General Lynch) ("I am pleased to inform you that the Affiliation by and between Roger Williams Medical Center and St. Joseph Health Services of Rhode Island was completed effective today, January 4, 2010 and CharterCARE is now operational.").

²⁰ ECF # 174-14 (Aff. Agmt) § 3.8 ("other than the provisions of this Agreement relating to the Prohibited Procedures, no Member of the CharterCARE System (other than SJHSRI) is required to comply with the ERDs.").

²¹ ECF # 174-24 (CCHP Bylaws) §§ 4.2, 4.4 (reflecting responsibilities of committees and lack of denominational requirement).

As noted, the Affiliation Agreement and the Bylaws provide that CCHP would be governed by a “Preclosing Board” of Trustees and corporate officers during the period from the execution of the Affiliation Agreement to the date when the affiliation would take full effect (the “Effective Date”), consisting of the individuals listed in Exhibit 2.1.B to the agreement.²² Thus, the Preclosing Board and the initial slate of officers were chosen by agreement of the parties to the Affiliation Agreement, not by any party exercising corporate control.

The Affiliation Agreement further provided that “[a]s of the Closing, the Preclosing Board will be replaced by a fifteen (15) member Board of Trustees (the ‘Initial Board’),” which would serve for a three-year term (the “Initial Term”).²³ The Initial Term was to commence on the effective date of the merger, which was January 4, 2010.²⁴ Accordingly, the Initial Term would conclude on January 4, 2013. At the conclusion of the Initial Term, the Initial Board would be replaced by a “First Successor Board.”²⁵ Accordingly, the Initial Term would conclude on January 4, 2013, and the First Successor Board would take over on that date.

The Affiliation Agreement provided that the Initial Board would “consist of eight (8) Trustees designated by the Bishop and seven (7) trustees designated by the Board

²² ECF # 174-14 (Aff. Agmt.) § 2.1.

²³ ECF # 174-14 (Aff. Agmt.) § 2.1.1.

²⁴ See note 19, *supra*. Prospect mistakenly refers to the effective date as June 30, 2010. The significance of that date is solely that it marked the end of the advisory function of SJHSRI’s Finance and Audit Committee to CCHP’s Finance, Audit & Compliance Committee. See ECF # 174-15 (SJHSRI’s Amended Bylaws with Secretary’s Certificate) § 4.5 (“Notwithstanding the foregoing, until June 30, 2010 (which time may be extended by the Trustees) the Finance and Audit Committees existing on the day immediately prior to the date these Bylaws are adopted and as then constituted shall continue to perform their duties set forth in the prior Bylaws but in an advisory capacity only, reporting to the Finance, Audit and Compliance Committee of the Class A Member [CCHP].”).

²⁵ ECF # 174-14 (Aff. Agmt.) § 2.1.4.

of Trustees of RWH.”²⁶ CCHP’s Bylaws provided that the Bishop and RWH’s appointees would be the individuals listed in Exhibit 2.1(C) as amended at the Closing.²⁷

The Bylaws also provided that, in addition to the fifteen (15) members appointed by the Bishop and RWH, CCHP’s Board of Trustees would include “the President/Chief Executive Officer and the Executive Vice President/Chief Operating Officer of the Corporation, both serving *ex-officio* with voting rights (the ‘Ex-Officio Trustees’).”²⁸ The inclusion of these two *ex-officio* members brought the total board to seventeen (17) members. These Bylaws also provided that neither the Bishop nor RWH would have the power to unilaterally appoint or remove these officers, by providing that “[a]ppointing or removing the President/Chief Executive Officer and the Executive Vice President/Chief Operating Officer” was a “Major Action” which required “a vote of seventy-five percent (75%) of the Board.”²⁹ Similarly, only CCHP’s Board of Trustees had power to remove any trustee, and such removal required the approval of 75% of the Board.³⁰

²⁶ ECF # 174-14 (Aff. Agmt.) § 2.1.1.

²⁷ ECF # 174-24 (CCHP Bylaws) § 4-2(c) (“Composition of the Board During Initial Term. Commencing on the Affiliation Effective Date and continuing until the annual meeting next following the third (3rd) anniversary of the Affiliation Effective Date (or special meeting in lieu thereof), (the “Initial Term”), provided, that Trustees shall serve until their respective successors have been elected and qualified, the Board of Trustees (the “Initial Board”), shall consist of: (i) the eight (8) individuals designated as trustees by the Bishop in Exhibit 2.1(C) of the Affiliation Agreement, as amended as of the Closing (the “Bishop Designees”), of whom at least one (1) shall be a physician on the Medical Staff of SJHSRI; (ii) the seven (7) individuals designated by RWMC in Exhibit 2.1(C) of the Affiliation Agreement, as amended at the Closing (the “RWMC Designees”), of whom at least one (1) shall be a physician on the Medical Staff of RWMC; and (iii) the two (2) *Ex Officio* Trustees.”) (emphasis in original).

²⁸ ECF # 174-24 (CCHP Bylaws) § 4-2(b). See also ECF # 174-24 (CCHP Bylaws) § 4-2(c) (including within the “[c]omposition of the Board During Initial Term” “the two (2) *Ex Officio* Trustees.”).

²⁹ ECF # 174-24 (CCHP Bylaws) § 4-9(g).

³⁰ ECF # 174-24 (CCHP Bylaws) § 7.2 (“A Trustee or Officer may be removed with or without cause by the vote of seventy-five percent (75%) of the Trustees then in office”). Removal, then, required the consent of board members appointed by both RCB and RWH.

Thus, CCHP's Bylaws provided for a total of seventeen (17) Trustees, during the Initial term of which the Bishop only appointed eight (8), or 47% of the Board.

The Affiliation Agreement and CCHP's Bylaws also provided that after the Initial Term, starting with the "First Successor Board," *all of the members of the board* (both *ex-officio* and non *ex-officio*) were to be chosen by the Board of Trustees itself, with no powers of appointment for either the Bishop or RWH.³¹ However, when the time came to replace the Initial Board with the First Successor Board, the asset sale to Prospect was imminent and CCHP's Board of Trustees voted to keep the Initial Board in place for the sake of continuity.³²

CCHP's Bylaws provided that the Board of Trustees could only elect individuals who had received the unanimous approval of the Nominating Committee of the Board of Trustees.³³ The Bylaws also provided that "[d]uring the Initial Term and until such time

³¹ ECF # 174-14 (Aff. Agmt) § 2.1.4. "Upon the expiration of the Initial Term, the Trustees shall elect their successors (the 'First Successor Board') from candidates recommended by the Nominating Committee to staggered terms"; ECF # 174-24 (CCHP Bylaws) § 4-2(d) ("At the annual meeting next following the third (3rd) anniversary of the Affiliation Effective Date or special meeting in lieu thereof, the Board (other than the Ex-Officio Trustees) shall elect their successors (the 'First Successor Board') from candidates nominated by the Nominating Committee to serve staggered terms such that, of a total of fifteen (15) Trustees who are elected to serve on the First Successor Board, five (5) Trustees will be nominated by the Nominating Committee and elected by the Board to serve terms which expire at each of second, third and fourth annual meetings of the Board, or special meetings in lieu thereof, following the expiration of the Initial Term or until their successors are elected and qualified.").

³² CCHP's control over this decision is evidenced by the minutes of the October 15, 2013 meeting of the CCHP Governance Committee. At that meeting, the committee discussed the need to defer the election of the First Successor Board due to the impending transaction with Prospect. ECF # 196-7 (Oct. 15, 2013 CCHP Gov. Comm. Mtg Mins) at 1-2 ("Ms. O'Connell explained to the Committee that with the impending affiliation closing the early part of next year, her recommendation was to retain the current Trustee rosters on each of the three Boards in order to allow continuity and defer new appointments and changes until such time."). At their annual meeting on December 17, 2013, the Chair of the Governance and Nominating Committee explained to CCHP's Board of Trustees "that Board rosters will remain essentially the same in 2014 in light of the pending affiliation." Plaintiffs' Supp. Response to Prospect's SUF, Exhibit 77 (minutes of meeting of CCHP Board of Trustees on December 17, 2013) at 8.

³³ See ECF # 174-24 (CCHP Bylaws) § 4-2(d) ("[T]he Board (other than the Ex-Officio Trustees) shall elect their successors (the 'First Successor Board') from candidates nominated by the Nominating Committee..." and ECF # 174-24 (CCHP Bylaws) § 4-4(d) ("All nominations made to the Board by the

as the members of the First Successor Board have been elected, the Nominating Committee shall consist of four (4) Trustees, two (2) of whom shall be appointed by RWH and two (2) of whom shall be appointed by the Bishop.”³⁴ Thus, the board members appointed by the Bishop could not dictate the nominations for members of the board. To the contrary, the appointees of RWH could veto any such nomination, and *vice versa*. Moreover, the CCHP Bylaws required the Nominating Committee to be non-partisan. ECF # 174-24 (CCHP Bylaws) § 4.4(d) (“Nominations shall be made without regard to any historical allegiance to SJHSRI, the Bishop, or RWMC.”).³⁵

The CCHP Bylaws did not provide for any role for the Bishop in setting CCHP committee membership or responsibilities. Section 4.4 of the CCHP Bylaws provides that “the [CCHP] Board shall appoint the members and the chairpersons of standing and other committees from nominations submitted by the Nominating Committee.”³⁶ As explained earlier, the Bishop did not control the CCHP Board or the Nominating Committee.

Tellingly, CCHP was not listed in the Catholic Directory as an organization that was “operated, supervised, or controlled by or in connection with the Catholic Church.”³⁷

Nominating Committee shall be made with the unanimous agreement of all members of the Nominating Committee (without abstentions).”).

³⁴ ECF # 174-24 (CCHP Bylaws) § 4-4(d).

³⁵ See also ECF # 174-14 (Aff. Agmt) § 2.1.3 (providing same).

³⁶ ECF # 174-24 (CCHP Bylaws) § 4.4.

³⁷ See Plaintiffs’ Supp. Response to Prospect’s SUF, Exhibit 51 (excerpt of the 2008 Official Catholic Directory); Exhibit 52 (excerpt of 2009 Official Catholic Directory); Exhibit 53 (excerpt of 2010 Official Catholic Directory); Exhibit 54 (excerpt of 2011 Official Catholic Directory); Exhibit 55 (excerpt of 2013 Official Catholic Directory); Exhibit 56 (excerpt of 2014 Official Catholic Directory). When subpoenaed in the Plan Receivership action, Defendants SJHSRI and Prospect Chartercare, LLC (the custodian of SJHSRI’s pre-June, 20, 2014 records) did not produce any excerpt of the 2012 Official Catholic Directory.

The entries in the Catholic Directory for the Diocese of Providence listed SJHSRI, but not CCHP.³⁸

C. Facts concerning CCHP'S Finance, Audit & Compliance Committee's lack of association with the Catholic Church

Prospect does not even argue that CCHP's Finance, Audit & Compliance Committee was associated with the Bishop or the Catholic Church.

Indeed, the undisputed facts establish that this Committee was not associated with a church. The members of the Finance, Audit & Compliance Committee were appointed by CCHP's Board of Trustees.³⁹ CCHP's Bylaws defined the areas of responsibility for CCHP's Finance, Audit & Compliance Committee.⁴⁰ The Finance, Audit & Compliance Committee was required to act within the scope of this authority and not outside of its scope.⁴¹ The Bylaws set the scope of the Finance, Audit & Compliance Committee's authority as follows:

Finance, Audit and Compliance Committee. The Finance, Audit and Compliance Committee shall review and monitor the financial operations of the Corporation [CCHP], recommend operational and financial goals and objectives and monitor compliance with the goals and objectives, review and recommend to the Board of Trustees the annual operating and capital budget, and review and make recommendations to the Board regarding plans for financing major capital acquisitions. The Finance, Audit and Compliance Committee shall review the scope and results of the audit of the books of the Corporation and of each company of which the Corporation is the sole member or stockholder and any other Affiliate of the Corporation [e.g., SJHSRI & RWH], and review such results with the

³⁸ See note 37, *supra*.

³⁹ Plaintiffs' Response to Prospect's SUF (ECF # 174-24) (CCHP Bylaws) § 4.4.

⁴⁰ Plaintiffs' Response to Prospect's SUF Exhibit 24 (ECF # 174-24) (CCHP bylaws) at 7-8.

⁴¹ Plaintiffs' Response to Prospect's SUF ¶ 6, Exhibit 27 (ECF # 196-1) (Belcher Depo.) at 19 ("Q. And committees of the CharterCARE Health Partners Board of Trustees were expected to act within the scope of their responsibility and not outside the scope of their responsibility; correct? A. That's correct.").

auditors, management and those responsible for internal controls. The Finance, Audit and Compliance Committee will assure that the financing, account, internal controls and financial reporting functions are in keeping with accepted accounting standards. The Finance, Audit and Compliance Committee will annually report to the Board of Trustees as to the performance of the independent auditor engaged to audit the books of the Corporation. The Finance, Audit and Compliance Committee also shall be responsible for approving compliance programs established for the Corporation, overseeing and monitoring such compliance programs, and making appropriate reports and recommendations to the Board of Trustees. The Finance, Audit and Compliance Committee shall be comprised of such Trustees as shall be appointed thereto by the Board of Trustees; provided, that any members of the Committee who are at the time employed by the Corporation shall recuse themselves from any discussion and the taking of any action with respect to the audit functions of the Committee.

ECF # 174-24 (CCHP bylaws) at 7–8 (underlining in original). As can be seen, the Finance, Audit & Compliance Committee had no involvement whatsoever with religious matters.

CCHP's Finance, Audit & Compliance Committee's responsibilities over the financial operations of CCHP also included oversight of the financial operations of Roger Williams Hospital, Fatima Hospital, and other medical facilities.⁴² The financial operations of the two hospitals were quite complex.⁴³ As a result, the minutes of meetings of the Finance, Audit and Compliance Committee of CCHP reflect detailed and wide-ranging oversight by that committee over the financial operations of Roger

⁴² Plaintiffs' Response to Prospect's SUF ¶ 62, Exhibit 36 (ECF # 196-10) (Deposition of Marshall Raucci on August 5, 2020) ("Raucci Depo.") at 74 ("Q. Now, the responsibilities of the Finance, Audit and Compliance Committee concerning finance included overseeing the financial operations of both St. Joseph's Hospital and Roger Williams Hospital; correct? A. Yes.").

⁴³ Plaintiffs' Response to Prospect's SUF ¶ 62, Exhibit 36 (ECF # 196-10) (Raucci Depo.) at 74 ("Q. Now, the responsibilities of the Finance, Audit and Compliance Committee concerning finance included overseeing the financial operations of both St. Joseph's Hospital and Roger Williams Hospital; correct? A. Yes. Q. And would you agree that those financial operations were quite complex? A. Yes.").

Williams Hospital, Fatima Hospital, and related medical facilities.⁴⁴ However, they demonstrate no involvement in religious matters.⁴⁵

D. Facts concerning the Catholic Church's lack of control over CCHP's Investment Committee

Just as Prospect's argument that the church (through the Bishop) controlled CCHP's Finance, Audit & Compliance Committee is predicated entirely on the contention that the church controlled CCHP itself, Prospect's claim that CCHP's Investment Committee was controlled by the church is predicated entirely on the contention that the church (through the Bishop) controlled CCHP itself. The facts refuting the church's alleged control over CCHP were addressed above and need not be repeated.

E. Facts concerning CCHP's Investment Committee's lack of association with the Catholic Church

Prospect does not even argue that CCHP's Investment Committee was associated with the Bishop and the Catholic Church.

Indeed, the undisputed facts establish that this Committee was not associated with a church. The members of the Investment Committee were appointed by CCHP's Board of Trustees.⁴⁶ CCHP's Bylaws established the areas of authority of the

⁴⁴ See, e.g., ECF # 190-16 (minutes of March 15, 2011 meeting); ECF # 190-17 (minutes of July 19, 2011 meeting); ECF # 190-18 (minutes of November 15, 2011 meeting); ECF # 190-23 (minutes of March 25, 2014 meeting).

⁴⁵ See note 44, *supra*.

⁴⁶ ECF # 174-24 (CCHP Bylaws) § 4.4.

Investment Committee.⁴⁷ The Bylaws set the scope of the Investment Committee's authority as follows:

Investment Committee. The Investment Committee shall be responsible for overseeing investment of the funds of the Corporation and its Affiliates. The Investment Committee shall approve investment policies and procedures and shall approve the investment of outside organizations to manage investments and advise the Corporation and its Affiliates with respect to such investments.

ECF # 174-24 at 10. The bylaws refer to CCHP as the "corporation," and define the "Affiliates" as "RWMC, RWMC [sic], SJHSRI and any other entity as to which the Corporation, now or in the future, is the sole corporate member or shareholder or which is otherwise controlled directly or indirectly by the Corporation."⁴⁸ The Investment Committee was required to act within the scope of this authority and not outside of the scope of that authority.⁴⁹

The Investment Committee had the responsibility to oversee the investment of the assets of the following funds: (a) the RWH Endowment and Board Designated

⁴⁷ Plaintiffs' Response to Prospect's SUF ¶ 6, Exhibit 27 (ECF # 196-1) (Belcher Depo.) at 51-52 ("Q. Okay. This section of the bylaws concerning the Investment Committee sets forth the scope of authority of that committee, in general terms; correct? A. Yes, correct. Q. Now, this section uses the word "shall," if you look at it, in three different places. Do you see that? A. I do. Q. And this section constitutes a direction to the Investment Committee of what its scope of authority is going to be; correct? MR. WAGNER: Objection. A. Correct.").

⁴⁸ ECF # 174-24 at 15.

⁴⁹ Plaintiffs' Response to Prospect's SUF ¶ 6, Exhibit 27 (Belcher Depo.) at 18-19.

Funds;⁵⁰ (b) the SJHSRI Endowment;⁵¹ (c) the employer contributions to the SJHSRI and RWH Defined Contribution Plan; and (d) the Plan's assets.⁵² The Investment Committee also had responsibility to choose the menu of funds in which participants in the RWH and SJHSRI Defined Contribution Plans⁵³ could choose to invest the amounts they contributed to those Plans.⁵⁴ As of the latter half of 2013, the total amount of funds over which the Investment Committee had authority, excluding the assets of the Plan, was \$89.7 million,⁵⁵ which was roughly equal in amount to the \$90.6 million in assets

⁵⁰ Plaintiffs' Response to Prospect's SUF ¶ 62, Exhibit 36 (ECF # 196-10) (Raucci Depo.) at 58 ("Q. Now, the Investment Committee, we've already discussed, had some responsibility for the Roger Williams endowment. Do you agree that the Roger Williams endowment was a valuable asset for Roger Williams Hospital? A. Yes. Q. And did you give as much importance to the Investment Committee's responsibilities, with respect to the endowment of Roger Williams, as to the Investment Committee did with respect to the defined benefit fund? A. The answer would be yes.").

⁵¹ Plaintiffs' Response to Prospect's SUF ¶ 62, Exhibit 36 (ECF # 196-10) (Raucci Depo.) at 58 ("Q. Okay. Now, finally, the Investment Committee was also responsible for the endowment for St. Joseph's. Do you recall that? A. I do.").

⁵² Plaintiffs' Response to Prospect's SUF ¶ 62, Exhibit 36 (ECF # 196-10) (Raucci Depo.) at 63 ("[Q.] Did the Investment Committee's responsibility over the defined benefit plan include responsibility concerning the investments of the defined benefit plan? A. Yes.").

⁵³ Of course, the Plan was a defined benefit plan. For a description of what constitutes a defined contribution plan, see Zelinsky, The Defined Contribution Paradigm, 114 Yale L.J. 451, 457 (2004) ("By its nature, a defined contribution plan does not pool resources like a defined benefit pension but rather establishes for each participant his own individual account. Allocated to that account are the employer's contributions for the employee, the employee's own contributions (if any), and the earnings or losses generated by the investment of all those contributions."). See also 29 U.S.C. § 1002(34) ("The term 'individual account plan' or 'defined contribution plan' means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.").

⁵⁴ Plaintiffs' Response to Prospect's SUF ¶ 62, Exhibit 36 (ECF # 196-10) (Raucci Depo.) at 43-44 ("[Q.] One of the responsibilities of the Investment Committee was to select the funds from which the participants in the two defined contribution plans could make investments; is that fair? A. Yeah, so it's not only select, but I would say it's broader: select and monitor and then make appropriate changes over time. So all of the criteria that we would use in selecting the initial is done on an ongoing basis as well.").

⁵⁵ The actual total was \$89,698,249. Plaintiffs' Response to Prospect's SUF ¶ 75, Exhibit 37 (ECF # 196-11) (February 14, 2014 CCHP Investment Committee Meeting minutes) (total assets in the defined contribution plans as of September 30, 2013 were \$63,247,666 and the market value of SJHSRI's endowment as of December 31, 2013 was \$1,350,583); Plaintiffs' Response to Prospect's SUF ¶ 75, Exhibit 38 (ECF # 196-12) (November 15, 2013 CCHP Investment Committee Meeting minutes) (RWH's endowment as of September 30, 2013 was \$25,100,000).

held by the Plan as of September 30, 2013.⁵⁶ However, the Investment Committee had no involvement whatsoever with religious matters.

F. Facts concerning the Catholic Church's lack of control over SJHSRI

It is undisputed that SJHSRI was the Plan's sponsor. Accordingly, SJHSRI needed to have been controlled by or associated with the Catholic Church for the Plan to qualify as a church plan during the period from January 4, 2010 through December 15, 2014 pursuant to 29 U.S.C. § 1002(33)(C)(i).

By 2010, SJHSRI was not controlled by the Catholic Church. To the contrary, pursuant to Section 4.2 of SJHSRI's Amended Bylaws effective January 4, 2010 (ECF # 174-15), all but one of the (at least) eleven (11) appointed members of SJHSRI's Board of Trustees were appointed by CCHP, which was a wholly secular entity.

Between January 4, 2010 and December 15, 2014, the Bishop could also appoint one member to the SJHSRI Board of Trustees and select the chairman and vice-chairman of SJHSRI's Board.⁵⁷ All other members of the SJHSRI Board of Trustees were "appointed and removed exclusively by the Class A member," CCHP.⁵⁸ From that point on, RCB only served as SJHSRI's Class B member, with reserved powers related solely to Catholicity.⁵⁹

⁵⁶ Contrary to Prospect's assertion that "[t]he Plan's investment portfolio dwarfed the other portfolios under the CCHP Investment Committee's stewardship....," Prospect Memo. at 25, and that "Plan assets then comprised \$90-\$100 million; the rest of the invested assets under the CCHP Investment Committee's oversight, generally consisting of endowments and restricted bequests from hospital donors, totaled approximately \$20 million, combined." Prospect Memo. at 63.

⁵⁷ ECF # 174-15 (SJHSRI Bylaws) §§ 4.2, 6.2.

⁵⁸ ECF # 174-15 (SJHSRI Bylaws) § 4.2.

⁵⁹ See ECF # 190-8 (Articles of Amendment to SJHSRI's Articles of Incorporation ("SJHSRI Amended Articles")), Ex. A at Part A, D; ECF # 174-15 (SJHSRI Bylaws) §§ 2.1, 4.13.

All financial, strategic, and administrative authority rested with the Class A member, CCHP. For example, beyond appointing and removing SJHSRI's trustees (except RCB's one *ex-officio* designee), CCHP was empowered to appoint and/or remove SJHSRI's President/Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Secretary, and Treasurer.⁶⁰

G. Facts concerning SJHSRI's lack of association with the Catholic Church

There was no denominational requirement for members of SJHSRI's Board of Trustees, or for patients who sought care from SJHSRI.⁶¹ Prospect has not even alleged that SJHSRI received any financial support from the Catholic Church.

Prospect's contention that SJHSRI was "associated with" the Catholic Church is largely predicated on SJHSRI's alleged listing in the Catholic Directory. However, Prospect's proof of that listing is solely a statement in the Declaration of Marshall Raucci. Prospect's Statement of Undisputed Facts ¶ 3 ("At all relevant times, SJHSRI was associated with the Catholic Church and was listed in the Official Catholic Directory (the 'Directory') as a subordinate organization that was 'operated, supervised, or controlled by or in connection with the [] Catholic Church.' (Declaration of Marshall Raucci dated June 26, 2020 ("Raucci Decl.") at para 5.).")

Mr. Raucci's Declaration, in fact, merely states that "[i]t is my understanding that at all relevant times, SJHSRI was listed in the Official Catholic Directory (the "Directory")

⁶⁰ ECF # 190-8 (SJHSRI Amended Articles), Ex A at Part B(ii) & (iv); ECF # 174-15 (SJHSRI Bylaws) §§ 6.2, 7.2.

⁶¹ See generally ECF # 174-15 (SJHSRI Bylaws) § 4.2 (reflecting no denominational requirement for board members).

as a subordinate organization that was “operated, supervised, or controlled by or in connection with the []⁶² Catholic Church.” ECF # 190-3 (Raucci Dec.) ¶ 5. Mr. Raucci’s subjective understanding is not relevant, and his statement is conclusory. Mr. Raucci does not explain the basis for his “understanding,” or what he considered were “all relevant times,” and Prospect has not included in its motion papers a copy of the listings in the Catholic Directory.

On the assumption that if Plaintiffs do not submit the relevant excerpts from of the Catholic Directory, Prospect will seek leave to do so in its reply memorandum, Plaintiffs provide them to the Court⁶³ and concede that SJHSRI was indeed listed in the Catholic Directory during the period with which Prospect’s cross-motion is concerned, from 2008 until 2017.

However, Plaintiffs do not concede that during the period from 2010 through 2014 SJHSRI was in actual fact operated, supervised, or controlled by or in connection with the Catholic Church, as opposed to merely having been “listed” in the Catholic Directory as having purportedly been operated, supervised, or controlled by or in connection with the Catholic Church.

Plaintiffs also do not concede that SJHSRI during the period from 2010 through 2014 was subject to the general control or supervision of either the USCCB or the Diocese of Providence. Prospect has made no such showing. Prospect has the burden of coming forward with such evidence but has failed to meet that burden.

⁶² Empty brackets in the original.

⁶³ See supra at note 37 (citing Official Catholic Directory exhibits).

Prospect ignores Plaintiffs' contention and the evidence of a corrupt bargain, in which SJHSRI was listed in the Catholic Directory even though it should not have been, Fatima Hospital was relieved of potential insolvency associated with the Plan, and Prospect agreed to operate Fatima Hospital in accordance with the USCCB's Ethical Directives and to refrain from performing "Prohibited Procedures," most notably abortions. Plaintiffs allege that the Bishop thereby achieved his goal of having there be a solvent hospital that operated with these restrictions. This result satisfied the objectives of the Bishop, Prospect, SJHRI, RWH, and CCHP, but sacrificed the interests of the Plan participants served by having the Plan supported by an operating hospital.

The proof of this corrupt bargain is set forth in Plaintiffs' Supplemental Response to Prospect's Statement of Undisputed Facts served and filed herewith.

What other evidence there is in the record also tends to prove that SJHSRI was not under the "general supervision or control" of the Catholic Church, and was not operated, supervised, or controlled by or in connection with the Catholic Church. For example, the Articles of Incorporation of SJHSRI do not indicate in any way that SJHSRI was under the "general supervision or control" of the Diocese of Providence or the USCCB, or that it was operated, supervised, or controlled by or in connection with the Catholic Church. The Bylaws of SJHSRI also do not provide that SJHSRI was under the "general supervision or control" of the Diocese of Providence or the USCCB, or operated, supervised, or controlled by or in connection with the Catholic Church. Instead, they show the opposite, that SJHSRI was under the control and supervision of CCHP.

H. Facts concerning SJHSRI'S lack of tax-exempt status

Prospect has offered no evidence demonstrating that SJHSRI ever even independently applied for (much less received) recognition of its tax-exempt status by the Internal Revenue Service, or that SJHSRI qualified under any group exemption issued by the IRS. Accordingly, Prospect has failed to meet its burden of proof to demonstrate that SJHSRI was tax exempt.

Plaintiffs object to Prospect's attempting to make such a showing after Prospect receives Plaintiffs' opposition memorandum. However, if Prospect is permitted to do so, and contends that SJHSRI was entitled to rely upon the group exemption the IRS issued to the USCCB, Prospect will have the burden of proving both that SJHSRI was "operated, supervised, or controlled by or in connection with" the Catholic Church, and that SJHSRI operated under "the general control or supervision" of the Catholic Church.

What evidence there is in the record tends to prove that SJHSRI was not under the "general supervision or control" of the Catholic Church, and was not operated, supervised, or controlled by or in connection with the Catholic Church. For example, the Articles of Incorporation of SJHSRI do not indicate in any way that SJHSRI was under the "general supervision or control" of the Diocese of Providence or the USCCB, or was operated, supervised, or controlled by or in connection with the Catholic Church. The Bylaws of SJHSRI also do not provide that SJHSRI was under the "general supervision or control" of the Diocese of Providence or the USCCB, or operated, supervised, or controlled by or in connection with the Catholic Church. Instead, they show the opposite, that SJHSRI was under the control and supervision of CCHP, a secular entity.

IV. ARGUMENT

A. Applicable Legal Standard

Summary judgment is appropriate where “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “At the summary judgment stage, a trial court is to make legal determinations rather than involve itself in factfinding.” Doe v. Trustees of Bos. Coll., 892 F.3d 67, 86 (1st Cir. 2018). “At summary judgment, the judge's function is not himself or herself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” Burns v. Johnson, 829 F.3d 1, 8 (1st Cir. 2016). “Facts are deemed ‘material’ if they have the potential to affect the outcome of the suit under the applicable law, and a dispute is deemed ‘genuine’ if the evidence about the fact is such that a reasonable jury could resolve the point in the favor of the non-moving party.” Ouellette v. Beaupre, 977 F.3d 127, 134–35 (1st Cir. 2020). “The party moving for summary judgment bears the initial burden of showing that no genuine issue of material fact exists.” Feliciano-Munoz v. Rebarber-Ocasio, 970 F.3d 53, 62 (1st Cir. 2020). In analyzing a summary judgment motion, the court “views all facts and draws all reasonable inferences in the light most favorable to the non-moving” parties. Estrada v. Rhode Island, 594 F.3d 56, 62 (1st Cir. 2010).

B. The Plan was subject to ERISA unless it qualified for an express statutory exemption

1. Under the plain statutory language, the Plan was covered by ERISA unless it qualified for certain statutory exemptions

Plaintiffs’ Summary Judgment Reply Memorandum fully addresses why under the plain statutory language, the Plan was covered by ERISA unless it qualified for

certain statutory exemptions. ECF # 197 (Plaintiffs' Reply Memo.) at 36–41. Plaintiffs incorporate that argument by reference.

2. The exemption from ERISA for church plans is subject to the rule of narrow construction for statutory exceptions from ERISA

Plaintiffs' Summary Judgment Memorandum addresses why the exemption from ERISA for church plans is subject to the rule of narrow construction for statutory exceptions from ERISA. ECF # 173 (Plaintiffs' Summary Judgment Memo.) at 17–20. Plaintiffs' Reply Memorandum further addresses this issue in response to Prospect's arguments in its opposition memorandum. ECF # 197 (Plaintiffs' Reply Memo.) at 36–41. Plaintiffs incorporate their prior arguments by reference.

C. Church plan status depends on compliance with four requirements

The requirements for church plan status are set forth in the definition of church plan contained in 29 U.S.C. § 1002(33)(C)(i) as follows:

A plan established and maintained for its employees ... by a church or by a convention or association of churches includes a plan maintained by an organization ... the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.

Both Prospect⁶⁴ and Plaintiffs accept the Tenth Circuit's summary of the inquiry necessitated by this definition in Medina, et al. v. Catholic Health Initiatives, 877 F. 3d 1213 (10th Cir. 2017), as follows:

⁶⁴ See Prospect Memo. at 51.

The statute imposes a three-step⁶⁵ inquiry for entities seeking to use the church-plan exemption for plans maintained by principal-purpose organizations:

1. Is the entity [whose employees are covered by the plan] a tax-exempt nonprofit organization [controlled by or] associated with a church?
2. If so, is the entity's retirement plan maintained by a principal-purpose organization? That is, is the plan maintained by an organization whose principal purpose [or function] is administering or funding a retirement [or other] plan for entity employees?
3. If so, is that principal-purpose organization itself [controlled by or] associated with [that same] church?

Under this framework, to qualify for the church-plan exemption, [the sponsor] **must receive an affirmative answer to all three inquiries.**

[Emphasis supplied]

Prospect's Memo. at 51 (quoting Medina, 877 F.3d 1213, at 1222) (ellipses added by Prospect "to conform to the operative statutory language" (Prospect Memo. at 51)).

D. CCHP's Finance Audit & Compliance Committee and CCHP's Investment Committee were not "Principal Purpose Organizations," because they did not have Plan administration or funding as their principal purpose or function

Plaintiffs' Summary Judgment Memorandum addresses one reason why neither CCHP's Finance Audit & Compliance Committee nor CCHP's Investment Committee were "principal purpose organizations"—they did not have administration or funding of the Plan as their principal purpose or function. ECF # 173 (Plaintiffs' Summary Judgment memo.) at 24–27. Plaintiffs' Reply Memorandum further addresses this issue

⁶⁵ Really four-steps, since what the Tenth Circuit in Medina refers to as step one has two distinct components, i.e.: a) a "tax-exempt organization" that is b) "controlled by or associated with a church."

in response to Prospect’s arguments in its opposition memorandum. ECF # 197 (Plaintiffs’ Reply Memo.) at 41–89. Plaintiffs incorporate those arguments by reference.

Prospect’s primary response to this showing was to argue that the reference to “principal purpose or function” in 29 U.S.C. § 1002(33)(C)(i) should be construed to mean “principal purpose or one of its functions,” but that argument is contrary to the plain meaning of the statute and the Supreme Court’s decision in Advocate Health Care Network v. Stapleton, 137 S. Ct. 1652 (2017). Indeed, Prospect’s construction of the statute would render the phrase “principal purpose” mere surplusage, and would lead to an absurd result, as extensively discussed in Plaintiffs’ Reply Memorandum in support of their motion for summary judgment.⁶⁶

As noted, the Court need not decide the other issues raised by Prospect’s cross-motion if the Court agrees that the question of whether CCHP’s Finance Audit & Compliance Committee and CCHP’s Investment Committee had administration or funding of the Plan as their principal purpose or function at least involves disputed facts. As also noted, Plaintiffs address those issues *arguendo*.

E. The meaning of “controlled by or in connection with” a church

1. The phrase “controlled by”

The statutory phrase “controlled by” is not defined by statute. See Prospect Summary Judgment Memo. at 52 (“While federal law describes what an organization must do to be considered ‘associated with’ a church or a convention or association of

⁶⁶ See Plaintiffs’ Summary Judgment Reply Memo. (ECF # 197) at 53-54 (“Indeed, construing the statute to qualify an organization if any function includes plan administration or funding, while requiring that plan administration or funding be the ‘principal purpose’ would violate the canon that ‘a statute should never be construed in a way that produces an absurd result.’”) (quoting Cahoon v. Shelton, 647 F.3d 18, 22 (1st Cir. 2011)).

churches, it does not define what it means to be ‘controlled by’ one.”) (footnote omitted). Nor are there regulations directly explicating the reference to “controlled by” in 29 U.S.C. § 1002(33)(C)(i).

“Although ERISA does not define the phrase ‘controlled by,’ [c]ourts have interpreted the provision as referring to corporate control, such as church control over appointment of a majority of the non-church organization's officers or Board of Directors.” Medina v. Catholic Health Initiatives, 147 F. Supp. 3d 1190, 1201 n.19 (D. Col. 2015), aff'd Medina, et al. v. Catholic Health Initiatives, 877 F. 3d 1213 (10th Cir. 2017) (quoting Catholic Charities of Maine, Inc. v. City of Portland, 304 F. Supp. 2d 77, 85 (D. Me. 2004)). See also Rinehart v. Life Ins. Co. of N. Am., No. C08-5486 RBL, 2009 WL 995715, at *4 (W.D. Wash. Apr. 14, 2009) (“Controlled by’ is not defined by ERISA; however, courts have taken the language to mean ‘referring to corporate control, such as control over the appointment of a majority of the non-church organization's officers or Board of Directors.’”); Catholic Charities, *supra*, 304 F. Supp. 2d at 85) (“an organization, the majority of whose officers or directors are appointed by a church's governing board, or by officials of a church, is controlled by a church”).

The Internal Revenue Code contains an identical provision to 29 U.S.C. § 1002(33)(C)(i), because “church plan” status exempts a plan from certain IRC requirements⁶⁷ which are applicable to tax-qualified pension plans. 26 U.S.C. § 414(e)(3)(A). An IRS regulation does address the meaning of “controlled by” under that provision of the Internal Revenue Code. See Treas. Reg. § 1-414(e)-1(d)(2). That regulation states in pertinent part as follows:

⁶⁷ See, e.g., 26 U.S.C. § 410(c)(1)(B) (exempting church plans from minimum participation standards for pension plans to have favorable tax treatment).

For example, an organization, a majority of whose officers and directors are appointed by a church's governing board or the officials of a church, is controlled by a church within the meaning of this paragraph.

26 C.F.R. § 1-414(e)-1(d)(2).

Notwithstanding that this regulation applies to the Internal Revenue Code, and not to ERISA, courts interpreting "controlled by" in 29 U.S.C. § 1002(33)(C)(i) commonly cite this regulation. See Lown v. Continental Cas. Co., 238 F.3d 543, 547 (4th Cir. 2001) ("Lown") ("An organization is controlled by a church when, for example, a religious institution appoints a majority of the organization's officers or directors.") (citing 26 C.F.R. § 1.414(e)-1(d)(2) (2000)); Catholic Charities of Maine, Inc. v. City of Portland, *supra*, 304 F. Supp. 2d at 85 ("ERISA does not define 'controlled by.' Courts have interpreted the provision as referring to corporate control, such as church control over appointment of a majority of the non-church organization's officers or Board of Directors.") (citing Lown, *supra*, 238 F.3d at 547, Duckett v. Blue Cross & Blue Shield, 75 F. Supp. 2d 1310, 1316 (M.D. Ala.1999), and 26 C.F.R. § 1.414(e)-1(d)(2)).

Accordingly, the requirement for control is not satisfied if a church shares control equally with another entity. In Hill v. Unum Provident Life & Accident Ins. Co., No. EDCV0801102SGLAGR, 2009 WL 10672830 (C.D. Cal. Aug. 20, 2009), the court considered whether Hoag Memorial Hospital Presbyterian ("Hoag") was "controlled by" a Presbyterian association which had the right to appoint 50% of the members who appointed the hospital's directors, with a secular foundation (the Hoag Family Foundation) controlling the remaining 50%. The court held that it was insufficient:

Here, the majority of Hoag's board of directors or of its corporate members are not appointed by a church or an association of churches. The Association of Presbyterian Members only has 50% control over the selection over the corporate members and, through those members'

actions, control over the board of directors. The regulations, however, seek for the entity in question to be “controlled by” the church, something that would occur if other persons or entities had to accede to and be subject to the will of the church. Here, the Association does not have such power. It cannot make or shape the policies of the hospital, but must partner with the Hoag Family Foundation to accomplish any such objective. **The lack of having the sole ability to determine such matters is conclusive on this issue.**

Hill v. Unum Provident Life & Accident Ins. Co., *supra*, 2009 WL 10672830, at *3 (emphasis supplied).

Prospect also directs the Court to another IRS regulation, applicable to tax-exempt organizations generally, which addresses the related issue of whether an individual trustee or director is controlled by another organization, and provides that such control exists if the other organization has the power to replace the trustee with another trustee. Prospect Memo. at 53 (quoting 26 C.F.R. § 1.414(c)-5(b)). That regulation states as follows:

A trustee or director is controlled by another organization if the other organization has the general power to remove such trustee or director and designate a new trustee or director. Whether a person has the power to remove or designate a trustee or director is based on facts and circumstances.

26 C.F.R. § 1.414(c)-5(b). As discussed below, Prospect’s argument that the Bishop controlled CCHP is contradicted by the test set forth in this regulation.

2. The phrase “associated with”

Prospect does not even contend that the Finance, Audit & Compliance Committee or the Investment Committee was “associated with” the Catholic Church. Accordingly, the Court need not address that issue in connection with the determination of whether either of these entities qualified as principal purpose organizations.

However, the meaning of “associated with” is relevant to Prospect’s motion because Prospect must prove that SJHSRI itself was associated with the Catholic Church, if (as Plaintiffs contend) Prospect cannot establish that SJHSRI was controlled by the Catholic Church (through the Bishop⁶⁸).

The term “associated with” is defined by ERISA:

An organization, whether a civil law corporation or otherwise, is associated with a church or a convention or association of churches if it shares common religious bonds and convictions with that church or convention or association of churches.

29 U.S.C. 1002(33)(C)(iv).

However, the statute does not define what constitutes “common religious bonds and convictions.” The issue of what constitutes “common religious bonds or convictions” has not been addressed by the First Circuit. It has been addressed by other courts, starting with the Fourth Circuit in Lown, which stated as follows:

In deciding whether an organization shares such common bonds and convictions with a church, three factors bear primary consideration: 1) whether the religious institution plays any official role in the governance of the organization; 2) whether the organization receives assistance from the religious institution; and 3) whether a denominational requirement exists for any employee or patient/customer of the organization.

Lown, *supra*, 238 F.3d at 548. The Eighth Circuit adopted this test in Chronister v. Baptist Health, 442 F.3d 648, 653 (8th Cir. 2006) (“We find the Fourth Circuit’s test useful and adopt it for analysis of the instant case.”).

Courts within the Fourth Circuit and Eighth Circuit continue to apply this test, as do many District Courts outside of those circuits. See Walsh v. Mut. of Omaha Ins. Co.,

⁶⁸ Prospect repeatedly conflates the Catholic Church with the Bishop. The Diocesan Defendants disagree. Solely for purposes of this motion Plaintiffs take no position and use the terms as if they are interchangeable.

No. 4:16 CV 800 RWS, 2016 WL 5076197, at *2 (E.D. Mo. Sept. 20, 2016) (“Applying the three-factor test from *Chronister*, plaintiff has not established that the plan at issue is a ‘church plan.’”) (citing *Chronister v. Baptist Health*, *supra*, 442 F.3d at 653); *Ward v. Unum Life Ins. Co. of Am.*, No. 09-C-431, 2010 WL 4337821, at *2 (E.D. Wis. Oct. 25, 2010) (quoting and applying test from *Lown*, *supra*, 238 F.3d at 548); *Hill v. Unum Provident Life & Accident Ins. Co.*, *supra*, 2009 WL 10672830, at *3–4 (C.D. Cal. Aug. 20, 2009) (pension plan was not “associated with” the Presbyterian Church where “two of the three” factors were not present).

The *Lown* test has been repeatedly applied by courts within the First Circuit. See *Torres v. Bella Vista Hospital, Inc.*, CIVIL 06-2158 (JAG), 2009 WL 10717769, at *6 (D.P.R. 2009) (“While the First Circuit has yet to establish a framework for interpreting this standard, several decisions have adopted the three factors enunciated by the Fourth Circuit in *Lown v. Cont’l Cas. Co.*”) (pension plan was “associated with” the Catholic Church when two of the three *Lown* factors were met but the hospital did not impose a denominational requirement on its employees or patients); *Catholic Charities of Maine, Inc. v. City of Portland*, 304 F. Supp. 2d 77, 85 (D. Me. 2004) (citing and applying *Lown* factors).

Other courts have treated the *Lown* factors as relevant but not an exclusive test for whether an organization is associated with a church. See *Medina v. Catholic Health Initiatives*, 877 F.3d 1213, 1224 (10th Cir. 2017) (“Setting aside their uncertain derivation, the *Lown* factors cannot be the exclusive means of determining whether an organization is “associated with a church. This is because the *Lown* factors are much narrower than the broad language of the definition in § 1002(33)(C)(iv)....Because the

Lown factors are narrower than the statutory language, satisfying the *Lown* factors may suffice to establish that an organization is associated with a church. But an organization does not need to satisfy the *Lown* factors in order to be associated with a church.”). Significantly, none of these courts has offered an alternative test. See, e.g., Rollins v. Dignity Health, 338 F.Supp.3d 1025, 1038 (N.D. Cal. 2018) (“Defendants urge the Court not to adopt the test in *Lown v. Continental Casualty Co.*, 238 F.3d 543, 548 (4th Cir. 2001) to determine association... However, Defendants provide this Court with no test, other than the statutory language and the Oxford English Dictionary, for evaluating whether Dignity Health and the sub-committee is associated with a church.”).

F. CCHP was not controlled by the Bishop

Prospect refers to a “principal purpose organization” as a “PPO”, and makes the following argument:

At various points in time, two different organizations were able to each qualify as a PPO: the CCHP Finance Committee qualified as a PPO, when designated, by making the handling of Plan administrative matters either its principal purpose, or one of its functions; and the CCHP Investment Committee qualified as a PPO by making the funding of the Plan, and the maintenance of the Plan’s funded status, its principal purpose or at least one of its functions. The ability of the two CCHP committees to sustain this period of compliance lasted for more than three years. Once the 2014 Assets Sale was consummated, however, those left in charge of the SJHSRI and CCHP boards of trustees apparently rejected the principal-purpose organization blueprint provided to them by former SJHSRI and CCHP executives and outside counsel, and ultimately caused the Plan to relinquish its church plan status on December 15, 2014.

Prospect Memo. (ECF # 193-1) at 50–51 (footnotes omitted). Thus, the focus is on CCHP’s Finance, Audit & Compliance Committee and CCHP’s Investment Committee.

Prospect makes no showing, and does not even contend, however, that the church exercised any control directly over these committees. Instead, Prospect seeks to prove such control through the church's control over CCHP itself.⁶⁹ Prospect acknowledges (as it must) that such control requires the power to appoint the majority of an entity's board of directors, citing with approval the following language from Overall v. Ascension, 23 F. Supp. 3d 816, 829 (E.D. Mich. 2014):

Both the IRS regulations and the courts have used the common-sense definition of organizational control: the ability of church officials to appoint the majority of the trustees or directors of an organization. See 26 C.F.R. § 1.414(c)-5; see also, e.g., *Lown v. Cont'l Cas. Co.*, 238 F.3d 543, 547-48 (4th Cir. 2001) (citing and applying IRS regulation); *Catholic Charities of Maine v. City of Portland*, 304 F. Supp. 2d 77, 85 (D. Maine 2004) (church control over the appointment of the majority of the non-church organization's officers or Board of Directors).

Prospect Memo. at 52–53. Prospect similarly cites with approval the following language from Catholic Charities of Maine v. City of Portland, *supra*, 304 F. Supp. 2d at 85 (D. Me. 2004):

ERISA does not define "controlled by." Courts have interpreted the provision as referring to corporate control, such as church control over appointment of a majority of the non-church organization's officers or Board of Directors. See *Lown*, 238 F.3d at 547; *Duckett v. Blue Cross & Blue Shield*, 75 F. Supp.2d 1310, 1316 (M.D. Ala. 1999). See also 26 C.F.R. § 1.414(e)-1(d)(2) (providing that "an organization, a majority of whose officers or directors are appointed by a church's governing board or by officials of a church, is controlled by a church" for the purposes of the Code).

Prospect Memo. at 53.

⁶⁹ See Prospect Memo. (ECF # 193-1) at 63–64 (arguing that the "controlled by or associated with" test is satisfied because the Bishop allegedly controlled CCHP, and the "Bishop's control over CCHP [allegedly] extended to control over the CCHOP Board and its constituent committees...").

Thus, Plaintiffs and Prospect agree on the legal standard. Where they part company, however, is when Prospect asserts that in fact the Bishop appointed the majority of the board of trustees during the Initial Term. Prospect again and again takes that position:

The Bishop controlled CCHP from the outset, given the way it was organized. He certainly had control during the Transition Period, and he continued to have that control by virtue of his right to appoint the majority of the trustees serving on its board of trustees, throughout the three-year Initial Term of the CCHP Board that ended June 30, 2013.

Prospect Memo. at 55.

As CCHP's amended Articles and amended and restated Bylaws make clear, the Bishop controlled CCHP through his right to appoint the majority of its trustees – eight out of fifteen.

Prospect Memo. at 63.

Prospect ignores, however, the fact that CCHP's Bylaws also provided that, in addition to the fifteen (15) members appointed by the Bishop and RWH, CCHP's Board of Trustees would include "the President/Chief Executive Officer and the Executive Vice President/Chief Operating Officer of the Corporation, both serving *ex-officio* with voting rights (the 'Ex-Officio Trustees')." The inclusion of these two *ex-officio* members brought the total board to seventeen (17) members. As a result, the Bishop never had the power to appoint more than 46% of the Board.

Only CCHP's Board of Trustees had power to remove any trustee, and such removal required the approval of 75% of the Board.⁷⁰ Moreover, after the Initial Term, starting with the "First Successor Board," *all of the members of the board* (both ex-

⁷⁰ ECF # 174-24 (CCHP Bylaws) § 7.2 ("A Trustee or Officer may be removed with or without cause by the vote of seventy-five percent (75%) of the Trustees then in office"). Removal, then, required the consent of board members appointed by both RCB and RWH.

officio and non *ex-officio*) were to be chosen by the Board of Trustees itself, with no powers of appointment for either the Bishop or RWH.⁷¹ Thus, Prospect's entire argument is based upon a false factual premise.

Prospect makes the following argument:

The Bishop's control over CCHP extended to control over the CCHP Board and its constituent committees, as internal subsets, especially so because since the members of those committees were drawn from the pool of trustees then seated on the CCHP Board, the majority of whom were appointed to their positions by the Bishop. This fit squarely within the ERISA's church plan rule for controlled entities through June 30, 2013, when the original CCHP trustees' Initial Terms ended, and thereafter through the date of the 2014 Assets Sale as Board members' terms were extended and they were not removed.

Prospect Memo. (ECF # 193-1) at 63–64. However, as noted, the Bishop did not appoint a majority of CCHP's Board of Trustees. Moreover the Initial Term ended January 4, 2010, not June 30, 2013.⁷² The decision to extend the members terms was not made by the Bishop, but, instead, was made by the CCHP Board itself, because the imminency of the asset sale to Prospect made it unnecessary to appoint a new Board.⁷³

⁷¹ ECF # 174-14 (Aff. Agmt) § 2.1.4. "Upon the expiration of the Initial Term, the Trustees shall elect their successors (the 'First Successor Board') from candidates recommended by the Nominating Committee to staggered terms"; ECF # 174-24 (CCHP Bylaws) § 4-2(d) ("At the annual meeting next following the third (3rd) anniversary of the Affiliation Effective Date or special meeting in lieu thereof, the Board (other than the Ex-Officio Trustees) shall elect their successors (the 'First Successor Board') from candidates nominated by the Nominating Committee to serve staggered terms such that, of a total of fifteen (15) Trustees who are elected to serve on the First Successor Board, five (5) Trustees will be nominated by the Nominating Committee and elected by the Board to serve terms which expire at each of second, third and fourth annual meetings of the Board, or special meetings in lieu thereof, following the expiration of the Initial Term or until their successors are elected and qualified.").

⁷² See note 24, *supra* (explaining why Prospect's reference to the effective date as June 30, 2010 is mistaken).

⁷³ See note 32, *supra* (explaining the action of CCHP Governance and Nominating Committee in continuing the existing roster for the sake of "continuity.").

Prospect also asks the Court to find that the Bishop controlled CCHP because of the Bishop's "outsized influence" arising from the requirement in CCHP's Bylaws for a super-majority for major board decisions:

The Bishop also controlled CCHP by virtue of the 75% super-majority voting standard(s) and the nomination process that was hard-wired into CCHP's Bylaws, which guaranteed that the Bishop's hand-picked trustees could (and would) exercise outsized influence over all CCHP Board decisions, even after June 30, 2013 came and went, until those trustees were replaced (none were, prior the 2014 Assets Sale).

Prospect Memo. at 63. Prospect ignores the fact, however, that, applying the same standard, RWH's appointees to CCHP's Board of Trustees also had an "outsized-influence." RWH only appointed seven (7) members of the seventeen (17) person board, or about 42% of the Board, but that would be sufficient to allow these trustees to block any board decision that required a 75% super-majority.

What the 75% super-majority requirements demonstrate is not that either the Bishop or RWH had "outsized control," but, rather, that neither the board appointees of RWH nor the board appointees of the Bishop had corporate control over CCHP. Instead, decisions had to be made by consensus.

Prospect points out that during the Initial Term, the Bishop's "appointments included a monsignor, and later the Chancellor of the Diocese and several other ordained priests," and asserts that "each of whom owed a duty of fealty to the Bishop and clearly held his proxy." Prospect Memo. at 63. "Fealty" is a feudal tenant's or vassal's sworn loyalty to a lord, not a board member's obligation to the entity that appointed him or her. A director cannot owe "fealty" to another entity or individual.

To the contrary, as a matter of modern corporate law, once an individual was appointed to the boards of trustees of SJHSRI or CCHP, that individual owed a fiduciary

obligation to that entity, regardless of whether the individual was a priest. See 3 Fletcher Cyc. Corp. § 837.60 (“In discharging their function of managing the business and affairs of the corporation, directors and officers owe fiduciary duties of care and loyalty to the corporation.”). Such loyalty must be undivided. See Ed Peters Jewelry Co., Inc. v. C & J Jewelry Co., Inc., 124 F.3d 252, 276 (1st Cir. 1997) (directors owe a “duty of undivided loyalty”). These legal duties prevented board members from favoring the interests of the Bishop over the interests of CCHP or SJHSRI. See 3 Fletcher Cyc. Corp. § 837.60 (“The duty of loyalty mandates that the best interest of the corporation and its shareholders take precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the shareholders generally.”).

Moreover, Prospect’s “fealty” argument hardly squares with the test that even Prospect acknowledges determines whether an individual board member is controlled by another entity; which is whether that entity has the power to remove the individual and designate a replacement. See Prospect Memo. at 53 (“A trustee or director is controlled by another organization if the other organization has the general power to remove such trustee or director and designate a new trustee or director. Whether a person has the power to remove or designate a trustee or director is based on facts and circumstances.”) (quoting 26 C.F.R. § 1.414(c)-5(b)). Only CCHP’s Board had the power to remove members of that board.⁷⁴

As noted, CCHP was not listed in the Catholic Directory as an organization that was “operated, supervised, or controlled by or in connection with the Catholic Church.”

⁷⁴ ECF # 174-24 (CCHP Bylaws) § 7.2 (“A Trustee or Officer may be removed with or without cause by the vote of seventy-five percent (75%) of the Trustees then in office”). Removal, then, required the consent of board members appointed by both RCB and RWH.

The entries in the Catholic Directory for the Diocese of Providence list SJHSRI,⁷⁵ but not CCHP.⁷⁶ Prospect argues that this omission “merely constitutes a public acknowledgment by the Catholic Church of a relationship with a non-church organization. A relationship does not have to be published and promoted, to nonetheless exist.”⁷⁷ However, even if the omission of CCHP from the Catholic Directory were not controlling on the issue of whether CCHP was controlled by or associated with the Catholic Church, it is some evidence that even the Catholic Church did not consider that CCHP was “operated, supervised, or controlled by or in connection with the Catholic Church.” That alone should be sufficient to raise a question of fact and preclude summary judgment on that issue.

Prospect argues that the Court should disregard the apparent independence of CCHP and find that the Bishop covertly controlled CCHP. Prospect asks the Court to infer from the omission of CCHP in the Catholic Directory that the Bishop wanted to conceal his control over CCHP:

The Bishop’s decision to not publicly acknowledge the control he had over CCHP (evident from his decision to not cause CCHP to be listed in the Directory) changes nothing.

⁷⁵ Plaintiffs dispute that listing in the Catholic Directory is controlling, or that SJHSRI was “operated, supervised, or controlled by or in connection with the Catholic Church,” but the absence of CCHP in the Catholic Directory is evidence that even the Catholic Church did not claim to that CCHP was a Catholic institution. See University of Great Falls v. N.L.R.B., 278 F.3d 1335, 1345 (D.C. Cir. 2002) (describing the Catholic Directory as “a compilation of all institutions in the country recognized by the Church as being Catholic institutions”).

⁷⁶ See supra at note 37 (citing Official Catholic Directory exhibits).

⁷⁷ Prospect Memo. at 64 (“The Bishop’s decision to not publicly acknowledge the control he had over CCHP (evident from his decision to not cause CCHP to be listed in the Directory) changes nothing. A listing in the Directory merely constitutes a public acknowledgment by the Catholic Church of a relationship with a non-church organization. A relationship does not have to be published and promoted, to nonetheless exist.”).

Prospect Memo. at 63. However, on a motion for summary judgment, all inferences are drawn against the movant. Prospect makes the following similar argument:

Here, as the facts make plain, when SJHSRI was reorganized in 2009 and 2010, and control was split between the Bishop (as to certain religious matters) and (then, new) CCHP (as to financial and operational matters), the changes only imply that control over SJHSRI was being shifted to a secular party. The reality was different. While relatively unknown, because of the way that CCHP had been structured, the Bishop remained firmly in control of both organizations, for a period of at least four years with the ability to perpetuate control through the board nomination process.

Prospect Memo. at 55. Prospect claims that the “reality” was different from the structure of the transaction that made CCHP an independent entity, and asks the Court to find that “[w]hile relatively unknown, because of the way that CCHP had been structured, the Bishop remained firmly in control...” Id. Such arguments might be appropriate at trial, but they have no place in a motion for summary judgment.

In summary, the Bishop did not control CCHP for the following reasons:

- The Pre-Closing Board of CCHP was determined by agreement of SJHSRI and RWH;
- The Bishop only appointed 46% of the members of CCHP’s Board of Trustees during the Initial Term from January 4, 2010 to January 4, 2013, and thereafter appointed no members of the Board;
- The Bishop had no power to remove board members;
- The Bishop did not control the appointment or removal of the *ex-officio* members of the Board of Trustees (the President/Chief Executive Officer or and the Executive Vice President/Chief Operating Officer of CCHP); and
- At the conclusion of the Initial Term, the First Successor Board was appointed by a vote of seventy-five percent (75%) of CCHP’s Board of Trustees, all of whom had to be first nominated by the unanimous vote of the four members of the Nominating Committee, two (2) of whom were appointed by RWH and two (2) of whom were appointed by the Bishop.

G. CCHP's Finance Audit & Compliance Committee was not a "Principal Purpose Organization," because it was not controlled by or associated with a church

1. CCHP's Finance Audit & Compliance Committee was not controlled by a church

Prospect's contention that CCHP's Finance Audit & Compliance Committee was controlled by a church is based entirely on the claim that CCHP itself was controlled by the Bishop. Prospect Memo. at 51. As discussed, "controlled" means corporate control. The evidence is that the Bishop did not have corporate control over CCHP. The Bishop did not appoint a majority of the Board of Trustees for their Initial Term. For every term after the Initial Term, CCHP's Board of Trustees appointed their own successors, and the Bishop had no power of appointment whatsoever. The Bishop had no power of removal over any Board member, either *ex-officio* or appointed.

2. CCHP's Finance Audit & Compliance Committee was not associated with a church

Prospect does not even contend that CCHP's Finance Audit & Compliance Committee was associated with a church. Accordingly, that argument is foreclosed.

In any event, and regardless of what test is applied, it is clear that CCHP's Finance, Audit & Compliance Committee was not associated with a church because it did not share common bonds and convictions with a church. CCHP's Bylaws detail the Committee's responsibilities and scope.⁷⁸ They make no reference whatsoever to religious matters except to disclaim religious discrimination. The members of the

⁷⁸ ECF # 174-24 (CCHP Bylaws) § 4.4.

Committee were appointed by CCHP's Board of Trustees, not the Bishop.⁷⁹ The Bylaws impose no denominational requirement,⁸⁰ and there is no evidence that such a requirement was applied in practice.

In short, none of the factors to which courts refer to determine whether an entity is associated with the church are present here. See Lown, *supra*, 238 F.3d at 548 (“In deciding whether an organization shares such common bonds and convictions with a church, three factors bear primary consideration: 1) whether the religious institution plays any official role in the governance of the organization; 2) whether the organization receives assistance from the religious institution; and 3) whether a denominational requirement exists for any employee or patient/customer of the organization.”).

H. CCHP's Investment Committee was not a “Principal Purpose Organization,” because it was not controlled by or associated with a church

1. The Investment Committee was not controlled by a church

Just as Prospect argued with respect to CCHP's Finance Audit & Compliance Committee. Prospect's claim that CCHP's Investment Committee was controlled by a church is predicated entirely on Prospect's claim that CCHP itself was controlled by the Bishop. That claim should be rejected for the reasons discussed above.

⁷⁹ ECF # 174-24 (CCHP Bylaws) § 4.4.

⁸⁰ See ECF # 174-24 (CCHP Bylaws) § 2.4 (“Nondiscrimination. In its policies on employment and administration or in administering its activities and programs, the Corporation shall not discriminate on the basis of . . . religion . . .”).

2. The Investment Committee was not associated with a church

Prospect does not even contend that the Investment Committee was associated with the church.

Just as is the case with CCHP's Finance, Audit & Compliance Committee, it is clear that CCHP's Investment Committee was not associated with a church because it did not share common bonds and convictions with a church. None of the factors to which courts refer to determine whether an entity is associated with the church are present with respect to CCHP's Investment Committee. CCHP's Bylaws detail the Committee's responsibilities and scope. They make no reference whatsoever to religious matters except to disclaim religious discrimination. The members of the Committee were appointed by CCHP's Board of Trustees, not the Bishop.⁸¹ The Bylaws impose no denominational requirement, and there is no evidence that such a requirement was applied in practice.

I. SJHSRI was not controlled by or associated with a church

1. SJHSRI was not controlled by a church

It is undisputed that SJHSRI was the Plan's sponsoring employer. Accordingly, SJHSRI had to have been controlled by or associated with the Catholic Church for the Plan to qualify as a church plan during the period from January 4, 2010 through December 15, 2014.⁸²

⁸¹ ECF # 174-24 (CCHP Bylaws) § 4.4.

⁸² See 29 U.S.C. § 1002(33)(C)(ii) ("The term employee of a church or a convention or association of churches includes-- . . . (II) an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 of Title 26 and which is controlled by or associated with a church or a convention or association of churches;").

As discussed, “controlled” means corporate control. SJHSRI was not controlled by the Catholic Church. To the contrary, pursuant to Section 4.2 of SJHSRI’s Amended Bylaws effective January 4, 2010 (ECF # 174-15), all but one of the appointed members of SJHSRI’s Board of Trustees were appointed by CCHP, which was a wholly secular entity.

Between January 4, 2010 and December 15, 2014, the Bishop could also appoint one member to the SJHSRI Board of Trustees and select the chairman and vice-chairman of SJHSRI’s Board.⁸³ All other members of the SJHSRI Board of Trustees were “appointed and removed exclusively by the Class A member,” CCHP.⁸⁴

As noted, Prospect contends that the priests who served on the Board of Trustees for SJHSRI or CCHP “owed a duty of fealty to the Bishop and clearly held his proxy.” Prospect Memo. at 63. That hardly squares with the test that even Prospect acknowledges determines whether an individual board member is controlled by another entity, which is whether that entity has the power to replace the individual and designate a replacement. See Prospect Memo. at 53 (“A trustee or director is controlled by another organization if the other organization has the general power to remove such trustee or director and designate a new trustee or director. Whether a person has the power to remove or designate a trustee or director is based on facts and circumstances.”) (quoting 26 C.F.R. § 1.414(c)-5(b)). Ten out of eleven of SJHSRI’s Trustees were appointed by CCHP, and only CCHP had the power to remove them.⁸⁵

⁸³ ECF # 174-15 (SJHSRI Bylaws) §§ 4.2, 6.2.

⁸⁴ ECF # 174-15 (SJHSRI Bylaws) § 4.2.

⁸⁵ ECF # 174-15 (SJHSRI’s Bylaws) § 7.2 (Removals: Any Trustee or Officer except the Bishop may, at any time, be removed from office with or without cause by the Class A Member.”).

In short, all financial, strategic, and administrative authority rested with the Class A member, CCHP, not the Bishop. For example, beyond appointing and removing SJHSRI's trustees (except RCB's one *ex-officio* designee), CCHP was empowered to appoint and/or remove SJHSRI's President/Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Secretary, and Treasurer.⁸⁶

2. SJHSRI was not associated with a church

SJHSRI was not associated with the Diocese of Providence or the Catholic Church. There was no denominational requirement for members of SJHSRI's Board of Trustees either before or after January 4, 2010.⁸⁷ Similarly, there was no denominational requirement for patients who sought medical care from SJHSRI. Finally, Prospect has offered no evidence that the Catholic Church provided any financial support to SJHSRI. Again, none of the Lown factors are present with respect to SJHSRI.

Prospect relies on SJHSRI's listing in the Catholic Directory as definitive proof of SJHSRI's association with the Catholic Church. This listing is also relevant to the issue of whether SJHSRI was tax-exempt, as also required by 29 U.S.C. 1002(33)(C)(i), and is also discussed in detail *infra* at 49–56, in connection with that issue.

Prospect has not offered competent evidence that SJHSRI in fact was listed in the Catholic Directory. Prospect bases its claim that SJHRI was listed in the Catholic Directory on paragraph 5 of the Declaration of Marshall Raucci dated June 26, 2020,

⁸⁶ ECF # 190-8 (SJHSRI Amended Articles), Ex A at Part B(ii) & (iv); ECF # 174-15 (SJHSRI Bylaws) §§ 6.2, 7.2.

⁸⁷ See generally ECF # 174-15 (SJHSRI Bylaws) § 4.2 (reflecting no denominational requirement); Ex. 1 (2007 SJHSRI Bylaws) at Art. 5 (same).

ECF # 190-3. See Prospect’s Statement of Undisputed Facts ¶ 3 (“At all relevant times, SJHSRI was associated with the Catholic Church and was listed in the Official Catholic Directory (the ‘Directory’) as a subordinate organization that was ‘operated, supervised, or controlled by or in connection with the [] Catholic Church.’ (Declaration of Marshall Raucci dated June 26, 2020 (“Raucci Decl.”) at para 5.).”) Raucci’s declaration constitutes impermissible hearsay. It also violates the best evidence rule, since the best evidence of what is in the Catholic Directory is the Catholic Directory itself, which Prospect has failed to submit in its motion papers.

Even if Prospect’s failure to submit the listing for SJHSRI is overlooked, the significance of the listing is a question of fact. Prospect ignores Plaintiffs’ contention and the evidence of a corrupt bargain, in which SJHSRI was listed in the Catholic Directory even though it should not have been, Fatima Hospital was relieved of potential insolvency associated with the Plan, and Prospect agreed to operate Fatima Hospital in accordance with the USCCB’s Ethical Directives and to refrain from performing “Prohibited Procedures,” most notably abortions.

The proof of this corrupt bargain is set forth in Plaintiffs’ Supplemental Response to Prospect’s Statement of Undisputed Facts served and filed herewith. Plaintiffs submit that this is more than sufficient to raise disputed issues of fact concerning Plaintiffs’ allegation that the listing of SJHSRI in the Catholic Directory was fraudulent. SJHSRI’s tax-exempt status cannot depend upon a fraud.

The significance of the listing of SJHSRI in the Catholic Directory would be a question of fact even in the absence of any evidence that the listing was wrongful. See Walsh v. Mut. of Omaha Ins. Co., No. 4:16 CV 800 RWS, 2016 WL 5076197, at *3 (E.D.

Mo. Sept. 20, 2016) (“The mere fact that SLU may be listed in something called the ‘Official Catholic Directory’ is not relevant—no less persuasive—evidence that the Catholic Church plays an official role in the governance of SLU and its hospital.”). At most that listing is just evidence to take into account in applying the Lown factors, especially the first factor of whether the religious institution plays any official role in the governance of the organization. See Torres v. Bella Vista Hospital, Inc., CIVIL 06-2158 (JAG), 2009 WL 10717769, at *6 (D.P.R. 2009) (“The sum of all of these facts [including listing in the Catholic Directory] is sufficient to conclude that the church played at least some official role in the governance of the Hospital, and that the first *Lown* factor favors defendants.”).

In short, the issue of whether SJHSRI was “associated with” the Catholic Church involves disputed issues of fact and cannot be resolved in connection with Prospect’s cross motion for summary judgment.

J. SJHSRI was not tax-exempt

The definition of church plan requires that the plan sponsor be tax exempt under 26 U.S.C. § 501.⁸⁸ To qualify as a tax-exempt organization, SJHSRI was required to a) have a statutorily-recognized approved⁸⁹ purpose, and b) either obtain its own advance

⁸⁸ See 29 U.S.C. § 1002(33)(C)(i) (“The term employee of a church or a convention or association of churches includes-- . . . (II) an employee of an organization, whether a civil law corporation or otherwise, **which is exempt from tax under section 501 of Title 26** and which is controlled by or associated with a church or a convention or association of churches;”) (emphasis supplied).

⁸⁹ Such as “religious, charitable, scientific, testing for public safety, literary, or educational purposes.” See 26 U.S.C. § 501(c)(3). See 26 C.F.R. § 1.501(c)(3)-1(a)(1) (organization must be both organized and operated exclusively for one or more of the statutory purposes).

determination⁹⁰ by the IRS of its tax-exempt status under 26 U.S.C. § 501 or qualify under a group exemption previously issued by the Internal Revenue Service.⁹¹ For purposes of Prospect's cross motion for summary judgment, Plaintiffs do not dispute that SJHSRI had a statutorily recognized and approved purpose under 26 U.S.C. § 501(c)(3). However, SJHSRI neither obtained its own advance determination by the IRS of its tax-exempt status, nor qualified under a group exemption previously issued by the Internal Revenue Service.

Here, it is not even alleged that SJHSRI ever sought or obtained its own advance determination from the IRS.⁹² Prospect also has not identified any group exemption under which SJHSRI actually qualified for tax exemption. Accordingly, it has offered no evidence that SJHSRI was tax exempt. As a result, it has not demonstrated that the requirements for church plan status of 29 U.S.C. § 1002(33)(C)(i) have been satisfied at any time whatsoever.

Plaintiffs will, however, address this issue assuming, *arguendo*, that SJHSRI claimed tax-exempt status as a subordinate organization under a group exemption that the Internal Revenue Service issued to the USCCB by a determination letter dated March 25, 1946, which the IRS has renewed annually since then. See Loffler, CatholicPac: Why the United States Conference of Catholic Bishops Should (Probably)

⁹⁰ See 26 U.S.C.A. § 508(a) (all organizations organized after October 9, 1969 must first apply for 501(c)(3) status); 26 C.F.R. § 1.508-1(a)(3)(c) (exception to application requirement, for "Subordinate organizations (other than private foundations) covered by a group exemption letter").

⁹¹ With exceptions not relevant here, such as the exception for churches. See 26 U.S.C. § 508(a) ("[C]hurches, their integrated auxiliaries, and conventions or associations of churches" are not required to obtain from the Internal Revenue Service advance recognition of their tax-exempt status.). Prospect does not (and cannot) contend that SJHSRI was a church or an integrated auxiliary of a church.

⁹² Prospect has offered no evidence of such a determination, and Plaintiffs have found no evidence of it in the document production from SJHSRI.

Lose its 501(c)(3) Tax Exempt Status, 14 Rutgers Journal of Law & Religion 69-146, at 73-74 (2012) (explaining USCCB's group exemption).

That determination letter granted tax-exempt status to the “agencies and instrumentalities, as well as the educational, charitable, and religious institutions, **operated, supervised, or controlled by or in connection with** the Roman Catholic Church in the United States, its territories or possessions that are subordinate organizations under your group tax exemption.” See Plaintiffs’ Supp. Response to Prospect’s SUF, Exhibit 50 (2011 IRS letter to the USCCB) (emphasis supplied).

Prospect has not submitted any entries from the Catholic Directory listing SJHSRI. Instead, Prospect bases its claim that SJHRI was listed in the Catholic Directory on paragraph 5 of the Declaration of Marshall Raucci dated June 26, 2020, ECF # 190-3. See Prospect’s Statement of Undisputed Facts ¶ 3 (“At all relevant times, SJHSRI was associated with the Catholic Church and was listed in the Official Catholic Directory as a subordinate organization that was ‘operated, supervised, or controlled by or in connection with the [] Catholic Church.’ (Declaration of Marshall Raucci dated June 26, 2020 (“Raucci Decl.”) at para 5).)”)

However, all the Raucci Declaration attests to is that SJHSRI was “listed” in the Catholic Directory “as a subordinate organization that was operated, supervised, or controlled by or in connection with the Roman Catholic Church in the United States.” Mere listing does not make it so. Mr. Raucci does not assert that *in operation or in fact* SJHSRI was “operated, supervised, or controlled by or in connection with the Roman Catholic Church in the United States.” He certainly does not assert that SJHSRI was “affiliated” with the USCCB.

An entity cannot be listed in the Catholic Directory unless it is “operated, supervised, or controlled by or in connection with the Roman Catholic Church. That is required to prove that the entity is a supporting organization of the Catholic Church. See Fitzgerald, The Catholic Directory: Civil and Canon Law Requirements, 30 Cath. Law. 107-133, 118 (2006) (“The Group Ruling covers the agencies, instrumentalities, and all educational, ‘charitable and religious institutions operated, supervised, or controlled by or in connection with the Roman Catholic Church’ in the United States. **This defines the relationship with the Church necessary for inclusion in the OCD [Official Catholic Directory].**”) (emphasis supplied). However, the IRS has offered no guidance on the meaning of the phrase “operated, supervised, or controlled by or in connection with.” Id. at 117, n.59 (“This relationship has never been defined by the IRS nor has the USCC ever sought such a definition.”).⁹³

Congress employed essentially the same language to provide favorable tax treatment for subordinate organizations that might otherwise not be available to them as private foundations. See 26 U.S.C. § 509(a)(3)(B); id. at 117, n.59. (“The language ‘operated, supervised, or controlled by or in connection with’ mirrors the language of section 509(a)(3)(B) [26 U.S.C. § 509(a)(3)(B)] of the [Internal Revenue] Code...”). The IRS has explicated the meaning of the phrase in that context. Treas. Reg. § 1.509(a)-4. The relationship styled as “operated, supervised or controlled by” is

comparable to that of a parent and subsidiary, where the subsidiary is under the direction of, and accountable or responsible to, the parent organization. This relationship is established by the fact that a majority of the officers, directors, or trustees of the supporting organization are appointed or elected by the governing body, members of the governing

⁹³ The IRS is currently considering a proposed revenue procedure which would define this relationship prospectively. See Notice 2020-36, 2020-21 IRB 840.

body, officers acting in their official capacity, or the membership of one or more publicly supported organizations.

Treas. Reg. § 1.509(a)-g(1)(i).

The relationship styled as “supervised or controlled in connection with” requires common supervision or control by the persons supervising or controlling both the supporting organization and the publicly supported organizations to insure that the supporting organization will be responsive to the needs and requirements of the publicly supported organizations. Therefore, in order to meet such requirement, the control or management of the supporting organization must be vested in the same persons that control or manage the publicly supported organizations.

Treas. Reg. § 1.509(a)-g(1)(i).

It is clear that the Diocese of Providence and SJHSRI did not have a relationship “comparable to that of a parent and a subsidiary.” To the contrary, the evidence is that it is the relationship of *CCHP* and SJHSRI, not the relationship of the Diocese of Providence and SJHSRI, that was “comparable to that of a parent and a subsidiary.” Similarly, Prospect has offered no evidence that the same individuals managed both SJHSRI and the church entity in question (i.e., the Bishop or the Diocese of Providence), so that SJHSRI could be said to have been supervised or controlled in connection with the Diocese of Providence. To the contrary, virtually all SJHSRI’s directors and all of its officers had no role whatsoever concerning the Diocese of Providence or the Bishop.

In addition to complying with the requirements for inclusion in the Catholic Directory, an entity claiming tax-exempt status based upon the group exemption issued to the USCCB must comply with Treasury regulations that are specifically applicable to group exemptions. These regulations provide that a subordinate organization is only

able to rely on the group exemption if the subordinate organization is “[s]ubject to the central organization’s general supervision and control”:

To qualify for a group exemption, the central organization and its subordinates must have a defined relationship. Subordinates must be:

- **Affiliated with the central organization;**
- Subject to the central organization’s **general supervision or control;** and
- Exempt under the same paragraph of IRC 501(c), though not necessarily the paragraph under which the central organization is exempt.

IRS Publication 4573 (Rev. 10- 2019) (emphasis supplied). See Rev. Proc. 80-27, 1980-1 C.B. 677 and Treas. Reg. § 601.201(n)(8), Treas. Reg. § 601.201(n)(8) (setting forth identical requirements). See also Loffler, CatholicPac: Why the United States Conference of Catholic Bishops Should (Probably) Lose its 501(c)(3) Tax Exempt Status, *supra*, at 74 (“Furthermore, these subordinates must be ‘[a]ffiliated with the central organization [and] . . . [s]ubject to the central organization’s general supervision or control.’”) (quoting Group Exemptions, IRS Publication 4573 (quoting Rev. Proc. 80-27, 1980-1 C.B. 677)).

Thus, for SJHSRI to qualify under this group exemption, SJHSRI must have been

- listed in the Catholic Directory;
- affiliated with the USCCB;
- “operated, supervised, or controlled by or in connection with the Roman Catholic Church in the United States;” and
- subject to the USCCB’s “general supervision or control.”

The terms “affiliation,” “general supervision” and “control” are not defined. See IRS Notice 2020-36, 2020-21 IRB 840, 842 (issued May 4, 2020) (“Rev. Proc. 80-27,

however, does not define the terms 'affiliation,' 'general supervision,' or 'control.' This lack of definition has caused confusion and created a lack of consistency for both the IRS and central organizations.”).

Prospect does not even allege that the USCCB or the Catholic Church exercised any general (or specific) supervision or control over the Diocese of Providence, much less over SJHSRI. The USCCB’s Mission Statement makes clear that the USCCB does not control or supervise other entities:

Mission

The mission of the United States Conference of Catholic Bishops (see CIC, c. 447) is to support the ministry of bishops with an emphasis on evangelization, by which the bishops exercise in a communal and collegial manner certain pastoral functions entrusted to them by the Lord Jesus of sanctifying, teaching, and governing (see *Lumen gentium*, no. 21).

This mission calls the Conference to:

Act collaboratively and consistently on vital issues confronting the Church and society (see *Christus Dominus*, no. 38.1)

Foster communion with the Church in other nations, within the Church universal, under the leadership of its supreme pastor, the Roman Pontiff

Offer appropriate assistance to each bishop in fulfilling his particular ministry in the local Church (Cf. *Apostolos suos*, 1998.)

The conference of bishops ... is a grouping of bishops of a given nation

... whereby, according to the norm of law, they jointly exercise certain pastoral functions on behalf of the Christian faithful of their territory in view of promoting that greater good which the Church offers humankind, especially through forms and programs of the apostolate which are fittingly adapted to the circumstances of the time and place. (CIC, c. 447)

<https://www.usccb.org/about/mission-statement> (accessed November 23, 2020). This Mission Statement does not suggest that USCCB claims any authority or right of supervision or control over any of the entities listed in the Catholic Directory.

Indeed, the USCCB itself acknowledges that it has no authority over either the Catholic Dioceses or the more local entities listed in the Catholic Directory within the Catholic Dioceses. See Letter dated August 16, 2020 from the Office of the General Counsel of USCCB to the Internal Revenue Service, Comments to IRS Notice 2020-36 (final - submitted).pdf, at 12 ([https://www.usccb.org/sites/default/files/about/general-counsel/rulemaking/upload/Comments%20to%20IRS%20Notice%202020-36%20\(final%20-%20submitted\).pdf](https://www.usccb.org/sites/default/files/about/general-counsel/rulemaking/upload/Comments%20to%20IRS%20Notice%202020-36%20(final%20-%20submitted).pdf)) (accessed November 23, 2020) (“Our ecclesial polity confers on an Episcopal Conference, such as USCCB, virtually no ecclesial authority over dioceses and the other more local Catholic entities that populate the group ruling.”).

The Articles of Incorporation of SJHSRI do not provide that SJHSRI was under the “general supervision or control” of the Diocese of Providence or the USCCB. The Bylaws of SJHSRI also do not provide that SJHSRI was under the “general supervision or control” of the Diocese of Providence or the USCCB. Instead, they show that SJHSRI was under the control and supervision of CCHP. In short, SJHSRI did not qualify under the USCCB’s group exemption because SJHSRI was not subject to the general control or supervision of either the USCCB or the Diocese of Providence.

K. ERISA’s “cure” provisions are irrelevant

In its opposition to Plaintiffs’ motion for summary judgment, Prospect made two arguments based on ERISA’s cure provisions, 29 U.S.C. §1002(33)(D). Prospect first

argued that any absence of a “principal purpose organization” during the transition period in 2009-2010 was cured when the CCHP Finance Committee and the CCHP Investment Committee came into existence.⁹⁴ Plaintiffs responded that this argument “is irrelevant because it mischaracterizes Plaintiffs’ argument as being focused on the transition period before the 2011 Plan came into effect on July 1, 2011. That is not Plaintiffs’ argument.”⁹⁵

Prospect’s second argument focused on the period from July 1, 2011, which was the effective date of the 2011 Plan, to the present. Unlike the first argument, Prospect did not contend that any deficiencies that existed during this period were cured. Instead, Prospect’s argument was that any failures to comply with the requirements for church plans during this period should be disregarded because they *could have been cured*, even though they *were not cured*.⁹⁶ Plaintiffs’ response to this argument was twofold: a) 29 U.S.C. § 1002(33)(D) provides that, when a Plan is “cured,” the cure is retroactive, not that “uncured” deficiencies are excused; and b) Prospect shares

⁹⁴ See Prospect Memo. at 64 (“Even if, for some reason, the Affiliation process caused some lapse to occur while the administration, and the funding, of the Plan were transferring from the Bishop’s Retirement Board to the CCHP Finance Committee and the CCHP Investment Committee, the actions taken to put in place and empower the CCHP Finance Committee and the CCHP Investment Committee and the actions those Committee then took to provide for the administration of the Plan and deal with its funding problems from 2011 through 2014 corrected those defects retroactive to when such lapses occurred (if any did occur), by operation of ERISA §3(33)(D) (codified at 29 U.S.C. §1002(33)(D)).”).

⁹⁵ Plaintiffs’ Reply Memo. at 90–91 (After noting “[t]hat is not Plaintiffs’ argument,” stating that, instead, “Plaintiffs contend that as of July 1, 2011, SJHSRI’s Board of Trustees and CCHP’s Finance, Audit & Compliance Committee, and CCHP’s Investment Committee did not qualify as a “principal purpose organization,” because their principal purpose or principal function was never administration of the Plan.”) (footnotes omitted).

⁹⁶ Prospect’s Memo. at 68 (“At any point in that eight-year period, if the Plan had (or, had been found to have) structural or operational defects or compliance problems, such as the failure of an administering organization or a funding organization to qualify as a principal-purpose organization, those then in charge of the Plan, or SJHSRI, had the opportunity to correct that failure. Had they done so, the Plan would have been considered retroactively corrected, and would have remained a non-electing church plan.”).

responsibility with SJHSRI for failing to “cure” the deficiencies that deprive the Plan of church plan status.⁹⁷

Prospect repeats these arguments in support of its cross motion for summary judgment,⁹⁸ but they are just as invalid in that context as when Prospect asserted them in opposition to Plaintiffs’ motion for summary judgment.

V. CONCLUSION

Prospect’s cross motion for summary judgment should be denied.

Respectfully submitted,

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Dated: November 23, 2020

⁹⁷ See Plaintiffs’ Reply Memo. at 93 (“Prospect cites absolutely no authority whatsoever for the proposition that the theoretical possibility that such failures could have been corrected can and should lead the Court to disregard those failures and conclude that the Plan satisfied the requirements for church plans, even though the Plan clearly did not satisfy those requirements. The plain meaning of 29 U.S.C. § 1002(33)(D) is that it does not apply counter-factually. The deficiency has to be corrected for the plan to qualify retroactively as a church plan. In other words, Prospect’s argument is not based on the actual function of 29 U.S.C. § 1002(33)(D) to retroactively cure a plan.”).

⁹⁸ See Prospect Memo. at 67–68 (“At any point in that eight-year period, if the Plan had (or, had been found to have) structural or operational defects or compliance problems, such as the failure of an administering organization or a funding organization to qualify as a principal-purpose organization, **those then in charge of the Plan, or SJHSRI, had the opportunity to correct that failure.** Had they done so, the Plan would have been considered retroactively corrected, and would have remained a non-electing church plan.”) (emphasis supplied).

LR Cv 7(c) REQUEST FOR ORAL ARGUMENT

Pursuant to LR Cv 7(c), Plaintiffs respectfully request oral argument and estimate that two hours will be required.

CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the within document was electronically filed on the 23rd day of November, 2020 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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