UNITED STATES DISTRICT COURT
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.

Case No.: 1:18-cv-00328-WES-LDA

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

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Defendants Prospect Medical Holdings, Inc., Prospect East Holdings, Inc., Prospect Chartercare, LLC, Prospect Chartercare SJHSRI, LLC, and Prospect Chartercare RWMC, LLC (together, the "Prospect Defendants") submit this Opposition to the Motion for Summary Judgment as to Count IV of the First Amended Complaint, ECF No. 173, filed by Stephen Del Sesto as Receiver and Administrator of the St. Joseph Health Services of Rhode Island Retirement Plan (respectively, "Del Sesto" and the "Plan"); and further submit their Cross-Motion for Summary Judgment as to that same Count IV.

INTRODUCTION

The sole question to be decided, both in Plaintiffs' Motion for Summary Judgment on Count IV of the Amended Complaint ("Plaintiffs' Motion") and in the cross-motion the Prospect Defendants file *instanter*, is <u>when</u> the Plan lost its status as a "church plan" and became subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA").[1] Plaintiffs look to an earlier date, in 2011 or 2013, but the actual text of the statute and the facts support a date significantly later.

Plaintiffs[2] contend that the Plan became subject to ERISA when it was amended and restated, effective July 1, 2011, or, at the latest, on April 29, 2013, when the Bishop took

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[1] Any doubt as to <u>whether</u> the Plan is subject to ERISA was definitively resolved on April 15, 2019, when the state court-appointed receiver, Stephen Del Sesto ("Del Sesto"), filed an irrevocable election to subject the Plan to ERISA by appending that election to a Form 5500 (Annual Report) filed that same day.

[2] In this Opposition and Cross Motion, the Prospect Defendants choose to not challenge the individual Plan participants' standing to join in this litigation -- but the issue certainly is not conceded. Rather, we reserve the right to challenge the individual participants' standing in the future, particularly in light of the U.S. Supreme Court's ruling in *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615 (June 1, 2020). In *Thole*, the Court held that participants covered by a defined benefit pension plan lack Article III standing unless they can effectively show they have, or are likely to have, a tangible loss; the Court in *Thole* also strongly suggested that Pension Benefit Guaranty

documented action recognizing that the administration and the funding of the Plan had been turned over to the St. Joseph Health Services of Rhode Island ("SJHSRI") board of trustees (the "SJHSRI Board") and to the Finance Committee of CharterCARE Health Partners (respectively, the "CCHP Finance Committee" and "CCHP"). Plaintiffs' Motion at 24-26.

Plaintiffs state correctly that three separate tests[3] must each be met for an employee pension benefit plan to qualify as a "church plan" under the "principal-purpose organization" rule.[4] Plaintiffs' Motion at 1-2 and 20-24. However, Plaintiffs focus on just one of the three tests – the "principal purpose or function" test – and contend that the failure to satisfy that test as of July 1, 2011 (or April 29, 2013) caused the Plan to lose its church plan status and become subject to ERISA at that point. Plaintiffs' Motion at 4.

Plaintiffs' argument is critically flawed in three respects. First, there are several ways that an organization can satisfy the "principal purpose or function" test set forth in ERISA § 3(33)(C)(i) (*codified at* 29 U.S.C. § 1002(33)(C)(i)); the one approach Plaintiffs describe in their Motion, which focuses exclusively on singularity of purpose and control over plan

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Corporation benefit guarantees should be taken into account when determining whether a participant has a tangible loss.

[3] Plaintiffs' Motion, in its discussion of *Medina v. Catholic Health Initiatives*, 877 F. 3d 1213 (10th Cir. 2017) ("*Medina*") and a handful of other church plan cases, describes the three tests as follows: (1) whether the entity whose employees are covered by the plan is a tax-exempt nonprofit organization associated with a church; (2) whether the plan at issue is maintained or funded by an organization which actually qualifies as a principal-purpose organization; and (3) whether the organization seeking to qualify as the principal-purpose organization is itself associated with a church. Plaintiffs' Motion at 22-24. This test reflects requirements for "church plan" status under Section 3(33) of ERISA.

[4] Plaintiffs describe this test as the "principal-purpose organization" test, which is the term the Supreme Court gave it, in *dicta*, in *Advocate Health Care Network v. Stapleton*, 581 U.S. ___, 137 S. Ct. 1652, 1656-57 (2017) ("*Stapleton*").

administration and heavily relies on a handful of documents without considering other evidence, is not the only possible approach. To get this result, Plaintiffs do not even address the flexible nature of ERISA §3(33)(C)(i), relying on court *dicta* rather than the statutory text.

Second, Plaintiffs assume a formalism requirement – that certain activities and decisions must be documented – that simply cannot be found within the four corners of ERISA §3(33)(C). Moreover, there are examples, found elsewhere in ERISA (and in companion provisions in the Internal Revenue Code (alternatively, the "Code" or "IRC")), where Congress specifies what is to be set forth in the relevant "instrument."[5]

Third, Plaintiffs completely misread and misapply ERISA §3(33) when they contend that its provisions need to be "strictly and narrowly construed" and that a "tight reading of [all] exemptions from comprehensive schemes of this kind" is required, simply because courts have looked at other ERISA provisions and concluded that *those* provisions require such an approach. Plaintiffs' Motion at 18-20. Here, the question relates to the intersection of a religious entity and ERISA law; the First Amendment's guarantee of religious liberty dictates that a liberal construction be given to the "church plan" exemption found at ERISA §3(33); indeed, the law has long worked to avoid constitutional concerns in such circumstances, and the fact that

[5] *E.g.*, ERISA §3(16)(A)(i) (indicating that the "administrator" typically is "the person specifically so designated **by the terms of the instrument** under which the plan is operated"); ERISA §402(a) ("Every employee benefit plan shall be established and maintained pursuant to **a written instrument**. **Such instrument** shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan"); and IRC §401(a)(2) ("A trust [ ] forming part of a stock bonus, pension, or profit-sharing plan of an employer [ ] shall constitute a qualified trust under this section . . . (2) **if under the trust instrument it is impossible**, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be [ ] used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries . . .") (Emphasis added.)

unrelated provisions in ERISA may be tightly construed must yield to such considerations here. Certainly, when Congress enacted ERISA, it evidenced just such an intention: ERISA §3(33)[6] not only provides church organizations and their affiliates with several different ways to avoid ERISA's regulatory construct, but it contains a unique statutory cure provision that enables plans and their promoters literally to fix any "church plan" compliance problem that could conceivably arise and thereby cause the plan to requalify for the church plan exemption retroactively. Plaintiffs cannot simply wish away this statutory provision because it is inconvenient for them.

These flaws doom Plaintiffs' Motion, as it renders them unable to pass the summary judgment threshold. Instead, they expose blind spots in Plaintiffs' logic and raise several potentially dispositive questions of fact, or questions of mixed fact and law, that arise from looking beyond the plan documents and at the actual activities surrounding the Plan:

- Did the SJHSRI Board have a dual role, both as a hospital board of trustees and as the Plan's Retirement Board, and simply suffer from poor record-keeping and a lack of anything meaningful to do as respects the Plan?
- Did the CCHP Finance Committee, recognized in the April 29, 2013, resolutions Plaintiffs appended as Exhibit 22 to their Motion as fulfilling some sort of Plan administrative role, have as its "principal purpose," or as its "function," the administration of the Plan or the funding of the Plan?
- Did the CCHP Investment Committee, which played a significant role in monitoring the Plan's funded status after the affiliation fully took effect, have as its "principal purpose," or as its "function," the funding of the Plan?

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[6] *See* Section 407 of the Multiemployer Pension Plan Amendments Act ("MPPAA"), P.L. 96-364, 94 Stat. 1208, 1303-07 (Sept. 26, 1980), amending ERISA § 3(33). Per MPPAA § 407(c), those amendments were retroactively effective to January 1, 1974.

- Even if those in charge of maintaining or funding the Plan at certain points in time ran afoul of the "principal purpose organization" requirements, were those problems subsequently remedied – by changed circumstances, or otherwise – thus causing the Plan to requalify – retroactively?

Plaintiffs' Motion leaves such important fact-based questions, and mixed questions of law and fact, unasked and unanswered. The fact that such questions exist (and, may not be the only ones to be found in the present circumstances) provide strong support for the proposition that Plaintiffs' focus is far too narrow to support a finding of partial summary judgment. Such questions strongly suggest that Plaintiffs are looking in the wrong places for answers in their determination to find the earliest possible date the Plan failed to comply with ERISA's "church plan" requirements.

Because Plaintiffs' Motion exalts formalisms over facts and relies on too narrow and unforgiving a view of ERISA's church plan exemption – thus leaving unresolved and debatable key factual questions and key mixed questions of fact and law – Plaintiffs' Motion should be denied.

In contrast, the Prospect Defendants submit their own Cross-Motion for Summary Judgment as to Count IV of the Amended Complaint, seeking a ruling that the Plan ceased to qualify as a non-electing church plan on or about December 15, 2014, when control over the Plan was permanently turned over to the then-President of SJHSRI and an attorney SJHSRI had retained, who then maintained the Plan until petitioning it into receivership on August 16, 2017.

COUNTERSTATEMENT OF RELEVANT FACTS

1995-2009

From at least 1995 through 2008, the Rhode Island nonprofit corporation known as St. Joseph Health Services of Rhode Island (here, "SJHSRI") was controlled by the Bishop of the

Diocese of Providence, Rhode Island (the "Bishop") and owned and operated both St. Joseph Hospital and Our Lady of Fatima Hospital (the "Catholic Hospitals"). Throughout that same period, SJHSRI was controlled by and closely associated with the Roman Catholic Church (the "Catholic Church"), and its Catholic Hospitals were operated consistent with the Catholic Church's healing mission.[7] Reflecting that close connection, SJHSRI 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."[8]

In connection with SJHSRI's employment of hundreds of nurses and other personnel at the Catholic Hospitals, SJHSRI sponsored, maintained and substantially funded the Plan during that period.[9] The Plan was administered by a Retirement Board (the "Retirement Board") whose members were hand-picked by the Bishop.[10] The Bishop also chaired the Retirement Board.

Even though the Retirement Board had, and exercised, plenary control over the Plan, SJHSRI and the SJHSRI Finance Committee (a subordinate board committee populated exclusively by SJHSRI Board members) handled several of the ongoing administrative duties with respect to the Plan, including everything from the day-to-day administrative duties to overseeing consultants and actuaries and making investment decisions.

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[7] *See* Defendants Prospect Medical Holdings, Inc., Prospect East Holdings, Inc., Prospect Chartercare, LLC, Prospect Chartercare SJHSRI, LLC, And Prospect Chartercare RWMC, LLC's Statement Of Undisputed Material Facts, filed *instanter* ("Defendants' Undisputed Facts"), at ¶2.

[8] Defendants' Undisputed Facts, at ¶3.

[9] Defendants' Undisputed Facts, at ¶s 4-5.

[10] *See* Article 18.1 of the 1999 restatement of the Plan (ECF No. 174-9).

2009: The Affiliation

Reorganizing

Several things changed in 2009. As a result of ongoing and significant financial issues that threatened the continuing viability of SJHSRI, SJHSRI and Roger Williams Hospital, a then-independent Rhode Island non-profit corporation and its affiliates ("RWH"), entered into a "Memorandum of Understanding" ("MOU") on May 12, 2008.[11] Under the MOU, the parties thereto agreed in principle to affiliate and form a new, single hospital system (the "Affiliation").[12] The Affiliation was ultimately approved by the Rhode Island Department of Health ("RIDOH") and the Rhode Island Attorney General ("RIAG"), and put into effect in late 2009 and early 2010.[13]

The MOU expressly provided that it was "a fundamental understanding of the Parties that the System shall be structured and governed in a manner that will preserve the Catholicity of SJHSRI …" (MOU at p. 1.) Pursuant to the MOU, "SJHSRI will maintain its designation as a Catholic hospital operating in full compliance with the social and ethical teachings of the Catholic Church, including the Religious and Ethical Directives for Catholic Health Care Services, as promulgated by the United States Conference of Catholic Bishops and adopted by the Bishop ("ERDs")." (MOU at. p. 4.)

Consistent with that MOU, as of February 2, 2009, SJHSRI, RWH, and the Bishop entered into a Health Care System Affiliation and Development Agreement (the "Affiliation

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[11] *See* Plaintiffs' Exhibit 11 (ECF Document 174-11).

[12] *Id. Also,* Defendants' Undisputed Facts, at ¶19.

[13] Defendants' Undisputed Facts, at ¶16.

Agreement").[14] The Affiliation Agreement committed those parties to reorganize the two hospitals into a combined health system and organize CharterCare Health Partners as a new tax-exempt, non-profit Rhode Island corporation (alternatively, "CCHP" or "CCCB"[15]), which would function as a parent organization for both SJHSRI and RWH and not only provide strategic oversight but also financial, administrative and organizational support to both of those operating entities on all matters except certain religious, pastoral and related matters.[16] Regarding those matters, the Bishop was to have a continuing and controlling role. Indeed, the Affiliation Agreement notably included provisions to ensure that SJHSRI would remain a Catholic hospital despite being affiliated with a secular system and that "SJHSRI [would] continue to operate consistent with the principles and mission of a Catholic hospital responsive to the needs of the poor and disenfranchised." (Affiliation Agreement at p. 2.)[17]

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[14] *See* Plaintiffs' Exhibit 14 (ECF Document 174-14).

[15] CCHP was later renamed the CharterCare Community Board, or "CCCB."

[16] One of the less apparent, but critically important, elements of the Affiliation lay with the efficiencies the new hospital system was intended to provide. Relevant here, the Affiliation Agreement called for organizational changes to be made to each of the operating entities' articles and bylaws, to cause activities that had been conducted at the operating entity level to, in effect, migrate and transfer to the newly formed parent organization, CCHP. That notably included functions that the operating organizations' boards of trustees and board-level committees had been performing. (June 26, 2020 Declaration of Kenneth H. Belcher ("Belcher Decl.") at ¶s 19, 22 & 25-26.)

[17] As previously noted, the Affiliation Agreement contained certain Catholicity Covenants whereby the parties agreed that CCHP "[would] encourage and support the maintenance and support the maintenance of Catholicity at SJHSRI" and SJHSRI "[would] remain a Catholic hospital." (Affiliation Agreement at Article 3.) These requirements were incorporated into CCHP's Bylaws as well. *See* Plaintiffs' Exhibit 24 (EFC Document 174-24) (CCHP Bylaws), sect. 5.

Thus, from its inception, the Affiliation – starting with the incorporation of CCHP itself on February 2, 2009 – was carefully structured to ensure that the Bishop, and thereby the Catholic Church, not only would maintain its close association with SJHSRI, but also would have control, or effective control, over the governance and operation of CCHP, and thus have at least indirect control over SJHSRI.

Formation, Structuring of CCHP

The Affiliation Agreement specified that the initial Board of Trustees of CCHP (the "CCHP Board") would consist of eight (8) trustees designated by the Bishop and seven (7) trustees designated by the Board of Trustees of RWH (the "Initial Board"), and that the Initial Board would serve for a general term of three (3) years, commencing on July 1, 2010, and ending on June 30, 2013, at the conclusion of the transition period provided for in the Affiliation Agreement (the "Initial Term").[18] Thus, the Bishop – at least for a period of years – had the right to directly control the CCHP Board. (Affiliation Agreement at sec 2.1.1.) The Affiliation Agreement further provided that the initial Vice-Chair of the CCHP Board of Trustees would be Monsignor Paul Theroux,[19] who was universally considered the Bishop's designate (Affiliation Agreement, sect. 2.1.8.); Edwin Santos served as the initial Chair of the CCHP Board.

The eight CCHP trustees designated by the Bishop, all hand-picked, consisted of Monsignor Theroux (Vice-Chair); Reverend Brian Shanley; and incumbent SJHSRI board members Joseph DiStefano; Dan Ryan; Kevin Stiles; Marshall Raucci, Jr.; the Honorable Joseph Weisberger; and Peter DeBlasio. These provisions were dutifully incorporated into CCHP's

[18] Defendants' Undisputed Facts, at ¶30.

[19] June 26, 2020 Declaration of Marshall Raucci, Jr. ("Raucci Decl."), at ¶22.

Bylaws. (CCHP Bylaws, sect. 4.) Not surprisingly, those same Bishop-designated individuals found their way onto the various board committees charged with taking over many of the rights, duties and obligations previously held by the board committees that had served SJHSRI and RWH, as the activities historically handled by the SJHSRI Board and its constituent committees migrated to the CCHP Board and its constituent committees. *Compare* SJHSRI Bylaws at sect. 4.5 (providing for the systematic transfer of committee responsibilities from SJHSRI board committees to counterpart CCHP committees, on or about June 30, 2010) *with* CCHP Bylaws at Sec. 4.4 (providing for the establishment of various standing committees, mirroring those found at SJHSRI and, presumably, at RWH).[20]

The process of electing CCHP Board members, at the conclusion of and following the Initial Term, was designed to prevent wholesale changes from occurring in the CCHP Board. First, CCHP's Bylaws provided that new CCHP Board members could only be elected by the affirmative vote of a super-majority (75%) of the existing CCHP Board members – a process requiring the affirmative vote of twelve (12) of the then-fifteen (15) members (including at least five of the eight hand-picked by the Bishop).[21] Second, new candidates (or, incumbent board members sitting for re-election) had to be nominated by a Nominating Committee consisting of four (4) CCHP Board members, two (2) of whom were appointed by the Bishop, and a candidate could only be put forward by unanimous vote of the Nominating Committee. (Affiliation Agreement at sect. 2.1.3; CCHP Bylaws at sect. 4.4(d).)[22] Moreover, and equally relevant, the

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[20] *See* Plaintiffs' Exhibits 15 (ECF Document 174-15; SJHSRI Bylaws) and 24 (ECF Document 174-24; CCHP Bylaws).

[21] Defendants' Undisputed Facts, at ¶36.

[22] *Id.*

Nominating Committee was explicitly required to determine that each candidate recommended for the CCHP Board (as well as for the positions of Chief Executive Officer ("CEO") and Chief Operating Officer ("COO")) understand, and acknowledge in writing, that CCHP was the operator of a Catholic hospital and that such candidate is able to support CCHP's mission and the Catholicity principles set forth in the Affiliation Agreement. (Affiliation Agreement at sect. 2.1.3; 2.2.)[23] These key provisions also were incorporated into CCHP's Bylaws. (CCHP Bylaws, at sect. 4.4(d).)

Given these structural barriers to identifying and seating new CCHP Board members, all of the then-sitting CCHP Board members were re-elected at the conclusion of the Initial Term, ultimately leaving control over CCHP in the hands of the Bishop and RWH, with the Bishop holding eight votes to RWH's seven.

The Bishop's advantage over the CCHP Board played an outsized role in how it exercised its oversight of SJHSRI and made critical decisions there. While the CCHP Board could exert substantial control over SJHSRI's strategic, financial and medical activities (the "Major Actions"), the Bishop controlled that Board. An examination of CCHP Board minutes, dating from 2010 (during the Transition Period)[24] and 2011 (after the Transition Period had ended)[25] confirm this to be the case.

<u>*Impact of Affiliation on SJHSRI*</u>

Pursuant to the Affiliation Agreement, the Articles and Bylaws of SJHSRI were amended to provide that, effective January 4, 2010, CCHP would be SJHSRI's sole Class A Member, and

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[23] Defendants' Undisputed Facts, at ¶37.

[24] Defendants' Undisputed Facts, at ¶s 41-42, and Defendants' Exhibit D.

[25] Defendants' Undisputed Facts, at ¶s 43-44, and Defendants' Exhibit E.

the Bishop, or his designee, would be the sole Class B Member. (SJHSRI Amended Articles, Section 2, Exhibit A, Part A; SJHSRI Bylaws Section 2.1.)

However, as was the case prior to the Affiliation the SJHSRI Board did not attempt to function alone during the critically important Transition Period. When it came to shouldering the tasks associated with converting from a stand-alone hospital organization to one of several operating hospital organizations headed by a single parent, each of the SJHSRI Board's standing board committees had a vital role to play.[26]

2010- 2014

Once the Transition Period ended on June 30, 2010, operational control over SJHSRI – from appointing and removing individual SJHSRI board members, to taking one or more so-called "Major Actions" such as incurring material debt, modifying hospital services, filing for certificates of need, and adopting SJHSRI's strategic plan – rested exclusively with CCHP, first acting through its board of trustees (as the Class A Member), subject to the reserved powers held by the Bishop over certain religious, canonical and pastoral matters (as the Class B Member).[27] And while the Bishop, as the Class B Member, had plenary control only over the handling and discharge of so-called "Catholicity" matters, this provided sufficient grounds for him to support the continued listing of SJHSRI in the Directory as a subordinate organization controlled by or associated with the Catholic Church, both during and after the Transition Period, which he did until 2018.

[26] Pursuant to section 4.5 of the Amended Bylaws, the SJHSRI Board maintained the right to elect or appoint committees made up of SJHSRI Board members and delegate any of its corporate powers.

[27] Defendants' Undisputed Facts, at ¶s 47.

These shifts in day-to-day responsibilities on or about June 30, 2010, did not signal a wholesale relinquishment by the Bishop of all influence and control over SJHSRI with the exception of pastoral matters. Rather, because care had been taken to preserve the Bishop's substantial role and influence within CCHP when it was organized and incorporated by positioning the Bishop to appoint a majority of the CCHP Board, the Bishop continued to have an outsized role despite the transfer of most functions – and most board and committee responsibilities – from SJHSRI to CCHP at the conclusion of the Transition Period.

To make permanent the Bishop's considerable influence over SJHSRI, two additional provisions were added to SJHSRI's Articles as they were being revised to reflect the Affiliation. Part D of SJHSRI's Amended Articles gave the Bishop significant power and authority to block certain actions the SJHSRI Board otherwise might attempt to take, simply by withholding his consent.[28]

Part E of the Amended Articles, in turn, acknowledged the Bishop's unique ability to recognize (or withhold recognition) of SJHSRI as a Catholic Church-affiliated institution by causing it to be included in the Directory. This enabled the Plan (and SJHSRI) to avoid ERISA's potentially crippling funding and regulatory requirements, which SJHSRI was not then in a position to afford, by providing that, so long as the Bishop cooperated and enabled the Plan to remain a "church plan," SJHSRI would not allow or permit any of a series of so-called "prohibited procedures" such as abortion or euthanasia to be performed at the Catholic Hospitals.[29]

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[28] Defendants' Undisputed Facts, at ¶50.

[29] Defendants' Undisputed Facts, at ¶51.

Impact of Affiliation On the Plan

In the years leading up to the Affiliation, various committees within SJHSRI had proposed to exert greater control over the Plan, in an attempt to reduce the financial pressure that maintaining and funding the Plan was imposing on SJHSRI. The first critical step took place in 2007, when the Finance Committee of the SJHSRI Board of Trustees (the "SJHSRI Finance Committee") recommended freezing benefit accruals for all Plan-covered SJHSRI employees other than those covered by one of the collective bargaining agreements SJHSRI had with its unions. (Meeting Minutes of SJHSRI Finance Committee dated July 13, 2007.)

During the Transition Period in 2009, the SJHSRI Finance Committee remained involved in various Plan matters[30] while renewing its 2007 recommendation to partially freeze the Plan at a meeting held June 29, 2009.[31] On July 16, 2009, the SJHSRI Board voted to approve the recommendation of the SJHSRI Finance Committee to freeze the Plan to non-union employees. On that same day, the Retirement Board, chaired by Bishop Tobin, approved a resolution to amend the Plan to freeze benefit accruals for non-union employees.[32]

Meetings held by the Retirement Board, following the action taken to close the Plan to non-union employees, continued but were markedly less frequent, likely due to the significant reduction in administrative duties following the benefit accrual freeze for non-union employees. Nonetheless, the Retirement Board – then consisting of eight individuals including the Bishop –

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[30] Defendants' Undisputed Facts, at ¶s 53-54.

[31] On June 29, 2009, the SJHSRI Finance Committee adopted a motion to recommend to the Board of Trustees the approval of placing a hard freeze on the Defined Benefit Pension Plan for all non-union employees effective September 30, 2009." (SJHSRI1673-4)

[32] Statement of Undisputed Facts, at ¶s 55-57 and related Defendants' Exhibit G.

continued to function throughout the approximately eighteen month Transition Period.[33] A meeting held in the first quarter of 2010, to address partially rejected pension applications, confirms that Retirement Board meetings did occur, notwithstanding some confusion regarding whether the Affiliation had prompted a minor change in the Retirement Board's name.[34]

While they did occur, meetings held by the SJHSRI Finance Committee during the remainder of the Transition Period to address matters involving the Plan likewise were less frequent.[35] This may have been the product of confusion over the roles those two organizations were to play in the ongoing administration and funding of the Plan following the consummation of the Affiliation.[36] The SJHSRI Finance Committee did take one action of note: at a meeting held November 6, 2009, involved determining that "the future Investment Committee of [CCHP] would be the setting where Plan investments would be reviewed to make sure they are keeping

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[33] Defendants' Undisputed Facts, at ¶59.

[34] The meeting minutes from a January 7, 2010, SJHSRI Finance Committee conference call provide that Darlene Souza "informed the Committee members of two pension matters that will be brought to the Pension Board…"

[35] Throughout 2010 the SJHSRI Board continued to be involved with overseeing the Plan and receiving input from the SJHSRI Finance Committee regarding the Plan until the SJHRSI Finance Committee was dissolved pursuant to the Affiliation Agreement and its functions were moved up to the CCHP level. Defendants' Undisputed Material Facts, at ¶61 and related Defendants' Exhibit J.

[36] See Meeting Minutes of the SJHSRI Board of Trustees dated September 17, 2009 (Ryan "provided the Board with an overview of the Finance Committee meetings of August 7th and September 11, 2009. He also noted that the Pension Plan Committee met with the pension administrator on August 7, 2009 to review and approve the revisions to the defined contribution 403(b) plan for non-union employees. Ms. Kenny reviewed the fundamental changes that have been made to the plans [including] the freeze of the defined benefit plan and changes to the 403(b) plan … Mr. Fogarty and Ms. Souza are scheduled to meet with the union within the next few weeks to request participation in the freeze now as compared to waiting for the next contract date").

pace with the agreed upon format." (*See* Meeting Minutes of the SJHSRI Finance Committee dated November 6, 2009).

Thus, while the financial pressure coming from the SJHSRI Finance Committee may have obfuscated the role of the Retirement Board to a degree, under the terms of the Plan, as set forth in Article 18 of its 1999 Restatement (ECF Document 174-9), the Retirement Board remained primarily responsible for administering the Plan and firmly in control, from the start of the Affiliation in 2009, throughout the Transition Period that ended June 30, 2010, and well into 2011, when the SJHSRI Board amended and restated the Plan, on or about August 25, 2011 (ECF Document 174-10; the "2011 Plan").

Plan Administration From September 1, 2011 to June 20, 2014

Following the close of the Transition Period on June 30, 2010, and in accordance with the Affiliation Agreement, the activities of the SJHSRI Finance Committee (and SJHSRI's other standing board committees, such as the Audit, Governance, Investment and Planning Committees) were surrendered to and taken up by comparably named CCHP Board committees, often populated by many of the same individuals that had served on the SJHSRI committees. As a result, on or about July 1, 2010, the CCHP Finance Committee simply picked up where the SJHSRI Finance Committee had left off, at least as respects the administration of the Plan.[37] So did the CCHP

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[37] See Defendants' Undisputed Facts, at ¶s 67-68 and related Defendants' Exhibit K. The CCHP Finance, Audit & Compliance Committee (the "CCHP Finance Committee") had a significant role in overseeing the administration of the Plan following the Affiliation and the expiration of the Transition Period. One of its roles was monitoring the financial status and outlook of the Plan. (*See e.g.,* Meeting Minutes of CCHP Finance Committee dated March 15, 2011, where Jeffrey Bauer from the Angell Pension Group made a presentation on the Plan and explained that if the Plan lost its church plan status, there would be a "significant impact from a cash flow perspective" due to required funding levels, and potential penalties if those levels are not met.) (*See also*, Meeting Minutes of CCHP Finance Committee dated November 15, 2011, where Darlene Souza provided an overview of the existing Plan and significant items affecting the Plan.

Investment Committee.[38] For its part, the SJHSRI Board remained constant, but subordinated to the CCHP Board.

Even after the Transition Period concluded, SJHSRI continued to suffer from significant financial burdens, which was the catalyst for formally amending and restating the Plan to institutionalize the freeze.[39]

The resulting July 1, 2011 restatement of the Plan (ECF Document 174-10; the "2011 Plan") identified the "Employer" (SJHSRI) as the 2011 Plan's Administrator and left it up to the SJHSRI Board to either re-designate the Retirement Board to serve as the Administrator or take some other action(s) (or, to take no action and administer the Plan itself). There is no indication in the record that the SJHSRI Board intended to abolish, or did abolish, the extant Retirement Board, or that the SJHSRI Board in any way took action to limit the Bishop's control over the Retirement Board, other than to require it to re-designate the Retirement Board.[40] Instead, the

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[38] On November 18, 2011, the CCHP Investment Committee voted on changes to the Investment Policies and Statements of Operating Procedures "so that they may be presented to the CCHP full Board." On December 8, 2011, at a meeting of the CCHP Board, Mr. Raucci gave a report to the Board and a motion was made to approve the Investment Policy Statements as presented. The motion was seconded and duly approved. (C-PHCA00849-).

[39] In 2011, the SJHSRI Board continued to have a role in overseeing the Plan, and the Bishop continued to exercise control over that Board through his designated representative. (The Board was chaired by Reverend Monsignor Theroux, and included Reverend Robert Forcier and Reverend Monsignor Varsanyi as members.) At a meeting held in July 2011, Monsignor Theroux "noted new board members will be presented to the Bishop for his approval." (Meeting Minutes dated July 21, 2011.) At that same meeting, however, Mrs. Darleen Souza provided a "Pension Update" and the Board voted to adopt a restatement of the Plan and amendments to the Plan including the freezing of benefits for Federation of Nurses and Health Professionals, effective September 30, 2011.

[40] On July 28, 2011, the Executive Committee of the CCHP Board ratified the decision made by the SJHSRI Board regarding the Plan. (Meeting Minutes of CCHP Board dated July 28, 2011.) At that same meeting the discussion evidenced the continued involvement of the Bishop even at the CCHP level. "A discussion ensued concerning the Bishop's role in appointing Trustees to the CCHP and SJHSRI Boards. A suggestion was made to have a letter sent to the Bishop requesting

SJHSRI Finance Committee began to exercise more affirmative control over the Plan, and began to discharge administrative duties that had traditionally been left to the Retirement Board – all, with at least the passive blessings of the Bishop.[41] This lasted from August 26, 2011, when the amended and restated Plan document was executed, until April 29, 2013.

On April 29, 2013, the Bishop, exercising his prerogatives under SJHSRI's Amended Articles, ratified and confirmed the 2011 Plan, through a set of resolutions (the "2013 Resolutions"). (ECF No. 174-22) The 2013 Resolutions explicitly identified the SJHSRI Board itself as the "new" Retirement Board, and further recognized that the CCHP Finance Committee had been tasked with handling the 2011 Plan's ongoing administrative matters:

> RESOLVED, that the Board of Trustees of St. Joseph Health Services of Rhode Island is the Retirement Board with respect to the Plan and acts on behalf of St. Joseph Health Services of Rhode Island as the Plan Administrator of the Plan. […]
>
> RESOLVED, that the Board of Trustees of St. Joseph Health Services of Rhode Island has the authority, pursuant to the terms of the Plan, to appoint a committee to act on its behalf with respect to administrative matters related to the Plan. […]
>
> RESOLVED, that the Board of Trustees of St. Joseph Health Services of Rhode Island has appointed the Finance Committee of CharterCARE Health Partners to act on its behalf with respect to administrative matters related to the Plan.
>
> RESOLVED, that the Plan is intended to qualify under Section 401(a) of the Internal Revenue Code of 1986, as amended (the "Code") as a **non-electing church plan** within the meaning of Section 414(e) of the Code and Section 3(33) of the Employee Retirement Income Security Act of 1974, as amended.

(ECF Document 174-22.)

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a replacement for Judge Weisberger. Mr. Belcher stated that he will contact Monsignor Theroux to inform him of the letter that will be sent to the Bishop. The Nominating Committee is responsible for nomination and recommendation of potential Trustees to the various Boards." (*Id.*)

[41] The Bishop remained effectively empowered to impose his will upon both the SJHSRI Board and even the CCHP Board by exercising his rights (or, causing proxies such as Monsignor Theroux to exercise their rights) under SJHSRI's and CCHP's respective articles and bylaws.

Thus, pursuant to the above action taken by the Bishop (and pursuant to the 2011 Plan), the SJHSRI Board was recognized and designated as the Retirement Board, acting on behalf of SJHSRI and the SJHSRI Board as its designate, and the Retirement Board came to be recognized as having deputized and appointed the CCHP Finance Committee to act on its behalf with respect to administrative matters related to the Plan.[42]

In addition to the above arrangements, the CCHP Investment Committee (the "CCHP Investment Committee") from June 30, 2010, the first date it could exercise responsibility over the Plan, began to exercise oversight over the Plan's investments, reviewing and approving the investment guidelines governing the Plan's pooled fund investments, and selecting, evaluating and reviewing the performance and portfolios being managed by the Plan's investment managers, while SJHSRI's human resources department handled the day-to-day administration.[43] The Plan's investment portfolio dwarfed the other portfolios under the CCHP Investment Committee's stewardship, making the Plan's financial well-being a principal concern of that Committee. The CCHP Investment Committee was quite active, as evidenced by its regular and extensive meeting minutes.[44]

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[42] The Plan explicitly allows the Administrator to "(1) employ agents to carry out nonfiduciary responsibilities (other than Trustee responsibilities), (2) consult with counsel who may be counsel to the Employer, and (3) provide for the allocation of fiduciary responsibilities (other than Trustee responsibilities) among its members….".

[43] Representations were made to state regulators in April 2014 that an Investment Committee would continue to monitor the Plan after the asset sale: "The pension liability will remain in place post transaction. Subsequent to the $14 Million contribution to the Plan upon transaction, future contributions to the Plan will be made based on recommended annual contribution amounts as provided by the Plan's actuarial advisors. Moving forward, the investment portfolio of the plan will be monitored by the Investment Committee of the Board of Trustees.")

[44] See e.g., Meeting Minutes dated November 19, 2010; December 17, 2010; February 18, 2011; May 20, 2011; August 26, 2011; November 18, 2011; February 24, 2012; February 22, 2013; February 14, 2014, May 16, 2014, etc.

This structure continued in effect until the 2014 Assets Sale was consummated on June 20, 2014. For example, at a March 13, 2014 meeting of the SJHSRI Board, chaired by Monsignor Theroux, Darleen Souza requested that the Board vote on various resolutions relating to the Plan effective June 1, 2014, including freezing benefits and authorizing officers of SJHSRI to effectuate amendments to Plan etc. The Board was also provided with an update on the asset sale with Prospect. Thus, well into 2014, the SJHSRI Board continued to play a significant role in Plan administration.

Likewise, at a meeting of the CCHP Finance Committee on March 15, 2014, Ms. Souza presented the Freeze Amendment to that Committee and noted that "this Amendment had already been presented to the SJHSRI Board at the March 13, 2014 meeting." Mrs. Souza also reminded the CCHP Finance Committee that it had been "appointed to oversee the Plan and provide SJHSRI approval to modify the Plan documents." Thus, in 2014, both the SJHSRI Board and the CCHP Finance Committee considered and approved Plan amendments adopting the Pension Freeze, which took effect June 1, 2014, just prior to the 2014 Assets Sale, which closed 19 days later.[45]

Plan Administration Following the 2014 Assets Sale

After the asset sale, SJHSRI ceased operating as a health care institution and entered a "wind-down" phase. A little more than sixty (60) days following the sale, SJHSRI representatives received a memorandum dated August 26, 2014 from Darlene Souza, a former

[45] Pursuant to the Plan, "In the event more than one party shall act as Administrator, all actions shall be made by majority decisions. In the administration of the Plan, the Administrator may (1) employ agents to carry out nonfiduciary responsibilities (other than Trustee responsibilities), (2) consult with counsel who may be counsel to the Employer, and (3) provide for the allocation of fiduciary responsibilities (other than Trustee responsibilities) among its members…." SJHSRI Retirement Plan, as Amended and Restated effective July 1, 2011 (ECF No. 174-10) at Article 8.1.

officer of both SJHSRI and CCHP (the "Souza Memo"), outlining the actions those organizations needed to take to ensure that the Plan would remain, or at least be able to requalify, as a non-electing church plan.[46] The Souza Memo specifically recommended that a board, committee, or subcommittee, almost identical to the pre-Affiliation "Retirement Board," be organized and populated by the Bishop or by Monsignor Theroux, and be put firmly in charge of the administration of the Plan during its frozen, wind-down period, and therefore qualify *prima facie* as a principal-purpose organization.

There is no documentary evidence that any such subcommittee was ever established, or that the SJHSRI Board ever responded to the Souza Memo. Rather, the meeting minutes from the September 25, 2014 meeting of the SJHSRI Board indicate that Monsignor Theroux continued to serve as chairman of that Board for a limited period of time after the 2014 Assets Sale without responding to, or taking any action(s) in response to, Souza's memorandum.

Instead, on December 15, 2014, by written consent of the Class A Member of SJHSRI, a new slate of individuals was elected to the SJHSRI Board, and Daniel J. Ryan, a CPA ("Ryan"), was elected President, Treasurer and Secretary. In addition, the bylaws of SJHSRI were amended in several key respects.[47]

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[46] *See* D. Souza Memorandum dated August 26, 2014 ("Human Resources Transitional Items"), Item 4 ("Pension Board") ("Although this is an Oldco item a new pension board needs to be established and appointed by the Bishop as the Pension Board was formerly the Finance Committee of CCHP. The recommendation of myself and Chris Kong our ERISA attorney [is] to establish a subcommittee from the SJHS [Board] with Msgr. Theroux appointed as chair. The documents would need to be drafted by Angell Pension along with review from Chris Kong legal counsel. There will need to be scheduled meetings along with minutes and an adoption agreement executed by the Bishop.")

[47] *See* Defendants' Undisputed Facts at ¶s 104-106 and related Defendants' Exhibit T.

At the December 15, 2014, CCHP Board meeting, the board caused SJHSRI to authorize Ryan and an attorney SJHSRI retained at his direction, Richard J. Land ("Land"), to "take such actions as either of them deems necessary and advisable in connection with the investment and liquidation of [SJHSRI's] assets…" Ryan and Land were appointed to serve as SJHSRI's agent and authorized signatory on all Plan-related investment accounts.

Thus, after the December 2014 board meeting, Ryan and Land took control of the Plan, entered into service agreements with the Plan's actuaries, commissioned studies, negotiated for services and caused the Plan to process pension applications and pay benefits. On February 16, 2017, Ryan resigned from SJHSRI and CCHP and all his offices and titles and was replaced by David Hirsch. Land continued to operate the Plan, alone, until August 2017, when he caused the Plan to be placed into receivership with the Rhode Island Superior Court on August 17, 2017. Del Sesto's appointment, as receiver and as Plan Administrator, followed 24 hours later.

ARGUMENT

A. Summary Judgment Requires the Absence of any Genuine Issue(s) as to any Material Fact(s).

By agreement and stipulation, Plaintiffs seek partial summary judgment under Federal Rule of Civil Procedure 56 in this case only as to Count IV. Plaintiffs claim that summary judgment is appropriate if the record, construed in the light most favorable to the party opposing the motion, "presents no genuine issue as to any material fact and reflects the movant's entitlement to judgment as a matter of law." Plaintiffs' Motion at 16, citing *Lawless v. Steward Health Care Sys., LLC*, 894 F. 3d 9 (1st Cir. 2018). While this general statement correctly characterizes the operative standard, *see also Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 467 (1962), as the moving party, Plaintiffs bear the burden of demonstrating that no material facts are in dispute, and the evidence

they submit – and the absence of any evidence on salient legal issues – must be viewed in the light most favorable to the Prospect Defendants as the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Additionally, the Court must draw all reasonable inferences from that evidence in favor of the nonmoving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

Plaintiffs bear the burden of identifying the relevant legal standard as well, when deciding which facts (and how many facts) are "material." The Prospect Defendants have the burden to submit evidence in support of any material element of a claim or defense on which they would bear the burden of proof at trial, even if the moving party has not submitted evidence to negate the existence of that material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Since "a party seeking summary judgment…bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact," *Celotex*, 477 U.S. at 323, the responding party is required to respond to those issues clearly identified by the moving party as being subject to the motion. But that rule is predicated on the operative legal standard having been properly ascertained and identified by the moving party.

Count IV asserts a claim under ERISA. It is undisputed by the parties that the plan, at some point, properly was classified as a "church plan" exempt from ERISA's exacting obligations, and it is also undisputed that currently it is not properly classified as a "church plan." The question before the Court is – when did it change? Plaintiffs offer two potential dates in their motion; the Prospect Defendants offer two potential dates in their cross-motion.

The question at the heart of deciding these motions concerns whether and when the Plan was either being maintained, or was to be funded, by an organization that met the requirements of

ERISA §3(33)(C)(i) – the so-called "principal purpose organization" rule. In making their argument for an earlier date, Plaintiffs ignore the impact that the church plan "cure" subparagraph, found at ERISA §3(33)(D), has and can have on their argument: any organization that at one point fails to meet the requirements of ERISA §3(33)(C)(i) is able subsequently to cure that failure by action or through circumstances, and by so doing can retroactively correct the failure – or, the lapse – that previously occurred. Thus, to point to one particular date and declare "non-compliance" is insufficient, because the investigation is dynamic, not static.

Equally important, Plaintiffs' reading of the statute is unduly narrow; it is telling that Plaintiffs rely on decisional law rather than the statute itself in making their argument regarding whether an organization can qualify as a "principal purpose organization." The large number of "or" constructions (W or Y or Y or Z) and the statute's emphasis on function (over formalism) forces them to resort to decisional law rather than statutory construction. But here, the statute is the touchstone, and a simple reading of the statutory text suffices to show that Plaintiffs' argument reads the text unduly narrowly, and must be rejected.

Accordingly, Plaintiffs have the burden of proving not only that <u>none</u> of the organizations responsible for the Plan's maintenance and funding – whether the SJHSRI Board, the Retirement Board (as populated by members of the SJHSRI Board of Trustees), the CCHP Finance Committee, SJHSRI's human resources apparatus, or some other organization – in 2011, or at least by April 29, 2013, could qualify as a "principal-purpose organization" under any of the several organizational variants recognized by ERISA §3(33)(C)(i), but that the failure was continuous and ongoing and was never corrected between then and the date that Del Sesto was appointed its Administrator, notwithstanding all the significant changes in circumstances between those milestones.

And in light of ERISA's "cure" provision, it is not enough to make a showing that there was no "principal purpose organization" as of a particular date; Plaintiffs must also – and have not – show that no subsequent action cured the alleged lapse as of the date in question. Consequently, Plaintiffs' motion for partial summary judgment must be denied.

B. Plaintiffs' Contention that ERISA's "Church Plan" Exemption Should Be Narrowly Construed Relies On Unrelated Case Law And Ignores Statutory Text.

Plaintiffs attempt to set the table for the rest of their arguments by strongly contending that ERISA's provisions should be liberally construed in favor of protecting participants in employee benefit plans, Plaintiffs' Motion at 17, and that "strict adherence to ERISA's text in interpreting its provisions [compels] a 'tight reading of exemptions from comprehensive schemes of this kind.'" Plaintiffs' Motion at 18, citing *Trustees of Southern California Bakery Drivers Security Fund v. Middleton*, 474 F.3d 642, 645-46 (9th Cir. 2007) ("*Middleton*") (internal quote from *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 97 (1993)).

Plaintiffs' argument sweeps too broadly. What unifies the cases Plaintiffs cite and discuss when urging this Court to engage in a "tight reading" of ERISA's church plan exemption is the fact that none of those cases (i.e., those mentioned in Part III.A of their brief, Plaintiffs' Motion 17-20) involves either a church plan or ERISA §3(33). Whatever the general rules may be, because of the First Amendment implications where ERISA law reaches religious organizations, no case argues for such a "tight reading" Plaintiffs ask this Court to impose. *Middleton* involved the scope of ERISA §401(b)(2) (codified at 29 U.S.C. § 1101(b)(2)), which excludes from ERISA's "plan assets" definition any assets held by a state-regulated insurer under a contract or policy to the extent such contract's or policy's benefits are guaranteed. Section 401(b)(2) does not have the flexible, easily met definition that ERISA §3(33) has for so-

called "principal-purpose organizations" (discussed, *post*), and most certainly does not have a cure provision, much less one like ERISA § 3(33)(D) (also discussed, *post*).

While *John Hancock Mut. Life Ins. Co. v. Harris Trust & Savings Bank*, 510 U.S. 86 (1993) ("*Hancock*") may provide quotes that are useful for Plaintiffs when stripped of their context (which is why Plaintiffs cite and quote *Hancock* twice, Plaintiffs' Motion at 17, and at 18), that decision actually reinforces the Prospect Defendants' central position here: that the Court should look to the statutory language itself to construe and apply it, rather than rely on guidance under other sections of ERISA, created by others in different circumstances. Strict adherence to ERISA's statutory text is paramount. In fact, *Hancock* teaches that proper statutory construction starts (and often, ends) with the statutory text, and not with policy-based pronouncements made by regulatory agencies and a handful of other courts.[48]

The other authorities Plaintiffs offer in support of their "strict construction" argument come no closer to ERISA §3(33) than *Middleton*. *Boggs v. Boggs*, 520 U.S. 833 (1997), Plaintiffs' Motion at 17, involved the preemption by ERISA of state laws pertaining to testamentary transfers – hardly a referendum on how ERISA-oriented exemptive provisions should be construed. *IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118 (3rd Cir. 1986), in turn, involved the application of the "controlled group" rules found in Internal Revenue Code Section 414(b) and (c) to a multiemployer pension plan withdrawal liability and

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[48] In *Hancock*, the Court upended a decades-old reading of ERISA §401(b)(2) used by the entire insurance industry to shield only partially "guaranteed" contracts and policies from ERISA's rules. Rejecting longstanding United States Department of Labor ("DOL") regulatory guidance, the Court in *Hancock* concluded that the regulators had taken liberties with the statutory text. *Hancock*, 510 U.S. 86, at 92 ("By reading the words "to the extent" to mean nothing more than "if," the Department has exceeded the scope of available ambiguity. See *Public Employees Retirement System of Ohio* v. *Betts*, 492 U.S. 158, 171 (1989) ("no deference is due to agency interpretations at odds with the plain language of the statute itself "). We therefore cannot accept current pleas for the deference described in *Skidmore* or *Chevron*").

delinquent contributions case. The same goes for the other multiemployer plan cases Plaintiffs cite to support their "liberal construction" hypothesis, Plaintiffs' Motion at 18, such as *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587 (9th Cir. 1984) (discretionary award of attorneys' fees; nothing to do with any statutory exemption, much less the church plan exemption); and *Jervis v. United Ass'n of Plumbers & Pipefitters Local Union No. 51 Pension Fund*, 2013 WL 5704653 (D.R.I. Oct. 17, 2013) (benefit claims case, construing ERISA's "plan" definition; again, no statutory exemption involved).

Plaintiffs' attempt to link ERISA to the Fair Labor Standards Act (the "FLSA") fares no better. First, the quote Plaintiffs draw from *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490 (1945), a wage-and-hour case decided almost 30 years before ERISA was enacted, lacks important context. See *Walling*, 324 U.S. 490, at 493 ("The Fair Labor Standards Act was designed 'to extend the frontiers of social progress' by 'insuring to all our able-bodied working men and women a fair day's pay for a fair day's work.' Message of the President to Congress, May 24, 1934.") Second, ERISA, and its policy underpinnings, are markedly different from FLSA and its more "humanitarian" policy underpinnings. ERISA reflects policy choices Congress consciously made – including whether to exempt church plans from ERISA's rigorous regulatory regime. As Chief Justice Roberts pointedly observed in *Conkright v. Frommert*, 559 U.S. 506 (2010):

> Congress enacted ERISA to ensure that employees would receive the benefits they had earned, but Congress did not require employers to establish benefit plans in the first place. *Lockheed Corp. v. Spink*, 517 U. S. 882, 887 (1996). We have therefore recognized that ERISA represents a "'careful balancing' between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans." *Aetna Health Inc. v. Davila*, 542 U. S. 200, 215 (2004) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987)).

Frommert, 559 U.S. 506, at 516-17.

The remaining cases Plaintiffs offer to support their "tight reading" of the church plan exemption simply involve the interpretation of ERISA's broad and sweeping definition of an "employee benefit plan," rather than a Congressionally crafted statutory exemption. Plaintiffs' Motion at 19-20, citing, e.g., *Anderson v. UNUM Provident Corp*., 369 F. 3d 1257 (11th Cir. 2004), *Meredith v. Time Ins. Co*., 980 F. 2d 352 (5th Cir. 1993) and *Peckham v. Gem State Mut. of Utah*, 964 F. 2d 1043 (10th Cir. 1992).

In contrast to these cobbled-together arguments from Plaintiffs, legislative commentary that directly addresses the church plan exemption shows that because the exemption was created to avoid a conflict under the First Amendment, it is the *exemption* that should be liberally construed. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...." and just prior to the introduction of the legislation that became ERISA, the U.S. Supreme Court in 1971 decided that in order for legislation to be constitutional under the Establishment Clause of the First Amendment, it "must have a secular legislative purpose; [ ] its principal or primary effect must be one that neither advances nor inhibits religion; [and it] must not foster 'an excessive government entanglement with religion'." *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (*quoting fr. Walz v. Tax Comm'r*, 397 U.S. 664, 674 (1970)). It was this analytical framework, and grounds, on which Congress then based the church plan exemption – a point prominent members of Congress made in 1978, when efforts were made (successfully) to amend the church plan exemption to add the "principal purpose organization" rule (found in ERISA §3(33)(C) and the remedial provision (found in ERISA §3(33)(D)).[49] Accordingly, the Prospect Defendants

[49] These changes were made by §407 of MPPAA, Pub. L. No. 96-364, 94 Stat. 1208 (1980). In expanding the exemption, Congress was attempting to avoid constitutional problems, not to create them. The amendment's backers acknowledged that without such an exemption,

urge this Court to decline Plaintiffs' invitation to commit reversible error, and instead engage in sound and careful statutory analysis in light of Congress's rationale for creating the church plan exemption.

C. Plaintiffs Misconceive and Misapply the "Principal-Purpose Organization" Test.

Plaintiffs' Motion focuses exclusively on the ability of the Plan, and those involved with its maintenance and funding, to continuously satisfy clause (i) of subparagraph (C) of Paragraph (33) of ERISA's definitions section (*i.e.*, ERISA § 3(33)(C)(i)). However, that statute provides many ways for an organization to qualify as a "principal-purpose organization" – in fact, many, many more than the singular path that Plaintiffs tackle in their Motion:

> A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, 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.

29 U.S.C. §1002(33)(C)(i).

Rather than following the Supreme Court's lead, Plaintiffs make only passing reference to ERISA §3(33)(C)(i) (*codified at* 29 U.S.C. §1002(33)(C)(i)) once, by briefly quoting it as it appears in the United States Supreme Court's recent decision in *Advocate Health Care Network v. Stapleton*, 581 U.S. ____, 137 S. Ct 1652 (2017) ("*Stapleton*"). Plaintiffs' Motion at 20-21.

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subjecting church plans to ERISA would create a serious possibility of excessive interference with religious governance and decision-making. *See* 124 Cong. Rec. H12106, 12108 (1978) (statement of Rep. Conable) (statutory definition being clarified because original definition of church plan was never intended to ignore how church plans operate or to be disruptive of church affairs); *see also* 125 Cong. Rec. S10052, 10054 (1979) (statement of Sen. Talmadge) (letter from Rabbinical Pension Board read into Congressional Record, expressing concern about IRS intrusions, seeking to define what is or what is not an integral part of these religious groups).

Plaintiffs instead rely exclusively on formulations that lower courts have offered in *dicta* in *Stapleton's* wake, such as the obviously imprecise "three-step inquiry" that the Tenth Circuit formulated for use in *Medina v. Catholic Health Initiatives*, 877 F.3d 1213 (10th Cir. 2017) ("*Medina*") when it was called upon to examine a church plan that supposedly was being administered by a "principal-purpose organization." Plaintiffs' Motion at 22-23. This leads to a distorted understanding of what §3(33)(C)(i) actually requires.[50]

By so doing, Plaintiffs ignore one of the central teachings in *Stapleton*: that it is vitally important to closely examine the statute itself. Indeed, the Supreme Court in *Stapleton* cautioned that when construing ERISA §3(33), it is always vitally important to "give effect, if possible, to every clause and word of [the] statute." *Stapleton*, 137 S. Ct. 1652, at 1659, quoting *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (emphasis added).[51] The Supreme Court's instruction, in *Stapleton*, to look at and consider "every clause and word" of a statute, requires considering all of the possibilities created by the repeated use by Congress of the disjunctive "or" when it crafted and enacted ERISA §3(33)(C)(i). Such a close examination reveals a very flexible statutory scheme:

> [a church plan] . . . includes a plan maintained by an organization, whether a civil law corporation **or** otherwise, 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

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[50] This very imprecision can be found in Plaintiffs' Motion. *Compare* Plaintiffs' Motion at 22-23, *quoting fr. Medina* ("(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 is administering or funding a retirement plan for entity employees?") with Plaintiffs' Motion at 23, *quoting fr. Cappello* ("(2) its retirement plan is 'maintained by an organization . . . the principal purposes or function of which is the administration or funding of [the retirement] plan' for the benefit of its employees").

[51] Ironically, Plaintiffs also overlook the fact that the Supreme Court had made precisely the same point in *Hancock*, the 1993 Supreme Court case they cite at a prior point in their brief. Plaintiffs' Motion at 17-18.

> benefits, **or** both, for the employees of a church **or** a convention or association of churches . . .

29 U.S.C. §1002(33)(C)(i) (emphasis supplied).

Informed by *Stapleton's* "every clause and word" admonition, a critical reading of the above passage reveals that as many as 24 different types of organizations could qualify as a "principal-purpose organization," depending on how they have been organized and what activities they have been tasked with performing. Indeed, just taking into account those organizations involved with "plans" that exclusively provide "retirement benefits," there are eight different ways an organization could satisfy §3(33)(C)'s operational requirements:

1. As a civil law corporation which has as its principal purpose the administration of a plan for providing retirement benefits;
2. As a noncorporate organization which has as its principal purpose the administration of a plan for providing retirement benefits;
3. As a civil law corporation which has as its function the administration of a plan for providing retirement benefits;
4. As a noncorporate organization which has as its function the administration of a plan for providing retirement benefits;
5. As a civil law corporation which has as its principal purpose the funding of a plan for providing retirement benefits;
6. As a noncorporate organization which has as its principal purpose the funding of a plan for providing retirement benefits;
7. As a civil law corporation which has as its function the funding of a plan for providing retirement benefits; or
8. As a noncorporate organization which has as its function the funding of a plan for providing retirement benefits.

Plaintiffs' Motion limits itself to just one of these eight possibilities – No. 2, above: whether the SJHSRI Board (a noncorporate organization) could qualify as a "principal-purpose organization" in 2011 or 2013 when it appeared to have been tasked with serving as the Plan's "administrator."

Several courts, looking at church plan challenges in the wake of *Stapleton*, have examined how the "principal-purpose organization" rule is to be construed in the context of ERISA's church plan exemption, but all but one of those courts have limited their examinations to literally a handful of comparatively narrow issues, such as (1) whether an organization has to be a juridical "person" (i.e., an entity) to qualify as a principal purpose organization, (2) whether serving as an "administrator" for a plan can be considered the equivalent of "maintaining" it, (3) what standards apply to determine whether an organization (either the sponsoring organization, or the organization claiming to be a principal purpose organization) is sufficiently "associated with" a church or convention of churches to be able to qualify as a principal purpose organization, (4) what does the term "principal purpose" mean, and (5) whether the entire church plan exemption is a Constitutional blasphemy, and violative of the Establishment Clause. Those certainly are the only principal-purpose organization questions that the church plan cases cited in Plaintiffs' Motion have examined – with one exception. *See Medina, et al. v. Catholic Health Initiatives*, 877 F. 3d 1213 (10th Cir. 2017) ((1), (2), (3) and (5)); *Smith, et al. v. OSF Healthcare Sys*., 933 F. 3d 859 (7th Cir. 2019) ((1), (2) and (5)); *Sanzone, et al. v. Mercy Health*, 954 F.3d 1031 (8th Cir. 2020) ((1), (2) and (5)); and *Cappello v. Franciscan Alliance, Inc*., 2019 U.S. Dist. LEXIS 1382909, 2019 WL 1382909 (N.D. Ind. Mar. 27, 2019) ((1), (2) and (3)).

Only the district court in *Boden, et al. v. St. Elizabeth Medical Ctr*., 404 F. Supp. 3d 1076 (E.D. Ky. 2019) has bothered to take a broader look at the principal-purpose organization requirements and attempted to make sense of it, and in so doing found notable all the ways an organization can satisfy those requirements:

> While the Supreme Court has summarized the exemption language with the term "principal-purpose organization," it is important to note that the statutory language is broad and allows an exemption for an organization with the "principal purpose" *or*

> "function" of "administering" *or* "funding." 29 U.S.C. §1002(33)(C)(i). In other words, either the "objective, goal, or end" of the organization *or* the "activit[ies] that [are] appropriate" for the organization, must be "administration" or "funding."

Boden, 404 F. Supp. 3d at 1092 (*citing, quoting fr.* Black's Law Dictionary, 11th edition (2019))(emphasis in text).

The district court's opinion in *Boden* thus shines a light on one of the comparatively unexamined aspects of Section 3(33)(C)(i)'s text: that an organization can qualify simply by having plan "administration" or plan "funding" be one of its "function[s]" without necessarily requiring that responsibility to constitute its principal function.[52]

Plaintiffs' Motion, which confines its examination of the Plan to just what the Plan's main document says about how the Plan was to be administered (and by whom), thus falls woefully short of eliminating any genuine issue as to any material fact.

A critically important feature to be found in ERISA's church plan exemption, which Plaintiffs conspicuously ignore, is a special remedial provision Congress added to the end of §3(33) in 1980, as new subparagraph (D). Subparagraph (D) of ERISA §3(33), if timely invoked, makes it possible to correct any qualification problem that a church plan could possibly have under Paragraph (33), and make that correction retroactively effective; the only thing that needs to be done is to make the correction before the statutory "correction period" expires.[53] ERISA's church plan exemption, again, clearly lays out this special corrective process:

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[52] Drawing upon *Stapleton*'s "every clause and word" teaching, it is logical to conclude that, had Congress wanted to require an organization to make plan administration or plan funding its principal "function" (as opposed to simply one of its "functions") the operative language in ERISA §3(33)(C)(i) would have read, "principal purpose or principal function."

[53] Clause (iii) of subparagraph (D) identifies the "correction period" as a period of at least 270 days, commencing after the Internal Revenue Service sends a notice of default regarding the

> **(D)** **(i)** **If a plan** established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of title 26 **fails to meet one or more of the requirements of this paragraph [(33)] and corrects its failure to meet such requirements within the correction period the plan shall be deemed to meet the requirements of this paragraph for the year in which the correction was made and for all prior years**.
>
> **(ii)** If a correction is not made within the correction period, the plan shall be deemed not to meet the requirements of this paragraph beginning with the date on which the earliest failure to meet one or more of such requirements occurred.

ERISA §3(33)(D) (clause (iii) omitted and emphasis added), *codified at* 29 U.S.C. §1002(33)(D).

Congress explicitly put the Internal Revenue Service ("IRS") in charge of this remedial process, as ERISA §3(33)(D)(iii) makes plain: the correction period for a church plan that has fallen from grace lasts a minimum of 270 days (nine months), and only begins when the IRS mails a notice of default pointing out that the plan has failed to meet one or more of the requirements found in paragraph (33) – like the failure to have in place a principal-purpose organization to administer or funding the plan.

In the view of the IRS, based on at least two rulings the IRS has issued in cases involving similar facts, the remedial relief available under subparagraph (D) is available in circumstances like those present here. In the first of the two, Private Letter Ruling ("*PLR*") 9619073 (2.13.96), a tax-exempt, nonprofit church-affiliated organization ("Corporation M") maintained five (5) benefit plans, one of which was a defined benefit pension plan ("Plan T"). Four of the benefit plans (referred to in the *PLR* as "Plans U, V, W and X") were being administered day-to-day by Corporation M's Vice President of Human Resources, and he reported to a general subcommittee of Corporation M's board of trustees. Corporation M advised the IRS that it would be setting up a separate administrative committee, similar to Committee M, whose sole purpose would be to

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plan's paragraph (33) qualification problem(s), and a court of competent jurisdiction has ruled on the matter. ERISA § 3(33)(D)(iii), *codified at* 29 U.S.C. §1002(33)(D)(iii).

control and manage the operation and administration of those four other benefit plans (notably, while still allowing Corporation M's human resources employees to continue to handle the routine, day-to-day functions of those plans). On the basis of those facts, the IRS confirmed that if it did so – thereby "fixing" the principal-purpose organization problem Plans U, V, W and X apparently had – those four benefit plans would qualify as church plans *retroactive to the date each one was established*. *PLR 9619073*, 1996 PLR LEXIS 134, *9-12, 1996 WL 241530 (2.13.96) (emphasis added). The IRS reached a similar conclusion in the second case, based on generally similar facts: *PLR 200326045*, 2003 WL 21483128 (4.2.03).

Plaintiffs make no effort to show in this case that SJHSRI failed or refused to fix any structural or organizational problems that the Plan may have had. Indeed, had Del Sesto not made an irrevocable election subjecting the Plan to ERISA at least as of April 15, 2019 (which is, in part, the subject of the Prospect Defendants' cross-motion), even he could have rescued the Plan's status as a non-electing church plan. But he chose not to.

Plaintiffs' main attack on the Plan's status is that none of the three entities or organizations Plaintiffs single out as having been called upon to provide administrative or other services to or for the Plan's benefit following its July 1, 2011 restatement[54] was capable of qualifying as a "principal-purpose organization" because it was not their "main job" to fund or manage the Plan. But this argument relies too heavily on *dicta* from *Stapleton* rather than the statutory text. Plaintiffs' Motion at 24-26. For example, Plaintiffs pluck the term "main job" from *dicta* that appears in the majority opinion (in *Stapleton*). Plaintiffs' Motion at 25. Plaintiffs also retrieve the term "principal-purpose organization" from *dicta* that appears in the same

[54] Plaintiffs identify three organizations: SJHSRI, the SJHSRI Board, and the CCHP Finance Committee. Plaintiffs do not mention the CCHP Investment Committee.

majority opinion, but do so by quoting from the Tenth Circuity's opinion in *Medina* (which did the plucking). Plaintiffs' Motion at 21.

In *Stapleton*, the only issue before the Supreme Court was whether a church plan had to actually be *established* by a church or convention or association of churches to have a prayer of qualifying for the exemption found in ERISA §3(33). While Justice Kagan's majority opinion in *Stapleton* certainly comments on the availability of what it repeatedly describes as the "principal-purpose organization" provision, the context makes plain that the opinion was written in a conversational tone designed to make the opinion approachable and that it would be wrong to take *dicta* as black-letter law. There is no other reasonable way to describe the following passage:

> That is a mouthful, for lawyers and non-lawyers alike; to digest it more easily, note that everything after the word "organization" in the third line is just a (long-winded) description of a particular kind of church-associated entity—which this opinion will call a "principal-purpose organization." The main job of such an entity, as the statute explains, is to fund or manage a benefit plan for the employees of churches or (per the 1980 amendment's other part) of church affiliates.

Stapleton, 137 S. Ct. 1652, at 1656-57.

Moreover, the Court in *Stapleton* went to great lengths to make clear – twice – that it was not expressing any view(s) regarding how the "principal-purpose organization" provision was to be interpreted and applied. First, the majority opinion cautions against placing too much stock in how it was describing such organizations:

> The employees alternatively argued in the District Courts that the hospitals' pension plans are not "church plans" because . . . their internal benefits committees do not count as principal-purpose organizations. [ ] **Those issues are not before us, and nothing we say in this opinion expresses a view of how they should be resolved**.

Stapleton, 137 S. Ct. 1652, at 1657, n.2. (Emphasis added.) The majority opinion then cautions readers of the opinion against attempting to turn the Court's casual phrasings into something that they are not:

> Again, we use the term "principal-purpose organization" as shorthand for the entity described in subparagraph (C)(i): a church-associated organization whose chief purpose or function is to fund or administer a benefits plan . . . **And again, the scope of that term – and whether it comprehends the hospitals' internal benefits committees – is not at issue here**. See n.2, supra.

Stapleton, 137 S. Ct. 1652, at 1657, n.3. (Emphasis added.) Indeed, one need only look at the above passage, where the Court also describes principal-purpose organizations as "entities" to conclude that the Court was not intending to make law on that particular subject. (Virtually all committees are not juridical persons, and limiting Section 3(33)(C)(i)'s application to "entities" would do violence to its statutory text.[55])

Plaintiffs nonetheless repeatedly characterize the principal-purpose organization test as a "main job" test. It is not. Again, the statute is the touchstone; the statute plainly provides that an organization – whether a civil law corporation or otherwise – can qualify as a principal-purpose organization if the "principal purpose" or the "function" of that organization is either the "administration" or the "funding" of the putative church plan, so long as the organization also is controlled by or associated with the church whose employees are involved. Merriam-Webster's Dictionary defines "principal" as "most important, consequential or influential"[56] and "purpose"

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[55] Section 3(33)(C)(i) not only allows "civil corporations or otherwise" to qualify as principal purpose organizations, but it also does not require such organizations to be tax-exempt – a sure sign that nonjuridical persons (i.e., organizations that are not entities) qualify. (One has to be a "person" in order to be subject to, or exempt from, taxation.)

[56] www.merriam-webster.com/dictionary/principal (last visited 6.26.20).

as "something set up as an object to be obtained" or "intention."[57] Just because a given organization does not spend much time on a given matter, or project, does not mean that its principal purpose is to spend time and effort on some other matter, or project. The world is full of examples where a service organization's "purpose" is frustrated by, e.g., the lack of demand, or a need, for those services.

Here, while the principal purpose of a committee or other organization could very well be the administration of a plan, if matters involving plan administration are under control – leaving little else to do -- that purpose nonetheless remains. Plaintiffs' narrow, and simplistic, view of ERISA's principal purpose organization test as one that only a certain type of organization engaged in a certain type of activity can satisfy, especially when combined with their unwarranted reliance on *dicta*, is not rooted in the statutory language, and cannot support entry of summary judgment in their favor.

In sum, because it is possible for several different types of organizations to satisfy the "principal-purpose organization" test, and thus cause the Plan to qualify for "church plan" treatment, whether in 2011, or later in 2013, or even later in 2014 or 2015, as a result of the changes in circumstances produced by the 2014 Assets Sale, Plaintiffs' Motion is deeply deficient, because it fails to take into account and eliminate all of the possible ways the Plan could have been corrected after 2011, and been able to retroactively qualify for ERISA's church plan exemption.

D. Contrary to Plaintiffs' Contention, There Are Ample Factual Disputes Regarding the Activities Taken to Administer and Fund the Plan, Between Its Restatement in 2011

[57] www.merriam-webster.com/dictionary/purpose (last visited 6.26.20).

and At Least Through the Date of the 2014 Assets Sale, to Raise Several Genuine Issues of Material Fact – More Than Enough to Defeat Plaintiffs' Motion.

As noted above, Plaintiffs' entire motion is based on a flawed premise: that the only way a putative "church plan" can satisfy ERISA §3(33)(C)(i)'s "principal-purpose organization" test is for it to successfully navigate the three-pronged test the Tenth Circuit described in *Medina*, as the Tenth Circuit has formulated and expressed it, and to show that the plan has been able to do so on a continuous basis.

However, once "every clause and word" of §3(33) is carefully taken into account, *Stapleton*, 137 S. Ct. 1652, at 1659, and one considers all the organizations that could qualify as the Plan's "principal-purpose" organization after the 2011 restatement of the Plan – and as important, how those organizations might qualify (i.e., other than just as an organization which has as its "principal purpose" the "administ[ration]" of the Plan), and one examines the Plan's entire operational history rather than simply its facial documentation to determine whether any flaws or breaks found in that history were fixed or corrected, it becomes clear that Plaintiffs' premise – and their Motion – do not persuade, and that genuine disputes as to material facts do exist.

Here, by the time the Plan was restated on July 1, 2011, the CCHP Finance Committee was already playing an ongoing, and significant, role in the administration of the Plan, and had been doing so since it took control of that committee function from the SJHSRI Finance Committee at the close of the Transition Period in June 2010, as provided for in the Affiliation

Agreement.[58] This significant role continued, both before the 2011 restatement,[59] and afterwards,[60] and expanded to fill the void left by the Bishop's Retirement Board.

For its part, the CCHP Investment Committee was tasked with monitoring the Plan's funding problems shortly after it had been organized; those activities were underway even before the CCHP Investment Committee took over from its SJHSRI counterpart in June 2010.[61] Marshall Raucci, a financial consultant who had been a longtime SJHSRI Board member and one of those tapped by the Bishop to serve on the CCHP Board and chair its Investment Committee, clearly was at work attempting to solve the Plan's funding problems by taking a more active role in developing better investment policies and more closely monitoring the Plan's condition.[62]

For both CCHP committees, the administration of the Plan, and its funding (despite the lack of any actually available funds, from a cash-strapped hospital system) was a key function because the Plan's status, and its fate, were important to the entire hospital system. And both of those CCHP committee were operating within a tax-exempt, nonprofit corporation over which the Bishop clearly had control, as the individual who had the power to appoint the majority of the

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[58] *See* Defendants' Undisputed Facts, at ¶s 61 and 64-66 and related Defendants' Exhibit J.

[59] *See* Defendants' Undisputed Facts, at ¶s 66-68 and related Defendants' Exhibit K.

[60] *See* Defendants' Undisputed Facts, at ¶s 69-72 and related Defendants' Exhibits L and M.

[61] *See* Defendants' Undisputed Facts, at ¶s 73-78 and related Defendants' Exhibit U.

[62] *See* Defendants' Undisputed Facts, at ¶s 79-80 and related Defendants' Exhibit U.

CCHP Board (and indirectly populate its committees) at least through June 30, 2013, and well beyond given the facts and circumstances.[63]

Plaintiffs' Motion completely ignores the activities of these CCHP committees, and by so doing, fails to account for facts and circumstances which clearly raise -- for them – genuine and outcome-determinative issues of material fact.

CONCLUSION

The Affiliation spawned an extensive restructuring of SJHSRI and a retooling of its governance mechanisms, a process that commenced in February 2009 and only came to rest on June 20, 2014, when CCHP sold substantially all of its operational assets and transferred select liabilities to the Prospect Defendants. A careful examination of the facts behind that 5½ year restructuring and retooling process reveals that several different organizations were tasked with either administering (or helping to administer) the Plan, or with overseeing and providing for the Plan's funding (including the management of the Plan's assets, an indispensable aspect of its funding).

At least two of those involved organizations, neither of which were explicitly identified in the Plan's primary document when it was restated in 2011 and again in 2016, show through their activity that they each qualify as a "principal-purpose organization" and thus do qualify as "principal-purpose organizations" – a finding that moves forward in time the date the Plan lost its church plan status, from the date(s) Plaintiffs urge (July 1, 2011 or April 29, 2013) to at least December 15, 2014.

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[63] ECF Document 174-14 (Affiliation Agreement) at _____; and ECF Document 174-24 (CCHP Bylaws_ at ____.

Plaintiffs' Motion fails to consider much less convincingly address these possibilities; it likewise fails to consider whether it was possible for SJHSRI (or one of the other organizations involved with the Plan) to, in effect, correct any problems created when the SJHSRI Board caused the Plan to be amended and restated in 2011, thereby calling into question whether the Plan remained in the hands of a "principal-purpose" organization. Because Plaintiffs' Motion fails to do so, it should be denied.

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PROSPECT DEFENDANTS'

CROSS MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

It does not surprise that Plaintiffs have failed to meet their burden of showing that the Plan ceased to qualify as a non-electing church plan (in their view, sometime in 2011, or in 2013 at the latest). Plaintiffs' reading of ERISA §3(33)(C) is too crabbed and narrow – particularly in light of the First Amendment concerns implicated by narrow interpretation of the church plan exemption – and their strict interpretation of even that narrow reading fails to take into account the possibility that ERISA's church plan exemption is flexible enough to permit one or more of the organizations left in charge of the Plan from and after 2011 to qualify as a "principal-purpose organization" (a "PPO").

A careful review of how the Plan, and CCHP's and SJHSRI's governing bodies navigated the tumultuous three-year period from July 1, 2011, when the Plan was restated and the Bishop appeared to relinquish control over it, until June 20, 2014, when CCHP and SJHSRI and their affiliates sold three hospitals' operating assets to the Prospect Defendants, reveals that the

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.

In fact, the more collective and collaborative approach that the SJHSRI Board and the CCHP committees used to maintain the Plan continued in operation for several months even after the hospitals' assets were sold, and only ended on December 15, 2014, when the reconstituted and repopulated SJHSRI Board effectively turned control of the Plan over to two individuals tasked with arranging for the Plan's eventual termination and liquidation. After that date, no apparent efforts were made to put any organization (much less a PPO) in charge of the Plan's administration or the Plan's funding until the Plan was petitioned into receivership on August 17, 2017, and Del Sesto was put in charge of it. Accordingly, in the absence of evidence of a subsequent "cure," the Prospect Defendants contend that the Plan lost its church plan status on December 15, 2014; if there was such a cure, then the Plan conclusively lost its church plan status when Del Sesto filed an election on April 15, 2019.

There are two reasons why the Plan was able to preserve its status as a non-electing church plan through the date of the 2014 Assets Sale, until December 15, 2014. The first has to do with the fact that ERISA's principal-purpose organization rule is – as we explain in our Opposition, above – a broadly and flexibly worded statute. There are several different ways for an erstwhile PPO to satisfy the three-step test mapped out in ERISA §3(33)(C).

The second has to do with the remarkable remedial provision Congress added to the statute in 1980, which is found at ERISA §3(33)(D). That provision provides those in charge of an erstwhile church plan with the opportunity to find and fix any structural or practical defects or mistakes that the plan might have, and by so doing <u>retroactively</u> requalify the plan as an exempt

church plan. That means, simply, that continuous compliance with ERISA's complicated church plan exemption rules is not required. Flaws and failures are not fatal; they can be fixed.

As it happens, there *were* periods in which the Plan qualified as a non-electing church plan during the consequential 3 to 3½ year period that ran from July 1, 2011 until December 15, 2014. Because of ERISA's extraordinary remedial provision, those period of compliance were then able to requalify the Plan after any period of unintentional non-compliance. The key to identifying those periods, and the circumstances under which they existed, starts by drawing upon the Supreme Court's admonition in *Stapleton* to examine "every clause and word" of Section 3(33) in order to reach a proper conclusion.

ARGUMENT

An in-depth examination of the record reveals that the Plan did in fact satisfy the requirements for operating as a non-electing church plan after the Plan was restated in 2011 and the Bishop turned over the administration of the Plan to the SJHSRI Board and/or its designate.

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.[64] The ability of the two CCHP committees to sustain this period of compliance lasted for more than three years.

[64] A collective, collaborative approach towards maintaining and funding a church plan admittedly is unorthodox, particularly when directed by the plan's sponsor. However, while the use of such an approach may have resulted in occasional compliance lapses, those lapses were timely remedied, causing the Plan to retroactively qualify for church plan treatment – which is exactly what ERISA's forgiving remedial provision (found at ERISA §3(33)(D)) expressly permits.

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.

When a tax-exempt organization wishes to maintain a benefit plan in compliance with ERISA's church plan exemption and wants to rely on a PPO to do so, three tests must be met. The Tenth Circuit in *Medina* loosely describes the three tests as follows:

> The statute imposes a three-step 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.

Medina, 877 F.3d 1213, at 1222. (Ellipses added to conform to the operative statutory language.)

As can be seen from the *Medina* court's formulation, Step 1 examines the sponsor of the plan whose employees are covered by it, and the sponsor's relationship with the church in question. Step 2 focuses on the activities of the would-be PPO. And Step 3, finally, examines the would-be PPO's own relationship with the church in question. We take each Step in the order the Tenth Circuit in *Medina* has presented them.

A. <u>SJHSRI All Relevant Times Was Controlled By, or a Minimum Was Associated With, the Catholic Church.</u>

The relationship between SJHSRI, the Plan's sponsor and then-current employer of the nurses and other employees then covered by the Plan, and the Catholic Church has always been both direct and strong. As ERISA's church plan rules make plain at ERISA §3(33)(C), there are two ways a sponsor can show that it has the requisite connection with a given church: show that the sponsor is within the church's control; or show that the sponsor is closely associated with the church and subscribes to its teachings and belief systems.

While federal law describes what an organization must do to be considered "associated with" a church or a convention or association of churches,[65] it does not define what it means to be "controlled by" one. Congress left that to the regulatory agencies and the courts. The regulatory agency primarily charged with overseeing the "church plan" rules – the United States Treasury Department and the Internal Revenue Service (the "IRS") – have promulgated two regulations that are very similar, but subtly different.

The first regulation was published in final form in 1980, specifically for purposes of the (then, new) church plan exemption found at Code §414(e). The second regulation was published in final form in 2007, and applied broadly to all types of tax-exempt organizations, including religious organizations seeking to qualify their plans as "church plans," as part of the Code's controlled group rules found at IRC §§414(b), (c), (m) and (o). The two standards are extremely similar; both look to the power a religious organization (or here, religious figure) has to appoint and remove, e.g., the target organization's directors, officers and/or trustees, and exercise control over the organization in that fashion. The 1980 version, created for the church plan rules found in the Code, focuses on the target organization's governing body and its executives and whether

[65] ERISA §3(33)(C)(iv); the parallel tax law definition can be found at 26 U.S.C. §414(e)(3)(D).

the church or church official has the right to appoint the majority of those in a position to control the organization itself:

> For the purposes of section 414(e) and this section, an agency of a church means an organization which is exempt from tax under section 501 and which is either controlled by, or associated with, a church. **For example, 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, within the meaning of this paragraph.** An organization is associated with a church if it shares common religious bonds and convictions with that church.

26 C.F.R. § 1.414(e)-1(d)(2) (3.31.80)[66] (Emphasis supplied.) The 2007 version, applicable to tax-exempt organizations generally, looks to the right to remove and replace individual trustees or directors, while ignoring the target organization's officers and executive team members:

> 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).

Unsurprisingly, those courts considering whether an organization is "controlled by" a church or convention or association of churches typically look to the relevant Treasury regulations, but are much more result-oriented. In *Overall v. Ascension*, 23 F. Supp. 3d 816 (E.D. Mich. 2014), for example, the court looked to the standard set forth in the relevant Treasury regulations, and noted that other courts had as well, but then zeroed in on the result(s) attained through the exercise of that control:

> 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

[66] This definition, which depicts a church-controlled entity as an "agency," was published March 31, 1980 (T.D. 7688; 45 Fed. Reg. 20797) and predates the changes made to the "church plan" exemption by MPPAA, which added subparagraphs (C) and (D) to ERISA §3(33) and paragraph (4) to IRC §414(e) (the parallel provisions in the Code). The "associated with" standard in the regulation has been superseded by the statutory definition found in, *e.g.*, ERISA §3(33)(C)(iv), but the "controlled by" standard remains the operative standard.

> 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).
>
> Here, the control of the Roman Catholic Church flows downward through Ascension Health Ministries, an entity created within the Roman Catholic Church, to Ascension and its system entities, including St. John Health, as described below. First, Ascension Health Ministries is an organization within the Roman Catholic Church, created by the Roman Catholic Church's canon law as a "Public Juridic Person." See Doc. 22-2, Exh. A, Vatican Decree. [Citations omitted] Currently five Catholic Religious Orders [ ] are the "Participating Entities" that appoint the members of Ascension Health Ministries. See Doc. 22-6, Exh. E, Ministries' Canonical Bylaws, Article IV. Seven of the 10 individual members are members of the five religious orders (i.e. brothers and sisters). [ ] These members have religious obligations imposed by the canonical statutes to maintain the Roman Catholic Church's control over Ascension and its System Entities, so that Ascension and the System Entities may remain a healing ministry carrying out the apostolic works of the Roman Catholic Church.

Overall, 23 F. Supp. 3d 816, at 829-830 (E.D.Mich. 2014).

Similarly, in *Catholic Charities of Maine v. City of Portland*, 304 F. Supp. 2d 77 (D. Me. 2004), the District Court looked at the result achieved to determine whether actual control over the affiliated entity existed, rather than simply counting the number of vacancies church officials could fill:

> 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). Under Catholic Charities' by-laws, the President and Vice President of the Catholic Charities Board of Directors are always the Diocesan Bishop of Portland and the Vicar General, respectively. Def.'s SMF, pp. 48-51. As President, the Bishop has the power to appoint and to remove both the corporation's members, id., p. 46, and the Chief Executive Officer. *Id.*, p. 55. The corporation's members, in turn, vote to approve members of the Board of Directors. *Id.* p. 47. Thus, the Bishop of Portland essentially controls the Board of Directors. Moreover, Catholic Charities cannot sell any of its property or assets without the Bishop's approval. *Id.*, at p. 59. These undisputed facts certainly suggest that Catholic Charities is "controlled by" the Catholic Church.

Catholic Charities of Maine, 304 F. Supp. 2d. 77, at 85.

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.

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. 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, and would extend to all the actions that the CCHP Board took with respect to SJHSRI.

Moreover, there is ample evidence to support the conclusion that the Bishop never intended to give up control. CCHP began searching for a buyer for its embattled hospitals shortly after the Affiliation was implemented, and when it became clear that the takeover discussions were going to extend beyond expiration of the CCHP trustees' Initial Term (3 years), steps were taken to extend each trustee's term in office, with the clear understanding (grounded in CCHP's Bylaws) that a trustee would remain in office until actually replaced. The fact that all but three of the fifteen sitting CCHP Board members' terms were extended at the conclusion of their Initial Term, in June 2013, provides further support for the conclusion that the Bishop's control over CCHP and its

board was resistant to change and that he continued to control the CCHP Board right up to the point where the 2014 Assets Sale occurred.

The Bishop's control over the CCHP Board in turn positioned him to exert substantial control over SJHSRI and *its* board in two ways: through the direct exercise by the CCHP Board of its rights as SJHSRI's A Member (which also could only be taken by a 75% super majority vote), and his direct right as SJHSRI's B Member to specifically approve of and agree to any and all decisions, and actions, involving pastoral care, use of Church-owned assets, and the performance of medical procedures considered by the Catholic Church to be doctrinally problematic.

It goes without saying that if SJHSRI and the SJHSRI Board are controlled by the Catholic Church, so too are the constituent committees of the SJHSRI Board, as internal subsets of the SJHSRI Board, particularly since the members of those committees are drawn from the pool of trustees who then sit on the SJHSRI Board, the majority of whom were appointed to their positions by the Bishop. The present situation, and the present relationships, thus fit squarely within the ERISA's church plan rule – at least through June 30, 2013, when the original CCHP trustees' Initial Terms ended, and colorably through the date of the 2014 Assets Sale because that same Board (and its constituent committees) remained in place throughout that period.

Even if there were periods prior to June 21, 2014 when SJHSRI and/or the SJHSRI Board could not be conclusively determined to have been controlled by the Bishop (and therefore, controlled by the Catholic Church), SJHSRI and the SJHSRI Board clearly were associated with the Catholic Church, which still allows SJHSRI and the SJHSRI Board to satisfy the first step, and the third step, of Section 3(33)(C)(i)'s principal-purpose organization test.

When the "church plan" exemption found in ERISA §3(33) was first enacted in 1974, Congress did not define what was meant by being "associated with" a church or convention or

association of churches. To fill that gap, Treasury regulations were published at 26 C.F.R. §1.414(e)-1(d)(2) (discussed, *infra*). In 1980, though, as part of the modifications made by the Multiemployer Pension Plan Amendments Act to ERISA §3(33) to add, *inter alia*, the concept of a "principal-purpose organization" and a special remedial/curative process, Congress specified what an organization or other body needed to demonstrate in order to show that they were in fact "associated with" a given church or convention or association of churches:

> (C) For purposes of this paragraph—
>
> *
>
> *
>
> (iv) 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). Courts examining this standard have looked to plan documents and operating rules that declare an affinity with the church in question, or materials that admonish committees and/or administrators to be "mindful of the . . . teachings and tenets of the [ ] Church." *Medina*, 877 F.3d 1213, at 1227. *See also Overall*, 23 F. Supp. 3d 816, at 831. For organizations affiliated with the Catholic Church, proving that such "common religious bonds and convictions" exist can be as simple as showing that the organization is recognized as in the Directory. *E.g., Medina*, 877 F.3d 1213, at 1223-24 (observing that the IRS considers inclusion in the official Directory *prima facie* evidence of proper "association" and rejecting plaintiffs' attempt to consider additional factors). In addition, some courts go beyond the institution's placement in the Directory and also look to the organization's internal policies and procedures. *E.g., Catholic Charites of Maine*, 304 F. Supp. 2d 77, at 85-86 (Directory listing is a public declaration by the Roman Catholic Church that an organization is associated with it; other materials further support a finding of "association").

Here, the Court need not look any further than SJHSRI's listing in the Directory, the

continuing presence of the Bishop as the B Member policing SJHSRI's commitment to Catholicity principles, and SJHSRI's Amended Articles and Bylaws which ensure that the Bishop has what he needs (as its B Member) to withhold consent on a variety of religious and pastoral matters, to see the clear presence of common religious bonds and convictions between SJHSRI and the Catholic Church. The SJHSRI Board, of course, is an internal subset of SJHSRI, and observes and carries out the Catholicity rules and restrictions laid out in Section 5 of its Bylaws, such as maintaining a Catholic Chapel capable of holding Catholic Mass, maintaining a fully staffed pastoral care department, maintaining internal and external signs, symbols and images manifesting the institution's commitment to Catholicism and to the Catholic Church, following the social and ethical teachings of the Catholic Church, and refraining from performing any medical or other procedures considered anathema to Church doctrine. That level of commitment is sufficient, in the view of most courts. *Boden v. St. Elizabeth Med. Ctr.*, 404 F. Supp. 3d 1076, at 1083-84.

It thus is incontrovertible that SJHSRI, the sponsor of the Plan and the entity whose employees were covered by the Plan and benefited from the Plan, was itself controlled by the Catholic Church at least until June 30, 2013, and arguably beyond that date because the Bishop's appointees remained in place and in control. It is equally incontrovertible that SJHSRI was at least associated with the Catholic Church, because it shared common religious bonds and values with the Catholic Church.

B. The CCHP Finance Committee, and the CCHP Investment Committee, Each Had As Their Principal Purpose, or At Least Their Function, the Administration of the Plan (Finance Committee) or the Funding of the Plan (Investment Committee)

The second step deals with the workings of the PPO itself, and whether the PPO can satisfy one of the several activities-oriented standards to be found in ERISA §3(33)(C)(i). As we point out in our Opposition, ERISA §3(33)(C)(i) is an extremely flexible statute that offers an organization several different ways to satisfy its requirements. Opposition at 31-32, *citing, inter*

alia, Boden v. St. Elizabeth Medical Center, 404 F. Supp. 3d 1076, at 1092. A review of the statutory text confirms this to be the case:

> A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation **or** otherwise, 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

29 U.S.C. §1002(33)(C)(i) (emphasis added). We also point out in our Opposition that among the possible alternatives for an organization that is not a juridical person (like a committee) are the following four:

1) A noncorporate organization which has as its principal purpose the administration of a plan for providing retirement benefits;

2) A noncorporate organization which has as its function the administration of a plan for providing retirement benefits;

3) As a noncorporate organization which has as its principal purpose the funding of a plan for providing retirement benefits; and

4) As a noncorporate organization which has as its function the funding of a plan for providing retirement benefits.

Opposition at 30.

Most important here, nothing in ERISA §3(33)(C)(i)'s text, or in its statutory history or in any of the relevant case law, holds that there can be only one PPO at a time. Here, for at least the period of time running from July 2011 through December 2014, there were two: one PPO was responsible for looking after the Plan's administration; and the other PPO was responsible for looking after the Plan's investments and its funded status.

1. A Key Function of the CCHP Finance Committee Was to Oversee The Administration of the Plan, Leading Up To and Following the Plan's 2011 Restatement.

The first PPO was the CCHP Finance Committee. The record shows that the CCHP

Finance Committee, once it had assumed the responsibilities previously assigned to the SJHSRI Finance Committee on June 30, 2010, promptly stepped in and began to assume many of the responsibilities associated with administering the Plan that the Bishop-led Retirement Board had been shouldering.[67] It did so initially as part of its financial oversight responsibilities (its first meeting was held March 1, 2010), but then did so on a more regular basis once the Plan was restated the following summer (July 1, 2011).[68] The CCHP Finance Committee played this critically important role at least from the July 1, 2011 amendment and restatement of the Plan until December 15, 2014, months after the 2014 Assets Sale, when the SJHSRI Board directed that those administrative duties be turned over to Mr. Daniel J. Ryan (discussed, *post*).

The Committee's responsibilities, while it was administering the Plan, were significant but not all-consuming, in part because the Plan had been closed to most new SJHSRI employees and was only continuing to accrue benefits for the collectively bargained employees working at the Catholic Hospitals (thus, reducing the time and attention needed to, *e.g.*, make eligibility determinations, resolve complex benefit determinations, etc.) and in part because many of the day-to-day chores were being performed by human resources personnel at SJHSRI and CCHP (whose activities the Committee supervised). Nonetheless, those duties were ongoing, and included hearing Plan appeals, reviewing contracts with third party vendors, and meeting with actuaries.

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[67] Defendants' Undisputed Facts, at ¶s 35 & 63-66; Belcher Decl. at ¶s 25, 28-29.

[68] Certainly, even Plaintiffs acknowledge that after CCHP was formed and SJHSRI was reorganized, right up to the point at which the Plan was amended and restated effective July 1, 2011, the Retirement Board was an unincorporated association (a non-juridical person) controlled by, headed by, and populated by, the Bishop. (ECF Document 174-13.) Plaintiffs' likewise concede that the Retirement Board was explicitly charged with administering and overseeing the Plan. (ECF Document 174-9, Art. 18.) Only with the 2011 amendment and restatement did that authority fall to the SJHSRI Board, or its designate. (ECF Document 174-10, Art. 8.)

While the scope of these activities made administration of the Plan a principal purpose of the CCHP Finance Committee, given the Plan's financial condition and its importance to the hospitals' well-being, administration of the Plan definitely was an essential function of the Committee, which brings it well within the four corners of ERISA §3(33)(C)(i).[69] That would make the CCHP Finance Committee an organization whose "function . . .is the administration of a retirement plan." After all, the common everyday definition of "function" is that it constitute an action or activity for which a person or thing is specially fitted.[70] Moreover, that involvement by the CCHP Finance Committee lasted at least until December 15, 2014, when the SJHSRI Board made Daniel J. Ryan, then SJHSRI's President, the Plan's Administrator.

2. The Principal Purpose, Or at Least a Key Function, of the CCHP Investment Committee Was to Oversee The Funding, and Funded Status, of the Plan Leading Up To and Following the Plan's 2011 Restatement.

The second PPO was the CCHP Investment Committee. Like the CCHP Finance Committee, the CCHP Investment Committee assumed the responsibilities of its SJHSRI counterpart on June 30, 2010, in connection with and as part of the final implementation of the Affiliation. From its inception as a committee, the record shows that the CCHP Investment

[69] We also observe in our Opposition that Plaintiffs' repeated depiction of the organization described in ERISA §3(33)(C)(i) as a "principal-purpose organization" also came straight from *dicta* in *Stapleton*. Opposition, at ____. As the face of the statute make plain, an organization which has as its "function" the administration of a given plan also can qualify, so long as the other tests are met.

[70] The Merriam-Webster Dictionary definition of "function," when used as a noun, has as its first two meanings the following:

> **1:** professional or official position **:** OCCUPATION -- His job combines the *functions* of a manager and a worker.
> **2:** the action for which a person or thing is specially fitted or used or for which a thing exists **:** PURPOSE

www.merriam-webster.com/dictionary/function (last visited 6.26.20).

Committee met regularly (in general, four times a year), commencing March 19, 2010, and conducted active oversight of the Plan and its funded status, in an effort to generate investment returns that could at least partially offset the lack of ongoing contributions from financially struggling SJHSRI, and regularly met with the investment managers and other parties charged with actively investing the Plan's assets.[71]

The Plan's portfolio constituted the largest of any of the investment portfolios under the CCHP Investment Committee's purview: 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. Judging just from the financial figures, that made management of the Plan's assets, and monitoring the Plan's funded status, the CCHP Investment Committee's principal purpose. The fact that CCHP's chief Human Resources Officer, Darleen Souza, was a member of the Committee's staff and routinely made presentations to the CCHP Investment Committee regarding the Plan simply confirms that to be the case.

Even if managing the Plan and its assets could not, arguendo, be considered the principal purpose of having a CCHP Investment Committee, managing the Plan's assets and looking after its funded status certainly was among the Committee's most important functions. As such, the CCHP Investment Committee also qualified as a PPO with regard to the Plan when it first began to discharge its oversight responsibilities regarding the Plan's assets in late 2010 while the Bishop-led Retirement Board remained in place.

In view of the foregoing, there can be no question that the CCHP Investment Committee had, either as its principal purpose, or as its function, the responsibility for dealing with the Plan's

[71] See *supra*, Footnote 37.

funded status – a responsibility made difficult by the inability and/or unwillingness of SJHSRI to make regular contributions.

C. CCHP Was Controlled By the Bishop, and Therefore By The Catholic Church, From the Inception of the Affiliation at Least Through the Date of the 2014 Assets Sale.

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. His appointments included a monsignor, and later the Chancellor of the Diocese and several other ordained priests, each of whom owed a duty of fealty to the Bishop and clearly held his proxy. He thus had control over CCHP during the Transition Period, and throughout the three-year Initial Term of the CCHP Board that ended June 30, 2013. 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).

As the district court observed in *Catholic Charities of Maine v. City of Portland*, 304 F. Supp. 2d 77 (D. Me. 2004), one looks at the *result* achieved to determine whether actual control by one entity over another actually exists, because:

> 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.

Catholic Charities of Maine, 304 F. Supp. 2d. 77, at 85.

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.

Accordingly, all three steps comprising the *Medina* test were met here. The fact that both organizations were CCHP committees thus changes nothing, because the Bishop was firmly in control of CCHP from its inception in June 2009 through at least June 20, 2014, when CCHP, RWH and SJHSRI sold their operating assets; it is that control that brought CCHP under the control of the Catholic Church during that period. 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.

D. Even if Lapses Did Occur In the Satisfaction by the Plan of the Church Plan Exemption Rules, From 2009 Through 2014, Those Failures Were Retroactively Corrected By the Ongoing Activities of the CCHP Committees, Which Lasted Until After the 2014 Assets Sale.

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)).

As noted above in connection with challenging Plaintiffs' Motion, ERISA's church plan

exemption has a sweeping redemptive provision that applies to circumstances like the ones present here. Subparagraph (D) of ERISA §3(33) permits those with the power and authority over a putative church plan's terms and its governance structure to correct any regulatory failures the plan is found to have, and if those failures are corrected within a broadly defined period of time, the correction is retroactively effective, back to the point at which the failure(s) occurred.

Unlike many of ERISA's church plan provisions, Subparagraph (D), Clause (i)'s wording is remarkably devoid of ambiguity:

> **(D)** **(i)** **If a plan** established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of title 26 **fails to meet one or more of the requirements of this paragraph [(33)] and corrects its failure to meet such requirements within the correction period the plan shall be deemed to meet the requirements of this paragraph for the year in which the correction was made and for all prior years**.
>
> **(ii)** If a correction is not made within the correction period, the plan shall be deemed not to meet the requirements of this paragraph beginning with the date on which the earliest failure to meet one or more of such requirements occurred.

ERISA §3(33)(D) (clause (iii) omitted and emphasis added), *codified at* 29 U.S.C. §1002(33)(D).

Thus, all that needs to be done is to fix the failure(s) within the correction period, and redemption for the plan, as a church plan, is assured. And the correction period itself is effectively open-ended: it only <u>begins</u> to come to an end if either (1) the IRS sends the plan sponsor (here, SJHSRI) a default notice indicating the plan fails to meet the requirements for qualifying as a church plan; <u>or</u> (2) a court of competent jurisdiction makes a final determination to that same effect, whichever comes <u>last</u>.[72] Even then, those responsible for the church plan

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[72] Clause (iii) of subparagraph (D) identifies the "correction period" as a period of at least 270 days, commencing <u>after</u> the IRS sends a notice of default regarding the plan's paragraph (33) qualification problem(s), and a court of competent jurisdiction has ruled on the matter. ERISA § 3(33)(D)(iii), *codified at* 29 U.S.C. §1002(33)(D)(iii).

have an additional 270 days – fully, nine months after it is made definitively clear that the plan has failed one or more of ERISA's church plan requirements – in which to fix whatever structural or operational problem(s) have been determined to exist. That correction period, too, is a matter of statute:

> **(iii)** For purposes of this subparagraph, the term "correction period" means—
>
> **(I)** the period ending 270 days after the date of mailing by the Secretary of the Treasury of a notice of default with respect to the plan's failure to meet one or more of the requirements of this paragraph; or
>
> **(II)** any period set by a court of competent jurisdiction after a final determination that the plan fails to meet such requirements, or, if the court does not specify such period, any reasonable period determined by the Secretary of the Treasury on the basis of all the facts and circumstances, but in any event not less than 270 days after the determination has become final; or
>
> **(III)** any additional period which the Secretary of the Treasury determines is reasonable or necessary for the correction of the default,
>
> **whichever has the latest ending date**.

29 U.S.C. §1002(33)(D)(iii) (emphasis added).

It likewise is clear that subparagraph (D)'s corrective provisions – including its unique retroactively effective feature – apply to a "principal-purpose organization" problem when necessary. As noted above, the IRS, which interprets, construes and enforces parallel principal-purpose organization and cure/correction provisions that Congress added to the Code at the same time it added subparagraphs (C) and (D) to ERISA §3(33) in 1980,[73] has ruled that a putative church plan found to have a principal-purpose organization problem can fix that problem, and if

[73] *See* MPPAA, P.L. 96-364, 94.Stat. 1208 (9.26.80), at §407 (Church Plans), 94 Stat. 1303-07. *Compare* MPPAA §407(a) (adding paragraphs (C) and (D) to ERISA §3(33)) *to* MPPAA §407(b) (adding subparagraphs (3) and (4) to IRC §414(e), respectively).

it does before the correction period expires, the plan will be treated as having been in compliance retroactive to the day the problem first occurred.[74] Courts have been quite deferential to IRS guidance, and rulings, in this area due to the presence of parallel language (in ERISA and the Code) and the clear indication given by Congress (in the statute) that the IRS is to function as the dominant regulatory agency in the area. *E.g., Overall*, 23 F. Supp. 3d 816, at 825-27 (discussing the IRS's role in church plan matters and citing *United States v. Cleveland Indians Baseball Co*., 532 U.S. 200, 220 (2001) regarding the deference to be shown the IRS in certain circumstances).

Subparagraph (D) of ERISA §3(33), and the parallel provisions of IRC §414(e)(4), show that the views of the IRS have a high degree of relevance, and persuasive effect, when it comes to the interpretation and application of the cure/correction rule (ERISA §3(33)(D)(i)-(iii)). In both cases, the Secretary of the Treasury (and hence, the IRS) is in charge of the correction period, thus making the IRS the final arbiter of how much leeway to provide to a church plan found to have fallen from grace, and how and when to provide the retroactive absolution that ERISA §3(33)(D) and IRC §414(e)(4) jointly make available.

The importance of ERISA §3(33)(D), to church plans in general and to a church plan in the circumstances present here, cannot be overstated. Here, the Plan traversed a period of eight tumultuous years. It began with the Affiliation in February 2009, and continued through its amendment and restatement in July 2011 as the Affiliation took full effect, and through the sale and disposition in 2014 by SJHSRI and RWH of their respective hospital facilities. And it ended with the winding up by both SJHSRI and RWH and CCHP (now, CCCB) of their remaining

[74] *PLR* 9619073, 1996 PLR LEXIS 134 (2.13.96) and *PLR* 200326045, 2003 WL 21483128 (4.2.03) (both, discussed *infra*).

activities, the settlement of their non-Plan obligations, and finally the petitioning of the Plan into receivership on August 17, 2017.

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.

E. The Plan Became Subject to ERISA on December 15, 2014, When All Control Over the Plan Was Surrendered to Messrs. Ryan and Land.

When the SJHSRI Board, on December 15, 2014, relieved the committees that had been responsible for helping to administer and monitor the funding of the Plan from their duties, and designated instead two individuals – SJHSRI's lay president and one of its outside attorneys (also, a layman) – severally to serve as Administrator, the Plan became subject to ERISA.[75]

And while the remedial provision addressed above remained available even then, there is no evidence in the record that any attempt was made to do so.[76] Rather, the Plan was petitioned into receivership 32 months later, on August 17, 2017.

With no principal purpose organization in place, and no steps to correct the problems that this caused, the law and facts compel the conclusion that the Plan's status as a non-electing church plan came to an end on or about December 15, 2014.

[75] Defendants' Undisputed Facts, at ¶s 104-106, and related Defendants' Exhibit T.

[76] Defendants' Undisputed Facts, at ¶107.

F. The Plan at Least Became Subject to ERISA on April 15, 2019 When Del Sesto Filed An Irrevocable Written Election With the IRS.

Even if the Court were to conclude that the appointment of Messrs. Ryan and Land did not sound the death-knell for the Plan as a non-electing church plan on December 15, 2014, it definitely occurred no later than April 15, 2019, when Del Sesto made his irrevocable election under 26 U.S.C. § 410(d) and filed it that day (the "Church Plan Election") as an attachment to the Annual Return/Report of Employee Benefit Plan he filed covering the Plan's fiscal year ended June 30, 2018 (the "2017 Form 5500"). A copy of the Church Plan Election is already on file with the Court. (ECF Document 127-1.) The Church Plan Election caused ERISA to apply as of July 1, 2018,[77] and removes any doubt that ERISA currently applies to the Plan. *See* 26 U.S.C. § 410(d)(2) ("An election under this subsection with respect to any church plan shall be binding with respect to such plan, and, once made, shall be irrevocable.")

While we believe that the change in responsibility that occurred on December 15, 2014 made the Plan subject to ERISA, by making and filing a written election with both the DOL and the IRS in accordance with IRC §410(d), as part of filing the 2017 Form 5500 under oath[78] on April 15, 2019, Plaintiff has irrevocably subjected the Plan to all of ERISA's provisions, including both Title I and the plan termination provisions of Title IV, and generally parallel requirements

[77] By its terms, the Plaintiff's Church Plan Election caused the Plan to be subject to ERISA effective "as to all Plan years beginning on or after August 17, 2017." (Ex. 1.) For the Plan, which has a June 30th fiscal year end, that would place the effective date of Plaintiff's Church Plan Election at July 1, 2018.

[78] The oath Plaintiff signed when filing the 2017 Form 5500 is comprehensive, and reads as follows: "Under penalties of perjury and other penalties set forth in the instructions, I declare that I have examined this return/report, **including accompanying schedules, statements and attachments**, as well as the electronic version of this return/report, and to the best of my knowledge and belief, it is true, correct, and complete." (Ex. 2, p. 1; emphasis added.) As noted above, the Church Plan Election is an attachment to the 2017 Form 5500. (Ex. 2, p. 57.)

imposed upon such plans by the Code in order to be treated as tax-qualified and tax-favored plans.

Congress put the election requirements in Code § 410(d), and they are both brief and straightforward:

> (d) **Election By Church To Have Participation, Vesting, Funding, Etc., Provisions Apply**
>
> (1) **In General**
>
> If the church or convention or association of churches which maintains any church plan makes an election under this subsection (in such form and manner as the Secretary may by regulations prescribe), then the provisions of this title relating to participation, vesting, funding, etc. (as in effect from time to time) shall apply to such church plan as if such provisions did not contain an exclusion for church plans.
>
> (2) **Election Irrevocable**
>
> An election under this subsection with respect to any church plan shall be binding with respect to such plan and, once made, shall be irrevocable.

26 U.S.C. §410(d). Corresponding Treasury Department regulations both reiterate key portions of the statute and explain how the election is to be made. Treas. Reg. §1.410(d)-1; found at 26 C.F.R. §1.410(d)-1, *et seq*.

Here, Del Sesto, in his capacity as Plan Administrator, made and filed the Church Plan Election in one of the ways specifically prescribed in the relevant federal tax regulations: he appended it to a Form 5500 filing (here, the 2017 Form 5500) and indicated it would be effective for the first Plan year commencing after August 17, 2017, as required by Treas. Reg. §1.410(d)-1(c)(5). As the Treasury regulations make clear, the plan's Administrator may make the election as a right. Neither the IRS nor any other agency is permitted to second guess or challenge a validly made election.

CONCLUSION

The Plan currently is subject to ERISA. In that, Plaintiffs and the Prospect Defendants are in agreement. As for <u>when</u> the Plan became subject to ERISA, the Prospect Defendants submit

that the Plan remained a non-electing church plan right up to the point when control over the Plan was permanently relinquished to SJHSRI's President and one of SJHSRI's outside counsel, on December 15, 2014. Even if that weren't the date the Plan permanently lost its way, it certainly came on April 15, 2019, the date Del Sesto filed an irrevocable election to subject the Plan to ERISA.

For all the foregoing reasons, the Prospect Defendants respectfully request that the Court enter summary judgment in their favor as to Count IV of Plaintiffs' Amended Complaint, in accordance with Federal Rule of Civil Procedure 56(c), 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.

Respectfully submitted,

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PROSPECT EAST HOLDINGS, INC.

By their attorneys,

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Dated: June 26, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of June 2020, I have caused the within document to be filed with the Court via the ECF filing system. As such, this document will be electronically sent to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants.

/s/ Dean J. Wagner, Esq.