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

DEFENDANTS PROSPECT MEDICAL HOLDINGS, INC., PROSPECT EAST MEDICAL HOLDINGS, INC., PROSPECT CHARTERCARE, LLC, PROSPECT CHARTERCARE SJHSRI, LLC AND PROSPECT CHARTERCARE RWMC, LLC'S JOINT MOTIONS TO DISMISS UNDER RULES 12(b)(1) FOR LACK OF STANDING, 12(b)(6) FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, AND RULE 12(b)(7) FOR FAILURE TO JOIN AN INDISPENSIBLE PARTY, OR IN THE ALTERNATIVE MOTION TO JOIN A PARTY PURSUANT TO RULE 19

Pursuant to Rules 9(b), 12(b)(1), 12(b)(6) and 12(b)(7) of the Federal Rules of Civil Procedure, Prospect Medical Holdings, Inc. ("Prospect"), Prospect East Holdings, Inc. ("Prospect East"), Prospect Chartercare, LLC ("Prospect Chartercare"), Prospect Chartercare SJHSRI, LLC ("Prospect SJHSRI"), and Prospect Chartercare RWMC, LLC ("Prospect RWH") (collectively the "Prospect Entities"), by and through their undersigned counsel, respectfully request that the Court dismiss the Plaintiffs' Complaint with prejudice as to the Prospect Entities for lack of standing, for failure to state a claim upon which relief can be granted, for failure to plead fraud claims with the requisite particularity, and for failure to join an indispensible party. Alternatively, the Prospect Entities request that the Court join the Pension Benefit Guaranty Corporation ("PBGC") as a necessary party pursuant to Fed. R. Civ. P. 19, and stay further action on all motions to dismiss until the PBGC has appeared in the case.

The grounds for Defendants' Joint Motion to Dismiss are set forth in detail in Defendants' accompanying Memorandum of Law filed herewith.

WHEREFORE, Defendants Prospect Medical Holdings, Inc. ("Prospect"), Prospect East Holdings, Inc. ("Prospect East"), Prospect Chartercare, LLC ("Prospect Chartercare"), Prospect Chartercare SJHSRI, LLC ("Prospect SJHSRI"), and Prospect Chartercare RWMC, LLC ("Prospect RWH") request that their Joint Motion to Dismiss be GRANTED. Alternatively, the Prospect Entities request that the Court join the PBGC as a necessary party, and stay further action on all motions to dismiss until the PBGC has appeared in the case.

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Dated: September 17, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of September 2018, that I have caused the within *Motion to Dismiss* 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.

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DEFENDANTS PROSPECT MEDICAL HOLDINGS, INC., PROSPECT EAST MEDICAL HOLDINGS, INC., PROSPECT CHARTERCARE, LLC, PROSPECT CHARTERCARE SJHSRI, LLC AND PROSPECT CHARTERCARE RWMC, LLC'S JOINT MEMORANDUM IN SUPPORT OF MOTIONS TO DISMISS UNDER RULES 12(b)(1) FOR LACK OF STANDING, 12(b)(6) FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, AND RULE 12(b)(7) FOR FAILURE TO JOIN AN INDISPENSABLE PARTY, OR IN THE ALTERNATIVE MOTION TO JOIN A PARTY PURSUANT TO RULE 19

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INTRODUCTION

This is a lawsuit that should never have been filed, and reflects an attempt by the Plaintiff-Receiver to do the job that an entire federal agency has been created to fulfill – which it does at taxpayer expense and without depleting the assets of a retirement plan that the Receiver himself says is terribly underfunded. As addressed below, given the Receiver's contention that the plan is subject to ERISA rules, this lawsuit is deeply misguided. And that is particularly true insofar as it seeks to impose liability on the Prospect Entities,[1] which are all, without dispute, strangers to the plan in question. But because the Prospect Entities are seen as a deep pocket in a situation involving a highly-underfunded plan, on the skimpiest of allegations and with virtually no law to support them, Plaintiffs seek to impose millions of dollars of pension obligations on the Prospect Entities. As explained below, this case is not yet ripe, but to the extent the Court allows it to proceed, the Prospect Entities should not remain a part of it, and the Court should dismiss all of the claims against them.

Plaintiffs are the Rhode Island state court-appointed receiver (the "Receiver") of the St. Joseph Health Services of Rhode Island Retirement Plan (the "Plan") and seven individual participants of the Plan (collectively, "Plaintiffs"). According to the Complaint, the Plan was established over fifty (50) years ago in 1965 by the Diocese of Providence ("Diocese"). *Compl.* at ¶ 213. Plaintiffs allege that the Plan for decades was exempt from the requirements of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") as a non-electing "church plan," but that at various times beginning in 2009 the Plan failed to qualify as a non-electing church plan. *Compl.* at ¶ 70. Plaintiffs further allege that the unfunded liability of the

[1] Prospect Medical Holdings, Inc. ("Prospect"), Prospect East Holdings, Inc. ("Prospect East"), Prospect Chartercare, LLC ("Prospect Chartercare"), Prospect Chartercare SJHSRI, LLC ("Prospect SJHSRI"), and Prospect Chartercare RWMC, LLC ("Prospect RWH") (collectively the "Prospect Entities").

Plan grew from $29 million in 2008 to $91 million as of April 30, 2013. *Compl.* at ¶¶ 123, 238, 254. Plaintiffs also allege that a scheme was conceived in 2011 to transfer assets of Defendant, St. Joseph Health Services of Rhode Island ("SJHSRI") to entities controlled by SJHSRI, but beyond the reach of Plan participants. *Compl*. at ¶ 57(d).

The Prospect Entities are, and have always been, complete strangers to the Plan. The Prospect Entities also were complete strangers to all of the events that transpired from the Plan's inception in 1965 until June 24, 2014, when two of the Prospect Entities (Prospect SJHSRI, and Prospect RWH) bought and paid millions of dollars for certain assets of Defendants SJHSRI and Roger Williams Hospital ("RWH") (the June 24, 2014 transaction is hereafter referred to as the "2014 Asset Sale"). *Compl.* at ¶¶ 11, 16-18, 20-21, 23.

The following facts are undisputed: (1) that the Prospect Entities had nothing to do with the Plan when it allegedly lost its church plan status (whether that occurred in 2009, in 2017 when the Receiver took over, or somewhere in between); (2) that the Prospect Entities played no role in the Plan's unfunded liability allegedly growing to $91 million as of April 30, 2013; and (3) that in 2011, the Prospect Entities did not participate (and, could not have participated) in any sort of allegedly fraudulent scheme conceived in 2011 to transfer assets beyond the reach of Plan participants.

Moreover, the Prospect Entities that purchased the SHSRI's and RWH's hospital assets in June 2014 did so pursuant to a publicly available Asset Purchase Agreement ("2014 APA") that expressly provided that the Prospect Entities would not, and did not assume the Plan or assume any liability for the Plan whatsoever. The publicly available 2014 APA fully disclosed that the Plan was one of the "Excluded Assets of Seller" to be retained by SJHSRI post-closing – a result entirely consistent with the sellers' repeated representations that the Plan was a non-

electing church plan incapable of being assumed by secular entities without losing its special status. Indeed, Plaintiffs acknowledge in the Complaint that the Prospect Entities structured the 2014 Asset Sale "to avoid any obligations under the Plan, and the 2014 APA expressly stated that responsibility for the Plan after the asset sale closed would remain with SJHSRI." *Compl.* at ¶ 301.

FACTUAL BACKGROUND[2]

From 1965 to 1995, SJHSRI's employees participated in the pension plan that the Roman Catholic Bishop of Providence, the Diocesan Administration Corporation, and the Diocesan Service Corporation (collectively, "Diocesan Defendants") had established for the employees of the Diocese (the "Diocesan Plan"). *Compl.* at ¶ 213. However, in 1995, SJHSRI and the Diocesan Defendants removed SJHSRI employees from the Diocesan Plan and simultaneously established the Plan, which segregated SJHSRI employees' funds from the funds of the Diocese's lay employees. *Compl.* at ¶¶ 216-18. At all relevant times, SJHSRI was associated with the Roman Catholic Church and treated the Plan as a non-electing "church plan" exempt from the provisions of ERISA that govern defined benefit pension plans. Both long before and after the 2014 Asset Sale, SJHSRI was listed in the Official Catholic Directory[3] ("Directory") as a subordinate organization that was "operated, supervised, or controlled by or in connection with the Roman Catholic Church." *Compl.* at ¶¶ 111-112.

[2] For purposes of these motions, the below facts are garnered from the Complaint in accordance with the applicable standard of review, and in no way are conceded.

[3] "Courts view an organization's listing in the Directory as a public declaration by the Roman Catholic Church that that organization is associated with the Church." *Sanzone v. Mercy Health*, 2018 U.S. Dist. LEXIS 145195 at 21 (E.D. Mo. Aug. 27, 2018) (citing *Overall v. Ascension*, 23 F. Supp. 3d 816 (E.D. Mich. 2014), *Catholic Charities of Maine v. City of Portland*, 304 F. Supp. 2d 77 (D. Me. 2004), *Hartwig v. Albertus Magnus Coll.*, 93 F. Supp. 2d 200 (D. Conn. 2000)).

As a result of ongoing and significant financial issues, in 2008, SJHSRI and RWH entered into a "Memorandum of Understanding" ("MOU") and agreed in principle to their merger, which was ultimately approved by the Rhode Island Department of Health ("RIDOH") and Rhode Island Attorney General ("RIAG") and effectuated in 2009. *Compl.* at ¶ 237. Consistent with that MOU, as of February 2, 2009, SJHSRI, RWH, and the Roman Catholic Bishop of Providence entered into a Health Care System Affiliation and Development Agreement (the "SJHSRI-RWH Affiliation Agreement") which reorganized the two hospitals into a combined health system called CharterCare Health Partners ("CCHP," which was later re-named Chartercare Community Board ("CCCB," or collectively with SJHSRI and RWH, the "SJHSRI Group Defendants")) to completely control both RWH and SJHSRI on all matters, except certain religious issues. *Compl.* at ¶ 238.

Despite the affiliation, the combined health system continued to sustain significant financial losses. As a result, in 2011, the trustees and management of SJHSRI, RWH, and CCCB decided to seek outside capital, but in doing so, desired to retain as much "local control" of RWH and Fatima Hospital (operated by SJHSRI) as possible. *Compl.* at ¶ 118-19. Toward the end of 2011 and into 2012, SJHSRI, RWH, and CCCB solicited offers from several entities that invested in or operated hospitals. *Compl.* at ¶ 120.

In 2013, Prospect–one of the entities that CCCB solicited–proposed to purchase the assets of CCCB, which included Fatima Hospital and RWH. *Compl.* at ¶ 126. Under the proposal, the Prospect Entities would pay SJHSRI and RWH cash consideration of $45 million (enough, to enable SJHSRI and RWH to completely discharge their bonded indebtedness of approximately $31 million and contribute $14 million to the Plan), commit to invest an additional $50 million over four years in capital projects and network development, provide

CCCB with a small (15%) equity interest to address its desire for some "local control," and fund annual asset depreciation in the amount of $10 million. *Compl.* at ¶ 126. The Prospect Entities' proposal was expressly conditioned upon the sponsorship of the Plan, and all liability associated with the Plan, remaining completely with SJHSRI. *Compl.* at ¶¶ 130-31.

To implement Prospect's proposal, a newly established limited liability company (Prospect Chartercare, to be owned 85% by Prospect East, and 15% by the Seller (CCHP)), would purchase substantially all the hospitals' assets from CCCB in exchange for the payment of $45 million in cash at closing, "$31 million of which [would] be applied to extinguish Seller's existing long-term debt and other obligations, and $14 million of which [would] be earmarked to strengthen the cash position of [the SJHSRI] pension plan." *Compl.* at ¶ 414. In addition, Prospect Chartercare–as the buyer–would agree to invest $50 million for long-term capital projects at the hospitals during the four-year period immediately following the closing. *Compl.* at ¶ 422.

Due to the Prospect Entities' for-profit status, the proposed 2014 Asset Sale went through an extensive administrative approval process under Rhode Island's 1997 Hospital Conversion Act ("HCA") in order to convert Fatima Hospital and RWH into for-profit hospitals. *Compl.* at ¶¶ 308-59. The RIDOH and the RIAG considered the extent that the Plan was underfunded, and the impact of the 2014 Asset Sale on SJHSRI's long-term pension liability to determine whether the transaction complied with the HCA. *See Compl.* at ¶¶ 308, 333-339. At the time the 2014 Asset Sale occurred, additional benefit accruals for existing Plan participants were terminated, which effectively froze benefits for then-eligible employees, and it was estimated that the Plan was 90% funded at the time. *Compl.* at ¶¶ 298, 327-28. Indeed, representatives of the SJHSRI Group Defendants assured state regulators that they intended to, and had the wherewithal to,

fund the Plan going forward. *Compl*. at ¶¶ 333, 340. As Plaintiffs allege, representatives of CCCB, SJHSRI and RWH testified to state regulators that they would be contributing $600,000 per year to the Plan going forward, in addition to directing $6,666,874.00 to the Plan post-closing. *Compl.* at ¶ 340. The 2014 Asset Sale was approved by the RIDOH and RIAG under the HCA notwithstanding the fact that SJHSRI still faced a significant unfunded pension liability. *Compl.* at ¶ 308.

The 2014 APA that the RIDOH and RIAG both approved expressly stated that the Prospect Entities would not assume or be responsible for any rights, duties, obligations or liabilities under the Plan. 2014 APA, Sections 2.2(d), 8.2(e).[4]

The Plan was administered by SJHSRI for more than three years after the 2014 Asset Sale until SJHSRI caused the Plan to be placed into receivership in September 2017, in a proceeding commenced in Rhode Island Superior Court, as a result of its allegedly having become insolvent. *Compl.* at ¶¶ 1, 16, 83. The Receiver for the Plan engaged special counsel ("Special Counsel") to investigate possible claims against third parties arising out of the Plan's

[4] The 2014 APA is a public document posted on the Office of the Rhode Island Attorney General at http://www.riag.ri.gov/CivilDivision/OfficeoftheHealthCareAdvocate.php under "Recent HCA Reviews," "CharterCARE/Prospect" and "Public Exhibits" and included thereunder as Exhibit 18. To avoid duplicative filings, any reference herein as to the 2014 APA shall be to the 2014 APA submitted along with the Diocesan Defendants' Motion to Dismiss. The Court can consider the 2014 APA without converting the motion to a motion for summary judgment because the factual allegations in the Complaint "are expressly linked to—and admittedly dependent upon"—the 2014 APA. *Roy v. General Elec. Co.*, 544 F. Supp. 2d 103, 107 (D.R.I. 2008). "[A] court may consider not only the complaint, but also the 'facts extractable from documentation annexed to or incorporated by reference in the complaint and matters susceptible to judicial notice.'" *Id.* (quoting *Jorge v. Rumsfeld*, 404 F.3d 556, 559 (1st Cir. 2005)). The First Circuit has held that a District Court may appropriately consider the whole of a document integral to or explicitly relied upon in a complaint, even if that document is not annexed to the complaint." *Jorge*, 404 F.3d at 559. Here, Plaintiffs referred to the 2014 Asset Sale, which the 2014 APA controlled, a total of seventy six (76) times. In addition, Plaintiffs mention the 2014 APA fourteen (14) times by referencing the 2014 APA ten (10) times, *see Compl.* at ¶¶ 142, 144, 150, 155, 174, 211, 301, 407, 424, 425, and quoting the 2014 APA four (4) times. *Compl.* at ¶¶ 395, 398, 421, 426.

alleged underfunded status. On June 18, 2018, Special Counsel filed the instant Complaint on behalf of Plaintiffs, asserting claims against numerous entities, including the Prospect Entities, relating to actions taken before, during, and after the 2014 Asset Sale. *Compl.* at ¶¶ 11, 16-18, 20-21, 23.

The wrongful conduct Plaintiffs allege occurred prior to the 2014 Asset Sale generally consists of (1) the failure to fund the Plan; (2) an alleged conspiracy among Defendants to characterize the Plan as a non-electing "church plan" in order to evade liability under ERISA and purported misrepresentations relating thereto; (3) SJHSRI and other Defendants' transfer of SJHSRI's assets, cash, and charitable income to entities controlled by SJHSRI's parent company; and (4) several Defendants' purported misrepresentations to state regulators and courts relating to the terms and effect of the 2014 Asset Sale. *Compl.* at ¶¶ 57, 65, 66, 70. Plaintiffs' allegations relative to conduct occurring at the time of and/or after the 2014 Asset Sale generally pertain to (1) the inclusion of SJHSRI in the Directory, which gave the Plan "church plan" status, allowing it to evade any and all obligations under ERISA; and (2) Defendants' purported misrepresentations to Plan participants about the funded status of the Plan.

STANDARD OF REVIEW

A. Rule 12(b)(1).

When resolving a Rule 12(b)(1) motion to dismiss an action for lack of standing, the Court must "credit the plaintiff's well-pled factual allegations and draw all reasonable inferences in the plaintiff's favor." *Sanchez ex rel. D.R.-S. v. United States*, 671 F.3d 86, 92 (1st Cir. 2012) (quoting *Merlonghi v. United States*, 620 F.3d 50, 54 (1st Cir. 2010)). Plaintiffs nonetheless must show that they have constitutional standing under Article III of the United States Constitution in order to survive a motion to dismiss by showing that they have (1) suffered an

injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant(s), and (3) that is likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Plaintiff, as "[t]he party invoking federal jurisdiction[,] bears the burden of establishing these elements." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561(1992).

B. Rule 12(b)(6).

"In order to survive a motion to dismiss under Rule 12(b)(6), a plaintiff must 'plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 48 (1st Cir. 2009) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (alteration in original). The complaint must "contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

In a complaint, "a plaintiff . . . is . . . required to set forth factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory." *Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 515 (1st Cir. 1988). In reviewing such complaint on a motion to dismiss, the Court must "accept as true all the factual allegations in the complaint and construe all reasonable inferences in favor of the plaintiff." *Sanchez*, 590 F.3d at 41 (citations omitted). However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. A complaint "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). While the Court must accept the alleged facts in a complaint as true, "this deferential standard does not force [a] court to swallow the plaintiff's invective hook, line, and sinker; bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like

need not be credited." *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996). Moreover, a plaintiff must provide defendants with "fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

"The First Circuit has adopted a 'practical, commonsense approach' for determining what materials may be properly considered on a motion to dismiss." *Roy v. Gen. Elec. Co.*, 544 F. Supp. 2d 103, 107 (D.R.I. 2008) (quoting *Beddall v. State St. Bank & Trust Co.*, 137 F.3d 12, 16 (1st Cir. 1998)). "Under this approach, a court may consider not only the complaint, but also the 'facts extractable from documentation annexed to or incorporated by reference in the complaint and matters susceptible to judicial notice.'" *Roy*, 544 F. Supp. 2d at 107 (quoting *Jorge v. Rumsfeld*, 404 F.3d 556, 559 (1st Cir. 2005)). Additionally, when a "'complaint's factual allegations are expressly linked to—and admittedly dependent upon—a document (the authenticity of which is not challenged), that document effectively merges into the pleadings.'" *Id.* (quoting *Beddall*, 137 F.3d at 17); *see also Jorge*, 404 F.3d at 559 (stating that "the district court appropriately may consider the whole of a document integral to or explicitly relied upon in a complaint, even if that document is not annexed to the complaint").

In addition to the minimum requisite pleading standards, heightened pleading requirements apply to fraud-based claims. "In alleging fraud . . . a party must state with particularity the circumstances constituting fraud . . . ." Fed. R. Civ. P. 9(b). "What constitutes sufficient particularity necessarily depends upon the nature of the case and should always be determined in the light of the purpose of the rule to give fair notice to the adverse party and to enable him to prepare his responsive pleading." *Women's Dev. Corp. v. Central Falls*, 764 A.2d 151, 161 (R.I. 2001) (quoting 1 Kent, R.I. Civ. Prac. § 9.2 at 92 (1969)); *see also Haft v. Eastland Fin. Corp.*, 755 F. Supp. 1123, 1126-27 (D.R.I. 1991).

C. Rule 12(b)(7).

When considering a motion to dismiss for failure to join a party under Fed. R. Civ. P. 12(b)(7), the Court conducts a two-step analysis. *See U.S.A. v. San Juan Bay Marina*, 239 F.3d 400, 405 (1st Cir.2001). Such two-step analysis is as follows:

> First, the Court needs to determine whether a person fits the definition of those who should be joined if feasible under Rule 19(a). Once the Court determines that the person in question is a necessary person according to Rule 19(a), it must ascertain whether the joinder of said party is feasible. If it is not feasible to join, the Court must decide whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed pursuant to Rule 19(b). When applying Rule 19(b), the court will ask whether it is so important, in terms of efficiency or fairness, to join this person, that, in the person's absence, the suit should not go forward at all.

Alexandrino v. Jardin de Oro, 573 F. Supp. 2d 465, 470 (D.P.R. 2008)(citations omitted).

"If the threshold requirements of Rule 19(a) are not met, then a Rule 19(b) inquiry is unnecessary." *Montes-Santiago v. State Ins. Fund Corp.*, 600 F. Supp. 2d 339, 342 (D.P.R. 2009) (citing *Temple v. Synthes Corp., Ltd.,* 498 U.S. 5, 7 (1990)). Rule 19(a) compels joinder when the court "cannot accord complete relief among existing parties" in that person or entity's absence. Fed. R. Civ. P. 19(a)(1)(A).

LEGAL ARGUMENT

I. THE ERISA CLAIMS SHOULD BE DISMISSED.

A. Plaintiffs' ERISA Claims Against the Prospect Entities Should Be Dismissed on Ripeness Grounds.

The Court should dismiss Plaintiffs' ERISA-based claims against the Prospect Entities because they are not ripe. Generally, Plaintiffs seek to invoke equitable remedies against the Prospect Entities on two levels – "appropriate equitable relief" under § 502(a)(3) of ERISA and a companion (but unspecified) successor liability theory. Specifically, Plaintiffs premise their

ERISA claims on the assertion that the Plan, while formerly a non-electing church plan exempt from ERISA, ceased being a church plan at some point after 2009 and thus became an ERISA-regulated pension plan. They then contend that all Defendants are jointly and severally liable for fully funding all of the Plan's benefits in compliance with ERISA's various requirements.

Plaintiffs' ERISA-based claims against the Prospect Entities are not ripe primarily because Plaintiffs (in particular, the Receiver) have not yet taken the steps necessary to determine the Plan's (and the participants') true losses – if any. Those true losses can only be ascertained after the PBGC is brought in to terminate the Plan (or, acquiesce in its termination), undertake and discharge its statutory and fiduciary responsibilities, and pay any and all statutorily-guaranteed benefits. Only then would the Court be in a position to determine which, if any, of the Plan participants have sustained a Plan "loss" and, thus, have a concrete injury capable of conferring upon them the requisite standing. *See*, *e.g.*, *Spokeo*, 136 S. Ct. at 1547

Whether Plaintiffs' attempt to hold the Prospect Entities liable for 50+ years of Plan neglect by the SJHSRI Group Defendants – including the critically important three-year period the SJHSRI Group Defendants maintained the Plan (and systematically ran it into the ground) following consummation of the 2014 Asset Sale – is even viable also depends almost entirely on an initial finding as to when the Plan conclusively ceased to qualify as a non-electing church plan wholly exempt from ERISA. If, as a fair reading of the Complaint together with ERISA's "church plan" statute strongly suggests, the Plan only became an unrepentant church plan in September 2017, when the SJHSRI Group Defendants put the Plan into receivership (as the Complaint concedes, it was only at that point that the Plan permanently ceased to be controlled or associated with any church), the Prospect Entities could not possibly be liable for the ensuing fallout. Without making these critically important determinations – which matter as much to the

PBGC and to the Internal Revenue Service (the "IRS") as they do to the Prospect Entities[5] – the Court is likely to spend significant time considering and deciding issues that could ultimately become moot, and/or are predestined to be re-litigated by one federal agency or another.

i. Courts Are Not in the Business of Providing Advisory Opinions and Ruling on Hypothetical Issues.

Ripeness, or justiciability, is a legal doctrine that generally provides that courts should not get involved in disputes likely to produce what amounts to an advisory opinion. *Nat'l Park Hospitality Assn v. Dep't of Interior*, 538 U.S. 803, 807-08 (2003). The justiciability doctrine has two prongs: (1) whether the issues are fit (i.e. ripe) for judicial decision, and (2) the hardship to the parties of withholding court consideration of the issues at the present time. *Id.*; *see also City of Fall River Mass. v. F.E.R.C.*, 507 F.3d 1, 6 (1st Cir. 2007). Both prongs of the test must be satisfied, although a strong showing on one may compensate for a weak showing on the other. *See Ernst & Young v. Depositors Econ. Prot. Corp.*, 45 F.3d 530, 535 (1st Cir.1995).

Under the first prong—the fitness inquiry—courts "'consider whether the matter involve[s] uncertain events which may not happen at all, and whether the issues involved are based on legal questions or factual ones.'" *F.E.R.C.*, 507 F.3d at 6. (quoting *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1237 (10th Cir. 2004)). The prospect of courts

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[5] The exact date the Plan lost (or, threw away) its status as a non-electing church plan and became subject to ERISA Titles I and IV has huge consequences, not only to the Prospect Entities (since that determination plays a key role in determining whether the Plan's alleged underfunded status was real or not, when the 2014 Asset Sale occurred), but also to the PBGC (since the PBGC premiums prescribed in, e.g., ERISA § 4007(a), et seq., are only due and payable in and for plan years that a plan is actually subject to ERISA Title IV, an amount which could easily reach into the millions of dollars), and to the IRS in its administration of Section 4971 of the Internal Revenue Code (the "Code"), which imposes a tax penalty of up to 100% of the minimum required contribution – each year – on the employer(s) responsible for contributing to the Plan – an amount which could cause the SJHSRI Group Defendants' financial obligation(s) to at least double, once interest and tax penalties are added. *See also* Code § 6651(a)(2) (penalty for failure to pay penalty taxes when due).

"entangling [them]selves in a challenge to a decision whose effects may never be 'felt in a concrete way by the challenging parties'" is "especially troublesome." *Id.* (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)). Such "premature review not only can involve judges in deciding issues in a context not sufficiently concrete to allow for focus and intelligent analysis, but it also can involve them in deciding issues unnecessarily, wasting time and effort." *W.R. Grace & Co. v. EPA,* 959 F.2d 360, 366 (1st Cir. 1992).

The second prong—hardship on the parties—evaluates "the extent to which withholding judgment will impose hardship—an inquiry that typically turns upon whether the challenged action creates a 'direct and immediate' dilemma for the parties." *McInnis-Misenor v. Maine Med. Ctr.*, 319 F.3d 63, 70 (1st Cir. 2003) (internal quotations omitted). "This inquiry encompasses the question of whether [a] plaintiff is suffering any present injury from a future contemplated event." *Id.*

Here, Plaintiffs claim that the Plan is insolvent. If that is the case, then the PBGC has a statutorily-mandated role to play in addressing the obligations of the Plan, and Plaintiffs' claims ignore or attempt to circumvent that role. But until the PBGC is joined as a party and fulfills that role, Plaintiffs' claims, which arise out of the underfunding of the Plan, are not yet ripe.

ii. The Role of the PBGC.

The viability of so-called "defined benefit" pension plans that are subject to ERISA and are tax-qualified is the central focus and concern of Title IV of ERISA, and the PBGC is the federal agency with primacy over the interpretation and enforcement of Title IV of ERISA. *See also PBGC v. LTV Corp*., 496 U.S. 633, 648 (1990) (explaining PBGC's role). Plaintiffs allege, and the Prospect Entities concede, that the Plan currently is subject to ERISA because the Receiver is firmly in control of it, and has been since September 2017. Under ERISA, unless the

Receiver has done something to destroy the Plan's status as a tax-qualified plan, that changes everything.[6] The PBGC's primary role is to serve as the insurer of all private sector defined benefit pension plans that qualify for its coverage. If a PBGC-covered single employer plan fails, the PBGC pays participants their earned benefits up to certain legal limits.[7] The importance of the PBGC's role in ensuring the payment of benefits to participants in underfunded plans cannot be overstated. To carry out its responsibilities, the PBGC can "sue and be sued, complain and defend, in its corporate name and through its own counsel, in any court, State or Federal." ERISA § 4002(b)(1). It also can bring civil actions for appropriate relief, legal or equitable, or both, to enforce the provisions of Title IV of ERISA, under a variety of civil relief provisions beginning with ERISA § 4003(e)(1)(A) but including ERISA §§ 4067, 4068(d), 4070. The PBGC thus plays a critical role in the termination of tax-qualified defined benefit-type pension plans.

iii. Plaintiffs' ERISA Claims Asserted Against the Prospect Entities Are Not Ripe.

Here, Plaintiffs' ERISA claims against the Prospect Entities are not ripe and will not be ripe at least until the PBGC has been brought in to pay statutorily-guaranteed benefits and assert its statutory rights, and, more important, until the Court determines when the Plan finally and permanently ceased to qualify as a non-electing church plan exempt from ERISA.

[6] The Plan presently fails to qualify as a "church plan" because it no longer is maintained by a church or by a convention or association of churches exempt from tax under Code § 501. ERISA § 3(33). As a result, the Plan presently is not exempt from the funding (29 U.S.C. § 1081, *et seq.*), fiduciary responsibility (29 U.S.C. § 1101, *et seq.*) and administration and enforcement provisions (29 U.S.C. § 1131, *et seq.*) of Title I of ERISA, nor the plan termination insurance provisions of Title IV of ERISA (29 U.S.C. § 1301, *et seq.*). This is not in dispute. *Compl.* at ¶ 32.

[7] *See* **www.pbgc.gov/prac/other-guidance/insurance-coverage** (visited September 8, 2018).

At bottom, Plaintiffs' ERISA claims seek to recover the funding necessary to pay pension benefits to the Plan's participants and beneficiaries, without reduction. It makes little sense to litigate these claims against the Prospect Entities before the PBGC is able to either initiate termination proceedings or acquiesce in a Receiver-initiated "distress" termination, assert its rights, and discharge its principal statutory obligation by paying the Plan's participants their guaranteed benefits. To the extent the PBGC's payment of guaranteed benefits completely satisfies the Plan's obligations to some or all of the Plan's participants and beneficiaries, it would completely eliminate their ERISA claims against the Prospect Entities, and with it, their standing to pursue those claims (or, have the Receiver pursue them). *Spokeo*, 136 S. Ct. at 1547 ("injury in fact is a constitutional requirement"); *see also Feather v. SSM Health*, 2018 U.S. Dist. LEXIS 122346, at *9-10 (D. Mo. July 23, 2018) (ERISA claims based on alleged misclassified and underfunded church plan dismissed for lack of standing, where plaintiffs failed to allege imminent risk of unpaid benefits).

Moreover, the failure or refusal by the Receiver to bring in the PBGC could *delay* and undermine the timely payment of benefits, while exacerbating the Plan's funded status by siphoning off Plan assets to pay the fees of the Receiver and his growing legal and administrative team (responsibilities the PBGC notably would discharge at taxpayer expense), while the Court is forced to tackle ERISA claims and issues that either could be mooted or relitigated by the PBGC or by one of the other federal agencies with jurisdiction. In the inverse context, in which an ERISA-regulated pension plan subsequently claimed to qualify for treatment as a non-electing church plan, courts have declined to get involved (on ripeness grounds) until after the regulatory agency with oversight responsibilities and a stake in the outcome has had its chance to weigh in. *See Tynes v. Pension Benefit Guar. Corp.,* 2005 U.S. Dist. LEXIS 16037, at *10-16 (D.N.J. Aug.

9, 2015). The First Circuit has previously invoked the ripeness doctrine in situations where a key regulatory agency has not yet completed (or, been able to complete) its review and where the posture/validity of the plan had not been completely resolved. *F.E.R.C.*, 507 F.3d at 1. These same considerations compel the conclusion that Plaintiffs' ERISA-based claims are not and cannot be ripe at least until the PBGC is brought into the litigation to explain its position, assert its rights, and pay guaranteed benefits.

Moreover, the PBGC's involvement seems both inevitable and imminent. The Complaint concedes that the first and the second of these events in which the PBGC may involuntarily terminate the Plan have already occurred, as the Plan has allegedly not met the Code's minimum funding standard since it ceased to qualify as a non-electing church plan, and the looming inability of the Plan to pay all benefits as and when they come due is cited as the catalyst for the entire lawsuit. *See* ERISA Section 4042(a) & (c). In addition, according to recent settlement documents submitted in the companion receivership proceeding pending in Rhode Island state court,[8] the Receiver (since September 2017, the Plan's controlling ERISA plan fiduciary) and his Special Counsel have already applied for (and at least in part have been paid) millions in fees from the settlement proceeds that the Receiver seeks to add to the Plan's diminishing funds, and there can be little doubt that further dissipation of Plan assets will follow unless the PBGC takes over in connection with a distress or involuntary termination of the Plan.[9] The PBGC was organized, and exists, to handle situations precisely like this.

[8] Because the Plan is now subject to ERISA, the Prospect Entities will be moving to dismiss the state law claims asserted against them on the grounds that they are preempted by ERISA, per ERISA § 514(a).

[9] Prospect Entities requests that the Court take judicial notice of the Receiver's Petition for Settlement Instructions and attached Settlement Agreement, as they were filed by Plaintiffs and publicly available in the companion state court action. *United States ex rel. Winkelman v. CVS*

In the unlikely event that the PBGC attempts to delay or avoid its responsibilities, despite the clear statutory role that Congress has assigned to it, this Court could decide the issue *de novo*, and if termination of the Plan is found to be necessary, force the issue by deciding the Plan's termination date in accordance with ERISA § 4048(a)(4) [29 U.S.C. § 1348(a)(4)]. *See*, *e.g*., *In re UAL Corp.,* 468 F.3d 444 (7th Cir. 2005); *see also*, *PBGC v. Heppenstall Co*., 633 F. 2d 293 (3rd Cir. 1980); *PBGC v. St. Gobain Corp. Benefits Comm.*, 2013 U.S. Dist. LEXIS 144515 (E.D. Pa. Oct. 4, 2013) (outlining the administrative process the PBGC follows when determining when and whether to initiative involuntary termination proceedings, and concluding that in the absence of action by the PBGC, the court can decide the issue *de novo*).

While the PBGC could be expected to contend that this Court would need to defer to PBGC's own determinations, likely applying an abuse of discretion standard generally reserved for agency actions taken under the Administrative Procedures Act (the "APA"), *Atieh v. Riordan*, 797 F.3d 135, 138 (1st. Cir. 2015) (courts may set aside an agency's decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."); *Dycus v. PBGC*, 133 F.3d 1367, 1369 (10th Cir. 1998) (recognizing review framework applies to decisions made by the PBGC), that contention should not hold sway. Courts have found that inaction – or here, a non-decision – does not implicate the APA or trigger the prescribed deferential standard. *St. Gobain Corp. Benefits Comm*., 2013 U.S. Dist. LEXIS 144515, at *9-12. And while the issue is not (and likely never will be) before the Court, it should be noted that based on the statutory directives and the PBGC's past practices, any decision by the PBGC *not* to initiate termination proceedings and pay Plan benefits, despite its dire financial condition, would

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Caremark Corp., 827 F.3d 201, 208 (1st Cir. 2016) ("within the Rule 12(b)(6) framework, a court may consider matters of public record and facts susceptible to judicial notice."); *Giragosian v. Ryan*, 547 F.3d 59, 66 (1st Cir. 2008) ("Matters of public record ordinarily include 'documents from prior state court adjudications").

likely constitute an abuse of discretion.[10] Ultimately, whatever the PBGC does will have significant ramifications over the claims asserted against the Prospect Entities, as well as over the course of this litigation. Thus, if the PBGC is not a party, the Court may be in the position of having "decid[ed] issues unnecessarily" while "wasting time and effort." *W.R. Grace & Co*, 959 F.2d at 366.

Finally, if Plaintiffs were to persist in pursuing claims against the Prospect Entities after the PBGC is brought in, the Court should then determine *when* the Plan conclusively ceased to qualify as non-electing church plan and definitively became subject to ERISA. The answer to that question would then determine whether Plaintiff's claims against the Prospect Entities are at all viable, just as it would determine the size and scope of the PBGC's premium claims, and the size and scope of any tax penalties IRS could assess and collect from the SJHSRI Group Defendants. As previously noted, if the Plan is found to be a non-electing church plan (or at least one capable of being retroactively corrected by the SJHSRI Group Defendants in accordance with 29 U.S.C. § 1002(33)(D)(i)) at the time of the 2014 Asset Sale), it is difficult to fathom any theory under which one or more of the Prospect Entities could be held liable for the Plan subsequently becoming subject to ERISA, especially since none of them have ever been a Plan fiduciary, administrator, or contributing sponsor.

Thus, the Court should dismiss Plaintiffs' ERISA claims against the Prospect Entities on ripeness grounds, or in the alternative enter an order that the PBGC be added as a party and, if necessary, decide exactly when the Plan ceased to qualify as a non-electing church plan.

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[10] The PBGC has previously provided benefits in connection with non-electing church plans that have fallen from grace, as well as plans that previously were subject to ERISA (and PBGC protection) but subsequently became church plans and then became insolvent. *See*, *e.g.*, PBGC May 10, 2003 Release (Hospital Center at Orange), found at https://www.pbgc.gov/news/press/releases/pr13-10.

B. If Plaintiffs' ERISA Claims Are Ripe, the PBGC Must Be Joined As A Necessary Party.

Even if Plaintiffs' ERISA claims are sufficiently ripe, the Court should dismiss the Complaint for failure to join the PBGC as an indispensable party or, in the alternative, the Court should join the PBGC as a necessary party under Rule 19(a). Rule 12(b)(7) authorizes the dismissal of a complaint for failure to join a party under Rule 19. *Taylor v. State, Dep't of Mental Health Retardation & Hosp.*, 726 F. Supp. 895, 897 (D.R.I. 1989). Rule 19(a) addresses circumstances in which a lawsuit is proceeding without particular parties whose interests are central to the suit, and provides for the joinder of such "necessary" parties when feasible. *See* Fed. R. Civ. P. 19(a); *Picciotto v. Cont'l Cas. Co.*, 512 F.3d 9, 15 (1st Cir. 2008). Specifically, Rule 19(a)(1) provides the following:

> A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if: (A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Accordingly, Rule 19 invokes a two-tiered analysis. *See* Fed. R. Civ. P. 19(a). The Court must first evaluate whether the absent party has an interest in the subject matter of the lawsuit. *Id.* If the Court recognizes an interest, it must then determine whether nonjoinder will prejudice either the absent party or the pending parties' rights. *Id.*

In proceeding with its inquiry, district courts "should keep in mind the policies that underlie Rule 19, including the public interest in preventing multiple and repetitive litigation, the interest of the present parties in obtaining complete and effective relief in a single action, and the

interest of absentees in avoiding the possible prejudicial effect of deciding the case without them." *Picciotto*, 512 F.3d at 15-16 (internal citations omitted); *see also Z&B Enters v. Tastee-Freez Int'l, Inc*., 162 Fed. Appx. 16, 18 (1st Cir. 2006).

Here, Plaintiffs assert that the Plan is governed by ERISA. As such, the PBGC is a necessary party under both Rule 19(a)(1)(A) and (B). As to Rule 19(a)(1)(A), the Court cannot award complete relief against the existing parties with respect to the heart of Plaintiffs' ERISA claims—the alleged failure to comply with ERISA's minimum funding standards— in the absence of the PBGC, because the PBGC has a critical role to play in the enforcement of those standards and its absence increases exponentially the likelihood of ineffective enforcement and inconsistent results. *See*, *e.g.*, 29 U.S.C. §§ 1083(k)(4), (k)(5) (creation, enforcement and release statutory liens for failure to satisfy ERISA's minimum funding requirements); *see also PBGC v. LTV Corp.*, 496 U.S. 633, 637 (1990) (describing PBGC's pivotal role in dealing with underfunded defined benefit plans). Thus, to the extent the alleged ERISA minimum funding issues are to be litigated, they cannot reasonably be enforced, or resolved, without the PBGC active involvement.

Moreover, if the Plan is an ERISA plan, the PBGC necessarily has a significant interest in this litigation that could be impaired if it is not joined. This case concerns an allegedly insolvent retirement plan that, if found to be subject to ERISA, almost certainly will have to be terminated by the PBGC in an involuntary termination (under 29 U.S.C. § 1342) or an Administrator-initiated distress termination (under 29 U.S.C. § 1341(c)).[11] The PBGC will then

[11] These circumstances—one in which the Plan is allegedly in dire financial conditions—appear to be relatively unique in the context of "church plan" lawsuits. This explains why other "church plan" cases have not had to address the necessary role of the PBGC in the proceedings. This also appears to be one of the first, if not the first, church plan case in which Plaintiffs have attempted to pin ERISA liability on an asset purchaser based solely on its alleged successor status.

take over the Plan as trustee and pay Plan benefits up to legal limits with Plan assets and PBGC guaranteed funds.[12] Importantly, the PBGC will then hold potentially valuable statutory liens, which it alone can assert against the employer in an attempt to recover the expended PBGC funds. *See* 29 U.S.C. § 1083(k). The value and utility of such lien rights could very well be lost over time if the PBGC is not made a party to this lawsuit and allowed to assert its interests directly .

Joining the PBGC will also allow it to assert its position regarding whether the Plan is a church plan or whether it is correctable under 29 U.S.C. § 1002(33)(D) and thus can regain its church plan exemption. Not joining the PBGC will expose all parties to a risk of inconsistent results if the PBGC initiates proceedings later. Unless the PBGC is made a party, any determination by this Court as to whether the Plan is subject to ERISA will not be binding on the PBGC. Clearly, Plaintiffs want the Plan treated as an ERISA pension plan, which would appear to have the practical effect of the PBGC assuming control over the Plan and paying benefits (assuming Plaintiffs' allegations regarding the financial state of the Plan and the SJHSRI are true). The PBGC should therefore have a proverbial seat at the table if and when it becomes necessary to argue before the Court whether the Plan is a church plan.

Finally, since there is no apparent reason why the PBGC cannot be joined, Rule 19(b) should be inapplicable. *Picciotta*, 512 F.3d at 15 (1st Cir. 2008). However, if for some reason joinder of the PBGC is not feasible, the Court should dismiss the ERISA claims asserted against

[12] The PBGC has previously provided benefits in connection with church plans that have fallen from grace, as well as plans that previously were subject to ERISA (and PBGC protection) but subsequently became church plans and then became insolvent. *See*, *e.g*., PBGC May 10, 2003 Release (Hospital Center at Orange), found at https://www.pbgc.gov/news/press/releases/pr13-10.

the Prospect defendants on the grounds that the PBGC is an indispensable party. *Picciotto*, 512 F.3d at 15.

Allowing Plaintiffs to bypass the PBGC while asking this Court to determine whether the Plan is an ERISA or church plan would be both inequitable and extremely prejudicial. The PBGC is the entity actually responsible for and capable of paying the alleged benefits. Thus, the PBGC should be joined as a necessary defendant. If for any reason joinder of the PBGC is not feasible, the Court should dismiss Plaintiffs' ERISA claims as asserted against the Prospect Defendants.

C. If the Court Agrees That the PBGC Should Be Joined as a Party, Further Action on All Motions to Dismiss Should Be Stayed.

Finally, in the event that the Court determines that the PBGC should be joined as a party, further action on the pending motions should be stayed until the PBGC has appeared in the case, asserted its rights, and had an opportunity to respond to the ERISA issues before the Court. Moreover, once the PBGC has been made a party, an initial determination by the Court as to when the Plan ceased to qualify as a non-electing church plan will necessarily affect (and perhaps eliminate) the claims against the Prospect Entities.

Staying this action until the PBGC can appear and be heard, and all parties can ascertain whether the PBGC is willing to take over the Plan and decide whether to, e.g., prosecute claims against the SJHSRI Group Defendants, would truly constitute appropriate equitable relief within the meaning of ERISA § 502(a)(3). After all, despite the critical role the PBGC plays in the life of employee pension benefit plans like the Plan, and despite the Receiver's current status as the leading ERISA fiduciary of an allegedly insolvent plan, the Receiver has not taken the simplest and most obvious course of action – one far more likely than any other to result in the payment of benefits to the Plan's participants and beneficiaries: to seek to turn over the Plan to the PBGC

by invoking the termination provisions of ERISA §§ 4041(c) and/or 4042. The Receiver has instead chosen to act as a front-runner to the PBGC for undisclosed reasons, consumed countless Plan assets in fees and expenses (including fees paid to his hand-picked legal counsel), and now proposes to settle a variety of fiduciary breach and ERISA statutory claims pending against the SJHSRI Group Defendants – the very parties responsible (and culpable) for creating the alleged defects in the Plan's "church plan" status, and running the Plan into the ground between 2014 and 2017, long after the Prospect Entities bought the hospitals' business assets. Bleeding a beleaguered pension plan dry before seeking relief from the PBGC is not what Congress intended when it enacted Title IV of ERISA.

D. Plaintiffs' Attempt to Foist ERISA's Minimum Funding Obligations on the Prospect Entities, as an Alleged Successor to the SJHSRI Group Defendants, Is Fatally Flawed and Should Be Dismissed.

If the Court elects to immediately decide the merits of Plaintiffs' claims, their ERISA claims as asserted against the Prospect Entities should be dismissed. In Count I, Plaintiffs allege that the Plan is a "lapsed" church plan that has been subject to ERISA's minimum funding obligations for the past several years; that ERISA's funding obligations have not been satisfied during those years; that Plaintiffs can force those funding obligations to be redressed under ERISA § 502(a)(3) by ordering the SJHSRI Group Defendants to make the minimum contributions in the name of "appropriate equitable relief"; and, most relevant here, that it is "appropriate[ly] equitable" under ERISA to foist those contribution obligations on the Prospect Entities, despite their being complete strangers to the Plan. *Compl.* at ¶¶ 429-38.

Even if the Plan could be found subject to ERISA before September 2017, when the Diocese and the SJHSRI Group Defendants caused the Plan to be irrevocably subject to ERISA

by surrendering all control over the Plan to a secular party (the Receiver)[13], there is no legally-cognizable basis under ERISA § 502(a)(3) for enforcing ERISA's minimum funding requirements against the Prospect Entities, because none of them are, or ever have been, "employer[s] responsible for making contributions to or under the plan." Further, none of the Prospect Entities have ever been a fiduciary of the Plan, and none have ever had any commercial or other dealings with the Plan that could be capable of supporting any of the equitable remedies "traditionally available in equity" or conceivably available in an action brought under ERISA § 502(a)(3). *See e.g.*, *Sereboff v. Mid Atl. Med. Svcs.*, 547 U.S. 356, 361-62 (2006) (clarifying the types of equitable remedies available under ERISA § 502(a)(3)).

There are three reasons why the minimum funding claim that Plaintiffs assert against the Prospect Entities in conclusory fashion in Count I, *see Compl.* at ¶ 438, is fatally flawed and should be dismissed. First, relevant federal statute makes plain – multiple times – that the SJHSRI Group Defendants, as "the employer[s] responsible for making contributions to or under the plan," alone bear the statutory obligation to satisfy ERISA's minimum funding obligations with respect to a defined benefit plan like the Plan. Second, a claim brought for "appropriate equitable relief" under ERISA § 502(a)(3), where remedies are limited to those traditionally available in equity, cannot possibly lie against complete strangers to the Plan (here, the Prospect Entities) that cannot be shown to have had any financial dealings with the Plan, or to have ever

[13] Prior to September 2017, when the SJHSRI Group Defendants and the other Diocese-controlled entities initiated receivership proceedings in Rhode Island state court and (by so doing) irrevocably put the future of the Plan at the mercy of the Rhode Island state courts (and here, the court-appointed Receiver), the Plan either was a non-electing church plan–as SJHSRI and CCCB consistently represented to the Prospect Entities throughout the negotiations leading up to the negotiation and consummation of the 2014 sale of the two hospital's operating assets–or was a lapsed church plan that those Diocese-controlled entities easily could have retroactively cured under ERISA § 3(33)(D), a special statutory procedure that Congress specifically put in place to enable a plan to be retroactively cured of the sort(s) of defects the Receiver alleges in the Complaint.

served as a fiduciary or party-in-interest to the Plan, or to have had any direct dealings with the Plan. Third, Plaintiffs' attempt to hold the Prospect Entities liable as "successors" to the SJHSRI Group Defendants is nothing more than a cynical attempt to find a way past the "appropriate equitable relief" limitation placed on actions predicated on ERISA § 502(a)(3) in order to reach– and pick – a supposed deep pocket, despite there not being any viable legal or proper equitable basis to do so.

i. ERISA's Minimum Funding Obligations Are Only Enforceable Against the Plan's Contributing Employers.

ERISA's statutory framework has long been recognized by the United States Supreme Court (and the inferior courts) as comprehensive and reticulated. *Nachman v. Pension Benefit Guar. Corp.*, 446 U.S. 59, 61 (1980); *see also Mertens v. Hewitt & Assocs.*, 508 U.S. 248, 252 (1993). Courts accordingly loathe reading into ERISA's remedial provisions remedies not placed there by Congress, whether in the name of interstitial rulemaking or otherwise. *See e.g., Anthony v. JetDirect*, 725 F. Supp. 2d 249, 255 (D. Mass. 2010) (rejecting implied right of contribution between co-fiduciaries, and agreeing with, *inter alia*, *Travelers Cas. & Sur. Co. of Am. v. IADA Servs., Inc.*, 497 F.3d 862, 867 (8th Cir. 2007)). As the Sixth Circuit pointedly observed in *Girl Scouts of Middle Tennessee, Inc. v. Girl Scouts of the USA*, "[e]ven compelling policy arguments do not permit a court to create federal common law in order to 'overcome what is a specific and intentional omission from ERISA.'" 770 F.3d 414, 424-425 (6th Cir. 2014).

Here, Plaintiffs seek to enforce, in a civil action brought under ERISA § 502(a)(3), the minimum funding obligation applicable to single employer defined benefit plans (which, per the allegations of the Complaint, now apply to the Plan). That obligation appears in three separate places in ERISA and the Internal Revenue Code ("IRC"), and in each instance imposes the obligation on exactly the same parties:

- ERISA § 302(b)(1) [29 U.S.C. § 1082(b)(1)] imposes the obligation on "the employer responsible for making contributions to or under the plan," and jointly and severally on any trades or businesses under common ownership and control with it.[14]

- IRC § 412(b)(1) [26 U.S.C. § 412(b)(1)], a parallel provision Congress wove into the so-called "tax-qualified" plan rules, likewise falls on "the employer responsible for making contributions to or under the plan" and–like ERISA § 302(b)– and jointly and severally on any trades or businesses under common ownership and control with it.[15]

- IRC § 4971 [26 U.S.C. § 4971], an enforcement provision consisting of a penalty tax which starts at 10% (*see* § 4971(a)) and ends with a confiscatory 100% tax (*see* § 4971(b)), like the other two is imposed on "the employer responsible for contributing to or under the plan," IRC § 4971(e)(1)–and jointly and severally on any trades or businesses under common ownership and control with it.[16]

The Prospect Entities do not fit within this clearly-defined group. There is not a lot of room for expansive interpretation, or judicial invention, when Congress chooses to repeat itself three times.

A few courts have sanctioned the pursuit of "the employer responsible for contributing to or under the plan," along with any trades or businesses under common ownership with it, *Gastronomical Workers Union Local 610 v. Dorado Beach Hotel Corp.*, 617 F.3d 54, 60 (1st Cir. 2010), so long as a cognizable injury can be shown, *McMahon v. McDowell*, 794 F.2d 100

[14] As noted, those same funding obligations fall jointly and severally on every other member of that "employer's" controlled group (within the meaning of, e.g., 26 U.S.C. §§ 414(b), (c), (m) and (o)). ERISA § 302(b)(2) [29 U.S.C. § 1082(b)(2)].

[15] As noted, those same funding obligations fall jointly and severally on every other member of that "employer's" controlled group (within the meaning of, e.g., 26 U.S.C. §§ 414(b), (c), (m) and (o)). IRC § 412(b)(2) [26 U.S.C. § 412(b)(2)].

[16] As noted, those same funding obligations fall jointly and severally on every other member of that "employer's" controlled group (within the meaning of, e.g., 26 U.S.C. §§ 414(b), (c), (m) and (o)). IRC § 4971(e)(2) [29 U.S.C. § 4971(e)(2)].

(3rd Cir. 1986), *cert. denied*, 478 U.S. 100 (1986). But no court has held, or even expressed support for, further expanding the wide net Congress chose to cast—and defined with great particularity—in three separate federal statutes.

Here, Plaintiffs do not allege—because they cannot—that any of the Prospect Entities have ever sponsored, or contributed to, the Plan. As such, attempting to enforce ERISA's minimum funding obligations against the Prospect Entities—tellingly, both for the plan years preceding the date the Prospect Entities bought two hospitals' operating assets from the SJHSRI Group Defendants (in 2014) and for the three plan years following those transactions—is a legally unsupported attempt to expand the unequivocally clear and unambiguous trio of federal statutes Congress put in place. Because Plaintiffs' minimum funding requirement claims are directed at the SJHSRI Group Defendants, *Compl.* at ¶¶ 432-437, and because Congress in ERISA § 302(b), IRC § 412(b), and IRC § 4971 made unequivocally clear that the funding obligation is to be imposed solely on "the employer responsible for making contributions to or under the plan" and the members of its controlled group," Count I against the Prospect Entities should be dismissed.

ii. ERISA § 502(a)(3) Only Permits an Award of "Appropriate Equitable Relief," and "Appropriate Equitable Relief" Can Only Lie Against Parties That Have Dealt With the Retirement Plan or Received Its Assets.

ERISA § 502(a)(3) has long been recognized as a "catchall" provision, designed to deal with all ERISA Title I violations for which there is no other adequate remedy. *Varity Corp. v. Howe,* 516 U.S. 489, 510-512 (1996). That would include claims for individualized relief for a breach by a plan fiduciary of its obligations. *Id.* However, the remedies available under ERISA § 502(a)(3) are limited to equitable remedies brought against breaching plan fiduciaries and non-

fiduciary third parties shown to have engaged in wrongful conduct with respect to the plan (or with a party-in-interest to the plan). *Mertens*, 508 U.S. at 254.

In *Mertens*, the Supreme Court rejected an attempt by aggrieved plan participants to hold the plan's actuaries liable for monetary relief, holding that § 502(a)(3) could only be used to seek "appropriate equitable relief" from breaching plan fiduciaries and from non-fiduciary third parties shown to have knowingly participated in a transaction with the plan that ERISA explicitly prohibits (known as a "prohibited transaction," *see* ERISA § 406, *et seq*.). *Mertens*, 508 U.S. at 254. Shortly following *Mertens*, the First Circuit in *Reich v. Rowe*, rejected a similar claim brought by the U.S. Department of Labor ("DOL") against a non-fiduciary third party under ERISA § 502(a)(5),[17] despite his having knowingly participated in conduct held to be a breach of fiduciary duty by the plan's fiduciaries. 20 F.3d 25, 29-30 (1st Cir. 1994).

Supreme Court jurisprudence regarding ERISA § 502(a)(3) has evolved in the twenty-five years since *Mertens* was decided, but not by much. Seven years after deciding *Mertens*, the Supreme Court, in *Harris Trust and Savings Bank v. Salomon Smith Barney, Inc*., held that plan fiduciaries could use § 502(a)(3) to pursue a party-in-interest to rescind poor investments it had sold the plan. 530 U.S. 238, 252-54 (2000) (plan fiduciary able to invoke ERISA § 502(a)(3) to sue a non-fiduciary party-in-interest to rescind the plan's purchase of underperforming investments from that party-in-interest and recover the consideration paid). Two years after *Harris Trust*, the Supreme Court held that plan fiduciaries could use § 502(a)(3) to obtain reimbursement from a different type of non-fiduciary party-in-interest—injured plan-covered employees—for the benefits they received to redress their injuries; however, such reimbursement

[17] ERISA § 502(a)(5), whose language parallels that of § 502(a)(3), is used by the DOL to pursue the same forms of relief from the same parties capable of being pursued under § 502(a)(3).

could only occur if the plan showed that it paid the benefit(s) subject to the condition that the plan would be repaid if the employee was able to recover damages from the third party that caused the injury; and if the plan could find an equitable remedy capable of producing that result. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210-11 (2002). The Supreme Court then heard and decided a series of "equitable relief" cases, which individually and collectively explored exactly what kinds of equitable relief would be acceptable under ERISA § 502(a)(3) (e.g., constructive trusts, equitable liens, etc.), and what circumstances would need to be present to enable the plan to be successful.[18]

These steps, taken by the Supreme Court from 1993 through 2016 to discern whether ERISA §502(a)(3) could be used to pursue non-fiduciaries, provide no legal support for the incredible result Plaintiffs hope to obtain in Count I against the Prospect Entities, because the Prospect Entities are complete strangers to the Plan and had no direct or indirect dealings with the Plan.

Plaintiffs can be counted upon to contend that in *Harris Trust*, the Supreme Court greatly expanded the circle of potential non-fiduciary defendants in an action grounded in ERISA § 502(a)(3), but that misreads the actual holding of the case. While in *Harris Trust* the Supreme Court clarified, and did slightly expand the "universe of possible defendants" capable of being sued under § 502(a)(3) by holding that it could include certain non-fiduciary parties-in-interest, the Supreme Court nonetheless made clear that the only type(s) of defendants capable of being included were those from whom "appropriate equitable relief" can be obtained. As the Supreme Court in *Harris Trust* explained,

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[18] *See*, *e.g.*, *Montanile v. Bd. of Tr. of Nat'l Elevator Indust. Health Plan*, 136 S. Ct. 651 (2016); *U.S. Airways v. McCutcheon*, 569 U.S. 88, 100-101 (2013); *Sereboff*, 547 U.S.at 361-62.

> [§ 502(a)(3)'s] language, to be sure, "does not . . . authorize 'appropriate equitable relief' *at large*, but only 'appropriate equitable relief' for the purpose of 'redress[ing any] violations or . . . enforc[ing] any provisions' of ERISA or an ERISA plan." *Peacock* v. *Thomas*, 516 U.S. 349, 353 (1996) (quoting *Mertens, supra,* at 253 (emphasis and alterations in original)). But § 502(a)(3) admits of no limit (aside from the "appropriate equitable relief" caveat, which we address *infra*) on the universe of possible defendants. Indeed, § 502(a)(3) makes no mention at all of which parties may be proper defendants—the focus, instead, is on redressing the "*act or practice* which violates any provision of [ERISA Title I]." 29 U.S.C. §1132(a)(3) (emphasis added).

Harris Trust, 530 U.S. at 244. The Supreme Court then explained the critically limiting role that the "appropriate equitable relief" restriction plays in this process—one that acts as a natural brake on the "universe . . . of defendants" capable of being pursued under § 502(a)(3):

> Notwithstanding the text of § 502(a)(3) (as informed by § 502(*l*)), [defendant] protests that it would contravene common sense for Congress to have imposed civil liability on a party, such as a non-fiduciary party in interest to a § 406(a) transaction, that is not a "wrongdoer" in the sense of violating a duty expressly imposed by the substantive provisions of ERISA Title I. *[Defendant] raises the specter of § 502(a)(3) suits being brought against innocent parties—even those having no connection to the allegedly unlawful "act or practice"—rather than against the true wrongdoer, i.e., the fiduciary that caused the plan to engage in the transaction.*
>
> *But this reductio ad absurdum ignores the limiting principle explicit in § 502(a)(3): that the retrospective relief sought be "appropriate equitable relief."* The common law of trusts, which offers a "starting point for analysis [of ERISA] . . . [unless] it is inconsistent with the language of the statute, its structure, or its purposes," *Hughes Aircraft Co.* v. *Jacobson,* 525 U.S. 432, 447 (1999) (internal quotation marks omitted), plainly countenances the sort of relief sought by petitioners against [defendant] here. As petitioners and *amicus curiae* the United States observe, it has long been settled that when a trustee in breach of his fiduciary duty to the beneficiaries transfers trust property to a third person, the third person takes the property subject to the trust, unless he has purchased the property for value and without notice of the fiduciary's breach of duty. The trustee or beneficiaries may then maintain an action for restitution of the property (if not already disposed of) or disgorgement of proceeds

> (if already disposed of), and disgorgement of the third person's profits derived therefrom.

Harris Trust, 530 U.S. at 248 (emphasis added) (citations omitted).

Plaintiffs' attempt to rope the Prospect Entities into their § 502(a)(3) claims made in Count I against the SJHSRI Group Defendants is just the sort of *reductio ad absurdum* situation the Supreme Court rejected as a straw man in *Harris*. *See id.* As noted above, and as the Complaint makes plain, the Prospect Entities are complete strangers to the Plan. This is not a case where any of the Prospect Entities sold investments to the Plan, received any type of property from the Plan, charged the Plan excessive fees, or received anything from the SJHSRI Group Defendants known to have come from the Plan that now would need to be disgorged. Simply, ERISA's "appropriate equitable relief" standard cannot be expanded to include Robin Hood situations.

As a critical review of the allegations comprising Count I reveals, Plaintiffs attempt to use ERISA § 502(a)(3) to force the SJHSRI Group Defendants to put more money *into* the Plan by seeking to enforce ERISA's minimum funding obligations against them; nothing in Count I can be read as an effort by Plaintiffs to recover anything improperly paid out of the Plan, or to unwind any improper transactions between the Plan and a non-fiduciary. Count I simply is styled as an enforcement action under ERISA § 502(a)(3) to enforce ERISA's minimum funding obligation(s) under ERISA § 302. *Compl.* at ¶¶ 430-35. Because the Prospect Entities all are strangers to the Plan, and have never had any direct or indirect dealings with the Plan, there is no "appropriate equitable relief" capable of being obtained from or against any of them in connection with Count I. Accordingly, the Prospect Entities should be dismissed from Count I of the Complaint.

Finally, it should be noted that while all the Prospect Entities should be dismissed from Count I of the Complaint, this is particularly true with respect to Prospect Medical Holdings and Prospect East as Plaintiffs simply allege that Prospect Medical Holdings "owns all of the shares of Prospect East" and that Prospect East holds an 85% ownership interest of Prospect Chartercare." *Compl.* at ¶¶ 12-14. This is not nearly enough to assert any viable claim, let alone an actionable ERISA § 502(a)(3) claim.

iii. Plaintiffs' Attempt to Pursue the Prospect Entities as Successors Is an Improper Attempt to Avoid the "Appropriate Equitable Relief" Limitation Placed on ERISA § 502(a)(3).

In Count I of the Complaint, Plaintiffs allege—without offering a scintilla of factual support—that the Prospect Entities "are the successors of SJHSRI, CCCB, and RWH, and are members of the same control [sic.] group, and are liable for SJHSRI's failure to make contributions." *Compl.* at ¶ 438. Putting aside the fact that Plaintiffs' conclusory and inherently illogical allegation[19] is just the kind of "unadorned, the-defendant-unlawfully-harmed-me accusation[ ]" that does not pass muster under *Iqbal*, Plaintiffs' attempt to invoke some sort of successor doctrine to stretch the "appropriate equitable relief" limits of ERISA § 502(a)(3) beyond recognition is wholly inappropriate and should be squarely rejected. While Plaintiffs make no attempt in their Complaint to identify the successor doctrine they are attempting to

[19] Plaintiffs' naked, conclusory allegation ignores several inconvenient facts, two of which stand out: (1) Plaintiffs' "somewhere between 2009 and now" church plan allegation is a fundamentally flawed foundation for any attempt to seek "appropriate equitable relief" from the Prospect Entities, when the loss of church plan status most likely occurred more than three years *after* the hospital assets were bought (in 2014); and (2) Plaintiffs' attempt to blame the Prospect Entities for actions that the SJHSRI Group Defendants took – or, failed to take – over an eight year period (i.e., the five year period preceding the Prospect Entities' 2014 acquisition, and the three year period following that same 2014 acquisition), again on the grounds that it would be both "appropriate" and "equit[able]" to do so, defies logic as much as it mocks equity, particularly when the contribution obligation (due to the presence of an alleged structural defect in the Plan's regulatory status) was not definitively known to exist prior to September 2017.

invoke (much less allege facts which, if true, could show that the standards of their undisclosed doctrine would be met), none of the potential options would actually be available under the facts Plaintiffs allege in their complaint.[20]

In *Upholsterers' Int'l Union Pension Fund v. Artistic Furniture*, the case widely considered responsible for fashioning the "modern" federal labor law successorship doctrine that multiemployer pension plans currently use to collect delinquent contributions and withdraw liability judgments from third party successors-in-interest, the Seventh Circuit observed that federal courts had long recognized four exceptions[21] to the "general rule" that "a corporation that merely purchases for cash the assets of another corporation does not assume the seller corporation's liabilities." 920 F.2d 1323, 1325-28 (7th Cir. 1990) (quoting *Travis v. Harris Corp.*, 565 F.2d 443, 446 (7th Cir. 1977)). The federal labor law successor liability doctrine in *Artistic Furniture* (and which traces its lineage to *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 185 (1973)), is now almost routinely invoked by ERISA-regulated multiemployer pension plans to enforce judgments obtained in collection actions involving delinquent contributions (and more recently, withdrawal liability). The equitable doctrine – at least, the formulation the

[20] Most important, Section 4069 of ERISA explicitly identifies the circumstances under which a purported "successor" can be held liable for an underfunded defined benefit plan, like the Plan, in the context of a corporate transaction. Therefore, the claims Plaintiffs assert against the Prospect Entities which are predicated on their allegedly being the successor(s) of SJHSRI, CCCB and RWH, must be brought – if at all – under Section 4069 of ERISA. This Court should not allow Plaintiffs to impermissibly expand the scope of remedies that Congress provided to them.

[21] Successors had been held liable where (1) there was an express or implied assumption of liability; (2) the transaction amounted to a consolidation or merger, or similar restructuring of two corporations; (3) the purchasing corporation was a 'mere continuation' of the seller; or (4) the transfer of assets to the purchaser was for fraudulent purposes of escaping liability for the seller's debts. *Artistic Furniture*, 920 F.2d at 1326.

Seventh Circuit has adopted[22] – relies on the use of a two-pronged test used to determine whether a purchaser can be held liable, as a successor, for a "labor law" liability that the seller has incurred but has not discharged or resolved: (1) whether the purchaser has notice of the liability, and (2) whether there is substantial continuity in operations because purchaser and seller. *Golden State*, 414 U.S. at 185; *Artistic Furniture*, 920 F.2d at 1327, 1329. Most relevant here, as the Seventh Circuit made abundantly clear in *Artistic Furniture*, the federal successor liability doctrine is firmly rooted in a balancing of competing interests unique to the funding of multiemployer pension plans. *Id.* at 1325.

It is inappropriate to use that doctrine in a situation not involving a multiemployer pension plan (the Plan unquestionably is a single employer plan), where the doctrine is being used as a bootstrap to avoid ERISA § 502(a)(3)'s "appropriate equitable relief" limitation(s). Such conclusion, and such result, would completely undermine *Mertens*, *Harris*, and their progeny. Accordingly, this Court should squarely reject Plaintiffs' poorly crafted and ill-conceived attempt to avoid Congress' decision to limit the sort of relief available under ERISA § 502(a)(3) to "appropriate equitable relief" capable of being obtained from parties that can be shown to have actually dealt with the plan or to have actually received property that once belonged to the plan.

E. Plaintiff's Attempt to Hold the Prospect Entities Liable for Allegedly Aiding and Abetting, or Knowingly Participating in, Alleged Plan Fiduciary Breaches Should be Dismissed Because the Prospect Entities Are Strangers to the Retirement Plan.

Relying entirely on three truncated paragraphs completely devoid of facts, Plaintiffs, in Count III, seek under ERISA § 502(a)(3) to build on the breach-of-fiduciary-duty claims that they bring against the SJHSRI and CCCB in Count II (under ERISA § 502(a)(2)), by attempting

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[22] Other circuits tellingly add a third factor to the test: whether the seller is unable to satisfy the liability. *See*, *e.g.*, *Einhorn v. M.L. Ruberton Constr. Co.,* 632 F.3d 89, 95 (3rd Cir. 2011).

to hold the Prospect Entities liable for "knowingly participat[ing] in, [and] aid[ing] and abet[ing] breaches of fiduciary duty by Plan fiduciaries." *Compl.* at ¶ 448. ERISA § 502(a)(3) does not support a secondary liability "aiding and abetting" claim to obtain relief from non-fiduciary third parties like the Prospect Entities, which are strangers to the Plan and have not been alleged (and cannot be shown) to have directly or indirectly received anything from the Plan (other than this lawsuit). As discussed *supra*, ERISA's remedial provisions are tightly circumscribed, and the Court should not step in to establish new avenues of redress when Congress already has already established a clear framework.

As addressed above, ERISA § 502(a)(3) has long been recognized as a "catch all" provision, designed to deal with all ERISA Title I violations for which there is no other adequate remedy, including claims for individualized relief for a plan fiduciary's breach of its obligations. *Varity Corp.*, 516 U.S. at 510-512. In a series of decisions dating from 1993, the Supreme Court has made clear—in holding that a §502(a)(3) claim would not lie against a non-fiduciary service provider—that only equitable remedies are available under ERISA § 502(a)(3), and that the only "appropriate" equitable relief capable of being obtained must be sought from breaching plan fiduciaries and non-fiduciary third parties shown to have had an unholy relationship with the plan (or with a party-in-interest to the plan). *Mertens*, 508 U.S. at 248.

In *Reich v. Rowe*, the First Circuit squarely rejected an attempt by the DOL to bring the same sort of equitable relief claim against a non-fiduciary third party (there, a claim under ERISA §502(a)(5)), even though the consultant was being accused of having knowingly participated in a breach by a plan fiduciary of its fiduciary duties. 20 F.3d at 29-30. The *Rowe* Court was very clear:

> Although this discussion in *Mertens* is purely dicta, *see id.* 508 U.S. at 254 (reserving any decision on whether § 1132(a)

> authorizes an action against a non-fiduciary for participating in a fiduciary breach), its reasoning, based on the *Russell* decision, accords with this Circuit's jurisprudence established in *Drinkwater v. Metropolitan Life Ins. Co.,* 846 F.2d 821 (1st Cir.), *cert. denied,* 488 U.S. 909 (1988). In *Drinkwater*, we applied *Russell* to hold that extra-contractual damages are not a form of "other appropriate relief" under § 1132(a)(5) because such relief was not expressly granted and we could not conclude "Congress intended to authorize any form of relief other than what was expressly granted." *Id.* at 824; *see also Russell* 473 U.S. at 145-48 (refusing to imply a private cause of action for individual beneficiaries to obtain damages caused by a fiduciary breach because Congress had created such liability only in favor of the ERISA plans themselves). *In this case, Congress did not expressly provide for a remedy against non-fiduciaries who participate in a fiduciary breach.* Therefore, and in light of the potentially broad area of liability such a remedy would create, we conclude that Congress did not intend for its grant of equitable relief in § 1132(a)(5) to authorize the present action against [defendant].

Id. at 30-31 (emphasis added).

Finally, in *Harris Trust*, the Supreme Court explained in a more fulsome way how the scope of relief available under ERISA § 502(a)(3) (i.e., "appropriate equitable relief . . . to redress violations") imposes practical constraints on the "universe . . . of possible defendants, and excludes non-fiduciary third parties who cannot be shown to have dealt directly with the plan or to have received property subject to recoupment by the plan. 530 U.S. at 248.

Considering the repeated rulings resisting expansion beyond what Congress explicitly authorized, the Court should reject Plaintiffs' attempt in Count III to hold the Prospect Entities liable for any sort of "aiding or abetting" or "knowing participation" in any fiduciary breaches that the Plan's fiduciaries may have committed, because the Prospect Entities all are strangers to the Plan, and not alleged to have dealt directly with the Plan or to have received any property (whether directly or indirectly) from the Plan. Accordingly, the Prospect Entities also should be dismissed from Count III of the Complaint.

F. Plaintiffs' ERISA Claims Should Also Be Dismissed as to the Prospect Entities Because Plaintiffs Seek Non-Equitable, Money Damages

Even if Plaintiffs could find some cogent basis for bringing claims against the non-fiduciary Prospect Entities under ERISA § 502(a)(3), those claims ultimately would fail because Plaintiffs are seeking a patently non-equitable remedy: money damages. Whether the remedy a plaintiff seeks under § 502(a)(3) "is legal or equitable depends on [(1)] the basis for [the plaintiff's] claim and [(2)] the nature of the underlying remedies sought." *Sereboff*, 547 U.S. at 363; *see Montanile*, 136 S. Ct. at 657.

The Supreme Court and the First Circuit both recognize that "[a]lmost invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages' . . . since they seek no more than compensation for loss resulting from the defendant's breach of legal duty." *Compare Knudson*, 534 U.S. at 210 *with Todisco v. Verizon Communications, Inc*., 497 F.3d 95 (1st Cir. 2007).[23]

Yet that is precisely what Plaintiffs attempt here: they seek monetary relief, poorly camouflaged as a claim for "equitable" relief. Both the Supreme Court and the First Circuit have clearly held such claims are unsound, and should be rejected. *See Mertens*, 508 U.S. 248; *Row*, 20 F.3d at 28. This Court should follow their lead by dismissing Plaintiffs' ERISA claims against the Prospect Entities as poorly-disguised attempts at obtaining monetary relief.

[23] Monetary damages are specifically not available under § 502(a)(3) against non-fiduciaries such as the Prospect Entities. *Mertens,* 508 U.S. 248; *Row*, 20 F.3d at 28 ("ERISA does not permit a civil suit for money damages against nonfiduciaries who knowingly participate in a fiduciary breach."); *Montanile*, 136 S. Ct. at 660 n. 3 (reaffirming that its prior holdings of *Mertens* and *Sereboff* as pertaining to equitable relief available under § 502(a)(3) remain controlling and unchanged).

G. The Prospect Entities Are Not a Proper Party to Plaintiffs' Attempt to Obtain Declaratory and Equitable Relief, and Should Be Dismissed From It Because they Are Strangers to the Plan.

Invoking ERISA § 502(a)(3) (ERISA's "catch all" remedial provision) yet again, Plaintiffs seek in Count IV a declaration that the Plan fails to qualify as a "church plan" within the meaning of ERISA §3(33). *Compl.* at ¶ 453. Because the Prospect Entities are non-fiduciary third parties as to the Plan and are in fact strangers to the Plan who have not directly or indirectly received anything from the Plan (other than this lawsuit), the Prospect Entities should be dismissed from this Count IV on the grounds that they have no interest in it and are not proper parties to it.

II. THE STATE LAW CLAIMS SHOULD BE DISMISSED.

Plaintiffs assert twelve (12) state law causes of action against the Prospect Entities: (Count V) Fraudulent Transfer, §6-16-4 (a)(1); (Count VI) Fraudulent Transfer, §6-16-4 (a)(2) and/or 6-16-5(A); (Count VII) Fraud through Intentional Misrepresentations and Omissions; (Count VIII) Fraudulent Scheme; (Count IX) Conspiracy; (Count XII) Alter Ego; (Count XIII) DeFacto Merger; (Count XIV) Joint Venture; (Count XV) Successor Liability; (Count XVI) Civil Liability under R.I. Gen. Laws § 9-1-2 for Violations of R.I. Hospital Conversion Act; (Count XX) Aiding and Abetting Breach of Fiduciary Duty; and (Count XXI) Declaratory Judgment, Liability and Turn Over of Funds. Each cause of action should be dismissed for the reasons explained below.

A. The State Law Claims are Preempted and Should Be Dismissed.

Plaintiffs acknowledge that at least some of the state law claims are preempted if the Court determines that the Plan is covered by ERISA. *Compl.* at ¶ 34. However, Plaintiffs

suggest that other state law claims are not preempted. *Compl.* at ¶ 33. In fact, all of the state law claims should be dismissed as they are preempted by ERISA.

Congress provided for the preemption of all state laws that "relate to" any employee benefit plan governed by ERISA. 29 U.S.C. § 1144(a); *see also Colonial Life & Acc. Ins. Co. v. Medley*, 572 F.3d 22, 27 (1st Cir. 2009) ("ERISA preempts any and all State laws insofar as they may now or hereafter relate to any employee benefit plan [. . .]"). "The term 'State law' includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." 29 U.S.C. § 1144(c)(1). "Express ERISA preemption analysis . . . involves two central questions: (1) whether the plan at issue is an 'employee benefit plan' [within ERISA] and (2) whether the cause of action 'relates to' this employee benefit plan." *Medley*, 572 F.3d at 29 (citing *Hampers v. W.R. Grace & Co., Inc.*, 202 F.3d 44, 49 (1st Cir. 2000)).

First, to be subject to ERISA preemption, the Plan in question must be an "employee benefit plan," *see id.*, which the First Circuit has explained contains five elements:

> (1) a plan, fund or program (2) established or maintained (3) by an employer or by an employee organization, or by both (4) for the purpose of providing medical, surgical, hospital care, sickness, accident, disability, death, unemployment or vacation benefits, apprenticeship or other training programs, day care centers, scholarship funds, prepaid legal services or severance benefits (5) to participants or their beneficiaries.

Gross v. Sun Life Assur. Co. of Canada, 734 F.3d 1, 6 (1st Cir. 2013).

Second, to be subject to ERISA preemption, the state law causes of action must relate to the Plan. *See Medley*, 572 F.3d at 29. The First Circuit has "consistently held that a cause of action 'relates to' an ERISA plan *when a court must evaluate or interpret the terms of the ERISA-regulated plan to determine liability under the state law cause of action*." *Hampers*, 202 F.3d at 52 (emphasis added). Furthermore, the First Circuit has held that "ERISA preempts state

law causes of action for damages *where the damages must be calculated using the terms of an ERISA plan*." *Id.* (emphasis added). A law is preempted "even if the law is not specifically designed to affect such plans, or the effect is only indirect." *Zipperer v. Raytheon Co.*, 493 F.3d 50, 53 (1st Cir. 2007) (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990)). Where "the very same conduct" underlies both the state law claim and the ERISA claim, that overlap "suggests that the state law claim is an *alternative mechanism for obtaining ERISA plan benefits*," and the state law claim is preempted. *Hampers*, 202 F.3d at 52 (emphasis added).

This includes fraud and misrepresentation claims relating to an ERISA plan, such as Counts VII, VIII and IX here. Thus, in *Vartanian v. Monsanto Co.*, the First Circuit held that a misrepresentation claim was preempted because, in order to recover, the court would need to find that an ERISA plan existed. 14 F.3d 697, 700 (1st Cir. 1994) ("[t]here is simply no cause of action if there is no plan"); *see also McMahon v. Digital Equip. Corp.*, 162 F.3d 28, 38 (1st Cir. 1998) ("[A] state law cause of action is expressly preempted by ERISA where a plaintiff, in order to prevail, must prove the existence of, or specific terms of, an ERISA plan"); *Pemental v. Sedgwick Claims Mgmt. Sys.*, 2014 U.S. Dist. LEXIS 69131 at * 10 (D.R.I. May 19, 2014) (fraud claim dependent on existence of plan preempted). Moreover, in *Carlo v. Reed Rolled Thread Die Co.*, a plaintiff brought a negligent misrepresentation claim against his former employer, claiming that the employer made a misrepresentation concerning the extent of the benefits under the employer's retirement plan. 49 F.3d 790, 794 (1st Cir. 1995). The *Carlo* Court held that the misrepresentation claim was preempted by ERISA because a calculation of damages would require the court's "inquiry [to] be directed to the plan." *Id.*

In determining whether a claim under state law has a connection with a benefit plan and is thus preempted, courts in the First Circuit also looks to "the objectives of the ERISA statute as

a guide to the scope of the state law that Congress understood would survive." *Vlahos v. Alight Sols. Ben. Payment Servs., LLC*, 2018 U.S. Dist. LEXIS 133212, at *5 (D. Mass. Aug. 8, 2018) (citing *Zipperer*, 493 F.3d at 53). "ERISA's objectives include uniformity of administration of ERISA plans and avoiding inconsistent state regulation of such plans." *Id.* "[A]ny state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 209-10 (2004) (holding that if entitlement to benefits exists "only because of the terms of an ERISA-regulated employee benefit plan, and where no legal duty (state or federal) independent of ERISA or the plan terms is violated, then the suit [is preempted]"). "There is a strong presumption that common-law claims that intrude on ERISA's civil enforcement regime are preempted." *Anthony*, 725 F. Supp. 2d at 256.

Here, all of the state law claims are based upon the allegations that the Plan, while formerly a church plan exempt from ERISA, ceased being a church plan at some point after 2009 and thus became an ERISA plan. Plaintiffs contend that the Plan was underfunded for years and all Defendants are jointly and severally liable for paying benefits under the Plan under various state law theories. *See Compl*. at ¶¶ 56-59. The state law claims should therefore be dismissed because the existence of the Plan is inseparably connected to any determination of liability under the state law claims. *See Vartanian*, 14 F.3d at 700. Indeed, Plaintiffs' purported standing to bring the state law claims is based upon the existence of the Plan.[24] Moreover, because "the very same conduct" underlies both the state law claims and the ERISA claims, that overlap "suggests that the state law claim[s are] an alternative mechanism for obtaining ERISA plan benefits."

[24] Plaintiffs' standing is by no means conceded. *See supra*.

Hampers, 202 F.3d at 52. The state law claims also "relate to" the Plan to the extent that the Court would have to evaluate or interpret the terms of the Plan in order to determine liability under the state law causes of action or to calculate the purported damages. Finally, the state law causes of action are preempted because they seek to duplicate, supplement, or supplant the ERISA civil enforcement remedy which conflicts with the clear congressional intent to make the ERISA remedy exclusive.

Thus, all the state law claims against the Prospect Entities should be dismissed as they are preempted.

B. Plaintiffs' Fraud Count (Count VII) Should Be Dismissed as to the Prospect Entities.

In Count VII, Plaintiffs assert a claim for Fraud through Intentional Misrepresentations and Omissions. Specifically, Plaintiffs broadly allege that Defendants SJHSRI, RWH, CCCB, the Angell Pension Group, Inc. ("Angell"), Prospect Chartercare, the Diocesan Defendants, Prospect East, Prospect, Prospect SJHSRI, and Prospect RWH made intentional misrepresentations to Plaintiffs and intentionally failed to provide material information under circumstances where they had a duty to speak. *See Compl.* at ¶ 472.

As set forth below, Plaintiffs' vague and conclusory allegations against the Prospect Entities fail to meet the heightened pleading requirement for fraud under Rule 9(b) of the Federal Rules of Civil Procedure, and otherwise fail to state any plausible claims against the Prospect Entities for Fraud through Intentional Misrepresentations and Omissions. *See* Fed. R. Civ. P. 9(b); *N. Am. Catholic Educ. Programming Found., Inc. v. Cardinale*, 567 F.3d 8, 13 (1st Cir. 2009); *Universal Truck & Equip. Co. v. Caterpillar, Inc.*, 2012 U.S. Dist. LEXIS 158233, *14 (D.R.I. Nov. 5, 2012).

i. Rule 9(b).

Plaintiffs' allegations of fraud trigger the heighted pleading requirements of Fed. R. Civ. P. 9(b), which requires a party to "state with particularity the circumstances constituting fraud or mistake." Rule 9(b) requires a party pleading fraud to specify the *time, place, and content* of the alleged false representations. *Powers v. Boston Cooper Corp.*, 926 F.2d 109, 111 (1st Cir. 1991) (emphasis added). In order to satisfy Rule 9(b)'s requirements, "[a] plaintiff must plead '*the who, what, when, where, and how*: the first paragraph of any newspaper story.'" *Haft*, 755 F. Supp. at 1128 (quoting *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990)) (emphasis added); *see also Rodi v. S. New England Sch. of Law*, 389 F.3d 5, 15 (1st Cir. 2004).[25] "Rule 9(b) requires not only specifying the false statements and by whom they were made but also identifying the basis for inferring scienter." *Cardinale*, 567 F.3d at 13. Because fraud claims require a showing of knowing falsity and reliance thereon, the lack of rigorous detailing of the basis for the claims prevents a defendant from attacking spurious allegations of fraud at the outset.

ii. Fraud through Intentional Misrepresentations and Omissions.

To establish a prima facie case for fraud under Rhode Island law, a plaintiff must prove: "1) that the defendant made a false representation of material fact; 2) that the defendant intended thereby to deceive the plaintiff; 3) that the defendant intended that the plaintiff rely on the representation; 4) that the plaintiff did rely on the representation as true; and 5) that the plaintiff

[25] Courts in the First Circuit have articulated three purposes behind Rule 9(b)'s particularity requirement: "(1) to place the defendants on notice and enable them to prepare meaningful responses; (2) to preclude the use of a groundless fraud claim as a pretext to discovering a wrong . . . ; and (3) to safeguard defendants from frivolous charges which might damage their reputations." *Guilbeault v. R.J. Reynolds Tobacco Co.*, 1999 U.S. Dist. LEXIS 8365, *11-12 (D.R.I. Apr. 30, 1999) (citing *Haft*, 755 F. Supp. at 1127); *see also New England Data Servs., Inc. v. Becher*, 829 F.2d 286, 289 (1st Cir. 1987).

was injured as a result." *Kelly v. Tillotson-Pearson, Inc.*, 840 F. Supp. 935, 940 (D.R.I. 1994) (citations omitted). A plaintiff must prove "not only that the defendant had an intention to deceive, but the complainant also must present sufficient proof that the party detrimentally relied upon the fraudulent representation." *Coccoli v. Scituate Town Council*, 184 A.3d 1113, 1120 (R.I. 2018) (quoting *Asermely v. Allstate Ins. Co.*, 728 A.2d 461, 464 (R.I. 1999)).

When a party advances a claim of fraud by omission, Rhode Island law requires that plaintiff prove, in addition to the common-law elements of fraud, that the defendant owed a "*duty to speak* because mere silence, in the absence of such duty, is not fraud." *R.I. Industrial-Recreational Bldg. Auth. v. CAPCO Steel, LLC*, 2015 R.I. Super. LEXIS 90, *31 (R.I. Super. Ct. Jul. 22, 2015) (emphasis added); *see McGinn v. McGinn*, 146 A. 636, 638 (R.I. 1929) ("[M]ere silence in the absence of a duty to speak is not fraudulent and . . . even meditated silence may not be fraudulent") (internal citations omitted); *see also Home Loan & Inv. Ass'n v. Paterra*, 255 A.2d 165, 167 (R.I. 1969) ("[O]ne party to a transaction is under no duty to speak out to the other concerning everything he knows about the matter, and that silence, even if meditated and upon a material fact, will not necessarily allow the other party to the transaction to set it aside as fraudulent"). Thus, fraud by omission requires both (1) concealment of material information, and (2) a duty requiring disclosure.

"Whether a person has a duty to disclose turns on the specific circumstances of the case. This is a flexible inquiry; one that examines the facts of each case to determine whether they give rise to a duty to disclose." *W. Reserve Life Assur. Co. of Ohio v. Caramadre*, 847 F. Supp. 2d 329, 337 (D.R.I. 2012) (internal citations omitted). Courts in Rhode Island have looked to Section 551 of the Restatement (Second) of Torts, entitled "Liability for Nondisclosure," which sets forth the circumstances where a duty to disclose may exist *as between parties to a business*

transaction even where no fiduciary duty exists. *See id.*; *see also CAPCO Steel, LLC*, 2015 R.I. Super. LEXIS 90, at * 32. According to the Restatement, one party to a business transaction has a duty to disclose:

> *facts basic to the transaction*, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

Restatement (Second) of Torts § 551(2)(e) (emphasis added).

In the case at bar, Plaintiffs' vague and conclusory allegations against the Prospect Entities fail to meet the heightened pleading requirement for fraud under Rule 9(b), and otherwise fail to state any plausible claims against the Prospect Entities for Fraud through Intentional Misrepresentations and Omissions.

iii. Plaintiffs Fail to Differentiate Among the Prospect Entities.

As an initial matter, Plaintiffs claims of Fraud through Intentional Misrepresentations and Omissions (Count VII) against the Prospect Entities are wholly deficient under Rule 9(b) because Plaintiffs fail to distinguish among the Prospect Entities and identify which Prospect Entity (or other Defendant) made which purported false representation or omission.

The Complaint refers to Prospect, Prospect East, Prospect Chartercare, Prospect SJHSRI, and Prospect RWH collectively as the "Prospect Entities." *Compl.* at ¶ 22. Despite acknowledging these entities as separate legal entities, *Compl.* at ¶¶ 11, 12, 13, 14, 20, 21, the Complaint, with very few exceptions, makes general and undifferentiated allegations against the Prospect Entities without indicating which entity acted or failed to act, or otherwise providing any of the required particularized facts.

Even putting aside Rule 9(b), a plaintiff is required to plead a factual basis for all legal claims asserted against *each* individual defendant. *See DM Research v. Coll. of Am. Pathologists*, 2 F. Supp. 2d 226, 228 (D.R.I. 1998), *aff'd*, 170 F.3d 53 (1st Cir. 1999) ("[T]he complaint must allege facts that establish all of the elements of the claim asserted . . . [and] the factual allegations must be specific enough to justify drag[ging] a defendant past the pleading threshold"). This threshold pleading requirement affords each defendant with fair notice of the legal and factual basis for the claims asserted against them. *Id.* The requirement to make specific allegations against each defendant is particularly significant when a plaintiff brings claims that trigger the heightened pleading requirements of Rule 9(b).

This Court has repeatedly held that a complaint is subject to dismissal under Rule 12(b)(6) where, as here, the plaintiff groups some or all defendants together and makes general and undifferentiated allegations and claims against them all. *See Levi v. Gulliver's Tavern, Inc.*, 2016 U.S. Dist. LEXIS 16204, *6-9 (D.R.I. Feb. 10, 2016); *Schofield v. United States Bank N.A.*, 2012 U.S. Dist. LEXIS 101620, *14 (D.R.I. Jul. 23, 2012) ("Without some semblance of factual allegations and an indication of which [d]efendant acted and when, that ties the [d]efendants' specific action to a recognized cause of action, then [plaintiff] has not sufficiently alleged claims for which relief can be granted").

Likewise, Rule 9(b) requires Plaintiffs to plead facts from which fraud may be reasonably inferred *as to each Defendant*. *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009). Rule 9(b) "does not allow a complaint to . . . lump multiple defendants together but require[s] plaintiffs to differentiate their allegations when suing more than one defendant." *Cisneros v. Instant Capital Funding Grp., Inc.*, 263 F.R.D. 595, 606-07 (E.D. Cal. 2009) (quoting *Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007)); *see Destfino v. Reiswig*,

630 F.3d 952, 958 (9th Cir. 2010) (upholding dismissal where complaint grouped multiple defendants together and failed to "set out which of the defendants made which of the fraudulent statements/conduct."); *McKee v. Pope Ballard Shepard & Fowle, Ltd.*, 604 F. Supp. 927, 931 (N.D. Ill. 1985) ("Courts have been quick to reject pleadings in which multiple defendants are lumped together").

By failing to make specific allegations regarding the conduct of each Defendant, the Complaint fails the basic threshold requirements demanded by federal pleading standards. Accordingly, Count VII should be dismissed as to the Prospect Entities for Plaintiffs' failure to differentiate among the various Prospect Entities.

iv. Plaintiffs Fail to Allege with Particularity That Any of the Prospect Entities Made Any Affirmative Misrepresentations or That the Prospect Entities Fraudulently Omitted Material Facts.

The Complaint consists of twenty one counts against fifteen separate entities, including 133 pages with 527 separately enumerated paragraphs. Plaintiffs broadly allege that the Defendants (sometimes including the "Prospect Entities") made misrepresentations and omissions regarding the following: (1) alleged misrepresentations and omissions regarding the extent to which the Plan was underfunded, *Compl.* at ¶¶ 236-56, 298, 300; (2) alleged misrepresentations and omissions to Plan participants, *Compl.* at ¶¶ 257-307; and (3) alleged misrepresentations and omissions to state regulatory authorities to gain approval for the 2014 Asset Sale, *Compl.* at ¶¶ 308- 59. As set forth below, Plaintiffs have failed to state a claim for fraud against the Prospect Entities for alleged misrepresentations and omissions with respect to any of these categories.

v. Plaintiffs Fail to State a Claim Against the Prospect Entities for Fraud for Alleged Misrepresentations and Omissions Regarding the Underfunded Status of the Plan.

Plaintiffs broadly allege that the various Defendants knew that the Plan was underfunded. *Compl.* at ¶¶ 236-56. Plaintiffs further allege that at the time of the 2014 Asset Sale, the Defendants failed to disclose to Plaintiffs the extent to which the Plan was underfunded, and that the $14 million contribution to the Plan was not enough to stabilize the Plan. *Compl.* at ¶¶ 256, 298, 300.

The Complaint fails to allege with the requisite particularity that any of the Prospect Entities made any false representations of material fact regarding the funding status of the Plan. Other than broad conclusory allegations against all Defendants, there are no allegations against the Prospect Entities that specifies the time, place, and content of any false representations allegedly made by any of the Prospect Entities. Indeed, with one exception, there are no allegations that any of the Prospect Entities had *any contact* with Plaintiffs or made *any representation* to them regarding the Plan or otherwise. This is not surprising; as previously indicated, the Prospect Entities are complete strangers to the Plan and had no direct or indirect dealings with the Plan. Plaintiffs do not allege, nor could they, that any of the Prospect Entities have ever sponsored or contributed to the Plan.

Thus, to the extent that Plaintiffs' fraud claims against the Prospect Entities relate to purported affirmative misrepresentations, those claims fail to state a claim. *See Fraioli v. Lemcke*, 328 F. Supp. 2d 250, 269-70 (D.R.I. 2004) (dismissing fraud/misrepresentation claims where no evidence that defendants had any contact with plaintiffs or made any representations to them); *see also Port Elevator, L.C. v. Gutierrez*, 198 Fed. Appx. 362, 369 (5th Cir. 2006) (holding that a "claim certainly [did] not rise to the level of fraud" when the plaintiff did "not

even claim [the defendant] made *any* statement to her, let alone a material representation") (emphasis in original); *Koch v. I-Flow Corp.*, 715 F. Supp. 2d 297, 303-04 (D.R.I 2010) (dismissing fraud counts where plaintiff failed to meet heightened pleading requirements of Rule 9(b)); *Hasbro, Inc. v. Mikohn Gaming Corp.*, 491 F. Supp. 2d 256, 266 (D.R.I. 2007).

Plaintiffs also broadly allege that Defendants "intentionally omitted providing material information under circumstances where said Defendants had a duty to speak." *Compl.* at ¶ 472. However, Plaintiffs have failed to state a plausible claim of fraud by omissions against any of the Prospect Entities. As set forth previously, for the Prospect Entities' purported failure to disclose to Plaintiffs the extent to which the Plan was underfunded to amount to fraud, it is necessary for the Plaintiffs to establish that the Prospect Entities were subject to a duty to report this information to Plaintiffs. The duty to disclose that has been recognized in Rhode Island is limited to fiduciaries and parties involved in a business transaction where one party knows that the other is under a mistake as to certain facts, and that the other, would reasonably expect a disclosure of those facts. *McGinn v. McGinn*, 50 R.I. 236, 240 (1929); *see also Caramadre*, 847 F. Supp. 2d at 337; *Nisenzon v. Sadowski*, 689 A.2d 1037, 1045-47 (R.I. 1997).

First, Plaintiffs fail to allege the source of any duty or obligation that any of the Prospect Entities had to inform the Plan participants (to the extent they were not already fully aware) of the extent of the underfunded status of the Plan. Plaintiffs do not allege, nor could they, that any of the Prospect Entities owed them a fiduciary duty.[26] Plaintiffs do not allege that any of the Prospect Entities had any financial dealings with the Plan, or served as a fiduciary or party-in-interest to the Plan, or had any direct dealings with the Plan.

[26] Plaintiffs allege that other Defendants (SJHSRI. CCCB, Angell, and the Diocesan Defendants) owed Plaintiffs fiduciary duties. *Compl.* at ¶ 521.

Second, Plaintiffs do not allege, nor could they, that they entered into a business transaction with the Prospect Entities that involved the Plan. The Plaintiffs were not parties to the 2014 APA such that they might be entitled to disclosures. Under these circumstances, the Prospect Entities had no duty to disclose. *See Caramadre*, 847 F. Supp. 2d at 340-41 (no duty to disclose where parties had no contractual relationship, no communications, no business dealings, and no direct dealings"); *see Moore v. Fenex, Inc.*, 809 F.2d 297, 303 n.2 (6th Cir. 1987) (stating that fraudulent nondisclosure "applies between parties to a business transaction. We are aware of no case, nor has any been cited, where a party has been held liable for fraudulent nondisclosure that had no direct dealings with the plaintiff"); *Magna Bank of Madison County v. Jameson*, 604 N.E. 2d 541, 544 (Ill. App. Ct. 1992) ("There is no duty to speak absent a fiduciary or other legal relationship between the parties."); *see also Chiarella v. United States*, 445 U.S. 222, 227-28 (1980) ("At common law, . . . one who fails to disclose material information prior to the consummation of a transaction commits fraud only when he is under a duty to do so. And the duty to disclose arises when one party has information that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them"); *Cardiovascular & Thoracic Assoc., Inc. v. Fingleton*, 1995 R.I. Super. LEXIS 26, at *7 (R.I. Super. Ct. Aug. 23, 1995) ("[F]raud can be established by silence where the business relationship of the parties is such as to create a duty to disclose certain facts").

Third, Plaintiffs have failed to allege the existence of any facts to show that the relationship between Plaintiffs and the Prospect Entities, or customs of the trade or other objective circumstances exist such that Plaintiffs could reasonably expect the Prospect Entities to communicate the extent to which the Plan was underfunded to the Plan participants. To the contrary, it was public knowledge that the Prospect Entities were not assuming liability for the

Plan.[27] The publicly available 2014 APA[28] fully disclosed that the Plan was one of the "Excluded Assets of Seller" to be retained by SJHSRI post-closing. 2014 APA, Sections 2.2(d), 8.2(e). Indeed, Plaintiffs acknowledge in the Complaint that the Prospect Entities structured the 2014 Asset Sale "to avoid any obligations under the Plan, and the APA expressly stated that responsibility for the Plan after the asset sale closed would remain with SJHSRI." *Compl.* at ¶ 301. Given that the Plan was specifically not being acquired by any Prospect Entity, Plaintiffs cannot credibly allege that they had any *reasonable* expectation that the Prospect Entities had any duty to disclose facts related to the underfunded status of the Plan to any plaintiff.

Fourth, there are no plausible allegations, nor could there be, that Plaintiffs relied upon the Prospect Entities to inform them of the funding status of the Plan. Finally, Plaintiffs cannot plausibly allege that the Prospect Entities purported failure to disclose the extent of the underfunded status of the Plan can be said to have caused the alleged funding deficiency. The Plan was allegedly underfunded for years before the Prospect Entities came on the scene. Therefore, Plaintiffs have failed to state a plausible claim against the Prospect Entities for fraud relating to the funding status of the Plan.

vi. Plaintiffs Fail to State a Claim Against the Prospect Entities for Fraud for Alleged Misrepresentations and Omissions to Plan Participants.

The allegations of misrepresentations to Plan participants are located at paragraphs 257 through 307 of the Complaint. There are numerous broad allegations of purported

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[27] The 2014 Asset Sale went through an extensive administrative approval process under the HCA which required approval by the RIAG and the RIDOH. *Compl.* at ¶ 308.

[28] The 2014 APA is a public document posted on the Office of the Rhode Island Attorney General at http://www.riag.ri.gov/CivilDivision/OfficeoftheHealthCareAdvocate.php under "Recent HCA Reviews," "CharterCARE/Prospect" and "Public Exhibits" and included thereunder as Exhibit 18.

misrepresentations made by other Defendants; however, there are only *three* allegations of misrepresentations to Plan participants that purport to relate to the Prospect Entities, none of which state a colorable or plausible claim against the Prospect Entities.

The first alleged misrepresentation that the Prospect Entities purportedly made to Plan Participants involves a statement allegedly made to the Plaintiffs' union. Specifically, the Complaint alleges that:

> [i]n connection with the 2014 Asset Sale, SJHSRI, RWH, CCCB, and the Prospect Entities that were purchasing or guaranteeing the purchase of the assets sought [United Nurses & Allied Professionals' ("UNAP")] agreement to a freeze on the accrual of pension benefits upon the closing of the asset sale. *These Defendants* offered the $14 million contribution to the Plan as an inducement for UNAP and its members to agree to the freeze on the accrual of pension benefits, and UNAP and its members agreed to the freeze in return for that contribution and in return for the assurance that the $14 million contribution would "stabilize" the Plan.

Compl. at ¶ 298 (emphasis added). Plaintiffs further allege that

> *[a]ll Defendants* made these misrepresentations and omitted this material information because they knew that such disclosure would create so much negative publicity and outcry that the applications to the Department of Health and the Attorney General for approval of the asset sale without fully funding the Plan would be denied or at the very least would be in serious jeopardy."

Compl. at ¶ 300 (emphasis added).

This alleged misrepresentation fails to state a claim for misrepresentation against the Prospect Entities for a number of reasons. First, the Plaintiffs fail to specify the time, place, and content of the alleged false representation or omission. Plaintiffs have failed to plead "the who, what, when, where, and how" of alleged misrepresentation. There is no specificity as to what role, if any, the various Prospect Entities had relative to the above allegations.

Second, the alleged misrepresentation was not even made to the Plaintiffs; it was made to UNAP. Plaintiffs cannot plausibly allege that a statement made to UNAP was made with the intent to deceive Plaintiffs, or with the intent that Plaintiffs rely upon it, or that Plaintiffs could have reasonably relied upon it. There is no basis for a claim based upon a third party's reliance on a purported fraudulent misrepresentation. *See Mendez Internet Mgmt. Servs. v. Banco Santander de P.R.*, 621 F.3d 10, 15 n.5 (1st Cir. 2010) ("unlike common-law fraud, mail and wire fraud does not require first-party reliance"); *see also Gorbey v. Am. Journal of Obstetrics & Gynecology*, 849 F. Supp. 2d 162, 166 (D. Mass. 2012) (observing that "[p]laintiffs here do not allege that they relied or acted upon any alleged misrepresentation but rather that third parties so relied and acted which, in turn, resulted in plaintiffs' injury. Plaintiffs point to no case, however, and the Court has found none, in support of a theory that third-party reliance on fraud is cognizable under Massachusetts law").

Third, to the extent that the Complaint is alleging that someone (it is not clear who) represented (to someone other than Plaintiffs) that the $14 million contribution would "stabilize the Plan," such statement cannot be the basis of a claim for fraud. It is axiomatic that "'[a] statement on which liability for fraud may be based must be one of fact; it may not be one of opinion, or conditions to exist in the future, or matters promissory in nature.'" *Siemens Fin. Servs. v. Stonebridge Equip. Leasing, LLC*, 91 A.3d 817, 823 (R.I. 2014) (emphasis added) (quoting *Stolzoff v. Waste Sys. Int'l, Inc.*, 792 N.E.2d 1031, 1041 (Mass. App. Ct. 2003)); *see Nisenzon*, 689 A.2d at 1045 n.11 ("misrepresentation should take the form of an expression of fact and not the offering of an opinion or estimate"). The purported "assurance that the $14 million contribution would 'stabilize' the Plan" was fundamentally a statement of opinion or estimate that was promissory in nature.

Fourth, to the extent that Plaintiffs allege that the 2014 Asset Sale was supposed to result in the Plan being fully funded, such an allegation lacks any semblance of plausibility. There is no allegation, nor could there be, that anyone represented to anyone that the $14 million payment to the Plan would be sufficient to fully satisfy SJHSRI's long-term pension liability. The extent that the Plan was underfunded and the impact of the 2014 Asset Sale on SJHSRI's long-term pension liability was considered by the RIDOH and RIAG in the administrative proceeding to determine whether the transaction complied with the HCA. *Compl.* at ¶ 308. The 2014 Asset Sale was approved notwithstanding that SJHSRI still faced a significant unfunded pension liability.

The 2014 APA—as approved by the RIDOH and RIAG—expressly stated that the Prospect Entities would not assume or be responsible for any rights, duties, obligations or liabilities under the Plan. 2014 APA §§ 2.2(d), 8.2(e). Furthermore, the APA did not include any warranty that SJHSRI's pension liability would be fully funded or satisfied by the transaction. In fact, SJHSRI expressly limited its warranty of solvency by excluding "Liabilities associated with the Retirement Plan due to their uncertainty of amount." 2014 APA § 4.29. Thus, SJHSRI warranted that it was not insolvent and would not be rendered insolvent by the transaction, *except for its liability under the Plan*.

Finally, Plaintiffs could not have reasonably relied upon any assurance from any of the Prospect Entities relating to the funding status of the Plan. Plaintiffs do not allege, nor could they, that the Prospect Entities had any role in the evaluation of the Plan or its funding level after the 2014 Asset Sale. Whether the $14 million payment would assure that the pensions of many former employees were protected depended upon whether SJHSRI or CCCB would continue to fund the Plain going forward, something completely outside the control of the Prospect Entities.

Thus, the purported assurance that the $14 million contribution would "stabilize" the Plan does not state a plausible claim for fraud against the Prospect Entities.

The second alleged misrepresentation to Plan participants purportedly occurred after the 2014 Asset Sale. Plaintiffs allege that "[o]n August 12, 2014, nearly two months after the Prospect Entities took over ownership and operation of New Fatima Hospital, Defendant Angell sought instructions from the Prospect Entities as to how Angell should respond to Plan participants who were seeking information concerning the solvency of the plan . . . ." *Compl.* at ¶ 301. Plaintiffs further allege that:

> The Prospect Entities instructed Angell not to provide Plan participants with the information they were seeking concerning the solvency of the Plan. Moreover, the Prospect Entities instructed Angell to tell Plan participants that "while we [Angell] can't speak to the future solvency of the plan, we can share that the plan administrators review the annual recommended funding as advised by the plan's actuaries each year. There is also an investment committee that reviews and monitors the plan on an ongoing basis.

Compl. at ¶ 302. Plaintiffs allege that "[b]oth Angell and the Prospect Entities knew that this statement was false and intended to mislead . . . ." *Compl.* at ¶ 303.

Here again, Plaintiffs have failed to plead "the who, what, when, where, and how" of alleged misrepresentation. The Complaint contains no specificity as to what role, if any, the various Prospect Entities had; Plaintiffs simply lump all the Prospect Entities together. There is no way for the various Prospect Entities to determine which alleged representation each is specifically charged with having made.

There is also no allegation that any of the Prospect Entities made any false representation to Plaintiffs. The allegation is that another Defendant, Angell, did. Plaintiffs do not allege, nor could they, that any of the Prospect Entities made a false representation of material fact.

Furthermore, there is no plausible allegation that the statements made *by Angell* were false. The future solvency of the Plan depended on SJHSRI or CCCB's willingness to fund the Plan going forward and was not in the control of any of the Prospect Entities or Angell. There is no allegation that the plan administrators did *not* review the annual recommended funding as advised by the Plan's actuaries each year. There is no allegation that there is *not* an investment committee that reviews and monitors the plan on an ongoing basis.

Plaintiffs acknowledge that "the [2014 APA] expressly stated that responsibility for the Plan after the asset sale closed would remain with SJHSRI." *Compl.* at ¶ 301. As the Plaintiffs were well aware, the Prospect Entities had no role in the evaluation of the Plan or its funding level after the 2014 Asset Sale. Thus, Plaintiffs could not have reasonably relied upon any statements regarding the Plan made by the Prospect Entities two months after the 2014 Asset Sale closed. Plaintiffs cannot plausibly allege that they detrimentally relied upon the statements or that they were injured as a result of the statements, much less that the statements in question can be said to have caused the alleged funding deficiency. Thus, Defendant Angell's purported statements to Plan participants do not state a claim for fraud against the Prospect Entities.

The third alleged misrepresentation to Plan participants purportedly occurred in April of 2016. Plaintiffs allege that:

> [o]n or about April 13, 2016, nearly two years after the asset sale, Angell worked with SJHSRI, CCCB, and Prospect Chartercare to prepare and make another PowerPoint presentation, this time at New Fatima Hospital, concerning the Plan and the rights of Plan participants, which again acknowledged that '[y]our pension benefit is an important part of your future retirement income,' and again assured them that '[t]he Hospital pays the entire cost of the Plan,' with payment options that included annuity payments for life.

Compl. at ¶ 305. Plaintiffs further allege the following:

> [t]hese Defendants knew that the "Hospital," which for nearly two years had been owned and operated by the Prospect Entities, claimed it had no obligations whatsoever to Plan participants. Moreover, SJHSRI, RWH and CCCB had already decided to put the Plan into receivership and ask for a severe cut in benefit payments to all Plan participants, and were allowing time to pass in order to obscure the connection between the 2014 Asset Sale and the receivership, so that the inevitable firestorm of employee shock and anger and negative publicity that would be generated by the receivership would not be linked to the current operation of New Fatima Hospital and New Roger Williams Hospital." "An earlier draft of the April 13, 2016 Power Point presentation stated that the Plan was a "Church Plan" and, therefore, that the Plan participants' benefits were not protected under ERISA. However, as part of a long history of concealment from the Plan participants, this disclosure was deleted and did not appear in the presentation actually given. Indeed, the Plan participants were never informed that the Plan was purported to be a Church Plan, such that the Plan participants' benefits were not protected under ERISA.

Compl. at ¶¶ 306-07.

With respect to this allegation, Plaintiffs have again failed to plead "the who, what, when, where, and how" of the alleged misrepresentation. Plaintiff simply lumps all the Prospect Entities together. With respect to Prospect Chartercare, Plaintiffs fail to plead "the who, what, when, where, and how" of the alleged misrepresentation. There is also no specificity as to what role, if any, Prospect Chartercare (other than being the employer) had in making the purported misrepresentation contained in a PowerPoint presentation. Plaintiffs simply lump Defendants SJHSRI, CCCB, and Prospect Chartercare together.

Further, the Complaint fails to allege that Prospect Chartercare made any misrepresentation. It only alleges that "Angell worked with SJHSRI, CCCB, and Prospect Chartercare to prepare and make another PowerPoint presentation." *Compl*. at ¶ 305. Further, as previously indicated, Plaintiffs have failed to allege the source of any duty or obligation that any

of the Prospect Entities had to inform the Plan participants that the Plan was a Church Plan not covered by ERISA.

Moreover, the suggestion that the "Plan participants were never informed that the Plan was purported to be a Church Plan" is not plausible. To the contrary, this was public knowledge; the 2014 APA, which was publicly disclosed to the RIDOH and RIAG, *expressly* stated that the Plan was a Church Plan: "The Retirement Plan has been a Church Plan since the date on which the Retirement Plan was established, and has continuously maintained such status since that date . . . ." 2014 APA § 4.17 (i).

Finally, there is no plausible allegation, nor could there be, that Plaintiffs relied upon any statements made by the Prospect Entities or that they changed their position in any way. Plaintiffs acknowledge that the Prospect Entities, which at this point had been operating the hospitals for nearly two years, had no role in the Plan and that the funding responsibility for the plan remained with SJHSRI and CCCB. *Compl.* at ¶¶ 301, 306. Thus, Plaintiffs could not have reasonably relied upon an ambiguous statement made in a PowerPoint presentation nearly two years after the 2014 Asset Sale. There certainly is no causal relationship between any statement made in a PowerPoint presentation in 2016 by a stranger to the Plan and SJHSRI/CCCB's purported failure to fund the Plan over many years.

Thus, Plaintiffs' three conclusory allegations of alleged fraudulent misrepresentations and omissions to Plan Participants fail to state a claim against the Prospect Entities.

vii. Plaintiffs Fail to State a Claim Against the Prospect Entities for Fraud for Alleged Misrepresentations and Omissions to State Regulators.

Plaintiffs broadly allege that the Defendants made misrepresentations to state regulators in connection with the administrative approval process under the Hospital Conversion Act

("HCA"). *Compl.* at ¶¶ 308-59. However, most of the allegations relate to representations made by Defendants other than the Prospect Entities, and none of these purported representations were made to the Plaintiffs. Plaintiffs have not, and cannot state a plausible claim for fraud against the Prospect Entities for representations that were made to third parties.

Plaintiffs cannot plausibly allege that statements made to state regulators were made with the intent to deceive Plaintiffs, or with the intent that Plaintiffs rely upon them, or that Plaintiffs did or could have reasonably relied upon them. As previously indicated, there is no basis for a claim based upon a purported fraudulent representation to a third party. *See Mendez Internet Mgmt. Servs*, 621 F.3d at 15 n.5; *Gorbey*, 849 F. Supp. 2d at 166.

With respect to the Prospect Entities, there are only *two* specific allegations of fraudulent representations made to third party regulators, neither of which state a plausible claim for relief against the Prospect Entities by these plaintiffs. The first allegation is that on March 7, 2014, counsel for SJHSRI, RWH, and CCCB and counsel for the various Prospect Entities co-signed and sent a letter to the RIDOH that responded to the RIDOH's inquiry relating to how the purchase price of the 2014 Asset Sale would be used by Chartercare for community benefit versus paying off debts. *Compl.* at ¶ 325. The letter stated in part,

> [t]he use of the sale proceeds … will benefit the community in three ways: … The use of $14M to strengthen the [] Plan will be of significant benefit to the community as it will assure that the pensions and retirement of many former employees, who reside in the community, are protected.

Compl. at ¶ 325. Plaintiffs allege that this statement was false and misleading because "all of the Defendants knew . . . that the contribution of the $14,000,000 to the Plan would not 'assure' that the benefits of the Plan participants were protected, even according to the calculations that Angell shared with all of those other Defendants." *Compl.* at ¶ 326.

Under Rhode Island law "[c]ommon-law fraud consists of a false or misleading statement of material fact that was *known by the defendant to be false and was made with intent to deceive*, upon which the plaintiff justifiably relies to its detriment." *Nisenzon*, 689 A.2d at 1045 n.11 (emphasis added) (citations omitted). "Rule 9(b) https://advance.lexis.com/search/?pdmfid=1000516&crid=f6d67f04-07d5-4064-bc42-9cb778ccd785&pdsearchterms=567+F.3d+8&pdstartin=hlct%3A1%3A2&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdqttype=or&pdpsf=jur%3A1%3A64&pdquerytemplateid=&ecomp=532bk&earg=pdpsf&prid=e53489b6-c5d8-411d-8a59-9d0b9845ffc6requires not only specifying the false statements and by whom they were made but also identifying the basis for inferring scienter." *Cardinale*, 567 F.3d at 13; *see also Greenstone v. Cambex Corp.*, 975 F.2d 22, 25 (1st Cir. 1992) ("The courts have uniformly held inadequate a complaint's general averment of the defendant's 'knowledge' of material falsity, unless the complaint also sets forth specific facts that make it reasonable to believe that defendant knew that a statement was materially false or misleading").

Here, Plaintiffs cannot plausibly allege that the Prospect Entities knew that contributing $14 million to the Plan would *not* strengthen the Plan and benefit the community by "assuring that the pensions and retirement of many former employees . . . are protected." As previously indicated, Plaintiffs have not alleged, nor could they, that any of the Prospect Entities had any role in the evaluation of the Plan or its anticipated funding level after the 2014 Asset Sale. Whether or not contributing $14 million to the Plan would assure that the pensions of many former employees were protected depended upon whether SJHSRI or CCCB would continue to fund the Plan going forward, something completely outside the control of the Prospect Entities. Furthermore, there is no allegation, nor could there be, that anyone represented to anyone that the $14 million payment to the Plan would be sufficient to fully satisfy SJHSRI's long-term pension liability. Indeed, Plaintiffs acknowledge that representatives of the CCCB assured state

regulators that it intended to, and had the wherewithal to, fund the Plan going forward. *Compl.* at ¶¶ 333, 340. As Plaintiffs allege, representatives of the CCCB, SJHSRI and RWH testified to state regulators that they would be contributing $600,000.00 per year to the Plan going forward as well as directing $6,666,874.00 to the Plan post-closing. *Compl.* at ¶ 340.

Second, a party can be liable for fraud only where it intentionally misrepresents a material fact. The statement in question cannot be held to be "false or incorrect" because there is no question that contributing $14 million to the Plan strengthened and benefited the Plan. As previously indicated, opinions, estimates, forecasts and predictions are not actionable as fraudulent misrepresentations since the fact that a prediction proves to be wrong in hindsight does not render a statement untrue. *See Nisenzon*, 689 A.2d 1045 n.11; *see also Siemens Fin. Servs.*, 91 A.3d at 823.

Third, Plaintiffs have failed to plausibly allege, nor could they, that they: relied upon the statement to their detriment; changed their position; or suffered any injury as a result of the statement. According to the Complaint, the underfunding of the Plan occurred long before the Prospect Entities came on the scene. Thus, the first allegation does not state a plausible claim of fraud against the Prospect Entities.

The second allegation against the Prospect Entities is that they and others "mislead state regulators concerning the degree of local control that CCCB would have after the 2014 Asset Sale." *Compl*. at ¶ 356. It is amazing that these Plaintiffs should even try to bring a fraud claim against the Prospect Entities based on this statement to regulators. The RIAG requested a description of "the governance structure of the new hospital after conversion, including a description of how members of any board of directors, trustees or similar type group will be chosen." *Compl.* at ¶ 357. The Prospect Entities' response accurately stated that fifty percent of

Prospect Chartercare's members would be appointed by Prospect and fifty percent would be appointed by CCHP. Furthermore, "[t]he issues that the Board of Directors will address will require a majority vote of those Directors appointed by PMH, and a majority appointed by CCHP." *Compl.* at ¶ 358. Plaintiffs allege that this statement was materially false because "under the Amended & Restated Limited Liability Company Agreement of Prospect Chartercare, LLC, . . . deadlocks between CCCB-appointed directors and Prospect-appointed directors for some of the most significant board-level decisions were to be resolved by allowing the decisions of Prospect-appointed board members to prevail." *Compl.* at ¶ 354. Plaintiffs allege that:

> [t]he statement that '[t]he issues that the Board of Directors will address will require a majority vote of those Directors appointed by PMH, and a majority vote of those Directors appointed by CCHP' was also materially false, for the same reason that some of the most significant decisions were to be resolved by allowing Prospect-appointed board members' decisions to prevail.

Compl. at ¶ 359.

This fails to state a claim for fraud against the Prospect Entities because such statement was not made to Plaintiffs, it was made to state regulators. *Gorbey*, 849 F. Supp. 2d at 166. Furthermore, the response was entirely accurate and therefore cannot be the basis for a fraud claim. Moreover, there is no causal relationship between the purported failure to disclose information regarding deadlocks (that was not asked for) to the RIAG, and CCCB's failure to fund the Plan. It is undisputed that, as part of the 2014 Asset Sale, neither Prospect Chartercare nor any of the Prospect Entities were assuming any control of, or responsibility for, the Plan. The Plaintiffs did not suffer any injury by reason of the Defendants' alleged failure to clarify an issue of control of an entity, Prospect Chartercare that had no control over the Plan.

Thus, Plaintiffs have failed to state any plausible claims of fraudulent misrepresentations or omissions against the Prospect Entities. Count VII should be dismissed as to the Prospect Entities.

C. Count XX Alleging Aiding and Abetting Breach of Fiduciary Duty Should Be Dismissed Against the Prospect Entities.

In Count XX, Plaintiffs assert a claim for Aiding and Abetting Breach of Fiduciary Duty. Plaintiffs alleges that SJHSRI, RWH, CCCB, CC Foundation, Angell, Prospect Chartercare, Diocesan Defendants, Prospect East, Prospect, Prospect SJHSRI, and Prospect RWH knowingly aided, abetted, and participated in, breaches of fiduciary duty by SJHSRI, CCCB, Angell, and the Diocesan Defendants.

In alleging facts to support an aiding and abetting breach of fiduciary duty claim, "Rule 9(b)'s requirements apply to both general claims of fraud and also to 'associated claims,'… 'where the core allegations effectively charge fraud.'" *Mulder v. Kohl's Dep't Stores, Inc.*, 865 F.3d 17, 21-22 (1st Cir. 2017) (quoting *Cardinale*, 567 F.3d at 15). Specifically, other courts have held that Rule 9(b)'s requirements apply to aiding and abetting breach of fiduciary duty claims where the claim is based on fraud. *See Hallal v. Vicis Capital Master Fund LTD*, 2013 U.S. Dist. LEXIS 39449, at *62 (D. Mass. Feb. 25, 2013); *R.I. Res. Recovery Corp. v. Albert G. Brien & Assocs.*, 2011 R.I. Super. LEXIS 72, *19 (R.I. Super. Ct. May 13, 2011) ("claims alleging civil conspiracy, aiding and abetting breach of fiduciary duty, fraud, negligent omissions or misrepresentations, and civil liability pursuant to § 9-1-2 . . . , are simply an attempt to utilize alternative legal theories to recover for the same underlying fraudulent activity, and as a result, are too vague, ambiguous, and conclusory to satisfy Defendants' entitlement to due process").

The Rhode Island Supreme Court has not yet addressed or adopted aiding and abetting a breach of fiduciary duty as a cognizable tort claim; however, the Superior Court (Silverstein, J.)

has addressed the claim in a number of cases. *See Martin v. Pascarella & Gill P.C.*, 2017 R.I. Super. LEXIS 55 (R.I. Super. Ct. Mar. 24, 2017); *R.I. Res. Recovery Corp. v. Albert G. Brien & Assocs.*, 2012 R.I. Super. LEXIS 113, at *45-46 (R.I. Super. Ct. Jul 16, 2012); *R.I. Res. Recovery Corp. v. Van Liew Trust Co.*, 2011 R.I. Super. LEXIS 70 (R.I. Super. Ct. May 13, 2011). In *R.I. Res. Recovery Corp.* the Superior Court held that:

> The Rhode Island Supreme Court has yet to recognize a cause of action for aiding and abetting a breach of fiduciary duty. However, under the decisional law of our sister state, Massachusetts, the elements of the tort of aiding and abetting a breach of fiduciary duty are: '(1) there must be a breach of fiduciary duty, (2) the defendant must know of the breach, and (3) the defendant must actively participate or substantially assist in or encourage the breach to the degree that he or she could not reasonably be held to have acted in good faith.'

2012 R.I. Super. LEXIS 113, at *45-46 (quoting *Arcidi v. Nat'l Ass'n of Gov't Emps., Inc.*, 856 N.E.2d 167, 174 (Mass. 2006)); *see also Van Liew Trust Co.*, 2011 R.I. Super. LEXIS 70, at *16 (applying Massachusetts elements for aiding and abetting breach of fiduciary duty in consideration of motion to dismiss); 74 Am. Jur. 2d Torts § 61 (2012) (setting forth similar elements for aiding and abetting a breach of duty and requiring a showing that defendant "substantially assisted or encouraged the primary tortfeasor"). Significantly, the Supreme Judicial Court of Massachusetts has noted that it is aware of "*no case holding a third party liable to a principal merely for entering into an arm's-length transaction* . . . ." *Arcidi*, 856 N.E.2d at 174 (emphasis added). To the contrary, for liability to attach, the aider and abettor must know of the breach and actively participate or substantially assist in or encourage the breach. *Id*. Liability based on aiding and abetting "requires actual knowledge that a breach of fiduciary duty is occurring." 37 Am. Jur. 2d Fraud and Deceit § 306 (2012); *see also R.I. Res. Recovery Corp.*, 2012 R.I. Super. LEXIS 113, at *45-47.

Plaintiffs allege that the Prospect Entities knowingly aided, abetted, and participated in, breaches of fiduciary duty by Defendants SJHSRI, CCCB, Angell, and the Diocesan Defendants. *See Compl.* at ¶ 524. One of the breaches of fiduciary duties that the Prospect Entities allegedly aided and abetted[29] involved SJHSRI's purported reliance on provisions in the Plan to deny any obligation to fund the Plan. Plaintiffs allege that:

> insofar as the Exculpatory Provisions if so construed would have the effect of relieving Defendant SJHSRI from liability to fully fund the Plan to pay the promised retirement benefits, then Defendants SJHSRI, Angell, and the Prospect Entities breached their fiduciary obligations to disclose that material information to the Plan participants, including, but not limited to, the information that Defendant SJHSRI contended that it was not obligated to fund, and, in fact, was not funding the Plan. All of the other Defendants aided and abetted those breaches of fiduciary duties by Defendants SJHSRI, Angell, and the Prospect Entities.

Compl. at ¶ 224. However, there are no allegations, nor could there be, that any of the Prospect Entities had any role in the drafting of the Plan, much less the drafting of any Exculpatory Provisions contained therein. This is not surprising given that the Plan was drafted years before the 2014 Asset Sale. Plaintiffs fail to allege any "active participation" by the Prospect Entities in furtherance of this purported breach.

Plaintiffs' second allegation is that on August 12, 2014, after taking over ownership and control of New Fatima Hospital, in response to a request for information from Plan participants relating to the Plan, the Prospect Entities allegedly instructed Angell:

> not to provide Plan participants with the information they were seeking concerning the solvency of the Plan. Moreover, the Prospect Entities instructed Angell to tell Plan participants that 'while we [Angell] can't speak to the future solvency of the plan, we can share that the plan administrators review the annual

[29] Plaintiffs also refer to other PowerPoint presentations that took place before and after the 2014 Asset Sale, which did not involve the Prospect Entities, and therefore cannot form the basis of an aiding and abetting claim against the Prospect Entities. *See Compl.* at ¶¶ 293-297, 305-307.

> recommended funding as advised by the plan's actuaries each year. There is also an investment committee that reviews and monitors the plan on an ongoing basis.'

Compl. at ¶ 302. Plaintiffs allege that "[b]oth Angell and the Prospect Entities knew that this statement was false and intended to mislead . . . ." *Compl*. at ¶ 303.

First, Plaintiffs have failed to plead "the who, what, when, where, and how" of the alleged aiding and abetting of breach of fiduciary duty. Plaintiffs simply lump all the Prospect Entities together. There is no specificity as to what role, if any, the various Prospect Entities had in allegedly aiding and abetting a breach of fiduciary duty. There is also no specificity as to precisely what information the Plan participants requested "concerning the solvency of the Plan."

Second, Plaintiffs have failed to allege plausible claims that there was a breach of fiduciary duty and the Prospect Entities knew of the breach and actively facilitated it. This allegation relates to an alleged incident that occurred *less than two (2) months after the 2014 Asset Sale*. As previously indicated, the 2014 Asset Sale was approved by the RIAG and the RIDOH after an extensive administrative approval process under the HCA which included analysis of the solvency of the Plan *to be retained by SJHSRI*. *Compl*. at ¶¶ 308-359. Thus, at the time of the 2014 Asset Sale, the solvency of the Plan, and SJHSRI's intentions and ability to fund the Plan going forward, were considered by the state regulators in connection with their review of the proposed asset sale under the HCA. *Compl.* at ¶¶ 308-59. Plaintiffs acknowledge that representatives of the CCCB assured state regulators that it intended to, and had the wherewithal to, fund the Plan going forward. *Compl*. at ¶¶ 333, 340. As Plaintiffs allege, representatives of the CCCB, SJHSRI and RWH testified to state regulators that they would be contributing $600,000.00 per year to the Plan going forward as well as directing $6,666,874.00 to the Plan post-closing. *Compl.* at ¶ 340. There is no plausible allegation that the Prospect

Entities were aware that SJHSRI was in breach of any fiduciary duties less than two (2) months after the 2014 Asset Sale or that the Prospect Entities actively participated in any breach.

The entire thrust of this lawsuit is that SJHSRI breached a fiduciary duty to the Plan participants by failing to adequately fund the Plan over a period of many years. The vague allegation that the Prospect Entities instructed a third party not to provide certain information concerning the solvency of the Plan does not state a plausible claim for aiding and abetting. First, it is not clear what information was requested and who the request was made to. Second, there are no plausible allegations that any of the Prospect Entities *actively* participated or substantially assisted in or encouraged SJHSRI's failure to adequately fund the Plan to the degree that they could not reasonably be held to have acted in good faith. Plaintiffs do not allege, nor could they, that the Prospect Entities had any responsibility or liability for the Plan. Indeed, Plaintiffs readily acknowledge that "the Asset Purchase Agreement expressly stated that responsibility for the Plan after the asset sale closed would remain with SJHSRI." *Compl.* at ¶ 301.

Furthermore, as previously indicated, there is no plausible allegation that the statement made by Angell was false. The future solvency of the Plan depended on SJHSRI or CCCB's willingness to fund the Plan going forward and was not in the control of any of the Prospect Entities or Angell. There is no allegation that the plan administrators did *not* review the annual recommended funding as advised by the Plan's actuaries each year. There is no allegation that there is *not* an investment committee that reviews and monitors the Plan on an ongoing basis. Thus, the second allegation fails to state a claim for aiding and abetting a breach of fiduciary duty against the Prospect Entities.

Plaintiffs' third allegation is that SJHSRI, RWH, CCCB, and the Prospect Entities (again, without specifying which of the Prospect Entities) "sought UNAP's agreement to a freeze on the accrual of pension benefits upon the closing of the asset sale." *Compl*. at ¶ 298. The Plaintiffs allege that:

> [t]hese Defendants offered the $14 million contribution to the Plan as an inducement for UNAP and its members to agree to the freeze on the accrual of pension benefits, and UNAP and its members agreed to the freeze in return for that contribution and in return for the assurance that the $14 million contribution would 'stabilize' the Plan."

Compl. at ¶ 298. Plaintiffs then allege that all Defendants knew the $14 million contribution would not be sufficient to stabilize the Plan and that:

> [a]ll Defendants made these misrepresentations and omitted this material information because they knew that such disclosure would create so much negative publicity and outcry that the applications to the Department of Health and the Attorney General for approval of the asset sale without fully funding the Plan would be denied or at the very least would be in serious jeopardy.

Compl. at ¶ 300 (emphasis added).

Here again, Plaintiffs fail to state a claim for aiding and abetting breach of fiduciary duty against the Prospect Entities. First, Plaintiffs have no standing to assert a claim with regard to representations made to third parties that caused them no injury. Furthermore, Plaintiffs have failed to plead "the who, what, when, where, and how" of the alleged aiding and abetting of fiduciary duty. Plaintiffs simply lump all the Prospect Entities together; there is no specificity as to what role, if any, the various Prospect Entities had in allegedly aiding and abetting a breach of fiduciary duty.

Second, to the extent that Plaintiffs allege that the 2014 Asset Sale was supposed to result in the Plan being fully funded, such an allegation lacks any semblance of plausibility. Plaintiffs

have not alleged, nor could they, that anyone represented to anyone that the $14 million payment to the Plan would be sufficient to fully satisfy SJHSRI's long-term pension liability. The RIDOH and RIAG considered the extent that the Plan was underfunded and the impact of the 2014 Asset Sale on SJHSRI's long-term pension liability in the administrative proceeding to determine whether the transaction complied with the HCA. *See Compl.* at ¶¶ 308, 333-339. The 2014 Asset Sale was approved notwithstanding the fact that SJHSRI still faced a significant unfunded pension liability.

The 2014 APA that was approved by the RIDOH and RIAG expressly stated that the Prospect Entities would not assume or be responsible for any rights, duties, obligations or liabilities under the Plan. 2014 APA §§ 2.2(d), 8.2(e). Certainly, the 2014 APA did not include any warranty that SJHSRI's pension liability would be fully funded or satisfied by the transaction.[30]

Finally, Plaintiffs do not allege, nor could they, that the Prospect Entities had any role in the evaluation of the Plan or its funding level after the 2014 Asset Sale. Whether or not the payment would assure that the pensions of many former employees were protected depended upon whether SJHSRI or CCCB would continue to fund the pension going forward, which was completely outside the control of the Prospect Entities. Plaintiffs could not have reasonably relied upon any assurance from any of the Prospect Entities relating to the funding status of the Plan. Thus, neither the payment of $14 million, nor the purported assurance that the $14 million contribution would "stabilize" the Plan, states a plausible claim for aiding and abetting a breach of fiduciary duty against the Prospect Entities; therefore, Count XX should be dismissed.

[30] In fact, SJHSRI expressly limited its warranty of solvency by excluding "Liabilities associated with the Retirement Plan due to their uncertainty of amount." 2014 APA § 4.29. Thus, SJHSRI warranted that it was not insolvent and would not be rendered insolvent by the transaction, *except for its liability under the Plan*.

D. Plaintiffs' Counts Alleging Conspiracy (Count IX) and Fraudulent Scheme (Count VIII) Should Be Dismissed as to the Prospect Entities.

In Count IX, Plaintiffs alleges that Defendants SJHSRI, RWH, CCCB, CC Foundation, Angell, Prospect Chartercare, Diocesan Defendants, Prospect East, Prospect, Prospect SJHSRI, and Prospect RWH participated in a conspiracy to injure Plaintiffs. In Count VIII, Plaintiffs allege that Defendants SJHSRI, RWH, CCCB, CC Foundation, Angell, Prospect Chartercare, Diocesan Defendants, Prospect East, Prospect, Prospect SJHSRI, and Prospect RWH intentionally defrauded Plaintiffs.[31]

To adequately plead civil conspiracy, a plaintiff must allege that "(1) there was an agreement between two or more parties and (2) the purpose of the agreement was to accomplish an unlawful objective or to accomplish a lawful objective by unlawful means." *Smith v. O'Connell*, 997 F. Supp. 226, 241 (D.R.I. 1998) (quoting *Stubbs v. Taft*, 149 A.2d 706, 708-09 (R.I. 1959)). "To prove a civil conspiracy, plaintiffs [must] show evidence of an unlawful enterprise." *Read & Lundy, Inc. v. Washington Trust Co. of Westerly*, 840 A.2d 1099, 1102 (R.I. 2004) (citing *ERI Max Entm't, Inc. v. Streisand*, 690 A.2d 1351, 1354 (R.I. 1997)). "Civil conspiracy is not an independent basis of liability, but merely a means of establishing joint liability for tortious conduct. Thus, a *civil conspiracy claim requires a valid underlying intentional tort theory*." *Guilbeault v. R.J. Reynolds Tobacco Co.*, 84 F. Supp. 2d 263, 268 (D.R.I. 2000) (emphasis added) (citing *Streisand*, 690 A.2d at 1354); *Caramadre*, 847 F. Supp.

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[31] Count VIII alleging "Fraudulent Scheme" relies on the same allegations as Count IX alleging Conspiracy. *Compl*. at ¶¶ 475, 480. Fraudulent Scheme has not been recognized by Rhode Island courts as a cognizable claim. To the extent that Count VIII alleging Fraudulent Scheme attempts to state a claim under state law, it should be dismissed for failure to state a claim. Furthermore, counts within a complaint may be dismissed if they are legally and factually "indistinguishable from [a] previously pled claim" and therefore "unnecessarily duplicative" of other causes of action asserted therein. *514 Broadway Trust, UDT 8/22/05 ex rel Blechman v. Rapoza*, 816 F. Supp. 2d 128, 140 (D.R.I. 2011). Count VIII should be dismissed for the same reasons as Count IX alleging Conspiracy. *See* discussion *infra*.

2d at 329. Further, civil conspiracy requires the "specific intent to do something illegal or tortious." *Guilbeault*, 84 F. Supp. 2d at 268 (citing *Fleet Nat'l Bank v. Anchor Media Television, Inc.*, 831 F. Supp. 16, 45 (D.R.I. 1993)). To sufficiently allege a civil conspiracy, there must be evidence to at least "reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise." *Fleet Nat'l Bank*, 831 F. Supp. at 45 (quoting *Thompson Trading, Ltd. v. Allied Breweries Overseas Trading, Ltd.*, 748 F. Supp. 936, 945 (D.R.I. 1990)); *see* 15A C.J.S. Conspiracy § 4 (2012) ("The essential nature of a civil conspiracy is a common design establishing that two or more persons in any manner, either positively or tacitly, arrive at a mutual understanding, or meeting of the minds, as to how they will accomplish an unlawful design").

A civil conspiracy claim requires a valid underlying tort theory. The only intentional tort theories alleged by Plaintiffs are (1) Fraud (Count VII) and (2) Aiding and Abetting Breach of Fiduciary Duty (Count XX). To the extent that Plaintiffs' claim for civil conspiracy are based on their underlying claims of fraud and other counts sounding in fraud, Rule 9(b) applies to further test the sufficiency of the pleading. *Cardinale*, 567 F.3d at 15 ("the case law here and in other circuits reads Rule 9(b) expansively to cover associated claims where the core allegations effectively charge fraud"); *Hallal*, 2013 U.S. Dist. LEXIS 39449, at *62 (applying Rule 9(b) to aiding and abetting fiduciary duty claim).

Plaintiffs broadly allege several conspiracies ostensibly involving the Prospect Entities.[32] The various conspiracies alleged include: (1) making false assurances to the RIAG and/or RIDOH to gain approval for the asset sale, *Compl.* at ¶ 352; (2) concealing the fact that the Plan

[32] The vast majority of allegations relating to alleged conspiracies involves other Defendants and do not even mention any of the Prospect Entities.

was underfunded from Plan participants, *Compl.* at ¶ 57(b); and (3) fraudulently claiming the Plan is a Church Plan not covered by ERISA, *Compl.* at ¶ 205.

Plaintiffs' conspiracy claims with respect to (1) purported false assurances to the RIAG and/or RIDOH, and (2) purportedly concealing the fact that the Plan was underfunded from Plan participants, are based upon their underlying fraud claims alleged in Count VII. Thus, for the same reasons that the Court should dismiss the Plaintiffs' fraud claims in Count VII, the Court must also dismiss Plaintiffs' claims of civil conspiracy (Count IX) that are based on such claims. As set forth *supra*, Plaintiffs have failed to state a plausible claim against the Prospect Entities for fraud for both (1) alleged misrepresentations and omissions to state regulators, and (2) concerning the underfunded status of the Plan. *See* discussion *supra*.

With respect to the alleged conspiracy to fraudulently claim that the Plan is a Church Plan not covered by ERISA, Plaintiffs likewise fail to state any plausible claim against the Prospect Entities. Plaintiffs fail to state a plausible claim that an unlawful enterprise existed and otherwise fail to state any plausible claims for the underlying intentional tort theories of fraud or aiding and abetting a fiduciary duty. Specifically, Plaintiffs allege that:

> *there came a time when the Plan no longer qualified as a Church Plan*, but SJHSRI, RWH, CCCB, Angell, the Prospect Entities, and the Diocesan Defendants all *fraudulently conspired to misrepresent that the Plan remained qualified as a Church Plan*, in violation of federal tax laws and ERISA, as part of their scheme to avoid successor liability of the Prospect Entities and to shield New Fatima Hospital from liability for the Plan.

Compl. at ¶ 67 (emphasis added). As an initial matter, Plaintiffs fail to state a plausible claim that an unlawful enterprise or objective existed. Plaintiffs broadly allege that "there came a time when the Plan no longer qualified as a Church Plan," and "[a]ll of the defendants were fully aware of the lack of *bona fides* for the claim that the Plan would be a Church Plan after SJHSRI

sold all its operating assets." *Compl.* at ¶¶ 67, 137. However, Plaintiffs' allegations regarding the legal status of the Plan are wholly conclusory legal opinions which do not plausibly allege an unlawful enterprise. Bald assertions, subjective characterizations and legal conclusions do not constitute plausible factual allegations. *See United States v. AVX Corp.*, 962 F.2d 108, 115 (1st Cir. 1992). "Where the allegations charging a civil conspiracy are conclusions of law and not statements of fact that demonstrate the defendants conspired, a plaintiff fails to allege sufficient allegations from which an intent to conspire may reasonably be inferred." *R.I. Res. Recovery Corp.*, 2012 R.I. Super. LEXIS 113, at *37 (citing *Stubbs*, 149 A.2d at 707-09).

Indeed, Plaintiffs acknowledge that whether the Plan ever ceased to qualify as a Church Plan is a question of law to be determined by the Court: "the determination of whether and when the Plan ceased to qualify as a Church Plan is essential to determining the rights of the parties herein." *Compl.* at ¶ 68. The Complaint contains numerous paragraphs of legal argument as to why the Plan may have ceased to qualify as a Church Plan at various alternative times. *See Compl.* at ¶¶ 69-115. However, none of Plaintiffs' (conflicting) legal conclusions are sufficient to state a plausible claim that an unlawful enterprise existed. "The evidence must do more than raise a suspicion. It must lead to belief." *Stubbs*, 149 A.2d at 709 (quoting 12 C.J. Conspiracy § 234).

Second, Plaintiffs fail to set forth any allegations with particularity or otherwise that the Prospect Entities made *any false representations* that the Plan remained qualified as a Church Plan. There are numerous allegations that other Defendants, and not Prospect Entities, reached an agreement to keep the Plan listed in the Directory. *Compl.* at ¶¶ 151-160, 167. However, none of those allegations mention the Prospect Entities, nor could they. The three allegations regarding the alleged Church Plan Conspiracy that even mention the Prospect Entities fail to

state plausible claims for fraud. Plaintiffs cannot circumvent the requirements of Rule 9(b) by pleading conclusory allegations of conspiracy or scheme to defraud. *See Beck v. Cantor Fitzgerald & Co.*, 621 F. Supp. 1547, 1552 (N.D. Ill. 1985).

Plaintiffs' first allegation against the Prospect Entities alleges that on May 28, 2013, a representative of the Prospect Entities questioned representatives of SJHSRI, RWH, and CCCB as to (1) how the Plan would remain a Church Plan if SJHSRI became a shell corporation; (2) whether the diocese would assume control of the corporation; and (3) how SJHSRI would remain in the Directory. *Compl.* at ¶ 138. This allegation fails to state a plausible underlying tort theory. First, this statement (which was not even made to Plaintiffs) is clearly not a false representation so there is no plausible claim of fraud. Second, merely questioning the Seller entities during a due diligence process about the status of the Plan post-closing does not state a plausible claim that the Prospect Entities "actively participated or substantially assisted in or encouraged" a breach of fiduciary duty "to the degree that [they] could not reasonably be held to have acted in good faith." *Van Liew Trust Co.*, 2011 R.I. Super. LEXIS 70, at *25. Thus, Plaintiffs have failed to allege a valid underlying intentional tort theory to support the conspiracy claim.

Plaintiffs' second allegation is that on November 11, 2014, the Diocesan Chancellor e-mailed a representative of the Prospect Entities to say that due to recently instituted "more formalized and rigorous policies and procedures, with increased expectations for the local Dioceses, in light of stricter IRS scrutiny of group rulings" Fatima Hospital and SJHSRI were no longer eligible for listing in the Directory. *Compl.* at ¶ 187. Prospect Entities responded by stating that failure to list SJHSRI in the Directory would "mean that the SJHSRI pension would no longer be treated as a church plan." *Compl.* at ¶ 188-89.

First, Plaintiffs have failed to plead "the who, what, when, where, and how" of any alleged misrepresentation; there is no specificity as to what role, if any, the various Prospect Entities had. Plaintiff simply lumps all the Prospect Entities together. Second, Plaintiffs do not even allege that the statement purportedly made by the Prospect Entities was made to the Plaintiffs; that they relied upon it to their detriment; or that it was even false. There is no plausible claim that any misrepresentation was made by any Prospect Entity. Third, merely advising the Diocesan Chancellor (months after the 2014 Asset Sale) about the consequences of failing to list SJHSRI in the Directory does not state a plausible claim that the Prospect Entities *actively participated or substantially assisted in or encouraged* a breach of fiduciary duty to the degree that they could not reasonably be held to have acted in good faith. Thus, this allegation fails to state a valid underlying intentional tort theory to support the conspiracy claim.

Plaintiffs' third allegation is that "[t]he contact person that the Diocesan Defendants listed in the Directory for SJHSRI for 2015 and every year since has been an agent for the Prospect Entities with no connection to SJHSRI." *Compl*. at ¶ 196. Putting the failure to plead with particularity aside, this allegation fails to state a plausible claim for fraud as it does not even allege that any of the Prospect Entities made any misrepresentation to anyone regarding the status of the Plan. Moreover, the allegation that the contact person listed in the Directory is an agent for the Prospect Entities does not state a plausible claim that the Prospect Entities actively participated or substantially assisted in or encouraged a breach of fiduciary duty to the degree that they could not reasonably be held to have acted in good faith. To the extent that Plaintiffs are alleging that a representative of the Hospital as opposed to the Plan administrator or SJHSRI was listed in the Directory, this does not support an inference of aiding and abetting. If a representative of the Catholic Church had an issue with one or more of the Catholic covenants,

he or she would more likely want to discuss it with a representative of the Hospital, not the administrator of the Plan. So there is nothing untoward about a hospital representative being the contact person listed in the Directory. The facts alleged do not support a reasonable inference that any of the Prospect Entities are part of a conspiracy or unlawful enterprise.

Thus, Plaintiffs' civil conspiracy count should be dismissed for failure to plausibly allege an unlawful enterprise and for failure to plausibly allege a valid underlying intentional tort theory. Plaintiffs fail to state a claim against the Prospect Entities for conspiracy or fraudulent scheme and Counts IX and VIII should be dismissed against the Prospect Entities.

E. Count VI Alleging Fraudulent Transfer Under R.I. Gen. Laws § 6-16-4(a)(2) and/or § 6-16-5(A) Should Be Dismissed.

In Count VI, Plaintiffs assert a claim for Fraudulent Transfer under R.I. Gen. Laws §6-16-4 (a)(2) and/or 6-16-5(A). Plaintiffs allege that the 2014 Asset Sale was a fraudulent transfer and Prospect, Prospect East, and Prospect Chartercare benefited therefrom and are liable for the value of the assets transferred. *See Compl.* at ¶¶ 463-470.

Section 6-16-4(A)(2) of the Rhode Island Uniform Fraudulent Transfer Act, § 6-16-1, *et seq.* (the "RIUFTA" or "Act"), entitled "Transfers fraudulent as to present and future creditors," states in relevant part:

> (a) A transfer made . . . is fraudulent as to a creditor . . . if the debtor made the transfer . . . :
> (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, *and* the debtor:
> (i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
> (ii) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

R.I. Gen. Laws § 6-16-4(a)(2) (emphasis added). Section 6-16-5 of the Act, which governs fraudulent transfers solely as to present creditors, provides:

> A transfer made or obligation incurred by a debtor is voidable as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation *and* the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

R.I. Gen. Laws § 6-16-5(a) (emphasis added). "Under the [A]ct a conveyance is fraudulent in regard to creditors, without regard to the transferor's actual intent, if the conveyance was made without fair consideration and the debtor was either insolvent at that time or was thereby rendered insolvent." *R.I. Depositors' Prot. Corp. v. Mollicone*, 677 A.2d 1337, 1339 (R.I. 1996). Accordingly, in the case at bar, Plaintiffs are required to plead sufficient facts that (1) the debtor was insolvent at the time of the 2014 Asset Sale, or became insolvent as a result thereof; *and* (2) the debtor made the transfer without receiving a reasonably equivalent value in exchange for the transfer. Although Plaintiffs have alleged sufficient facts to be entitled to an inference with respect to the insolvency prong, they have failed to allege any plausible facts, either direct or inferential, with respect to the requirement that the transaction be made without receiving reasonably equivalent value.

The 2014 Asset Sale was structured so that a newly established limited liability company (Prospect Chartercare, which was owned 85% by Prospect East, and 15% by the Seller (CCHP)), would purchase substantially all the assets from the CCCB in exchange for the payment of $45 million in cash at closing, "$31 million of which will be applied to extinguish Seller's existing long-term debt and other obligations, and $14 million of which will be earmarked to strengthen the cash position of [SJHSRI] pension plan. *Compl*. at ¶ 414. In addition, Prospect Chartercare

as the buyer agreed to invest $50 million for long-term capital projects at the hospitals in the four-year period immediately following the closing. *Compl.* at ¶ 422.

The Complaint contains no allegations that plausibly suggest that inadequate consideration was provided to the Sellers in this transaction that was scrutinized and approved by both the AG and the RIDOH. The only allegations in the Complaint relating to whether the Buyer paid reasonably equivalent value for the assets transferred relate to CCCB receiving a 15% ownership interest *and not its wholly-owned subsidiaries, SJHSRI and RWH*. Plaintiffs alleges that "[t]he consideration that the Prospect Entities provided in return for the assets included the undertaking to provide long term working capital of $50,000,000, which conferred a benefit on CCCB as 15% shareholder in the additional amount of $9,479,000, according to Prospect Chartercare's own audited financials." *Compl.* at ¶ 422. The Complaint further alleges that

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

Compl. at ¶ 423.

Plaintiffs fail to allege that the Prospect Entities did not provide adequate consideration in the 2014 Asset Sale. Not only did CCCB receive a cash payment for the assets, but it also received a 15% interest in Prospect Chartercare. Plaintiffs merely allege that one of the Seller entities, CCCB, which was acting on behalf of all Seller entities, unfairly retained an interest at the expense of other Seller entities. This fails to allege a plausible claim against the Prospect Entities for fraudulent transfer.

The 2014 Asset Sale involved "the sale of all the assets of SJHSRI, RWH, CCCB, and related entities to various Prospect Entities." *Compl.* at ¶ 456. Pursuant to the 2014 APA, the Sellers designated CCHP (the Seller) to be the holder of the 15% of the shares of Prospect Chartercare "*on behalf of all Sellers* to be issued as partial consideration in respect of the sale by Sellers of the Purchased Assets." *Compl.* at ¶ 421. Thus, the Sellers (SJHSRI, RWH, CCCB, and related entities) never transferred the 15% interest that Plaintiffs are claiming was fraudulently transferred, that interest was *retained* by the Sellers. Moreover, the 2014 Asset Sale was ultimately approved by the RIAG and the RIDOH under the HCA after an expansive and public HCA administrative approval process.[33]

Plaintiffs have failed to plausibly allege, nor could they, that the Sellers transferred the assets without receiving a reasonably equivalent value in exchange for the transfer. Thus, Count VI should be dismissed.

F. Count V Alleging Fraudulent Transfer Under R.I. Gen. Laws § 6-16-4(A)(1) Should Be Dismissed.

Count V alleges a fraudulent transfer under section 6-16-4(A)(1), which concerns transfers made "with actual intent to hinder, delay, or defraud any creditor of the debtor." *See* R.I. Gen. Laws § 6-16-4(a)(1); *Re-Source, Inc. v. Carlin*, 2014 R.I. Super. LEXIS 141, at *16-17 (R.I. Super. Ct. Oct. 3, 2014); *see also Supreme Bakery, Inc. v. Bagley*, 742 A.2d 1202, 1204 (R.I. 2000) ("[A] transfer made by a debtor is fraudulent in respect to a creditor if the debtor made the transfer with an actual intent to hinder, delay, or defraud the creditor"). Subsection (b)

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[33] Under R.I. Gen. Laws § 23-17.14-7(c), the review criteria utilized by the RIAG for a hospital conversion involving a conversion of a non-profit hospital to a for-profit hospital includes: "[w]hether the proposed conversion contemplates the appropriate and reasonable fair market value." R.I. Gen. Laws § 23-17.14-7(c)(17).

of § 6-16-4 of the Act codifies eleven factors to assist in a court's determination of "actual intent," providing the following:

> (b) In determining actual intent under subsection (a)(1), consideration may be given, among other factors, to whether:
> (1) The transfer or obligation was to an insider;
> (2) The debtor retained possession or control of the property transferred after the transfer;
> (3) The transfer or obligation was disclosed or concealed;
> (4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
> (5) The transfer was of substantially all the debtor's assets;
> (6) The debtor absconded;
> (7) The debtor removed or concealed assets;
> (8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
> (9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
> (10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and
> (11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

R.I. Gen. Laws § 6-16-4(b).

Plaintiffs have failed to plausibly allege that the 2014 Asset Sale was entered into with actual intent to hinder, delay, or defraud any creditor of the debtor.

As to the first factor, the transfer of the assets was *not* to an insider, but rather to Prospect Chartercare, a company formed without any prior affiliation to SJHSRI, CCCB, or RWH. Most notably, as acknowledged in the Complaint, the 2014 Asset Sale required approval by the RIAG and the RIDOH under the HCA, and was ultimately approved after an expansive and public HCA administrative approval process. *Compl.* at ¶ 308.

As to the second factor, the debtor/seller (CCHP) did *not* retain possession or control of the property transferred after the transfer and in fact only retained a minority fifteen percent

interest in Prospect Chartercare. *Compl.* at ¶ 354. Accordingly, by the Complaint's own admission, CCHP did not retain possession or control of the property transferred.

Relative to the third and fourth factors, the 2014 Asset Sale was conducted in a fully transparent way, and was fully vetted and approved by the RIDOH and RIAG. Furthermore, there are no allegations in the Complaint that, prior to the transfer, the debtor/seller (CCHP) had been sued or threatened with suit.

The Complaint fails to allege facts sufficient to satisfy the fifth and sixths factors because, while the Complaint alleges that the transfer was of substantially all the debtor's assets, there is no plausible allegation that adequate consideration was not provided. *See* discussion *supra*. Moreover, the Seller represented that it had the wherewithal and intention to continue to fund the Plan. *See Compl.* at ¶¶ 333, 340. Further, the debtor did not abscond. The 2014 Asset Sale was fully disclosed and not concealed. The transaction was fully vetted and approved by the RIDOH and RIAG.

As to the seventh factor, CCHP did not remove or conceal assets. The Plaintiffs allege that CCCB obtained 15% ownership in Prospect Chartercare, totaling a fair market value of over $15 million, *and SJHSRI and RWH received none of that interest*. *Compl.* at ¶¶ 421-23. However, the terms of the transaction were fully disclosed to the RIAG and throughout the HCA administrative proceeding. As part of the 2014 Asset Sale, the Seller (debtor) retained 15% of the shares of Prospect Chartercare. Pursuant to the 2014 APA, the sellers designated CCHP (the "Seller Member") to be the holder of the 15% of the shares of Prospect Chartercare, LLC "*on behalf of all Sellers* to be issued as partial consideration in respect of the sale by Sellers of the Purchased Assets." *Compl.* at ¶ 421. Therefore, the fact that the Seller was to retain a 15% interest *on behalf of all the selling entities* was fully disclosed.

With regard to the eighth factor, the debtor received reasonably equivalent value for the assets transferred, and the Plaintiffs cannot plausibly allege otherwise. The transaction was fully vetted and approved by the RIDOH and RIAG, with one of the factors that was considered being whether the price represented fair market value. The only allegations that relate to the consideration for the 2014 Asset Sale do not state a plausible claim that the consideration received was inadequate.

While Plaintiffs have alleged sufficient facts to be entitled to an inference with respect to the ninth factor (insolvency), it is undisputed that the Plan received $14 million as a result of the 2014 Asset Sale. The 2014 Asset Sale was ultimately approved by the RIAG and the RIDOH under the HCA after an expansive and public HCA administrative approval process. It is also undisputed that the debtor/seller represented that it had the wherewithal and intention to continue to fund the Plan post-closing. *See Compl.* at ¶¶ 333, 340.

As to the tenth and eleventh factors, the transfer did not occur shortly before or shortly after a substantial debt was incurred; in fact, Plaintiffs allege the Plan was significantly underfunded for years prior to the 2014 Asset Sale. Furthermore, the debtor did not transfer the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Accordingly, based upon a weighing of the statutorily-enumerated factors, Plaintiffs have failed to plead sufficient facts that plausibly suggest that the arm's-length 2014 Asset Sale was effectuated "with actual intent to hinder, delay, or defraud any creditor of the debtor." *See* R.I. Gen. Laws § 6-16-4(a)(1). Furthermore, the Complaint fails to assert any plausible allegations that the consideration received by the debtor was not reasonably equivalent to the value of the asset transferred.

G. Count XII of the Complaint Should Be Dismissed as the Complaint Does Not Allege Plausible Facts That Prospect Medical Holdings or Prospect East Were Alter Ego Corporations of Any Other Defendant.

The Complaint alleges in the most bare terms that Prospect was an alter ego of SJHSRI, RWH, CCCB, CC Foundation, Prospect Chartercare, Prospect SJHSRI, and Prospect RWH due to a unity of interest and ownership among all such entities such that there is no separate personality of each. *See Compl*. at ¶¶ 493-94. However, Count XII should be dismissed because the Complaint fails to allege that Prospect exercised control over SJHSRI, RWH, CCCB, CC Foundation, Prospect Chartercare, Prospect SJHSRI, or Prospect RWH such that its corporate formality should be disregarded.

An alter ego claim is one method of piercing a corporate veil and imputing the liability of one entity onto another. However, "[w]hen it comes to piercing corporate veils, courts are loath to act like Vlad the Impaler. Indeed, the stakes are too high for courts regularly to disregard the separate legal status of corporations." *Doe v. Gelineau*, 732 A.2d 43, 44 (R.I. 1999). Therefore, courts should be disinclined "to perforate a corporation's legal shell merely to stick one or more of its constituent or affiliated entities with liability for the corporation's misdeeds." *Id.* Instead, "respect for the legitimacy of the corporate form and its protective shield of limited liability usually dissuades courts from using their remedial swords to run them through—at least without extreme provocation to do so." *Id.*

To pursue a claim for alter ego liability under Rhode Island law,

> there must be a concurrence of two circumstances: (1) there must be such a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, viz., the corporation is, in fact, the alter ego of one or a few individuals; and (2) the observance of the corporate form would sanction a fraud, promote injustice, or an inequitable result would follow.

Heflin v. Koszela, 774 A.2d 25, 30 (R.I. 2001) (quoting *Transamerica Cash Reserve, Inc. v. Dixie Power and Water, Inc.*, 789 P.2d 24, 26 (Utah 1990)).

As to the first prong, "[t]he alter ego approach is an attempt to puncture, rather than to swell, [a] defendant's corporate identity." *Oman Int'l Fin. Ltd. v. Hoiyong Gems Corp.*, 616 F. Supp. 351, 360 (D.R.I. 1985). As such, the mere existence of a parent/subsidiary relationship is insufficient for a finding of alter ego status. *See Doe*, 732 A.2d at 48. "When a parent-subsidiary relationship is involved, . . . in order to impose liability on a parent corporation for the torts of its subsidiary, 'it must be demonstrated that the parent dominated the finances, policies, and practices of the subsidiary.'" *Id.* (quoting *Miller v. Dixon Industries Corp.*, 513 A.2d 597, 604 (R.I. 1986)); *see also Mobil Oil Corp. v. Linear Films, Inc*., 718 F. Supp. 260, 266 (D. Del. 1989) ("An alter ego relationship might also lie where a corporate parent exercises complete domination and control over its subsidiary"); *Asea Brown Boveri, S.A. v. Alcoa Fujikura, Ltd.*, 2007 R.I. Super. LEXIS 59, *68-69 (R.I. Super. Ct. Apr. 11, 2007). Other factors include common stock ownership, "capitalization, dual office holding and directorships, financial support or dependence, a lack of substantial business contracts independent from the other corporation . . ." *Nat'l Hotel Assocs. v. O. Ahlborg & Sons, Inc.*, 827 A.2d 646, 652 (R.I. 2003); *see also Scully Signal Co. v. Joyal*, 881 F. Supp. 727, 736 (D.R.I. 1995) ("Factors include whether the parent corporation and its subsidiary were separately incorporated, had separate boards of directors, maintained separate financial records, and had separate facilities and operating personnel").

However, "the mere fact that a person holds an office in two corporations that may be dealing with each other and that have offices in the same building, without more, is not enough to make them identical in contemplation of law." *Doe*, 732 A.2d at 49 (quoting *Stratford Credit*

Corp. v. Berman, 54 A.2d 404, 407 (R.I. 1947)). Furthermore, common stock ownership between two companies is insufficient to establish alter ego status "'unless the totality of the circumstances surrounding their relationship indicates that one of the corporations 'is so organized and controlled, and its affairs are so conducted, as to make it merely an instrumentality, agency, conduit, or adjunct of [the other].'" *O. Ahlborg & Sons, Inc.*, 827 A.2d at 652 (quoting *Vucci v. Meyers Bros. Parking Sys., Inc*., 494 A.2d 530, 536 (R.I. 1985)).

The second prong of an alter ego analysis "is addressed to the conscience of the court, and the circumstances under which it will be met will vary with each case." *Heflin*, 774 A.2d at 30 (quoting *Transamerica Cash Reserve*, 789 P.2d at 26). However, to satisfy the second prong, "it must be shown that the corporation itself played a role in the inequitable conduct at issue." *Id.* In adopting an alter ego theory approach to veil piercing in *Heflin*, the Rhode Island Supreme Court relied upon the Utah Supreme Court's decision in *Transamerica Cash Reserve v. Dixie Power & Water*. In *Transamerica,* the Court held that the second prong of the alter ego analysis—that the observance of the corporate form would sanction a fraud, promote injustice, or an inequitable result would follow—"does not mean that a court has carte blanche to refuse to recognize the legal separation of shareholder and corporation." *Transamerica Cash Reserve*, 789 P.2d at 26. It further explained that

> The inequity contemplated by the second requirement of the alter ego test is not present just because the existence of the corporate form is inconvenient for a creditor seeking to pursue the shareholder's assets; it is not enough for the creditor to complain that it must proceed against the shareholder's assets, including the stock in the corporation, rather than simply levying on the corporation's assets.

Id. For instance, the Court held that where the corporation is a "stranger" to the underlying tort, the second prong of the alter ego theory is not satisfied. *Id.* at 26-27; *see also United Elec.,*

Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp., 960 F.2d 1080, 1093 (1st Cir. 1992) (requiring only that "the parent corporation . . . acted in a blameworthy manner" for a finding of fraud in alter ego analysis).

Here, Count Twelve of the Complaint should be dismissed because it fails to allege any unity of interest and ownership, and that the observance of separate corporate forms would result in fraud or injustice. First, as to the unity of ownership, the Complaint does not allege that Prospect or Prospect East exerted so much control over SJHSRI, Prospect Chartercare, Prospect SJHSRI, or Prospect RWH such that they controlled SJHSRI, Prospect Chartercare, Prospect SJHSRI, or Prospect RWH's finances, policies, and practices.

Specifically, as to SJHSRI, the Complaint fails to allege that SJHSRI is a subsidiary of Prospect or Prospect East; in fact, to the contrary, it alleges that SJHSRI's parent company is CCCB, which has no parent company and its only affiliation to Prospect East is that it is a member of Prospect Chartercare along with Prospect East. *See Compl*. at ¶¶ 12, 19. Further, the Complaint alleges that SJHSRI's business post-2014 Asset Sale consists of defending lawsuits and workers' compensation claims, collecting certain debts and receivables, paying or settling certain liabilities that were *excluded from the 2014 Asset Sale*, and administering the Plan. *See Compl*. at ¶ 16. There are no allegations in the Complaint that Prospect or Prospect East affected or controlled any such business of SJHSRI, or that Prospect and Prospect East had the same board of directors as SJHSRI, maintained the same financial records as SJHSRI, or that SJHSRI operates under the same identity as Prospect or Prospect East.

Further, as to Prospect Chartercare, Prospect SJHSRI, and Prospect RWH, which are subsidiaries of Prospect East, which is a subsidiary of Prospect, there are no allegations in the Complaint that such entities conflated their corporate structures. Rather, the Complaint outlines

the separate corporate structures of each, explaining that Prospect SJHSRI and Prospect RWH are separate entities, operating two separate hospitals (New Fatima and New RWH), both of which are wholly owned by Prospect Chartercare. *See Compl.* at ¶¶ 20-21. Prospect Chartercare is a limited liability company with two members: CCCB and Prospect East, which is a wholly owned subsidiary of Prospect. *Compl.* at ¶¶ 11-13. Other than outlining these corporate structures, the Complaint fails to (1) identify any corporate directors common to Prospect Chartercare, Prospect SJHSRI, Prospect RWH; (2) allege financial support of one by the other; (3) allege a failure to maintain separate financial records; or (4) allege a commonality of facilities and operating personnel. The only allegations as to the corporate statuses of Prospect, Prospect East, Prospect Chartercare, Prospect SJHSRI, Prospect RWH, and SJHSRI are the conclusory allegation that "[t]here is a unity of interest and ownership among" such defendants; however, such conclusory allegation cannot suffice or constitute a plausible allegation to survive motion to dismiss muster.

Second, the Complaint also fails to sufficiently allege that any fraud of injustice would result from a refusal to maintain corporate separateness; it merely makes the conclusory allegation that "[o]bservance of the corporate form would sanction a fraud, promote injustice, or result in inequity." *Compl.* at ¶¶ 494. While central to the Complaint are allegations that the Plan is underfunded, which will result in a reduction of benefits to the Plan participants, the fact that "the existence of the corporate form is inconvenient" for a creditor is insufficient as a matter of law to sustain a cause of action under the alter ego theory. *See Transamerica*, 789 P .2d at 26. Furthermore, the Complaint fails to allege any inequitable or wrongful conduct by the Prospect Entities that caused the underfunding of the Plan. Boiled down to its essence, the allegations in the Complaint are that Prospect and Prospect East purchased assets, expressly excluded liability

for the Plan from such purchase, and made such exclusion of the Plan's liability transparent and public while going through the approval process with the RIDOH and the RIAG. While the Complaint does make allegations that Prospect and Prospect East knew of the underfunding, and knew that the $14 million contribution to the Plan would not make the Plan fully funded, such knowledge does not allege any wrongdoing by Prospect or Prospect East, and thus fail to allege a necessary element of the alter ego doctrine. *See id*. For all intents and purposes, while Prospect and Prospect East, as alleged, may have known of the Plan's underfunded status, it was a "stranger" to the underlying wrong of SJHSRI not adequately funding the Plan. *See Compl.* at ¶¶ 26-27. This is certainly not the stuff of alter ego liability.

As the Complaint fails to allege any unity of ownership between Prospect, Prospect East, Prospect Chartercare, Prospect SJHSRI, and Prospect RWH, and because the Complaint does not adequately plead that fraud of injustice will result if each's corporate formality is not disregarded, Count XII should be dismissed.

H. Count XIII of the Complaint Should Be Dismissed Because the Complaint Fails To Allege Sufficient Plausible Facts That the Relationship Between Prospect Medical Holdings and the Other Defendants Constitutes a De Facto Merger.

Plaintiffs allege that Prospect Medical Holdings, Prospect Chartercare, Prospect SJHSRI, and Prospect RWH all assumed the liabilities and ordinary business of SJHSRI, RWH, and CCCB during the 2014 Asset Sale, and as a result of a continuity of management, personnel, physical location, assets, and general business operation, the 2014 Asset Sale constituted a de facto merger. *See Compl.* at ¶¶ 496-501. However, Count XII should be dismissed because the Complaint fails to allege sufficient plausible facts that the 2014 Asset Sale was a de facto merger.

Under Rhode Island law, as a general rule, a transferee corporation ordinarily will not be held liable for the debts of the transferor corporation merely because an asset transfer has occurred. *H.J. Baker & Bro. v. Orgonics, Inc.*, 554 A.2d 196, 205 (R.I. 1989). However, in *Douglas v. Bank of New England*, the Rhode Island Supreme Court recognized and adopted the "de facto merger" doctrine, under which "a successor corporation [may be] held liable for the debts of its predecessor in a nonmerger situation." 566 A.2d 939, 941 (R.I. 1989). Under the "de facto merger" theory, the Court must "consider the actual substance and effect of an agreement, and not merely the label placed upon it by the parties." *Blouin v. Surgical Sense, Inc.*, 2008 R.I. Super. LEXIS 63, at *17 (R.I. Super. Ct. May 12, 2008). Accordingly, "if the transfer of assets achieves virtually all the results of a merger, the equitable doctrine of 'de facto merger' will impute the transferor company's liabilities to the successor company." *Id.* at *18. While the Supreme Court has not expressly articulated any factors to be considered in evaluating a de facto merger claim, the Superior Court has adopted those factors outlined by courts in the First Circuit. *Id.* at *18. To sufficiently allege a claim of de facto merger, a plaintiff must allege the following:

1. that there was a continuation of the enterprise of the selling corporation vis a vis a continuation of management, personnel, physical location, assets, and general business operation;
2. that there is a continuity of shareholders resulting from the purchase of the assets with shares of stock, rather than cash;
3. that the selling corporation ceases operations, liquidates, or dissolves as soon as possible; and
4. that the purchasing corporation assumes the obligations of the selling corporation necessary for uninterrupted continuation of business.

Id. (quoting *Kleen Laundry and Dry Cleaning v. Total Waste Mgmt.*, 817 F. Supp. 225, 230-31 (D.N.H. 1993)); *see also Asea Brown Boveri, S.A.*, 2007 R.I. Super. LEXIS 59, at *53-58;

Richmond Ready-Mix ex rel. Accounts Receivable of Atl. Ready-Mix Concrete v. Atl. Concrete Forms, Inc., 2004 R.I. Super. LEXIS 82 (R.I. Super. Ct. April 21, 2004).

In considering the first factor, "courts pay particular attention to the continuation of management, officers, directors and shareholders." *Am. Paper Recycling Corp. v. IHC Corp.*, 707 F. Supp. 2d 114, 121 (D. Mass. 2010). For instance, a district court found that a transaction did not constitute a de facto merger because the purchasing company had none of the same officers or directors. *Id.* In contrast, the Massachusetts Supreme Judicial Court did find that a de factor merger occurred when the work force remained the same, the key manager remained in place, and all employees and personnel "maintain[ed] their same positions and responsibilities." *Cargill, Inc. v. Beaver Coal & Oil Co.*, 676 N.E.2d 815, 819 (Mass. 1997).

The First Circuit categorizes continuity of shareholders, as "one of the key requirements for a merger under traditional corporation law." *Dayton v. Peck, Stow and Wilcox Co.*, 739 F.2d 690, 693 (1st Cir. 1984); *see also Louisiana-Pac. Corp. v. Asarco, Inc.*, 909 F.2d 1260, 1264 (9th Cir. 1990) (continuity of shareholders is "accomplished by paying for the acquired corporation with shares of stock"); *Bud Antle, Inc. v. Eastern Foods, Inc.*, 758 F.2d 1451, 1458 (11th Cir. 1985) (for a de facto merger "at the very least there must be some sort of continuity of the stockholders' ownership interests"); *Kelly v. Kercher Mach. Works*, 910 F. Supp. 30, 35 (D.N.H. 1995) (no de facto merger where no sale of stock). Continuity of the shareholders occurs when "the purchaser corporation exchanges its own stock as consideration for the seller corporation's assets so that the shareholders of the seller corporation become a constituent part of the purchaser corporation." *Id.* However, a minor retention of stock will not suffice to satisfy the second element of a de facto merger. For instance, in *Devine & Devine Food Brokers, Inc. v. Wampler Foods, Inc.*, the First Circuit found that although the seller retained a ten percent

interest in the purchasing corporation, such retention did not evidence “a wholesale continuity of management or ownership.” 313 F.3d 616, 619 (1st Cir. 2002). Similarly, a district court found that the retention of 7,750 shares of preferred stock—constituting 3.2% of the overall company’s shares—is insufficient to satisfy the second element of a de facto merger analysis. *Am. Paper*, 707 F. Supp. 2d at 121.

Here, the Complaint fails to allege a de facto merger because it does not allege that the 2014 Asset Sale was for stock rather than cash, and because CCCB and SJHSRI did not cease operations, liquidate, or dissolve as soon as possible. First, consideration for the 2014 Asset Sale, as alleged in the Complaint, was generally (1) cash; and (2) CCCB obtaining a fifteen percent interest in Prospect Chartercare. However, CCCB’s acquisition of a minor portion of Prospect Chartercare (15%) is an insufficient “continuity of shareholders” for purposes of a de facto merger. *See Devine*, 313 F.3d at 619. Furthermore, the Complaint's allegations as to a de facto merger fail because CCCB, which the Complaint identifies as the “selling” entity, did not cease operations, liquidate, or dissolve; instead, it obtained a fifteen percent share of Prospect Chartercare. *See Compl.* at ¶¶ 419-423. Furthermore, to the extent that SJHSRI is considered the “selling” entity, it too did not cease operations, liquidate, or dissolve, and pursuant to the allegations of the Complaint, still conducts certain business, including administration of the Plan.

Accordingly, because CCCB’s interest in Prospect Chartercare is insufficient as a matter of law to constitute a continuity of a shareholder, and because CCCB and SJHSRI did not cease operations, liquidate, or dissolve, Count XIII should be dismissed.

I. Count XV of The Complaint Should Be Dismissed Because the Complaint Fails To Allege Sufficient Plausible Facts That the Prospect Entities Are Successors to SJHSRI, RWH, or CCCB.

Plaintiffs allege that the Prospect Entities are liable for the debts and obligations of SJHSRI, RWH, and CCCB because each received assets in connection with the 2014 Asset Sale for less than adequate consideration. *See* Compl. at ¶¶ 506-07. Further, Plaintiffs allege that SJHSRI, RWH, and CCCB had at least one common officer or director who was instrumental in the 2014 Asset Sale and the 2014 Asset Sale rendered SJHSRI, RWH, and CCCB incapable of paying their creditors. However, Count XV should be dismissed because Plaintiffs have failed to plausibly allege, nor could they, that any of the Prospect Entities paid inadequate consideration for the assets obtained in the 2014 Asset Sale.

The general rule is that "a company that purchases the assets of another is not liable for the debts of the transferor company." *H.J. Baker & Bro.*, 554 A.2d at 205 (citing *Cranston Dressed Meat Co. v. Packers Outlet Co.*, 190 A. 29, 31 (R.I. 1937)). In *H.J. Baker & Bro.*, the Rhode Island Supreme Court acknowledged a "mere continuation" exception to this general rule, finding that a successor company can be liable for the debts of the predecessor company if

> (1) there is a transfer of corporate assets; (2) there is less than adequate consideration; (3) the new company continues the business of the transferor; (4) both companies have at least one common officer or director who is instrumental in the transfer; and (5) the transfer renders the transferor incapable of paying its creditors because it is dissolved either in fact or by law.

Id. at 205 (citing *Jackson v. Diamond T. Trucking Co.*, 241 A.2d 471, 477 (N.J. Super. 1968)).

In considering the adequacy of consideration of a transaction, "a valuable consideration negotiated at arm's-length between two distinct corporate entities normally is presumed 'adequate,' particularly if the divesting corporation's creditors can continue to look to the divesting corporation and/or the sales proceeds for satisfaction of their claims." *Id.* at 270.

Here, Plaintiffs have failed to plausibly allege, nor could they, that the 2014 Asset Sale occurred for less than adequate consideration. As alleged on several occasions in the Complaint, the RIDOH and RIAG vetted and ultimately approved the 2014 Asset Sale pursuant to the provisions of the HCA.[34] *Compl.* at ¶ 308. The Complaint alleges that in consideration for the 2014 Asset Sale, CCCB would receive fifteen percent ownership in Prospect Chartercare, and the Prospect entities would pay $45 million in cash and commit $50 million to long term working capital for "physician network development and capital projects." *Compl.* at ¶¶ 147, 419-20, 422. Accordingly, the total financial commitment for the 2014 Asset Sale is approximately $95 million dollars, in addition to CCCB receiving a 15% ownership interest in Prospect Chartercare, which was anticipated to provide CCCB with about $800,000 per year. *Compl.* at ¶ 333. As such, the 2014 Asset Sale was supported by adequate consideration and Count XV should be dismissed.

J. Count XIV Alleging Joint Venture Should Be Dismissed as to the Prospect Entities.

In Count XIV, Plaintiffs allege that a joint venture existed between Defendants CCCB, Prospect East and Prospect and that each is liable to Plaintiffs. Ignoring the relevant law regarding the elements of a joint venture, discussed below, Plaintiffs state that "[i]nsofar as Prospect Chartercare was a joint venture, Prospect East, Prospect [], and CCCB share the liabilities of Prospect Chartercare, and have successor liability for the Plan, both under ERISA and if ERISA is not applicable, under state common law of successor liability and joint ventures." *Compl.* at ¶ 410. However, the Complaint does not contain the requisite facts to plausibly allege a joint venture.

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[34] As previously indicated, under R.I. Gen. Laws § 23-17.14-7(c), the review criteria utilized by the RIAG for a hospital conversion involving a conversion of a non-profit hospital to a for-profit hospital includes: "[w]hether the proposed conversion contemplates the appropriate and reasonable fair market value." R.I. Gen. Laws § 23-17.14-7(c).

The only facts in the Complaint supporting the joint venture claim is Plaintiffs' allegations that "[n]otwithstanding the formal documentation creating a limited liability company controlled primarily by Prospect East, the Prospect Entities have repeatedly referred to the relationship between CCCB and Prospect Medical Holdings and held themselves out as joint venturers, in statements to employees, to the public, to the regulatory agencies that approved the 2014 Asset Sale, and to the court that approved the 2015 *Cy Pres* Petition . . . ." *Compl.* at ¶ 409. However, this allegation, even if true, does not create a joint venture. Under Rhode Island law, "a joint venture is an association of two or more persons formed to carry out a single business enterprise for profit." *Fireman's Fund Ins. Co. v. E. W. Burman, Inc.,* 391 A.2d 99, 101 (R.I. 1978). "Generally, in order for a joint venture to exist, the parties must be bound by express or implied contract providing for: (1) a community of interests, and (2) joint or mutual control, that is, an equal right to direct and govern the undertaking." *McAleer v. Smith*, 860 F. Supp. 924, 943 (D.R.I. 1994). In addition, "the joint venture agreement must provide for a sharing of losses as well as profits." *Id.* To demonstrate the existence of a joint venture, a party must make the "essential" allegation that defendants had an agreement to share profits and losses. *Gray v. Derderian*, 400 F. Supp. 2d 415, 433 (D.R.I. 2005). Further, a key element in determining the existence of a "joint venture" is whether the alleged "joint venturers" each had control over instrumentalities of the purported joint venture. *See McAleer v. Smith*, 57 F.3d 109, 114-15 (1st Cir. 1995).

For instance, in *McAleer*, the plaintiffs alleged that a joint venture existed between a sailing association and the owners of a vessel, in order to impute liability for the operation of the vessel to the sailing association. *McAleer*, 860 F. Supp. at 943. In rejecting plaintiffs' joint venture claim, the Court held that even if the sailing association and the vessel owners "engaged

in coordinated promotional activities for their mutual advantage, the record contains no evidence of any agreement to share profits and losses . . . ." *Id.* In addition, the Court noted that there is no evidence that the sailing association had anything near an "*equal right to direct the operations* of [the vessel]." *Id.* (emphasis added).

Other courts agree that joint and equal control is essential to joint venture claims. For example, in *O'Sullivan v. Hemisphere Broad. Corp.*, a plaintiff sued a radio station for its alleged negligence in sponsoring an event at a bar, at which an event patron allegedly became drunk and injured the plaintiff while driving away from the event. 520 N.E.2d 1301, 1302-03 (Mass. 1988). Under its sponsorship agreement, the radio station donated air time to advertise the event and provided some of its on-air personalities to appear at the event. *See id*. at 1302. The plaintiff claimed that by sponsoring the event, the radio station became a joint venturer with the bar and therefore had a right and obligation to control the distribution of alcohol at the event. *See id*. The trial court granted summary judgment in favor of the radio station, and the Supreme Judicial Court of Massachusetts affirmed, holding that the radio station was neither "directly [nor] vicariously authorized to supervise the distribution of beer and hence . . . had [no] right to control its distribution." *Id*. at 1303; *see also Triplex Comms., Inc. v. Riley*, 900 S.W.2d 716, 718-19 (Tex. 1999); *Archer v. Outboard Marine Corp.*, 908 S.W.2d 701, 703-04 (Mo. Ct. App. 1995).

Here, the Complaint alleges only that certain of the Defendants made statements characterizing Prospect Chartercare as a joint venture. However, this allegation, even if true, does not create a joint venture. The Complaint does not contain any allegations regarding an actual agreement between Prospect Chartercare, Prospect East, Prospect, and CCCB that satisfies the requirements of a joint venture, particularly, an agreement to share profits and losses. Nor

does the Complaint allege that Prospect, Prospect East, and CCCB had "equal right to direct the operations" of the hospitals. On the contrary, Plaintiffs alleges the complete opposite in both respects.

Plaintiffs acknowledge that Prospect Chartercare:

> is a limited liability company organized and existing under the laws of the State of Rhode Island, with its principal office in Los Angeles, California. Directly, and through its 100% owned subsidiaries Prospect Chartercare SJHSRI, LLC and Prospect Chartercare RWMC, LLC, Prospect Chartercare owns and operates health care facilities in Rhode Island, including but not limited to two hospitals, Roger Williams Hospital and Our Lady of Fatima Hospital, . . . having acquired them in connection with [the 2014 Asset Sale]. Prospect Chartercare currently has two members.

Compl. at ¶ 11. Plaintiffs further allege that "[o]ne member of Prospect Chartercare, holding a 15% ownership interest, is [CCCB], an entity organized and existing under the laws of the State of Rhode Island as a non-profit corporation, with its principal office in Providence, Rhode Island . . ." *Compl.* at ¶ 12. "The other member of Prospect Chartercare, holding the remaining 85% ownership interest, is [Prospect East], a for-profit corporation organized and existing under the laws of the State of Delaware with a principal office and place of business in Los Angeles, California . . . ." *Compl.* at ¶ 13. There is no plausible allegation that the Prospect Entities and CCCB shared equally in profits and losses. Indeed, Plaintiffs allege that "CCCB has yet to receive any profit sharing whatsoever" and does not include any allegation of shared losses. *Compl.* at ¶ 334.

With respect to equal rights to direct Prospect Chartercare, Plaintiffs allege that "under the Amended & Restated Limited Liability Company Agreement of Prospect Chartercare []. . . deadlocks between CCCB-appointed directors and Prospect-appointed directors for some of the

most significant board-level decisions were to be resolved by allowing the decisions of Prospect-appointed board members to prevail." *Compl.* at ¶ 354.

Plaintiffs have failed to state a plausible claim that a joint venture exists between CCCB, Prospect East and Prospect. Count XIV should be dismissed.

K. Count XVI Alleging Civil Liability Under R.I. Gen. Laws § 9-1-2 for Violations of the Hospital Conversion Act Should Be Dismissed as to the Prospect Entities.

Plaintiffs allege that Defendants SJHSRI, RWH, CCCB, CC Foundation, Angell, Prospect Chartercare, Diocesan Defendants, Prospect East, Prospect, Prospect SJHSRI, and Prospect RWH knowingly violated or failed to comply with one or more provision of the HCA, R.I. Gen. Laws § § 23-17.14-1 *et seq.*, or willingly and knowingly gave false or incorrect information, and such conduct constituted a crime or offense under R.I. Gen. Laws § 9-1-2.

R.I. Gen. Laws § 9-1-2 provides that:

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

R.I. Gen. Laws § 9-1-2. In turn, R.I. Gen. Laws § 23-17.14-30 of the HCA provides that:

> if any person knowingly violates or fails to comply with any provision of this chapter or willingly or knowingly gives false or incorrect information… [t]he superior court may, after notice and opportunity for a prompt and fair hearing, may impose a fine of not more than one million dollars ($1,000,000) or impose a prison term of not more than five (5) years.

R.I. Gen. Laws § 23-17.14-30. The purpose of R.I. Gen. Laws § 9-1-2 is to provide "crime victims with recourse to make a financial recovery from crime perpetrators." *Gray*, 400 F. Supp.

2d at 429. In order to bring a claim under § 9-1-2, a plaintiff must plausibly allege that he or she suffered an injury by reason of the commission of a crime or offense. *Id.* To the extent that the underlying crime or offense is fraud, Plaintiffs' fraud claims must meet the heightened pleading requirements of Fed. R. Civ. P. 9(b), which "applies to state law fraud claims asserted in federal court." *Cardinale*, 567 F.3d at 13. These claims must "specify the who, what, where, and when of the allegedly false or fraudulent representation." *Alternative Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 29 (1st Cir. 2004). Fed. R. Civ. P. 9(b) also requires "identifying the basis for inferring scienter," which refers to the culpable mental state of knowingly or intentionally committing fraud. *Cardinale*, 567 F.3d at 13.

There are many allegations that purport to show that Defendants SJHSRI, RWH, and CCCB made misrepresentations and omissions to state regulators. *Compl*. at ¶¶ 308-59. However, the facts purporting to allege that the Prospect Entities knowingly violated or failed to comply with one or more of the provisions of the HCA, or willingly or knowingly gave false or incorrect information are limited to two (2) allegations previously addressed *supra*. *See supra*, § II (B)(vii). The first involved a letter purportedly signed by counsel for SJHSRI, RWH, and the Prospect Entities to the RIDOH on March 7, 2014. *See Compl*. at ¶¶ 325-25. The second involved a response to an inquiry from the RIAG regarding "the governance structure of the new hospital after conversion." *Compl.* at ¶ 357. As set forth in detail *supra*, Plaintiffs have failed to state any plausible claims that any of the Prospect Entities made any fraudulent misrepresentations to state regulators. *See supra*, § II(B)(vii). For the same reasons articulated above, Plaintiffs have failed to state a plausible claim that the Prospect Entities willingly or knowingly gave false or incorrect information to state regulators in connection with the HCA application.

Moreover, Plaintiffs have failed to plausibly allege, because they cannot, that they suffered any damages that were caused by any alleged false information provided to state regulators. R.I. Gen. Laws § 9-1-2 provides that "whenever any person shall suffer any injury to his or her person . . . *by reason of* the commission of any crime or offense, he or she may recover his or her damages for such injury in a civil action against the offender…" R.I. Gen. Laws § 9-1-2 (emphasis added); *see also Kelly v. Marcantonio*, 187 F.3d 192, 203 n.8 (1st Cir. 1999) ("The plain language of the statute thus requires a causal connection between the alleged crime and the claimed injury.") Plaintiffs cannot establish a causal connection between the alleged false statements to state regulators and the underfunding of the Plan for the simple reason that, as Plaintiffs allege, the underfunding had been going on for years prior to the proposed hospital conversion. The actions they allege violate the HCA occurred *after* their alleged injury. Furthermore, to the extent that Plaintiffs are basing their claim under § 9-1-2 on an alleged cover-up, that claim likewise fails. The First Circuit has stated, "to the extent plaintiff-appellants are asserting a claim under § 9-1-2 for an alleged cover-up, their claim also fails because of the lack of any nexus between the alleged cover-up and the injuries (and damages) that they claim. *Kelly*, 187 F.3d at 202 n.8. Thus, Plaintiffs' purported injuries were not proximately caused by any statements made to state regulators in connection with the HCA. Accordingly, Plaintiff claims of civil liability pursuant to R.I. Gen. Laws § 9-1-2 against the Prospect Entities fails and should be dismissed.

L. Count XXI Seeking Declaratory Judgment Should Be Dismissed as to the Prospect Entities.

"The purpose of declaratory judgment actions is to render disputes concerning the legal rights and duties of parties justiciable without proof of a wrong committed by one party against another, and thus facilitate the termination of controversies." *Millett v. Hoisting Engineers'*

Licensing Div. of Dep't of Labor, 377 A.2d 229, 233 (R.I. 1977) (emphasis added); *see also* R.I. Gen. Laws § 9-30-12 ("This chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations . . .The remedy provided by this chapter shall be cumulative and shall not exclude or prevent the exercise of any other right, remedy, or process heretofore allowed by law or by previous enactment of the legislature").

In *Ponte v. Davis*, 2016 R.I. Super. LEXIS 46, at *8 (Super. Ct. Apr. 15, 2016), the Rhode Island Superior Court dismissed a Declaratory Judgment claim that was "simply a recitation of the other causes of action asserted by the Plaintiffs." *Id.* Likewise here, Plaintiffs' Declaratory Judgment claim does not ask the court for a determination of the legal rights or status of the parties, but rather determine Defendants' liability for the underlying state law claims in Counts V-XX. As outlined *supra*, Counts V-XX should be dismissed as to the Prospect Entities; therefore so too should Count XI.

Moreover, counts within a complaint may be dismissed if they are legally and factually "indistinguishable from [a] previously pled claim" and therefore "unnecessarily duplicative" of other causes of action asserted therein. *Rapoza*, 816 F. Supp. 2d at 140. As the Declaratory Judgment claim simply seeks a determination of liability on Counts V-XX, it is indistinguishable from those claims and should be dismissed.

Even if the Court declines to dismiss the Declaratory Judgment claim based on the above, "a necessary predicate to a court's exercise of its jurisdiction under the Uniform Declaratory Judgments Act is an actual justiciable controversy." *Meyer v. City of Newpor*t, 844 A.2d 148, 151 (R.I. 2004). "Without making this initial determination, the court does not have jurisdiction to entertain the claim." *N & M Props., LLC v. Town of W. Warwick*, 964 A.2d 1141, 1144-45

(R.I. 2009) (citations omitted). "For a claim to be justiciable, two elemental components must be present: (1) a plaintiff with the requisite standing and (2) some legal hypothesis which will entitle the plaintiff to real and articulable relief." *Id*. at 1145. "In determining whether a party has standing, a court begins with the pivotal question of whether the party alleges that the challenged action has caused him or her injury in fact." *Narragansett Indian Tribe v. State*, 81 A.3d 1106, 1110 (R.I. 2014) (citing *Blackstone Valley Chamber of Commerce v. Pub. Utils. Comm'n*, 452 A.2d 931, 932-33 (R.I. 1982)). The standing inquiry is satisfied when a plaintiff has suffered "some injury in fact, economic or otherwise." *N & M Props., LLC*, 964 A.2d at 1144-45. Injury in fact has been defined as "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Id*. "As a general rule, a claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *State v. Gaylor*, 971 A.2d 611, 614-15 (R.I. 2009) (quoting *Thomas v. Union Carbide Agricultural Prod. Co.*, 473 U.S. 568, 580-81 (1985)). Thus, to meet this prong, the Complaint must allege an injury that is concrete and particularized, actual or imminent, but not conjectural, hypothetical, or resting upon future events. *See Gaylor*, 971 A.2d at 614-15; *N & M Props.*, 964 A.2d at 1145.

Similar to the ERISA claims discussed above, Plaintiffs claims under Counts V-XX are not ripe and will not be ripe until, at a minimum: (1) the Receiver fully explores and decides whether the alleged defects with the Plan are retroactively correctable under 29 U.S.C. § 1002(33)(D); and (2) if the Receiver determines the Plan is not correctable, then the PBGC should be joined to assert its statutory rights to likely initiate termination proceedings and pay

statutorily protected benefits. 29 U.S.C. § 1322(a). Therefore, because there is no justiciable controversy, the Count XXI should be dismissed.

CONCLUSION

Based upon the foregoing, Prospect, Prospect East, Prospect Chartercare, Prospect SJHSRI, and Prospect RWH request that this Honorable Court grant their Motions to Dismiss pursuant to Rule 12(b)(1) for lack of standing, Rule 12(b)(6) for failure to state a claim upon which relief can be granted, and Rule 12(b)(7) for failure to join the PBGC as a party, or in the alternative for an order requiring that PBGC be joined pursuant to Rule 19(a)(1) and (2).

Dated: September 17, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of September 2018, that I have caused the within *Memorandum in Support of Motion to Dismiss* 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.