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

THE PROSPECT DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO THE PROSPECT DEFENDANTS' MOTION TO DISMISS (ECF NOs. 99, 100)

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INTRODUCTION

As this Court is aware and as the Plaintiffs'[1] Amended Complaint makes obvious, Plaintiffs' goal is to collect enough money to be able to fully fund the St. Joseph Health Services of Rhode Island Retirement Plan ("Plan") (or more) and pay all the related legal bills and expenses. If that indeed is the goal, it is a tall—and frankly, unsustainable—order at least as to the ERISA claims that Plaintiffs assert against the Prospect Defendants[2] for three interrelated reasons.

First, Plaintiffs brought this lawsuit under ERISA (which is the sole reason this Court has jurisdiction over this case), alleging that, since 2009, the Plan has failed to qualify as a "church plan" exempt from ERISA due to governance defects.[3] That fundamentally alters the form and scope of the relief Plaintiffs can seek and obtain, and dictates who can—and cannot—be pursued for various types of plan-based or equitable relief. The Prospect Defendants are *not* in that group.

Second, at least as to the two ERISA-based claims that Plaintiffs assert against the Prospect Defendants (Counts I and III), the participants in the Plan have Constitutional standing problems: they cannot establish that they have incurred a demonstrable injury-in-fact due to the protections each can expect to receive under the single employer plan termination insurance program maintained by the Pension Benefit Guaranty Corporation ("PBGC"), coupled with the fact that

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[1] Plaintiffs include Stephen Del Sesto, as Receiver and Administrator of the Plan ("Receiver"), Gail J. Major, Nancy Zompa, Ralph Bryden, Dorothy Willner, Caroll Short, Donna Boutelle, and Eugenia Levesque (collectively, "Plaintiffs").

[2] The Prospect Defendants include Prospect Medical Holdings, Inc.; Prospect East Holdings, Inc.; Prospect Chartercare, LLC; Prospect Chartercare SJHSRI, LLC; and Prospect Chartercare RWMC, LLC.

[3] The Prospect Defendants agree with the Plaintiffs in that sense: because Del Sesto is not a church and not under church control, the Prospect Defendants agree that, at least since Del Sesto took control of the Plan in 2017, the Plan has not qualified (and has not been able to qualify) as a church plan exempt from ERISA.

ERISA's accrued benefit provisions make it unlawful for the Plan's administrator to reduce their benefits at any point prior to plan termination.

Third, ERISA's carefully-crafted remedies sharply limit the relief that can be obtained from non-fiduciaries and confine it to "appropriate equitable relief" under ERISA § 502(a)(3). Plaintiffs may not use ERISA's remedial scheme on complete strangers to the Plan such as the Prospect Defendants—at least not for purposes of procuring a monetary award from them. Monetary relief simply is not among the limited forms of equitable relief that can be imposed on a non-fiduciary that is not a party-in-interest and cannot be shown to have received money from the Plan or to be holding money traceable to the Plan. This is true even if aiding or abetting a fiduciary breach could be found to have occurred.

As for the array of state law claims Plaintiffs assert, those claims in all instances are preempted and superseded by ERISA's federal preemption provision. *See* ERISA § 514(a). ERISA's preemptive provision applies with full force to all ERISA-based disputes involving pension plans.[4]

Accordingly, even if their standing issues are surmounted, Plaintiffs' claims against the Prospect Defendants should all be dismissed, either on the grounds that Plaintiffs lack the standing required bring them, or that they fail to state a plausible claim for which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

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[4] With an employee pension benefit plan not funded with insurance contracts or policies, ERISA's "savings clause" (ERISA § 514(b)(2)) does not temper federal preemption and allows various state insurance, banking, and securities laws to be "saved."

ARGUMENT

I. ERISA APPLIES TO THE CLAIMS IN THE AMENDED COMPLAINT AND THE COURT SHOULD MAKE THAT DETERMINATION NOW.

As the Prospect Defendants noted in their sur-reply filed with this Court last month, when responding to the Receiver's recent attempts to settle key claims with key defendants (ECF No. 101), ERISA is not an *a la carte* statute. If a benefit plan is subject to ERISA, then ERISA controls the claims that a plan-covered participant, beneficiary, or plan fiduciary can assert. This is because ERISA claims are "necessarily federal in character by virtue of the clearly manifested intent of Congress." *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 67 (1987). ERISA is not optionally available—either it applies, in which case it applies across the board, or it does not. Here, it is plain as day that ERISA applies to the Plan. Plaintiffs alleged it in their Complaint (ECF No. 1), realleged it in their Amended Complaint (ECF No. 60), and depend on that allegation to gain access to this Court. Why all this backpedaling from the Plaintiffs?

Plaintiffs insist that they are the masters of their complaint, and that they are entitled to plead both federal claims (under ERISA) and state claims (under Rhode Island law) in the alternative. *See* ECF No. 100 at 158-161. While that may be true as a pleading device, when the Court finally decides whether a federal law with preemptive effect applies, Plaintiffs' pleading in the alternative must end. ERISA is one of those types of laws. Plaintiffs' apparent reliance on the well-pleaded complaint rule, and a couple of isolated district court cases where the federal court's jurisdiction rested on *more* than just ERISA-related federal questions, is misplaced. Here, the Court should decide whether ERISA applies—it plainly does—and then one whole side (i.e., the state law claims) of this decision tree can be lopped off and the case can proceed accordingly.

A. The Artful Pleading Doctrine Is a Corollary to the Well-Pleaded Complaint Rule.

In general, a plaintiff is considered the master of his complaint. *See ConnectU, LLC v. Zuckerberg*, 522 F.3d 82, 93 (1st Cir. 2008) ("the plaintiff is both the author and the master of its complaint"). But when Congress has chosen to occupy the field, which it did in enacting ERISA, a plaintiff's mastery must yield to congressional dictate. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981). That makes ERISA—and ERISA preemption of related state law claims—unavoidable. *Metro. Life*, 481 U.S. at 65-67. As the Supreme Court explained more broadly in *Rivet v. Regions Bank*:

> We have long held that "[t]he presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." A defense is not part of a plaintiff's properly pleaded statement of his or her claim. Thus, "a case may not be removed to federal court on the basis of a federal defense, . . . even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case."
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> Allied as an "independent corollary" to the well-pleaded complaint rule is the further principle that "a plaintiff may not defeat removal by omitting to plead necessary federal questions." If a court concludes that a plaintiff has "artfully pleaded" claims in this fashion, it may uphold removal even though no federal question appears on the face of the plaintiff's complaint. The artful pleading doctrine allows removal where federal law completely preempts a plaintiff's state-law claim. *Although federal preemption is ordinarily a defense, "[o]nce an area of state law has been completely preempted, any claim purportedly based on that pre-empted state-law claim is considered, from its inception, a federal claim, and therefore arises under federal law."*

522 U.S. 470, 475 (1998) (emphasis added) (internal citations omitted); *see also Ben. Nat'l Bank v. Anderson*, 539 U.S. 1, 6 (2003) (identifying the National Bank Act as another example of

congressional occupation and reaffirming the artful pleading corollary as explained in *Metropolitan Life*).

The First Circuit not surprisingly embraces this rule, and recently explained it in *Lopez-Munoz v. Triple-S Salud, Inc.*:

> The "arising under" analysis is informed by the well-pleaded complaint rule, which "requires the federal question to be stated on the face of the plaintiff's well-pleaded complaint." As a general matter, this rule envisions "that the plaintiff is master of his complaint and that a case cannot be removed if the complaint's allegations are premised only on local law." These principles normally govern when the defendant asserts that the plaintiff's local-law claims are preempted by federal law.
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> But the general rule that gives birth to these principles, like virtually every general rule, admits of exceptions. One such exception is embodied in the artful pleading doctrine, which is designed to prevent a plaintiff from unfairly placing a thumb on the jurisdictional scales. To this end, the artful pleading doctrine allows a federal court to peer beneath the local-law veneer of a plaintiff's complaint in order to glean the true nature of the claims presented. *When such a glimpse reveals that a federal statute entirely displaces the local-law causes of action pleaded in the complaint, a hidden core of federal law sufficient to support federal jurisdiction emerges. In such a case, the plaintiff's claims are deemed "federal claims in state law clothing and, to defeat artful pleading, the district court can simply 'recharacterize' them to reveal their true basis.*"

754 F.3d 1, 5 (1st Cir. 2014) (emphasis added) (internal citations omitted).

Here, Plaintiffs voluntarily walked through the federal courthouse doors, pleading ERISA claims in order to secure federal question jurisdiction. By so doing, Plaintiffs abandoned any right they otherwise might have to invoke the well-pleaded complaint/masters of their complaint rule. As for Plaintiffs' explanation—that they merely are trying to be well-pleaded—it simply does not hold up.

After all, Plaintiffs already have a pending state court action (currently stayed) where they are bringing these same state law claims. *See Stephen Del Sesto, as Receiver and Administrator of the St. Joseph Health Service of Rhode Island Retirement Plan, et al. v. Prospect Chartercare, LLC, et al.* (PC-2018-4386). Plaintiffs also have had the opportunity, which they already have taken, to clean up their complaint, after having gotten a glimpse of the Prospect Defendants' position regarding their claims, and they nonetheless persist in trying to have it both ways. This is more than effective Rule 8 pleading: this is gamesmanship bordering on abuse of process. In arguing that this Court should not decide this question now, Plaintiffs effectively ask this Court to render advisory rulings—either on a variety of ERISA questions that will have no legal effect if ERISA is held not to apply to the Plan, or on a variety of state law questions that will have no legal effect if ERISA is held to apply to the Plan.

B. Plaintiffs' Alternative Pleading Authorities Miss the Mark or Are Wholly Irrelevant.

What, then, to make of the authorities that Plaintiffs cite in their Omnibus Opposition to support their contention that federal and state claims can be pled in the alternative, such as *Coleman v. Std. Life Ins. Co.,* 288 F. Supp. 2d 1116 (E.D. Cal. 2003) and *Siegel v. Lincoln Fin. Grp.*, 2015 U.S. Dist. LEXIS 35694, *2 (D.N.J. Mar. 23, 2015)? It is this: where a plaintiff has asserted multiple bases for a federal court's jurisdiction, such as both federal question jurisdiction and diversity jurisdiction, a few federal courts have permitted the plaintiff to plead federal and state claims in the alternative, because whichever claims survive then move forward in the federal court proceeding.

In *Siegel* the district court says so explicitly, by pointing out that the lawsuit was predicated both under ERISA's federal question jurisdiction *and* diversity. *Siegel*, 2015 U.S. Dist. LEXIS 35694, at *2-3. In *Coleman*, the opinion is less explicit, but it makes clear that independent

grounds for federal court jurisdiction existed. *Coleman*, 288 F. Supp. 2d at 1119 ("There is a great temptation to grant defendant's motion and get on with the case"). Here, if the Plan were found not to be an ERISA-regulated plan, there would be no "get[ting] on with the case," *id.*, because, with no diversity jurisdiction available, this Court would not have jurisdiction over the surviving claims. While Fed. R. Civ. P. 8(e) permits a plaintiff to be the master of his complaint and plead in the alternative, it is far from clear that the rules of pleading can be used to subvert the fundamental principal that federal courts are courts of limited jurisdiction. Plaintiffs cannot be permitted to, for example, engage in discovery without even knowing whether their activities are—at the end of the day—a nullity because the court overseeing the litigation lacks jurisdiction.

II. IN APPLYING ERISA, PLAINTIFFS' CLAIMS FAIL.

A. Because the Plan Is Subject to ERISA, the Amended Complaint Should Be Dismissed Because the Plan's Participants Lack Standing For Several of Their Claims.

Plaintiffs devote a significant number of pages to defending and justifying their right to bring suit under ERISA, primarily by arguing that they have demonstrable injuries-in-fact. *See* ECF No. 100 at 79-87. At virtually the same time, Plaintiffs go to great lengths to cast doubt on the role of the PBGC. *Id.* at 87-118.

This issue was addressed in the Prospect Defendants' sur-reply on the CCCB settlement briefing; accordingly, it is addressed only briefly here.[5] The Prospect Defendants agree that Article III standing requires showing the presence of a demonstrable injury-in-fact, a "traceable" (i.e., causal) connection between that injury and a particular defendant's conduct, and the ability of the court to provide relief to redress that injury. *See Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296 (2017); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). However, it is quite clear

[5] Such argument is incorporated herein by reference.

that standing is a claims-specific and a defendant-specific inquiry, and that is where Plaintiffs fail to reach the bar.

As the Supreme Court made clear in *Davis v. FEC*, a "'plaintiff must demonstrate standing for each claim he seeks to press' and 'for each form of relief that is sought.'" 554 U.S. 724, 734 (2008) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)). As such, Plaintiffs' standing claim sweeps far too broadly, and attempts to cover standing deficiencies that at least some of the Plaintiffs have, regarding several of the claims being asserted against several of the defendants, including the Prospect Defendants.

Plaintiffs' standing claims are based entirely (so far as discernable) on Count II of their Amended Complaint (the ERISA § 502(a)(2) breach-of-fiduciary duty claim they brought against SJHSRI and which is before the Court for settlement approval). That makes things messy when it comes to testing the rest of Plaintiffs' claims for Constitutional standing, especially in light of *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248 (2008) and *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 139-141 (1985).

LaRue and *Russell* hold that when determining whether a defined benefit plan-covered participant has a demonstrable injury-in-fact for Article III standing purposes, a court must take into account the presence of the PBGC's "backstop" benefit guarantee and, implicitly, the fact that, under ERISA, it is unlawful to reduce or cut back a single employer plan participant's accrued benefit so long as the plan remains in effect. ERISA § 204(g), *codified at* 29 U.S.C. § 1054(g); *see also Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004). Indeed, the only Plan participants in a position to suffer an actual injury-in-fact are those whose Plan benefit is greater than the guaranteed benefit the PBGC would provide.

Accordingly, "appropriate equitable relief"—catchall, "make whole" relief—is only available under ERISA § 502(a)(3) for those that really do have a demonstrable injury in fact, and such an injury can only be shown after statutory rights, and statutory relief, are exhausted. Even then, such relief cannot be obtained from the Prospect Defendants because they are strangers to the Plan, and never transacted with the Plan.

B. Plaintiffs' Attempt to Hold the Prospect Defendants Liable for the Plan Fiduciaries' Failure to Fully Fund the Plan Seeks Relief From Strangers–Relief That Is Neither "Appropriate" Nor "Equitable," and Thus Ultimately Not Viable Under ERISA § 502(a)(3) as Against the Prospect Defendants.

Plaintiffs chastise the Prospect Defendants for advancing "technical legal arguments" in support of their Motion to Dismiss. *See* ECF No. 100 at 146. However, if an ERISA plan's actuarial firm cannot be pursued under ERISA § 502(a)(3) for allegedly aiding and abetting a fiduciary breach because the firm is a non-fiduciary service provider, despite having provided information critically important to the plan's financial well-being, as the Supreme Court held in *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993) and the First Circuit subsequently held in *Reich v. Rowe*, 20 F.3d 25 (1st Cir. 1994) (there, as to ERISA § 502(a)(5), the parallel provision the U.S. Department of Labor uses), then what chance do Plaintiffs' § 502(a)(3) claims have against complete strangers to the Plan, like the Prospect Defendants?[6] None whatsoever, particularly after the Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) and then in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (both, handed down after *Mertens*, and after the First Circuit decided *Reich*) raised the pleading bar from merely possible to *plausible*.

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[6] There can be no dispute, and obviously Plaintiffs do not dispute, that the Prospect Defendants are complete strangers to the Plan. None of them are among its fiduciaries. None of them are parties-in-interest to the Plan. And perhaps most important, none of the Prospect Defendants have ever transacted business with the Plan, or ever received any assets—directly or indirectly—from the Plan.

In an attempt to salvage their "aiding and abetting" claims against the Prospect Defendants, Plaintiffs first offer a one-dimensional, distorted reading of *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238 (2000). Plaintiffs go so far as to suggest that, in *Harris Trust*, the Supreme Court intended to open the floodgates and permit ERISA claimants to sue virtually anyone in the "universe." Were that true, the *Harris Trust* Court would have overruled *Mertens*, because the actuarial firm in *Mertens* certainly would have been part of that "universe of . . . defendants" were there absolutely no limits. But the Supreme Court did not overrule *Mertens*. That is telling.

Plaintiffs then attempt to breathe life into their distorted reading of *Harris Trust* by pairing it with the Supreme Court's holding in *Cigna Corp. v. Amara*, 563 U.S. 421, 439-45 (2011), where the Court recognized that a traditional form of equitable relief known as a surcharge, which can take the form of a monetary award, could qualify as "appropriate equitable relief" under ERISA §502(a)(3) in very limited circumstances. Plaintiffs neglect to mention (or even acknowledge), however, that in *Amara*, the Supreme Court made crystal clear that *only a breaching trustee can be subjected to a surcharge*. None of the Prospect Defendants are breaching trustees of the Plan.

a. *Harris Trust: Following the Money.*

To undercut the Prospect Defendants' argument that they cannot be pursued for "appropriate equitable relief" because they are strangers to the Plan, Plaintiffs offer up a one-dimensional reading of *Harris Trust*'s carefully-considered analysis of ERISA § 502(a)(3). *See* ECF No. 100 at 146. That reading distorts both the holding in *Harris Trust* and the explanation the majority in *Harris Trust* provided.

The Supreme Court in *Harris Trust* made plain that § 502(a)(3) has two essential components, and the second component acts as a check on the first. The Supreme Court's opinion

describes the linkage between the two components, not once but *twice*; first, in an important parenthetical that Plaintiffs try to wish away:

> [Section 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." *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 1]."

Harris Tr., 530 U.S. 238 at 246 (emphasis added). The opinion later explains this important linkage, and how the "appropriate equitable relief" caveat acts as a brake (the Court calls it a "limit") on the "universe of possible defendants" and why those having "no connection" to the act (in our case, CCCB and SJHSRI's decision to not fund the Plan, particularly in the years following the 2014 Sale) are not part of that "universe":

> Notwithstanding the text of § 502(a)(3) (as informed by § 502(l)), Salomon protests that it would contravene common sense for Congress to have imposed civil liability on a party, such as a nonfiduciary 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 1. Salomon 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.
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> 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," plainly countenances the sort of relief sought by petitioners against Salomon 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 Tr., 530 U.S. at 249-250 (emphasis added).

Harris Trust makes abundantly plain that there really is *not* a "universe" of possible defendants because only those parties from whom "appropriate equitable relief" can be obtained can properly be defendants. The Prospect Defendants are not within that grouping. Who are among the "possible defendants"? Potentially, non-fiduciary third parties capable of being stopped by an injunction to prevent further ERISA-related violations. Also (as was the case in *Harris Trust*), non-fiduciary third parties that sell a plan overpriced property or charge the plan excessive fees and are paid plan assets that they can be required to return. While *Harris Trust* provides aggrieved plaintiffs with the right to pursue recovery of misspent or transferred plan assets, it plainly does not provide the Plaintiffs here with a license to use ERISA § 502(a)(3) to chase strangers—strangers that did not transact with the Plan and never received any assets from the Plan.

That also explains why the Supreme Court in *Harris Trust* did not overturn *Mertens*. Hewitt Associates (now, AON Hewitt) was the plan actuary for the Kaiser Steel Retirement Plan, and worked for (and was paid by) Kaiser, the plan's sponsor. *Mertens*, 508 U.S. at 249. Its short-sighted actuarial assumptions arguably contributed to that plan's downfall. But there was no "plan" money for a court to pursue under ERISA § 502(a)(3) under the guise of appropriate equitable relief. That also is why the First Circuit has had no occasion to revisit *Reich v. Rowe*. *Harris Trust*'s expansion of the "universe" left those non-fiduciary third parties alone. And that

is why this Court should reject Plaintiffs' misreading and misapplication of *Harris Trust* as an invitation to err.

b. *Amara's Surcharge Can Only Be Imposed on Trustees.*

The other Supreme Court decision Plaintiffs subject to a tortured, self-serving reading is *Amara*. Apparently recognizing that *Harris Trust* really does require them to identify some viable form of equitable relief that the Court could order against the Prospect Defendants—one that could involve a monetary award—Plaintiffs seize on *Amara*, because one of the three forms of equitable relief the Supreme Court recognized there was an equitable surcharge (the other two were estoppel and plan reformation). In their haste, though, Plaintiffs overlook a critically important aspect of the Court's opinion: *an equitable surcharge can only be imposed upon a breaching trustee*. An examination of the Supreme Court's opinion in *Amara* makes that abundantly clear:

> *The case before us concerns a suit by a beneficiary against a plan fiduciary (whom ERISA typically treats as a trustee) about the terms of a plan (which ERISA typically treats as a trust).* It is the kind of lawsuit that, before the merger of law and equity, respondents could have brought only in a court of equity, not a court of law.
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> With the exception of the relief now provided by §502(a)(1)(B), the remedies available to those courts of equity were traditionally considered equitable remedies.
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> The District Court's affirmative and negative injunctions obviously fall within this category. And other relief ordered by the District Court resembles forms of traditional equitable relief. That is because equity chancellors developed a host of other "distinctively equitable" remedies—remedies that were "fitted to the nature of the primary right" they were intended to protect. Indeed, a maxim of equity states that "[e]quity suffers not a right to be without a remedy." And the relief entered here, insofar as it does not consist of injunctive relief, closely resembles three other traditional equitable remedies.
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> [Discussions of the first two remedies, plan reformation and estoppel, omitted]

> Third, the District Court injunctions require the plan administrator to pay to already retired beneficiaries money owed them under the plan as reformed. But the fact that this relief takes the form of a money payment does not remove it from the category of traditionally equitable relief. Equity courts possessed the power to provide relief in the form of monetary "compensation" for a loss resulting from a trustee's breach of duty, or to prevent the trustee's unjust enrichment. Indeed, prior to the merger of law and equity this kind of monetary remedy against a trustee, sometimes called a "surcharge," was "exclusively equitable."
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> The surcharge remedy extended to a breach of trust committed by a fiduciary encompassing any violation of a duty imposed upon that fiduciary. *Thus, insofar as an award of make-whole relief is concerned, the fact that the defendant in this case, unlike the defendant in Mertens, is analogous to a trustee makes a critical difference*. In sum, contrary to the District Court's fears, the types of remedies the court entered here fall within the scope of the term "appropriate equitable relief" in §502(a)(3).

Amara, 563 U.S. at 441-43 (emphasis added) (internal citations omitted). In so doing, the Supreme Court in *Amara* squared its decision with *Mertens* by pointing out that the defendant in *Mertens* was a non-fiduciary service provider (such as the Angell Group). If Plaintiffs' claimed surcharge could not be imposed upon the Angell Group, it certainly cannot be imposed upon strangers like the Prospect Defendants.

c. *Plaintiffs Seek Monetary Relief, Pure and Simple, and Their Attempts to Dress It up as "Equitable Relief" Are Unpersuasive.*

Try as they might to re-cast their lawsuit, Plaintiffs' ultimate claim for relief—to hold the Prospect Defendants liable for millions of their own dollars (and to obtain an order forcing the Prospect Defendants to pour those dollars into the Plan)—is one for monetary relief. There is no way to pass that objective off as a claim for equitable relief, much less "appropriate" equitable relief.

The Supreme Court has had several occasions since *Mertens* to visit and revisit the question as to what constitutes "appropriate equitable relief," and whether there are equitable remedies

capable of being turned into cash, but none is more on point than *Great W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002). In *Knudson*, the Supreme Court—*after Mertens*, and *after Harris Trust*—sharply distinguished between *legal restitution* and *equitable restitution*. *Knudson*, 534 U.S. at 213-14. It did so by pointing out that, with *legal* restitution (which the Court in *Knudson* makes clear is *not* available under §502(a)(3)), the plaintiff simply seeks to hold the defendant personally liable for money while, with *equitable* restitution (which *is* available under §502(a)(3)), the plaintiff seeks to force the defendant to disgorge money shown to have been taken from the plaintiff (or here, from the plan):

> [P]etitioners argue that their suit is authorized by § 502(a)(3)(B) because they seek restitution, which they characterize as a form of equitable relief. *However, not all relief falling under the rubric of restitution is available in equity*. In the days of the divided bench, restitution was available in certain cases at law, and in certain others in equity. Thus, "restitution is a legal remedy when ordered in a case at law and an equitable remedy . . . when ordered in an equity case," and whether it is legal or equitable depends on "the basis for [the plaintiff's] claim" and the nature of the underlying remedies sought.
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> *In cases in which the plaintiff "could not assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him," the plaintiff had a right to restitution at law through an action derived from the common law writ of assumpsit.* In such cases, the plaintiff's claim was considered legal because he sought "to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money." *Such claims were viewed essentially as actions at law for breach of contract (whether the contract was actual or implied).*

Knudson, 534 U.S. at 213-14 (emphasis added) (internal citations omitted).

Here, Plaintiffs want the Prospect Defendants' money—money the Plan never had. That makes Plaintiffs' claim one for legal relief. That simply will not wash under *Mertens*, *Harris*

Trust, or *Knudson*. And because none of the Prospect Defendants are or were Plan trustees or fiduciaries, it also will not wash under *Amara*.

d. *Plaintiffs' Authorities Reconcile with Harris Trust and Amara.*

Besides the fact that Plaintiffs, in their Omnibus Opposition, cannot point to any cases in the First Circuit that support their tortured readings of *Harris Trust* and *Amara*, the non-Supreme Court authorities that Plaintiffs cite and discuss in their Omnibus Opposition do not support their expansive and unsupportable reading of *Harris Trust* and *Amara*.

For example, to support of their "universe of potential defendants" argument, Plaintiffs cite *Cyr v. Reliance Std. Life Ins. Co*., 642 F.3d 1202 (9th Cir. 2011); *Solis v. Couturier*, 2009 U.S. Dist. LEXIS 51888 (E.D. Cal. Jun. 17, 2009); *Chesemore v. Alliance Holdings, Inc*., 770 F. Supp. 2d 950 (W.D. Wis. 2011); and *Daniels v. Bursey*, 313 F. Supp. 2d 790 (N.D. Ill. 2004). *See* ECF No. 100 at 147-148. But those are all follow-the-money/disgorgement cases, where the defendants received plan assets either in the form of allegedly excessive premiums the plan paid (*Cyr*), excessive fees and compensation the plan allegedly was charged (*Couturier*), allegedly overpriced stock the plan bought (*Chesemore*), or fees and premiums the plan paid (*Daniel*). Plaintiffs' other cited cases have substantially the same fact patterns.

Recovering misspent plan assets, which is comparable to what the Supreme Court approved in *Harris Trust* (there, recovering assets paid a party-in-interest for bad investments), is night-and-day different from pursuing *new money* from third parties on behalf of a plan. That is what Plaintiffs seek here, from the Prospect Defendants, and as the Supreme Court in *Knudson* points out, that constitutes legal relief, not equitable relief.

Plaintiffs' attempt to build upon *Amara* would take this Court down that same path: to extend Amara beyond its terms and scope and into unsanctioned territory. *See* ECF No. 100 at

152-155 (citing *Chesemore* and *Kenseth v. Dean Health Plan, Inc.*, 722 F.3d 869 (7th Cir. 2013)). But those cases simply reinforce *Amara*'s central teaching regarding the use of equitable surcharge: a surcharge can only be used on a trustee, or a plan fiduciary occupying the role of a trustee. The Seventh Circuit's opinion in *Kenseth* makes this abundantly clear:

> The identity of the defendant as a fiduciary, the breach of a fiduciary duty, and the nature of the harm are important in characterizing the relief. *Gearlds v. Entergy Servs., Inc.*, 709 F.3d 448, 450 (5th Cir. 2013) ("The Supreme Court recently stated an expansion of the kind of relief available under § 503(a)(3) when the plaintiff is suing a plan fiduciary and the relief sought makes the plaintiff whole for losses caused by the defendant's breach of fiduciary duty."). *See also McCravy v. Metropolitan Life Ins. Co.*, 690 F.3d 176, 181 (4th Cir. 2012) (under *Cigna*, "remedies traditionally available in courts of equity, expressly including estoppel and surcharge, are indeed available to plaintiffs suing fiduciaries under Section 1132(a)(3)").

Kenseth, 722 F.3d at 880.

Thus, the cases that Plaintiffs cite to support their attempt to have this Court impose an equitable surcharge on non-fiduciaries like the Prospect Defendants provide no support for the unprecedented (and unsanctioned) relief they seek from the Prospect Defendants in Counts I and III of their Amended Complaint. Accordingly, Plaintiffs' two § 502(a)(3)–based claims against the Prospect Defendants should be dismissed.

III. PLAINTIFFS' STATE LAW CLAIMS FAIL.

A. Plaintiffs' State Law Claims Fail Because They Are Preempted by ERISA.

As more fully set forth in the Prospect Defendants' Motion to Dismiss, virtually all of Plaintiffs' state law claims are preempted by ERISA to the extent they "relate to" or "refer to" an ERISA-regulated plan. As to the Prospect Defendants, Plaintiffs specifically contend that their claims for fraudulent transfer are not preempted by ERISA. However, ERISA preempts the

fraudulent transfer claims and the substantial majority of other state law claims being asserted against one or more of the Prospect Defendants.

Plaintiffs bring their fraudulent transfer claim on behalf of the Plan, as its principal named fiduciary (the Administrator) and as its participants, to recover monies for the benefit of the Plan and predicating their claim on "Defendants' violations of ERISA and/or obligations imposed by state law." *Amend. Compl.* at ¶ 478. ERISA § 502(a) clearly provides a basis for claims of this type, as a long line of Supreme Court cases confirms. *See U.S. Airways, Inc. v. McCutchen*, 133 U.S. 88, 100-01 (2013); *Sereboff v. Mid Atl. Med. Servs.*, 547 U.S. 356, 362-63 (2006); *Knudson*, 534 U.S. at 204 (all involving fiduciary-led claims brought under ERISA § 502(a)(3), for appropriate equitable relief).

That brings Plaintiffs' claim reasonably within *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004). *Davila* holds that if ERISA's remedial scheme provides a particular plaintiff with a remedy, ERISA preempts any and all related state law-based claims. As the majority in *Davila* explained:

> Congress enacted ERISA to "protect . . . the interests of participants in employee benefit plans and their beneficiaries" by setting out substantive regulatory requirements for employee benefit plans and to "provid[e] for appropriate remedies, sanctions, and ready access to the Federal courts." The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans. To this end, ERISA includes expansive pre-emption provisions, *see* ERISA § 514, 29 U.S.C. § 1144 which are intended to ensure that employee benefit plan regulation would be "exclusively a federal concern."
>
> ERISA's "comprehensive legislative scheme" includes "an integrated system of procedures for enforcement." This integrated enforcement mechanism, ERISA §502(a), 29 U.S.C. § 1132(a), is a distinctive feature of ERISA, and essential to accomplish Congress' purpose of creating a comprehensive statute for the regulation of employee benefit plans . . . .
>
> Therefore, any 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.

Davila, 542 U.S. at 208-09 (citations omitted).

The mere fact that Plaintiffs' fraudulent transfer claim provides for a different potential recovery does not alter the result. As the majority in *Davila* went on to explain:

> *Nor would it be consistent with our precedent to conclude that only strictly duplicative state causes of action are pre-empted*. Frequently, in order to receive exemplary damages on a state claim, a plaintiff must prove facts beyond the bare minimum necessary to establish entitlement to an award. In order to recover for mental anguish, for instance, the plaintiffs in *Ingersoll-Rand* and *Metropolitan Life* would presumably have had to prove the existence of mental anguish; there is no such element in an ordinary suit brought under ERISA §502(a)(1)(B). This did not save these state causes of action from pre-emption. *Congress' intent to make the ERISA civil enforcement mechanism exclusive would be undermined if state causes of action that supplement the ERISA §502(a) remedies were permitted, even if the elements of the state cause of action did not precisely duplicate the elements of an ERISA claim.*

Id. at 216 (emphasis added) (internal citations omitted), *accord Gallagher v. Cigna Healthcare of Me., Inc*., 538 F. Supp. 2d 286 (D. Me. 2008). Indeed, in regards to the claims being asserted against the Prospect Defendants, at least Counts VI, VII, XI, XII, XIII, XV, XVIII, XXI and XXII satisfy this test, where the claim depends on the existence of the Plan or on an activity that is a "central matter of plan administration." *Gobeille v. Liberty Mut. Life Ins. Co*., 136 S. Ct. 936, 943 (2016).

Since Plaintiffs' fraudulent transfer claims are brought to benefit the Plan, to create a pool of additional funds capable of being contributed to the Plan to fully fund it, Counts V and VI could be framed as a claim for appropriate equitable relief under ERISA § 502(a)(3). Under *Davila*, that is enough for preemption to apply. The same holds for any and every other count that involves alleged reporting or disclosure violations (including, e.g., misrepresentations, false statements,

false filings, etc.), alleged breaches of fiduciary duty, or any similar alleged conduct—which may well apply to all of the Plaintiffs' remaining counts against the Prospect Defendants.

B. Even If Plaintiffs' State Law Claims Are Not Preempted, They Nonetheless Fail and Should Be Dismissed.

a. *Plaintiffs' Claim for Actual Fraudulent Transfer (Count V) Should Be Dismissed for Failure to State a Claim Upon Which Relief Can Be Granted.*

In response to the Prospect Defendants' argument that Plaintiffs did not adequately allege their fraudulent transfer claim, Plaintiffs counter that they have sufficiently alleged a claim for fraudulent transfer as (1) such claim may be alleged generally through circumstantial evidence, *see* ECF No. 99-1 at 34-38; and (2) most—if not all—of the indicia of fraud identified in § 6-16-4(b) are alleged, *see id.* at 38-44.

i. General Allegations and Circumstantial Evidence.

Plaintiffs submit that their allegations are sufficient because (1) the fraudulent intent of the Prospect Entities can be pled generally; and (2) the Amended Complaint contains circumstantial evidence of the Prospect Defendants' intent to defraud Plaintiffs. *See id.* at 34 ("intent can be proven by circumstantial evidence"). In support of such contention, Plaintiffs aver that their allegations are sufficient because "enough" of the indicia or "badges" of fraud as outlined in *Max Sugarman Funeral Home, Inc. v. A.D.B. Inv'rs*, 926 F.2d 1248 (1st Cir. 1991) are alleged or circumstantially apparent at the time of the 2014 Sale. As Plaintiffs note, *Sugerman* provides certain "indicia or badges of fraud" as being "common circumstantial indicia" of fraudulent intent "*at the time of the transfer*." *Id.* at 1254 (emphasis added). Such indicia include (1) actual or threatened litigation against the debtor; (2) a purported transfer of all or substantially all of the debtor's property; (3) insolvency or other unmanageable indebtedness on the part of the debtor;

(4) a special relationship between the debtor and the transferee; and (5) retention by the debtor of the property involved in the putative transfer. *Id.*

Here, at the time of the 2014 Sale, the Amended Complaint—explicitly and implicitly—makes the following allegations: that SJHSRI was concerned about potential liability for the Plan, *see Amend. Compl.* at ¶¶ 364-66 (SJHSRI discussing possible class action litigation regarding the Plan); that the 2014 Sale included SJHSRI selling all of its assets, except liability for the Plan, to Prospect Chartercare in exchange for $45 million in cash ($14 million of which would be contributed to the Plan) and CCCB obtaining a fifteen percent interest in Prospect Chartercare, *see id.* at ¶¶ 145-47, 436; and that the RIDOH and RIAG reviewed and approved the 2014 Sale, *see id.* at ¶ 319. Moreover, as set forth the APA—a public document—and Plaintiffs' allegations, it is undisputed that the Prospect Defendants were *not* assuming liability for the Plan, which was *expressly* excluded from the purchased assets. *See id.* at ¶¶ 125, 128. Absent conclusory allegations to the contrary, such facts—boiled to their essence—do not demonstrate, even in their most generous interpretation, that the Prospect Defendants were parties to a fraudulent transfer.

To the extent that the Prospect Defendants attempted to avoid actual or threatened litigation (which the Amended Complaint does not allege; only alleging that SJHSRI was concerned with a class action), such concern would be consistent with the fact that the Plan was—from the first day of negotiation of the sale of the Hospitals[7]—expressly excluded from the 2014 Sale. Even assuming the Plaintiffs' allegations as true, nothing is unlawful about attempting to avoid litigation

[7] As early as the first Letter of Intent, the Prospect Defendants excluded the Plan from any purchased assets. *See id.* at ¶ 437 ("As Exhibit A to the March 18, 2013 Letter of Intent, CCHP and Prospect Medical Holdings attached a 'CharterCARE Health Partners Balance Sheet' dated '1/31/13' which stated that 'Pension Liability' in the amount of '89,536,553' dollars was 'Retained by CharterCARE'"). For the Prospect Defendants, the decision was both easy and inevitable: the Plan was (or was consistently represented to be) a non-electing church plan incapable of being assumed by a secular organization, such as any of the Prospect Defendants.

relative to a third-party-owned asset for which the Prospect Defendants had and have no liability or duty. In the end, Plaintiffs' theory is that the Prospect Defendants are liable because they made a good business deal. That's not a fraudulent conveyance.

As to the third factor—insolvency or other unmanageable indebtedness on part of the debtor—Plaintiffs' allegations are insufficient to plausibly indicate indicia of a fraudulent transfer. Plaintiffs' allegations are that that SJHSRI *would* have sufficient assets to make contributions to the Plan by way of payments from CCCB from its interest in Prospect Chartercare, or by way of income from trusts. *See id.* at ¶ 350 (SJHSRI's anticipated future $600,000 recommended contributions to the Plan "would be paid out of SJHSRI's expected $800,000 annual income from outside trusts, and profit sharing paid to CCCB in connection with its 15% share in Prospect Chartercare"). Therefore, *at the time of the transfer*, there are no allegations (except conclusory ones) that the representation that SJHSRI would have assets to pay money into the plan was incorrect.[8]

The fourth and fifth factors are also insufficiently alleged because of the separate corporate formalities and identities of Prospect Chartercare (as the transferee) and SJHSRI (as the debtor). As to the relationship between the debtor and the transferee, the Amended Complaint alleges that Prospect Chartercare and SJHSRI are separate entities. *See id.* at ¶¶ 11, 12. As a result, the Amended Complaint's allegations are that the debtor, SJHSRI, and the "transferee" of the 2014 Sale, Prospect Chartercare, are not in a special relationship. In an attempt to evade this

[8] Plaintiffs argue that such statement was incorrect, because *after the fact*, SJHSRI did not in fact make its contributions. However, the operative inquiry is whether there were sufficient assets *at the time of the transfer*. Such allegation evidences that there was, and there is no allegation that *at the time of the transfer*, SJHSRI did not have the purported income or assets. As discussed herein, a reasonable inference from the Amended Complaint is that SJHSRI would be able to make such contributions to the Plan post-2014 Sale because it was reducing its debt and would receive $800,000 per year.

requirement, Plaintiffs claim that CCCB's special relationship with SJHSRI is imputed to Prospect Chartercare. *See* ECF No. 99-1 at 38 ("[t]hat is certainly present here, since SJHSRI's controlling member was a 15% owner of the transferee after the 2014 [] Sale").

However, the fact that CCCB was the managing member of SJHSRI does not change the distinct, legal existence of Prospect Chartercare and SJHSRI. *Doe v. Gelineau*, 732 A.2d 43, 44 (R.I. 1999) ("[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 . . . . 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"). Plaintiffs assert that such "special relationship" is evidenced by a "closer financial relationship" between the *debtor* and the *transferee*, *see* ECF No. 99-1 at 38; however, Plaintiffs make no allegation of a "financial" connection between Prospect Chartercare and SJHSRI. They do not allege that finances were commingled, that Prospect Chartercare funded SJHSRI, or that SJHSRI was indebted to Prospect Chartercare. As such, there was no "financial" special relationship between the transferee, Prospect Chartercare, and the debtor, SJHSRI.

Furthermore, Plaintiffs fail to make any allegation that the debtor, SJHSRI, retained property involved in the putative transfer. The Amended Complaint explicitly alleged that SJHSRI transferred away all of its operating assets, and there is no allegation that SJHSRI retained property in the putative transfer. *See id.* at ¶¶ 111 ("[a]t least since the 2014 [] Sale, which included the transfer of all of SJHSRI's operating assets . . ."), 135, 142, 148, 154. In fact, the Plaintiffs allege the opposite: that CCCB, a separate entity from SJHSRI, obtained an interest in Prospect Chartercare. *See id.* at ¶ 441 ("[t]he consideration that Prospect East provided at the closing . . .

included 15% of the shares of Prospect Chartercare"). Because of CCCB and SJHSRI's separate corporate formalities, the "debtor" did not retain any property involved in the transfer.

Notably, in addressing the relationship between CCCB and SJHSRI, Plaintiffs plead inconsistent facts, or ask the Court to make inconsistent inferences. On one hand, Plaintiffs argue that CCCB and SJHSRI are separate and distinct enough that payment to CCCB of the proceeds of the 2014 Sale should have been paid to SJHSRI and constitutes an unlawful transaction, but on the other, Plaintiffs argue that CCCB and SJHSRI are sufficiently related such that CCCB's obtaining of a fifteen percent interest in Prospect Chartercare is the same as SJHSRI obtaining that interest.[9] Such inconsistency cannot serve as the factual basis for Plaintiffs' claims. *Compare* ECF No. 99-1 at 37 ("[t]he Complaint alleges (and it is undisputed) that the 2014 [] Sale included all of SJHSRI's operating assets") *with* ECF No. 99-1 at 38 ("SJHSRI[10] would receive a 15% interest in the company that would own the assets that SJHSRI transferred in connection with the 2014 [] Sale").

To find that the Plaintiffs have sufficiently alleged a cause of action for fraudulent transfer, the Court would need to make the following inferences in favor of the Plaintiffs: that the Prospect Defendants, despite openly, publicly, and repeatedly indicating that they were not assuming liability for the Plan, somehow conspired with other defendants to limit its liability for the Plan (for which it had none) by transferring the 2014 Sale proceeds to CCCB instead of SJHSRI. Further, the Court would need to infer that the terms of the 2014 Sale—that SJHSRI would sell all

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[9] Similarly, Plaintiffs contend on one hand that SJHSRI transferred all of its assets, *see Amend. Compl.* at ¶ 439 ("SJHSRI and RWH, not CCCB, owned the real estate and all of the assets used in operating Old Fatima Hospital and Old Roger Williams Hospital"), but on the other, argue that, through CCCB, SJHSRI retained assets in the 2014 Sale.

[10] By the allegations in the Amended Complaint and the terms of the APA, CCCB, and not SJHSRI, was to receive the fifteen percent interest in Prospect Chartercare. Once again, Plaintiffs attempt to blur the lines between two separate entities.

its assets, except the Plan and its liabilities, to the Prospect Defendants and $45 million would be paid to CCCB ($14 million of which would go to the Plan)—were somehow fraudulently kept secret, despite them being openly discussed through filings and hearing with the RIDOH and RIAG. These arguments are too tenuous to sustain Plaintiffs' cause of action.

ii. <u>Indicia of fraudulent intent.</u>

Plaintiffs contend that they have sufficiently alleged a cause of action for actual fraudulent transfer because they have pled the enumerated factors in § 6-16-4(b). The Prospect Defendants address each factor in their Motion to Dismiss. However, central to Plaintiffs' argument is that CCCB's interest in Prospect Chartercare constitutes shared possession and control over the assets of the 2014 Sale, making the 2014 Sale an asset sale to an "insider" and thus constituting fraud. However, according to the Amended Complaint, it would appear that the 15% interest that CCCB received in Prospect Chartercare was not fraudulent inasmuch as it was not to hold assets to the 2014 Sale, but rather was to collect dividends from Prospect Chartercare's operation of the Hospital (or to exercise a put option as outlined in an LLC Agreement), and pay those funds to SJHSRI to pay into the Plan. A reasonable reading of the Amended Complaint and the structure of the 2014 Sale was that CCCB's obtaining an interest in Prospect Chartercare was not to defraud the Plan, but rather to benefit the Plan in that such interest was a means for CCCB and SJHSRI to fund the Plan.

b. *Plaintiffs' Claims for Constructive Fraudulent Transfer Under R.I. Gen. Laws §§ 6-16-4(a)(2)(i), and 6-16-5(a) (Count VI) Should Be Dismissed.*

Plaintiffs attempt to evade dismissal of Count VI by arguing that the consideration for the 2014 Sale was inadequate and was improperly received by CCCB, not SJHSRI. *See* ECF No. 99-1 at 50 ("In fact Plaintiffs expressly alleged that the 2014 [] Sale involved a 'transfer of assets for less than adequate consideration"); 51 ("[t]he fraudulent transfer statute looks at whether the

debtor received reasonably equivalent value, not whether the other party *gave* reasonably equivalent value"). However, by the Plaintiffs' own allegations, the consideration for the 2014 Sale was adequate because it totaled approximately $110 million in value for financially failing hospitals, *see infra* n.11. Further, the operative inquiry is whether the Prospect Defendants *provided* adequate consideration because they were buyers in good faith. *See Hayes v. Palm Seedlings Partners-A (In re Agric. Research & Tech. Grp., Inc.)*, 916 F.2d 528, 535-36 (9th Cir. 1990).

i. Adequate Consideration.

In an attempt to rebut the Prospect Defendants' argument that the Amended Complaint does not allege sufficient facts to support claims under §§ 6-16-4(a)(2)(i) or 6-16-5(a), Plaintiffs aver that the proceeds of the 2014 Sale ($45 million in cash and fifteen percent interest that CCCB received in Prospect Chartercare)[11] did not constitute reasonably equivalent value for the assets that SJHSRI sold. *See* ECF No. 99-1 at 49-50. In support, Plaintiffs point to the conclusory allegation that the 2014 Sale involved a "transfer of assets for less than adequate consideration," and "the Prospect Defendants did not provide adequate consideration in the 2014 [] Sale." *See id.* at 50. They allege that the LHP Hospital Group, Inc.'s ("LHP") offer to purchase the Hospitals

[11] Notably, the Amended Complaint's own allegations are that the fifteen percent interest in Prospect Chartercare had a value of "at least" $15,919,000 at the time of the 2014 Sale. *See Amend. Compl.* at ¶ 445. Accordingly, in addition to the $45 million in cash, the Prospect Defendants paid almost $61 million, in addition to committing another $50 million in capital improvement and network expansion. As such, the Prospect Defendants provided approximately $110 million in consideration for the 2014 Sale. Treating CCCB's interest as a "proceed" is consistent with Plaintiffs' allegations that it was improperly diverted and SJHSRI and RWH are entitled to a portion of CCCB's interest in Prospect Chartercare. *See* ECF No. 99-1 at 42 (SJHSRI "received inadequate consideration because the consideration should have included at least some portion of the 15% interest in Prospect Chartercare that was re-directed to CCCB"); 42 at n.48 (" . . . some portion of the 15% interest also should have gone to RWH which also sold its operating assets in the 2014 [] Sale").

was $60 million more in up-front cash (although there are no allegations that LHP would offer a membership interest to CCCB).[12]

Here, conclusory allegations aside, the only remaining allegation to support Plaintiffs' fraudulent transfer claims is that LHP made a larger up-front monetary offer. However, that allegation is belied by Plaintiffs' own allegations that the Hospitals sought a purchaser that would allow the Hospitals to retain as much local control as possible. *See Amend. Compl.* at ¶ 117 ("From the outset of their deciding to seek outside capital, the board of trustees and executive management of SJHSRI, CCCB, and RWH placed a great deal of importance on retaining as much 'local control' of the hospitals as possible and keeping existing management in place"). The alleged facts relative to LHP, even if true, cannot sustain a cause of action simply because a higher offer may have been on the table. This is especially true in the purview of the sale of healthcare institutions in which a sale to the "highest and best" bidder may not be in the best interests of the Hospitals. *See In re United Healthcare Sys*., 1997 U.S. Dist. LEXIS 5090, *17 (D.N.J. Mar. 26, 1997) (in considering sale of hospital, a court cannot apply the mechanical "highest and best" offer approach, and instead "must not only weigh the financial aspects of the transaction but also look to the countervailing consideration of a public health emergency"). As such, in light of the fact that CCCB was provided approximately $110 million in value according to the Amended Complaint (which included paying off debt of SJHSRI and RWH, *see id.* at ¶ 124), Plaintiffs have failed to allege a cause of action for fraudulent transfer.

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[12] Although the allegation is that LHP would offer $60 million more in up-front cash, there is no allegation that such offer was *better* than the offer by Prospect in which CCCB would obtain a 15% interest in Prospect Chartercare and have the potential to receive dividends that it could pay to the Plan.

ii. Receipt of Consideration.

Although it is undisputed that the Prospect Defendants paid adequate consideration for the 2014 Sale, Plaintiffs content that, for purposes of the RIUFTA, there is a distinction between Prospect Defendants *paying* consideration and SJHSRI *receiving* consideration. *See* ECF No. 99-1 at 51. Plaintiffs cite several Bankruptcy Court decisions for the proposition that when consideration is paid to a parent corporation rather than a "debtor," the benefit to the debtor is presumed to be nominal. *See id.* at 52. However, even if bankruptcy precedent is applicable, it provides an exception to this rule for bona fide purchasers that take assets from the debtor in "good faith." *See* Bankruptcy Code 548(c); *Gill v. Maddalena (In re Maddalena)*, 176 B.R. 551, 555 (Bankr. C.D. Cal. 1995). For instance, the Ninth Circuit has interpreted "good faith" under the Uniform Fraudulent Transfer Act to be present when a transferee, in considering the circumstances, was not alerted to the fraudulent purpose of the transfer, or after diligent inquiry, would not discover such fraudulent purpose. *Hayes*, 916 F.2d at 535-36. Under such analysis, even "far from praiseworthy" and "generalized bad conduct does not negate good faith for fraudulent transfer purposes." *Field v. Parker (In re Mortg. Store)*, 2013 Bankr. LEXIS 4356, *13 (Bankr. D. Haw. Oct. 17, 2013).

Here, Plaintiffs' claims under the RIUFTA must fail because the Prospect Defendants were bona fide purchasers in the 2014 Sale. There are no plausible or nonconclusory allegations that at the time of the 2014 Sale the Prospect Defendants knew—or should have known—that the 2014 Sale was being consummated for the purposes of defrauding the Plan participants. The allegations are that the Prospect Defendants made an offer to purchase the assets of SJHSRI and RWH, except the liability for the Plan, for, among other things, a cash payment of $45 million. While the Amended Complaint may allege that *SJHSRI* knew that the Plan was underfunded and discussed

the possibility of litigation relating to the Plan, there are no allegations that *at the time of the 2014 Sale*, the *Prospect Defendants* knew that SJHSRI was only selling its assets to defraud Plan participants. Most notably, because the Prospect Defendants had no liability for the Plan under the APA, they would have no interest in attempting to defraud claims of Plan participants against SJHSRI or the Plan. While SJHSRI may have had knowledge and an intent to defraud claims regarding its liabilities, the Amended Complaint lacks any allegations that the Prospect Defendants had such knowledge, or had any interest in limiting claims against SJHSRI's liabilities. To the extent that Plaintiffs' argue that the Prospect Defendants participated in general bad conduct by virtue of any purported knowledge they may have had at the time of the 2014 Sale, such allegation is insufficient for purposes of the RIUFTA. *Field*, 2013 Bankr. LEXIS 4356, *13.

Furthermore, it is undisputed that SJHSRI and RWH *did* receive some form of consideration as $31 million of the proceeds of the 2014 Sale were utilized to pay off SJHSRI and RWH's bond indebtedness. *See Amend. Compl.* at ¶ 124. As such, because the Prospect Defendants gave value in the 2014 Sale in good faith, Plaintiffs have failed to adequately allege their claims for fraudulent transfer.

c. *Plaintiffs' Claim for Fraudulent Misrepresentations and Omissions (Count VII) Should Be Dismissed.*

The Amended Complaint alleges (although insufficiency) that the Prospect Defendants engaged in two types of misrepresentations and/or omissions: (1) misrepresentations and omissions made to Plan participants, *see* ECF No. 99-1 at 53-72; and (2) misrepresentations and omissions made to state regulators, *see id.* at 73-81. In both instances, however, as asserted in the Motion to Dismiss, those allegations are insufficient because (1) they are not pled with sufficient particularity; (2) they are legally deficient; and (3) do not adequately differentiate among the Defendants.

Of further note, is that Plaintiffs, in defending their fraudulent misrepresentations and omissions claims, ask the Court to engage in an unreasonable review of the alleged facts and to completely disregard any "explanations" offered by the Prospect Entities. As the Court is aware, the applicable standard of review requires the Court to accept all *plausible* allegations in the Plaintiffs' complaint as true, and give the Plaintiff the benefit of any *reasonable* inferences garnered therefrom. Despite such mandate, Plaintiffs appear to take the position that "explanations" offered by the Prospect Entities are "impermissible" at this stage in the litigation. *See* ECF No. 99-1 at 55 ("[t]he Prospect Entities' tactic of offering explanations or alternative inferences is impermissible in support of a motion to dismiss, in which the Plaintiffs' allegations are accepted as true, and all reasonable inferences are drawn in favor of the Plaintiffs").

However, in holding the Prospect Defendants to such standard, the Plaintiffs seem to forget it applies to them as well. On several occasions, the Plaintiffs' claim that implausible allegations and unreasonable inference support their claims. For instance, Plaintiffs ask the Court to take as true the allegation that the Plaintiffs were not aware of the underfunded status of the Plan. Given the public and transparent manner in which the 2014 Sale was conducted, such allegation is simply neither plausible nor reasonably inferred. In addition to the other reasons cited herein, this is perhaps most evident in the fact that in the Receiver's most recent report and recommendation to the Superior Court, the Receiver indicated that

> [a]ccording to documents reviewed by the Receiver, excluding the United Nurses and Allied Professionals Local 5110 ("UNAP") members hired before October 1, 2008, *the Plan was closed to all employees on or about October 1, 2007. Thereafter, benefits accruals were frozen for non-union employees on September 30, 2009 for Federation of Nurses and Health Professionals and other UNAP union employees on September 30, 2011 and for UNAP employees on June 19, 2014.*

See Receiver's Eighth Interim Report and Seventh Interim Request for Approval of Fees, Costs and Expenses at 2, n.1. The Amended Complaint is rife with these types of unreasonable inference or implausible conclusions. Despite Plaintiffs' contention, simply because an inference does not bode in Plaintiffs' favor does not make it unreasonable.

d. *Plaintiffs' Claim for Conspiracy (Count IX) Should Be Dismissed.*

Plaintiffs claim that they have adequately pleaded a cause of action for conspiracy because, contrary to the Prospect Defendants' assertions, they have alleged facts that the Prospect Defendants were a part of an agreement with SJHSRI, CCCB, and RWH to do three things: make false assurances to the RIAG and/or RIDOH to gain approval for the 2014 Sale, *Amend. Compl.* at ¶¶ 338, 370; conceal the fact that the Plan was underfunded from Plan participants, *id*. at ¶ 55(b); and fraudulently claim that the Plan was a church plan not covered by ERISA, *id.* at ¶ 203. Plaintiffs claim that there is "seldom" evidence of an explicit agreement to commit an unlawful act, and therefore, such explicit agreement can be inferred circumstantially. *See* ECF No. 99-1 at 89-90.

Here, the Amended Complaint fails to make any direct allegation that the Prospect Defendants made an agreement to make misrepresentations to the RIDOH, RIAG, or Plan participants, or improperly claim that the Plan was a church plan. Furthermore, despite Plaintiffs' contentions, they fail to allege any circumstantial evidence of any agreement to commit unlawful activity. For instance, Plaintiffs aver that the joint application to the RIAG satisfies the first requirement that of the existence of an agreement, and the second prong that it was "unlawful conduct" for an "unlawful purpose." However, a joint application to the RIAG does not evidence specific intent required to agree to commit an unlawful act. Civil conspiracy requires the "specific intent to do something illegal or tortious." *See Guilbeault v. R.J. Reynolds Tobacco Co.*, 84 F.

Supp. 2d 263, 268 (D.R.I. 2000). Notably, the Amended Complaint lacks any direct allegation of such intent despite the Plaintiffs having conducted an extensive investigation, which, according to the Receiver's special counsel, resulted in hundreds of hours of attorney work that included reviewing thousands of pages of documents. Despite having the benefit of conducing discovery *before* filing the Amended Complaint, there is no explicit allegation of a conspiracy, and the Plaintiffs only rely on circumstantial evidence, which fails to meet the heightened pleading standard of Rule 9(b). *N. Am. Catholic Educ. Programming Found., Inc. v. Cardinale*, 567 F.3d 8, 15 (1st Cir. 2009) ("the case law here and in other circuits reads Rule 9(b) expansively to cover associated claims where the core allegations effectively charge fraud").

e. *Plaintiffs' Alter Ego Claim (Count XII) Should Be Dismissed.*

To support their alter ego claim in Count XII, Plaintiffs assert the conclusory allegation that they have "sufficiently alleged a unity of interest ownership" among the Prospect Defendants, CCCB, RWH, and SJHSRI. ECF No. 99-1 at 91. Plaintiffs contend that their allegation that corporate formalities should be disregarded is supported by their allegations (1) that the Prospect Defendants' (without identifying which) "employee and agent Otis Brown [("Brown")] was listed as the representative of SJHSRI in the Catholic Directory," and (2) that the Prospect Defendants treated SJHSRI as an instrumentality by "taking over direct dealings with Plan participants, and directing SJHSRI to put the Plan into receivership." *See id*. at 92.

But such allegations—including those relating to Brown and SJHSRI—fail to sustain a cause of action. Plaintiffs cannot genuinely assert that one employee's alleged overlap between SJHSRI and the Prospect Defendants constitutes a foundation for an alter ego claim, given the Rhode Island Supreme Court's holding that "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. Furthermore, Plaintiffs' bald, conclusory allegation that SJHSRI was an "instrumentality" of the Prospect Defendants because the Prospect Defendants "directed dealings with Plan participants" and "direct[ed] SJHSRI to put the Plan into receivership," even if taken as true, are legally insufficient to sustain a cause of action for alter ego liability. *See id.* 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'"). The Amended Complaint's allegations are nowhere near close to meeting the standard that the Rhode Island Supreme Court requires.

f. *Plaintiffs' Claim of De Facto Merger (Count XIII) Should Be Dismissed.*

In an attempt to avoid dismissal of their de facto merger claims, Plaintiffs aver that they need only allege that the Prospect Defendants are continuing SJHSRI's businesses, because the factors outlined in *Blouin v. Surgical Sense, Inc*., 2008 R.I. Super. LEXIS 63 (R.I. Super. Ct. May 12, 2008) should only be *considered* and are not *required* to be pled. *See* ECF No. 99-1 at 93-94. Plaintiffs contend that they have sufficiently alleged a cause of action for de facto merger because they have alleged facts to support the factors in *Blouin*.

A mere allegation of continuing business cannot sufficiently allege a cause of action for de facto merger. If that were the case, any time a purchaser bought the assets and continued the seller's business, the purchaser, without regard to anything else, would be subject to a de facto merger claim. That is not the law.

Despite having taken the opportunity to amend their original Complaint after the Prospect Defendants made these arguments, Plaintiffs still have not sufficiently alleged a cause of action because of the corporate separateness of CCCB and SJHSRI. Most notably, in regard to the second

Blouin factor—continuity of shareholders—Plaintiffs' claim fails, because the sellers (according to Plaintiffs' contentions, RWH and SJHSRI) did not retain any ownership in Prospect Chartercare. According to Plaintiffs' own allegations, CCCB was the entity that took a membership interest in Prospect Chartercare. Plaintiffs once again inconsistently claim that SJHSRI is CCCB (because it obtained a portion in Prospect Chartercare), but on the other hand claim that SJHSRI is separate from CCCB (in that the proceeds of the 2014 Sale were "diverted" to CCCB and not paid to the asset seller, SJHSRI). Furthermore, while Plaintiffs allege that SJHSRI sold substantially all its assets, it cannot satisfy the third factor—that the selling corporation ceases operations, liquidates, or dissolves as soon as possible—because the alleged facts are to the contrary. The Amended Complaint alleges that SJHSRI did not liquidate or dissolve as soon as possible, and maintained its existence in order to, *inter alia*, make future contributions to the Plan and act as Plan's administrator.

g. *Plaintiffs' Claim of Successor Liability (Count XV) Should Be Dismissed.*

Plaintiffs' successor liability claim should be dismissed because they have failed to allege any bad faith on part of the Prospect Defendants, and have inadequately plead that Prospect Chartercare is a "mere continuation" of SJHSRI or CCHP.[13]

Plaintiffs' assert that their claim of successor liability should not be dismissed because they have sufficiently plead allegations that (1) SJHSRI's corporate assets were transferred with the actual intent to hinder, delay, or defraud creditors, which is sufficient under Rhode Island law to

[13] In regard to Plaintiffs' contention that the 2014 Sale was not supported by adequate consideration because SJHSRI did not *receive* the consideration of the 2014 Sale, the Prospect Defendants incorporate their argument in section III(B)(b)(ii) *infra*. In response to the Plaintiffs' argument that adequate consideration alone cannot foreclosure a claim for successor liability, such claim is certainly foreclosed when the asset sale is for adequate consideration and in good faith, which the 2014 Sale was.

impose successor liability, *see* ECF No. 99-1 at 98-106; and (2) Prospect Chartercare is a mere continuation of SJHSRI, *see id.* at 107-09. Neither the facts nor the law support these arguments.

i. Intent to Hinder and Delay.[14]

Plaintiffs' allegations that the 2014 Sale was to hinder, delay, or defraud creditors are belied by the transparent, public nature of the 2014 Sale. Plaintiff alleges that the 2014 Sale was subject to the scrutiny of the RIDOH and RIAG and was the topic of public hearings on its terms, *especially* those terms relating to excluding the Plan from the assets purchased. Plaintiffs attempt to persuade the Court that the 2014 Sale was secretive, mysterious, fraudulent transaction, when just the opposite is true. This distinction between an open, transparent, transaction, and a fraudulent, secretive transaction is best illustrated in comparing the facts here with the "bad faith" evidenced in *H.J. Baker & Bro. v. Organics, Inc.*, the case upon which Plaintiffs principally rely. 554 A.2d 196, 202 (R.I. 1989).

In *H.J. Baker*, the Rhode Island Supreme Court upheld the trial court's denial of a new trial on, among other things, a fraudulent conveyance claim, which was an "obvious scenario" to defraud a creditor and hinder it in collecting its debt while company's owner "ridd[ed]" the company of its assets. *Id.* at 202-03. The bad faith conduct therein included the business owner suing and obtaining a default judgment against the company in an attempt to collect amounts due on an illegitimate promissory note that the business executed in his favor three days after a creditor commenced an action against the company. *Id.* at 202. The Court noted that the company raised no defenses to the owner's attempt to collect the promissory note's debt, while simultaneously

[14] As an initial matter, to the extent that the Plaintiffs contend that their cause of action for successor liability based upon fraud should be sustained because they have adequately plead a claim under the RIUFTA, such claim should be denied because, as elaborated *infra*, Plaintiffs' claim under the RIUFTA fails for lack of any sufficient, plausible, alleged facts.

actively defending lawsuits from creditors. *Id.* The Court also elaborated that the default judgment allowed the owner to levy his claim against the company's subsidiary that owned the land that the company rented. *Id.* The Court noted that other indicia of fraud included the owner acquiring two assignments of mortgages on property owned by the company's subsidiary and attempting to foreclose on those instruments without notifying creditors. *Id.* Further, the Court explained that when a creditor inquired as to the sale, the owner assured the creditor that the sale was cancelled, but did not mention a future sheriff's sale that would effectuate the same intent of transferring 100 percent of the interest in the property to the owner. *Id.* The Court found other indicia of fraud including the fact that the corporate secretary and attorney "mysteriously" stopped taking minutes, and the company offered to pay the opposing parties counsel fees. *Id.*

There is absolutely nothing about the 2014 Sale that bears even the slighted resemblance to the scheme to defraud creditors seen in *H.J. Baker*. The 2014 Sale, according to the Complaint, was public, involved state regulators, and was deemed *in the best interest of the Hospitals* by the state regulators. It was far from the "behind-the-door," secretive, and fraudulent transaction that Plaintiffs claim. Moreover, the claimed "creditors" (the Plan participants) were aware of the 2014 Sale and the underfunded status of the Plan. Without the 2014 Sale, the Plan and Hospitals were going to stay on their same course of financial ruin. The 2014 Sale allowed the Hospitals to continue serving community members, and resulted in a cash addition to the Plan. That structure alone evidences not only that the 2014 Sale was not conducted in a fraudulent manner, but was the Plan and Hospital's best hope at surviving, as affirmed by the RIDOH and RIAG.

ii. Mere Continuation.

Plaintiffs assert that the 2014 Sale was not supported by adequate consideration, because the consideration was not *received* by SJHSRI. In regard to the value of the consideration, it would

appear, from the Amended Complaint's allegations, undisputed that the value exchanged for the Hospitals was substantial. Absent conclusory allegations that the consideration was inadequate, the Complaint alleges that the Hospitals were suffering large financial losses each year, despite entering into an affiliation agreement, and the Prospect Defendants *still* purchased the Hospitals for $61 million in value, and committed another $50 million to network improvements. Therefore, according to the Amended Complaint, total consideration paid by Prospect Defendants for a failing hospital system in financial ruin totaled over $100 million. It cannot be genuinely asserted, given the allegations of the Amended Complaint, that the *value* of the consideration was inadequate.

h. *Plaintiffs' Claim for Joint Venture (Count XIV) Should be Dismissed.*

Plaintiffs' contention that a public proclamation of a joint ventureship is sufficient, without any allegation as to reliance, to establish a partnership by estoppel claim is simply incorrect. *See Collings v. Sidhartan (In re KSRP, Ltd.)*, 2011 Bankr. LEXIS 5786, *37 (Bankr. S.D. Tx. 2011) ("The elements of partnership by estoppel are satisfied only when the person to whom the representations were made relies on the representations"); *In re Tryit Enters.*, 121 B.R. 217, 223 (Bankr. S.D. Tex. 1990) ("to find a joint venture by estoppel or a partnership by estoppel there must be an element of reliance on the joint venture or partnership"); *Alaska State Hous. Auth. v. Blomfield, Dudley & Ekness*, 662 P.2d 114, 119 (Alaska 1983) ("[t]he flaw in [plaintiff's] analysis is that it fails to recognize that reliance is a critical element of liability by estoppel . . . . [A]s in the case of any other claim of estoppel, [there must] be proof of action in reliance upon the acts constituting the alleged estoppel, with resultant injury or damage"); *Rivett v. Nelson*, 322 P.2d 515, 520 (Cal. Ct. App. 1958) ("[o]ne who consents to being represented by another as a joint adventurer may be estopped to deny that he is a joint adventurer as to third persons who enter into a transaction in reliance upon an ostensible agency, and who have dealt with the ostensible agent

as an agent of the purported joint venture, not as a principal"); *Howick v. Lakewood Vill. L.P.*, 2009 Ohio App. LEXIS 1637, *16, (Oh. Ct. App. Apr. 27, 2009) ([a]ccordingly, partnership by estoppel has three prongs: a misrepresentation prong (prong one); a reliance prong (prong two); and a credit prong (prong three).

CONCLUSION

For the aforementioned reasons, as well as the reasons set forth in the Prospect Defendants' Motion to Dismiss, the Court should grant the Prospect Defendants' Motion to Dismiss, and dismiss the Plaintiffs' Amended Complaint.

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of March, 2019, I have caused the within Reply 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/ Christopher J. Fragomeni, Esq.