UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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

THE DIOCESAN DEFENDANTS' MEMORANDUM REGARDING PLAINTIFFS' PENDING MOTION FOR SUMMARY JUDGMENT

On July 20, 2021, the Court instructed the parties to file a brief memorandum addressing how the Court should handle Plaintiffs' pending motion for summary judgment (the "Motion"), ECF No. 173. The Diocesan Defendants[1] believe the Court should grant the relief requested by the Motion which they had previously not opposed. To eliminate any potential ambiguity, the Diocesan Defendants today filed a Notice of Assent to the Relief Requested in Plaintiffs' Motion.

The Court should also be aware that following the July 20, 2021 proceedings, the Diocesan Defendants and Plaintiffs agreed to mediate this dispute before Chief Justice Frank Williams, beginning on September 29, 2021.[2]

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[1] "The Diocesan Defendants" are collectively the Roman Catholic Bishop of Providence, a corporation sole, Diocesan Administration Corporation, and Diocesan Service Corporation.

[2] Media reports that the Diocesan Defendants had refused to participate in the mediation before Chief Justice Williams that resulted in the most recent settlement were flatly wrong. The Diocesan Defendants were excluded from that process and first learned of that mediation when Plaintiffs and the settling defendants filed their notice of settlement with the Rhode Island Superior Court. The Diocesan Defendants proposed to mediate with Plaintiffs, but until recently, Plaintiffs had declined to do so.

PRELIMINARY STATEMENT

Plaintiffs' suggestion that this Court should not decide their own fully briefed and unopposed motion for summary judgment is nothing short of shocking. Plaintiffs seek to intentionally complicate this litigation—and force the Diocesan Defendants to litigate an undisputed issue—for tactical advantage. The Court should not permit this. At the outset of this litigation, Plaintiffs asked this Court to "let the parties litigate" all the issues in this case. The Court declined. The parties then spent nearly two years working towards the goal of clarifying the law that would apply to this case and simplify the issues before the Court. This effort came at the request of the Court. The Court approved stipulated case management order, ECF No. 170, was designed and agreed to by the parties. Now, on the very precipice of accomplishing the goal that the Court set, the parties worked towards, and Plaintiffs, themselves, moved to achieve, Plaintiffs ask the Court to throw those efforts aside.

Plaintiffs have extensively briefed, under the strictures of Rule 11, that they are entitled to judgment as a matter of law on Count IV of their Amended Complaint. Plaintiffs have asked the Court to declare that "by April 29, 2013 at the latest, the Plan[3] was not a Church Plan within the meaning of 29 U.S.C. § 1002(33) and, therefore, was subject to ERISA." ECF No. 173 at 27. Count IV applied to all defendants. Am. Compl., ECF No. 60, Count IV (request for relief). The Diocesan Defendants did not oppose the declaration that Plaintiffs requested. Diocesan Defs.' Resp. Concerning Pls.' Mot. for Summ. J., ECF No. 189, at 1. In their filing in response to that motion, they did state that they "strongly believe that a prompt resolution of this legal question will benefit the Court and the Parties." *Id.* That is still true.

[3] "The Plan" refers to the St. Joseph Health Services of Rhode Island Retirement Plan. ECF No. 173 at 2. The same is true for all references to "the Plan" herein.

ARGUMENT

I. The Pending Motion is the Culmination of the Process that the Court and Parties Proposed and Approved to Simplify this Case

Confronted with a blunderbuss amended complaint rife with conclusory assertions, improper group pleading, and legally deficient allegations, the Diocesan Defendants filed motions to dismiss. So, too, did other defendants. The Court expressed concern about the time it would take to sort the "meat" from the "potatoes" in Plaintiffs' 163 page, 558 paragraph amended complaint and pressed the parties on ways to simplify the case:

> THE COURT: And this is a complaint that alleges so many different kinds of causes of action that we're all going to spend a lot of time trying to sort through all of this and try to figure out at various stages what stays and what goes. But something's going to stay. And at the end of the day, I'm not sure it really matters that much whether this is a 14-count complaint or a 4-count complaint.
>
> So what can be done to get this thing narrowed down so that we have a viable, realistic complaint that the parties can move forward into discovery and we can then really see what this is all about? Because the way things stand now, I'm going to have to invest a whole bunch of time trying to figure out whether some of this can be peeled off while nothing is going on in terms of the discovery. And I think everybody's interests are served better if we figure out, you know, where is the meat here and not the potatoes. Let's get to the meat.

Ex. 1, Mot. to Dismiss Hr'g Tr. 38:13–39:6, Sept. 10, 2019. In response to the Court's query, counsel for Prospect[4] proposed that "one straightforward way of dealing with the paring back of the complaint" would be to "embrace the critically important question" in this case: Is the Plan "an ERISA plan and when did it become an ERISA plan?" *Id.* 40:1-5. The Court replied: "And maybe that is exactly what should happen. Maybe discovery should go forward on that point alone, and we should decide that question ***and then see what's left of the case***. That's a helpful discussion." *Id.* 40:8-12 (emphasis added).

[4] "Prospect" refers collectively to Defendants Prospect Medical Holdings, Inc., Prospect East Holdings, Inc., Prospect Chartercare LLC, Prospect Chartercare SJHSRI, LLC, and Prospect Chartercare RWMC, LLC.

The Court then asked Plaintiffs' counsel about "a way to get this case narrowed down in some reasonable fashion" and raised the proposal by Prospect's counsel. *Id.* 59:20-21.

> THE COURT: If I understand what you're doing and what the possibilities are at a very high level, it seems like it's this: Either the Plan is a church plan and continued to be a church plan up until the election in 2017, in which case, some of your ERISA causes of action fall by the wayside; or the Plan was an ERISA plan all along and some of your state law causes of action then fall by the wayside.
>
> MR. SHEEHAN: Some.
>
> THE COURT: Or the Plan was a church plan up to a certain point in time and then it became an ERISA plan. So you have causes of action that relate to the time period when it was a church plan, and you have causes of action that relate to when it became an ERISA plan. And there might be a period of time when it's really unclear what it was, but it has to be one or the other; it can't be anything else. So maybe there's a little bit of overlap.
>
> So that's basically it, right?
>
> MR. SHEEHAN: Right.
>
> THE COURT: Wouldn't it make sense to get a decision on that question?

Id. 69:14–70:10. Then, as now, Plaintiffs' counsel suggested that the Court simply defer resolution of the motions to dismiss until trial and "[l]et the parties litigate" on all issues in the case, even if the motions to dismiss would have disposed of some of them. *Id.* 70:19. The Court declined that proposal and ultimately instructed the parties to "meet and confer on a discovery plan." *Id.* 74:8-9.

The parties complied and negotiated a Stipulation and Proposed Order Concerning Limited Discovery and Related Summary Judgment Motions ("the Stipulation"), ECF No. 170. The Stipulation provided:

> The Parties agree to discovery as set forth below, limited to Count IV of the Plaintiffs' First Amended Complaint, concerning when, if at any time, the St. Joseph Health Services of Rhode Island Retirement Plan (the "Plan") ceased to be a church plan exempt from ERISA, with the expectation that Plaintiffs and/or

> Non-Settling Defendants will file motions for summary judgment as further described below, limited to that issue.

ECF No. 170, ¶ 2. The Court approved the stipulation by text order, dated October 29, 2019.

The parties subsequently exchanged documents, engaged in written discovery, conducted depositions, and drafted comprehensive legal briefs and statements of undisputed and disputed facts on cross-motions for summary judgment concerning if and when the Plan became subject to ERISA. Plaintiffs' motion is the culmination of the process that the Court requested to separate the meat from the potatoes "and then see what's left of the case."[5] Ex. 1, Tr. 40:11.

Plaintiffs' pending and fully briefed Motion is ripe for decision. The Court has the benefit of written adversarial presentation in the form of Prospect's opposition. *See generally* Prospect Defs.' Mem. of Law in Supp. of Opp'n to Pls.' Mot. for Summ. J., ECF No. 190-1. It is not moot. Count IV is not restricted to a particular defendant but applies equally to all of them. ECF No. 60, Count IV. So, too, does Plaintiffs' Motion for Summary Judgment.

As discussed more fully below, the issue of when the Plan was subject to ERISA will need to be decided in the context of determining which law applies to the various claims asserted, and what discovery is relevant and necessary, against the remaining defendants. Consistent with Rule 1 and the Stipulation that the parties negotiated and the Court approved to "get to the meat" of this case, the Court should decide the Motion. Ex. 1, Tr. 39:5-6. It is for this reason that the Diocesan Defendants have steadfastly sought resolution of these issues. The Court needs to decide the basic rules and standards of this proceeding. It is for this reason that the Diocesan Defendants filed the Notice of Assent to the relief sought by Plaintiffs. There is no legitimate reason for this Court to allow this case to go backwards. The Court should apply the

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[5] To be clear, it has been and remains the Diocesan Defendants' position that their motion to dismiss needs to be adjudicated. Diocesan Defs.' Mot. to Dismiss Pls.' Compl., ECF No. 54; Diocesan Defs.' Mot. to Dismiss Pls.' First Am. Compl., ECF No. 67.

Stipulation negotiated by the parties, and approved by the Court, and grant the relief sought in the Motion and assented to by the only remaining defendants.

II. The Court Should Decide the Motion Because its Resolution will Simplify and Streamline this Case

The parties negotiated a process that envisioned discovery and motions for summary judgment restricted to Count IV for a reason: When and if the Plan became subject to ERISA is a legal issue with significant impact on the case. For example, the following major implications would flow from the grant of the relief sought by Plaintiffs and assented to by the remaining defendants:

1) The key mixed question of fact and law in this case would largely be resolved. The parties would have greater clarity on whether federal or state law applies during a given time period as regards various claims and the Court would have a significantly simpler task in resolving any disputes related thereto;
2) Resolution of this issue is required to determine whether any of Plaintiffs' ten state law claims against the Diocesan Defendants are preempted by ERISA to the extent they relate to events on or after April 29, 2013. Indeed, most of Plaintiffs' allegations of wrongdoing by the Diocesan Defendants (which are denied) post-date that date (e.g., claims related to letters to the Vatican and the Health Services Council and the listing of Saint Joseph Health Services of Rhode Island, Inc. in the Official Catholic Directory);
3) The Court could determine whether ERISA precludes Plaintiffs' claim for money damages against the Diocesan Defendants; and
4) A decision by this Court granting the relief sought by Plaintiffs and assented to by the remaining defendants would, at a minimum, strengthen (and perhaps resolve) Plaintiffs' ability to claim that Plan Participants' benefits are fully guaranteed by the Pension

Benefit Guaranty Corporation ("PBGC") because a court has declared that the Plan has been subject to ERISA for more than five years.[6]

Given where the case is after months and months of effort, decision of this issue is the only practical way to ensure that work is not wasted.

III. Failure to Grant the Relief Sought by Plaintiffs and Assented to by the Remaining Defendants will Incentivize Litigation for Litigation's Sake

The benefits (both real and potential) of ordering the relief sought by Plaintiffs and assented to by the remaining defendants are inarguable. Nor can Plaintiffs dispute that the relief they sought before this Court is somehow inappropriate or not justified on the facts. Indeed, they have represented to the Court by filing the Motion that there are no genuine issues of material fact and that they are entitled to that requested relief as a matter of law on Count IV. Yet when asked at the July 20, 2021 conference, Plaintiffs argued that the Court should not decide their own Motion.

The motivation behind this complete reversal is apparent and improper. Plaintiffs seek tactical advantage by attempting to preserve and prolong factual and legal ambiguity, even

[6] 29 U.S.C. § 1321 limits PBGC coverage to ERISA plans. When a plan administrator makes an election for ERISA coverage (like the Receiver did in April 2019), it does not immediately trigger full PBGC coverage. Instead, the benefit guaranty phases in over the course of five years, at twenty percent per year. 29 U.S.C. § 1322(b)(7). Section 1322(b)(2) addresses when the five-year phase in begins for a "plan to which section 1321 of this title does not apply on September 3, 1974" (i.e., a plan not covered by ERISA the day after ERISA was enacted), but subsequently becomes an ERISA plan. In such a case, the five-year phase-in "shall be computed beginning on the first date on which [29 U.S.C. § 1321] does apply to the plan." *See id.* § 1322(b)(2). PBGC regulations and guidance from the PBGC's website indicate that the five-year phase-in applies to elections for ERISA coverage from the later of the date of the election, the effective date of the election or when the PBGC receives the election. 29 C.F.R. § 4022.24(e); *see* Pension Benefit Guaranty Corporation, "Staff Responses to Practitioner Questions," at Guaranteed Benefits, 1 (Feb. 13, 2020), https://www.pbgc.gov/prac/staff-responses-prac-questions (hereinafter "PBGC Responses"). That same guidance, however, also suggests that the five-year phase-in triggers when there is a failure on the part of a plan to meet the requirements for an exemption to ERISA. *See* PBGC Responses at Guaranteed Benefits 1 ("For instance, a professional services plan that has been excluded from Title IV coverage under [29 U.S.C. § 1321(b)(13)] because it never had more than 25 active participants would begin the five-year phase-in period when it acquired a 26th active participant."). The Motion requests a declaration that the Plan has been subject to ERISA since at least April 29, 2013, which is more than five years ago. At a minimum, therefore, grant of the relief sought in the Motion would give Plaintiffs the ability to argue to the PBGC that the Plan Participants' benefits are already fully guaranteed.

in the face of their own pending Motion designed to eliminate much of that ambiguity. Plaintiffs seek to shield their claims from possible dismissal and prolong and increase the burden and expense of this litigation (now more than three years old). They wish to preserve unnecessary complexity and uncertainty in this case and wield it as a cudgel. They want the trumped-up public accusations to continue in the hopes that they will pressure the remaining defendants to capitulate to baseless claims. They do not want to better equip this Court to scrutinize the viability of their claims, even when their very own Motion argued for the assented-to relief.

The Court should not ratify this tactic. It should resist Plaintiffs' transparent invitation to plunge this matter back two years into the muddled, free-for-all that the Court hoped to avoid in September 2019. Instead, the Court should hold steady to the process it requested and that the parties agreed upon. It should review the results of the two years of effort devoted to that process and order the relief sought by Plaintiffs, and assented to by the Diocesan Defendants, and move this case forward.

CONCLUSION

For the foregoing reasons, the Court should declare that "by April 29, 2013 at the latest, the Plan was not a Church Plan within the meaning of 29 U.S.C. § 1002(33) and, therefore, was subject to ERISA." ECF No. 173 at 27.

Respectfully Submitted,

ROMAN CATHOLIC BISHOP OF PROVIDENCE, A CORPORATION SOLE, DIOCESAN ADMINISTRATION CORPORATION and DIOCESAN SERVICE CORPORATION

By Their Attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of August, 2021, the foregoing document has been filed electronically through the Rhode Island ECF system, is available for viewing and downloading, and will be sent electronically to the counsel who are registered participants identified on the Notice of Electronic Filing.

/s/ Howard Merten

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EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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Stephen Del Sesto, as Receiver and Administrator of the St. Joseph Health Services of Rhode Island Retirement Plan, et al., Plaintiffs,	: 18-CV-00328(WES)
	: United States Courthouse Providence, Rhode Island
vs.	:
Prospect CharterCARE,LLC, et al., Defendants.	: Tuesday, September 10, 2019 Afternoon Session

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TRANSCRIPT OF CIVIL CAUSE FOR DEFENDANTS' MOTION TO DISMISS
BEFORE THE HONORABLE WILLIAM E. SMITH
UNITED STATES CHIEF DISTRICT COURT JUDGE

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Court Reporter: Lisa S. Schwam, CSR, CRR, RPR, RMR

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1 (In open court)
2 THE COURT: All right. Welcome back, everyone.
3 So we're continuing with the hearing in the matter of
4 Del Sesto versus Prospect CharterCARE, and now we're
5 going to hear arguments on the defendants' motions to
6 dismiss. So I think we can get right to it.
7 Who is going to argue first?
8 MR. GODOFSKY: Good afternoon, your Honor.
9 David Godofsky representing the Angell Pension Group.
10 THE COURT: Okay.
11 MR. GODOFSKY: Mindful of the fact that we have
12 a very large and complex case here and you've already
13 received hundreds of pages of briefings on all the
14 issues, I'd like to confine my comments to a few key
15 points.
16 THE COURT: Okay.
17 MR. GODOFSKY: The first of those points relates
18 to the pleading standard as outlined by *Bell Atlantic*
19 *Corporation v. Twombly* by the U.S. Supreme Court. That
20 case turned on the meaning of the word "agreement" as
21 included in a complaint and whether that word was
22 deserving of an assumption of truth. And the Court
23 held that it was not.
24 The Court held that in order for an allegation
25 that there is an agreement to be given the assumption

1 of truth, that the plaintiff had to plead additional
2 facts that would lead the Court to conclude that there
3 was, in fact, an agreement.
4 And the Court further said that circumstances
5 pled that were consistent with there being an
6 agreement, but also consistent with there not being an
7 agreement, were insufficient. And I will come back in
8 just a moment to how that applies to our case, but
9 before I get into that, I want to just quickly mention
10 the case of *Ashcroft v. Iqbal* which clarified that the
11 *Twombly* standard applied in all civil litigation. And
12 that case turned on the meaning of the word "knowledge"
13 which, again, the Supreme Court held was insufficient
14 and that when a plaintiff pleads knowledge, the
15 plaintiff must plead facts supporting the idea that the
16 defendant has the requisite knowledge.
17 Now, where does that come in in terms of our
18 case with respect to the Angell Pension Group? If you
19 look at all of the various complaints, all of the
20 various counts against the Angell Pension Group, what
21 you're going to see is all of those counts depend on
22 either an agreement or knowledge. And in none of those
23 cases do plaintiffs actually plead any facts that would
24 lead a court to conclude that Angell did, in fact, have
25 the requisite knowledge or did, in fact, reach the

1 requisite agreement.
2 As an example of that, all of the warnings that
3 plaintiffs contend that Angell should have given with
4 respect to the future solvency of the Plan, the future
5 ability of the Plan to pay benefits, depend not on the
6 current funding standard of the Plan, but on the future
7 ability of the Plan sponsored to make contributions to
8 the Plan.
9 So that's a rather critical factor because all
10 of us have gotten mortgages, borrowed money, used a
11 credit card. When we do that, when we borrow money,
12 there is no implied promise that we presently have the
13 money to make those future payments. And it certainly
14 is not fraudulent to get a mortgage knowing that you're
15 going to make your future mortgage payments out of your
16 future income. When you look at a church plan, the
17 actual funding obligation on that church plan is zero;
18 that is, the employer is required to put in enough
19 money to pay benefits when they come due and no more
20 than that. And from Angell Pension Group's
21 perspective, any money that's in the plan is more money
22 than the plan is required to actually have. And the
23 question of whether the plan is going to become
24 insolvent in the future depends on the ability of the
25 employer to make future contributions.

1 There is no allegation in the complaint that
2 suggests -- other than a purely conclusory allegation
3 of knowledge, there is no allegation in the complaint
4 that shows how Angell would have the knowledge that the
5 plan sponsor would be unable to make future
6 contributions which, in fact, it was promising to the
7 Attorney General, promising to the Department of
8 Health, and apparently the Attorney General and the
9 Department of Health believed those promises.
10 Similarly, when you look at allegations like
11 agreement, Angell agreed to deal with the participants,
12 Angell agreed to advise the participants, for example,
13 all of the circumstantial evidence that's pled by the
14 plaintiffs is both consistent with those agreements and
15 consistent with a completely innocent explanation,
16 which is that Angell Pension Group simply agreed to
17 perform certain ministerial tasks, take phone calls; to
18 the extent that it was going to advise participants, it
19 would advise participants as to the amount of their
20 benefits and how to fill out their collection forms.
21 There's no allegation in the complaint that could
22 support the idea that Angell Pension Group had ever
23 agreed to or even did advise participants about when
24 they should retire or whether they should retire or
25 which benefit they should elect or the funding status

1 of the Plan. In fact, the only allegation with respect
2 to the funding status of the Plan and Angell's
3 agreement was that it agreed not to advise participants
4 as to the funding status of the Plan.
5 So with the pleading standard not having been
6 met by the plaintiffs with respect to either knowledge
7 or agreement, they have a problem with respect to
8 virtually everything in the entire complaint as it
9 relates to Angell Pension Group.
10 Similarly, detrimental reliance, which is pled
11 by the plaintiffs, is pled in a purely conclusory
12 fashion. The complaint simply says that the class
13 plaintiffs relied on various statements that the
14 plaintiffs contend were misleading to their detriment.
15 That's a purely conclusory allegation. There's
16 absolutely nothing behind it in terms of, you know, any
17 particular action that any particular participant took
18 in reliance on any particular statement made by the
19 Angell Pension Group.
20 So the next point that I'd like to cover is that
21 there are no allegations in the complaint that could
22 lead this Court to conclude that Angell was a
23 fiduciary, that Angell owed fiduciary duties or that
24 Angell had established a relationship of trust with any
25 particular Plan participant. There's no allegation

1 that could lead to a conclusion of privity. The
2 fiduciary status of an actuary, I would refer you to
3 the case of *Mertens v. Hewitt* which is referred to in
4 our motion. *Mertens* shows that actuaries are not
5 fiduciaries. There's lots of other cases that we've
6 cited to the fact that actuaries are not fiduciaries.
7 If you look at the case that we've cited,
8 *Chamber of Commerce v. Acosta*, also in our motion --
9 actually, I believe it's in our reply to the
10 opposition -- that case, Fifth Circuit case, outlines a
11 number of things that are necessary for a party to
12 become a fiduciary and, most particularly, that the
13 party established a close relationship of trust with
14 the plaintiff. And in this case, there are no
15 allegations that could get you there.
16 Mindful of the time, I just want to point out
17 there are really only three things that Angell has
18 actually been accused of doing, specifically. There's
19 the conspiracy to hide the fact that the Plan is not a
20 church plan, which fails on two sides. First of all,
21 conspiracy is another one of those buzz words, and
22 there are no facts that show that Angell ever agreed
23 with anybody to enter into a conspiracy.
24 And the second way that that particular
25 allegation fails is that the plaintiffs contend that to

1 this day they don't know whether the Plan is a church
2 plan, and I don't know how you can conspire to hide a
3 fact that may or may not be true.
4 Second is tricking participants into thinking
5 the Plan is fully funded by saying that it could not
6 discuss whether the Plan would be solvent in the
7 future. I don't know how that tricks participants or
8 by giving them statements saying things like the Plan
9 is important, which it was, or that the Plan is subject
10 to a trust fund or even that the employer pays the full
11 cost of the Plan, because even though the employer was
12 not making contributions to the Plan as recommended by
13 the actuary, the employer was making way more than the
14 necessary contributions to pay the benefits as they
15 came due and that's all that's required for a church
16 plan.
17 And then there's the 94.9 percent demonstration
18 which the plaintiffs have asked you to close your eyes
19 to. And if you look at the 94.9 percent demonstration,
20 you'll see that Angell did everything that anybody
21 could possibly do to show that that demonstration did
22 not prove that the Plan would be fully funded. It
23 shows a ten-year amortization of a non-funded liability
24 with contributions of $1.39 million per year for ten
25 years following the $14 million contribution. It shows

1 that in order for that projection to be realized, the
2 return on assets would have to be 7.75 percent, and
3 specifically mentions that that return on assumptions
4 was not picked by the Angell Pension Group but picked
5 by St. Joseph's Hospital.
6 It says these estimates are assumptions and
7 subject to change. It says that they don't reflect all
8 future possible funding and accounting costs. The
9 actual results at a future date will be based on future
10 circumstances. In other words, if you look at that,
11 it's hard to imagine how that demonstration could trick
12 anybody into thinking that that's a guaranteed plan
13 full funding.
14 So as a final point, before I turn this over to
15 my colleagues, I'd just like to make a very quick point
16 regarding the standing question. This is the question
17 of whether PBGC coverage defeats standing on part of
18 the class plaintiffs. It's not Del Sesto, but the
19 class plaintiffs.
20 This is, as plaintiffs point out, an issue of
21 first impression in this court, but it's an issue that
22 has been considered by other courts. So in particular,
23 the standing standard was set out by the U.S. Supreme
24 Court in *Spokeo*. And when *Spokeo* was in front of the
25 Supreme Court, there was another case in front of the

1 Supreme Court, *Lee v. Verizon Communications*, in which
2 standing of participants to sue because of plan
3 underfunding was in question.
4 The Supreme Court remanded that case back down
5 to the Fifth Circuit. The Fifth Circuit found that the
6 plaintiffs did not have standing. That was not based
7 on PBGC coverage. However, in that case, which is
8 cited in our motion to dismiss, the Fifth Circuit says,
9 "Moreover, even where an employer is unable to cover
10 underfunding, the impact on the participants is not
11 certain since the PBGC provides statutorily defined
12 protection of participants' benefits." So the Fifth
13 Circuit did not think that it was unreasonable to
14 consider PBGC coverage in terms of standing.
15 The last point on standing is, there's a case in
16 front of the United States Supreme Court right now,
17 *James J. Thole v. U.S. Bank*; the Supreme Court granted
18 cert on June 28th of this year. The question in that
19 case is whether the participants in the pension plan
20 had standing to sue based on the funding status of the
21 Plan.
22 Before I sit down, does your Honor have any
23 questions for me?
24 THE COURT: So PBGC coverage is -- there is no
25 PBGC coverage at this time?

1 MR. GODOFSKY: Oh, there is indeed PBGC
2 coverage. The Plan is completely covered by the PBGC;
3 there's no question about that. Before the church plan
4 election was made by Mr. Del Sesto, the question as to
5 whether there was PBGC coverage turned on whether the
6 Plan is a church plan or not. But now because of the
7 church plan election that was made by Mr. Del Sesto,
8 there's no longer any question of PBGC coverage.
9 THE COURT: Maybe we're talking past each other.
10 When I say there's no PBGC coverage, what I mean is,
11 the insurance benefit of the PBGC has not been
12 triggered, nothing has happened. The Plan hasn't been
13 terminated or there has not been another triggering
14 event that has caused the PBGC to come in and say,
15 okay, we're in, we're taking over, we are going to
16 provide the benefits.
17 I'm not saying that it somehow falls outside of
18 the coverage of the PBGC, I'm just saying it isn't in
19 there yet providing the benefit.
20 MR. GODOFSKY: No. Well, the PBGC is not paying
21 the benefit right now, but the PBGC is providing the
22 coverage just the same way when you get in your car and
23 you've paid a premium to your insurance company, that
24 insurance company is not going to pay anything until
25 you get into an accident, but you are covered.

1 This plan is covered. PBGC is required to pay
2 benefits the instant one participant fails to receive
3 one dollar --
4 THE COURT: Just to use your analogy, that's
5 like saying that I lose standing to sue the person that
6 hits me with their car because I have insurance.
7 MR. GODOFSKY: Well, no, that's a different
8 situation because the insurance company pays you for
9 your loss. The PBGC does not pay Mr. Del Sesto for the
10 receiver's loss or for the Plan's loss. If the PBGC
11 steps in, which it will eventually in this case, the
12 PBGC takes over the Plan. It becomes the Plan
13 administrator. It becomes the trustee of the Plan. It
14 essentially becomes the Plan.
15 If you look at the PBGC's website, what you see
16 is PBGC actually administers about 5,000 plans right
17 now. And so when the PBGC takes over the Plan, the
18 Plan then continues to pay out all of the benefits to
19 all of the participants. None of the class members
20 here, none of the participants in this plan, will ever
21 lose one dollar because the instant the Plan is unable
22 to pay their benefits, the PBGC must step in, take over
23 the Plan and pay those benefits through the Plan.
24 THE COURT: Well, a couple points. I don't want
25 to get too far down the road on this, but my

1 understanding is that PBGC steps in when it determines
2 that there has been a triggering type of event that
3 causes it to step in, and that there's at least some
4 degree of discretion associated with that. If there
5 wasn't any discretion associated with that, they'd be
6 in this chase now.
7 MR. GODOFSKY: There's no discretion as to the
8 latest possible point at which they can jump in which
9 is the instant a participant is about to lose one
10 dollar. The PBGC must jump in at that point. If one
11 participant is going to lose one dollar of the
12 benefits, the PBGC has no discretion. And if you look
13 at page 107 of the Plan's brief, you'll see it actually
14 quotes the particular statutory section that says the
15 PBGC shall step in as soon as the Plan is unable to pay
16 benefits they're due.
17 Now, at any point before that, the PBGC may step
18 in and take over the Plan if it determines that its
19 risk of loss has increased unreasonably, so that is
20 discretionary, but that does not allow it to allow any
21 participant to lose benefits. In addition to that, the
22 plaintiffs here, Mr. Del Sesto, could file a Form 600
23 and invoke PBGC coverage any time he wants. All he
24 needs to do is file Form 600. PBGC has no option. It
25 is statutorily obligated to respond to that Form 600 by

1 terminating the Plan if the Plan qualifies, which it
2 pretty clearly does.
3 THE COURT: Isn't there a question of whether
4 the PBGC has the funds to fulfill all of its
5 obligations to all of the plans that are under its
6 jurisdiction?
7 MR. GODOFSKY: The PBGC has two different trust
8 funds. One trust fund covers multi-employer plans, and
9 one trust fund covers single-employer plans. The
10 multi-employer trust fund is completely walled off by
11 law from the single-employer plans. The multi-employer
12 trust fund is, indeed, in trouble, as plaintiffs have
13 pointed out, and it is expected to run out of money if
14 it doesn't receive some kind of infusion. And I can't
15 remember what the precise date is, but sometime in the
16 next ten years it is projected to run out of money.
17 That's the multi-employer trust fund.
18 This is a single-employer plan, not a
19 multi-employer plan. The single-employer trust fund
20 has a surplus even as compared with the obligations
21 that are promised to all of the plans that the PBGC
22 trustees for the remainder of their lifetime of all of
23 the participants. And in our supplemental brief and in
24 our reply brief, we did point out the PBGC website
25 where you can look it up and see that the

1 single-employer trust plan has a surplus.
2 THE COURT: Okay. All right. Thank you.
3 MR. GODOFSKY: Thank you, your Honor.
4 MR. McGOWAN: Good afternoon, your Honor. May
5 it please the Court. Mr. Wagner and I are going to tag
6 team this one. He is going to take the state law
7 claims. I'm going to deal with the ERISA side of
8 things.
9 THE COURT: Okay.
10 MR. McGOWAN: We're here to further support the
11 joint motion that all of the Prospect entities filed
12 under ECF-70 and to do it so as to not tax the Court's
13 patience.
14 By our count, 16 of the 23 claims are leveled
15 against the Prospect entities directly or indirectly.
16 Two of those are pure ERISA claims; that's Counts One
17 and Three. Another four can be categorized as mixed
18 claims that have both ERISA and state law implications.
19 Those are Counts Twelve through Fifteen. Another four
20 are purely Rhode Island based state law claims. And
21 the final category are six state law claims that
22 arguably parallel the ERISA claims and could be
23 preempted depending upon how this Court determines the
24 when did the Plan become an ERISA plan issue.
25 We submit that at least as of April 15th, as Mr.

1 Godofsky pointed out, and colorably as of 7-1-17, the
2 receiver's irrevocable church plan election is the Plan
3 now an ERISA plan in question. I won't add to Mr.
4 Godofsky's arguments regarding the necessity of holding
5 the plaintiffs' factual allegations in the amended
6 complaint to *Iqbal* and *Twombly*'s high standards.
7 THE COURT: So why is it appropriate for me to
8 consider an election that occurred in 2017? Aren't I
9 required to take the facts as pled as true for purposes
10 of this motion and not look at something that's outside
11 of the pleading that is as of a later date?
12 MR. McGOWAN: Well, we submit that the question
13 of the church plan and whether or not it was a church
14 plan is squarely in the complaint and it alludes to
15 basically the regulatory posture of it. And since
16 again the receiver has, in fact, made an irrevocable
17 election, that basically establishes this Court's
18 jurisdiction over this case.
19 THE COURT: Well, I guess what I'm -- I get that
20 and I understand it. I'm not saying it's an irrelevant
21 event or irrelevant fact, but what I'm asking you is,
22 it seems like something that is a fact that's outside
23 of the pleadings. And it is a fact that may actually
24 come up and be relevant at another stage, maybe summary
25 judgment.

1 But right now for purposes of this motion, which
2 is a motion to dismiss, I have to simply take the
3 allegations as they're set forth in the complaint,
4 assume that they're true and then evaluate whether they
5 constitute a valid cause of action or not. And looking
6 to what happened later in 2017 in terms of what the
7 receiver did and what it may show, what it might prove,
8 that is going outside of the pleadings.
9 MR. McGOWAN: Well, fair point, your Honor. I
10 will direct our argument in the alternative as it has
11 been presented in the alternative in the amended
12 complaint because basically what we're saying is, in
13 many of these cases, no matter which way you look at
14 this, the claims fail and should be dismissed. We
15 understand that there are 16 of them one way or another
16 hypothecating either an ERISA plan or a non-ERISA plan,
17 and I'll at least address myself to those two issues.
18 But before I go down that rabbit hole, I'd like
19 to button down and focus the Court's attention on the
20 equities here which frequently get lost. ERISA, after
21 all, to the extent that it applies, is an equitable
22 relief statute and, more important, several of these
23 so-called mixed claims and by those, I mean, the
24 insertion of alterego status, the assertion of joint
25 venture, the assertion of successorship and whatever

1 the fourth one is, but the point is, 12 through 15
2 basically are argued both ways because they claim
3 either that the Prospect entities are either a
4 successor or an alterego, depending upon which way you
5 look at this complaint, either the federal law
6 standards or the state law standards.
7 And I want to focus the Court's attention on the
8 inadequacy of those mixed claims. But I think, again,
9 back to equities, I think it's without controversy that
10 the two hospitals at the heart of this plan were aged,
11 underperforming facilities that had been losing money
12 for years and by 2013 seemed destined to fail and close
13 when the organizations operating them sought to sell
14 them in a deal that ended up with our clients buying
15 the two hospitals in a deal that closed in 2014.
16 Our clients, the Prospect entities, did not seek
17 out the hospitals but were, in fact, solicited along
18 with others in 2013 after the 2011 deal fell through
19 and the hospitals continued to hemorrhage money and
20 lose value. Again, this is picked up here and there in
21 the amended complaint, but the point is, I want to
22 connect the dots and talk about the equities.
23 The Prospect entities made the only viable
24 purchase in 2013 -- viable proposal in 2013 and spent
25 45 million to purchase the failing facilities and

1 committed to invest another 50 million to make the
2 hospitals competitive and preserve them as community
3 assets and preserve thousands of jobs. I'm told that
4 the Prospect entities actually have invested much more
5 than that, but the point is, even by the amended
6 complaint standards, that was a commitment that was
7 made, a meaningful commitment.
8 And throughout the purchasing process in 2013
9 and 2014, the Prospect entities were repeatedly advised
10 by hospital officials that the Plan was indeed a church
11 plan and was told further, or at least was not told,
12 that anyone who had a history of dealing with the Plan
13 such as union officials ever questioned or expressed
14 concerns about the Plan's status as a church plan.
15 The point is, our clients were coming to the
16 party in 2014, were unfamiliar with the Plan and all of
17 the representations and all the stories consistently
18 told them at the time was that it was a church plan and
19 that while it was, indeed, underfunded, it was,
20 frankly, a plan that they couldn't assume because
21 they're not a church organization and that was capable
22 of being, shall we say, left behind with the seller
23 because, again, as a church plan and as Mr. Godofsky
24 pointed out, there are no aggressive funding
25 obligations such is the type that ERISA imposes.

1 I make that point all in the context again, and
2 I'll return to it, of how the equities really need to
3 be seen here from our client's prospective and
4 particularly in the context of attempting to paint our
5 client as a successor in interest or an alterego. With
6 that, I want to quickly offer some comments about the
7 ERISA claims, then the four mixed federal/state claims
8 and then the state law claims we think would be
9 preempted or displaced again if ERISA were held to
10 apply to the Plan and depending at what point ERISA
11 were held to apply to the Plan.
12 Our papers are pretty straight forward in how we
13 address the two ERISA claims, which are Counts One and
14 Three which are funding and aiding and abetting
15 fiduciary breaches, respectively. I think I'd like to
16 take the aiding and abetting first. We believe that
17 notwithstanding the when ERISA question if, in fact,
18 the Plan is a church plan and ERISA doesn't apply,
19 obviously, both of those counts fall by the wayside.
20 But assuming for the moment that the Plan is indeed a
21 church plan and dates possibly from 2014 forward so as
22 to make it, if you will, relevant to these counts, we
23 believe that we've laid out in detail, particularly in
24 our reply, that's ECF-113, the analysis there and
25 showing that because our clients, who are strangers to

1 the Plan, they are weren't Plan sponsors, they are
2 weren't contributing employers, they weren't
3 fiduciaries, they weren't parties in interest, that
4 there is no liability against them.
5 And our position on that point, it kind of echos
6 what Mr. Godofsky was saying with respect to the
7 service provider such as Angell Group, which is
8 actually closer to the action than actually was
9 providing services directly and indirectly to the Plan.
10 Our clients are even further afield than that.
11 Similarly, with regard to the funding claim and,
12 again, if the Plan were found to be an ERISA plan
13 dating from 2014 or before, our client did not have a
14 direct funding obligation because the statute under
15 ERISA imposes that obligation on the Plan sponsor and
16 contributing employers and those entities that are part
17 of a controlled group of trades or businesses in
18 corporations that are with that sponsor or contributing
19 employer. That's the way the statute is drawn up. Our
20 clients fall outside of all of that. They've never
21 been co-owned by their religious organizations or the
22 quasi-religious organizations that were sponsoring and
23 maintaining the Plan for all those years whether before
24 2014, in 2014 or afterwards.
25 But Count One goes further, and this is where I

1 go into this issue of mixed claims and the adequacy of
2 the pleadings in Counts Twelve through Fifteen. Those
3 counts sweepingly and conclusively assert that the
4 Prospect entities are, for example, successors to RWH
5 and St. Joseph Health Services of Rhode Island and
6 CCCB. And while we deal with this briefly in our joint
7 motion, ECF-70 at pages 72 and 73, I want to hammer
8 home the inadequacy in the amended complaint of those
9 arguments and assertions which, again, echoing what Mr.
10 Godofsky said on behalf of the Angell Group, were pled
11 in sweeping, conclusory terms but, more important, they
12 were pled without regard to the fact that, again, if
13 the Plan's an ERISA plan, there are federal law
14 standards, there are federal law tests and factors that
15 become applicable to determine, for example, whether or
16 not two entities that are otherwise strangers are
17 considered alteregos of one another. And there's case
18 law on that.
19 The factors, and there are several, as many as
20 eight actually, and I could direct the Court's
21 attention to *Massachusetts Carpenters Central*
22 *Collection Agency vs. Belmont Concrete Corp*, 139 F.3d
23 304, First Circuit 1998, to point out that the federal
24 factors for alterego tests are substantially identical
25 management, business purpose, operations, equipment,

1 customers, supervision, ownership and the presence of
2 antiunion animus. Eight factors. None of those are
3 found in the amended complaint. There's just a brief
4 mention of that they are alteregos of each other, but
5 no attempt is made to present factual argument that
6 ties the Prospect entities or any of them to that just
7 showing what a continuity in operations. But certainly
8 nothing like antiunion animus when, in fact, the
9 Prospect entities dealt directly with the union and
10 maintained the collective bargaining relationships with
11 the representatives in effect in 2014.
12 Similarly, the joint venture and merger claims,
13 that's 14 and 13, ignore federal statutes, the
14 controlled group ones, and the reference there would be
15 29 U.S. Code Section 1082 and specifically 1082(b)(2)
16 and (d)(3), that point out that funding obligations
17 fall upon the sponsor, contributing employers and their
18 respective controlled groups, not strangers who get
19 dragged in through some side door. Nothing in the
20 facts attempt to show that the separate ownership or
21 the 15 percent interest, which is clearly a minority
22 interest that was conveyed in the deal in 2014, create
23 such overlapping ownership so as to create controlled
24 group relationships between those parties.
25 And then there's the question of successorship

1 which seems to permeate the amended complaint. Again,
2 it's an attempt to tie Prospect to many of the counts
3 that otherwise would lie squarely against the sponsors
4 and contributing employers by, in effect, putting them
5 into their shoes. The amended complaint focuses solely
6 on continuity and operations.
7 Paragraph 529 in the amended complaint comes to
8 mind. And the presence of a single officer or director
9 on both sides, both before and after the transaction,
10 to support the successorship claim, but that's not the
11 federal rule. In fact, there's only one case to date
12 that has dealt with the prospect of successful
13 liability in a single-employer plan case. It's *PBGC*
14 *vs. Findlay Industries*, and that is at 902 F.3d 597,
15 which was decided by a split panel of the Sixth Circuit
16 in 2018, four years after this transaction was
17 consummated.
18 In that case, the split panel, the majority held
19 that successorship could be found in extraordinary
20 circumstances where it could be shown that (1) the Plan
21 terminated at closing so as to make, as your Honor
22 observed, the liability real and the role of the PBGC
23 as, if you will -- the trustee of the Plan and the
24 administrator of the Plan real and the loss, if you
25 will, to the PBGC at least real, that the purchasing

1 party have actual knowledge of the liability, that
2 there be substantial continuity in operations which, in
3 fact, the amended complaint does deal with, and that --
4 and there's a careful balancing of the equities which
5 requires a finding in favor of applying the doctrine
6 against the buyer or purchaser, which is my point about
7 the equities here.
8 The point is that in asserting successorship and
9 just attempting to link our clients, the Prospect
10 entities, in with those who were maintaining and
11 supposedly responsible for funding the Plan, those
12 aren't pled. There is no balancing of the equities as
13 showing that our clients, which seem to be the lone
14 bidder with the viable plan paying 45 million in cash
15 and committing to invest to preserve jobs and to keep
16 the hospitals open, whether that somehow was -- that it
17 would be equitable to visit upon them another hundred
18 million dollars. Notwithstanding the fact that they
19 were the last ones to the party in 2013 and 2014 and
20 were repeatedly assured that this was a church plan
21 and, for that matter, that they could be been shown to
22 have had actual knowledge of a liability which, as Mr.
23 Godofsky pointed out, doesn't exist if it's a church
24 plan.
25 So how could they have had actual knowledge of a

1 liability that was just hypothecation at that point in
2 time? So, again, we believe that those mixed claims
3 have not been sufficiently pled, certainly not in those
4 circumstances where an ERISA finding were made and
5 those were shown to be ERISA-based claims. And again,
6 if it's not an ERISA plan but a church plan back in
7 2014, the claims have no viability anyway because ERISA
8 has no application.
9 Finally, and then I'll turn it over to
10 Mr. Wagner, depending upon how this Court decides the
11 ERISA question and when the Plan became an ERISA plan,
12 if ever, prior to the day of the irrevocable election,
13 if we go back and you start -- and you presume that the
14 state law claims that parallel the federal law claims
15 would be swept up -- and we've argued this in our
16 papers and by referencing to the *Aetna vs. Davila* case,
17 it's a Supreme Court case referenced in our papers, I
18 believe in the joint motion specifically, but also I
19 think maybe in the reply.
20 The point is that then a series of those state
21 law claims, we think about six of them, would be swept
22 aside and preempted by federal law. The rest, again,
23 are based on Rhode Island statute. And for that, I'll
24 give you Mr. Wagner to deal with that and to deal with
25 perhaps what he wants to on those potentially preempted

1 claims.
2 Does the Court have any immediate questions for
3 me or do you want me to just stand by?
4 THE COURT: No. I have some general questions
5 or observations, but I think I'll hear from Mr. Wagner
6 first. I think that will be a better way to go.
7 MR. McGOWAN: All right. Thank you, your Honor.
8 MR. WAGNER: Good afternoon, your Honor.
9 Plaintiffs assert 14 separate state law claims against
10 the Prospect entities. I'm going to deal with those 14
11 briefly, your Honor.
12 First, in Count Seven, plaintiffs assert a claim
13 for fraud for intentional misrepresentation and
14 omissions. In our memorandum, we specifically go
15 through each of the alleged misrepresentations that
16 purportedly involve the Prospect entities and show that
17 plaintiffs have failed to allege any plausible claim
18 against the Prospect entities for fraud.
19 This complaint is mostly made up of allegations
20 that lump all the defendants together and make
21 conclusory statements that fail to meet the
22 requirements of Rule 9(b). We've pointed that out in
23 the memorandum. For example, any allegations that the
24 Prospect entities committed fraud by omission for
25 failing to state a claim because the plaintiffs cannot

1 plausibly allege that the Prospect entities had any
2 duty to the plaintiffs to disclose information
3 regarding the status of the funding. All the
4 fraud-by-omission claims also fail because it was
5 public knowledge that the Prospect entities were not
6 assuming liability for the Plan, and it was also public
7 knowledge that the Plan was severely underfunded. So
8 all those claims of fraud by admission are out the
9 window.
10 Most of the allegations of misrepresentations
11 relate to purported misrepresentations to third parties
12 such as union officials and state regulators. We've
13 briefed that, your Honor. We've given you the case law
14 that shows that plaintiffs cannot state a colorable
15 claim based upon third-party reliance. In fact, there
16 are no allegations that any of the Prospect entities
17 made any representations directly to plaintiffs
18 regarding the plan in the entire complaint.
19 And your Honor knows that this complaint is not
20 like a typical complaint. The plaintiffs had at least
21 a million documents to look at. They had discovery in
22 the state court. And this is their second bite at the
23 apple. This is the amended complaint. So there really
24 is no reason that they couldn't allege any specific
25 facts particularly with respect to the Prospect

1 entities. They failed to do that.
2 Likewise, they cannot plausibly allege that any
3 of the plaintiffs detrimentally relied upon any
4 representation made by the Prospect entities or that
5 they were injured as a result of any of the statements
6 made by Prospect entities, much less that the
7 statements in question caused them damages or the
8 funding deficiency itself. So we've asked that you
9 dismiss Count Seven, fraud, with respect to the
10 Prospect entities.
11 Now, along with that dismissal, your Honor, come
12 other counts. Count Nine, they allege conspiracy. And
13 in Count Eight, they alleged a fraudulent scheme. As
14 we set forth in our brief, the fraudulent scheme should
15 be dismissed. It is not recognized by Rhode Island
16 law, and they're really the same claims as the
17 conspiracy claims.
18 To adequately plead a conspiracy, your Honor
19 knows the plaintiff must allege that there was an
20 agreement between two or more parties, and the purpose
21 of the agreement was to accomplish an unlawful
22 objective or to accomplish a lawful objective by
23 unlawful means. To prove a civil conspiracy,
24 plaintiffs must show evidence of an unlawful
25 enterprise. And civil conspiracy is not an independent

1 basis of liability. There has to be a valid,
2 underlying intentional tort.
3 And here -- and we go through all the
4 allegations in our memoranda that attempt to support a
5 conspiracy claim including allegations of: First,
6 alleged false representations to state regulators;
7 second, allegedly concealing the fact that the Plan was
8 underfunded; and third, fraudulently claiming the Plan
9 as a church plan not covered by ERISA.
10 Now, the plaintiffs have not plausibly alleged a
11 valid underlying tort theory against the Prospect
12 entities or that they were involved in an unlawful
13 enterprise and for the same reasons that the fraud
14 claim should be dismissed for making false assurances
15 to state regulators and concealing the fact that the
16 fund was underfunded, there is no underlying tort
17 claims, that those claims should fail for conspiracy as
18 well.
19 The final conspiracy is the church plan
20 conspiracy. With respect to that, all they do is
21 allege wholly conclusory legal opinions that cannot
22 plausibly be alleged an unlawful enterprise. The Plan
23 was considered a church plan at the time. And finally,
24 the receiver's election, your Honor, I think that the
25 Court can take judicial notice of the election. We did

1 brief that for you. That's relevant here because the
2 dual position that the receiver's taking shows that it
3 undermines any allegation that Prospect should have
4 known the Plan didn't qualify as a church plan in 2014.
5 And we briefed that in our memo as well, your Honor.
6 For those reasons, we think the conspiracy count should
7 be dismissed against the Prospect entities.
8 Count Twenty asserts a claim for aiding and
9 abetting and breach of fiduciary duty. Plaintiffs
10 allege that the Prospect entities knowingly aided,
11 abetted and participated in breaches of fiduciary duty
12 by St. Joseph's, CCCB, Angell and the Catholic
13 defendants.
14 The Rhode Island Supreme Court has not addressed
15 this cause of action. Rhode Island Superior Court
16 Judge Silverstein has, has looked to Massachusetts law.
17 And there are three elements that need to be met. The
18 first is there must be a breach of fiduciary duty.
19 Second, the defendant must know of the breach. And
20 third, the defendant must actively participate or
21 substantially assist in or encourage the breach to the
22 degree that he or she could not reasonably be held to
23 have acted in good faith. Plaintiffs have not pled any
24 facts sufficient to show that the Prospect entities
25 either knew that another defendant was breaching a

1 fiduciary duty or actively participated in a breach.
2 In our memorandum we go through allegations, and
3 I can go through them. I'm trying to move quickly, but
4 we go through three allegations that they make and show
5 that there is clearly no plausible claims that there
6 was active participation by the Prospect entities.
7 And Counts Five and Six, your Honor, alleges
8 fraudulent transfer. Count Five alleges an actual
9 intent to hinder delay. And Count Six talks about
10 without receiving reasonable value. The sole basis for
11 plaintiffs' fraudulent transfer claims is the fact that
12 CCCB received a 15 percent ownership interest in
13 Prospect CharterCARE and not St. Joseph Health
14 Services, its wholly owned subsidiary.
15 Plaintiffs do not allege that there was not
16 adequate consideration provided by Prospect in
17 purchasing the hospitals. They allege only that the
18 value received by St. Joseph's, aside from the 14
19 million that went to the Plan, was not reasonably
20 equivalent in value. They allege that St. Joseph's
21 should have received at least some portion of that 15
22 percent.
23 As your Honor knows, the 2014 asset sale was
24 scrutinized and approved by the Rhode Island Attorney
25 General and the Rhode Island Department of Health. And

1 the asset purchase agreement fully disclosed the way
2 the transaction was structured, and it was fully vetted
3 by the Department of Attorney General and the
4 Department of Health. Pursuant to the 2014 APA, the
5 seller's designated CCHP, now CCCB, as the seller
6 member to be the holder of the 15 percent of the shares
7 of Prospect CharterCARE on behalf of all sellers.
8 So there's no dispute that CCCB, St. Joseph
9 Health Services' parent company, was acting on behalf
10 of all the seller entities. According to the amended
11 complaint, CCCB's CFO testified before the state
12 regulators that the recommended contributions going
13 forward to fund the Plan was $600,000 a year, which
14 would be paid out of St. Joseph healthcare's expected
15 income from trusts as well as from profitsharing from
16 CCCB. So the 15 percent interest was supposed to be
17 available, it was always intended to be available, for
18 the Plan. Structuring the 2014 asset sales so that
19 CCCB received a 15 percent interest in Prospect
20 CharterCARE on behalf of all the sellers was not a
21 fraudulent transfer.
22 And I'm trying to move quickly, your Honor. In
23 Count Twelve, plaintiffs allege alterego. Under Rhode
24 Island law, you have to show there's such a unity of
25 interest in ownership that the separate personalities

1 of the corporation and the individual no longer exist;
2 in other words, the corporation is, in fact, the
3 alterego of one or more few individuals and the
4 observance of the corporate forum would sanction a
5 fraud. Plaintiffs baldly allege that there is a unity
6 of interest in ownership among the Prospect entities
7 CCCB, St. Joseph's Health and CC Foundation, such that
8 separate personalities of the entities and their
9 members do not exist. I'm going to kind of go through
10 this quickly.
11 For factual support, they make three
12 allegations: First, the allegation that an employee of
13 one of the Prospect entities was listed as a
14 representative of St. Joseph Health Services in the
15 Catholic Directory; second, there's a bald allegation
16 that after the 2014 asset sale, the Prospect entities
17 took over direct dealings with Plan participants; and
18 third, that Prospect entities allegedly directed St.
19 Joseph to put the Plan into a receivership.
20 Now, none of these allegations, even if true, is
21 enough to plausibly allege alterego. Regarding the
22 Prospect employee being listed as a representative of
23 St. Joseph, the Rhode Island Supreme Court has made
24 clear that the mere fact that a person holds an office
25 in two corporations that may be dealing with each other

1 is not enough for alterego. And likewise, the
2 conclusory allegations that the Prospect entities took
3 over direct dealings with Plan participants without any
4 particular facts to support that and somehow directed
5 St. Joseph to file a receivership do not make an
6 alterego. That count should be dismissed.
7 Count Thirteen alleges a de facto merger. Rhode
8 Island courts have set forth four factors that should
9 be considered. I won't go through them all, but I'll
10 tell you they cannot plausibly allege two of the four
11 factors. There was no continuity of shareholders
12 resulting from the purchase of assets with shares of
13 stock rather than cash and that selling corporations
14 did not cease operations, liquidate or dissolve as soon
15 as possible.
16 And I will point out that a minor retention of
17 stock of 15 percent is not enough. There's a First
18 Circuit case, *Devine & Devine Food Brokers vs. Wampler*,
19 where a 10 percent retention was clearly not enough.
20 Count Thirteen should be dismissed.
21 Count Fifteen is claim successor liability under
22 the mere continuation exception to the general rule
23 that a company that purchases the assets of another is
24 not liable for the debts. Count Fifteen should be
25 dismissed because plaintiffs have failed to plausibly

1 allege that Prospect entities paid inadequate
2 consideration for the assets. That's one of the main
3 factors. I'm not going to go through the settlement
4 factors, they're in the brief, but the main factor here
5 is inadequate consideration. Under the mere
6 continuation theory, there's no plausible allegations
7 in the complaint that the Prospect entities paid
8 inadequate consideration and, therefore, the count
9 should be dismissed.
10 Count Fourteen is a joint venture. In our brief
11 we show that the joint venture should be dismissed
12 because there's no agreement as required under Rhode
13 Island law.
14 And finally, your Honor, in Counts Sixteen,
15 Eighteen and Nineteen, plaintiffs allege that the
16 Prospect entities are subject to civil liability under
17 Section 912 for violating three criminal statutes. The
18 purpose of Section 912, as your Honor knows, is to
19 provide crime victims with recourse to make a final
20 recovery from crime perpetrators. In order to bring a
21 claim under 912, a plaintiff must plausibly allege that
22 he or she suffered an injury by reason of the
23 commission of the crime. So these three separate
24 counts deal with three separate criminal statutes, and
25 all of them we show in our briefs that there is no

1 plausible allegations that the Prospect entities
2 committed these crimes. And, furthermore, there's
3 clearly no causal relationship between any purported
4 representations made by Prospect entities and the
5 underfunding of the Plan. So there's no proximate
6 clause in those counts. Sixteen, Eighteen and Nineteen
7 should be dismissed.
8 THE COURT: So let me ask you a very general
9 question. I'm going to ask Mr. Sheehan to address this
10 too, and I don't know if you want to respond or if
11 somebody else wants to respond. But it seems likely to
12 me that -- very likely to me -- that some part of this
13 complaint is going to go forward. And this is a
14 complaint that alleges so many different kinds of
15 causes of action that we're all going to spend a lot of
16 time trying to sort through all of this and try to
17 figure out at various stages what stays and what goes.
18 But something's going to stay. And at the end of the
19 day, I'm not sure it really matters that much whether
20 this is a 14-count complaint or a 4-count complaint.
21 So what can be done to get this thing narrowed
22 down so that we have a viable, realistic complaint that
23 the parties can move forward into discovery and we can
24 then really see what this is all about? Because the
25 way things stand now, I'm going to have to invest a

1 whole bunch of time trying to figure out whether some
2 of this can be peeled off while nothing is going on in
3 terms of the discovery. And I think everybody's
4 interests are served better if we figure out, you know,
5 where is the meat here and not the potatoes. Let's get
6 to the meat.
7 MR. WAGNER: Your Honor, I think it's all
8 potatoes. From my client's perspective, it's all
9 potatoes. Now, they have got the culpable parties
10 already. They got the Heritage Hospital --
11 THE COURT: We're in a motion to dismiss. Maybe
12 it is all potatoes. You're not going to get an
13 all-potato finding at a motion-to-dismiss stage. Let's
14 just put it that way. It isn't going to happen. You
15 know, it just doesn't happen that way.
16 Now, maybe in summary judgment you might get it,
17 but you're not going to get it here. Some things are
18 going to survive here, it's obvious. So, I mean, let's
19 not kid ourselves.
20 MR. WAGNER: And I think it's fair that there be
21 two or three counts that survive, but I think when you
22 look at this deeply, the vast majority of these counts
23 should be dismissed.
24 THE COURT: Okay. You're not helping me too
25 much.

1 MR. McGOWAN: Your Honor, if I may, just one
2 straightforward way of dealing with the paring back of
3 the complaint is to, again, kind of embrace the
4 critically important question about, is it an ERISA
5 plan and when did it become an ERISA plan? Because a
6 lot of things fall logically one side or the other once
7 we --
8 THE COURT: And maybe that is exactly what
9 should happen. Maybe discovery should go forward on
10 that point alone, and we should decide that question
11 and then see what's left of the case. That's a helpful
12 discussion.
13 All right. Mr. Merten.
14 MR. MERTEN: Your Honor, I don't mean to burden
15 an already very busy court, but I actually would
16 suggest to you, as perhaps untasteful as it might be,
17 that the best way to clarify this is to weed some of
18 these claims out because some of these claims simply
19 aren't tenable. And you've got a lot of briefing on
20 that and I know it's a big, huge hurdle, but part of
21 the reason that there's so many grounds for dismissal
22 is because the plaintiffs filed a 163-page complaint
23 that's ripe with -- you've heard it from two defendants
24 and I'm going to talk about it a little bit today as
25 well because I think it's particularly pertinent to the

1 three defendants that we represent -- that it's filled
2 with conclusory and vague and group allegations to the
3 point where this Court can't discern what's being said
4 against who.
5 And to reward the plaintiff for that by saying,
6 well, 160 pages, however many counts, 20-something
7 counts, you know, let's get to the meat of it, from our
8 client's perspective, that's what these motions are all
9 about because there are some things that are in this
10 complaint that the Court shouldn't bother with. And
11 I'll jump ahead, and I wasn't going to spend a lot of
12 time talking about this, but it's pertinent to your
13 Honor's point, which is there are claims that go back
14 to representations made allegedly by some of the
15 Diocesan defendants from 1973 and 1978 and 1995 that
16 they are alleging is somehow a fraud or a
17 misrepresentation but that somehow stays alive because
18 we didn't correct them decades later.
19 There are claims -- and I spent a lot of time in
20 this and I think your Honor can and I'm not going to
21 repeat all the reasons why I think you can. There are
22 claims that predate 2008 and 2009 where there was a
23 cataclysmic economic disaster that took this plan from
24 an adequately funded plan based on documents -- and you
25 can confirm that -- based on documents that the

1 plaintiffs cite in their own complaint that showed that
2 the assets of this plan went in 2006 and 2007 and 2008
3 where it was adequately funded and the assets exceeded
4 the accrued liabilities, it went from 114 million to 78
5 million. It lost 30 percent of its value. And that's
6 why it became underfunded as a matter of fact. That's
7 ten years ago.
8 Take all of those claims and say we're not going
9 to look at those claims. If the documents you cite
10 show the Court that this plan was adequately funded as
11 of 2008 and 2009, let's get rid of them; those are
12 potatoes. Allegations about 1973 and 1995, bad
13 potatoes, rotten potatoes. They're just too old, and
14 they're not relevant to what's going on here.
15 But the other piece of this, your Honor, I think
16 that's critical, is I think you do have to hold the
17 plaintiffs to the pleading standards that would make a
18 lot of these problems go away. And I'll go back, your
19 Honor, to the question you asked my colleague right
20 before -- in the morning right before he sat down
21 because I think it actually is a great jumping-off
22 point for why you have to do some work here. And I
23 apologize.
24 But you asked Mr. Kessimian, does the Diocesan
25 have an opinion as to whether or not this is a church

1 plan? That's something of a reasonable question for
2 somebody who is coming to this fresh, but I assume your
3 Honor has read the 163-page complaint and yet you don't
4 know, I assumed based on that answer, what the role of
5 the three Diocesan defendants were with respect to this
6 plan.
7 And the reason for that is because it's not set
8 forth in the complaint, and it has to be. It has to be
9 set forth in the complaint with particularity. You
10 can't just say, as the plaintiff says over and over and
11 over again, the Roman Catholic Bishop, the Diocesan
12 Administrator Corporation and the Diocesan Service
13 Corporation did this. That doesn't tell us -- and they
14 do that for every statement. What happened here is
15 that the original complaint said the, quote/unquote,
16 Diocesan defendants did this, did that, did this and we
17 filed a motion to dismiss saying you can't do that,
18 that's impermissible, clear as a bell impermissible;
19 you can't just group everybody together like that.
20 So what the plaintiff did was say instead of
21 saying Diocesan defendants, said Diocesan every time
22 RCB, DAC, DSC. So essentially, if you've taken logic,
23 they've said variable A equals variable B, C, D, but
24 that's all they've said. And it doesn't give any
25 information or elucidate what B, C, D might be.

1 And so you have to fix that kind of stuff
2 because the answer to your question depends on what the
3 roles are. And we're standing here saying what they're
4 describing in that complaint, if they had to spell out
5 particularly what the roles were of these three
6 defendants, would be a very different picture because
7 they didn't do any of the things that would allow us to
8 answer that question definitively.
9 And so, for example, you asked us do you have an
10 idea of whether or not this is a church plan or not? A
11 church plan is not the same as the church's plan. A
12 church plan is a legal term of art. It's a
13 determination that the Plan sponsor and the Plan
14 administrator make and then the IRS can review it.
15 The Diocese and the Diocesan defendants, in
16 particular, the three that are named, we're not the
17 church and we're not the Plan sponsor and we're not the
18 Plan's administrator. The complaint doesn't lay out
19 what roles these particular defendants had. The
20 complaint does, however, tell you that the Plan sponsor
21 and the Plan administrator was SJHSRI; that's who was
22 responsible for determining whether it was a church
23 plan or whether it wasn't a church plan.
24 You've heard the other defendants talk about,
25 you know, the problems with group pleadings. That

1 applies to the Diocesan defendants I like to think of
2 it times three, times three. Because to the extent
3 that there are vague and conclusory pleadings, it
4 applies to us times three because there are three
5 defendants.
6 What did each of those defendants do? You have
7 to know that to assess the legal viability of this
8 complaint. And if you don't know that, because it's
9 not set forth, that's a facial violation of Rule 9(b).
10 Times three again. That applies specifically to the
11 Diocesan defendants because the complaint makes clear
12 and affirmatively alleges that the role of these
13 Diocesan defendants changed over time with respect to
14 this plan and with respect to St. Joseph.
15 And it did so in three key ways. So it starts
16 in 1965 the Plan. In 1995, the complaint alleges that
17 the SJHSRI plan broke off from the Diocesan employee
18 plan so one significant change in the roles. What are
19 those roles and what is the impact of that? It's not
20 set forth in the complaint.
21 2009, there's a sale to CharterCARE. And with
22 the sale to CharterCARE, the role of the Diocesan
23 defendants changes dramatically. There's an allegation
24 in the complaint that says that, how and what impact is
25 there on the Plan and the roles of the Plan. And then

1 in 2014 it changes again.
2 And the complaint never describes how those
3 changes affect what responsibilities each of those
4 three defendants have to the Plan. And the reason is,
5 because they can't because they don't have those
6 responsibilities because they're not the Plan sponsor
7 and they're not the Plan administrator, and they don't
8 make the judgments about whether or not this is a
9 church plan. So the Court needs to look at what is
10 exactly alleged against these three defendants and then
11 make determinations as to what their roles and
12 responsibilities are. And the Court can't simply do
13 that at this point.
14 So the complaint needs to be dismissed, and I
15 would submit the whole of it, at least with respect to
16 our clients, because the Court can't make those
17 determinations. And that's basic black letter law. If
18 you look at the complaint, you will see it says all
19 three defendants every time without any kind of
20 particularization. It's a fundamental problem in
21 trying to get to the meat as opposed to the potatoes,
22 your Honor.
23 I'll give you one other example of this which I
24 think illustrates how this has impact. And that's if
25 you look at the claim in Count Twenty-one, that the,

1 quote/unquote, Diocesan defendants -- I'm using
2 "Diocesan defendants" because it's easier to say than
3 the three names all together -- But when I say
4 "Diocesan defendants," I assure you if the Court looks
5 at the complaint, it's going to list all three.
6 Count Twenty-One alleges that the Diocesan
7 defendants somehow had fiduciary duties to this plan.
8 We pointed out in our original motion to dismiss that
9 the plaintiffs hadn't pled sufficient facts such as
10 Prospect has alleged, have argued, that establish the
11 duties, the special relationships, the facts that would
12 underpin a fiduciary duty claim.
13 And we made that argument, and I want to quote
14 for you the response in the opposition from the
15 plaintiffs. In the paragraph they wrote, it's on page
16 95 of their brief, it says, "The first amended
17 complaint sets forth extensive and specific allegations
18 whereby plaintiffs place trust and competence in the
19 Diocesan defendants which they breached causing
20 damages. This trust in confidence stems from decades
21 of communications to SJHSRI's employees and to Plan
22 participants through the Bishop assuring them that
23 their pensions were secure and their interests were
24 being protected by the Diocesan." That paragraph
25 doesn't cite the Court to a specific paragraph, not a

1 single one. It doesn't cite the Court to a specific
2 paragraph of the extensive and specific allegations
3 which would show that the plaintiffs placed trust and
4 confidence in there.
5 I would submit to the Court, there aren't any
6 and they haven't identified any. With the exception of
7 there two allegations of specific representations to
8 the Plan participants by something related to the
9 Diocese, they are from 1973 and they're from 1995 and
10 they're paragraphs 265 and 272.
11 And so the Court, I'm sorry, has to grapple with
12 the general and conclusory allegations because without
13 the setting, without the factual predicate for that
14 claim, and there's none pointed out in this response
15 and there's none in the complaint, the Court has to
16 dismiss that claim. How are we going to decide whether
17 it's meat or potatoes if the description of the food
18 isn't in the complaint? And that's where we are with
19 this case.
20 If I can, your Honor, I want to take a quick
21 look at -- now that I've said they haven't done what
22 they need to do, they have made some allegations
23 directed to the Diocesan defendants, all three of them,
24 about misrepresentations. And I think those same
25 failings apply. And I think if the Court needs to

1 answer the question of was it a church plan, wasn't it
2 a church plan and, more fundamental, I think the
3 correct question is what were the roles of the Diocesan
4 defendants here, if you look at those allegations, they
5 suffer from legal flaws.
6 I'm making this argument with the understanding
7 that the Court said can we shrink this down? I think
8 if you look at it and you want to shrink it down, this
9 is the way you have to do it. You have to look at what
10 the allegations are against the Diocesan defendants,
11 and you have to see if they are legally sustainable and
12 what exactly is said.
13 So I'll point you to -- there's three basic
14 allegations of misrepresentations against the Diocese,
15 and I think only three. One is representations I just
16 mentioned from 1973 and 1995 who were the Diocese,
17 presented a booklet. And in 1995 -- prior to 1995,
18 they sent out notices to retirees that basically told
19 them what they could expect as payments when they
20 retire. That's one.
21 The second one is a listing in the OCD which
22 gets back to the church plan issues which we talked
23 about very briefly.
24 And the third is two letters that were written
25 in the context of the 2014 transaction, not to the

1 plaintiffs, to the Vatican and to the HSC. And I think
2 since I mentioned them already, I'd like to start with
3 the specific allegations of representations to the
4 plaintiffs that I've already pointed out; that those
5 allegations are from 1973 and 1975. And those are in
6 paragraphs 265 and 272.
7 If the plaintiffs are going to sue my clients
8 alleging that they made false representations to Plan
9 participants, it's incumbent upon them under Rule 9(b)
10 to tell the Court what they are. And if they don't do
11 that, neither we, nor the Court, are in a position to
12 separate the meat from the potatoes and they haven't
13 done that. Those two specific allegations -- and I
14 think merely by saying the date of them, your Honor, I
15 think that's all you need to say to point out just how
16 ridiculous, sorry, those claims are with respect to
17 misrepresentations.
18 But it also goes beyond that with respect to
19 when you look at those allegations, the allegations
20 from 1995 are the letters that were sent that said
21 here's what you can expect to receive. And as my
22 brother from Angell pointed out in a footnote in one of
23 his briefs, it was the same form -- essentially the
24 same form that the receiver used after he took over the
25 plan. It's just a standard form.

1 Beyond that, your Honor, 1995 and 1973, there's
2 no allegations whatsoever that those statements were
3 false when made. In 1973 and 1995, there's no
4 allegation that the Plan was underfunded. If anything,
5 the Court has before it actuarial reports cited in the
6 complaint that show that it was adequately funded in
7 2006 and 2007.
8 We've submitted to the Court, and we think the
9 Court can rely on it and we briefed why and how, the
10 actuarial reports which are on the receiver's website
11 from 2003, 2004, 2005 that also show that the Plan's
12 assets exceeded the Plan's accrued liabilities all
13 those years. It's only after the Great Recession.
14 And so if that's the factual predicate and there
15 is no allegation whatsoever that the claim was
16 underfunded or that there was no intent to fund the
17 Plan in '73 and '95, that's stuff that the Court should
18 clear out. It's just not sufficient to establish a
19 fraud claim. So that's with respect to that one, your
20 Honor.
21 The other two, the letters to the Vatican and
22 the HSC, they're basically -- that and the OCD listing,
23 both of them are alleged to be part of this conspiracy
24 where we agreed to a quid pro quo to allow the
25 transaction to go forward. To the extent that they

1 needed us to agree to an unlawful act, the unlawful
2 acts they pointed to are those two things, the letters
3 and the listing in the OCD.
4 THE COURT: What's the OCD, remind me?
5 MR. MERTEN: It's the Official Catholic
6 Director. All right. I'll finish with that one, your
7 Honor.
8 The letters, I urge the Court to read them.
9 They are like the most bizarre conspiratorial letter
10 you ever want to see. The letter is written to the
11 HSC, the Health Services Council, which had a role in
12 the approval of this transaction and to the Vatican to
13 help approve -- they asked for approval to sell assets
14 that were consecrated and that the church controlled by
15 an annual report -- I mean, articles of incorporation.
16 That letters say flatly that the pension system
17 is at significant risk. The plaintiffs quibbled about
18 whether significant risk was a strong enough adjective
19 and whether we should have used in an earlier version
20 gaping and spiralling. That's not a fraud claim. The
21 fact that the Bishop wrote to the HSC and put them on
22 notice that there was a significant risk to the pension
23 and uses the phrase "catastrophic loss," that's one of
24 the things that they say hooks us into the conspiracy,
25 a letter from the Bishop -- and was somehow fraudulent

1 -- a letter from the Bishop that says that and is
2 written to the experts that are reviewing this
3 transaction, the accountants, the lawyers and the
4 people from the Attorneys General, that's going to
5 trick them into approving this.
6 And I urge the Court to look at it and look at
7 it in the context of whether it's opinion, whether it's
8 a statement of -- and the letter actually used I
9 believe this transaction could help reduce a
10 significant risk. I believe. And it appears to be.
11 It's statements of opinion. And they're just not the
12 kind of thing that a fraud claim can be based on.
13 And finally, the third thing that they mention
14 is listing in the OCD. And the Court asked what it
15 was, and let me back up a little bit. The Official
16 Catholic Directory is essentially a publication that
17 the Catholic Church puts together where they declare
18 these are the entities that we, the Catholic Church,
19 say have some connection or association with us.
20 And that language, some connection or
21 association with us, comes from the IRS code Section
22 414(c) and also from standards that are issued by the
23 U.S. Conference of Catholic Bishops which is an exhibit
24 to our motion. And so what that does is that qualifies
25 somebody for consideration by the IRS for the group

1 exemption to the Catholic Church as a public charity.
2 That's a critical distinction, your Honor,
3 because the OCD -- and it's conflicted, look at the
4 complaint -- plaintiffs tried to conflate listing in
5 the OCD with whether or not it's a church plan. And
6 some of the tests overlap, but it's not the same test
7 and it's not the same determination. And so the
8 plaintiffs allege that the listing in the OCD was
9 somehow fraudulent because there was no association,
10 there was no connection, it didn't qualify.
11 And there's a number of problems with that, your
12 Honor, a number of significant problems with it. One
13 is that the complaint itself sets forth connections
14 between the Catholic Church and St. Joseph's. So the
15 argument is, after 2014 there's no connection. And so
16 if there's no connection, you can't put it in the
17 Official Catholic Directory. And the test is whether
18 or not it's associated with -- look at the reg and look
19 at the USCCB standards.
20 The complaint alleges that there are, in fact,
21 connections and it says in paragraphs 88, 150 and 151,
22 it references those connections. In paragraph 88, it
23 mentions that upon conclusion of the 2014 sale, the
24 only rights the Dioceses had, meaning the Dioceses had
25 rights, the only rights the Dioceses had concerning the

1 the Catholicity of St. Joe's operation of the hospital
2 and the provision of its health care. And in
3 paragraphs 150 and 151, it mentions the church's
4 historical authority to enforce Catholicity and
5 associated controls.
6 So it references those, your Honor, because in
7 2009 through 2014 and beyond, the Roman Catholic Bishop
8 of Providence was a Class B shareholder in SJHSRI. And
9 we attached these articles of incorporation to our
10 motion, and we cited to the Court the authority that
11 allows the Court to look at articles of incorporation
12 filed with the Secretary of State that allowed you to
13 look at that.
14 And those articles of incorporation are still in
15 effect. They haven't been revoked. And there's no
16 allegation in the complaint that they've been replaced.
17 And those articles of incorporation establish they were
18 Class B shareholders still, and they also set forth
19 various authorities including the ability to revoke or
20 reject sales of assets, changes in the mission
21 statement and the like.
22 So the plaintiffs' argument is not that there
23 isn't any connection, because I think they have to
24 concede that there is a connection. What they're
25 claiming is, there's not a meaningful connection. And

1 they actually use that word in one of the paragraphs
2 that I cited, I don't remember which one it is, that it
3 wasn't a meaningful connection.
4 First, there's no requirement whether or not
5 it's meaningful. Second, being a Class B shareholder
6 and having rights that can still be invoked including,
7 for example, not allowing St. Joseph's to take the
8 money that they had and shift it to an abortion clinic,
9 they have veto power over that. And third, in the
10 *Overall* case, which we cited to the Court, the Court
11 deciding whether or not the Bishops's determination
12 about whether an association is meaningful or not,
13 crosses the line in terms of constitutional intrusion
14 and limitations.
15 And I won't go through that argument unless the
16 Court wants me to, but it's cited in *Overall* and we
17 track that. And we also track -- the *Overall* case was
18 another case about whether or not something was a
19 church plan and the impact of that church plan status.
20 And they discussed what the connections and
21 associations were that warranted a finding that it was
22 connected. And the things that it cited are the things
23 I've already talked about, one of which I didn't.
24 The hospital was originally created by a
25 religious order. That happened here. It's called St.

1 Joseph's. It's not Acme Health Services. It's a
2 Catholic institution. Members of the church sit on the
3 board. You've already heard that there's a member of
4 the clergy that sits on the board. Has power to
5 oversee compliance with Catholic teachings. That's
6 there both as referenced in the complaint, and it's
7 referenced in the articles of incorporation. So if you
8 go track those indicia, and there's no question that
9 it's appropriate to list it.
10 So those are the three things, the
11 constellations of things that they mention that the
12 Catholic defendants, the Diocesan defendants, have done
13 here. And the Court should I think, because the Court
14 is right that it needs to get to the meat and not the
15 potatoes. And I think a little investment by the Court
16 on the front-end will actually be the quickest and most
17 effective way to do that because then we'll know what
18 we're really dealing with.
19 Because what we're really dealing with isn't
20 what you might get the impression of if you just read
21 the complaint without paying attention to some of the
22 details that have been pointed out here.
23 Then you get to the conspiracy claim. We've
24 spent a fair amount of time, your Honor, pointing to
25 why the conspiracy claim makes no sense and is not

1 plausible. The big picture is, every single fact that
2 they say was somehow concealed from the regulators, and
3 that's the conspiracy, were actually revealed to the
4 regulators. And we document that item by item, alleged
5 misrepresentation by alleged misrepresentation.
6 Everything was submitted including the fact that this
7 was characterized as a church plan, including the fact
8 that the pension was underfunded, by how much the
9 pension was underfunded in financial statements
10 including by how much it was funded in financial
11 statements, that kind of conspiracy, including a letter
12 from the Bishop where he writes and says the pension
13 plan is at significant risk, the idea that you're going
14 to make a pitch to a regulator filled with accountants
15 and attorneys and people from the Attorneys General and
16 health care specialists to trick them into doing this
17 is not plausible, it's just not plausible. And if the
18 Court deals with the underlying facts and gets the
19 allegations to be more specific, that shape is going to
20 be separated out from the weeds, your Honor.
21 And for that reason I urge the Court -- I know
22 it's a burden -- to actually look at these allegations
23 and that's the best way to get the Court where it wants
24 to be. Because if we don't do that, we're going to be
25 dealing with these issues in discovery. We're going to

1 do discovery back to 1973? We'll be dealing with it in
2 depositions and in other motions. And it should be
3 cleared up now because they're just that deficient.
4 THE COURT: Okay. Thank you, Mr. Merten.
5 Five minutes.
6 COURTROOM DEPUTY: All rise.
7 (Recess taken)
8 MR. SHEEHAN: Thank you, your Honor. Your
9 Honor, I'm here to address 150 pages of reply memos and
10 over an hour and a half of argument by my brothers.
11 THE COURT: Don't feel obligated to --
12 MR. SHEEHAN: I'm asking for time, not to be let
13 off the hook. Thank you, your Honor.
14 THE COURT: So how about -- you know, you filed
15 all the briefs. I have all the briefs. I've read as
16 much of them as I can. I'm not going to say I've read
17 everything. But I want you to start with where I tried
18 to get the others to go, and they didn't really want to
19 go there.
20 But there's got to be a way to get this case
21 narrowed down in some reasonable fashion so that you
22 can get to the heart of the matter and figure out is
23 there really something to this? And I appreciate the
24 arguments that you made and I appreciate what
25 Mr. Merten is asking for, but the flipside of that is

1 that it's going to take a lot of time to do that and I
2 don't think you want that. I mean, of course, you want
3 me just to deny the motion wholesale, but I don't think
4 I can do that. So why don't you talk about that.
5 MR. SHEEHAN: Okay. Your Honor, I want to start
6 first with Mr. Godofsky's calm assurance to the Court
7 that there is PBGC coverage because that relates to
8 what I'm about to propose.
9 In our memos, we explain all the reasons why
10 their receiver's election by no means assures coverage
11 for any of the losses in this case. Your Honor, if one
12 has a house that burns down and one goes to an
13 insurance company and buys insurance, one has coverage
14 against fire but not for the loss that just took place.
15 You don't have a loss and then go buy insurance, which
16 is what the defendants construe the receiver's election
17 to be.
18 After 20 years of losses under the Plan, I'll
19 pay one premium and now it's covered. You don't get
20 insurance that way, and there's no law that says the
21 PBGC functions any other than an insurance company; in
22 other words, there's no assurance that they pay for
23 deficits that are already in existence at the time the
24 premium is paid. There's a five-year period in the
25 statute that limits them from coming in at all to cover

1 any benefits.
2 So here's my proposal. My brothers are so sure
3 about the situation. If they could give us a properly
4 secured guaranty that the PBGC will cover the benefits
5 that are due these Plan participants, we'll dismiss the
6 case. Boom, it's over.
7 Now, if they're not prepared to do that, your
8 Honor, my suggestion to your Honor is that your Honor
9 not even decide the motions to dismiss. They have no
10 right to have those decided prior to trial. They are
11 usually done, but in this case I don't think it's
12 appropriate.
13 Mr. Merten's suggestion that the Court pare
14 allegations is completely contrary to the law under
15 12(b)(6) which deals with dismissing counts in
16 complaints. And I'm going to cite four or five cases
17 that say the district court is not to pare allegations
18 from the complaint on the basis of whether this
19 particular allegation is legally cognizable. It's just
20 not the exercise.
21 Under Rule 56, there's the provision in the rule
22 that if the Court doesn't grant summary judgment, the
23 Court nevertheless may decide certain issues. But Rule
24 12(b)(6) is limited to one thing; have you stated a
25 claim? And we haven't stated separate claims against

1 the Bishop pre-2008 for fraud and post-2008 for fraud.
2 We have one claim for fraud. So you don't go back and
3 cut away earlier allegations on some notion that, oh,
4 they're too remote; in other words, the Court under
5 12(b)(6) doesn't dismiss allegations. That's the law.
6 Now, if I may proceed, your Honor. The
7 plausibility issue in the specific context of the facts
8 of this case, is it plausible that we're entitled to
9 relief? What is that specific context? A large part
10 of it is undisputed. We have a sale of all operating
11 assets by the Plan sponsor. We have transfer of assets
12 to related entities, 15 percent to CCCB. We have
13 transfer of $8.2 million by the Plan sponsor to a
14 foundation controlled by its shareholder. We have the
15 allegation in the complaint that there was no notice to
16 the Plan participants that the plan was underfunded,
17 that Prospect was not accepting liability and that St.
18 Joseph's assets were insufficient to fund the Plan.
19 The Plan participants were not told that.
20 And we've put into evidence many, many documents
21 in which that information should have been there and
22 isn't and my brothers, who burden the Court with scores
23 of extraneous documents to the pleadings, have brought
24 forth not a single document in which any Plan
25 participant was notified of any of that. So that's the

1 context you look at.
2 And then we look at the continued listing of St.
3 Joseph's in the Catholic Directory after 2014. What we
4 have there is the Catholic Church consenting to list in
5 its directory a shell corporation whose only function
6 was to administer a pension plan. Now, the facts that
7 are undisputed is this: Separating plan assets from
8 the liability -- I'm sorry, separating corporate assets
9 of St. Joseph's from liability of the Plan participants
10 conferred a benefit. It conferred a benefit on St.
11 Joseph's related entity, St. Joseph's, Prospect,
12 because they got the assets without the liability. It
13 conferred a benefit on the Providence Diocese and each
14 of the Diocesan defendants. And this is the benefit.
15 They wanted a Catholic hospital that was
16 solvent, that wouldn't have any risk of going through a
17 bankruptcy. And if it goes through a bankruptcy and
18 it's bought in a bankruptcy, it doesn't come out as St.
19 Joseph's, it comes out as whoever the purchaser wants
20 it to be. And there are no Catholic ethical practices
21 binding on that entity when it goes through a
22 bankruptcy.
23 And the church didn't want that. They wanted to
24 maintain their restrictions on contraception and
25 abortion rights, etc., and the way they were going to

1 get it in perpetuity was to get rid of something that
2 was very inconvenient, which was the Plan participants.
3 Now, the only individuals that suffered in
4 connection with this asset sale were the Plan
5 participants, and their suffering was necessary for the
6 others to benefit. That's the undisputed factual
7 background. That's where we start. And then we have
8 the specific allegations in the complaint of who did
9 what to whom. And that's what the plausibility
10 analysis is based on. And I submit that common sense
11 is that what happened here was an enormous wrong, and
12 the specific allegations in the complaint are a very
13 plausible explanation of who did what to whom to
14 explain how that wrong happened.
15 Now, in addition to that being the specific
16 factual context, the defendants have a huge hole in
17 their motions to dismiss that is also part of the
18 factual context, and that is, as a matter of tactics,
19 they've chosen not to dispute any of the allegations in
20 the complaint against the settling defendants, the
21 Heritage Hospitals. They don't dispute any of it.
22 Now, we don't have an obligation as a nonmovant
23 to rebut arguments they don't make. And it's very key
24 because those allegations have a dual purpose. They
25 establish liability of the Heritage Hospitals. They

1 are also predicates, predicates of liability of the
2 other defendants for most of plaintiffs' causes of
3 action. And those predicates have not been disputed.
4 And I'm going to expand on that if I may, your Honor.
5 St. Joseph's debtor status, they don't dispute
6 that, that St. Joseph's owes an obligation on the Plan
7 either under state law or ERISA. The debtor status is
8 a predicate for the fraudulent transfer claims against
9 Prospect. They don't dispute that St. Joseph's
10 breached its fiduciary duties. That's a predicate both
11 for aiding and abetting a breach of fiduciary duty
12 under Count Three under ERISA and for aiding and
13 abetting a breach of fiduciary duty under state law.
14 They don't dispute that St. Joseph's made
15 fraudulent misrepresentations to the Plan participants.
16 Now, that's key, your Honor, because for purposes of
17 conspiracy, one needs an underlying tort, but only one
18 member of the conspiracy needs to have committed it.
19 It becomes the obligation of the entire group. So
20 they've admitted the underlying tort took place,
21 conspiracy claims against all of them -- or rather
22 they've chosen not to contest it which, for purposes of
23 a motion to dismiss, is the same thing.
24 Now, when we come to the ERISA claims, the only
25 dispute they have with respect to St. Joseph's is this

1 question of whether there was a connection between St.
2 Joseph's and the church. That's a factual issue, and
3 we've provided the Court with all of the *Lown* factors
4 that go into what the Court looks at to determine if
5 there really is a connection. That can't be decided on
6 the motion to dismiss.
7 So here we are on a motion to dismiss, and St.
8 Joseph's liability under ERISA is also established for
9 purposes of plaintiffs' ERISA claims. And with that
10 comes Count One, duty to make contributions. And with
11 duty to make contributions comes the claim for
12 successor liability against Prospect under ERISA. And
13 with that comes the obligation under Count Three of a
14 fiduciary duty under ERISA.
15 And we allege specifically what St. Joseph's
16 breached its fiduciary duty as follows: Misrepresented
17 the funding status and security of the Plan; failed to
18 fund the Plan; failed to demand that others fund the
19 Plan; failed to administer the Plan in the best
20 interests of beneficiaries; failed to act honestly and
21 loyally; and failed to act in good faith in the best
22 interest of the Plan and its Plan participants and with
23 the necessary level of care.
24 All of those allegations are undisputed. And
25 that's where we find ourselves right now. For example,

1 on the aiding and abetting count, it leaves only two
2 issues: Did the defendants aid and abet? And the
3 second issue on the ERISA part is, are they proper
4 defendants under ERISA for purposes of this appropriate
5 equitable remedies?
6 On the first issue of how they aided and
7 abetted, they worked closely with St. Joseph's in all
8 of the acts that we allege constituted breaches of
9 fiduciary duty. Prospect was essential to facilitating
10 the transfer of these assets without notice being given
11 to the Plan participants of this liability. They
12 suggest that they didn't deal directly with Plan
13 participants.
14 That's false. They dealt with them directly in
15 July of 2014. They dealt with them directly again in
16 April of 2016. And they never disclosed what was going
17 on, and they knew what was going on. They knew St.
18 Joseph's wasn't funding the Plan, but they told Plan
19 participants in 2016 that the hospital is funding the
20 Plan.
21 The second question under ERISA is, do
22 plaintiffs have an equitable remedy? And my brothers
23 spent a lot of time in their memos talking about that.
24 What they failed to note is on a motion to dismiss, the
25 availability of ethical remedies is premature. It's a

1 maximum of equity that if a court in equity finds a
2 wrong, it will find a remedy.
3 We won't know until the end of the case what
4 plaintiffs' equitable remedies may be, and that's why
5 the case law is uniform that on a motion to dismiss the
6 availability of equitable remedies is not grounds that
7 the Court should consider because it's premature.
8 There's *Kauffman v. General Electric*, 2015 WL 3562577,
9 E.D. Wisconsin, 2015. And it states, "The Court seeks
10 such other relief as may be appropriate which is a
11 sufficient request for equitable relief under Section
12 1182(a)(3) at the motion to dismiss stage."
13 There is *Kaliebe v. Parmalat*, 2003 WL 22282379,
14 Northern District of Illinois, 2003. "Appropriateness
15 of equitable relief is a fact-intensive inquiry." And
16 then there's *Hirata v. IDA*, 2010 WL 2179812, District
17 of Hawaii, 2010. Quote, "In this Court's view,
18 dismissing Count Two on the grounds that no appropriate
19 equitable relief is available would require a finding
20 that there is no possible set of facts under which the
21 Court could fashion equitable relief under ERISA. The
22 Court is not willing to make such a finding at this
23 time."
24 And then finally *George v. CNH*, 2017 WL 2241513,
25 E.D. Wisconsin, 2017. "The Court cannot state with

1 certainty the ultimate nature of plaintiff's injuries
2 or the appropriateness of any particular remedy at this
3 time." And it's on that basis the Court denied the
4 motion to dismiss.
5 My brothers continue to criticize plaintiffs for
6 pleading in the alternative. They actually called what
7 the plaintiffs are doing artful pleading. They use
8 that term in their reply memos. That's a term from the
9 law of removal jurisdiction, and it says that plaintiff
10 in a state court complaint cannot conceal a federal
11 cause of action through artful pleading and then
12 thereby avoid removal. It has nothing to do with
13 alternative pleading.
14 THE COURT: If I understand what you're doing
15 and what the possibilities are at a very high level, it
16 seems like it's this: Either the Plan is a church plan
17 and continued to be a church plan up until the election
18 in 2017, in which case, some of your ERISA causes of
19 action fall by the wayside; or the Plan was an ERISA
20 plan all along and some of your state law causes of
21 action then fall by the wayside.
22 MR. SHEEHAN: Some.
23 THE COURT: Or the Plan was a church plan up to
24 a certain point in time and then it became an ERISA
25 plan. So you have causes of action that relate to the

1 time period when it was a church plan, and you have
2 causes of action that relate to when it became an ERISA
3 plan. And there might be a period of time when it's
4 really unclear what it was, but it has to be one or the
5 other; it can't be anything else. So maybe there's a
6 little bit of overlap.
7 So that's basically it, right?
8 MR. SHEEHAN: Right.
9 THE COURT: Wouldn't it make sense to get a
10 decision on that question?
11 MR. SHEEHAN: Your Honor, to go through an
12 entire round of depositions devoted to one set of
13 issues, brief all of those issues, submit them to your
14 Honor for motions for summary judgment, is just going
15 to delay this case, your Honor, and leave the parties
16 to our own devices, your Honor. It's not going to be
17 an imposition on the Court. I'm suggesting the Court
18 not even decide the motions to dismiss. Let the
19 parties litigate.
20 THE COURT: Well, maybe that's an alternative
21 approach that could work, but there's going to be a lot
22 of complaints from the other side about -- you heard
23 what Mr. Merten said, you know, we're going to be doing
24 depositions about what was said to the Plan members in
25 1973 and 1975. Well, you know, I think that's a

1 legitimate complaint. I mean, if discovery is going to
2 be so broad and deep that they're going to be required
3 to do the kind of document production to satisfy those
4 kinds of requests, well, you know, that's a huge
5 burden, and I think they've got a right to at least ask
6 and get a decision -- maybe it won't be the decision
7 they want, but to get a decision on whether that count
8 or those allegations really make out a cause of action.
9 MR. SHEEHAN: Your Honor, they do have that
10 right, but they don't have it under Rule 12(b)(6).
11 They have the right to move to strike matters that are
12 immaterial and impertinent. And that's what Mr. Merten
13 is saying; it's immaterial and impertinent what
14 happened in '73 and '75 and '95. Let him file his
15 motion to strike and let him be aware that: First,
16 motions to strike are disfavored; and secondly, your
17 Honor, the standard on a motion to strike, if I may say
18 so --
19 THE COURT: Well, I don't know that we can
20 debate -- you know, maybe that's the vehicle, maybe
21 not. I think this may be a perfectly appropriate
22 vehicle to deal with that, but you're missing the
23 point. The point is, if you can -- if discovery can be
24 done in a manageable way that still allows you to
25 pursue all of the causes of action as you're

1 suggesting, you know, that that would be more efficient
2 than getting an early summary judgment decision on if
3 and when it was an ERISA plan, okay, let me grant you
4 that for a moment. If that's how we're going to
5 proceed, I think the defendants have a reasonable
6 suggestion that it ought to be done in a manageable and
7 reasonable way.
8 MR. SHEEHAN: Your Honor, that's why I'm really
9 quite seriously pointing out that under Rule 12(b)(6),
10 the law is the Court does not prune the complaint which
11 is what Mr. Merten is asking. And instead, those
12 issues are directed under motions to strike. And let
13 him make those motions.
14 And the standard there, your Honor -- and this
15 is very helpful because it shows that Mr. Merten is
16 just barking up the wrong tree or going down the wrong
17 path -- the standard is, it will not be granted these
18 impertinent, immaterial allegations about 1973 --
19 THE COURT: That's not what he's saying. He's
20 not saying these allegations are impertinent and
21 immaterial.
22 MR. SHEEHAN: Yes, he did. He's saying they're
23 not legally cognizable. That's what he's saying.
24 That's exactly the same thing.
25 Now, he has to even show it's possibly

1 prejudicial to them that they're alleged, that there's
2 no purpose or possible relationship in controversy. He
3 can't prove under a motion to strike what he's trying
4 to get the Court to do under 12(b)(6), that the Court
5 is not in a position to do since 12(b)(6) deals with
6 dismissal of claims, not dismissal of allegations. So
7 his desire to take an ax to the complaint doesn't work
8 in that respect.
9 THE COURT: Well, I'm the one who is going to
10 decide whether it's going to work or not, and I don't
11 think you're listening to me.
12 MR. SHEEHAN: All I can cite, your Honor, is the
13 case law that says that under 12(b)(6) the Court cannot
14 dismiss allegations. I can cite the Court to Second
15 Circuit, 1996, *Bernheim v. Litt*, 79 F.3d 318. And *In*
16 *Re Netopia, Inc. Securities Litigation*, 2005 WL
17 3445631, Northern District of California, 2015. "The
18 Court assumes that Federal Rule of Civil Procedure
19 12(b)(6) language 'failure to state a claim,' means the
20 rule should not be used on subparts of claim. A cause
21 of action either fails totally or remains in the
22 complaint under the rule."
23 And then, your Honor, *Ferrero v. New York City*,
24 215 WL 1476392 EDNY, 2015. Quote, "Allegations as such
25 are not properly subject to dismissal." That's all I

1 can do, your Honor. And those courts say instead move
2 under a motion to strike. He can do it. But that's
3 where it should be addressed, your Honor. He's not
4 only in the wrong rule, he's not applying the right
5 standard.
6 Now, on this issue of --
7 THE COURT: All right. Here's what we're going
8 to do: I'm going to give you some time to meet and
9 confer on a discovery plan that will allow for some
10 type of phase or reasonably organized discovery that
11 would allow the claims to move forward and discovery to
12 get started without my having to go through and try to
13 parse this complaint down at this point in response to
14 all these motions. I want to get a proposal from you
15 about how that's going to be done.
16 If you're unable to come up with a joint
17 proposal on how to do it, then you can submit your
18 respective proposals on how to do it. And I'll
19 consider those proposals, and then I'll decide how
20 we're going to go forward. I'm going to end the
21 argument now. I do want to say that there are a number
22 of motions that are pending that I'm going to, unless
23 you tell me why they shouldn't be dismissed, I think
24 they're all moot; 49, 50, 51, 52 and 54.
25 And all of those I think relate to claims that

1 were either in the first -- in the original complaint
2 or they relate to matters that are settled, okay.
3 MR. SHEEHAN: I believe your Honor is correct as
4 far as those claims go. Thank you, your Honor.
5 THE COURT: We're in recess.
6 COURTROOM DEPUTY: All rise.
7 (Time noted: 4:05 p.m.)
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2 **CERTIFICATION**

3 I certify that the foregoing is a correct transcript from the

4 record of proceedings in the above-entitled matter.

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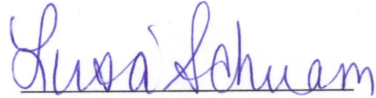
6 

7 Official Court Reporter September 26, 2019

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