UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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

PLAINTIFFS' MEMORANDUM CONCERNING MOOTNESS OF PENDING MOTIONS FOR SUMMARY JUDGMENT

At the Court's direction,[1] Plaintiffs Stephen Del Sesto (as Receiver and Administrator of the St. Joseph Health Services of Rhode Island Retirement Plan (the "Plan")) (the "Plan Receiver"), and Gail J. Major, Nancy Zompa, Ralph Bryden, Dorothy Willner, Caroll Short, Donna Boutelle, and Eugenia Levesque, individually as named plaintiffs (the "Individual Named Plaintiffs") and putative class representatives[2] (collectively "Plaintiffs") submit this memorandum to address why the pending motion and cross-motion for summary judgment granting declaratory relief should be dismissed

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[1] See July 20, 2021 Minute Entry:

> Minute Entry for proceedings held before District Judge William E. Smith: Fairness Hearing held on 7/20/2021: M. Wistow, S. Sheehan, B. Ledsham, P. Halperin, M. Russo, D. Godofsky, S. Boyajian, H. Merten, E. Bernardo, C. Fragomeni, C. Callaci. T. Hemmendinger. Arguments/ statements heard. Court addresses the parties. Plaintiff to submit a Proposed Order regarding Class Action, Approved Attorneys fees, etc. Remaining parties to file brief memos regarding pending Motion for Summary Judgment by August 31, 2021. Court to hold conference once received.

[2] The individual named plaintiffs have been certified as class representatives three times, in connection with each of the three settlements to date.

as moot as a result of the settlement (the "Prospect Settlement") between and among Plaintiffs, the Prospect Defendants,[3] and The Angell Pension Group, Inc. ("Angell").

SUMMARY OF THE ARGUMENT

To manage this case the Court ordered the parties then in the case to file summary judgment motions on the applicability of ERISA to the Plan, pursuant to stages in which Plaintiffs filed first, discovery was allowed on their motion, then Defendants were to file their motions and discovery would be allowed concerning those motions, and then the parties would brief the issues. The actual process took more than a year, but, as noted below, the only Defendants who actually filed motions for summary judgment were the Prospect Defendants.

Both Plaintiffs' motion for summary judgment and the Prospect Defendants' cross-motion for summary judgment were focused on establishing or (in the case of the cross-motion) rebutting one of the issues involved in Plaintiffs' claim against the Prospect Defendants under the federal common law of successor liability applicable to ERISA plans, specifically whether the Plan was subject to ERISA when the Prospect Defendants took over as successor to the Plan Sponsor St. Joseph Health Services of Rhode Island ("SJHSRI"). The Diocesan Defendants,[4] on the other hand, filed no motion for summary judgment notwithstanding the Court's order, and expressly took no

[3] Prospect Medical Holdings, Inc., Prospect East Holdings, Inc., Prospect Chartercare, LLC, Prospect Chartercare SJHSRI, LLC, and Prospect Chartercare RWMC, LLC.

[4] Defendants Roman Catholic Bishop of Providence, a corporation sole, Diocesan Administration Corporation, and Diocesan Service Corporation.

position on either Plaintiffs' or the Prospect Defendants' motions or on the larger issue of whether the Plan became subject to ERISA at any time.

Now, however, the Diocesan Defendants contend that the Court should decide the pending motions notwithstanding the Prospect Settlement and their own decision to stay out of the process. That request should be denied on the grounds of mootness, and even if the motions were not moot, the Court should exercise its discretion not to decide the motions.

Undoubtedly the pending motions contributed to the Prospect Settlement, which, in turn, greatly reduced the number of parties in this case. However, the Prospect Settlement also mooted the Prospect Defendants' cross-motion for summary judgment because the Prospect Defendants are no longer in the case and the Diocesan Defendants chose not to join in the motion. The Prospect Settlement also mooted Plaintiffs' motion for summary judgment because only the Prospect Defendants (and not the Diocesan Defendants) objected to Plaintiffs' motion for summary judgment and the Prospect Defendants are no longer in the case to press their objections.

In addition to eliminating the requisite adversity among the (remaining) litigants, the Prospect Settlement eliminated the clear connection between the dueling claims for declaratory relief and Plaintiffs' claims for damages. Prior to the Prospect Settlement that connection was Plaintiffs' claim that the Prospect Defendants had successor liability. However, notwithstanding the thousands of pages of memoranda and factual submissions in connection with these motions, none of the parties addressed the impact, if any, that the grant or denial of the declaratory relief that either Plaintiffs or the Prospect Defendants were seeking would have on Plaintiffs' claims against the

Diocesan Defendants. As a result, the Court cannot determine what effect its decision will have on the remaining parties or what useful purpose would be achieved in deciding the motions.

Adversity between the litigants with respect to the subject of the declaratory judgment is necessary under the Article III requirement of a "case or controversy" in the context of declaratory judgments. It is also required under the limitation in the Declaratory Judgment Act limiting the declaratory judgment to a "case of actual controversy." Finally, the lack of a clear connection between the issues involved in the pending motions and Plaintiffs' claims against the remaining defendants negates the practical benefit of a declaratory judgment and should lead the Court to exercise its discretion to deny declaratory relief at this juncture.

In addition to offering no obvious practical benefit, the Diocesan Defendants' insistence on the resolution of the pending motions is completely contrary to their refusal to take any position and will further delay and add unnecessary complexity to an already complex case. This case was filed over three years ago and has yet to be answered by the Diocesan Defendants.

The Diocesan Defendants' request that the Court decide the motions would also lead to many anomalous situations. For example, is the Court expected to consider the Prospect Defendants' arguments notwithstanding they are no longer in the case to press them? Is the Court expected to consider Plaintiffs' arguments notwithstanding that Plaintiffs' claims against the only Defendants who objected to the motion have been dismissed with prejudice as a condition of the Prospect Settlement? How is oral

argument to proceed?[5] How can there be an "argument" when none of the remaining parties oppose Plaintiffs' motion or join in the Prospect Defendants' cross-motion? The anomaly of the Diocesan Defendants' request and practical obstacles to accommodating it further support the Court's exercise of its discretion not to consider the pending motions for declaratory judgment at this time.

BACKGROUND

At the Fairness Hearing on Plaintiffs' settlement with Defendants SJHSRI, Roger Williams Hospital ("RWH"), and CharterCARE Community Board ("CCCB")[6] in the afternoon on September 10, 2019, counsel for the Prospect Defendants suggested the following:

> Your Honor, if I may, just one straightforward way of dealing with the paring back of the complaint is to, again, kind of embrace the critically important question about, is it an ERISA plan and when did it become an ERISA plan?

ECF # 169 (September 10, 2019 Fairness Hearing Transcript) at 40. The Court responded as follows:

> 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.

ECF # 169 (September 10, 2019 Fairness Hearing Transcript) at 40. Counsel for the

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[5] See ECF # 197 at 99 ("LR CV 7(C) REQUEST FOR ORAL ARGUMENT Pursuant to LR Cv 7(c), Plaintiffs respectfully request oral argument and estimate that two hours will be required.") and ECF # 202 at 59 ("LR CV 7(C) REQUEST FOR ORAL ARGUMENT Pursuant to LR Cv 7(c), Plaintiffs respectfully request oral argument and estimate that two hours will be required."). For a detailed discussion of the necessity of oral argument on these motions, see *infra* at 29-31.

[6] This was Plaintiffs' settlement with the Heritage Hospitals and holding company that sold their assets to the Prospect Defendants.

Diocesan Defendants took no position. Counsel for Plaintiffs expressed concern with that approach.[7] The Court then directed the parties to confer on a procedure to accomplish that result.[8]

None of the Defendants, including the Diocesan Defendants, had at that time (nor have they since) answered the First Amended Complaint. Instead, the parties agreed upon and filed with the Court their Stipulation and Proposed Order Concerning Limited Discovery and Related Discovery Motions (ECF # 170) which provided for limited discovery:

> 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.

The Court entered the stipulation and proposed order on October 29, 2019.[9]

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[7] See ECF # 169 (September 10, 2019 Fairness Hearing Transcript) at 71 ("MR. SHEEHAN: Your Honor, to go through an entire round of depositions devoted to one set of issues, brief all of those issues, submit them to your Honor for motions for summary judgment, is just going to delay this case…"

[8] See ECF # 169 (September 10, 2019 Fairness Hearing Transcript) at 71:

> THE COURT: All right. Here's what we're going to do: I'm going to give you some time to meet and confer on a discovery plan that will allow for some type of phase or reasonably organized discovery that would allow the claims to move forward and discovery to get started without my having to go through and try to parse this complaint down at this point in response to all these motions. I want to get a proposal from you about how that's going to be done.
>
> If you're unable to come up with a joint proposal on how to do it, then you can submit your respective proposals on how to do it. And I'll consider those proposals, and then I'll decide how we're going to go forward.

ECF # 169 (September 10, 2019 Fairness Hearing Transcript) at 71.

[9] See Docket Entry for October 29, 2019 ("TEXT ORDER entering [170] Stipulation and Proposed Order Concerning Limited Discovery and Related Summary Judgment Motion. Furthermore, based on the filing of the Stipulation, the Court hereby DENIES WITHOUT PREJUDICE [67] Motion to Dismiss for Failure to State a Claim, [68] Motion to Dismiss for Failure to State a Claim, and [70] Motion to Dismiss for Failure to State a Claim. To the extent that any party wishes to raise an issue asserted in the motions to dismiss, it may do so at a later time in the proceedings, as contemplated by the Stipulation. Furthermore, in

Pursuant to that stipulation and order, Plaintiffs immediately produced to all Defendants documents the Plan Receiver "received from all defendants and third parties pursuant to the turn-over order and/or subpoenas in the Receivership Proceeding." Stipulation and Proposed Order Concerning Limited Discovery and Related Discovery Motions (ECF # 170) ¶ 3(b).

Plaintiffs filed their Motion for Summary Judgment on Count IV of the Complaint (ECF # 173) on December 17, 2019. Count IV of Plaintiffs' First Amended Complaint states as follows:

> COUNT IV (ERISA, DECLARATORY RELIEF)
>
> 473. Plaintiffs repeat and reallege paragraphs 1-210.
>
> 474. 29 U.S.C. § 1132(a)(3), authorizes a fiduciary, participant or beneficiary to bring a civil action to: "(A) enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan."
>
> 475. As Administrator and Receiver of the Plan, the Receiver is a fiduciary entitled to relief under 29 U.S.C. § 1132(a)(3).
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> 476. Pursuant to this provision, 28 U.S.C. §§ 2201 and 2202, and Federal Rule of Civil Procedure 57, Plaintiffs seek declaratory relief that the Plan is not a Church Plan within the meaning of 29 U.S.C. § 1002(33), and is thus subject to the provisions of Title I and Title IV of ERISA.
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> WHEREFORE, Plaintiffs demand a declaratory judgment declaring that the Plan is not a Church Plan within the meaning of 29 U.S.C. § 1002(33), and is thus subject to the provisions of Title I and Title IV of ERISA.

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accordance with the schedule set forth by the parties, Plaintiffs' Motion for Summary Judgment as to Count IV shall be filed no earlier than November 29, 2019, and no later than December 29, 2019. The Defendants' responses and/or cross-motions for Summary Judgment will be due in accordance with the remainder of the schedule outlined in the Stipulation. So Ordered by Chief Judge William E. Smith on 10/29/2019.").

ECF # 160 at 144.

In their motion for summary judgment, Plaintiffs sought the following relief:

> The Court should enter an order declaring that by April 29, 2013 at the latest, the Plan was not a Church Plan within the meaning of 29 U.S.C. § 1002(33) and, therefore, was subject to ERISA.

ECF # 173 at 27. In their memorandum Plaintiffs made the following observation, to apprise the Court of the connection between the requested declaratory judgment and Plaintiffs' claims against the Prospect Defendants:

> Although not the subject of this motion, it is highly relevant for purposes of successor liability that more than a year prior to the 2014 Asset Sale, the Prospect Defendants and their ERISA counsel specifically requested and obtained and reviewed both this legal opinion and the Plan documents that unequivocally demonstrate that the requirement for a principal purpose organization was not adhered to, such that when the Prospect Defendants purchased the assets of SJHSRI they knew, or, at the very least, certainly should have known that the Plan did not qualify as a church plan, and, therefore, they were purchasing the assets of an entity (SJHSRI) that operated an ERISA Plan and that such entity was subject to (and in violation of) the minimum contribution requirements of ERISA.

ECF # 173 at 3 n.11.

Following the submission of Plaintiffs' motion for summary judgment, the parties engaged in discovery over a ninety-day period limited to the issue on which Plaintiffs' motion for a declaratory judgment was based: "whether the St. Joseph Health Services of Rhode Island Retirement Plan ('Plan'), St. Joseph Health Services of Rhode Island, or any other person or entity responsible therefore complied with the so-called 'principal purpose organization' requirement referenced in 29 U.S.C. § 1002(33)(C)(i) regarding church plans exempt from ERISA." ECF # 175 (Stipulation and Consent Order Concerning Limited Discovery and Related Summary Judgment Motions) ¶ 2.

On January 8, 2020, Plaintiffs and Angell entered into a stipulation which stated in pertinent part as follows:

> 2. Angell hereby stipulates and agrees that it will not object or assert any opposition to Plaintiffs' Motion either in writing or by argument, nor join in any objection or opposition to Plaintiffs' Motion asserted by the other Defendants;
>
> 3. Angell hereby stipulates and agrees that it will not file any cross-motions to Plaintiffs' Motion, nor join in any cross-motions filed by the other Defendants;

ECF # 170. As a result, Plaintiffs agreed that Angell need not respond to Plaintiffs' discovery requests on the limited issue of whether the Plan was subject to ERISA. ECF # 170. Consistent with this stipulation, Angell filed no responses to either Plaintiffs' motion for summary judgment or the Prospect Defendants' cross-motion.

On June 26, 2020, which was well after the conclusion of the initial ninety-day period for limited discovery, the Diocesan Defendants filed their Response and Reservation of Rights[10] Concerning Plaintiffs' Motion for Summary Judgment (ECF # 189). The Diocesan Defendants did not file their own cross-motion. In their submission the Diocesan Defendants stated as follows:

> First, the Diocesan Defendants state that they take no position concerning the only question posed in Plaintiffs' pending Motion: Whether the St. Joseph Health Services of Rhode Island Retirement Plan ("the Plan") became subject to ERISA by April 29, 2013 because of an alleged failure to meet any principal purpose organization requirement. The Diocesan

[10] The "reservation of rights" did not involve or represent the Diocesan Defendants taking a position on when the Plan became subject to ERISA. It merely concerned the Diocesan Defendants' disagreement with one of Plaintiffs' factual contentions concerning the Diocesan Defendants' state of mind. The Diocesan Defendants took the position that their state of mind was irrelevant to the motion for summary judgment but reserved the right to contest that assertion "at the appropriate time – which is not now." ECF # 169 at 2-3.

> Defendants strongly believe that a prompt resolution of this legal question will benefit the Court and the Parties.

ECF # 189 at 1.[11] Notably, the Diocesan Defendants did not question the adequacy of the discovery on the issue of when the Plan ceased to be a "church plan," contend that the existing discovery rendered them unable to take a position on that issue, or request (under Fed. R. Civ. P. 56(d) or otherwise) that the Court allow additional discovery to enable them to respond to Plaintiffs' motion for summary judgment.

Also on June 26, 2020, the Prospect Defendants filed their Objection to Plaintiffs' Motion for Summary Judgment on Count IV of the Complaint and Cross-Motion for Summary Judgment on Count IV of the Complaint (ECF # 193). The Prospect Defendants sought the following relief by their cross-motion:

> For all the foregoing reasons, the Prospect Defendants respectfully request that the Court enter summary judgment in their favor as to Count IV of Plaintiffs' Amended Complaint, in accordance with Federal Rule of Civil Procedure 56(c), finding that the Plan lost its church plan status on, and as of, December 15, 2014, but in any event no later than April 15, 2019.

ECF # 193 at 171. Thus, the Prospect Defendants took the position that the Plan remained exempt from ERISA until sometime between December 14, 2014 and April

[11] Although they expressly took "no position" on Plaintiffs' entitlement to the declaratory judgment Plaintiffs sought by their motion for summary judgment, the Diocesan Defendants did take exception to what they characterized as Plaintiffs' "irrelevant, false, and potentially prejudicial assertion" that:

> SJHSRI and the Diocesan Defendants were acutely aware of the requirement for a principal purpose organization, and what needed to be done to comply . . . . Although subjective intent is irrelevant to qualification for the church plan exemption, here we have a clear case of deliberate non-compliance with this statutory requirement.

ECF # 189 at 2 (quoting ECF # 173 at 3). The Diocesan Defendants asked the Court to "disregard this assertion and preserve everyone's rights to dispute it at the appropriate time – which is not now." ECF # 189 at 2-3.

19, 2019, which was at least six months after the Prospect Defendants acquired the assets of Defendants SJHSRI, RWH, and CCCB on June 20, 2014.

Following the filing of the Prospect Defendants' cross-motion for summary judgment, the parties conducted another ninety-day period of discovery "limited to the issues raised by their cross-motions in addition to the principal purpose issue." ECF # 175 (Stipulation and Consent Order Concerning Limited Discovery and Related Summary Judgment Motions) ¶ 5.

On September 1, 2020, Plaintiffs filed their reply memorandum which *inter alia* further explained the connection between the declaratory relief Plaintiffs were seeking and Plaintiffs' claim that the Prospect Defendants were liable under the federal common law doctrine of successor liability applicable to ERISA plans. Plaintiff stated as follows:

> Plaintiffs' claim that Prospect has successor liability for the Plan under ERISA is based upon Plaintiffs' claim that the Plan was already subject to ERISA when Prospect took over Fatima Hospital on June 20, 2014, thus, it does not matter whether church plan status was lost on July 1, 2011 or April 29, 2013, since even the latter date was over a year before Prospect took over Fatima Hospital. Plaintiffs contend that under the doctrine of successor liability applicable to ERISA plans, Prospect is liable for its failure to fund the Plan from that day forward.[7]
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> [footnote 7] See Einhorn v. M.L. Ruberton Const. Co., 632 F.3d 89, 99 (3d Cir. 2001) ("In sum, we hold that a purchaser of assets may be liable for a seller's delinquent ERISA fund contributions to vindicate important federal statutory policy where the buyer had notice of the liability prior to the sale and there exists sufficient evidence of continuity of operations between the buyer and seller."); Pension Benefit Guaranty Corporation v. Findlay Industries, Inc., 902 F.3d 597, 611-12 (6th Cir. 2018) (applying federal common law of successor liability for a single employer defined benefit plan). The fact that the Asset Purchase Agreement expressly provided Prospect would not have liability for the Plan does not shield it from the legal doctrine of successor liability if the other requirements for successor liability are satisfied. See, e.g., Sugartown Worldwide LLC v. Shanks, 150 F. Supp. 3d 470, 478 (E.D. Pa. 2015) ("As a matter of equity, we do not

> allow entities to succeed in this transparent attempt to avoid obligations.") (summary judgment of successor liability on guaranty where asset purchaser expressly assumed certain liabilities but expressly did not assume seller's liabilities for a guaranty to a third party).

ECF # 197 (Plaintiffs' Reply Memorandum) at 4 & 4 n.7.

On November 23, 2020, Plaintiffs filed Plaintiffs' Memorandum of Law in Opposition to the Prospect Entities' Cross-Motion for Summary Judgment on Count IV of the First Amended Complaint (ECF # 202), which requested that the Prospect Defendants' cross motion be denied. ECF # 202 at 58 ("Prospect's cross motion for summary judgment should be denied.").

On November 20, 2020, the Diocesan Defendants filed the Diocesan Defendants' Response to Prospect's Cross-Motion for Summary Judgment (ECF # 200). In their filing the Diocesan Defendants advised the Court as follows:

> The Diocesan Defendants take no position on whether St. Joseph Health Services of Rhode Island, Inc. ("SJHSRI") satisfied the principal purpose organization requirement under ERISA for Church Plans after 2010. They also take no position on how the Court should resolve the dispute between Plaintiffs and Prospect as to whether SJHSRI failed to meet the requirements for qualification of a Church Plan on or before April 29, 2013 (Plaintiffs' position) or on or after December 15, 2014 (Prospect's position).

ECF # 200 at 1.[12]

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[12] Although they also expressly took "no position on how the Court should resolve the dispute between Plaintiffs and Prospect as to whether SJHSRI failed to meet the requirements for qualification of a Church Plan on or before April 29, 2013 (Plaintiffs' position) or on or after December 15, 2014 (Prospect's position)" (ECF # 200 at 1), the Diocesan Defendants did file an 88 page submission entitled "Diocesan Defendants' Statement of Disputed Facts in Response to Prospect's Statement of Undisputed Facts" (ECF # 199) which offered a point-by-point rebuttal of many of the facts upon which the Prospect Defendants relied.

On December 8, 2020, the Diocesan Defendants filed the "Diocesan Defendants' Response to Plaintiffs' Response Prospect's Cross-Motion for Summary Judgment." ECF # 204. Once again, that submission did not take a position on the dispute between Plaintiffs and the Prospect Defendants concerning when the Plan ceased to be a church plan. That submission did take issue, however, with certain of Plaintiffs' factual statements and legal arguments, specifically concerning the Diocesan Defendants' "Knowledge and Actions", "SJHSRI's Association with a Church", and "SJHSRI's Tax-Exempt Status." ECF # 204 at 2-3. Contradicting their ostensible desire to have the Court decide the pending motions for summary judgment, the Diocesan Defendants asked the Court to refrain "on this record and without complete briefing" from addressing Plaintiffs' arguments on the tax-exempt status of SJHSRI. ECF # 204 at 3.

After the motion and cross-motion for summary judgment were fully briefed, but before the Court heard argument thereon, Plaintiffs, the Prospect Defendants and Angell entered into a settlement agreement that fully resolved all disputes between them in return for the payment of $30,000,000, subject to the approval of the Rhode Island Superior Court and this Court.

At the Fairness Hearing on the Prospect Settlement on July 20, 2021, the Court advised the parties that the Court would grant final approval to the proposed settlement. See ECF # 218 (Transcript of Hearing on July 20, 2021) at 42. The Court's order approving the settlement was entered on July 30, 2021. ECF # 217. Following the payment of the settlement funds, the action by Plaintiffs against the Prospect Defendants and Angell was dismissed, with prejudice (ECF # 220), pursuant to the

terms of the Settlement Agreement (ECF # 207-1 (Settlement Agreement) at 13-14 & 60-62).

At the conclusion of the Fairness Hearing on the Prospect Settlement on July 20, 2021, the Court inquired of counsel concerning how the case between Plaintiffs and the Diocesan Defendants would proceed, and an off-the-record discussion ensued.[13]

During that discussion, counsel for the Diocesan Defendants suggested that the Court should decide the motion and cross motion for summary judgment filed by Plaintiffs and the Prospect Defendants. However, counsel for Plaintiffs took the position that the motion and cross-motion had been mooted by the Prospect Settlement. The Court directed Plaintiffs and the Diocesan Defendants to submit memoranda on the issue of mootness. This is Plaintiffs' submission.

ARGUMENT

I. Plaintiffs' request for declaratory relief

Count IV of Plaintiffs' First Amended Complaint is expressly predicated upon 28 U.S.C. §§ 2201 & 2202. ECF # 193 at 144.

28 U.S.C. § 2201 states in pertinent part:

> In a case of actual controversy within its jurisdiction…, any court of the United States, upon the filing of an appropriate pleading, may declare the

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[13] See ECF # 218 (Transcript of Hearing on July 20, 2021) at 46:

> THE COURT: All right. So is there anything else before we sign off?
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> MR. WISTOW: I guess I have to give you some bad news. We may be back in front of you with the remaining defendants.
>
> THE COURT: Yes. I figured that we would be setting something up. Maybe we can go off the record for just a moment before we adjourn just so that we don't bother the court reporter with this, but what is your plan in terms of the rest of the case? (Off-the-record discussion).

ECF # 218 at 46.

> rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2202 states:

> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

II. The requirements for a declaratory judgment

A. Under Article III

The Declaratory Judgment Act "does not broaden the jurisdiction granted to the federal courts by the Constitution and statutes enacted pursuant thereto," and, accordingly, "there still must be a case or controversy before a federal court can assume jurisdiction and reach the merits" of a declaratory judgment action. Brennan v. Rhodes, 423 F.2d 706, 706–07 (6th Cir. 1970).

"'The requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit.'" Penobscot Nation v. Frey, 3 F.4th 484, 508 (1st Cir. 2021) (quoting Alabama State Federation of Labor, Local Union No. 103, United Broth. of Carpenters and Joiners of America v. McAdory, 325 U.S. 450, 461 (1945)). See Conyers v. Reagan, 765 F.2d 1124, 1128-29 (D.C. Cir. 1985) ("That appellants also seek declaratory relief does not affect our mootness determination. The Article III case or controversy requirement is as applicable to declaratory judgments as it is to other forms of relief.").

"The doctrine of mootness enforces the mandate 'that an actual controversy must be extant at all stages of the review, not merely at the time the complaint is filed.'" Mangual v. Rotger–Sabat, 317 F.3d 45, 60 (1st Cir. 2003) (quoting Steffel v. Thompson,

415 U.S. 452, 460 n.10 (1974)). See 10B Fed. Prac. & Proc. Civ. § 2757 ("The presence of a controversy must be measured at the time the court acts."). Mootness is a jurisdictional issue that "a federal district court must resolve before it assumes jurisdiction." North Carolina v. Rice, 404 U.S. 244, 246 (1971). "There is no longer an actual controversy, and a declaratory judgment cannot be given, if a matter has become moot." 10B Fed. Prac. & Proc. Civ. § 2757 (4th ed.). The main question in determining mootness "is whether a change in circumstances since the beginning of the litigation precludes any occasion for meaningful relief." Old Bridge Owners Coop. Corp. v. Township of Old Bridge, 246 F.3d 310, 314 (3d Cir. 2001).

Because mootness goes to justiciability, the inquiry must be done on a "claim-by-claim basis." Solis v. Emery Fed. Credit Union, No. 1:19-cv-387, 2020 WL 2319718, at *6 (S.D. Ohio May 11, 2020) ("[B]ecause justiciability is a fundamental limitation on the scope of the judicial power, the inquiry as to justiciability must necessarily be on a claim-by-claim basis. In other words, a party cannot combine a justiciable claim with a non-justiciable claim, and then argue that the court's power over the former likewise gives power over the latter"); Perry v. Gonzales, 472 F. Supp. 2d 623, 626 (D.N.J. 2007) ("The existence of a case or controversy is a necessary element of every cause of action under Article III.") (citing DeFunis v. Odegaard, 416 U.S. 312, 316 (1974)). In the context of claims for declaratory relief, this means that each claim for declaratory relief must present a case of actual controversy. Centennial Ins. Co. v. Ryder Truck Rental, Inc., 149 F.3d 378, 381 (5th Cir. 1998) ("Centennial sues under the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201–02. Each claim under this measure must rest on an

independent jurisdictional ground—in other words, a ground other than the Act itself—and present a justiciable question.").

"To determine if the declaratory relief is sought within a case of actual controversy, district courts must examine 'whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" In re Financial Oversight and Management Board for Puerto Rico, 919 F.3d 638, 645 (1st Cir. 2019) (quoting Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941)). "'The disagreement must not be nebulous or contingent but must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them.'" In re Financial Oversight and Management Board for Puerto Rico, *supra*, 919 F.3d at 645-46 (quoting Pub. Serv. Comm'n of Utah v. Wycoff Co., 344 U.S. 237, 243-44 (1952)).

Justiciability requires that the parties to the declaratory judgment proceeding have adverse interests and assert adverse positions. City of Springfield v. Washington Public Power Supply System, 564 F. Supp. 90, 93 (D. Or. 1983) (declaratory judgment) ("While some parties argue that federal law governs this case as a result of the federal involvement, others argue that federal law is inapplicable. Some parties argue that abstention is appropriate, others disagree. I conclude that I am faced with a real and justiciable controversy between litigants having adverse interests and asserting adverse positions.").

An actual controversy exists only when the parties 'ha[ve] taken adverse positions with respect to their existing obligations." Midwest Division-MMC, LLC v. California Nurses' Association, No. 2002372JARTJJ, 2020 WL 6202680, at *3 (D. Kan. October 22, 2020) (quoting Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227, 240-41 (1937)) (declaratory judgment). As stated by Professor Wright in the section of his treatise concerning mootness,

> Our model of adversary litigation requires that there be at least one pair of contesting parties. The conclusion is so clear that only rare circumstances will create a need to express it.

13B Fed. Prac. & Proc. Juris. § 3533.2 (3d ed.) (citations omitted). See also Allied Min. Prod., Inc. v. OSMI, Inc., No. 15-81753-CIV, 2016 WL 4479392, at *5 (S.D. Fla. Aug. 25, 2016) ("Generally, the Supreme Court has affirmed declaratory judgment jurisdiction when the parties take adverse positions with respect to their existing obligations, each side presenting a concrete claim of a specific right.") (citing Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, *supra*, 300 U.S. at 240-41). The case or controversy requirement is not satisfied in the declaratory judgment context in the absence of clearly delineated adverse positions between the parties. Prasco, LLC v. Medicis Pharmaceutical Corp., 537 F.3d 1329, 1340 n.8 (Fed. Cir. 2008) (declaratory judgment) ("In addition, the lack of clearly delineated, adverse positions by the parties diminishes the 'definite[ness] and concrete[ness]' of any potential controversy and its fitness for current judicial resolution.'").

A request for a declaratory judgment on an issue which is not contested does not satisfy the requirements of Article III. Am. Fam. Mut. Ins. Co. v. Deck, No. 4:16 CV 315 CDP, 2016 WL 3627287, at *2 (E.D. Mo. July 6, 2016) (A request for a declaratory

judgment "must relate to a dispute between parties who have taken adverse positions with respect to their existing obligations."). In American Family the plaintiff was an insurance company who brought a declaratory judgment action seeking a declaration of whether or not there was coverage for the insured defendant's claim but took no position on that issue. The court held that the insurer's failure to take a position was fatal to its claim for declaratory relief:

> American Family does not allege in its complaint that it has previously taken or presently takes a position adverse to the Decks. It has neither denied coverage nor alleged that coverage does not exist. Instead, it asks me to put on an insurance adjuster's hat and make that determination for it. That is not my role. Requesting the Court to determine "whether or not" an insurance policy provides coverage for a loss that is not yet contested is a request for an advisory opinion as to the validity of a possible defense to the claim.

American Family Mutual Insurance Company v. Deck, *supra*, 2016 WL 3627287, at *2.

Nautilus Ins. Co. v. Heartland Builders, LLC, No. 219CV02624JARKGG, 2021 WL 929786 (D. Kan. Mar. 11, 2021) provides an example of how a non-movant's failure to oppose a motion for summary judgment concerning declaratory relief has the effect of rendering the motion moot. In that case, an insurer brought a declaratory judgment action against its insureds, seeking a declaration of non-coverage for an arbitration award entered against those insureds. The insurer sought a declaratory judgment on certain counts, which the defendant insureds opposed but only in part: it was uncontested that there was no insurance coverage for certain categories of damages that had been awarded by the arbitrator. See Nautilus Ins. Co., 2021 WL 929786, at *7. On that posture, rather than granting declaratory relief as to those issues where there was no dispute, the court denied those portions of the partial summary judgment motion (as to the uncontested categories of damages) as moot:

> Since these categories of damages are no longer contested, Nautilus's motion for summary judgment is moot as to Counts I, II, and V. The Court therefore proceeds to examine only whether Nautilus has met its burden to show that specific provisions of the Policies exclude coverage of the remaining negligence damages as alleged in Counts III and VI.

Nautilus Ins. Co. v. Heartland Builders, LLC, *supra*, 2021 W.L. 929786, at *7.

In deciding whether a case is moot, "the fact that the parties desire a decision on the merits does not automatically entitle them to receive such a decision. It is not at all unusual for all parties in a case to desire an adjudication on the merits when the alternative is additional litigation; but their desires can be scarcely thought to dictate the result of our inquiry into whether the merits should be reached." Kremens v. Bartley, 431 U.S. 119, 134 n.15 (1977). "Federal courts cannot decide moot issues that the parties seek to have resolved." Northern Alaska Environmental Center v. Hodel, 803 F.2d 466, 469 n.3 (9th Cir. 1986). "Mootness is a jurisdictional issue, and the agreement of the parties does not bind us." United States v. Johnson, 801 F.2d 597, 600-01 (2d Cir. 1986). "The parties cannot avoid the effect of a mootness determination simply by attempting to stipulate that the court has jurisdiction." Olin Water Services v. Midland Research Laboratories, Inc., 774 F.2d 303, 306 (8th Cir. 1985).

B. Under the Court's discretionary jurisdiction

Even if the pending motions were not moot, the Court has discretion to choose not to decide them. "[D]istrict courts possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites." Wilton v. Seven Falls Co., 515 U.S. 277, 282 (1995). "'By the Declaratory Judgment Act, Congress sought to place a remedial arrow in the district court's quiver; it created an opportunity, rather than

a duty, to grant a new form of relief to qualifying litigants. Consistent with the nonobligatory nature of the remedy, a district court is authorized, in the sound exercise of its discretion, ... to dismiss an action seeking a declaratory judgment before trial.'" DeNovellis v. Shalala, 124 F.3d 298, 313 (1st Cir.1997) (quoting Wilton v. Seven Falls Co., *supra*, 515 U.S. at 288). "'In the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration.'" Id. (quoting Wilton v. Seven Falls Co., *supra*, 515 U.S. at 288).

> "The two principal criteria guiding the policy in favor of rendering declaratory judgments are (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding."

10B Fed. Prac. & Proc. Civ. § 2759 (4th ed.) (quoting Borchard, *Declaratory Judgments*, 2d ed.1941, 299) ("The courts have often quoted with approval Professor Borchard's formulation.") (citations omitted).

In particular, courts should "refrain from giving a declaration unless there is a full-bodied record developed through adequate adversary proceedings with all interested parties before the court." Nautilus Ins. Co. v. 8160 South Memorial Drive, LLC, 436 F.3d 1197, 1200 (10th Cir. 2006) (quoting 10B Fed. Prac. & Proc. Civ. § 2759 (3d ed. 1998)).

III. Plaintiffs' summary judgment motion and the Prospect Defendants' cross-motion for summary judgment are moot

Plaintiffs' First Amended Complaint clearly satisfies the "case or controversy" requirements of Article III with respect to Plaintiffs' claims for damages. Prior to the

settlement with Prospect and Angell, Plaintiffs' motion and the Prospect Defendants' cross-motion for declaratory relief (each of which were addressed to Count IV of the Complaint) each also passed constitutional muster since Plaintiffs and Prospect asserted adverse claims and contentions. Plaintiffs focused their motion for summary judgment on establishing the applicability of ERISA to the Plan prior to the Prospect Defendants' acquisition of Fatima Hospital, to support the imposition of successor liability on the Prospect Defendants under the federal common law doctrine of successor liability applicable to ERISA plans.[14] The Prospect Defendants in turn focused its efforts on demonstrating that ERISA became applicable to the Plan only after Prospect acquired Fatima Hospital, to support their claim that the federal law of successor liability did not apply to them.

Thus, prior to the Prospect Settlement, the pending motions involved "adverse parties" whose "disagreement" had "a fixed and final shape" which enabled the court "to see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them." In re Financial Oversight and Management Board for Puerto Rico, *supra*, 919 F.3d at 645-46 (quoting Pub. Serv. Comm'n of Utah v. Wycoff Co., *supra,* 344 U.S. at 243-44).

The sequential periods of discovery on the issues raised by the pending motions and the submission and complete briefing of the motion and cross-motion for summary judgment took over a year but had the salutary effect of focusing the issues between the

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[14] Plaintiffs also asserted a claim against the Prospect Defendants under state law for *de facto* merger, joint venture, and successor liability. See ECF # 60 (First Amended Complaint) ¶¶ 519-530. However, the federal common law doctrine of successor liability imposes "liability upon successors beyond the confines of the [state] common law rule…" Einhorn v. M.L. Ruberton Const. Co., 632 F.3d 89, 94 (3d Cir. 2011) (applying federal common law of successor liability in an ERISA case).

Plaintiffs and the Prospect Defendants, and, no doubt, contributed to those parties' decision to settle their disputes. In turn that settlement simplified the remaining lawsuit into a dispute between essentially two parties: the Plaintiffs and the Diocesan Defendants.

However, after the Prospect Settlement, the remaining parties have no adversity whatsoever concerning the declaratory judgments that have been requested by the pending motions for summary judgment, much less a "disagreement" with "a fixed and final shape." Similarly, the Court cannot see "what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding" the motions, In re Financial Oversight and Management Board for Puerto Rico, *supra*, because the Diocesan Defendants chose not to note (much less address) the impact, if any, that the grant or denial of the declaratory relief that either Plaintiffs or the Prospect Defendants were seeking would have on Plaintiffs' claims against the Diocesan Defendants. In choosing to take no position, the Diocesan Defendants made clear they had no concern whatsoever for how the grant or denial of those motions would affect Plaintiffs' claims against them.

Although Plaintiffs and the Diocesan Defendants are apparently[15] adverse concerning Plaintiffs' claims for damages, there is absolutely no identified adversity between them concerning the issues raised by the pending motions for summary judgment. The fact that there may be adversity on other claims is irrelevant, because Article III requires that the determination of justiciability must be made on a "claim-by-

[15] However, the Diocesan Defendants' failure to answer the Complaint leaves the *degree of adversity* between Plaintiffs and the Diocesan Defendants uncertain even as to Plaintiffs' claims for damages.

claim basis." Solis v. Emery Fed. Credit Union, *supra*, 2020 WL 2319718, at *6 ("[B]ecause justiciability is a fundamental limitation on the scope of the judicial power, the inquiry as to justiciability must necessarily be on a claim-by-claim basis. In other words, a party cannot combine a justiciable claim with a non-justiciable claim, and then argue that the court's power over the former likewise gives power over the latter."). See Centennial Ins. Co. v. Ryder Truck Rental, Inc., *supra*, 149 F.3d at 381 ("Centennial sues under the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201–02. Each claim under this measure must rest on an independent jurisdictional ground—in other words, a ground other than the Act itself—and present a justiciable question.").

It is clear there is no adversity between Plaintiffs and the Diocesan Defendants with respect to the motion or the cross-motion for summary judgment. The Diocesan Defendants have not filed an Answer contesting any of Plaintiffs' claims, including the declaratory judgment count *sub judice* (Count IV). The Diocesan Defendants were given full opportunity both to file their own cross-motion for summary judgment and to take a position either in response to Plaintiffs' motion for summary judgment or in response to the Prospect Defendants' cross-motion for summary judgment. That was the whole purpose of the procedure ordered by the Court. However, the Diocesan Defendants chose not to do anything except to affirmatively inform the Court that they took no position.

As noted, after the motions were filed, the Diocesan Defendants expressly twice stated that they *take no position on the issues raised by either motion*:

> First, the Diocesan Defendants state that **they take no position concerning the only question posed in Plaintiffs' pending Motion**: Whether the St. Joseph Health Services of Rhode Island Retirement Plan

> ("the Plan") became subject to ERISA by April 29, 2013 because of an alleged failure to meet any principal purpose organization requirement.

ECF # 189 at 1 (emphasis supplied).

> **The Diocesan Defendants take no position on whether St. Joseph Health Services of Rhode Island, Inc. ("SJHSRI") satisfied the principal purpose organization requirement under ERISA for Church Plans after 2010. They also take no position on how the Court should resolve the dispute between Plaintiffs and Prospect as to whether SJHSRI failed to meet the requirements for qualification of a Church Plan on or before April 29, 2013 (Plaintiffs' position) or on or after December 15, 2014 (Prospect's position).**

ECF # 200 at 1 (emphasis supplied).

The Diocesan Defendants ignored the Court's direction that the parties advise the Court on their positions concerning the applicability of ERISA, and instead chose to stay out of the fray. Now the Diocesan Defendants insist the Court should decide that issue notwithstanding they chose not to and the only defendants who asserted a position are no longer in the case. We submit this is not what the Court intended.

The Diocesan Defendants not only expressly declined to take any position on these issues, but they also chose not to inform the Court how the resolution of these issues would resolve (or even affect) Plaintiffs' specific claims against them.[16] Thus, the Court has no way of knowing what would be the effect on dispute between Plaintiffs and the Diocesan Defendants if the Court were to grant the declaratory relief that Plaintiffs sought in their motion for summary judgment,[17] or, on the other hand, if the Court were

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[16] As noted, Plaintiffs related their motion for summary judgment to their claim against the Prospect Defendants under the federal common law of successor liability, not their claims against the Diocesan Defendants, and the Prospect Defendants used their cross-motion for summary judgment to attempt to rebut Plaintiffs' claim.

[17] I.e., a declaration "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 # 173 at 27.

to deny Plaintiffs' motion and instead grant the declaratory relief that the Prospect Defendants sought by their cross-motion for summary judgment.[18]

The Diocesan Defendants were afforded a ninety-day period of discovery on the sole issue on which Plaintiffs' motion for summary judgment is based, and another ninety-day on that issue and any other issues raised by any cross-motion they or the other defendants might file for summary judgment. ECF # 175 (Stipulation and Consent Order Concerning Limited Discovery and Related Summary Judgment Motions) ¶¶ 2 & 5. That discovery was pursuant to a stipulation and order to which the Diocesan Defendants agreed. Id. After agreeing to a discovery and briefing protocol which extended cumulatively (and delayed the case) for over a year, the sole purpose of which was to allow the parties to fully assert their positions and fully respond to the positions of the other parties, the Diocesan Defendants chose to do neither.

In any event, in their submissions in connection with both Plaintiffs' motion for summary judgment and the Prospect Defendants' cross-motion for summary judgment, the Diocesan Defendants did not question the adequacy of the discovery on the issue of when the Plan ceased to be a "church plan" or request (under Fed. R. Civ. P. 56(d) or otherwise) that the Court allow additional discovery. See ECF ## 189 & 200.

The mere fact that the Plaintiffs have pled state law and ERISA claims in the alternative does not help the Diocesan Defendants' position. No one is entitled to declaratory relief concerning whether ERISA or state law applies unless the case or controversy requirements of Article III are satisfied by the parties to the declaratory

[18] I.e., a declaration "that the Plan lost its church plan status on, and as of, December 15, 2014, but in any event no later than April 15, 2019." ECF # 193 at 171.

judgment claim taking adverse positions with a “fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them.’” In re Financial Oversight and Management Board for Puerto Rico, *supra*, 919 F.3d at 645-46 (quoting Pub. Serv. Comm'n of Utah v. Wycoff Co., *supra*, 344 U.S. at 243-44). See Am. Fam. Mut. Ins. Co. v. Deck, *supra* (request for a declaratory judgment “must relate to a dispute between parties who have taken adverse positions with respect to their existing obligations.”). The Diocesan Defendants, much like the plaintiff insurance company in American Family, are now asking the Court to render an opinion on an issue with respect to which they take no position. In short, they are asking for an advisory opinion as to “whether or not” and as to “when” the Plan failed to qualify as a “church plan.” Id. (“Requesting the Court to determine ‘whether or not’ an insurance policy provides coverage for a loss that is not yet contested is a request for an advisory opinion as to the validity of a possible defense to the claim.”).

The fact that the Diocesan Defendants contend it would be helpful to the resolution of Plaintiffs’ claims against them for the Court to decide the issues raised by the motion and cross-motion for summary judgment does not exempt this case from the rules of justiciability arising out of the “case or controversy” requirement. As stated by the Eighth Circuit in Bishop v. Committee on Professional Ethics and Conduct of Iowa State Bar Ass'n, 686 F.2d 1278 (8th Cir. 1982):

> While we fully recognize the importance of the constitutional issues present in this case, and we do not doubt the earnestness of the parties in seeking a decision on the merits, we believe that it is appropriate to reiterate the Supreme Court's statement in *Kremens v. Bartley*, 431 U.S. 119, 97 S.Ct. 1709, 52 L.Ed.2d 184 (1977) concerning the rules of justiciability arising out of the “case or controversy” requirement: “ ‘The

> fact that it would be convenient for the parties and the public to have promptly decided whether the legislation assailed is valid, cannot justify a departure from these settled rules * * *.' " *Id.* at 136, 97 S.Ct. at 1718 (quoting *Ashwander v. TVA*, 297 U.S. 288, 345, 56 S.Ct. 466, 482, 80 L.Ed. 688 (1936) (Brandeis, J., concurring)).

Bishop v. Committee on Professional Ethics and Conduct of Iowa State Bar Ass'n, *supra*, 686 F.2d at 1284 n.12.

For whatever reason, the Diocesan Defendants made the tactical or strategic decisions not to file their own motion for summary judgment although ordered by the Court to do so, and not even to take a position on the pending motion or cross-motion for summary judgment. Those motions presented a justiciable controversy for so long as Plaintiffs and the Prospect Defendants asserted adverse positions. However, the Prospect Defendants no longer assert any position on these issues whatsoever. They have settled any disputes they had with Plaintiffs, whether those disputes were valid or without merit, and the Plaintiffs claims against them have been dismissed with prejudice pursuant to the terms of the settlement agreement between the settling parties. There is simply no mechanism for the Prospect Defendants to participate in the adjudication of the pending motion even if they wished to do so. The consequence of that settlement is that the pending motion and cross-motion for summary judgment and any issues involved therein have been rendered moot.

IV. The Court should exercise its discretion not to entertain declaratory relief at this time

As noted, "district courts possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise

satisfies subject matter jurisdictional prerequisites." Wilton v. Seven Falls Co., *supra*, 515 U.S. at 282.

On the current posture, in which Plaintiffs have settled with the Prospect Defendants, and the Diocesan Defendants neither oppose nor offer any explanation how resolution of Plaintiffs' motion for summary judgment or the Prospect Defendants' cross-motion for summary judgment will affect Plaintiffs' claims against the Diocesan Defendants, it cannot be said that "the judgment will serve a useful purpose in clarifying and settling the legal relations in issue," or "terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." 10B Fed. Prac. & Proc. Civ. § 2759 (4th ed.) (quoting Borchard, *Declaratory Judgments*, 2d ed.1941, 299). Accordingly, neither the pending motion nor the cross-motion for declaratory relief serve either of these "two principal criteria guiding the policy in favor of rendering declaratory judgments…." Id.

As noted, in addition to offering no practical benefit and being completely anomalous, resolution of the pending motions would lead to all sorts of anomalies and present practical obstacles. Is the Court expected to consider the Prospect Defendants' arguments notwithstanding they are no longer in the case to press them? Is the Court expected to consider Plaintiffs' motion even though Plaintiffs' claims against the only Defendants who objected to the motion have been dismissed with prejudice as a condition of the Prospect Settlement?

How should oral argument proceed when there is no "argument" because none of the remaining parties oppose Plaintiffs' motion or join in the Prospect Defendants' cross-motion? Plaintiffs would be entitled to oral argument given the complexity of this

case and the occurrence of the Prospect Settlement after the briefing was completed. Plaintiffs requested oral argument on their motion and in opposition to the Prospect Defendants' cross-motion.[19] "[O]rdinarily it is appropriate to hear oral argument before rendering summary judgment." Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc., 754 F.2d 404, 411 (1st Cir. 1985). The First Circuit has acknowledged "the wisdom of hearing oral argument on motions bottomed on difficult questions of law and alleged questions of fact." This is certainly such a case. The postures of the motion and cross-motion for summary judgment are quite different now that Plaintiffs have settled with the Prospect Defendants and Angell. The settlement was entered into after the parties briefed the issues. It certainly was not contemplated that the motions would go forward solely between Plaintiffs and the Diocesan Defendants. Oral argument as well as additional written submissions would be required to address the issues raised by the resolution of the motions in this context.

But allowing oral argument and/or additional written submissions will raise a host of anomalies and questions. Will the Diocesan Defendants be permitted to adopt Prospect's arguments for the first time? Do the Diocesan Defendants even intend to adopt any of Prospect's arguments? If so, which arguments do they adopt, will they be permitted to offer additional grounds, and will Plaintiffs be given notice (and the opportunity for a written rebuttal) of the Diocesan Defendants' arguments prior to oral argument? Or do the Diocesan Defendants, instead, intend to adopt Plaintiffs'

[19] Plaintiffs requested oral argument with respect to both their motion and the Prospect Defendants' cross-motion. See ECF # 197 at 99 ("LR CV 7(C) REQUEST FOR ORAL ARGUMENT Pursuant to LR Cv 7(c), Plaintiffs respectfully request oral argument and estimate that two hours will be required."); ECF # 202 at 59 ("LR CV 7(C) REQUEST FOR ORAL ARGUMENT Pursuant to LR Cv 7(c), Plaintiffs respectfully request oral argument and estimate that two hours will be required.").

arguments? Or do the Diocesan Defendants intend to continue to assert that they "have no position"?

In short, even if there remained an "actual controversy" (which Plaintiffs dispute), the present situation is too anomalous for the Court to decide the motion or cross-motion. The underlying issues may be revisited at a later stage in this litigation, if appropriate, for example sometime after the Diocesan Defendants answer the Amended Complaint (including after discovery) and in the context of a motion that clearly delineates the impact of the requested relief on Plaintiffs' claims against the Diocesan Defendants. Even if the requirements of Article III were met (which they are not), at the present time, and in the current context, the Court should exercise its discretion not to grant declaratory relief.

CONCLUSION

The pending motion and cross-motion for summary judgment should be dismissed, either as moot, or, in the alternative, pursuant to the Court's exercise of its discretion not to grant declaratory relief, at least at this time.

Respectfully submitted,
Plaintiffs,
By their Attorneys,

/s/ Max Wistow

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Dated: August 31, 2021