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' REPLY MEMORANDUM CONCERNING MOOTNESS OF PENDING MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs submit this memorandum to reply to the arguments made by the Diocesan Defendants[1] in the Diocesan Defendants' Memorandum Regarding Plaintiffs' Pending Motion for Summary Judgment (ECF # 222) ("Diocesan Defendants' Memo.") and to address the significance of the Diocesan Defendants' belated filing of their Notice of Assent to Relief Requested in Plaintiffs' Motion for Summary Judgment (ECF # 221) ("Diocesan Defendants' Assent").

I. The Diocesan Defendants were not excluded from mediation

The Diocesan Defendants make the completely unsupported statement that they were "excluded" from mediation. Diocesan Defendants' Memo. at 1 n.1. That would be

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

completely irrelevant if true, but lest Plaintiffs' failure to respond be construed as assent, we should note that it is wildly incorrect and grossly misleading.

The Diocesan Defendants participated in the first mediation and Plaintiffs were informed by that mediator and counsel for the other Defendants that the Diocesan Defendants refused to contribute to any settlement. Nevertheless, after the Prospect Settlement, Plaintiffs inquired of the Diocesan Defendants whether they would participate in a mediation with Judge Williams and they declined.

In any event, there apparently would have been no point including them since even now they characterize Plaintiffs' claims as "baseless" (Diocesan Defendants' Memo. at 8), notwithstanding Plaintiffs have already recovered in excess of $47,000,000 in settlements in this case. Time will tell whether their current willingness to engage in mediation reflects a genuine desire to make a reasonable settlement or simply a disinclination to appear uncooperative in response to the suggestion of the Court at the Final Fairness Hearing on July 20, 2021.

II. There is no live "case or controversy" because there is no adversity between the remaining litigants concerning the declaratory judgment count

In the off-the-record discussion at the close of the Fairness Hearing on the Prospect Settlement on July 20, 2021, Plaintiffs' counsel took the position that the Prospect Settlement had mooted the pending motion and cross-motion for summary judgment because there was no adversity between the remaining parties. In their memorandum, the Diocesan Defendants do not dispute that there is no adversity between them and the Plaintiffs concerning the pending motions. Nor could they, because throughout the year the parties spent briefing the issues, the Diocesan

Defendants' position remained the same: they had no position on either Plaintiffs' motion for summary judgment or on the Prospect Defendants' cross-motion for summary judgment.

Even though there was no adversity, up until their most recent filings the Diocesan Defendants could argue that there was at least a *difference* between the Plaintiffs advocating for a specific declaratory judgment and their taking no position. Now, by belatedly filing the Diocesan Defendants' so-called Notice of Assent[2] (filed after all the briefs have been submitted and the Prospect Settlement has been approved), they have established that not only is there no adversity, there no longer is *any difference whatsoever* between their position and the position the Plaintiffs asserted in their motion for summary judgment.

As a result, it is indisputable that there is no adversity between the remaining litigants concerning the claim for declaratory relief, and, as a result, that claim for declaratory relief at this time presents no "case of actual controversy" as required by 28 U.S.C. § 2201(a), or "case or controversy" as required by Article III. See Auto-Owners Ins. Co. v. Broadsouth Commc'ns, Inc., No. CV 16-0613-WS-B, 2017 WL 1025186, at *2 (S.D. Ala. Mar. 15, 2017) (insurer's motion for declaratory judgment of non-coverage denied because insureds' failure to answer case or respond to motion suggested that they "do not presently have a definite and concrete dispute with the [insurer's] coverage position"). As stated by that court:

> On its face, the Declaratory Judgment Act provides the remedy of entry of declaratory judgments only "[i]n a case of actual controversy." 28 U.S.C. §

[2] ECF # 221.

> 2201(a); see also *Malowney v. Federal Collection Deposit Group*, 193 F.3d 1342, 1347 (11th Cir. 1999) (observing that § 2201 "specifically provides that a declaratory judgment may be issued only in the case of an actual controversy.... Based on the facts alleged, there must be a substantial continuing controversy between two adverse parties.") (citations and internal quotation marks omitted); *U.S. Fire Ins. Co. v. Caulkins Indiantown Citrus Co.*, 931 F.2d 744, 647 (11th Cir. 1991) ("the controversy must be 'live' throughout the case; federal jurisdiction is not created by a previously existing dispute"). It is unclear whether a live coverage dispute exists between Auto-Owners and its insureds (Broadsouth and Williams) in this matter. **In particular, despite being served with the Complaint, neither Broadsouth nor Williams has made any attempt to appear in this action, to defend its interests, or to litigate the coverage question. That fact strongly suggests that those defendants do not presently have a definite and concrete dispute with Auto-Owners' coverage position, and that there is thus no live case or controversy as to whether Auto- Owners owes those defendants any coverage in the Pettaway matter.**

Id. (emphasis supplied).[3] In Auto-Owners, the defendants' default merely "suggested" that the defendants did not have a "definite and concrete dispute" with the plaintiffs' claim for declaratory relief. Although the Diocesan Defendants are not in default, it is even more clear that the Diocesan Defendants "do not presently have a definite and concrete dispute" with the Plaintiffs' position. Indeed, they have now "assented" to it! Accordingly, there is no "case or controversy" over Plaintiffs' motion for summary judgment.

The Diocesan Defendants ignore the requirement of adversity between the remaining litigants and assert instead that "[t]he Court has the benefit of written

[3] Default declaratory judgments are available only where the movant's papers sufficiently allege an actual controversy between the parties. See *infra* at 7–9. In this case, Plaintiffs' motion alleged that the Plan was governed by ERISA when the Prospect Defendants acquired Fatima Hospital. Only the Prospect Defendants opposed Plaintiffs' position, thus creating a case or controversy. That case or controversy was mooted by Plaintiffs' settlement with the Prospect Defendants, the Diocesan Defendants' failure to take a position, and the Diocesan Defendants' eventual "assent" to Plaintiffs' position.

adversarial presentation in the form of Prospect's opposition." Diocesan Defendants' Memo. at 5. The fact that former Defendants were adverse to Plaintiffs, prior to their settling and being dismissed from the case, may indicate there had been a case or controversy at that time, but for the Court to decide Plaintiffs' motion for summary judgment now there must be a case or controversy between the litigants before the court and at the present time. See U.S. Fire Ins. Co. v. Caulkins Indiantown Citrus Co., 931 F.2d 744, 647 (11th Cir. 1991) ("the controversy must be 'live' throughout the case; federal jurisdiction is not created by a previously existing dispute"). "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."). Thus, the Prospect Defendants' prior opposition to Plaintiffs' motion is irrelevant to the issue of the lack of adversity.

III. The supposed implications that deciding Plaintiffs' motion may have for Plaintiffs' other claims against the Diocesan Defendants are irrelevant, are inaccurate, involve extraneous issues, and are offered too late

The declaratory relief sought by Plaintiffs did not address the merits of any of Plaintiffs' claims against the Diocesan Defendants.[4] Moreover, over the many months and many memoranda involved in the pending motion and cross-motion for summary judgment, none of the parties addressed the impact, if any, that the grant or denial of

[4] Instead, it was focused solely on Plaintiffs' claims against the Prospect Defendants under the federal common law of successor liability.

the declaratory relief that either Plaintiffs or the Prospect Defendants were seeking would have on Plaintiffs' claims against the Diocesan Defendants. Instead, the Diocesan Defendants had no comment, while Plaintiffs and the Prospect Defendants were focused entirely on the effect the requested relief would have on Plaintiffs' claim against the Prospect Defendants under the federal common law of successor liability.

Now the Diocesan Defendants, for the first time, address the implications the grant of the declaration sought by Plaintiffs might have on Plaintiffs' other claims against them. The Diocesan Defendants lay out these "implications" in four paragraphs:

> [T]he 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);
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> 3) The Court could determine whether ERISA precludes Plaintiffs' claim for money damages against the Diocesan Defendants; and
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> 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.

Diocesan Memorandum at 6-7 (footnote 6 omitted but discussed below). However, these arguments are irrelevant, are inaccurate, concern extraneous issues, and are offered too late.

A. The Diocesan Defendants' alleged implications are irrelevant

The Diocesan Defendants provide four paragraphs ennumerating the "implications" or consequences that the grant of Plaintiffs' motion for summary judgment allegedly would have for other claims in the case, which they contend would "simplify and streamline the case." Diocesan Defendants' Memo. at 6. The Diocesan Defendants offer their list as a reason why the Court should grant Plaintiffs' motion for summary judgment. However, since the Court lacks subject matter jurisdiction, the Court lacks the power to decide Plaintiffs' motion for summary judgment regardless of whether doing so would "simplify and streamline the case." In other words, it is irrelevant whether the "implications" or consequences that the Diocesan Defendants claim would flow from the grant of Plaintiffs' motion for summary judgment would "simplify and streamline the case."

That is so *even if* deciding Plaintiffs' motion for summary judgment would decide some of the issues involved in Plaintiffs' other claims against the Diocesan Defendants. The fact remains that Plaintiffs' motion for summary judgment does not present a live "case or controversy" because the remaining litigants are not adverse on the sole issue presented by that motion, i.e., whether the plan was governed by ERISA by April 29, 2013, at the latest. That claim therefore does not currently present a live case or controversy. As noted in Plaintiffs' initial memorandum, Article III requires that the determination of mootness must be made on a "claim-by-claim basis." See United

States v. Vega, 960 F.3d 669, 673 (5th Cir. 2020) ("A live case or controversy is necessary to invoke federal jurisdiction. Thus, the court must evaluate mootness on a claim-by-claim basis to determine whether each claim satisfies the constitutional requirements for Article III jurisdiction."). The fact that Plaintiffs' other claims against the Diocesan Defendants involve a case or controversy does not empower the Court to grant declaratory relief if the claim for declaratory relief is not itself a live case or controversy. Solis v. Emery Fed. Credit Union, 459 F. Supp. 3d 981, 990 (S.D. Ohio 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.").

Moreover, the Court would lack subject matter jurisdiction even if (*arguendo*) Plaintiffs now wanted the Court to decide Plaintiffs' motion for summary judgment, such that both Plaintiffs and the Diocesan Defendants agreed that the Court should resolve the motion. "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).

Thus, even assuming, *arguendo*, that the Diocesan Defendants were correct concerning the beneficial "implications" they allege would flow from the grant of

Plaintiffs' motion for summary judgment, and that those "implications" would "simplify and streamline the case," that would be irrelevant, because the Court cannot decide a claim that is outside the Court's subject matter jurisdiction regardless of how beneficial the consequences would be. Advisory opinions often could have beneficial consequences, but the Court as a court of limited jurisdiction is nonetheless without power to issue them.

B. The Diocesan Defendants' alleged implications are inaccurate

The first paragraph in the list of alleged "implications" is a naked conclusion which the next three paragraphs purportedly explain. The statement in the next paragraph in the list, *viz.* that "most of Plaintiffs' allegations of wrongdoing by the Diocesan Defendants (which are denied) post-date" April 29, 2013, Diocesan Defendants' memo. at 6, is incorrect.[5] The Complaint extensively alleges the Diocesan Defendants' wrongdoing before that date.[6] Indeed, Prospect had already signed the Letter of Intent leading to the June 20, 2014 Asset Sale on March 18, 2013[7], more than a month before April 29, 2013. Defendants' fraudulent scheme[8] and conspiracy[9] (joined by the Diocesan Defendants) to strip the hospital assets and orphan the Plan was already under way well before the Bishop's April 29, 2013 resolution, which was itself an

[5] It is also not of crucial significance. After all, "the 'timing of plan formation is not the crucial factor in ERISA preemption.'" Westfall v. Bevan, No. CIV.A.308-CV-0996-D, 2009 WL 111577, at *7 (N.D. Tex. Jan. 15, 2009) (quoting Hobson v. Robinson, 75 F. App'x 949, 954 (5th Cir. 2003)).

[6] See, e.g., Amended Complaint ¶¶ 55(b), 55(d), 62, 64, 115, 124 – 129, 214 – 216, 276 – 277.

[7] See Amended Complaint ¶ 124.

[8] Amended Complaint, Count VIII.

[9] Amended Complaint, Count IX.

overt act in furtherance of that pre-existing conspiracy. None of those claims is even conceivably preempted by ERISA.[10]

The statement in the third paragraph, *viz.* that resolution of Plaintiffs' claim for declaratory relief would "determine whether ERISA precludes Plaintiffs' claim for money damages against the Diocesan Defendants," is simply not true. All Plaintiffs were seeking was a determination that the Plan was governed by ERISA by April 29, 2013, at the latest. Plaintiffs' claim for declaratory relief did not address the effect of that finding on Plaintiffs' claims against the Diocesan Defendants. Certainly, Plaintiffs did not ask the Court to determine the extent to which "ERISA precludes Plaintiffs' claim for money damages" against any Defendant, and certainly not against the Diocesan Defendants.

Moreover, the difference between "money damages" and other kinds of monetary relief available under ERISA is often merely a matter of semantics:

> Plaintiff's equitable label for the monetary relief it seeks flows from the fact that ERISA does not permit a court to award damages per se, but instead authorizes a court "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to [award] other appropriate equitable relief." 29 U.S.C. § 1132(a)(3). What qualifies as "other appropriate equitable relief" has snarled litigants and judges for

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[10] ERISA never preempts state law claims that arose prior to a plan's becoming subject to ERISA. See Robinson v. Metro. Life Ins. Co., No. 12-CV-01373-JAM-AC, 2013 WL 1281868, at *6 (E.D. Cal. Mar. 27, 2013) ("The plain text of 29 U.S.C. § 1003(b)(2) states that a church plan is exempt from ERISA until it makes a § 410(d) election. There is no reference to retroactive ERISA coverage, and no basis for inferring it. Disability claims arising before the election are therefore not governed by ERISA, and claims arising after the election are."); Welsh v. Ascension Health, No. 3:08CV348/MCR/EMT, 2009 WL 1444431, at *8 (N.D. Fla. May 21, 2009) ("[T]his court likewise concludes that preemption in this case began at the time of Ascension's 2008 election and not before. Therefore, at the time Welsh's claims under the LTD plan arose in 2003 Ascension's church plan was not governed by ERISA."); Geter v. St. Joseph Healthcare Sys., Inc., 575 F. Supp. 2d 1244, 1250 (D.N.M. 2008) ("Until January 12, 2004, CHI's long-term disability plan was a 'church plan[ ] with respect to which no election had been made.' Thus, under the statute's plain language, ERISA did not preempt' [sic] state law until January 12, 2004.") (quoting 29 U.S.C. § 1003(b)); Catholic Charities of Maine, Inc. v. City of Portland, 319 F. Supp. 2d 88, 89–90 (D. Me. 2004) ("[T]the plain language of ERISA suggests that preemption occurs upon the 'making' or filing of a section 410(d) election.").

> years. It is nonetheless established that an order to pay money, even if functionally equivalent to a judgment awarding damages, qualifies as "appropriate equitable relief" in some ERISA cases, depending on the circumstances. *See Great–West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212–21, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002).

Teets v. Great-W. Life & Annuity Ins. Co., 286 F. Supp. 3d 1192, 1206 (D. Colo. 2017).

Moreover, four of Plaintiffs' counts allege the Diocesan Defendants have civil liability under R.I. Gen. Laws § 9-1-2 due to their participation in certain crimes. There can be no serious argument that those counts (which encompass, *inter alia*, the Diocesan Defendants' conduct relating to the entire 2014 Asset Sale transaction) are preempted under ERISA, even if the Plan was subject to ERISA by April 29, 2013. ERISA expressly exempts state criminal laws from preemption. See 29 U.S.C.A. § 1144(b)(4) (exempting "any generally applicable criminal law of a State").

Accordingly, even a finding that ERISA governs some of Plaintiffs' claims against the Diocesan Defendants (which Plaintiffs' claim for declaratory relief does not address), and even a finding that ERISA precludes Plaintiffs from recovering money damages on those claims (which Plaintiffs' claim for declaratory relief also does not address) would not meaningfully "simplify and streamline the case."

C. The Diocesan Defendants' alleged implications raise extraneous issues

The Diocesan Defendants' fourth paragraph in the list of alleged consequences that would flow from deciding Plaintiffs' motion concerns the Pension Benefit Guaranty Corporation ("PBGC"). The Diocesan Defendants argue that the Court should grant Plaintiffs' motion because that allegedly would increase the likelihood of obtaining coverage from PBGC. See Diocesan Defendants' Memo. at 6-7. In support of that

contention, they offer an extensive and quite complex analysis of Title IV of ERISA. Id. at 7 n.6. That issue is certainly extraneous to the motion for summary judgment. Moreover, it has always been Plaintiffs' position that the issue of PBGC coverage is irrelevant to the entire case because at most PBGC coverage would be a collateral source of recovery that would not reduce Defendants' liability. See Plaintiffs' Omnibus Memorandum in Support of Their Objection to Defendants' Motions to Dismiss (ECF # 100) at 118-23. In addition, Plaintiffs have repeatedly invited the Defendants to guaranty PBGC coverage if they are so certain it will be forthcoming. See ECF # 168 (September 10, 2019 Motion to Dismiss Hearing Transcript) at 61 (proposing that the Defendants to guaranty PBGC coverage). They have always declined, leaving Plaintiffs with the risk of non-coverage.

D. The Diocesan Defendants' alleged implications are offered too late

"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 Fin. Oversight & Mgmt. Bd. 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 Fin. Oversight & Mgmt. Bd. 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)).

Prior to the Diocesan Defendants' submission of their memorandum on August 31, 2021 (ECF # 222), and notwithstanding the several rounds of briefing and the thousands of pages of submissions, 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. Up until that time, there was no adversity between Plaintiffs and the Diocesan Defendants on the issue of declaratory relief, much less a "disagreement" with "a fixed and final shape," and the Court could not see "what effect its decision will have on" the Diocesan Defendants and Plaintiffs, and "some useful purpose to be achieved in deciding" the motions. 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.

It was only when Plaintiffs pointed out that the motions for summary judgment were moot that the Diocesan Defendants made any effort whatsoever to address the impact of Plaintiffs' motion on the Plaintiffs' other claims against the Diocesan Defendants. As discussed, that is insufficient given the parties are not adverse. In addition, we submit that is both much too late and not a substitute for the development of those issues in the memoranda addressed to the merits of the motions for summary judgment. The Diocesan Defendants' recent about-face, calling upon the Court to grant a motion for summary judgment that they had expressly declined to join, is rank gamesmanship.

IV. There is nothing unfair about Plaintiffs' position that their motion for summary judgment should not now be decided

The Diocesan Defendants contend that "Plaintiffs' suggestion that this Court should not decide their own fully briefed and unopposed motion for summary judgment is nothing short of shocking." Diocesan Defendants' Memo. at 2. They also assert that:

> 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 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.

Diocesan Defendants' Memo. at 6-7.

This is not the first time the Diocesan Defendants have made baseless accusations of bad faith. They did the same thing in opposing Plaintiffs' settlement with St. Joseph Health Services of Rhode Island, Roger Williams Hospital and CharterCARE Community Board when they accused Plaintiffs and those defendants of collusion. Of course, the Diocesan Defendants' hyperbolic and feigned outrage is meaningless if the Court lacks jurisdiction to decide Plaintiffs' motion. In that case, Plaintiffs would be entitled and, indeed, obligated, to raise the Court's lack of subject matter jurisdiction.

The Diocesan Defendants' protestations would also be inappropriate even if the Court had subject matter jurisdiction and the issue were simply whether the Court should exercise its discretion not to grant Plaintiffs' motion for declaratory relief. There is nothing unfair in the Court refusing to exercise its discretion to grant declaratory relief.

The Diocesan Defendants certainly did not rely (or even pretend to rely) on Plaintiffs' motion. To the contrary, they expressly claimed to have no position on whether the motion should be granted or denied.

Plaintiffs are entitled to ask for leave to withdraw their motion if such formalism is necessary and such leave should be granted. Plaintiffs' motion was primarily directed to Plaintiffs' claims against the Prospect Defendants. Those claims have been settled. Plaintiffs' motion was not directed to Plaintiffs' claims against the Diocesan Defendants, and the Diocesan Defendants chose not even to address the effect of Plaintiffs' motion on those claims until after the Prospect Settlement.

On the other hand, the Diocesan Defendants' effort to tie Plaintiffs' hands on this issue is completely unfair. They declined to make their own motion for summary judgment or to take a position on either Plaintiffs' motion or the Prospect Defendants' cross-motion until the circumstances surrounding the motion were changed by the Prospect Settlement. If the Diocesan Defendants are entitled to wait until then to change their position from "taking no position" to acceding in Plaintiffs' motion, so too Plaintiffs are allowed to argue that their motion is moot, or to withdraw their motion for summary judgment in light of the Prospect Settlement.

Moreover, if and when Plaintiffs' other claims against the Diocesan Defendants are litigated, Plaintiffs will not be bound by the claim that "by April 29, 2013, at the latest, the St. Joseph Health Services of Rhode Island Retirement Plan was not a Church Plan within the meaning of 29 U.S.C. § 1002(33) and, therefore, was subject to ERISA." Certainly, Plaintiffs will not be bound under the doctrine of judicial estoppel, which requires a showing that the party sought to be estopped prevailed on the position that

the party is now opposing. Sexual Minorities Uganda v. Lively, 899 F.3d 24, 32 (1st Cir. 2018) ("[Under] the doctrine of judicial estoppel…a litigant may be precluded 'from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'") (quoting Pegram v. Herdrich, 530 U.S. 211, 227 n.8 (2000)); Id., 899 F.3d at 33 ("[T]he party must have persuaded the first tribunal to accept its earlier position, such that judicial adoption 'of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled.'") (quoting New Hampshire v. Maine, 532 U.S. 742, 750 (2001)) (internal quotation omitted).

Plaintiffs have not prevailed on their claim. Not only have Plaintiffs not prevailed, it is unknown and unknowable whether the settlement they obtained from the Prospect Defendants and Angell was enhanced by that claim. As the Court will recall, both Plaintiffs' motion for summary judgment and the Prospect Defendants' cross-motion for summary judgment were pending when the parties participated in mediation before Retired Chief Justice Williams and settled their claims. Settlements are reached when dispositive motions are pending because all of the parties to the settlement are concerned that the motions would be decided adversely to their interests. That was certainly true for Plaintiffs here. Plaintiffs had no way of knowing whether their motion for summary judgment would be granted. Indeed, Plaintiffs faced the risks that 1) their claim would be rejected outright by the Court; 2) the Court would grant the Prospect Defendants' cross-motion for summary judgment to the effect that the Plan was a church plan until after the sale of Fatima Hospital to the Prospect Defendants; or 3) the

Court would conclude that both motions for summary judgment were precluded by questions of material fact.

Indeed, when Plaintiffs sought preliminary approval of the Prospect Settlement from this Court, Plaintiffs pointed to the pendency of the Prospect Defendants' cross-motion for summary judgment, and stated as follows:

> If the Court were to grant Prospect's cross-motion for summary judgment and conclude that the Plan was not subject to ERISA at the time of the 2014 Asset Sale, Plaintiffs' claims would be dealt a serious blow. Under those circumstances, it would be unlikely that Prospect would make any meaningful settlement offer. It would also be unlikely that Plaintiffs would prevail against Prospect on their ERISA claims. In that event, the Court would have discretion to dismiss that case pursuant to 28 U.S.C. § 1367(c) and, if the Court exercised that discretion, Plaintiffs would have to begin anew with the State Court Action, which until now has been completely stayed.

Plaintiffs' Motion for Preliminary Settlement Approval, Settlement Class Certification, Appointment of Class Counsel, and a Finding of Good Faith Settlement (ECF # 206) at 35. Thus, the Prospect Settlement was as much a product of the pendency of the Prospect Defendants' cross-motion for summary judgment as it was a product of the pendency of Plaintiffs' motion.

Contrary to the Diocesan Defendants' assertion, Plaintiffs' right to withdraw their motion and, indeed, take a contrary position is not affected by the fact that "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." Diocesan Defendants Memo. at 2. The fact that Plaintiffs filed their motion in good faith and consistent with Rule 11 does not mean they would be unable to take the contrary position in good faith and consistent with Rule 11. The best illustration of that is that counsel for the Prospect Defendants in good faith and consistent with Rule 11 objected

to Plaintiffs' motion and filed the cross-motion that asserted a position completely at odds with Plaintiffs' position.

CONCLUSION

The pending motion and cross-motion for summary judgment should be dismissed, either as moot, as no longer pending, 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,

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