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 OF LAW IN OPPOSITION TO THE DIOCESAN DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON COUNT IV OF THE FIRST AMENDED COMPLAINT

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April 18, 2022

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Plaintiffs Stephen Del Sesto (as Receiver and Administrator of the St. Joseph Health Services of Rhode Island Retirement Plan) (the "Receiver"), and Gail J. Major, Nancy Zompa, Ralph Bryden, Dorothy Willner, Caroll Short, Donna Boutelle, and Eugenia Levesque, individually as named plaintiffs ("Named Plaintiffs") and on behalf of all class members[1] (the Receiver and the Named Plaintiffs being referred to collectively as "Plaintiffs"), submit this memorandum in support of their opposition to the Motion for Summary Judgment on Count IV of Plaintiffs' First Amended Complaint (ECF # 236 (hereafter "DD MSJ")) filed by Defendants Roman Catholic Bishop of Providence, a corporation sole, Diocesan Administration Corporation and Diocesan Service Corporation (collectively the "Diocesan Defendants").

The following related filings are submitted herewith:

- Plaintiffs' LR Cv 56(a)(4) Statement of Undisputed and Disputed Material Facts in Opposition to the Diocesan Defendants' Motion for Summary Judgment ("Plaintiffs' LR Cv 56(a)(4) Statement");
- Plaintiffs' LR Cv 56(a)(3) Statement of Disputed Facts in Opposition to the Diocesan Defendants' Statement of Undisputed Material Facts ("Plaintiffs' LR Cv 56(a)(3) Statement");[2] and
- Plaintiffs' Conditional Fed. R. Civ. P. 56(d) Motion to Defer or Deny the Diocesan Defendants' Motion for Summary Judgment to Allow Essential Discovery ("Plaintiffs' Conditional Rule 56(d) Motion").

I. PRIOR PROCEEDINGS

This case has already gone through a round of motions for summary judgment, which took place prior to Plaintiffs' settlement with the Prospect Defendants and The

[1] Contingent upon the Court certifying the Class and appointing them Class Representatives. The individual plaintiffs have previously been certified as class representatives but only for purposes of three settlements. See ECF # 162; ECF # 164; ECF # 217.

[2] Plaintiffs' LR Cv 56(a)(4) Statement attaches documentary exhibits as well as the affidavit of Richard P. Land and the declarations of Christopher Callaci, Stephan P. Sheehan, Gail J. Major, Nancy Zompa, Ralph Bryden, Dorothy Willner, Caroll Short, Donna Boutelle, and Eugenia Levesque.

Angell Pension Group, Inc. ("Angell"). The origin of the prior round of summary judgment motions was at the hearing on September 10, 2019, on the motions to dismiss filed by the Diocesan Defendants and other defendants, when the Court agreed with Prospect's counsel's suggestion that the Court entertain summary judgment motions on the issue of whether the Plan was subject to ERISA.[3] Plaintiffs objected that approach might result in undue delay, and asked instead that the Court "[l]et the parties litigate."[4] The Court overruled that objection and directed the parties to work together to agree upon the procedure for that approach which would involve discovery limited to the issue of the applicability of ERISA.[5]

At the direction of the Court, the parties entered into a stipulation (entered as an Order of the Court) which was to govern motions for summary judgment concerning the applicability of ERISA to the Plan.[6] Pursuant to that Stipulation and Order, Plaintiffs would file their motion for summary judgment first, then there would be a period of limited discovery, then the Defendants were directed to file their opposition and their own cross-motions for summary judgment, followed by another period of limited discovery.[7] Plaintiffs filed their motion for summary judgment on December 17, 2019.[8] However, as noted below, the only Defendants who filed any opposition to Plaintiffs' motion or filed their own motions for summary judgment were the Prospect Defendants.[9]

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[3] ECF # 222-1 (Sept. 10, 2019 afternoon hearing transcript) at 40, 69–71.

[4] ECF # 221-1 (Sept. 10, 2019 afternoon hearing transcript) at 70.

[5] ECF # 222-1 (Sept. 10, 2019 afternoon hearing transcript) at 74.

[6] ECF # 170.

[7] ECF # 170.

[8] ECF # 173.

[9] ECF # 193 (Prospect's Objection and Cross-Motion for Summary Judgment).

Plaintiffs' motion sought summary judgment pursuant to Count IV of the Amended Complaint (Declaratory Relief), and requested "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."[10] The Prospect Defendants opposed Plaintiffs' motion for summary judgment.[11] The Prospect Defendants also filed a cross-motion for summary judgment pursuant to Count IV of the Amended Complaint, and requested an order declaring 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."[12]

Both Plaintiffs' motion for summary judgment and the Prospect Defendants' cross-motion for summary judgment were addressed to the issue of whether the Plan was subject to ERISA when Prospect acquired the operating assets (including Our Lady of Fatima Hospital) of St. Joseph Health Services of Rhode Island ("SJHSRI") on June 20, 2014. In connection with their own motion for summary judgment, Plaintiffs informed the Court that Plaintiffs were seeking summary judgment on this issue because it was an essential element of Plaintiffs' claim that the Prospect Defendants were liable as Plan sponsor under the federal common law of successor liability.[13]

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[10] ECF # 173 at 27.

[11] ECF # 193.

[12] ECF # 193 (Memorandum of Law in Support of Opposition to Plaintiffs' Motion for Summary Judgment on Count IV of the First Amended Complaint and Cross Motion for Summary Judgment by the Prospect Defendants) at 71.

[13] See ECF # 202 (Plaintiffs' Memorandum of Law in Opposition to the Prospect Defendants' Cross Motion for Summary Judgment on Count IV of the Complaint) at 5 n.9 ("Although successor liability is not before the Court in connection with either of the pending motions for summary judgment, the Prospect Entities hope that the finding they seek through their cross motion for summary judgment that the Plan retained church plan status until after Prospect began to operate Fatima Hospital will limit if not eliminate the risk that, in subsequent proceedings, it may be determined that the Prospect Entities have successor liability for the Plan under ERISA. Conversely, if Plaintiffs' motion for summary judgment is granted, and the Court concludes that church plan status was lost by April 29, 2013 at the latest, Plaintiffs contend that

The Diocesan Defendants, on the other hand, did not oppose Plaintiffs' motion for summary judgment, filed no motion for summary judgment of their own, and did not oppose the Prospect Defendants' cross-motion for summary judgment. Indeed, the Diocesan Defendants expressly disclaimed having any position concerning the applicability of ERISA to the Plan, stating in their initial submission on June 26, 2020[14] 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 Defendants strongly believe that a prompt resolution of this legal question will benefit the Court and the Parties.

and again on November 20, 2020,[15] when the Diocesan Defendants stated 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.

After the Court approved Plaintiffs' settlement with the Prospect Defendants and Angell, and after previously declining to take any position, the Diocesan Defendants

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Prospect is liable for the failure to fund the Plan from that day forward, under the doctrine of successor liability that is applicable to ERISA plans.") (citations omitted).

[14] ECF # 189 at 1.

[15] ECF # 200 at 1.

filed a much-belated "assent" to Plaintiffs' motion for summary judgment.[16] Plaintiffs responded that the settlement had rendered their motion moot,[17] and sought leave to withdraw their motion.[18] Plaintiffs asserted that they were entitled to take inconsistent positions on the issue of whether the Plan was exempt from ERISA, since Plaintiffs settled their dispute with the Prospect Defendants before their motions were heard, and their argument was not adopted by the Court.[19] See In re Bankvest Capital Corp., 375 F.3d 51, 60 (1st Cir 2004) (judicial estoppel inapplicable where parties settled before court rules on the issue, notwithstanding that the court approved the settlement).

On December 10, 2021, the Court granted Plaintiffs' motion for leave to withdraw their motion for summary judgement.[20]

II. DIOCESAN DEFENDANTS MOTION FOR SUMMARY JUDGMENT

The Diocesan Defendants' motion for summary judgment is a reprise of Plaintiffs' (withdrawn) motion for partial summary judgment:

> This motion requests the same relief on the same grounds, records, and legal authority as Plaintiffs presented to this Court in their Motion for Summary Judgment filed on December 17, 2019 (ECF # 173).[21]

The Diocesan Defendants assert the identical claim for relief that "this Motion for summary judgment on Count IV of the First Amended Complaint should be granted, and the Court should enter an order declaring that by April 29, 2013 at the latest, the Plan

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[16] ECF # 221.

[17] ECF # 223.

[18] ECF # 226 (motion); ECF # 226-1 (memorandum).

[19] ECF # 226-1 at 3-5.

[20] Text Order entered December 10, 2021. At the same time, the Court dismissed the Prospect Defendants' cross motion for summary judgment as moot.

[21] ECF # 236 (DD MSJ) at 1.

was not a Church Plan within the meaning of 29 U.S.C. § 1002(33) and, therefore, was subject to ERISA."[22]

Indeed, the sole ground upon which the Diocesan Defendants rely for the conclusion that the Plan was not a Church Plan is the same ground upon which Plaintiffs relied in their motion for partial summary judgment—that the Plan failed to meet the statutory requirement that the Plan be administered by a "principal purpose organization." Specifically, the Diocesan Defendants parrot the request Plaintiffs made in their motion for summary judgment, *viz.*, that "this Court should enter summary judgment declaring that as of April 29, 2013 at the very latest, the Plan was not 'maintained by an organization … the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits' as required by I.R.C. § 414(e) (26 U.S.C. § 414(e)) and ERISA § 3(33)(C)(i) (29 U.S.C. § 1002(33)(C)(i))."[23]

In support of their motion for summary judgment, the Diocesan Defendants point (just as Plaintiffs pointed) to the fact that the Plan itself made SJHSRI the Plan Administrator, and that a certain resolution of the Bishop of Providence on April 29, 2013 purported to make the Board of Trustees of SJHSRI the "Retirement Board" charged with administration of the Plan.[24] They also note that, "[c]learly, maintaining the Plan was not the "main job" of SJHSRI itself, which was operating hospital facilities.

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[22] ECF # 236 (DD MSJ) at 19. Compare ECF # 173 (Plaintiffs Motion for Partial Summary Judgment) at 27 ("Plaintiffs' motion for summary judgment on Count IV of the First Amended Complaint should be granted, and 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.").

[23] Id.

[24] ECF # 236 (DD MSJ) at 11-12.

Similarly, maintaining the Plan was not the 'main job' of SJHSRI's Board of Trustees, which was overseeing the operation of those hospital facilities."[25]

III. SUMMARY OF ARGUMENT

The Diocesan Defendants' motion should be denied for two reasons, neither of which was raised in the prior round of summary judgment motions concerning the applicability of ERISA to the Plan:

1. After the sale of all of the operating assets of SJHSRI on June 20, 2014, SJHSRI no longer had an operating business to run, and, thereafter, the maintenance and funding of the Plan was the principal purpose of SJHSRI and its Board of Trustees, such that SJHSRI and its Board of Trustees qualified as a "principal purpose organization" after June 20, 2014, and such qualification is given retroactive effect under ERISA's "cure" provisions; and

2. Even assuming, *arguendo*, that were not the case, the Diocesan Defendants are judicially estopped from using ERISA to limit their liability, based upon their and SJHSRI's prior representations in quasi-judicial administrative proceedings before both the Rhode Island Department of Health and the Rhode Island Attorney General that the Plan was indeed a "Church Plan" and, therefore, exempt from ERISA, pursuant to which they and SJHSRI secured regulatory approval for the sale of SJHSRI's operating assets to the Prospect Defendants to the benefit of the Diocesan Defendants and the prejudice of the Plan participants.

Neither of these reasons was raised in connection with the earlier round of summary judgment motions.

Plaintiffs did not make the first argument summarized above. Plaintiffs sought to prove that the Plan was subject to ERISA by the time of the closing of the 2014 Asset

[25] ECF # 236 (DD MSJ) at 18 ("Clearly, maintaining the Plan was not the 'main job' of SJHSRI itself, which was operating hospital facilities. Similarly, maintaining the Plan was not the 'main job' of SJHSRI's Board of Trustees, which was overseeing the operation of those hospital facilities."). *Compare* ECF # 173 (Plaintiffs Motion for Partial Summary Judgment) at 26 ("Clearly, maintaining the Plan was not the 'main job' of SJHSRI itself, which was operating hospital facilities. Similarly, maintaining the Plan was not the "main job" of SJHSRI's Board of Trustees, which was overseeing the operation of those hospital facilities.").

Sale and did not consider SJHSRI's limited function after then to be either material or relevant to the motion. Plaintiffs did so in complete good faith.[26] Even though the Prospect Defendants opposed Plaintiffs' motion, they also did not make the argument that Plaintiffs assert herein.[27] The Diocesan Defendants did not raise the argument since they expressly took no position whatsoever on the issue of whether and when the Plan was subject to ERISA. When the initial round of summary judgment motions were pending and the parties were uncertain whether Plaintiffs or Prospect would prevail, Plaintiffs, Prospect and Angell settled the case and the Court did not decide the issue, leaving the case in the procedural posture as if the motion had never been made.[28]

The second reason why the Diocesan Defendants' motion for summary judgment should be denied, *viz.* judicial estoppel, was not addressed because it was irrelevant at that time. The Diocesan Defendants chose to take no position whatsoever. In that

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[26] After the Diocesan Defendants filed their motion, Plaintiffs' counsel focused on the potential significance of SJHSRI's very limited function after the 2014 Asset Sale, contacted Attorney Richard Land who represented SJHSRI following the 2014 Asset Sale, and obtained his affidavit setting forth the factual basis for Plaintiffs' argument. Plaintiffs' LR Cv 56(a)(4) Statement Exhibit 8 (Declaration of Stephen P. Sheehan) ¶ 22.

[27] Prospect initially did refer to the cure provisions of ERISA in their opposition (ECF # 190-1) to Plaintiffs' motion for summary judgment, but Prospect did not claim that SJHSRI and SJHSRI's Board of Trustees were a principal purpose organization after June 20, 2014. Instead they made two other arguments that referred to the cure provision: 1) "Even if, for some reason, the Affiliation process caused some lapse to occur while the administration, and the funding, of the Plan were transferring from the Bishop's Retirement Board to the CCHP Finance Committee and the CCHP Investment Committee, the actions taken to put in place and empower the CCHP Finance Committee and the CCHP Investment Committee and the actions those Committee then took to provide for the administration of the Plan and deal with its funding problems from 2011 through 2014 corrected those defects retroactive to when such lapses occurred (if any did occur), by operation of ERISA §3(33)(D)" (ECF # 190-1 at 64); and 2) that in order to prevail upon their motion, Plaintiffs' had the burden to affirmatively prove that the Plan was not somehow cured. ECF # 190-1 at 31 ("[I]in light of ERISA's "cure" provision, it is not enough to make a showing that there was no "principal purpose organization" as of a particular date; Plaintiffs must also – and have not – show that no subsequent action cured the alleged lapse as of the date in question. the burden should be on Plaintiffs to prove that "no subsequent action cured the alleged lapse as of the date in question.").

[28] "Withdrawal of a motion has a practical effect as if the party had never brought the motion." Caldwell-Baker Co. v. S. Illinois Railcar Co., 225 F. Supp. 2d 1243, 1259 (D. Kan. 2002). See also Remley v. Lockheed Martin Corp., No. C00-2495CRB, 2001 WL 681257, at *3 (N.D. Cal. June 4, 2001) ("The withdrawal of motion effectively meant that Lockheed had not made the motion.").

circumstance, there was nothing they could be estopped from asserting. Had they taken the position they now assert, Plaintiffs could (and would) have raised the issue of judicial estoppel at that time.[29]

IV. FACTS

A. Relevance of the facts

The facts recited herein are addressed to three issues:

- To demonstrate that after the 2014 Asset Sale, the Plan was administered by an organization whose main job was administering or funding the Plan, which retroactively "cured" any prior disqualification based on the Plan not having been administered by a principal purpose organization;[30]
- To demonstrate that the Diocesan Defendants both controlled and had a substantial identity of interest with SJHSRI in connection with the application filed by SJHSRI and others with the Rhode Island Attorney General and the Rhode Island Department of Health under the Hospital Conversions Act for approval of the sale of SJHSRI's assets to Prospect entities in late 2013 and the first half of 2014, such that SJHSRI's statements to the regulators are attributed to the Diocesan Defendants for purposes of judicial estoppel; and
- To demonstrate that the Diocesan Defendants and SJHSRI predicated that application upon the assertion that the Plan was a "Church Plan" exempt from ERISA, including the express assertion that the Plan was administered by a principal purpose organization, in direct contradiction to the position that the Diocesan Defendants are taking in their motion for summary judgment, such that the Diocesan Defendants are judicially estopped from now asserting that the Plan did not qualify for the "Church Plan" exemption.

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[29] In that event Plaintiffs would have argued judicial estoppel against the Diocesan Defendants. However, judicial estoppel would not have applied against Prospect because Prospect was not taking a contradictory position to what it had asserted before the state regulators.

[30] These facts for the most part are from the period beginning June 20, 2014 through the filing of the petition to place the Plan in receivership on August 18, 2017. Under the "cure" provisions of ERISA, 29 U.S.C. § 1002(33)(D), insofar as the Plan qualified as a "Church Plan" during this period, such qualification "cures" any prior non-compliance with the requirements for the "Church Plan" exemption and is, therefore, retroactive.

These facts are presented chronologically. The issue of whether the Plan in fact was administered by a principal purpose organization is based upon events on and after June 20, 2014. The issues concerning judicial estoppel, on the other hand, are based largely (but not entirely) on events leading up to the closing of the Asset Sale on June 20, 2014.

B. Facts

1. Concerning judicial estoppel

SJHSRI was formed in 1892 as the corporation named St. Joseph Hospital.[31] In 1970, St. Joseph Hospital (pursuant to a merger) acquired Our Lady of Fatima Hospital.[32] In 1995, St. Joseph Hospital was renamed St. Joseph Health Services of Rhode Island.[33] SJHSRI operated Our Lady of Fatima Hospital ("Fatima") as a completely independent Catholic Hospital from 1970 until January 4, 2010.[34]

From 1995 to January 4, 2010, the Bishop of Providence appointed all members of the Board of Trustees of SJHSRI, who served at his pleasure.[35] He was also the Chairman of and appointed all of the members to SJHSRI's Retirement Board, which administered the Plan.[36]

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[31] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 40.

[32] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 40.

[33] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 40.

[34] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 40.

[35] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 41.

[36] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 41.

In May of 2008, SJHSRI and Roger Williams Hospital ("RWH") entered into a "Memorandum of Understanding" ("MOU") and agreed in principle to an affiliation to create a new health care system.[37]

The MOU expressly provided that it was "a fundamental understanding of the Parties that the System shall be structured and governed in a manner that will preserve the Catholicity of SJHSRI …"[38] Pursuant to the MOU, "SJHSRI will maintain its designation as a Catholic hospital operating in full compliance with the social and ethical teachings of the Catholic Church, including the Religious and Ethical Directives for Catholic Health Care Services, as promulgated by the United States Conference of Catholic Bishops and adopted by the Bishop ('ERDs')."[39]

As of February 2, 2009, SJHSR, RWH, and the Bishop of Providence entered into a Health Care System Affiliation and Development Agreement.[40] The affiliation involved the creation of a new "healthcare system" under a new entity, CharterCARE Health Partners ("CCHP" or "CCCB").[41] CCHP would be the sole member of RWH, and the sole Class A member of SJHSRI.[42] The Bishop of Providence was the sole Class B Member of SJHSRI, with each member of SJHSRI having different voting rights.[43] Notably, the Affiliation Agreement included provisions to ensure that SJHSRI would

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[37] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 42.

[38] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 43.

[39] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 43.

[40] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 44.

[41] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 45. CCHP was eventually renamed CharterCARE Community Board so that the Prospect Defendants could use its former business name for themselves.

[42] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 45.

[43] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 45.

remain a Catholic hospital despite being affiliated with a secular system.[44] By these provisions the parties expressly agreed that CCHP "[would] encourage and support the maintenance and support the maintenance of Catholicity at SJHSRI" and SJHSRI "[would] be a Catholic hospital."[45]

Following the reorganization, the Bishop of Providence or the Bishop's designee was an *ex officio* member of the Board of Trustees with voting rights.[46] The Bishop or his designee was also the Chairperson of SJHSRI's Board of Trustees.[47] The Bishop also had the exclusive right to appoint the Vice Chairperson of SJHSRI's Board of Trustees.[48] The Bishop or his designee remained Chairman of SJHSRI's Board of Trustees throughout the period from January 4, 2010 through April 2016.[49]

It should be noted that the wrongdoing on which Plaintiffs' claims against the Diocesan Defendants are primarily based took place from 2010 – June 20, 2014, which was on the watch of the Bishop or the Bishop's designee as Chairman of SJHSRI's Board of Trustees. SJHSRI's actuaries informed SJHSRI of the minimum recommended contributions that would have been required if the Plan was governed by ERISA, for the following Plan years: 2010, 2011, 2012, 2013, and 2014, but SJHSRI made no contributions in 2010, 2011, 2012, or 2013, and no contribution in 2014 until June 20, 2014, when $14,000,000 was contributed to the Plan in connection with the

[44] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 46.

[45] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 46

[46] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 47.

[47] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 48

[48] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 50.

[49] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 49.

2014 Asset Sale.[50] There is no documentation evidencing that SJHSRI ever informed Plan participants that it was not making recommended minimum contributions to the Plan, that the Plan was underfunded, or that the purpose of the 2014 Asset Sale was to separate (and hopefully insulate) SJHSRI's operating assets from SJHSRI's pension liability.[51] Moreover, the individual Named Plaintiffs have submitted their Declarations attesting to the fact that they were never informed that SJHSRI was not making recommended minimum contributions to the Plan, that the Plan was underfunded, or that the purpose of the 2014 Asset Sale was to separate (and hopefully insulate) SJHSRI's operating assets from SJHSRI's pension liability.[52]

In March 2011, the leadership of CCHP decided to seek a capital partner.[53] Prospect Medical Holdings, Inc. ("Prospect") was identified as one possibility.[54] However, SJHSRI's balance sheet showed an accumulated deficit owed to the Plan of approximately $72,000,000.[55] Prospect did not want to assume liability for the deficit or satisfy the obligation.[56] On September 10, 2012, Prospect's representative Tom Reardon sent an email to CCHP and SJHSRI's CEO Ken Belcher requesting a meeting "to talk more about a **creative solution to the pension issue** and talk joint venture LOI

[50] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 51.

[51] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 53.

[52] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 54.

[53] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 55.

[54] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 57.

[55] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 56.

[56] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 56.

[Letter of Intent] terms."[57] Tom Reardon, Ken Belcher, and Jeff Bauer of Angell Pension Group met on September 12, 2012.[58] On November 5, 2012, Ken Belcher advised SJHSRI's Board of Trustees that Prospect's position with respect to the pension liability of $72 million was to "develop a [separate] board to manage the Pension fund."[59]

On September 20, 2012, another potential suitor, LHP Hospital Group, Inc. ("LHP") sent CCHP, SJHSRI, and RWH a draft letter of intent which proposed, *inter alia*, that "[t]hrough the transaction, LHP will contribute ~$160 million in cash which will be used, in part, to retire CCHP's long-term debt of ~$33 million and resolve CCHP's[60] pension liability of ~$72 million."[61] According to the minutes of the meetings of SJHSRI's Board of Trustees, they did not want to devote so much capital to paying the pension liability.[62]

On September 24, 2012, Prospect Medical sent CCHP a letter of intent which proposed, *inter alia*, the formation of a new company to hold the assets of RWH and SJHSRI, that the new company would not assume SJHSRI's pension plan, and that instead:

> **Discharge of Pension Plan Liability**. As stated above the pension plan liability of SJHSRI as reflected on CCHP's financial records will not be assumed by Newco. Furthermore, $86 million of cash and investments held by Bank of America and designated for the discharge of the pension plan obligations shall not be contributed to Newco. We propose that the

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[57] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 59 (emphasis supplied). This case is about Prospect's "creative solution to the pension issue," except that Plaintiffs characterize it differently, as a series of fraudulent transfers, aiding and abetting multiple breaches of fiduciary duties, fraud on regulators, etc.

[58] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 60.

[59] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 61.

[60] Actually SJHSRI's liability.

[61] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 62.

[62] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 63.

> $14 million cash contribution of CCHP be transferred to SJHSRI to augment the assets available to discharge the Pension plan liability. . . . We anticipate that we would need to negotiate the discharge of the pension liability with SJHSRI's unions.[63]

On or about March 18, 2013, Prospect Medical signed the Letter of Intent to purchase the assets of CCHP, RWH, and SJHSRI, pursuant to an asset purchase agreement (the "APA").[64] The Letter of Intent stipulated that the purchaser would not assume, and SJHSRI would remain liable for, "Seller's… pension liability," and provided for the "SJHSRI Pension Plan Discharge" as follows:

> **SJHSRI Pension Plan Discharge**
>
> a. Seller will work diligently to freeze the SJHSRI pension obligations in an amount equal to $100 million (the "Final balance"). This process may include creation of a separate fund, and appointment of a small board and investment CEO to manage the Final balance. **The intent of this action is to maintain the pension plan as a "Church Plan"**.
>
> b. The gap between the current SJHSRI Retirement Plan assets and the Final Balance will be funded by contributions from the Seller.[65]

As noted, Union approval was required for the new owner of Fatima Hospital not to have liability for the Plan.[66] One of the lead union negotiators was Christopher Callaci of United Nurses and Allied Professionals ("UNAP").[67] During the period from 1998 up to June 20, 2014, senior executives from SJHSRI informed him on many occasions that the Plan was exempt from ERISA because it was a "church plan."[68]

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[63] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 64.

[64] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 66.

[65] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 66 (emphasis supplied).

[66] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 64.

[67] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 67.

[68] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 67.

Prospect's representatives met with him and informed him that Prospect was completely unwilling to have liability for the Plan.[69] Based on the representations that the Plan was exempt from ERISA, UNAP agreed that the new owner of Fatima Hospital "will not have any obligations to the Defined Benefit Plan…"[70]

On the other hand, if UNAP had been informed that in fact the Plan was governed by ERISA, UNAP would have passed that information on to all union members who were employed by SJHSRI, and would have approached UNAP's negotiations with Prospect and SJHSRI from a different posture.[71] At a minimum, UNAP would have insisted that UNAP and SJHSRI's employees be provided with additional information concerning the Plan, including all the disclosures required under ERISA.[72] UNAP certainly would have demanded an explanation of why a plan that had been reported to be a church plan over many years was at that time, in 2013–2014, being described instead as an ERISA plan.[73] UNAP could have demanded that SJHSRI find another buyer.[74]

The Bishop or his designee remained Chairman of SJHSRI's Board of Trustees, and, therefore, was directly (or through his designee) involved from within SJHSRI in all of the decisions of its Board. He also worked directly and very closely with SJHSRI in his other capacities as the Class B member and in his role as Bishop of the Diocese of

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[69] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 68.

[70] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 69.

[71] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 70.

[72] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 70.

[73] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 70.

[74] As noted, LHP was willing to "resolve CCHP's[ ] pension liability of -$72 million" if it were the purchaser of Fatima Hospital.

Providence, especially in connection with the proposed sale to Prospect and securing the requisite regulatory approvals.

The Bishop's affirmative approval was required for the sale to occur, since SJHSRI's by-laws following the 2009 reorganization provided that for so long as SJHSRI was "Under Catholic Sponsorship," the affirmative votes of both the Class A Member of the Corporation and the Class B Member were required to act on certain matters, including "the sale, mortgaging or leasing of any real or personal property of the Corporation having a value in excess of the relevant canonical threshold as the same may exist from time to time…"[75] Pursuant to SJHSRI's by-laws, "Under Catholic Sponsorship" meant that both of the following conditions are met: "(i) SJHSRI was sponsored by the Roman Catholic Church, as determined by the Bishop; and (ii) SJHSRI was listed in the Official Catholic Directory, or if the Official Catholic Directory ceased to exist, the St. Joseph Health Services of Rhode Island Retirement Plan (the 'Plan') continued to be a Church Plan."[76]

Pursuant to the directives of the United States Conference of Bishops ("USCB"), the entities within a Catholic Diocese are eligible to be listed in the Catholic Directory only if the entities were under the sponsorship of the Diocese.[77] The Diocese of Providence, under supervision of a diocesan attorney, determines what entities should be listed in the Catholic Directory under the sponsorship of the Diocese of Providence.[78] At all times from SJHSRI acquiring ownership of Fatima Hospital until the petition was

[75] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 72.

[76] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 73.

[77] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 74.

[78] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 75.

filed to place the Plan into receivership on August 18, 2017, SJHSRI was listed in the Catholic Directory as under the sponsorship of the Diocese of Providence.[79]

Accordingly, the Plan was "Under Catholic Sponsorship" under both SJHSRI's by-laws and the terms of the APA. The sale of SJHSRI's assets in 2014 exceeded the canonical threshold.[80] Accordingly, pursuant to SJHSRI's by-laws following the 2009 reorganization, the Bishop's approval as the sole Class B member of SJHSRI was required for SJHSRI to enter into the APA.[81]

Expressing concern over committing to the asset sale without the Bishop having committed to preserve the Plan's status as a "church plan," CCHP's Chief Executive Officer Kenneth Belcher at a meeting of the Executive Committee of CCHP's Board of Trustees on July 25, 2013 raised the possibility of signing an asset sale agreement with the Prospect Entities but making it "'**subject to' if Bishop signs off on the pension piece**."[82] (emphasis supplied) The conclusion of this meeting of the Executive Committee was to share the current version of the APA with Bishop Tobin, and seek his support and agreement to maintaining SJHSRI in the Catholic Directory, prior to SJHSRI, RWH, and CCHP's signing the Asset Purchase Agreement.[83]

SJHSRI submitted the APA in draft to the Diocesan Defendants for their review and approval several times before the APA was signed. Each draft and the final version of the APA contained an express warranty that the Plan was a "church plan" and was

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[79] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 76.

[80] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 78.

[81] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 79.

[82] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 80 (emphasis supplied).

[83] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 80.

administered by a principal purpose organization, both of which the Diocesan Defendants now deny.

On August 8, 2013, SJHSRI's counsel provided the Diocesan Defendants (by email to the Chancellor of the Diocese of Providence) with the then-current draft of the APA.[84] That draft contained the following statement as part of the "Warranties of Sellers":

> Schedule 4.17(i) lists each Seller Plan that is a "church plan" within the meaning of Code Section 414(e) (a "Church Plan"), and, if later than the date on which the Seller Plan was established, the date on which such Seller Plan first became a Church Plan. **Each Church Plan has at all times been administered by an organization described in Section 414(e)(3)(A) of the Code** and Seller has not made, with respect to any Seller Plan listed on Schedule […], an election pursuant to Section 410(d) of the Code.[85]

This provision is key to applicability of judicial estoppel, both as the provision was set forth in the first draft to the Diocesan Defendants and in the form it took in subsequent drafts and the final version of the APA, since the Plan was listed as a "Church Plan" in the APA and schedules to the APA,[86] and the meaning of the reference to "an organization described in Section 414(e)(3)(A) of the Code" is clear. That is the definition of a "church plan":

> **(3) DEFINITIONS AND OTHER PROVISIONS**
>
> For purposes of this subsection—
>
> (A)Treatment as church plan

[84] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 81.

[85] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 81 (emphasis supplied).

[86] Plaintiffs' LR Cv 56(a)(4) Statement ¶¶ 101, 102.

> A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.

IRC Section 414(e)(3)(A).

In short, "an organization described in Section 414(e)(3)(A) of the Code," as required and warranted in the APA, is "an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches…."

Notwithstanding this express provision, the Diocesan Defendants' motion for summary judgment is based upon the contention that the Plan did *not* qualify as a "church plan," because the Diocesan Defendants allege that by April 29, 2013 the Plan allegedly was *not* "administered by an organization described in Section 414(e)(3)(A) of the Code."[87]

In addition to providing the Diocesan Defendants with the draft APA in various iterations for their review and approval, SJHSRI and its counsel on several occasions met with the Bishop and other representatives of the Diocesan Defendants to go over

[87] ECF # 236 (DD MSJ) at 19 ("Accordingly, this Court should enter summary judgment declaring that as of April 29, 2013 at the very latest, the Plan was not 'maintained by an organization … the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits' as required by I.R.C. § 414(e) (26 U.S.C. § 414(e)) and ERISA § 3(33)(C)(i) (29 U.S.C. § 1002(33)(C)(i)).").

the transaction and the Diocesan Defendants' role. The longest and most involved meeting was probably on August 14, 2013, when counsel for SJHSRI, CCHP, and RWH (including at least SJHSRI's outside counsel Keith Anderson), together with SJHSRI, CCHP, and RWH "senior leadership" (including at least Kenneth Belcher and Edwin Santos) met at the offices of the Diocesan Defendants to obtain their cooperation.[88] That meeting was also attended by Bishop Tobin, Rev. Timothy Reilly (the Chancellor of the Diocese of Providence), and Msgr. Paul Theroux (who was a member of the Diocesan Finance Council).[89]

Counsel for SJHSRI, CCHP, and RWH brought to the meeting a document entitled "Overview of the Strategic Transaction with Prospect Medical Holdings, Inc., Presentation to the Board of Directors," referring to the Board of Trustees for SJHSRI, CCHP, and RWH.[90] That document outlined the salient details of the 2014 Asset Sale, whereby SJHSRI, CCHP, and RWH would sell "substantially all of their assets to Prospect CharterCARE LLC ('Newco')."[91]

The very first page of the presentation (after the cover page) noted that only $14 million of the sales proceeds would be paid into "the Church-sponsored retirement plan (the 'Church Plan')."[92] The document then detailed certain "Catholic identity covenants" that would be promised to the Bishop as part of the transaction, quoted as follows:

> Catholic identity covenants of Prospect and Newco

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[88] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 82.

[89] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 82.

[90] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 83.

[91] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 83.

[92] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 84.

- Our Lady of Fatima Hospital and other legacy SJHSRI facilities will be operated in compliance with the ERDs[93]
- Roger Williams Medical Center and its facilities will not engage in prohibited activities
    - Abortion
    - Euthanasia
    - Physician-assisted suicide
- Any hospital or facility acquired or established after Closing must comply with restrictions on prohibited activities
- The Bishop has a direct right to enforce the Catholicity covenants
- CCHP intends to propose that the Bishop may require a name change of Our Lady of Fatima Hospital and other legacy SJHSRI facilities if he is unsuccessful in enforcing the covenants

This "Overview of the Strategic Transaction" then laid out the *quid pro quo* for freeing New Fatima Hospital from the unfunded liabilities of the Plan, and granting these extensive and perpetual "Catholic identity covenants" for New Fatima Hospital and New Roger Williams Hospital.[94] Defendants SJHSRI, RWH, and CCHP, through their counsel, informed Bishop Tobin, Rev. Timothy Reilly, and Msgr. Paul Theroux at this meeting that it was a "**requirement**" of the parties to the Asset Purchase Agreement that after the closing the Bishop would "**[m]aintain the retirement plan of St. Joseph Health Services of Rhode Island as a 'Church Plan'.**"[95]

On September 11, 2013, SJHSRI through its counsel again provided the Diocesan Defendants (by email to the Chancellor of the Diocese of Providence) with a

[93] Ethical and Religious Directives for Catholic Health Care Services.

[94] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 86.

[95] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 86 (emphasis supplied)

draft of the APA for their review and approval.[96] That draft had the same language quoted previously from the version that the Diocesan Defendants had received on August 8, 2013, which stated that:

> Schedule 4. l 7(i) lists each Seller Plan that is a "church plan" within the meaning of Code Section 414(e) (a "Church Plan"), and, if later than the date on which the Seller Plan was established, the date on which such Seller Plan first became a Church Plan. **Each Church Plan has at all times been administered by an organization described in Section 414(e)(3)(A) of the Code** and Seller has not made, with respect to any Seller Plan listed on Schedule […], an election pursuant to Section 410(d) of the Code.[97]

On September 12, 2013, SJHSRI through its counsel provided the Diocesan Defendants (by email to the Chancellor of the Diocese of Providence) with a copy of the presentation that had been shared with them on August 14, 2013, at the Diocesan Defendants' request so they could share it with the Diocese of Providence Finance Council.[98] The presentation states that it is "For the Bishop of the Roman Catholic Diocese of Providence, Rhode Island," and is "*CONFIDENTIAL*.[99]

On September 17, 2013, the Finance Council of the Diocese of Providence met with Ken Belcher, the CEO of CharterCARE Health Partners and SJHSRI to review the terms of the APA.[100] At the meeting it was stated that the cash proceeds from the sale would include "$14 million for the Church sponsored retirement plan (referred to as the 'Church Plan…')".[101]

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[96] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 87.

[97] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 87 (emphasis supplied).

[98] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 88.

[99] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 88.

[100] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 89.

[101] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 89.

At the meeting there was a discussion of the "Catholicity covenant part of the" APA, which the Chancellor described as "very solid."[102] It was noted at the meeting of the College of Consultors that "[o]nce [the APA is] approved by the Finance Council, the College of Consultors and the Bishop, who has the final say, the documentation will be sent to the Vatican for final approval."[103] At the meeting, the Bishop asked for a motion to be made to approve the "proposal of alienation of CharterCARE, St. Joseph Health Services to Prospect (Newco), and the motion was made, seconded and accepted."[104]

The Diocesan Defendants even solicited and obtained SJHSRI's assistance in securing approval for the transaction from the Vatican. On September 18, 2013, the Chancellor by email provided SJHSRI's counsel with a draft of the Bishop's letter to the Vatican seeking approval for the transaction, and solicited SJHSRI's counsel's comments.[105] The letter recounted the "merger" of SJHSRI and RWH into CCHP in 2009, and stated that "[s]hortly thereafter, in the wake of the global economic downturn, CharterCARE soon began to experience the need for increased capital and was confronted with a **spiraling and gaping unfunded liability within its employee-pension system**" (emphasis supplied).[106] On September 24, 2013 SJHSRI's counsel provided the Diocesan Defendants (by email to the Chancellor) with red-lined revisions to the Bishop's letter to the Vatican, which deleted the reference to "spiraling and gaping" pension liability, and substituted "significant" liability, stating that he preferred

[102] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 90.

[103] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 91.

[104] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 92.

[105] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 93.

[106] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 93 (emphasis supplied).

the revision "**in the event this letter was ever subject to discovery in a civil lawsuit**" (emphasis added).[107]

On September 24, 2013 the APA was signed.[108] The APA included Warranties and Representations of Sellers.[109] Many of the Warranties and Representations of Sellers are qualified as being "[t]o Sellers' knowledge."[110] Certain other Warranties and Representations of Sellers were not qualified.[111] Certain of the Warranties and Representations of Sellers concerned the Plan, which the APA referred to as the "Retirement Plan."[112] The Warranties and Representations of Sellers as to the Plan were not qualified, but, rather, were categorical, such as follows:

> **The Retirement Plan is a Church Plan. The Retirement Plan has been a Church Plan since the date on which the Retirement Plan was established, and has continuously maintained such status since that date. The Retirement Plan has at all times been administered by an organization described in Section 414(e)(3)(A) of the Code** and Seller has not made, with respect to the Retirement Plan, an election pursuant to Section 410(d) of the Code.[113]

As noted, the organization described in Section 414(e)(3)(A) of the Internal Revenue Code is a "principal purpose organization," and the Diocesan Defendants now contend that this warranty is false, that the Plan was *not* "a Church Plan," and that the Plan was *not* "administered by an organization described in Section 414(e)(3)(A) of the Code."[114]

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[107] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 94 (emphasis supplied).

[108] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 95.

[109] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 96.

[110] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 97.

[111] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 98.

[112] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 99.

[113] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 100 (emphasis supplied).

[114] ECF # 236 (DD MSJ) at 19.

Although the Bishop was not a signatory to the APA, the APA expressly provides that the Bishop is a third party beneficiary.[115] The APA states as follows:

> 15.5 Third-Party Beneficiaries.
>
> (a) Except as provided in Section 15.5(b) below, the terms and provisions of this Agreement are intended solely for the benefit of the Prospect, the Prospect Member, the Company, the Company Subsidiaries, Sellers, Company/Prospect Indemnified Persons, Seller Indemnified Persons and their respective permitted successors or assigns, and it is not the intention of the Parties to confer, and this Agreement shall not confer, third-party beneficiary rights upon any other person.
>
> (b) Notwithstanding Section 15.5(a) above, the Parties hereby acknowledge and agree that the provisions of Section 13.16[116] hereof, including the accompanying Exhibits M and N, are for the specific benefit of the Bishop of the Roman Catholic Diocese of Providence, Rhode Island. The parties further acknowledge and agree that any breach or violation of such provisions shall cause irreparable harm as to which no adequate remedy at law exists and that the Bishop may seek specific performance and injunctive relief in addition to all other remedies in equity or at law. If, in such circumstances, the Bishop is unsuccessful in obtaining specific performance and/or injunctive relief, the Company and the Company Subsidiaries shall, if requested by the Bishop in his sole discretion, cease operating under the names "St. Joseph" or "Our Lady of Fatima" or any other name that implies Catholicity.

In addition to his approval being required by SJHSRI's by-laws, the APA expressly was conditioned upon the Bishop's approval. The Sellers' obligations under the APA were subject to the condition precedent of "Sellers shall have received the Church Approvals."[117] The APA states that the Sellers, including SJHSRI, "shall promptly apply for and use commercially reasonable efforts to obtain those ecclesiastical approvals required from officials within the Roman Catholic Church (the

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[115] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 108.

[116] Concerning "Catholic identity and Covenants." Plaintiffs' LR Cv 56(a)(4) Statement ¶ 95 (APA at 66-67).

[117] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 110.

'Church') in order to consummate the Transactions, including the authorization of the Bishop of the Roman Catholic Diocese of Providence, Rhode Island, and the permission of the Holy See through the Vatican Congregation of Bishops (the 'Church Approvals.')."[118]

The Diocesan Defendants continued to work with SJHSRI to secure the necessary approvals after the APA was signed. On September 26, 2013, there was a meeting of the Roman Catholic Diocese College of Consultors, including the Bishop, at which the presentation the Bishop reviewed on August 14, 2013 and again on September 17, 2013 was presented to and reviewed by the College of Consultors.[119] The Bishop informed them that "this transaction will require canonical action from the Consultors", and that "[g]iven that the financial amounts involved in the alienation exceed the maximum amount set by the United states Conference of Catholic Bishops, the transaction will require the additional consent of the Holy See…."[120] The Bishop "reminded the College that because SJHSRI/Our Lady of Fatima Hospital is subject to the juridic person of the Diocese of providence, the College's formal consent was required."[121] A motion was then made, seconded and voted "[t]o consent to the alienation of substantially all assets of SJHSRI/Our Lady of Fatima to Prospect CharterCARE, LLC…."[122]

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[118] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 109.

[119] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 103.

[120] Id.

[121] Id.

[122] Id.

On September 27, 2013 the Diocesan Defendants (through the Bishop) sent their letter to the Vatican seeking approval for the transaction.[123] The letter enclosed the signed APA in its entirety.[124] It also enclosed the presentation by SJHSRI's counsel that the Bishop had reviewed on August 14, 2013, September 17, 2013, and again on September 26, 2013.[125] The letter to the Vatican states that this presentation "provides an overview of the transaction's details."[126] The letter made the following statements (*inter alia*):

> **[W]ithout this transaction, it appears that a consistent Catholic healthcare presence in the Diocese of Providence would be gravely compromised, and the financial future for employee-beneficiaries of the pension plan would be at significant risk**. I believe that the APA between CharterCARE and Prospect will help avoid the catastrophic implications of such a failure, and at the same time, enhance the quality of care at SJHSRI/Our Lady of Fatima. The alienation will allow the Diocese, through CharterCARE, to better attain the goals of fulfilling the mission of serving the poor and those in need, while respecting Catholic medical ethics and the Gospel of Life. We are grateful for the strong local presence of SJHSRI/Our Lady of Fatima Hospital that has been a foundation for Catholic healthcare here for over 100 years.
>
> The APA states that SJHSRI/Our Lady of Fatima Hospital will retain its Catholic identity, its existing policies on charitable and pastoral care, and its community benefit program. Additionally, it will continue to approach labor relations from a social justice perspective. The transaction will provide Our Lady of Fatima Hospital with much-needed capital for infrastructure, programs and pensions, while it continues to provide high-quality hospital services in accord with the Ethical and Religious Directives for Catholic Health Care Services, (the "Directives") as provided by the United States Conference of Catholic Bishops. The APA states that the Bishop of Providence has a direct right to enforce the Catholicity

[123] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 104.

[124] Id.

[125] Id.

[126] Id.

> covenants, and that the Bishop shall be the sole arbiter with respect to matters relating to compliance with the Directives at the SJHSRI/Our Lady of Fatima locations. In the event of non-compliance, the Bishop may request that Prospect CharterCARE, LLC cease operating under the names "St. Joseph" or "Our Lady of Fatima" or any other name that implies Catholicity. Any hospital or facility that Prospect CharterCARE, LLC subsequently acquires or establishes must comply with the restrictions on prohibited activities.
>
> **The transaction is subject to customary civil law closing requirements, including approvals from the Rhode Island Attorney general and the Rhode island department of health, and will be subject to the conditions of the Hospital Conversions Act. Hearings in both those offices will begin shortly, and we espect that the necessary approvals will be obtained in the next 60 days. Should any unexpected issues arise, I will notify you.**
>
> As noted, this alienation has been approved by the CharterCARE Board of Trustees. In addition, it has also received the consent of the diocesan Finance Council on September 16, 2013 and the consent of the College of Consultors on September 26, 2013 – all in accord with Canon 1292, §1. I have no objection to the alienation.
>
> * * *
>
> As you can see, this alienation is the culmination of a long process. **It is my sincere hope that Your Excellency will understand the important role of this alienation for the faithful of the Diocese of Providence, and the thousands of patients, employees, and pensioners of SJHSRI. Since we expect civil approvals in the coming weeks, I respectfully request your permission to proceed, so that the Diocese of Providence (through CharterCARE and affiliate SJHSRI/Our Lady of Fatima Hospital) may complete the final steps within the desired timeframe.**[127]

Thus, it is indisputable that the Bishop strongly supported this transaction as the means to secure a Catholic hospital in the Diocese of Providence that was not "confronted with

[127] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 104 (emphasis supplied).

a spiraling and gaping unfunded liability within its employee-pension system" and that the transaction depended upon approvals by the Department of Health and the Attorney General under the Hospital Conversions Act.

On October 18, 2013, CCHP, RWH, SJHSRI, Prospect Medical, Prospect East Advisory Services, LLC,[128] Prospect East Holdings, Inc.,[129] Prospect CharterCARE, LLC,[130] Prospect CharterCARE RWMC, LLC,[131] and Prospect CharterCARE SJHSRI, LLC [132] (collectively the HCA Applicants") submitted to the Rhode Island Department of Health and the Rhode Island Attorney General a hospital conversion application ("HCA Application") pursuant to the Rhode Island Hospital Conversion Act ("RIHCA") for permission to convert all health care facilities owned and operated by non-profit RWH and non-profit SJHSRI, including the Fatima Hospital and Roger Williams Hospital, to a for profit joint venture, Prospect CharterCARE, in which Prospect East Holdings would initially have an 85% interest and CCHP would have the remaining 15% interest.[133]

The HCA Application contained a sworn and notarized certification signed by all of the HCA Applicants, including SJHSRI, which certified that "all the information contained in this application is complete, accurate and true."[134] The information

[128] The entity that was to manage the new hospitals.

[129] The entity that was to own Prospect's 85% share in the limited liability company that would be the sole member in the entities that owned the new hospitals.

[130] The sole member in the two limited liability companies that were to own the new hospitals.

[131] The entity which was to own Our Lady of Fatima Hospital and the other operating assets that had been owned by SJHSRI.

[132] The entity which was to own Roger Williams Hospital and the other operating assets that had been owned by RWH.

[133] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 105.

[134] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 106. On January 2, 2014, the HCA Applicants resubmitted the HCA Application, accompanied by the same certification. Plaintiffs' LR Cv 56(a)(4) Statement ¶ 115.

contained in the HCA Application included the APA dated as of September 24, 2013.[135] Accordingly, the HCA Applicants certified that the APA itself was "complete, accurate and true."

SJHSRI was well aware that the determination of the amount by which the Plan was underfunded was dependent upon the actuarial assumptions used to predict the future earnings of the Plan assets. At a meeting of the CCHP Investment Committee on November 15, 2013, Committee Chairman Marshall Raucci informed the Committee that the projected $14,000,000 contribution to the Plan in connection with the proposed asset sale "would bring the funding level to 90% or better."[136] The Investment Adviser for the Plan in 2013 was Mercer Investment Consulting, Inc. ("Mercer").[137] On December 17, 2013, Chris Cozzini, who was one of the principals of Mercer, contacted the Chief Operating Officer of CCHP Michael Conklin and noted that the CCHP Investment Committee "is under the impression that the funded status of the plan will get to 90% [with the addition of $14 million]."[138] Mr. Cozzini informed Mr. Conklin that conclusion was based upon the actuary assuming a future rate of return on Plan assets of 8%.[139] He also noted that "[s]ince the plan is a church plan, you can set their own assumptions…," but that "[u]sing current market discount rates the funded status will only improve to about 60% [with the addition of $14 million.]"[140]

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[135] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 107.

[136] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 111.

[137] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 112.

[138] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 113.

[139] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 113.

[140] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 113.

Moreover, if the Plan were not exempt from ERISA as a "Church Plan," the funded status of the Plan would have to be determined using the projected future rates of return required by ERISA, which were much less than 8%.[141] Using the rates required by ERISA, the funded status of the Plan would be from 62.97% (using the rate required by the Pension Benefit Guaranty Corporation) to 74.39% (using the rates required for determination of the required minimum contribution).[142] In addition, a notice would have to be sent to the Plan participants every year, reporting the funded status of the Plan using both rates,[143] and informing the Plan participants every year when SJHSRI failed to make the required minimum contribution to the Plan.[144]

Without the Bishop's participation it would have been impossible for SJHSRI to claim that the Plan was a "church plan" exempt from ERISA. Indeed, on April 29, 2013, the Bishop signed a resolution (the "Bishop's Resolution") which stated in pertinent part as follows:

> RESOLVED: That the Plan is intended to qualify under Section 401(a) of the Internal Revenue Code of 1986, as amended (the "Code") as a non-electing church plan within the meaning of Section 414(e) of the Code and Section 3(33) of the Employee Retirement Income Security Act of 1974, as amended.[145]

The Bishop was also directly involved and cooperated with SJHSRI in the determination of the entity that would have responsibility for administration of the Plan. The Bishop's Resolution also addressed that issue, as follows:

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[141] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 114.

[142] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 114.

[143] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 114.

[144] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 114.

[145] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 116.

RESOLVED: That the Board of Trustees of St. Joseph Health Services of Rhode Island is the Retirement Board with respect to the Plan and acts on behalf of St. Joseph Health Services of Rhode Island as the Plan Administrator of the Plan.

RESOLVED: That the Board of Trustees of St. Joseph Health Services of Rhode Island has the authority, pursuant to the terms of the Plan, to appoint a committee to act on its behalf with respect to administrative matters related to the Plan.

RESOLVED: That the Board of Trustees of St. Joseph Health Services of Rhode Island has appointed the Finance Committee of CharterCARE Health Partners to act on its behalf with respect to administrative matters related to the Plan.[146]

The Bishop and SJHSRI also worked hand in glove in connection with the HCA Application. For example, on February 7, 2014, R. Otis Brown (acting on behalf of CCHP) sent an email to the Diocesan Defendants (through the Chancellor), copied to the CEO of CCHP and SJHSRI, that requested that the Bishop "author" a "letter… of support" for the HCA Application to the Members of the Rhode Island Health Services Council.[147] Mr. Brown attached to his email a draft letter from the Bishop to the members of the Health Services Council, which he stated was a "sample draft" prepared by Mr. Brown in the name of the Bishop.[148]

On February 14, 2014, the Diocesan Defendants (through the Chancellor) informed Mr. Brown that "Bishop Tobin today signed the letter you requested" and

[146] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 117. The Diocesan Defendants' document production in the Receivership Proceeding does not include any explanation why this resolution was created and signed by the Bishop. Plaintiffs' LR Cv 56(a)(4) Statement ¶ 118.

[147] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 119.

[148] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 119. Neither Prospect's nor SJHSRI's document production includes a copy of this draft. Plaintiffs' LR Cv 56(a)(4) Statement ¶ 119. Discovery will be required to determine what the draft said and the extent to which the Bishop may have revised it before signing.

attached an electronic (unsigned) copy.[149] The Chancellor informed Mr. Brown that "[w]e've not put the signed original in the mail yet … so let us know if you have any comments once you read it. Otherwise, we'll mail it directly to the Health Services Council at the address you provided."[150]

On February 20, 2014, the Rhode Island Department of Health Office of Health Systems Development[151] received the letter signed by Bishop Tobin.[152] It stated in pertinent part as follows:

> Dear Members of the Health Services Council:
>
> **I write on behalf of the proposed partnership between CharterCARE Health Partners and Prospect Medical Holdings**, which will assure that Rhode Islanders continue to have the choice of Catholic-sponsored health care at Our Lady of Fatima Hospital, and at St. Joseph Community health Center in South Providence – which provides critical primary and specialty care to thousands of less fortunate citizens each year.
>
> * * *
>
> The Diocese of Providence is grateful to CharterCARE for all it has done to preserve the healing ministry of SJHSRI/Our Lady of Fatima Hospital, all within difficult financial circumstances. **However, without this transaction, it appears that a consistent Catholic health care presence in the Diocese of Providence would be gravely compromised, and the financial future for employee-beneficiaries of the pension plan would be at significant risk. I believe that the partnership will help avoid the catastrophic implications of such a failure**, and at the same time, enhance the quality of care at SJHSRI/Our Lady of Fatima. The transaction will also allow the Diocese, through CharterCARE, to better attain the goals of fulfilling the mission of serving the poor and those in need, while respecting Catholic medical ethics and Church Law. We are grateful for the strong local presence of SJHSRI/Our

[149] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 120.

[150] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 120 (ellipsis in original).

[151] The Office of Health Systems Development was one of the divisions within the Department of Health charged with addressing the HCA Application.

[152] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 121.

> Lady of Fatima Hospital that has been a foundation for Catholic healthcare here for over 100 years.
>
> I respectfully ask you to look favorably on this proposed transaction.
>
> Sincerely yours,
>
> Thomas J. Tobin
> Bishop of Providence[153]

The HCA process included the Attorney General and Department of Health addressing written questions to the HCA Applicants and the HCA Applicants providing formal written responses. The Department of Health and the Attorney General advised the HCA Applicants that these governmental agencies "will consider the answers to these questions as a supplement to the Initial Application."[154] Accordingly, the answers of the HCA Applicants were subject to their certification that the information contained in their responses was "complete, accurate and true."

The essential role of the Bishop was expressly addressed in connection with the HCA Application process. On February 21, 2014, the Rhode Island Department of Health sent the HCA Applicants a list of questions to supplement the record of the HCA Applications, which included a request for a status report on the church approvals required for the transaction.[155] The question and the HCA Applicants' response on March 7, 2014[156] were as follows:

> 6. Asset Purchase Agreement. Please address the following:

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[153] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 121 (emphasis supplied).

[154] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 122.

[155] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 123.

[156] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 123 (emphasis supplied).

a. Section 7.5(e) of the APA relates to seller obtaining ecclesiastical approvals from the Roman Catholic Church including the authorization of the Bishop of the Roman Catholic Diocese of Providence, Rhode Island and the permission of the Holy See through the Vatican Congregation of Bishops. Please identify the status of and expected date for obtaining such approvals.

Response: **On September 17, 2013, the Finance Council of the Diocese of Providence voted to consent to the alienation of substantially all of the assets of Saint Joseph Health Services of Rhode Island including Our Lady of Fatima Hospital to Prospect CharterCARE, a newly-formed affiliate of CCHP and PMH.**

On September 26, 2013, the Roman Catholic diocese of Providence College of Consultors voted to consent to the alienation of substantially all of the assets of Saint Joseph Health Services of Rhode Island including Our Lady of Fatima Hospital to Prospect CharterCARE.

On September 27, 2013, Bishop Thomas J. Tobin, bishop of the Diocese of Providence, sent correspondence to Most Reverend Celso Morga Izurubieta, Secretary, Congregation for the Clergy in Vatican City, indicating that he has no objection to the alienation and requesting canonical permission for the proposed alienation of substantially all of the assets of Saint Joseph Health Services of Rhode Island including Our Lady of Fatima Hospital to Prospect CharterCARE.

At the request of the Congregation for the Clergy, additional information was sent to Cardinal Beniamino Stella, Prefect, Congregation for the Clergy on February 17, 2014. A response is anticipated in the next few weeks.

On March 25, 2014, the Diocesan Defendants (through the Chancellor) emailed to SJHSRI the "Vatican Approval letter" dated March 20, 2014, which the Chancellor stated was "good news" which "informs Bishop Tobin of the Holy See's approval of the

transaction."[157] The Vatican's Approval Letter expressly states that it is issued at the request of the Bishop pursuant to the Bishop's letter dated September 27, 2013.[158] On April 28, 2014 the HCA Applicants forwarded the Vatican Approval letter to the Attorney General.[159]

Certain of the Department of Health's and Attorney General's written questions to the HCA Applicants concerned the Plan, including SJHSRI's liabilities under the Plan and the sufficiency of the Plan's assets to funds the Plan's obligations to pay retirement benefits.[160] None of the written responses of the HCA Applicants questioned whether the Plan was a "church plan" exempt from ERISA. To the contrary, many of the written responses of the HCA Applicants and information provided in connection with such responses were expressly or implicitly predicated upon the representation that the Plan was a "church plan," and, therefore, exempt from ERISA.

The list of questions that the Department of Health submitted to the HCA Applicants on February 21, 2014 included a question regarding the use of the purchase price.[161] The relevant portions of the question and the relevant answers (highlighted in bold) which the HCA Applicants provided on March 7, 2014[162] were as follows:

> 5. Purchase Price and Uses. The purchase price for the proposed transaction is $45 million (reflecting 85% ownership interest of Prospect). Please address the following:

[157] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 124.

[158] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 124.

[159] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 125.

[160] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 126.

[161] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 127.

[162] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 127.

* * *

b. Additionally, please discuss the intend uses of the $45 million that will be going to CharterCARE and how those uses for spending those funds would be established.

Response:

* * *

d. $14,000,000 shall be applied to the St. Joseph Pension Plan.

c. Please identify the extent to which, if any, the purchase price will be used by CharterCARE for community benefit versus paying off debts.

Response: The use of the sale proceeds as described in Section (b) above will benefit the community in three ways

* * *

b. The use of $14M to strengthen the St. Joseph Pension Plan will be of significant benefit to the community as it will assure that the pensions and retirement of many former employees, who reside in this community, are protected.[163]

These answers were signed by CCHP and SJHSRI CEO Ken Belcher, under the attestation that "the information contained in this material is true, accurate, and complete."[164]

However, as discussed below, the calculations that purportedly substantiated the claim that the $14 million would strengthen the Plan and "assure" that "the pensions…are protected" were only true if the Plan was valued as a Church Plan. If it were assumed that the Plan was subject to ERISA, as the Diocesan Defendants now

[163] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 127.

[164] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 127.

contend, the $14 million would not significantly "strengthen" the Plan and certainly would not "assure" that pension benefits were "protected."

On April 7, 2014 the Department of Health and the Attorney General issued questions to the HCA Applicants numbered S3-1 through S3- 65.[165] Question number S3-46 stated as follows:

> Please provide:
>
> a. the most recent actuarial valuation of the Pension Plan;
>
> b. the documentation as to the determination that $14M[166] will stabilize the plan, and a description of any written information of the understanding with employee representatives with respect to the freezing and funding of the plan;
>
> c. how many employees are eligible for this pension; and
>
> d. how many employees will be affected by the freeze.

On April 14, 2014 the HCA Applicants provided the Attorney General and the Department of Health with their written responses to these questions.[167] They responded to Question S3-46 as follows:

> **Response:**
>
> **a. See attached Confidential Exhibit S3-46A;**
>
> **b. See attached Confidential exhibit S3-46B;**
>
> **c. There are 2,828 eligible participants including actives, inactive per-diems, terms with vested balances and retirees and beneficiaries; and**
>
> **d. 199 employees.**

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[165] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 128. "S3" meaning third set of supplemental questions.

[166] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 128. Referring to the $14 million that would be deposited into the Plan if and when the HCA Application was approved and the asset sale closed.

[167] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 129.

Confidential Exhibit S3-46B included an analysis prepared by Defendant Angell of the effect that the $14,000,000 contribution would have to "stabilize" the Plan.[168] In that analysis, Angell stated that **"[i]t is assumed that the Plan will remain a non-electing Church Plan and will not become subject to ERISA**."[169]

The analysis concluded that with the $14,000,000 contribution, the Plan would be 94.9% funded as of July 1, 2014.[170] That calculation was expressly based upon the assumption that the existing Plan assets plus the $14,000,000 would earn a future rate of return of 7.75%.[171] Using the rates required by ERISA, the funded status of the Plan would be from 62.97% (using the rate required by the Pension Benefit Guaranty Corporation) to 74.39% (using the rates required for determination of the required minimum contribution).[172] Moreover, a notice would have to be sent to the Plan participants every year, reporting the funded status of the Plan using both rates, and disclosing that SJHSRI was not making required minimum contributions to the Plan.[173]

The issue of the Plan's funded status was the subject of sworn testimony of the Chief Executive Officer of SJHSRI Kenneth Belcher at a public hearing on April 7, 2014 in connection with the HCA Applications.[174] Mr. Belcher was asked to address three questions raised by a recent report on SJHSRI by Moody's Investor Services, that had warned that SJHSRI's "dwindling cash and large pension liabilities may force it to

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[168] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 130.

[169] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 130 (emphasis supplied).

[170] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 130.

[171] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 130.

[172] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 114.

[173] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 114.

[174] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 131.

default on its bonds."[175] The third question to CEO Belcher related to Moody's' concern over the funded status of employee retirement accounts, including the Plan.[176] Mr. Belcher testified as follows:

> MR. BELCHER: . . . But the third part was on the pension fund, and the impact on the pension fund with this -- and **I think you know we shared information up-front is that at the time of the closing we'll be putting millions of dollars into the pension fund which will bring it to a level of roughly 91 and a half percent funding which is above the safe level that you need for sort of a quote safe level. So all of this really helps stabilize the pension fund as well.**[177]

However, the statement that the plan will be at 91.5% funding was only true if the Plan was exempt from ERISA, contrary to the Diocesan Defendants' current claim.

The issue of the Plan's funded status was the subject of additional submissions to the Attorney General and the Department of Health to secure approval of the HCA Application. On May 2, 2014, the HCA Applicants submitted "the Transacting Parties' Final Supplemental HCA Responses" with exhibits to the Department of Health and the Attorney General.[178] This submission included the "Confidential Final Supplemental Responses to the HCA Application."[179] That enclosure included the following statement with respect to the Plan:

> Pension:
>
> **Please see attached at Confidential Miscellaneous Exhibit 3 is the requested information regarding the Pension Plan.**

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[175] Plaintiffs' LR Cv 56(a)(4) Statement ¶¶ 131-132.

[176] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 133.

[177] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 133 (emphasis supplied).

[178] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 134.

[179] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 134.

The document entitled "Confidential Miscellaneous Exhibit 3" consists of a narrative captioned the "Confidential Response Regarding Pension" and Attachment 1 thereto.[180] The Confidential Response Regarding Pension[181] states as follows:

> **Confidential Response Regarding Pensions**
>
> Enclosed herein at Attachment 1 is a listing of the projected contributions necessary to keep the St. Joseph Health Services of Rhode Island Retirement Plan (the "Pension Plan") funded at recommended levels. **First, it is important to note that these contributions are not mandatory. Secondly, it is important to note that upon receipt of the $14 M contribution that will be made in connection with the proposed transaction, the Pension Plan will be funded in excess of ninety percent (90%).**
>
> That being said, there are three potential sources of funding through which additional contributions can be made to the Pension Plan. They are as follows:
>
> 1. The Perpetual Trust income of St. Joseph Health Services of Rhode Island, which has over the last few years averaged approximately $300,000.00;
>
> 2. The second pool of income will be distributions from the fifteen percent (15%) ownership interest that CCHP will maintain in the joint venture; and
>
> 3. The third possible stream of funds is the RWMC Perpetual Trust income, which has averaged approximately $170,000.00 over the last few years.
>
> The first source can and will be utilized. The second source, combined with the first source, may satisfy the funding recommendations as the Hospitals reach a level of profitability. Research is being done as to the potential use of the third source.[182]

The sentences which are highlighted (bold) were false if the Plan did not qualify for exemption from ERISA as a Church Plan, as the Diocesan Defendants now claim.

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[180] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 135.

[181] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 135.

[182] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 135 (emphasis supplied).

The first sentence would have been false because under ERISA, minimum contributions are mandatory. The second sentence would be false if the Plan were not exempt from ERISA because Angell's computation was expressly predicated upon an assumed expected rate of return on the Plan's current assets of 7.75%.[183] Using the discount rates required by ERISA, upon receipt of the $14,000,000 contribution to be made in connection with the proposed transaction, the Pension Plan would be funded only 62.97% (using the rate required by the Pension Benefit Guaranty Corporation) or 74.39% (using the rates ERISA required for determination of the required minimum contribution).[184]

That is just one of many ways that the adequacy of Plan assets as represented to the Attorney General and the Department of Health depended on the Plan's being exempt from ERISA.

As noted, if the Plan was not exempt from ERISA as a Church Plan, it would have been subject to the reporting requirements of ERISA, which included that the Plan Sponsor (SJHSRI) annually provide each Plan participant with a summary of the status of the Plan, which was required to disclose the extent to which the Plan was underfunded and whether SJHSRI had made the required minimum contribution.[185] Accordingly, if the Plan did not qualify as a Church Plan, each Plan participant would have to have been informed that the Plan was only 62.97% funded (using the rate required by the Pension Benefit Guaranty Corporation) or 74.39% funded (using the

[183] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 130.

[184] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 114.

[185] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 114.

rates ERISA required for determination of the required minimum contribution).[186] Had they been so informed, it is reasonable to conclude they would have objected to the 2014 Asset Sale obtaining the requisite regulatory approval.

Without doubt, the HCA Application never would have been filed and the operating assets of SJHSRI never would have been sold to Prospect if the Plan were subject to ERISA, because Prospect's agreement to purchase those assets was based upon the express warranty that the plan qualified as a "Church Plan" exempt from ERISA.[187] No doubt this was part of Prospect's "creative solution" for how to evade liability for the Plan, since Prospect would have been exposed to successor liability if the Plan were subject to ERISA. If necessary, a deposition of Prospect will confirm this.

On May 2, 2014, Assistant Attorney General Genevieve M. Martin requested that SJHSRI's counsel "send me your legal analysis as to the ability to use RWMC perpetual trust income to pay St. Joseph's expenses, including its pension expenses."[188] On May 8, 2014, SJHSRI's counsel forwarded documentation to Ms. Martin the following:

> Finally, attached is the Roger Williams Medical Center (RWMC) Board of Trustees Resolution authorizing the use of the RWMC Board Designated Funds to satisfy the St. Joseph Health Services of Rhode Island (SJHSRI) liabilities at close and any potential future funding and expenses related to the SJHSRI pension plan, and any surplus shall be transferred to the CCHP Foundation.[189]

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[186] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 114.

[187] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 100. See also ECF # 203 (Prospect's Reply to Plaintiffs' Memorandum of Law in Opposition to the Prospect Entities' Cross-Motion for Summary Judgment) at 4 ("SJHSRI and CCHP repeatedly and resolutely affirmed that the Plan constituted a non-electing church plan exempt from ERISA.").

[188] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 136.

[189] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 136.

The Resolution identifies $6,666,874 in "RWMC Board Designated Funds" and "approves and directs use of the RWMC Board Designated Funds to satisfy SJHSRI's liabilities at close and any potential future funding and expenses related to the SJHSRI pension plan, and any surplus shall be transferred to the CCHP Foundation."[190]

Both the Attorney General and the Department of Health retained experts to review the applicants' submissions.

The Attorney General retained James P. Carris, C.P.A. "to review and evaluate the Proposed transaction and to provide expert witness testimony if the Proposed Transaction proceeds to litigation."[191] In particular, Mr. Carris was retained to "[a]nalyze all financial aspects of the Proposed Transaction…"[192]

The Department of Health retained Harborview Consulting, LLC to provide expert analysis (principally through Dr. John J. Schibler).[193] The Department of Health's May 19, 2014 Decision with Conditions approving the HCA conversions summarized that scope of services:

> For this conversion review, the Department contracted with Harborview Consulting, LLC ("Harborview"), the principal of which is John J. Schibler, CPA, Ph.D., to work directly with staff to interpret and analyze financial information supplied by the transacting parties. Additionally, Harborview's services included the analysis of financial documents, papers, and related financial records provided by the transacting parties, that included audited and internal financial and operating statements, and any financial or utilization data provided to the Department by the transacting parties as part of the conversion review. The purpose of the contract was to obtain

[190] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 137.

[191] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 138.

[192] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 138.

[193] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 139.

> consulting services of an expert in the hospital/health care accounting industry to develop a financial assessment of the proposed conversion.[194]

On May 6, 2014, Dr. Schibler testified before the Project Review Committee:

> REVEREND SHIRE: Thank you very much, Doctor. Let me start with a question. I'm interested in hearing more about the unfunded pension liability. Can you say a few words about that.
>
> DR. SCHIBLER: Yeah, I looked at the unfunded pension liability. I have looked at a report. Let me qualify this by one thing. Usually, typically what I would want to look at is either the footnote in the audited financial statements or I would want to look at the actual actuary' s report. I did see a projection, and in essence what that projection said was that with that $14 million being added to the pension plan, that it was going to require about an additional $600,000 a year to fund that pension plan, and that they were intending that that was to come from some perpetual trusts that are part of St. Joseph's, and then it was also indicated that possibly anything that they would receive on their 15 percent from the joint venture. So, again, the reason I qualify that is **it's been represented that the pension plan with the $14 million is funded to the 90 percent level**. I have not seen an actuary's report that actually specifies that 90 percent level, so that's the only qualification.[195]

Again, what was "represented," that the "pension plan with the $14 million is funded to the 90 percent level," was false if the Plan was subject to ERISA, as the Diocesan Defendants now contend.

At the conclusion of the May 6, 2014 Project Review Committee hearing, the committee voted to approve the HCA applications and recommend further approval by the Health Services Council.[196] The Project Review Committee issued a written report to the Health Services Council on May 13, 2014.[197]

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[194] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 139.

[195] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 140 (emphasis supplied).

[196] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 141.

[197] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 142.

On May 13, 2014, the Health Services Council of the Rhode Island Department of Health approved the Project Review Committee's written report, recommending that the Department of Health approve the HCA applications with certain conditions.[198]

On May 14, 2014, Mr. Carris submitted his report to the Attorney General.[199]

The Attorney General approved the HCA Application by written decision dated May 16, 2014 ("AG Decision").[200] The Attorney General's approval of the transaction was expressly conditioned upon the requirement "[t]hat the transaction be implemented as outlined in the Initial Application, including all Exhibits and Supplemental Responses."[201]

The AG Decision noted that the statutory criteria the Attorney General was required to apply included determining the value of the transaction, and that Mr. Carris was consulted to make that determination,[202] and quoted extensively from Mr. Carris's Report, including the entirety of Mr Carris's analysis of the transaction.[203]

The AG's Decision quoted the following from Mr. Carris's Report:

> A third party valuation analysis or fairness opinion was not completed with regard to the entire transaction. CCHP stated that its board did not undertake an appraisal since any potential valuation would have to be measured against the board's requirement for a joint venture model that included the retention of local ownership and local governance. Prospect stated that it looked at two methods of determining potential value. The first method was a multiple of twelve months trailing EBITDA and the second method was a multiple of enterprise value. Neither of these

[198] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 143.

[199] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 144.

[200] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 145.

[201] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 145 (quoting AG Decision at 52 (Condition 9)).

[202] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 145.

[203] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 145.

> methods were deemed by the parties to be applicable in this situation. Accordingly, the parties looked at the existing long-term debt, other outstanding obligations and future capital needs. CCHP in pursuing its joint venture model, as directed by its Board, was looking to resolve approximately $31 million in long-term debt, **to bring the St. Joseph's Pension Plan to a ninety (90%) percent funding level** and fund future capital needs of approximately $50 million. The parties therefore estimate the total consideration to be approximately $95 million.
>
> The purchase commitment from Prospect is fair and reasonable for the acquisition of CCHP and its affiliates. This is based on the criteria established by the CCHP Board, a review of available documentation, analysis of CCHP' s current and historical operating performance as well as interviews and discussions with numerous individuals who participated in the processes and discussions which culminated in this transaction.[204]

Again, the claim that the addition of $14 million would "bring the St. Joseph's Pension Plan to a ninety (90%) percent funding level" was false if the Plan was subject to ERISA, as the Diocesan Defendants now claim.

Immediately following this quotation, the AG Decision stated as follows:

> Moreover, given the considered and extensive review process employed by the CCHP Board and its finding that the terms of its deal with Prospect "were the best available from the remaining, interested parties," **the information provided by Carris**, as well as the offers of other bidders, the criteria under the Hospital Conversions Act regarding valuation of the Proposed Transaction has been met.[205]

The Rhode Island Department of Health approved the HCA Application on May 19, 2014 ("DOH Decision").[206] The DOH Decision stated that the approval was conditional, and "Condition 1" was that "[t]he transacting parties shall implement the

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[204] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 145 (AG Decision at 21-22) (quoting Carris Report) (emphasis supplied).

[205] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 145 (AG Decision at 22) (emphasis supplied).

[206] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 146.

conversion, as detailed in the initial application, and as conditionally approved by the Director of Health.[207] The DOH Decision also noted the Rhode Island Department of Health's reliance on Dr. Schibler's interpretation and analysis of the parties' submissions.[208]

The asset sale closed on June 20, 2014.[209] At 10:17 a.m. on June 20, 2014, CharterCARE Health Partners filed articles of amendment with the Rhode Island Secretary of State, changing its name from CharterCARE Health Partners to CharterCARE Community Board.[210] One minute later, at 10:18 a.m. on June 20, 2014, Prospect Chartercare, LLC filed a "fictitious business name statement" with the Rhode Island Secretary of State, stating that it would operate under the "fictitious name" of CharterCARE Health Partners, which was the same name under which SJHSRI, RWH, and CCHP had operated Old Fatima Hospital and Old Roger Williams Hospital from 2009 right up to the day of the closing of the 2014 Asset Sale.[211]

Moreover, the new Prospect entities retained existing management, including the executives that had led the effort for regulatory approval such as Ken Belcher and Michael Conklin.[212]

The Diocesan Defendants' support for the transaction, because it met their goal of preserving a Catholic Hospital, continued after the closing. On July 24, 2014, the Chancellor of the Diocese of Providence, Father Timothy Reilly, contacted the Editor of

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[207] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 146 (DOH Decision at 33).

[208] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 146.

[209] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 148.

[210] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 149

[211] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 149.

[212] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 150.

the Rhode Island Catholic about doing a story on the sale of Our Lady of Fatima Hospital, which would be a "great way to emphasize the positives of this transaction."[213] In his email[214] Father Reilly made the following statement:

> Given the financial challenges for SJHSRI/Fatima Hospital over the past five years, the new joint venture presents the best possible alternative so that Catholic healthcare continues to be available here in Rhode Island.
>
> The Catholic Church will remain involved in the ongoing mission of SJHSRI/Fatima Hospital, especially regarding pastoral care. That will not change.
>
> And, since the new parent company is contractually bound by "Catholicity covenants", the Catholic identity of Fatima Hospital remains as well (the covenants provide for, among other things, the continued presence of a Catholic priest-chaplain; a specifically Catholic chapel in which the Blessed Sacrament is kept; as well as the signage, crucifixes, and statues that serve as visible reminders that Our Lady of Fatima is a Catholic hospital.

Not coincidentally, over those five years SJHSRI had accrued accumulated liabilities on the Plan of over $72,000,000. However, as a result of the Asset Sale, the entity that owned Fatima Hospital no longer carried liability for the Plan on its balance sheet.[215]

The Bishop was interviewed in connection with the story, and stated as follows[216]:

> For all intents and purposes, Fatima Hospital will retain its Catholicity, and that is guaranteed by contract now. It's not just an aspiration, it's guaranteed by contract that the Catholic identity of Fatima Hospital itself is

[213] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 151.

[214] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 151.

[215] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 152.

[216] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 153.

> still under the supervision of the local bishop and that in all of its ministries and external signs Fatima Hospital will be as Catholic as it has ever been.
>
> Even though we are out of the direct delivery of healthcare services itself, we will still have a hospital that's thoroughly Catholic in many ways.

Similarly, even after the closing, SJHSRI continued to emphasize the new hospital's obligations to the Diocesan Defendants. SJHSRI CEO Ken Belcher was interviewed for the story in the Rhode Island Catholic on August 21, 2014, and stated as follows:

> The new partnership will continue to uphold its commitments to preserve the Catholic identity of the facilities just as CharterCARE had promised the diocese it would do when it initially became the parent company.
>
> We have been very careful to make sure that we have maintained all the promises that we said we would, particularly within the affiliated structure and respecting the ethical and religious directives.[217]

Thus, all of the actors involved in the 2014 Asset Sale came out ahead, except for the Plan which no longer was backed by an operating hospital. Indeed, it is fair to say that all of the other actors involved in the 2014 Asset Sale, including the Diocesan Defendants, came out ahead *because* the Plan was disadvantaged.

2. Concerning the cure

In support of the claim (for purposes of opposing summary judgment) that SJHSRI's Board of Trustees qualified as a "principal purpose organization" after June 20, 2014, Plaintiffs rely upon the affidavit of Richard P. Land and documents obtained in discovery. Attorney Richard P. Land of the law firm Chace Ruttenberg & Freedman, LLP ("CRF") acted as attorney and agent for CCHP, SJHSRI, and RWH during the

[217] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 154.

period from at least mid-November 2014 until those entities were placed into a liquidating receivership in December of 2019.[218] Throughout that representation, he was the attorney from CRF with primary responsibility for the work done on behalf of or in connection with CCHP, SJHSRI, and RWH.[219] Indeed, he was expressly authorized to act "in connection with the administration, management and potential wind-down of the" Plan.[220]

While he was acting as agent and attorney for CCHP, SJHSRI, and RWH, Attorney Land was aware that on or about June 20, 2014, SJHSRI, RWH, and CCHP sold their operating assets to Prospect Chartercare and various other entities in the Prospect group of companies.[221] He was also aware that it was intended that, thereafter, RWH and SJHSRI would go into wind-down, RWH would be liquidated, but SJHSRI's funding obligations and obligations as Sponsor and Administrator of the St. Joseph Health Services of Rhode Island Retirement Plan (the "Plan") would continue.[222]

Throughout his service as attorney and agent for SJHSRI, Attorney Land participated in the wind-down of SJHSRI and RWH, which consisted of the payment of obligations incurred while SJHSRI had operated Fatima Hospital and thereafter in connection with the wind-down, and incurred while RWH had operated Roger Williams Hospital and thereafter in connection with the wind-down, and collection of all debts owed to SJHSRI and RWH.[223]

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[218] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 155.

[219] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 155.

[220] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 155.

[221] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 158.

[222] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 158.

[223] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 159.

SJHSRI and RWH were left with certain financial assets after the sale of SJHSRI and RWH's operating assets to Prospect Chartercare and related entities.[224] SJHSRI and RWH were nonprofit corporations and a significant portion of their remaining assets derived from charitable bequests, the disposition of which was subject to the approval of the Rhode Island Attorney General ("AG") and the Superior Court.[225]

As noted, the AG approved the sale to Prospect Chartercare on May 16, 2014. The AG's conditions of approval included the requirement that the assets of SJHSRI and RWH that were retained by those entities (not sold to Prospect) be allocated and distributed pursuant to a Cy Pres proceeding, based upon the submission of a *Cy Pres* petition approved by the AG.[226] The AG's Decision included Condition No. 8 on page 52, which stated as follows:

> 8. That (a) a proposed opening balance sheet for the CCHP Foundation and the Heritage Hospitals as of the close of the transaction identifying the source and detail of all charitable assets to be transferred to the CCHP Foundation be provided to the Attorney General promptly following the close of the transaction; (b) a proposed Cy Pres petition satisfactory to the Attorney General be prepared promptly following the close of the transaction allowing certain charitable assets to be transferred to the CCHP Foundation and requesting that other charitable assets remain with the Heritage Hospitals, in each case for disbursement in accordance with donor intent, **with such proposed modifications as agreed to by the Attorney General, and (c) the approved Cy Pres petition be filed with the Rhode Island Superior Court**.

Accordingly, the disposition of SJHSRI's charitable assets following the sale to Prospect was pursuant to the conditions imposed by the Attorney General, including the requirements for a *Cy Pres* petition satisfactory to the Attorney General, and were not

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[224] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 160.

[225] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 161.

[226] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 161.

subject to the discretion of SJHSRI or SJHSRI's Board of Trustees as would have been the case if SJHSRI were operating without such control.[227]

SJHSRI, RWH, and an affiliated foundation, CharterCARE Foundation ("CCF"), were the petitioners in the *Cy Pres* proceeding and were represented by Adler Pollock & Sheehan P.C. ("APS").[228] APS prepared and secured the Attorney General's advance approval for the *Cy Pres* petition which was filed on January 13, 2015.[229] The *Cy Pres* petition referred in paragraph 14 to the Attorney General's condition concerning charitable assets as follows:

> The AG decision discussed the proposed disposition of charitable assets at pages 23 through 32 having reviewed draft cy pres petition outlines submitted during the HCA review. Among other things, it approved the concept of (1) the transfer of certain of the charitable assets to the CCHP Foundation and (2) the use of certain of the charitable assets during the Heritage Hospitals' wind down to satisfy the Outstanding Pre and Post Closing Liabilities subject to cy pres approval from this Court. It also required the filing of this Petition to address such disposition of the charitable assets post closing.[230]

The *Cy Pres* petition in its paragraphs 24, 27-29, and 32 sought Superior Court approval for RWH to retain charitable assets totaling $17,109,003.04 to pay its pre and post-closing liabilities and to transfer any remaining balance to SJHSRI for SJHSRI to use to pay its pre and post-closing liabilities, including its pension obligations.[231] The *Cy Pres* petition in its paragraphs 27, 30, and 32 sought court approval for SJHSRI to retain charitable assets totaling $6,473,365 to pay its pre and post-closing liabilities,

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[227] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 162.

[228] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 163.

[229] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 163.

[230] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 163.

[231] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 164.

including its pension obligations.[232] The *Cy Pres* petition in its paragraph 17 expressly noted that SJHSRI's pension obligations would remain after its other pre and post-closing liabilities were paid:

> 17. As set forth on Exhibit C, at the Joint Venture closing, certain obligations of RWH and SJHSRI were paid, i.e., bond, pension and account payable liabilities, using sales proceeds from PMH and unrestricted cash. In addition, the Outstanding Pre and Post Closing Liabilities remain to be paid, including, without limitation, malpractice insurance tail policies, third party payor obligations and worker's compensation payments. It is anticipated that the Outstanding Pre and Post Closing Liabilities will be paid during the Wind-down period of RWH and SJHSRI over the next approximately three years. The SJHSRI pension funding obligation will continue after the wind-down period concludes.[233]

The *Cy Pres* petition was granted by the Rhode Island Superior Court by order dated April 20, 2015.[234]

Consequently, virtually all ordinary business decisions which management would make and a board of trustees normally would be expected to supervise were pre-determined or non-existent for SJHSRI's management or Board of Trustees following the sale of SJHSRI's operating assets.[235] There were no operating issues to be managed or for the Board to supervise, because SJHSRI had no remaining operating business or operating assets.[236] In addition, the sources and amount of SJHSRI's charitable and other assets and SJHSRI's obligation to apply them to pay its pre and

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[232] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 165.

[233] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 166.

[234] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 167.

[235] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 168.

[236] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 168.

post-closing liabilities were already determined in the *Cy Pres* proceeding and the prior Decision of the Attorney General.[237]

However, SJHSRI remained Plan Administrator with full power and authority to amend or terminate the Plan.[238] Moreover, the ultimate goal of the wind-down of RWH and SJHSRI was to fund SJHSRI's obligations under the Plan.[239] Thus, the principal matter going forward for SJHSRI and SJHSRI's Board of Trustees was the maintenance and funding of the Plan.[240] That was no mere formality. To the contrary, it was clear that the Plan was not sufficiently funded to pay all its obligations to the Plan participants.[241] In other words, if nothing were done to address the problem, those Plan participants who were already receiving benefits would receive some or all the benefits they expected, whereas Plan participants who had not yet retired would receive much less or possibly nothing because the Plan would run out of money.[242]

The records of SJHSRI reveal that SJHSRI did not designate an Administrator or named fiduciary, and, thus, SJHSRI remained the Administrator and named fiduciary of the Plan until October 20, 2017, when the Board of Trustees of SJHSRI irrevocably designated Plaintiff Receiver as administrator of the Plan.[243]

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[237] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 168.

[238] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 169.

[239] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 169.

[240] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 169.

[241] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 169.

[242] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 169.

[243] The Diocesan Defendants have stipulated for purposes of their motion to the fact that "[t]he records of SJHSRI reveal that SJHSRI did not designate an Administrator or named fiduciary, and, thus, SJHSRI remained the Administrator and named fiduciary of the Plan until October 20, 2017, when the Board of Trustees of SJHSRI irrevocably designated Plaintiff Receiver as administrator of the Plan." DD SUMF ¶ 30. To the extent it remains an issue, the Land Declaration puts it to rest. Land attests as follows:

During the period of Attorney Land's involvement from mid-November 2014 through SJHSRI's filing of the petition to put the Plan into receivership on August 18, 2017, there was no active Finance Committee of CharterCARE Health Partners, and no one purporting to act on behalf of the Finance Committee of CharterCARE Health Partners exercised any authority over the Plan.[244]

The issue of what to do with the Plan, and specifically the problems resulting from the Plan's underfunded status, were always a matter of primary importance to SJHSRI and SJHSRI's Board of Trustees throughout the period from November 2014 through the filing of the Petition to place the Plan into receivership.[245] One of the members of that board, until he resigned on May 1, 2015, was Christopher N. Chihlas, M.D.[246] His email to Attorney Land announcing his resignation reflects his primary concern for the Plan, which was shared by SJHSRI's Board of Trustees as a whole:[247]

> My only parting request is to tirelessly work to develop a pension plan strategy that is equitable and thus acceptable to those who worked many years expecting the Church plan to provide for them in their retirement.

> In connection with the Plan receivership in the Rhode Island Superior Court, captioned St. Joseph Health Services of Rhode Island, Inc. v. St. Joseph Health Services of Rhode Island Retirement Plan, C.A. No: PC-2017-3856, SJHSRI was served with a subpoena duces tecum that requested, inter alia, "[a]ll documents relating to the establishment, functions, or conduct of any board, committee, or subcommittee that administers or administered the Plan, including any board or committee or subcommittee resolutions and any appointments to such board, committee, or subcommittee." I responded to the subpoena on behalf of SJHSRI and produced all such documents in the possession or control of SJHSRI and do not recall seeing any document by or on behalf of SJHSRI or SJHSRI's Board of Trustees indicating that SJHSRI's Board of Trustees ever intended to or in fact appointed the Finance Committee of CharterCARE Health Partners (under that name or as renamed CharterCARE Community Board) to act with respect to any matters related to the Plan.
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> Plaintiffs' LR Cv 56(a)(4) Statement ¶ 170.

[244] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 173.

[245] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 174.

[246] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 174.

[247] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 174.

Dealing with this concern was the principal responsibility and focus of SJHSRI and SJHSRI's Board of Trustees throughout Attorney Land's involvement with SJHSRI, up to the filing of the petition to place the Plan into receivership on August 18, 2017.[248] Consistent with that concern, the receivership petition in its paragraph 15 sought an order reducing all Plan participants' benefits by 40% so that the shortfall would be shared equally.[249]

The Plan was discussed during the first meeting Attorney Land attended of SJHSRI's Board of Trustees on December 15, 2014.[250] The Plan was discussed again during the next meeting of SJHSRI's Board of Trustees on January 21, 2015.[251] The agenda for that meeting highlighted the importance to the board of a range of "Pension Matters," including the "underfunding issue" and the related "Church plan issue."[252] The "Church plan issue" discussed with the Board concerned reasons why the Plan might cease to qualify as a "church plan" exempt from ERISA.[253] It was Attorney Land's understanding that insofar as the Plan qualified for this exemption, SJHSRI was not obligated under ERISA to fund the Plan.[254] However, throughout Attorney Land's involvement with SJHSRI and SJHSRI's Board of Trustees, it was always the policy of

[248] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 175.

[249] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 175.

[250] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 176.

[251] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 177.

[252] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 177.

[253] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 178.

[254] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 178.

SJHSRI and SJHSRI's Board of Trustees that SJHSRI had at least a moral obligation to fund the Plan and to honor that moral obligation to the extent possible.[255]

The problems associated with the Plan's underfunded status were also the key issues for the meeting of SJHSRI's Board of Trustees which took place on April 8, 2015.[256] As noted in the email dated April 2, 2015, that meeting was attended by Albert Krayter, Angell's Director of Defined Benefit Department, who explained the underfunding problem and discussed with the Board various strategies to deal with the problem.[257] Those strategies included "two additional benefit and funding scenarios – reducing benefits by 25% and 30%, and solving for the rates of return needed to keep the Plan solvent, assuming that the Plan will continue as a church plan," as noted in the email dated April 2, 2015.[258]

The problem of what to do with the Plan was a primary concern of SJSHRI and SJHSRI's Board of Trustees throughout Attorney Land's involvement, but it came to a head beginning in the winter of 2016–2017, culminating on August 7, 2017 when the Board of Trustees after a great deal of deliberation authorized and directed Attorney Land to file the petition for receivership.[259]

On April 15, 2019, the Plaintiff Receiver filed an election with the United States Department of Labor, electing to have the Plan become subject to ERISA, regardless of

[255] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 178.

[256] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 182.

[257] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 182.

[258] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 182.

[259] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 183.

whether it was entitled to the Church Plan exemption, effective July 1, 2017.[260] As a result, the Plan became subject to ERISA by April 15, 2019, effective as of July 1, 2017.

V. ARGUMENT

A. Summary Judgment Standard

Summary judgment is appropriate only where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "At the summary judgment stage, a trial court is to make legal determinations rather than involve itself in factfinding." Doe v. Trustees of Bos. Coll., 892 F.3d 67, 86 (1st Cir. 2018). "At summary judgment, the judge's function is not himself or herself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Burns v. Johnson, 829 F.3d 1, 8 (1st Cir. 2016). "Facts are deemed 'material' if they have the potential to affect the outcome of the suit under the applicable law, and a dispute is deemed 'genuine' if the evidence about the fact is such that a reasonable jury could resolve the point in the favor of the non-moving party." Ouellette v. Beaupre, 977 F.3d 127, 134–35 (1st Cir. 2020). "The party moving for summary judgment bears the initial burden of showing that no genuine issue of material fact exists." Feliciano-Munoz v. Rebarber-Ocasio, 970 F.3d 53, 62 (1st Cir. 2020). In analyzing a summary judgment motion, the court "views all facts and draws all reasonable inferences in the light most favorable to the non-moving" parties. Estrada v. Rhode Island, 594 F.3d 56, 62 (1st Cir. 2010).

[260] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 184.

B. The Diocesan Defendants have failed to prove as a matter of law that the Plan was not maintained by a principal purpose organization during the period from June 20, 2014 until October 20, 2017

1. The requirement for a "principal purpose organization"

"The statutory definition of 'church plan' came in two distinct phases." Advocate Health Care Network v. Stapleton, 137 S. Ct. 1652, 1656 (2017).

> From the beginning, ERISA provided that "[t]he term 'church plan' means a plan established and maintained ... for its employees ... by a church or by a convention or association of churches." [29 U.S.C.] § 1002(33) (A). Then, in 1980, Congress amended the statute to expand that definition by deeming additional plans to fall within it. The amendment specified that for purposes of the church-plan definition, an "employee of a church" would include an employee of a church-affiliated organization (like the hospitals here). [29 U.S.C.] § 1002(33)(C)(ii)(II). And it added the provision whose effect is at issue in these cases:
>
> > "A plan established and maintained for its employees ... by a church or by a convention or association of churches includes a plan maintained by an organization ... the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches." [29 U.S.C.] § 1002(33)(C)(i).
>
> That is a mouthful, for lawyers and non-lawyers alike; to digest it more easily, note that everything after the word "organization" in the third line is just a (long-winded) description of a particular kind of church-associated entity—which this opinion will call a "principal-purpose organization." The main job of such an entity, as the statute explains, is to fund or manage a benefit plan for the employees of churches or (per the 1980 amendment's other part) of church affiliates.

Advocate Health Care Network v. Stapleton, 137 S. Ct. at 1656-57 (ellipses in the original).

"As *Advocate* makes clear, two types of organization qualify for the church-plan exemption: churches and so-called principal-purpose organizations." Medina v. Catholic Health Initiatives, 877 F.3d 1213, 1220 (10th Cir. 2017) (referring to Advocate Health Care Network v. Stapleton, *supra*). As quoted above, a principal purpose organization is an organization "the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches." 29 U.S.C. § 1002(33)(C)(i).

It is undisputed that SJHSRI was the Plan sponsor since 1995 and is not and never was a church. Accordingly, for the Plan to qualify as a church plan since 1995, it needed to be funded or managed by a principal purpose organization. See Smith v. OSF HealthCare Sys., 933 F.3d 859, 863 (7th Cir. 2019) ("The language in § 1002(33)(A) and (C)(i) thus makes the church plan exemption available to pension plans and other employee benefit plans established by church-associated entities, such as church-associated hospitals, where the plans are maintained by principal-purpose organizations.").

Whether the *principal purpose organization* requirement is satisfied depends upon compliance with *all* parts of a three-part test, as noted in Medina v. Catholic Health Initiatives, *supra*:

> The statute imposes a three-step inquiry for entities seeking to use the church-plan exemption for plans maintained by principal-purpose organizations:
>
> 1. Is the entity a tax-exempt nonprofit organization associated with a church?

> 2. If so, is the entity's retirement plan maintained by a principal-purpose organization? That is, is the plan maintained by an organization whose principal purpose is administering or funding a retirement plan for entity employees?
>
> 3. If so, is that principal-purpose organization itself associated with a church?
>
> Under this framework, to qualify for the church-plan exemption, CHI [the plan sponsor] must receive an affirmative answer to all three inquiries.

Medina v. Catholic Health Initiatives, *supra*, 877 F.3d at 1222.

ERISA does not define the statutory term "maintained," but the courts have construed it as simply meaning that the principal-purpose organization cares for the plan for purposes of operational productivity. See Medina v. Catholic Health Initiatives, supra, 877 F.3d at 1226 (10th Cir. 2017) ("In our view, then, when ERISA says that a church plan includes a plan "maintained" by a principal-purpose organization, 29 U.S.C. § 1002(33)(C), it simply means the principal-purpose organization, as *Black's* says, 'cares for the plan for purposes of operational productivity.'") (citing Black's Law Dictionary 1039 (9th ed. 2009)); Boden v. St. Elizabeth Med. Ctr., Inc., *supra*, 2019 WL 3338850, at *7 ("[A]n organization said to 'maintain' a plan must merely 'care[ ] for the plan for the purposes of operational productivity.'") (citing Medina and Black's Law Dictionary). For purposes of this motion, however, the precise meaning of the statutory term "maintained" is irrelevant. Rather, the focus here is on whether the entity maintaining the Plan had that as its main job.

2. The Diocesan Defendants' motion is focused solely on the issue of whether the entity that maintained the Plan did so as its main job

As noted above, the test for a Plan to qualify as a "Church Plan" has three prongs. However, the Diocesan Defendants' motion for summary judgment addresses only the second prong, i.e., "is the plan maintained by an organization whose principal purpose is administering or funding a retirement plan for entity employees?" The Diocesan Defendants do not dispute that the entity that sponsored the Plan was "a tax-exempt nonprofit organization associated with a church." Similarly, they do not dispute that the entity that maintained the Plan was "itself associated with a church." Accordingly, the issues before the Court do *not* include either whether the entity that sponsored the Plan was "a tax-exempt nonprofit organization associated with a church," or whether the entity that maintained the Plan was "itself associated with a church." Consequently, Plaintiffs do not address those issues herein.

Instead, the only issue raised by the Diocesan Defendants' motion is whether or not the Plan was maintained by an organization whose principal purpose is administering or funding a retirement plan for entity employees. Thus, the Diocesan Defendants' motion for summary judgment must be denied unless it is clear as a matter of law that the Plan was *not* maintained by an organization whose principal purpose is administering or funding a retirement plan for entity employees.

3. SJHSRI and SJHSRI's Board of Trustees maintained the Plan after June 20, 2014

The Plan was amended and restated effective July 1, 2011.[261] The Plan was again amended and restated effective July 1, 2016.[262] The 2011 Plan and the 2016 Plan are identical with respect to the organization that was the Administrator of the Plan.[263] The 2011 Plan and the 2016 Plan did not expressly provide for any retirement board.[264]

The 2011 Plan and the 2016 Plan did not refer to, or confer any authority on, any outside organization concerning the administration or funding of the Plan.[265] Instead, both the 2011 Plan and 2016 Plan provided that

> The Employer shall be the Plan Administrator, hereinafter called the Administrator, and named fiduciary of the Plan, unless the Employer, by action of its Board of Directors [sic], shall designate a person or committee of persons to be the Administrator and named fiduciary.[266]

It is undisputed that "SJHSRI did not designate an Administrator or named fiduciary, and, thus, SJHSRI remained the Administrator and named fiduciary of the Plan until October 20, 2017, when the Board of Trustees of SJHSRI irrevocably designated Plaintiff Receiver as administrator of the Plan."[267]

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[261] DD SUMF Exhibit 4.

[262] DD SUMF Exhibit 5 (2016 Plan).

[263] Compare DD SUMF Exhibit 4 (2011 Plan) at 3, 38; DD SUMF Exhibit 5 (2016 Plan) at 4, 41.

[264] See DD SUMF Exhibit 4 (2011 Plan) at 3, 38; Exhibit 5 (2016 Plan) at 4, 41.

[265] See DD SUMF Exhibit 4 (2011 Plan) at 3, 38; DD SUMF Exhibit 5 (2016 Plan) at 4, 41.

[266] See DD SUMF Exhibit 4 (2011 Plan) at 38; DD SUMF Exhibit 5 (2016 Plan) at 41.

[267] DD SUMF ¶ 30; DD SUMF Exhibit 11 (October 20, 2017 Resolution). The Diocesan Defendants' stipulation to this fact makes it unnecessary to demonstrate why the Finance Committee of CharterCARE Health Partners did not act as Plan administrator after June 20, 2014. In any event Attorney Land is clear that the records of SJHSRI show no delegation of that function to the Finance Committee of CharterCARE Health Partners, and that throughout his involvement with the Plan "from mid-November, 2014 through the filing of the petition to put the Plan into receivership on August 18, 2017, there was no

4. SJHSRI's main job after June 20, 2014 was administering or funding the Plan

Prior to June 20, 2014, SJHSRI operated Our Lady of Fatima Hospital and other medical facilities, and SJHSRI's Board of Trustees supervised management's operation. Although SJHSRI also administered the Plan, it is ludicrous to suggest that *prior* to June 20, 2014, SJHSRI's main job or the main job of SJHSRI's Board of Trustees was administering or funding the Plan.

However, *after* the closing on June 20, 2014, it is clear from Attorney Land's declaration and his reasoning as set forth therein that the administration and funding of the Plan *were* the principal purpose of SJHSRI and SJHSRI's Board of Trustees. There were no operating issues to be managed or for the Board to supervise, because SJHSRI had no remaining operating business or operating assets.[268] In addition, the sources and amount of SJHSRI's charitable and other assets and SJHSRI's obligation to apply them to pay its pre and post-closing liabilities were already determined in the *Cy Pres* proceeding and the prior Decision of the Attorney General.[269] Consequently, by that time, virtually all ordinary business decisions that SJHSRI management would normally make and the board of trustees normally would be expected to supervise were pre-determined or non-existent for SJHSRI's Board of Trustees.[270]

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active Finance Committee of CharterCARE Health Partners, and no one purporting to act on behalf of the Finance Committee of CharterCARE Health Partners exercised any authority over the Plan." Plaintiffs' LR Cv 56(a)(4) Statement ¶ 173.

[268] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 168.

[269] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 168.

[270] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 169.

Notwithstanding its severally constrained role in other areas, SJHSRI remained Plan Administrator with full power and authority to amend or terminate the Plan.[271] Moreover, the ultimate goal of the wind-down of RWH and SJHSRI was to fund SJHSRI's obligations under the Plan.[272] Thus, the principal matter going forward for SJHSRI and SJHSRI's Board of Trustees was the maintenance and funding of the Plan.[273]

The issue of what to do with the Plan, and specifically the problems resulting from the Plan's underfunded status, were always a matter of primary importance to SJHSRI and SJHSRI's Board of Trustees throughout the period from November 2014 through the filing of the Petition to place the Plan into receivership.[274] Dealing with this concern was the principal responsibility and focus of SJHSRI and SJHSRI's Board of Trustees throughout Attorney Land's involvement with SJHSRI, up to the filing of the petition to place the Plan into receivership on August 18, 2017.[275]

The problem of what to do with the Plan was a primary concern of SJSHRI and SJHSRI's Board of Trustees throughout Attorney Land's involvement, but it came to a head beginning in the Winter of 2016-2017, culminating on August 7, 2017 when the Board of Trustees after a great deal of deliberation authorized and directed Attorney Land to file the petition for receivership.[276]

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[271] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 169.

[272] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 169.

[273] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 169.

[274] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 174.

[275] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 175.

[276] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 183.

Given these facts, it cannot be said as a matter of law that SJHSRI did not qualify as a "principal purpose organization."

5. ERISA's "cure" provisions moot SJHSRI's prior deviations from the requirements for the Church Plan exemption

ERISA contains the following cure provision:

> (D) (i)If a plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of title 26 fails to meet one or more of the requirements of this paragraph and corrects its failure to meet such requirements within the correction period, the plan shall be deemed to meet the requirements of this paragraph for the year in which the correction was made and for all prior years.
>
> (ii) If a correction is not made within the correction period, the plan shall be deemed not to meet the requirements of this paragraph beginning with the date on which the earliest failure to meet one or more of such requirements occurred.
>
> (iii) For purposes of this subparagraph, the term "correction period" means—
>
> > (I) the period ending 270 days after the date of mailing by the Secretary of the Treasury of a notice of default with respect to the plan's failure to meet one or more of the requirements of this paragraph; or
> >
> > (II) any period set by a court of competent jurisdiction after a final determination that the plan fails to meet such requirements, or, if the court does not specify such period, any reasonable period determined by the Secretary of the Treasury on the basis of all the facts and circumstances, but in any event not less than 270 days after the determination has become final; or
> >
> > (III) any additional period which the Secretary of the Treasury determines is reasonable or necessary for the correction of the default,
>
> whichever has the latest ending date.

29 U.S.C. §1002(33)(D).

The Secretary of the Treasury has never sent SJHSRI (or anyone else) a notice of default with respect to SJHSRI's failure to have met the requirement for a "principal purpose" organization.[277] Accordingly, by definition, the "correction period" has not yet begun, much less expired.

Thus, it would be irrelevant whether during some period of time prior to June 20, 2014 the Plan failed to meet the requirement for a "principal purpose" organization, provided that failure was subsequently corrected. If that failure was subsequently corrected, the Plan is "deemed" to have met that requirement both going forward and "for all prior years" from the effective date of ERISA.[278]

This conclusion that the correction was both effective and retroactive in restoring the "Church Plan" exemption is clear from the statutory language, such that it is unnecessary to consider the position of the Internal Revenue Service ("IRS"), which is the agency within the Department of the Treasury charged with send the initial notice of default. However, the IRS's interpretation through private letter rulings is in accord.

In Private Letter Ruling ("PLR") 9619073, 1996 WL 241530 (2.13.96), a tax-exempt, nonprofit church-affiliated organization (Corporation M) maintained five (5) benefit plans as "Church Plans," one of which was a defined benefit pension plan (Plan T). Plan T was administered by a committee referred to as Committee M, as follows:

> The duties of Committee M, established under Article 15, section 7 of the Amended Bylaws are to oversee and supervise the activities of Plan T in a fiduciary capacity in accordance with the Employee Retirement Income

[277] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 185.

[278] The Plan was formed effective July 1, 1995. See Diocesan Defendants' Statement of Undisputed Material Facts (ECF # 237) ¶ 2 ("Effective July 1, 1995, SJHSRI established the St. Joseph Health Services of Rhode Island Retirement Plan (the 'Plan').").

> Security Act of 1974 (ERISA) for the benefit of the participants in the Plan, including, but not limited to selecting, reviewing, and supervising the activities of the Plan's actuary, asset trustee, investment manager, independent accountant and other outside professionals retained to perform services for the Plan. Committee M is composed of at least three members of the Board of Trustees of Corporation M and Corporation M's president, vice-president of finance and vice president of human resources.

PLR 9619073, 1996 WL 241530 (2.13.96). The IRS acknowledged that Committee M qualified as a principal purpose organization:

> Further, because the principal function of Committee M is the administration of Plan T, Committee M constitutes an organization, the principal purpose or function of which is the administration or funding of plans or programs for the provision of retirement benefits for employees of Corporation M. Therefore, Committee M qualifies as an organization described in section 414(e)(3)(A) of the Code.

PLR 9619073, 1996 WL 241530 (2.13.96).

However, the other four benefit plans (referred to in the PLR as "Plans U, V, W and X") were being administered day-to-day by Corporation M's Vice President of Human Resources, and he reported to a general subcommittee of Corporation M's board of trustees. The IRS concluded that "[i]n this case, the administration of Plans U, V, W and X by the vice president of human resources of Corporation M and Committee N has not satisfied the 'principal purpose or function' requirement of section 414(e)(3)(A) of the Code." PLR 9619073, 1996 WL 241530 (2.13.96).

Corporation M, without having received any notice of default, sought a private letter ruling in which it advised the IRS that it "intends" to set up a separate administrative committee, similar to Committee M, whose purpose would be to control and manage the operation and administration of those four other benefit plans (notably,

while still allowing Corporation M's human resources employees to continue to handle the routine, day-to-day functions of those plans). The IRS concluded as follows:

> Based on the foregoing facts and representations, we conclude that Plans T, U, V, W and X are qualified as church plans within the meaning of section 414(e) of the Code, and have been since their inception, but in no event earlier than January 1, 1974. However, with respect to Plans U, V, W and X, this ruling shall have no effect unless and until such time as the aforementioned committee is established, whose sole[279] purpose, as has been represented, must be to administer Plans U, V, W and X, and which is controlled by or associated with a church or a convention or association of churches.

PLR 9619073, 1996 WL 241530 (2.13.96). In other words, by "fixing" the principal-purpose organization problem, which Plans U, V, W and X apparently had, those four benefit plans would qualify as church plans retroactive to the date each one had been established.

The IRS reached a similar conclusion in a second case, involving a Catholic nursing home (owned by another "Corporation M" different from the one discussed above) and a Catholic assisted living facility (owned by "Corporation N"). PLR 200326045, 2003 WL 21483128 (4.2.03). Corporation M had established a defined benefit plan on July 1, 1972 (prior to the effective date of ERISA). Corporation N had established a tax-deferred annuity plan effective January 1, 1996. Both were treated as "Church Plans." Until October 13, 2000, both plans were administered by Corporation

[279] Corporation M represented to the IRS that plan administration would be the "sole" purpose of Committee M, and the IRS was merely holding Corporation M to its representation, not ruling that the requirement for a "principal purpose organization" meant "sole" purpose. In any event, the statute clearly refers to "principal purpose," and the Supreme Court has construed that to mean an organization's "main job," not sole job. Advocate Health Care Network v. Stapleton, *supra*, 137 S. Ct. at 1656-57.

M. The IRS noted that "Corporation M is not an organization described in section 414(e)(3)(A) of the Code." PLR 200326045, 2003 WL 21483128 (4.2.03).

However, as of October 13, 2000, a separate committee ("Committee N") began administering both plans. The IRS noted that "[t]he sole function of Committee N is the administration of Plan X and Plan Y." PLR 200326045, 2003 WL 21483128 (4.2.03). Corporation M established Committee N and then sought the private letter ruling that the change had preserved the "Church Plan" exemption for the Plans.

The IRS was even more explicit that such correction, even in the absence of any notice of default, was both effective and retroactive:

> At that time, no notice of default with the requirements of section 414(e) had been mailed by the Secretary and no final determination had been made by a court of competent jurisdiction. Section 414(e)(4)(A) provides that where a plan fails to meet one or more of the church plan requirements and corrects its failure within the correction period, then that plan shall be deemed to meet the requirements of section 414(e) for the year in which correction is made and for all prior years. Thus, the defect has been corrected as provided under section 414(e)(3)(A) of the Code.
>
> Accordingly, we conclude that Plan X and Plan Y are "church plans" within the meaning of section 414(e) of the Code; that Plan X is deemed to have been a church plan within the meaning of section 414(e) of the Code on January 1, 1974 (the effective date of section 414(e) of the Code) and thereafter; and that Plan Y is deemed to have been a church plan within the meaning of section 414(e) of the Code on January 1, 1996 and thereafter.

PLR 200326045, 2003 WL 21483128 (4.2.03).

It should be noted that the Plan's loss of "Church Plan" status in connection with the Receiver's election made ERISA applicable to the Plan only going forward from the effective date of the loss of the exemption, and that the law is clear that state law applies to claims that arose prior to the July 1, 2017 effective date of the loss of the

"Church Plan" exemption. That has been the holding again and again in cases discussing the issue of whether state law claims are preempted because a Plan has elected to become 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)) (referring to the effective date of the section 410(d) election); 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.").

Plaintiffs assert no claims against the Diocesan Defendants that arose on or after the July 1, 2017 effective date by which the Plan lost exempt "Church Plan" status in connection with the receivership.

C. The Diocesan Defendants are estopped from using ERISA to limit their liability

1. The law of judicial estoppel

The First Circuit has summarized the doctrine of judicial estoppel as follows:

> "As a general matter, the doctrine of judicial estoppel prevents a litigant from pressing a claim that is inconsistent with a position taken by that litigant either in a prior legal proceeding or in an earlier phase of the same legal proceeding." *InterGen N.V. v. Grina*, 344 F.3d 134, 144 (1st Cir. 2003); accord *Pegram v. Herdrich*, 530 U.S. 211, 227 n. 8, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000). The doctrine's primary utility is to safeguard the integrity of the courts by preventing parties from improperly manipulating the machinery of the judicial system. *New Hampshire*, 532 U.S. at 750, 121 S.Ct. 1808; *United States v. Levasseur*, 846 F.2d 786, 792 (1st Cir.1988). In line with this prophylactic purpose, courts typically invoke judicial estoppel when a litigant is "playing fast and loose with the courts." *Patriot Cinemas, Inc. v. Gen. Cinema Corp.*, 834 F.2d 208, 212 (1st Cir. 1987) (quoting *Scarano v. Cent. R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953)).
>
> The contours of the doctrine are hazy, and there is no mechanical test for determining its applicability. *See New Hampshire*, 532 U.S. at 750–51, 121 S.Ct. 1808; *Patriot Cinemas*, 834 F.2d at 212. Each case tends to turn on its own facts. It is, however, widely agreed that, at a minimum, two conditions must be satisfied before judicial estoppel can attach. *See, e.g.*, *Hall*, 327 F.3d at 396; *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 783–84 (9th Cir. 2001); *Levinson v. United States*, 969 F.2d 260, 264–65 (7th Cir. 1992); *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir.1982). First, the estopping position and the estopped position must be directly inconsistent, that is, mutually exclusive. *See Faigin v. Kelly*, 184 F.3d 67, 82 (1st Cir. 1999); *Levasseur*, 846 F.2d at 794. Second, the responsible party must have succeeded in persuading a court to accept its prior position. *Lydon v. Boston Sand & Gravel Co.*, 175 F.3d 6, 13 (1st Cir. 1999); *Gens*, 112 F.3d at 572–73. The presence of these elements creates the appearance that either the first court has been misled or the second court will be misled, thus raising the specter of inconsistent determinations and endangering the integrity of the judicial process. *See New Hampshire*, 532 U.S. at 750–51, 121 S.Ct. 1808.

> While it is not a formal element of a claim of judicial estoppel, courts frequently consider a third factor: absent an estoppel, would the party asserting the inconsistent position derive an unfair advantage? Id. at 751, 121 S.Ct. 1808. Relatedly, courts often inquire as to whether judicial acceptance of a party's initial position conferred a benefit on that party. *See, e.g.*, *Levasseur*, 846 F.2d at 793; *Patriot Cinemas*, 834 F.2d at 213. Judicial acceptance and partisan benefit normally are two sides of the same coin (after all, it is unlikely that a party will advance a particular position unless that position benefits its cause). To the extent that there is a separation, however, it is the court's acceptance of the party's argument, not the benefit flowing from the acceptance, that primarily implicates judicial integrity. *See New Hampshire*, 532 U.S. at 750, 121 S.Ct. 1808. Thus, benefit is not a sine qua non to the applicability of judicial estoppel.
>
> Synthesizing these various points, we recently concluded that, in a prototypical case, judicial estoppel applies when "a party has adopted one position, secured a favorable decision, and then taken a contradictory position in search of legal advantage." *InterGen*, 344 F.3d at 144.

Alternative System Concepts, Inc. v. Synopsys, Inc., 374 F.3d 23, 32-33 (1st Cir. 2004) (Selya, J.).

More recently, the First Circuit has described as the third condition that the party asserting the inconsistent position would derive an unfair advantage if the new position was adopted by the court:

> In general, three conditions must be satisfied for the doctrine of judicial estoppel to apply: "First, the estopping position and the estopped position must be directly inconsistent," *Alt. Sys.*, 374 F.3d at 33, "[s]econd, the responsible party must have succeeded in persuading a court to accept its prior position," id., and "[t]hird, the party seeking to assert the inconsistent position must stand to derive an unfair advantage if the new position is accepted by the court," *Knowlton v. Shaw*, 704 F.3d 1, 10 (1st Cir. 2013) (citation omitted).

Diaz-Baez v. Alicea-Vasallo, 22 F.4th 11, 21 (1st Cir. 2021).

"To demonstrate acceptance of the prior position by a court, 'a party need not show that the earlier representation led to a favorable ruling on the merits of the

proceeding in which it was made, but must show that the court adopted and relied on the represented position either in a preliminary matter or as part of a final disposition.'" RFF Family Partnership, LP v. Ross, 814 F.3d 520, 528 (1st Cir. 2016) (quoting Perry v. Blum, 629 F.3d 1, 11 (1st Cir. 2010)).

A "classic case" for the application of judicial estoppel is when "a litigant asserts inconsistent statements of fact or adopts inconsistent positions on combined questions of fact and law." Patriot Cinemas, Inc. v. General Cinemas Corp., 834 F.2d 208, 214 (1st Cir. 1987). The doctrine "'forbids a litigant to repudiate a legal position on which it has prevailed.'" Trafton v. Koplove, No. 14-CV-155-JL, 2014 WL 6871139, at *5 (D.N.H. Dec. 3, 2014) (quoting Cont'l Illinois Corp. v. C.I.R., 998 F.2d 513, 518 (7th Cir. 1993), and citing 18 James Wm. Moore et al., Moore's Federal Practice §134.30 at 134–68 & n.8 as "citing cases for the proposition that 'the doctrine applies to preclude inconsistent legal assertions'").

Judicial estoppel is applicable to legal positions applied to facts:

> [l]legal positions are advanced in litigation with respect to specific fact situations, and most assertedly inconsistent positions are likely to involve some elements of both law and fact. Little would be left of judicial estoppel if any trace of law were to defeat preclusion. Judicial estoppel may properly apply even when the facts are clear and only legal positions have changed, so long as the underlying facts are constant.

18B Fed. Prac. & Proc. Juris. § 4477.3 (3d ed.). See also Matter of Cassidy, 892 F.2d 637, 642 (7th Cir. 1990) ("Similarly, in this case we think that the change of position on the legal question is every bit as harmful to the administration of justice as a change on an issue of fact.").

Judicial estoppel applies equally to positions taken in quasi-judicial administrative proceedings as it does in courts of law:

> The doctrine of judicial estoppel applies equally to positions taken in quasi-judicial administrative proceedings as it does in courts of law. *Zapata Gulf Marine Corp., v. Puerto Rico Maritime Shipping Authority*, 731 F. Supp. 747, 749 (E.D.La.1990) (holding that judicial estoppel applied to proceedings before the Interstate Commerce Commission); *see also Simo v. Home Health & Hospice Care*, 906 F. Supp. 714, 718 (D.N.H. 1995) (judicial estoppel applied to prior proceedings before the Social Security Administration); *Muellner v. Mars, Inc.*, 714 F. Supp. 351, 358 (N.D. Ill. 1989) (application process for social security benefits constitutes prior legal proceeding for purposes of judicial estoppel).

Harris v. Marathon Oil Co., 948 F. Supp. 27, 28-29 (W.D. Tex. 1996). See also Trustees in Bankr. of N. Am. Rubber Thread Co. v. United States, 593 F.3d 1346, 1354 (Fed. Cir. 2010) ("Judicial estoppel applies just as much when one of the tribunals is an administrative agency as it does when both tribunals are courts."); Simon v. Safelite Glass Corp., 128 F.3d 68, 72 (2d Cir. 1997) ("Numerous decisions have approved the application of judicial estoppel where the prior statements were made in administrative or quasi-judicial proceedings."); Rissetto v. Plumbers and Steamfitters Loc. 343, 94 F.3d 597, 605 (9th Cir. 1996) ("Unsurprisingly given its name, judicial estoppel is often articulated as applying to 'judicial' proceedings. However, many cases have applied the doctrine where the prior statement was made in an administrative proceeding, and we are not aware of any case refusing to apply the doctrine because the prior proceeding was administrative rather than judicial."); Brown v. Con-Way Freight, Inc., No. 14 C 2055, 2016 WL 861210, at *6 (N.D. Ill. Mar. 7, 2016) ("Finally, judicial estoppel may be applied to positions taken in both judicial and quasi-judicial proceedings.") (citing DeGuiseppe v. Vill. of Bellwood, 68 F.3d 187, 191 (7th Cir. 1995)).

Judicial estoppel does not require mutuality, i.e., the party asserting the estoppel need not have also been a party to or in privity with a party to the prior proceeding:

> The Fifth Circuit has noted that the doctrine of judicial estoppel is designed to protect the judicial system rather than the litigants. *Coastal Plains*, 179 F.3d at 205. Indeed, other circuits have held that privity, though often present in judicial estoppel cases, is not required. *See Ryan Operations G.P. v. Santiam–Midwest Lumber Co.*, 81 F.3d 355, 360 (3d Cir.1996) ("privity is not required for the application of judicial estoppel"); *Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208, 214 (1st Cir.1987) ("harm to an opponent is not an invariable prerequisite to judicial estoppel"); *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir.1982) ("judicial estoppel may be applied even if detrimental reliance or privity does not exist"); *Konstantinidis v. Chen*, 626 F.2d 933, 937 (D.C.Cir.1980) (same); *Total Petroleum, Inc. v. Davis*, 822 F.2d 734, 737 n.6 (8th Cir.1987) (judicial estoppel does not require reliance or prejudice, because it seeks to protect the courts); *see also Coastal Plains*, 179 F.3d at 205 n.3 (citing cases that hold privity is not required to establish judicial estoppel).

Austin v. McNamara, No. 6:05-CV-247, 2007 WL 5787498, at *3 (E.D. Tex. Mar. 30, 2007) (collecting circuit decisions).

Judicial estoppel may bar a litigant from asserting a position even when the litigant is not the same party that took the inconsistent position in the prior proceeding, provided the circumstances are such that "it is fair to bind a nonparty to another party's actions." Toyo Tire & Rubber Co. v. Hong Kong Tri-Ace Tire Co., 281 F.Supp.3d 967, 983 (C.D. Cal. 2017). As noted in Toyo Tire,

> Judicial estoppel looks to the connection between the litigant and the judicial system, not the relationship between the parties to the prior litigation. Because the doctrine of judicial estoppel is intended to protect the courts, we are particularly mindful that the [i]dentity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different; and parties nominally different may be, in legal effect, the same. While it is true that a new party should generally not be punished for another party's unseemly conduct, there are circumstances in which it is fair to bind a nonparty to another party's actions. To protect the integrity of the judicial process, a court needs freedom to consider the equities of an entire case.

Toyo Tire & Rubber Co. v. Hong Kong Tri-Ace Tire Co., *supra*, 281 F.Supp.3d at 983 (internal quotation marks and citations omitted).

The analysis around applying judicial estoppel to a nonparty for purposes of preclusion is frequently expressed in terms of "privity" but all that signifies is that the nonparty substantially controlled the prior litigant or there is a sufficient identity of interest between the nonparty and the prior litigant such that is equitable to bind the nonparty:

> Numerous courts have recognized that while "privity is an elusive concept," *see Griffin*, 570 F.2d at 1071, the privity which can lead to issue preclusion is that relationship between two parties which is sufficiently close so as to bind them both to an initial determination, at which only one of them was present. *First Alabama Bank v. Parsons Steel, Inc.*, 747 F.2d 1367, 1378 (11th Cir.1984) ("A finding of privity is no more than a finding that all of the facts and circumstances justify a conclusion that non-party preclusion is proper.") rev'd on other grounds, 474 U.S. 518, 106 S.Ct. 768, 88 L.Ed.2d 877 (1986); *Gill & Duffus Services, Inc. v. Nural Islam*, 675 F.2d 404, 405 (D.C.Cir.1982) ("The term 'privity' signifies that the relationship between two or more persons is such that a judgment involving one of them may justly be conclusive upon the others, although those others were not party to the lawsuit."); *Vulcan, Inc. v. Fordees Corp.*, 658 F.2d 1106, 1109 (6th Cir.1981), cert. denied, 456 U.S. 906, 102 S.Ct. 1752, 72 L.Ed.2d 162 (1982); *Bruszewski v. United States*, 181 F.2d 419, 423 (3d Cir.) (Goodrich, J., concurring) ("It [privity] is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the res judicata."), cert. denied, 340 U.S. 865, 71 S.Ct. 87, 95 L.Ed. 632 (1950).

N.L.R.B. v. Donna-Lee Sportswear Co., 836 F.2d 31, 34-35 (1st Cir. 1987).

The First Circuit has not considered the issue in the context of judicial estoppel, but has addressed it in the related issue of when a nonparty to a prior proceeding is collaterally estopped by issues decided in a prior litigation:

> Under the concept of privity, a non-party to an action nonetheless may be bound by the issues decided there if it substantially controls, or is

> represented by, a party to the action. Restatement (Second) of Judgments §§ 39, 41 (1982). *See Montana v. United States*, 440 U.S. 147, 154, 99 S.Ct. 970, 974, 59 L.Ed.2d 210 (1979); *Chicago, R.I. & P. Ry. Co. v. Schendel*, 270 U.S. 611, 618–19, 46 S.Ct. 420, 423, 70 L.Ed. 757 (1926); *see also Mother's Restaurant, Inc. v. Mama's Pizza, Inc.*, 723 F.2d 1566, 1572 (Fed.Cir.1983) and cases cited therein. The party estopped due to representation by a party to the action must have been "so closely related to the interest of the party to be fairly considered to have had his day in court." *In re Gottheiner*, 703 F.2d 1136 (9th Cir.1983). There must be a "substantial identity" of the parties such that the party to the action was the virtual representative of the party estopped. *Chicago, R.I. & P. Ry. Co.*, 270 U.S. at 621, 46 S.Ct. at 424; *Pan American Match Inc. v. Sears, Roebuck and Co.*, 454 F.2d 871 (1st Cir.1972).
>
> Whether a party is virtually representative of a non-party is a question of fact determined on a case-by-case basis. *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1003 (9th Cir.1980); *Aerojet–General Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir.1975), *cert. denied*, 423 U.S. 908, 96 S.Ct. 210, 46 L.Ed.2d 137, *reh'g denied*, 423 U.S. 1026, 96 S.Ct. 470, 46 L.Ed 2d 400 (1975).

United States v. Bonilla Romero, 836 F.2d 39, 43 (1st Cir. 1987).

Outside the First Circuit, judicial estoppel has been widely applied to bind nonparties:

> Federal courts have held that those in privity with a prior judgment are barred by the doctrine of judicial estoppel in a subsequent action. *See In re 815 Walnut Assocs.*, 183 B.R. 423, 431–32 (E.D. Pa. 1995) (explaining that "judicial estoppel clearly may be applied against a party to a prior lawsuit or someone in privity with that party") (emphasis in original); *Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc.*, 568 F. Supp. 2d 1152, 1168–69 (C.D. Ca. 2008) ("To determine whether plaintiffs are judicially estopped by statements to the California inheritance tax appraiser made on behalf of Monroe's estate, the court must first examine whether plaintiffs are in privity with Frosch, such that they may be deemed the "same party" as that which participated in the tax proceeding.") aff'd, 692 F.3d 983 (9th Cir. 2012); *see also Maitland v. Univ. of Minn.*, 43 F.3d 357, 363–64 (8th Cir. 1994) (explaining that under the doctrines of collateral estoppel, equitable estoppel, promissory estoppel, and judicial estoppel, "the party who is to be estopped, or one in privity with that party, must

> have asserted a fact or claim, or made a promise, that another party relied on, that a court relied on, or that a court adjudicated"); *Long v. Knox*, 155 Tex. 581, 588, 291 S.W.2d 293, 297 (1956) (holding that husband's heir was barred by doctrine of judicial estoppel because heir was in privity with husband). In *Siller v. LPP Mortgage, Ltd.*, the court relied on federal law in determining that "the doctrine of judicial estoppel may extend to a wife, because her rights are derivative of her spouse and because she is in privity with her husband, the trial court did not abuse its discretion." No. 04-11-00496-CV, 2013 WL 1484506, at *7 (Tex. App.—San Antonio Apr. 10, 2013, pet. denied).

Feuerbacher v. Wells Fargo Bank, No. 4:15-CV-59, 2016 WL 3669744, at *3 n.2 (E.D. Tex. July 11, 2016).

"Judicial estoppel applies to one in privity to a party who has asserted a fact or claim relied on or that a court adjudicated." Mathison v. Berkebile, 988 F.Supp.2d 1091, 1093 (D.S.D. 2013) (citing Maitland v. University of Minnesota, 43 F.3d 357, 364 (8th Cir. 1994)). See In re Greenberg, 26 B.R. 554, 567 (S.D. Cal 2016) ("Judicial estoppel may apply 'not only against actual parties to prior litigation, but also against a party that is in privity to a party in a previous litigation.'") (quoting Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC, 692 F.3d 983, 996 (9th Cir. 2012)) (internal quotation omitted); Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc., 568 F.Supp.2d 1152, 1168-69 (C.D. Cal. 2008) ("To determine whether plaintiffs are judicially estopped by statements to the California inheritance tax appraiser made on behalf of Monroe's estate, the court must first examine whether plaintiffs are in privity with Frosch, such that they may be deemed the 'same party' as that which participated in the tax proceeding.").

Judicial estoppel by definition precludes a party from relying on *true* statements of fact or conclusions of law where the party has previously argued to the contrary and a court or administrative agency acting in any quasi-judicial proceeding accepted the

incorrect statement of fact or conclusion of law. Thus, whether the prior tribunal "may have been misled is not the Court's focus or concern." In re Pich, 253 B.R. 562, 568 (Bankr. D. Idaho 2000) (emphasis supplied). "The principle [of judicial estoppel] is that if you prevail in Suit # 1 by representing that A is true, you are stuck with A in all later litigation." Astor Chauffeured Limousine Co. v. Runnefeldt Inv. Corp., 910 F.2d 1540, 1547 (7th Cir. 1990).

Indeed, prior to 2001, the Tenth Circuit took the minority position and rejected the doctrine of judicial estoppel entirely, in cases based on federal law, precisely because it tends to "discourage the determination of cases on the basis of the true facts as they might be established ultimately." Parkinson v. California Co., 233 F.2d 432, 438 (10th Cir. 1956). That minority position was abrogated by the Supreme Court's holding in New Hampshire v. Maine, 532 U.S. 742, 750 (2001) that judicial estoppel applies under federal law. See Johnson v. Lindon City Corp., 405 F.3d 1065, 1068-69 (10th Cir. 2005) ("Although this circuit has repeatedly refused to apply this principle [of judicial estoppel], the Supreme Court's intervening decision in *New Hampshire* has altered the legal landscape. Accordingly, we must follow the guidance of the Court's binding precedent.") (other citations omitted) (applying judicial estoppel).

The fact that ERISA is a federal statute does not make estoppel inapplicable, because estoppel is a remedy available under ERISA. See CIGNA Corp. v. Amara, 563 U.S. 421, 441 (2011) (approving of equitable estoppel as "other appropriate equitable relief" to redress violations of ERISA). The case of Montrose Medical Group Participating Savings Plan v. Bulger, 243 F.3d 773 (3d Cir. 2001) is especially on point, since there the Third Circuit held that a hospital's assertion of contrary positions in

separate proceedings, concerning whether or not a benefits plan was governed by ERISA, satisfied the inconsistency element of judicial estoppel, but judicial estoppel did not apply "when the initial claim was never accepted or adopted by a court or agency." Id. at 780-82.

Any questions of intent (including inadvertence or mistake) and bad faith involved in judicial estoppel are for the jury to decide. See Aguilar v. Zep Inc., No. 13-CV-00563-WHO, 2014 WL 4245988, at *6 (N.D. Cal. Aug. 27, 2014) (denying summary judgment on judicial estoppel because there were material issues of fact regarding inadvertence or mistake); Black v. State Farm Fire & Cas. Co., No. 1:12-CV-02240-CL, 2013 WL 4835041, at *3 (D. Or. Sept. 10, 2013) (denying motion for summary judgment on judicial estoppel and holding that jury had to decide questions of fact regarding plaintiff's conduct); Moore v. United States, No. 13CV931-DMS (WVG), 2014 WL 12637954, at *3 (S.D. Cal. Oct. 28, 2014) (denying summary judgment on judicial estoppel because court was precluded from making credibility determinations and the "quintessentially personal fact of state of mind" had to "remain open for trial"); Benjamin v. Nat'l R.R. Passenger Corp., No. CIV.A. 09-4885, 2011 WL 2036702, at *5 (E.D. Pa. May 23, 2011) (holding that the existence of bad faith for purposes of judicial estoppel "is generally a question of fact for the jury to decide").

2. The Diocesan Defendants are judicially estopped

The Diocesan Defendants are judicially estopped from now asserting that the Plan was not an ERISA-exempt Church Plan, based on their participation (and the participation of SJHSRI whom the Bishop substantially controlled or with whom the Diocesan Defendants had a sufficient identity of interest) in the 2013–2014

administrative proceedings ratifying and approving the Asset Purchase Agreement and 2014 Asset Sale, pursuant to specific representations that the Plan was a "Church Plan" and the overestimation of the Plan's funding status based upon the assumption it was a "Church Plan."

a. The Diocesan Defendants substantially controlled or had a sufficient identity of interest with SJHSRI

The close and extensive connections between the Diocesan Defendants and SJHSRI, especially in the specific context of the 2014 Asset Sale and the representations of "Church Plan" status in the HCA Application and process, and the fact that they had an identical interest in securing regulatory approval on those grounds, makes it only fair that they be treated as if they were one party for the purposes of judicial estoppel. These include the following:

- The Bishop was expressly informed that the transaction required regulatory approvals and worked hand in glove with SJHSRI to secure those approvals;[280]
- The Bishop or his designee was the Chairman of SJHSRI's Board of Trustees[281] and, therefore, was directly involved in the Board's decision to enter into the APA and submit the HCA Application;
- The Bishop of Providence as the sole Class B member in SJHSRI had to affirmatively approve the sale for the transaction to proceed;[282]
- SJHSRI was unwilling to enter into the APA until it had secured the Bishop's agreement to continue to treat the Plan as a "church plan;"[283]
- SJHSRI on several occasions before it was signed provided the Bishop with the Asset Purchase Agreement (including the representation that the Plan was a

[280] Plaintiffs' LR Cv 56(a)(4) Statement ¶¶ 104, 119-121.

[281] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 49.

[282] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 72.

[283] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 80.

Church Plan "administered by an organization described in Section 414(e)(3)(A) of the Code," i.e., a "principal purpose organization");[284]

- The status of the Plan as a "Church Plan" was controlled by the Bishop;[285]
- The Bishop issued his "Resolution" that SJHSRI's Board of trustees would be Plan Administrator and that the Plan was intended to be a "Church Plan;"[286]
- SJHSRI and SJHSRI's lawyers met with the Diocesan Defendants on several occasions to explain the APA and secure the Bishop's agreement to retain "Church Plan" status, and went over extensive "CONFIDENTIAL" presentations that made clear the Bishop's role in the *quid pro quo* whereby in return for supporting the transaction and retaining sponsorship of SJHSR, the Bishop would obtain a "Catholic Hospital" free of crippling pension liabilities;[287]
- The APA was conditioned upon the Bishop's approval and the Bishop was an express third-party beneficiary;[288]
- The APA was submitted to the regulators as part of the HCA Application, and certified to be "complete, accurate and true," including the express unqualified representation and warranty that the Plan was "administered by an organization described in Section 414(e)(3)(A) of the Code" (i.e., a "principal purpose organization");"[289]
- The Bishop even worked with SJHSRI to secure the approval of the Vatican, which included providing the Papal Nuncio with the signed APA, which approval was submitted to the regulators upon the regulators' specific request;[290] and
- The Bishop personally wrote to the regulators to lobby in favor of the HCA Application, in a letter which SJHSRI approved in advance, and purported to be writing "on behalf of the proposed partnership between CharterCARE Health Partners and Prospect Medical Holdings…"[291]

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[284] Plaintiffs' LR Cv 56(a)(4) Statement ¶¶ 81, 87, 104.

[285] Plaintiffs' LR Cv 56(a)(4) Statement ¶¶ 74-77.

[286] Plaintiffs' LR Cv 56(a)(4) Statement ¶¶ 116-17.

[287] Plaintiffs' LR Cv 56(a)(4) Statement ¶¶ 83, 89.

[288] Plaintiffs' LR Cv 56(a)(4) Statement ¶¶ 108-10.

[289] Plaintiffs' LR Cv 56(a)(4) Statement ¶¶ 106-07.

[290] Plaintiffs' LR Cv 56(a)(4) Statement ¶¶ 93-94, 124.

[291] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 121.

In light of this showing, the resolution of the question of whether the Diocesan Defendants controlled or had sufficient identity with SJHSRI so as to make it fair to apply judicial estoppel to hold the former to the latter's positions at the very least is precluded by disputed issues of fact.

b. The Diocesan Defendants' representations (directly and through SJHSRI) to the regulators in support of the HCA Application are directly contradicted by the Diocesan Defendants' claims in support of its motion for summary judgment

The starting point (and, we suggest, all that is necessary) to prove that the Diocesan Defendants have espoused directly contradictory positions is the express, unqualified representation and warranty in the APA, which was provided to and closely analyzed by both the Department of Health and the Attorney General, stating as follows:

> The Retirement Plan is a Church Plan. The Retirement Plan has been a Church Plan since the date on which the Retirement Plan was established, and has continuously maintained such status since that date. **The Retirement Plan has at all times been administered by an organization described in Section 414(e)(3)(A) of the Code** and Seller has not made, with respect to the Retirement Plan, an election pursuant to Section 410(d) of the Code.

As noted, the organization described in Section 414(e)(3)(A) of the Internal Revenue Code is a "principal purpose organization," and the Diocesan Defendants now contend that this representation and warranty was false, that the Plan was *not* a "Church Plan." The Diocesan Defendants instead contend that "by April 29, 2013 at the latest, the Plan was not a Church Plan,[292] and that "as of April 29, 2013 at the very latest, the Plan was not 'maintained by an organization … the principal purpose or function of which is the

[292] ECF # 236 (DD MSJ) at 19.

administration or funding of a plan or program for the provision of retirement benefits' as required by I.R.C. § 414(e)."[293]

It is anticipated that the Diocesan Defendants will seek to shirk their responsibility for this statement by claiming this is some technical requirement of ERISA which they neither understood nor should have understood. That argument has several flaws, each of which would be fatal alone, beginning with the fact that it is completely contradicted by the Bishop's Resolution, which stated as follows:

> RESOLVED: That the Board of Trustees of St. Joseph Health Services of Rhode Island is the Retirement Board with respect to the Plan and acts on behalf of St. Joseph Health Services of Rhode Island as the Plan Administrator of the Plan.
>
> RESOLVED: That the Board of Trustees of St. Joseph Health Services of Rhode Island has the authority, pursuant to the terms of the Plan, to appoint a committee to act on its behalf with respect to administrative matters related to the Plan.
>
> RESOLVED: That the Board of Trustees of St. Joseph Health Services of Rhode Island has appointed the Finance Committee of CharterCARE Health Partners to act on its behalf with respect to administrative matters related to the Plan.
>
> RESOLVED: That the Plan is intended to qualify under Section 401(a) of the Internal Revenue Code of 1986, as amended (the "Code") as a non-electing church plan within the meaning of Section 414(e) of the Code and Section 3(33) of the Employee Retirement Income Security Act of 1974, as amended.[294]

[293] ECF # 236 (DD MSJ) at 19.

[294] Plaintiffs' LR Cv 56(a)(4) Statement ¶¶ 116–17.

The Bishop or his designee was Chairman of SJHSRI's Board of Trustees from 2010 through 2016,[295] and prior to then had himself chaired and appointed all of the members of SJHSRI's "Retirement Board."[296] He had or had access to all of the information he needed in 2013 and 2014 to assure the accuracy of both the Bishop's resolution and the warranty in the APA that "[t]he Retirement Plan has at all times been administered by an organization described in Section 414(e)(3)(A) of the Code…."

It is also anticipated that the Diocesan Defendants will argue that the conclusion set forth in the representation that the Plan was administered by a "principal purpose organization" was the result of either a misunderstanding of the law or misunderstanding of how the law applied to the facts, i.e., it was a good faith "mistake." That itself is a question of fact, and Plaintiffs are entitled to discovery (including to depose the Bishop) concerning the circumstances surrounding the Bishop's Resolution before the Diocesan Defendants can make that argument. As noted, questions of intent (including inadvertence or mistake) and bad faith involved in judicial estoppel are for the jury to decide. See discussion and cases cited *supra* at 83.

Moreover, "deliberate dishonesty is not a prerequisite to application of judicial estoppel." Guay v. Burack, 677 F.3d 10, 20 n.7 (1st. Cir. 2012) (citing Schomaker v. United States, 334 Fed.Appx. 336, 340 (1st Cir.2009) for the "finding that judicial estoppel was appropriate 'whether [plaintiff] has taken an intentionally inconsistent position ... or failed to disclose [asset] in the bankruptcy proceeding because he mistakenly believed it was subject to forfeiture'"). Similarly, "'a party is not automatically

[295] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 49.

[296] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 41.

excused from judicial estoppel if the earlier statement was made in good faith.'" Guay v. Burack, *supra*, 677 F.3d at 16 (quoting Thore v. Howe, 466 F.3d 173, 184 n.5 (1st Cir. 2006)). See also Rockwood v. SKF USA Inc., 687 F.3d 1, 10 (1st Cir. 2012) ("Even if the earlier statement that was later contradicted was made in good faith, a party is not automatically shielded from judicial estoppel.") (citing Guay v. Burack, *supra*, 677 F.3d at 16).

In short, litigants are not permitted to obtain an unfair advantage through the assertion of mutually inconsistent positions simply because they acted in good faith or were mistaken when they persuaded the first adjudicatory body of the merits of their position. Certainly, the Diocesan Defendants are not in a position to turn back the clock and secure the regulators' denial of the HCA Application. Moreover, they just as certainly have not abjured the ongoing benefit to them of having a "Catholic Hospital" free of pension liabilities.

The only circumstance in which the First Circuit has acknowledged that a "good faith exception to judicial estoppel" might operate is if "the new, inconsistent position is the product of information neither known nor readily available to it at the time the initial position was taken." Alternative System Concepts, Inc. v. Synopsys, Inc., 374 F.3d 2, 34 (1st Cir. 2004). Here there is no new information that was not readily available to the Bishop that explains the alleged mistake. As noted, the Bishop either possessed or had access to all of the information he needed in 2013 and 2014 to assure the accuracy of the Bishop's resolution and the warranty in the APA.

Nor can the Bishop's and SJHSRI's prior position be excused based upon the Bishop's alleged new understanding of the facts. See Alternative System Concepts,

Inc. v. Synopsys, Inc., *supra*, 374 F.3d at 34 ("noting that a 'new understanding of the facts may not excuse a party who has failed a standard of ordinary negligence'") (quoting 18B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice & Procedure § 4477, at 586 (2d ed. 2002)). Whether the Bishop's alleged "misunderstanding of the facts" was based upon the exercise of ordinary care or fails a standard of ordinary negligence cannot be decided on the Diocesan Defendants' motion for summary judgment.

In addition to the representation in the APA that the Plan was administered by a principal purpose organization, there was also the representation that:

> The Retirement Plan is a Church Plan. The Retirement Plan has been a Church Plan since the date on which the Retirement Plan was established, and has continuously maintained such status since that date.[297]

The same representation that the Plan was a church plan was made to the Department of Health and the Attorney General in several other contexts, most notably in SJHSRI's submission of reports from its actuaries that noted that expressly assumed that the plan was "church plan" exempt from ERISA.[298]

Similarly, SJHSRI on several occasions made written submissions which informed the regulators (and their experts Dr. Schibler and Mr. Carris) that the Plan would be funded in excess of 90% with the $14,000,000 to be paid at the closing of the Asset Sale.[299] This representation made also made by SJHSRI CEO Ken Belcher in

[297] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 100.

[298] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 130.

[299] Plaintiffs' LR Cv 56(a)(4) Statement ¶¶ 130, 135, 140, 145.

response to the regulators' inquiries at a public hearing.[300] Most significantly, it is quoted in the Attorney General's Decision as part of the basis for the Attorney General's conclusion that the statutory criteria for valuation had been satisfied.[301]

The issue of ERISA-exempt church plan status was absolutely central to those representations, because the calculations that the Plan would be over 90% funded were all based upon that assumption, since it allowed the calculation to be made assuming an 8% or 7.75% future rate of return on Plan assets.[302] As noted, SJHSRI (and presumably the Bishop as the Chairman of SJHSRI's Board of Trustees and former head of the Retirement Board) should have known that it was the Plan's alleged "church plan" status that allowed the actuaries to use that rate of return. Indeed, SJHSRI's investment adviser expressly told the Chief Operating Officer of CCHP Michael Conklin that the CCHP Investment Committee's "impression that the funded status of the plan will get to 90%" was based upon the actuary assuming a future rate of return on Plan assets of 8%.[303] He also noted that "[s]ince the plan is a church plan, you can set their own assumptions…," but that "[u]sing current market discount rates the funded status will only improve to about 60% [with the addition of $14 million]."[304]

Moreover, if the Plan were not exempt from ERISA as a "Church Plan," the funded status of the Plan would have to be determined using the projected future rates of return required by ERISA, which were much less than 8%.[305] Using the rates

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[300] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 135.

[301] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 145 (AG Decision at 21-22).

[302] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 130.

[303] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 113 .

[304] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 113.

[305] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 114.

required by ERISA, the funded status of the Plan would be between 62.97% (using the rate required by Pension Benefit Guaranty Corporation) and 74.39% (using the rates ERISA required for determination of the required minimum contribution).[306]

Thus, the Diocesan Defendants' current contention that the Plan was not a "church plan" would have completely frustrated the efforts of the HCA Applicants to reassure the regulators (who on several occasions sought formal written assurances on that issue) that the Plan would be adequately funded. It also would contradict the testimony of SJHSRI CEO Ken Belcher at a public hearing who sought to reassure the regulators that "we'll be putting millions of dollars into the pension fund which will bring it to a level of roughly 91 and a half percent funding **which is above the safe level that you need** for sort of a quote safe level."[307]

c. There is sufficient evidence that the regulators accepted the Diocesan defendants' and SJHSRI's representations that the Plan was a "church plan"

It is clear that both the Attorney General and the Department of Health accepted the HCA Applicants' representations that the Plan was a Church Plan.

The Attorney General expressly relied on Mr. Carris, who concluded that "[t]he purchase commitment from Prospect is fair and reasonable for the acquisition of CCHP and its affiliates…based on the criteria established by the CCHP Board," which he noted included that the transaction would "bring the St. Joseph's Pension Plan to a ninety

[306] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 114.

[307] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 135 (emphasis supplied)

(90%) percent funding level."[308] That statement was true only if the Plan qualified as a "Church Plan."

Moreover, the Attorney General's approval was conditioned upon the requirement "[t]hat the transaction be implemented as outlined in the Initial Application, including all Exhibits and Supplemental Responses."[309] That included the APA and the certification that the APA was "complete, accurate and true."[310] The APA contained the express representations both that the Plan was a "Church Plan" (i.e. a "'church plan' within the meaning of Code Section 414(e) (a 'Church Plan')")[311] and "has at all times been administered by an organization described in Section 414(e)(3)(A) of the Code…."[312]

The Department of Health's Decision was also conditional, and "Condition 1" was that "[t]he transacting parties shall implement the conversion, as detailed in the initial application, and as conditionally approved by the Director of Health.[313]

Another example that proves that the Rhode Island Attorney General and Department of Health's approvals were based upon representations that the Plan was a "church plan" is the fact that the HC Application attached a "Post Conversion Organizational Chart" that informed the regulators that, after the sale, the Plan would remain a "Church Plan" under the sponsorship of the Bishop.[314]

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[308] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 145 (AG Decision at 21-22).

[309] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 145 (AG Decision at 52 (Condition 9)).

[310] Plaintiffs' LR Cv 56(a)(4) Statement ¶¶ 106-07.

[311] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 100.

[312] Id.

[313] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 146 (quoting DOH Decision dated May 19, 2014) at 33.

[314] Plaintiffs' LR Cv 56(a)(4) Statement ¶ 100.

Moreover, it is clear that the claim that the Plan was a "church plan" was not an incidental or inconsequential detail in the HCA Application and the Asset Sale. To the contrary, the funded status of the Plan was the subject of repeated questions from both the Attorney General and the Department of Health to the HCA Applicants. The questions were posed in both sworn testimony at public hearings and in formal questions which required written answers which had to be certified to be "complete, accurate and true." That issue clearly was very important to the regulators.

d. The proceedings in connection with the HCA Application were quasi-judicial proceedings for which judicial estoppel applies

The RIHCA sets forth a regulatory process and procedure which must be complied with in order for hospitals to be sold. See R.I. Gen. Laws §§ 23-17.14-1, *et. seq.* The General Assembly has found that this process is in the public interest. R.I. Gen. Laws § 23-17.14-2 (Findings) ("In order to protect public health and welfare and public and charitable assets, it is necessary to establish standards and procedures for hospital conversions."). The process includes detailed statutory requirements for the initial application. R.I. Gen. Laws § 23-17.14-6 (Initial application—Conversions involving for-profit corporations or not-for-profit as acquirors). The process includes specific criteria to be applied by the Attorney General and the Department of Health. R.I. Gen. Laws § 23-17.14-7 (Review process of the department of attorney general and the department of health and review criteria by department of attorney general). The process also includes the right to compel attendance under oath. R.I. Gen. Laws § 23-17.14-14 (Investigations—Notice to attend—Court order to appear—Contempt). Finally, the process includes and judicial review in the Superior Court. R.I. Gen. Laws § 23-

17.14-34 (Judicial review).[315] As noted *supra*, the 2014 administrative proceedings included public hearings, in which the regulators accepted witness testimony and incorporated it into their written administrative decisions.

Accordingly, the HCA Applicants' dealings with the Attorney General and the Department of Health constituted quasi-judicial proceedings to which the doctrine of judicial estoppel applies. See Remcor Products Co. v. Scotsman Group, Inc., 860 F.Supp. 575, 578 (N.D. Ill. 1994) ("Dealing with an administrative agency, such as the FTC, pursuant to a statutory scheme as a pre-condition to achieving some desired result qualifies as sufficient administrative proceedings to apply the doctrine of judicial estoppel."). See also Harris v. Marathon Oil Co., 948 F. Supp. 27, 28 (W.D. Tex. 1996) (collecting cases), aff'd, 108 F.3d 332 (5th Cir. 1997) ("The doctrine of judicial estoppel applies equally to positions taken in quasi-judicial administrative proceedings as it does in courts of law."): Czajkowski v. City of Chicago, Ill., No. 90 C 3201, 1993 WL 11896, at *4 (N.D. Ill. Jan. 19, 1993) ("The Police Board determination in this case was based on the presentation of both sides' positions, statements of three witnesses to the incident, and the transcript of a criminal proceeding at which Garza, his victim, and others testified and were cross-examined. The Police Board proceedings were a quasi-judicial administrative proceeding upon which judicial estoppel can be based.").

[315] Prior to 2019, R.I. Gen. Laws § 23-17.14-34 spelled out a particular procedure for seeking such judicial review in the Superior Court, including for review of "administrative findings". Since its amendment in 2019, R.I. Gen. Laws § 23-17.14-34 provides that such review is taken under the Rhode Island Administrative Procedures Act, R.I. Gen. Laws § 42-35-15 (judicial review of contested cases).

e. The Diocesan Defendants are estopped from using ERISA to limit their liability

In addition, even if (*arguendo*) Plaintiffs agreed that the Plan was an ERISA plan, the Diocesan Defendants would be estopped from claiming the benefit (to them) of any limitations on Plaintiffs' damages under ERISA. A plan cannot be operated for over forty years without the plan participants receiving any of the benefits or protections of ERISA, including minimum annual contributions, reporting, and insurance from Pension Benefit Guaranty Corporation, in reliance on the "church plan" exemption, and then have the responsible parties argue that plan participants are limited to the remedies allowed under ERISA, especially when those remedies are arguably inferior to the remedies provided by state law which would otherwise be applicable. ERISA was created to "protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." S. Rep. No. 117 (1993). ERISA was not intended to be used as a sword to injure plan participants.

f. Plaintiffs are entitled to discovery

Although the parties were permitted limited discovery[316] concerning the issue of whether the Plan ceased to be an exempt church plan, the parties have not yet been

[316] See ECF # 170 (Stipulation and Proposed Order Concerning Limited Discovery and Related Summary Judgment Motions).

permitted to conduct discovery into the facts pertinent to the doctrine of judicial estoppel, including all of the circumstances surrounding the Bishop's involvement in the 2013-2014 administrative proceedings. Plaintiffs submit herewith their motion for limited discovery pursuant to Fed. R. Civ. P. Rule 56(d).

Accordingly, if the Diocesan Defendants' motion for summary judgment is not immediately denied on the merits, it should be denied or deferred to allow Plaintiffs to conduct discovery.

VI. CONCLUSION

The Diocesan Defendants' motion for summary judgment should be denied on the merits, or, if not, then denied or deferred to allow Plaintiffs to conduct necessary discovery.

Respectfully submitted,

Plaintiffs,
By their Attorney,

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Dated: April 18, 2022

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.