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
PROSPECT CHARTERCARE, LLC, ET AL.	:	
Defendants.	:	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS ROMAN CATHOLIC BISHOP OF PROVIDENCE, DIOCESAN ADMINISTRATION CORPORATION AND DIOCESAN SERVICE CORPORATION'S RENEWED MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

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Plaintiffs Stephen Del Sesto (as Receiver and Administrator of the St. Joseph Health Services of Rhode Island Retirement Plan (the "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] as defined herein (the Receiver and the Named Plaintiffs are referred to collectively as "Plaintiffs"), submit this memorandum in opposition to the "renewed" motion (ECF # 238) filed by Defendants Roman Catholic Bishop of Providence, Diocesan Administration Corporation, and Diocesan Service Corporation (collectively the "Diocesan Defendants") to dismiss the First Amended Complaint ("FAC").

INTRODUCTION

This case is about how the Diocesan Defendants and the other defendants combined with each other to wrongfully separate assets (real estate, equipment, and personal property of the hospitals and other health care facilities) from liabilities to the Plan, to the detriment of Plan participants. That goal was achieved and led to this litigation.

The FAC is necessarily long, because it attempts to explain factually what was done to achieve that goal. Although the Diocesan Defendants' goal was simple, the route to achieving that goal was long and proceeded along many avenues. For example, and without being exhaustive, the process involved thirteen separate entities selling assets and seven entities purchasing the assets, with the present and former

[1] Contingent upon the Court certifying the Class and appointing them Class Representatives.

Defendants such as the Diocesan Defendants, CharterCARE Foundation, and The Angell Pension Group, Inc. improperly combining with the sellers and purchasers to accomplish that unlawful goal. The Defendants needed the approval and involvement of third parties such as the Vatican, the Official Catholic Directory, multiple state regulators (e.g., the Rhode Island Department of Health and several offices within that department and the Rhode Island Attorney General), public hearings, and the Rhode Island Superior Court in *cy pres* proceedings. This was necessary to make it appear that there had been compliance with complex regulatory statutes including the Rhode Island Hospital Conversions Act, ERISA, and the Internal Revenue Code. Defendants (including the Diocesan Defendants) violated these statutes and a host of other laws, giving rise to many common law and statutory causes of action.

Since the FAC was filed, the majority of the named Defendants have settled. Nevertheless, their roles and conduct as set forth in the FAC remain highly relevant to Plaintiffs' claims against the Diocesan Defendants, because they and the other Defendants worked in a common scheme and conspiracy, such that each of their actions pursuant to that scheme and conspiracy is attributed to them all.

The Diocesan Defendants protest at the length of the FAC. On page 2 of their Renewed Motion to Dismiss, they suggest that the Court had the option to order Plaintiffs to file a complaint that is "short, clear, and to-the-point – and based upon factual allegations, not conclusions and conjecture." ECF # 238 at 2. If the Court took their suggestion, the Diocesan Defendants proposed to file their motion to dismiss thereafter, based upon the new complaint. Plaintiffs are content to rely upon the existing FAC. It is Plaintiffs' position that virtually all of the allegations in the FAC, even

those directed principally at other Defendants already dismissed, are necessary to understand the nature of the scheme that the Diocesan Defendants joined and aided.

This case has been in the pre-answer and pre-discovery stage for over three years. Much was accomplished during that time, including three settlements involving eleven Defendants and the recovery of almost $50,000,000. However, the time has come to move forward. The Court should deny the Diocesan Defendants' motion to dismiss and open the case to general discovery.

There is an extremely unusual aspect to this case. Specifically, Plaintiffs at one point moved for summary judgment to the effect that the Plan was subject to ERISA prior to the June 2014 sale of the hospitals to the Prospect entities, because by April 29, 2013 at the latest the Plan had ceased to be administered by a "principal purpose organization."[2] The Prospect entities cross-moved for summary judgment that the Plan was not subject to ERISA at that time.[3] The Diocesan Defendants expressly declined to take any position on that issue.[4]

Before the Court ruled one way or the other on the Plaintiffs' and Prospect entities' motions for summary judgment, they, together with Angell, settled their case. After such settlement was approved, the Diocesan Defendants belatedly adopted[5] the position that Plaintiffs had taken. Plaintiffs, over the Diocesan Defendants' objections, were allowed to withdraw their motion for summary judgment. The Court allowed the

[2] ECF # 173.

[3] ECF # 190.

[4] ECF # 200 at 1.

[5] ECF # 221.

Diocesan Defendants to file their own motion for summary judgment, in which they took the position previously espoused (but later withdrawn) by Plaintiffs.

Plaintiffs now take the position that there are at least disputed issues of fact suggesting that *after* the closing of the 2014 Asset Sale, the Plan was administered by a "principal purpose organization," such that any disqualification of the Plan's entitlement to "church plan" status based upon its prior failure to be administered by a "principal purpose organization" was retroactively cured. Plaintiffs do not, however, contend that the other requirements for "church plan" status were satisfied, such that it can be affirmatively concluded that the Plan was exempt from ERISA. That determination also involves disputed issues of fact. Plaintiffs have the right to make inconsistent claims at this time—and probably up until the closing of the evidence at trial, when they may have to make an election. Plaintiffs previously argued (in support of their motion to withdraw their motion for summary judgment) that they were free to do so and were not estopped in any way (the Court having never ruled on the issue). See ECF # 226-1 at 3–5.

The Diocesan Defendants are in a different situation entirely. In Plaintiffs' objection to the Diocesan Defendants' motion for summary judgment, Plaintiffs establish that unlike the Plaintiffs (whose options on this issue remain open), the Diocesan Defendants are judicially estopped from claiming that the Plan was not a church plan exempt from ERISA. The judicial estoppel arises from the Diocesan Defendants' participation directly (and in aiding other defendants) in the regulatory proceedings that reviewed and approved the 2014 Asset Sale, in which the regulators accepted the

assertion that the Plan was a "church plan" exempt from ERISA, which the Diocesan Defendants now dispute.[6]

FACTS

I. Defendants and Former Defendants

Defendant Roman Catholic Bishop of Providence ("Corporation Sole") is a corporation sole, created by an act of the Rhode Island General Assembly entitled *An Act to Create the Roman Catholic Bishop of Providence, and His Successors, a Corporation Sole*.

Defendant Diocesan Administration Corporation ("Diocesan Administration") is a non-profit corporation that aids in administering the affairs of the Roman Catholic Diocese of Providence ("Diocese of Providence") and was instrumental in various matters alleged herein concerning the Diocese of Providence.

Diocesan Service Corporation ("Diocesan Service") is a non-profit corporation that aids in administering the affairs of and services provided by the Diocese of Providence and was instrumental in various matters alleged herein concerning the Diocese of Providence.

Since May 31, 2005, Bishop Tobin has been the President and Chief Executive Officer of Defendants Corporation Sole, Diocesan Administration, and Diocesan

[6] Ironically, the Diocesan Defendants on page 29 of their present motion to dismiss, inform this Court that "For example, Section 4.17(i) of the APA [Asset Purchase Agreement] states clearly that 'The Retirement Plan is a Church Plan,'" apparently forgetting that the Diocesan Defendants gave their approval to the APA and participated in obtaining its regulatory approvals.

Service.[7] He was acting within the scope of his employment by all three entities with respect to all of his actions and omissions alleged in the Complaint.[8]

Defendant St. Joseph Health Services of Rhode Island ("SJHSRI") is a non-profit corporation,[9] which owned Fatima Hospital prior to the 2014 Asset Sale. Since then, SJHSRI no longer operated a hospital or otherwise provided health care. It continued to administer the Plan until the Receiver was appointed to administer the Plan by SJHSRI's Board of Trustees on October 20, 2017.[10] In 2019, following judicial approvals of Settlement A,[11] SJHSRI petitioned itself into a Superior Court liquidating receivership. SJHSRI remains a party Defendant.

Defendant Roger Williams Hospital ("RWH") is non-profit corporation, which owned the hospital it operated under the name of Roger Williams Hospital prior to the 2014 Asset Sale. Since then, RWH ceased operating a hospital or otherwise providing medical care.[12] In 2019, following judicial approvals of Settlement A,[13] RWH petitioned itself into a Superior Court liquidating receivership. RWH remains a party Defendant.

At all relevant times CharterCARE Community Board ("CCHP" or "CCCB")[14] was the ostensible parent company of both SJHSRI and RWH, although Plaintiffs have

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[7] FAC ¶¶ 26, 27, 28.

[8] Id.

[9] FAC ¶ 15.

[10] FAC ¶ 16.

[11] See ECF # 164 (October 9, 2019 Memorandum and Order, approving the settlement known as Settlement A).

[12] FAC ¶ 18.

[13] See ECF # 164 (October 9, 2019 Memorandum and Order, approving Settlement A).

[14] Previously named CharterCARE Health Partners.

alleged that the separate corporate statuses of CCCB, SJHSRI, and RWH must be disregarded to prevent fraud.[15]

Prospect Chartercare SJHSRI, LLC ("Prospect SJHSRI") is a limited liability company that has owned Fatima Hospital since the 2014 Asset Sale. The sole member of Prospect SJHSRI is Prospect Chartercare, LLC ("Prospect Chartercare").[16] In 2021, following a judicially approved settlement,[17] both Prospect Chartercare and Prospect SJHSRI were dismissed as named Defendants.

Prospect Chartercare RWMC, LLC ("Prospect RWH") is a limited liability company that has owned Roger Williams Hospital since the 2014 Asset Sale. The sole member of Prospect RWH is Prospect Chartercare.[18] In 2021, following a judicially approved settlement,[19] Prospect RWH was dismissed as a named Defendant.

As used herein, "Old Fatima Hospital" refers to Fatima Hospital when it was owned and operated by SJHSRI, and "New Fatima Hospital" refers to Fatima Hospital since June 20, 2014 when it has been owned and operated by Prospect SJHSRI. "Old Roger Williams Hospital" refers to Roger Williams Hospital when it was owned and operated by RWH, and "New Roger Williams Hospital" refers to Roger Williams Hospital since June 20, 2014 when it has been owned and operated by Prospect RWH.[20]

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[15] FAC ¶ 19.

[16] FAC ¶ 20.

[17] See ECF # 217 (July 29, 2021 Order Granting Final Approval to Settlement).

[18] FAC ¶ 21.

[19] See ECF # 217 (July 29, 2021 Order Granting Final Approval to Settlement).

[20] FAC ¶ 22.

The Angell Pension Group, Inc. ("Angell") is a for-profit corporation which since 2005 provided actuarial services in connection with the Plan, and, at least since 2011, provided administrative services which included dealing directly with and advising Plan participants, both before and after the 2014 Asset Sale.[21] In 2021, following a judicially approved settlement,[22] Angell was dismissed as a named Defendant.

II. The Diocesan Defendants' and SJHSRI's Misrepresentations and Omissions, Knowing Participation in the Fraudulent Scheme and Conspiracy, and Fraudulent Transfers

In their motions to dismiss, the Diocesan Defendants do not question the sufficiency of the allegations in the Complaint as to any other Defendants. Accordingly, those are not disputed for purposes of their motion to dismiss. Although not disputed, those allegations are very relevant to the Diocesan Defendants' motion to dismiss,[23] and must be summarized to demonstrate the Diocesan Defendants' participation in the fraudulent scheme and conspiracy to defraud the Plan participants. Moreover, they are a crucial part of "the array of circumstances described in the complaint" that together support the reasonable inferences of the Diocesan Defendants' liability for purposes of the motion to dismiss. Rodríguez–Reyes v. Molina–Rodríguez, 711 F.3d 49, 57 (1st Cir. 2013) (motion to dismiss should be denied if "the array of circumstances described

[21] FAC ¶ 29.

[22] See ECF # 217 (July 29, 2021 Order Granting Final Approval to Settlement).

[23] These undisputed allegations are relevant to the Diocesan Defendants' motions to dismiss for several reasons, including because they are liable for them under Plaintiffs' claims for fraudulent scheme and conspiracy, and because they sufficiently allege that the other defendants committed intentional torts and, therefore, they independently satisfy the requirement of civil conspiracy for an underlying intentional tort. See Read & Lundy, Inc. v. Washington Trust Co. of Westerly, 840 A.2d 1099, 1102 (R.I. 2004) (civil conspiracy is "a means for establishing joint liability for other tortious conduct; therefore, it 'requires a valid underlying intentional tort theory.'").

in the complaint suffices to support an inference"). Accordingly, they are included herein for that purpose, notwithstanding that they themselves are not disputed.

The Plan began in 1965 when Corporation Sole, Diocesan Administration, and Diocesan Service established a defined benefit pension covering employees of the Diocesan Defendants and SJHSRI (the "Diocesan Plan").[24] The Diocesan Plan initially was funded mostly by the Plan participants' employers, and in part by employee contributions.[25] Beginning in 1973, however, employee contributions were no longer required or permitted.[26] The Diocesan Plan documents went through iterations over the ensuing years until 1995, with at least two constants: they were never provided to the Plan participants, and they arguably relieved the Diocesan Defendants and later SJHSRI of any obligation to make contributions.[27] In 1995, and without any disclosure to Plan participants, the portion of the Diocesan Plan that covered SJHSRI's employees was split off into its own Plan, the St. Joseph Health Services of Rhode Island Retirement Plan (the "Plan"), which subsequently also went through several iterations, none of which were provided to the Plan participants and which were structured to arguably relieve SJHSRI of any obligation to make contributions to the Plan.[28]

Although Plan participants were never given the Plan documents, participants were provided with a great many other documents that made representations

[24] FAC ¶ 211.

[25] FAC ¶ 212.

[26] FAC ¶ 213.

[27] FAC ¶¶ 213, 218, 221.

[28] FAC ¶¶ 214, 218, 221.

concerning the Plan, which SJHSRI offered to entice new employees and to retain existing employees.[29]

SJHSRI management and directors[30] were informed on numerous occasions that SJHSRI's employees did not understand the provisions of the Plan.[31] Indeed, SJSHRI's employees received misleading information, including descriptions of the Plan in detailed booklets, less-detailed handouts and tri-fold pamphlets specific to the Plan, employee handbooks, presentations ("PowerPoints") used in slideshows, and memoranda and letters from SJHSRI management to employees.[32]

A detailed booklet entitled "Retirement Plan for Employees of the Diocese of Providence," issued prior to 1973, described the pension benefits being provided to the employees of SJHSRI as of January 1, 1973 and stated:

> It is the desire of the diocese, its parishes and institutions, to make provision for its employees in retirement. Indeed, we have always had a sympathetic concern for the welfare of our employees and are confident that this implementation of that concern will provide the necessary sense of security and peace of mind that all envision.
>
> * * *
>
> Q. **What does the Diocese contribute?**
>
> A. The Diocese contributes the entire cost of the benefits you have earned prior to the adoption of the Retirement Plan. **The Diocese will also contribute an additional amount which, when added**

[29] FAC ¶¶ 256–57.

[30] Prior to 2010, Bishop Tobin was SJHSRI's chairman. See, e.g., FAC ¶ 115. Following SJHSRI's 2010 affiliation with RWH, SJHSRI's chairman was Bishop Tobin's designee, Monsignor Paul Theroux. See, e.g., FAC ¶¶ 187, 435.

[31] See FAC ¶¶ 258(a)–(c) (detailing examples).

[32] FAC ¶ 263.

to your contributions, will meet the cost of benefits you will earn during the remaining years of your employment.

* * *

Q. How will my Retirement Benefit be paid?

A. You will receive a check each month beginning on your retirement date and terminating with the payment preceding your death.[33]

[Emphasis supplied]

Another detailed booklet, entitled Saint Joseph's Hospital Retirement Plan (1973 edition) stated:

This booklet has been prepared to inform you about your Saint Joseph's Hospital Retirement Plan.

* * *

One of the most important sources of your income will be our Retirement Plan . . . .

* * *

HIGHLIGHTS OF THE PLAN

The Hospital will pay the entire cost of the Plan beginning January 1, 1973.

* * *

COST OF THE PLAN

5. Do I make any contributions to the Plan?

No. The Hospital will pay the entire cost of the Plan beginning January 1, 1973 – not only your pension but also all actuarial, legal and investment expenses incurred in the administration of the Plan.[34]

[33] FAC ¶ 265.

[34] FAC ¶ 266.

On or about February 6, 1978, SJHSRI's then President A. Edward Azevedo sent a memorandum to employees, urging them not to unionize and describing the benefits SJHSRI already provided through the Diocesan Plan. This memorandum contrasted the Hospital's pension benefits with what SJHSRI characterized as "vague promises" of union organizers and touted that the "Hospital pays [the] full cost of the plan."[35]

Another detailed booklet, entitled "RETIREMENT PLAN ST JOSEPH HOSPITAL Providence/North Providence, Rhode Island (1982 Edition)" contains the following statement, in question and answer format:

> WHO WILL PAY FOR MY BENEFITS?
>
> The Hospital pays the entire cost of your benefits earned after 1972 and before 1965. You and the Hospital shared the cost between 1965 and 1972.
>
> **Each year independent actuaries calculate the amount of money which the Hospital will pay to the Plan Trustee. This money is then set aside and invested to provide each eligible employee with a pension at retirement**.[36]
>
> [Emphasis supplied]

The preface to the booklet was a letter to employees signed by then-SJHSRI President Azevedo, which concluded with the "hope that this Plan will be evidence of our personal interest in your welfare, not only while actively in our employ but after you retire to enjoy the rewards of a long and productive life."[37]

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[35] FAC ¶ 267.

[36] FAC ¶ 268.

[37] FAC ¶ 268.

Similar language was included in the next edition of that booklet, captioned "St. Joseph Hospital Retirement Plan Providence/North Providence, Rhode Island (1986 Edition)", which stated:

> The St. Joseph Hospital Retirement Plan was established to help you make your retirement years economically more secure. Since its inception in 1965, the Hospital has made many improvements to the Plan. The most recent improvements became effective on July 1, 1985.
>
> **The Hospital pays the entire cost of the Plan and no contributions are required by you.**
>
> Your Retirement Plan will give you a lifetime monthly income when you become eligible to retire. In addition, the Plan may provide benefits to your spouse or beneficiary after your death.
>
> * * *
>
> WHO PAYS FOR MY BENEFITS?
>
> **The Hospital pays the entire cost of your benefits. Each year independent actuaries calculate the amount of money which the Hospital will pay to the Plan Trustee. This money is then set aside and invested to provide each eligible employee with a pension at retirement.**[38]
>
> [Emphasis Supplied]

The above-bolded language was repeated in a subsequent revision of that booklet in 1988 and draft revisions in 1993, 1995, 1996, and 1999.[39] It appears that SJHSRI stopped revising that booklet but continued to use it over time. During the period it was in use, SJHSRI never omitted or in any way contradicted this language.[40]

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[38] FAC ¶ 269.

[39] FAC ¶ 271.

[40] FAC ¶ 271.

Prior to 1995, the Diocese's Retirement Board sent terminated or retiring employees of SJHSRI documents entitled "STATEMENT OF INFORMATION FOR TERMINATED EMPLOYEES WITH VESTED RIGHTS". For example, one such form dated January 15, 1994 stated:

> According to our records, your service with St. Joseph Hospital prior to your termination of employment on 12/3/92 entitles you to a benefit at age 65 from the Diocese of Providence Retirement Plan – St. Joseph Hospital (the "Plan"). The amount of this benefit is $192.42 per month commencing on 4/1/2020 and **payable to you for as long as you live**.[41]
>
> [Emphasis supplied]

From time to time SJHSRI offered seminars or made presentations to Plan participants to explain their benefits, and in the process assured Plan participants that they could rely on their pensions.[42]

On October 24, 1996, SJHSRI's President and Chief Executive Officer sent a letter to employees of SJHSRI, which stated that he was "particularly pleased about the Pension Plan improvements," but neglected to disclose the fact that SJHSRI employees were no longer part of the Diocesan Plan[43] and neglected to disclose that the Plan was not insured by Pension Benefit Guaranty Corporation ("PBGC").[44]

From time to time thereafter, SJHSRI, as well as the then-incumbent Bishop acting on behalf of Defendants Corporation Sole, Diocesan Administration, and Diocesan Service, communicated with SJHSRI employees concerning the Plan in terms

[41] FAC ¶ 272.

[42] FAC ¶ 273 (detailing such seminars and presentations and the misleading information provided).

[43] FAC ¶ 274.

[44] FAC ¶ 275.

that falsely reassured Plan participants that the Bishop and Diocese of Providence had ongoing involvement in the Plan.[45]

For example, a handout was provided to Plan participants, entitled "RETIREMENT PLAN HIGHLIGHTS," that purported to summarize the Plan as of January 1, 1998 (three years after the split off of the Plan from the Diocesan Plan), and referred to the Bishop's and Diocese's ongoing involvement in the Plan:

> Who administers the Plan?
>
> The Roman Catholic Bishop of Providence has appointed a Retirement Board to administer the Plan. The Board will establish rules and regulations for the administration of the Plan, and will be responsible for resolving any disputes concerning Plan operation.
>
> Who administers the Retirement Fund?
>
> The Diocese has established a Trust Fund with Fleet Investment Services. The Trustee of the Fund will hold, invest, and distribute the money in accordance with the terms and provisions of the Plan and Trust Agreement.[46]

The statement that Plan assets were held in a trust established by the Diocese was false, since in connection with the separation of the two plans in 1995, a new trust was established by SJHSRI, but SJHSRI and the Diocesan Defendants did not inform Plan participants of the separation, much less that only a portion of the Diocesan Plan assets were transferred to the new trust for the Plan alone.[47] The handout also contained other false assurances, that the Plan was completely paid for and would

[45] FAC ¶ 276.

[46] FAC ¶ 277.

[47] FAC ¶ 277.

provide benefits throughout employees' entire lifetimes.[48] Similar false assurances were given in other pamphlets, handbooks, and materials given to employees over the following years,[49] including in communications to employees by Angell (who in addition to being the Plan's actuary was administering benefits).[50]

These misrepresentations continued after 2009, by which time Bishop Tobin had become bishop and chairman of SJHSRI's Board of Trustees.[51]

For example, in 2011, pension benefits were frozen for members of the Federation of Nursing and Health Care Professionals, upon representations that the freeze was necessary to protect the assets of the Plan and that benefits already earned would "not be affected".[52]

On January 2, 2012, the Chairman of the Investment Committee for CCCB's Board of Trustees informed CCCB's head of Personnel, Darlene Souza, and CCCB's Chief Financial Officer Conklin, that the Board of Trustees and management must consider the option of terminating the Plan and distributing the assets with a *pro rata* reduction in benefits.[53]

On December 31, 2012, Ms. Souza emailed Mr. Conklin and CCCB's Chief Executive Officer Belcher, wished them a "Happy New Year," and then advised them of

[48] FAC ¶ 278 (quoting such statements).

[49] See FAC ¶¶ 279–86 (detailing and quoting such materials).

[50] FAC ¶¶ 288–91.

[51] See FAC ¶ 115.

[52] FAC ¶ 287.

[53] FAC ¶ 363.

what she called the "potentially good news" that, according to her reading of the Plan documents, they could "terminate the plan without a solvency issue," and:

- deprive 1,798 Plan participants of any benefits whatsoever;
- pay benefits to an additional 744 Plan participants of only 88% of what they were due;
- pay full benefits only to the remaining 1,054 Plan participants who had already reached normal retirement age; and
- improve SJHSRI's balance sheet by over $29,000,000 by eliminating its liability for the unfunded portion of the Plan.[54]

However, in the same email, Ms. Souza advised Messrs. Conklin and Belcher that there was a downside to the Plan termination, which was that other hospitals with supposed Church Plans had attempted to terminate their plans just as she was proposing, but those hospitals had been sued in class actions, and one of those cases had a pending settlement that obligated the hospital to pay a significant amount of the unfunded benefits, notwithstanding its purported Church Plan status.[55]

Accordingly, Ms. Souza warned that if SJHSRI terminated the Plan and distributed reduced benefits, "we are exposed to a class action lawsuit" by the Plan participants who received no benefits, which could expose SJHSRI to "$30-$35m" as damages, which "would potentially erode the $29m fiscal savings" resulting from eliminating SJHSRI's funding liability by termination of the Plan.[56]

On April 29 & 30, 2014, shortly before the sale of Fatima Hospital was approved by state regulators, representatives of Angell (including at least Mary Pat Moran),

[54] FAC ¶ 364.

[55] FAC ¶ 365.

[56] FAC ¶ 366.

SJHSRI, RWH, and CCCB (including at least Darlene Souza) again participated in PowerPoint Presentations to SJHSRI employees intended to reassure them that the sale of the hospital to Prospect Medical would not affect their pension benefits.[57] In those presentations, the employees were shown a PowerPoint presentation which informed them that the terms of agreement for SJHSRI's joint venture with CCCB and Prospect Medical "includes a $14 Million contribution to the Pension Plan to stabilize plan assets," and were shown a sample final benefit statement that again acknowledged that "[y]our pension benefit is an important part of your future retirement income," and reassured them that "[t]he Hospital pays the entire cost of the Plan," with payment options that included annuity payments for life.[58] At that time, Angell and Defendants SJHSRI, RWH, and CCCB already knew that the $14 million contribution was not even remotely sufficient "to stabilize plan assets."[59]

Angell and Defendants SJHSRI, RWH, and CCCB also knew that the statement that "the Hospital pays the entire cost of the Plan" was also false and deceptive, on at least two levels. "[T]he entire cost of the Plan" includes funding the Plan, and, therefore, the statement was false because no one was funding the Plan. Moreover, given the timing of the presentation (two months before the closing) and the purpose to reassure employees concerning the effect of the 2014 Asset Sale on their pension benefits, the employees reasonably concluded that the "Hospital" referred to was New

[57] FAC ¶ 292.

[58] FAC ¶ 292.

[59] FAC ¶ 294.

Fatima Hospital under the ownership and operation of Prospect Chartercare, Prospect SJHSRI, Prospect RWH, Prospect Medical Holdings, and Prospect East.

Moreover, Angell and Defendants SJHSRI, RWH, and CCCB knew that the Plan, which this PowerPoint presentation referred to as an "important part of [the Plan participants'] future retirement income" was grossly underfunded, and the option to choose annuity payments for life was illusory if not an outright lie, because Plan assets would run out long before most of the Plan participants or their designated beneficiaries would have passed away.[60]

It was never "public knowledge," and Plan participants were never told that the Plan was being administered as a Church Plan, or that the Plan participants' benefits were not protected under ERISA, or that Defendants SJHSRI, RWH, and CCCB reserved the right not to make recommended contributions to the Plan, and in fact in many years did not make recommended contributions to the Plan.[61]

A. The Diocesan Defendants' Misrepresentations and Unlawful Acts in Aid of the Conspiracy

The Diocesan Defendants participated in misrepresenting that there was a meaningful connection between SJHSRI and the Catholic Church both before and after the 2014 Asset Sale, in order to wrongfully perpetuate the Plan's status as a "Church Plan" exempt from ERISA. In addition, and pursuant to the overall conspiracy and fraudulent scheme to defraud the Plan participants, the Diocesan Defendants misled and deceived the Vatican and state regulators to obtain approval for the 2014 Asset

[60] FAC ¶ 296.

[61] FAC ¶ 318.

Sale. The Diocesan Defendants also aided and abetted SJHSRI's breach of its fiduciary duties to Plan participants.

1. Fraudulent Inclusion of SJHSRI in the Catholic Directory and Securing Vatican Approval to Enable the 2014 Asset Sale

Although whether the Plan qualified for the church plan exemption from ERISA is not a subject of the pending motion to dismiss,[62] Plaintiffs' claims for fraudulent scheme and conspiracy are based in part on the actions taken and statements made by the Diocesan Defendants to fraudulently perpetuate that exemption. One of these actions concerned the fraudulent inclusion after 2014 of SJHSRI in the publication entitled the Official Catholic Directory ("Catholic Directory"), sometimes referred to as the Kennedy List, to enable SJHSRI to fraudulently claim church plan status.

One of the requirements for church plan status for the Plan was that SJHSRI at all times was required to be a "qualified church-controlled organization" as defined in 29 U.S.C. § 1002 (33)(A)(ii). Under that statute, a church-controlled entity cannot be a "qualified church-controlled organization" unless it first qualifies as a tax-exempt organization "under section 501 of Title 26." Plaintiffs allege for reasons set forth in the Complaint[63] that SJHSRI could not properly qualify as a tax exempt organization other than as a subordinate organization under the IRS approved group exemption for the United States Conference of Catholic Bishops ("U.S. Conference of Bishops").[64] The requirements for a subordinate organization to qualify under this group exemption

[62] It is, however, addressed at length in the Complaint. See FAC ¶¶ 57–113.

[63] FAC ¶¶ 99, 114.

[64] FAC ¶ 99.

include that the entity must be "operated, supervised, or controlled by or in connection with the Roman Catholic Church" in each year for which the exemption is claimed.[65]

Rather than requiring proof each year that a particular entity satisfies this requirement, the IRS accepts the listing of the entity in the Catholic Directory as *prima facie* proof of this qualification on a year-by-year basis.[66] The Catholic Directory contains diocesan entries, confirmed and approved by each diocese on an annual basis, for each subordinate organization that is "operated, supervised, or controlled by or in connection with the Roman Catholic Church," and entitled to exemption under the group ruling issued to the U.S. Conference of Bishops.[67]

The Diocesan Defendants were responsible to provide accurate and complete information to the Catholic Directory concerning subordinate organizations in the Diocese of Providence that are "operated, supervised, or controlled by or in connection with the Roman Catholic Church" that claim exemption under the group ruling issued to the U.S. Conference of Bishops.[68] At all relevant times before 2014, the Diocesan Defendants listed SJHSRI in the Catholic Directory as a subordinate organization that was "operated, supervised, or controlled by or in connection with the Roman Catholic Church" in the Diocese of Providence, as a "hospital."[69] In and since 2015, the Diocesan Defendants listed SJHSRI in the Catholic Directory as a subordinate

[65] FAC ¶ 101.

[66] FAC ¶¶ 98, 102.

[67] FAC ¶ 103.

[68] FAC ¶ 104.

[69] FAC ¶ 109.

organization that was "operated, supervised, or controlled by or in connection with the Roman Catholic Church" in the Diocese of Providence, as a "miscellaneous" entity.[70]

At least since the 2014 Asset Sale, which included the transfer of all of SJHSRI's operating assets, SJHSRI was not "operated, supervised, or controlled by or in connection with the Roman Catholic Church," either in the Diocese of Providence or anywhere else.[71] Accordingly, SJHSRI was no longer entitled to come under the group exemption issued to the U.S. Conference of Bishops, and pursuant to federal law should have been deleted and removed from the Catholic Directory by Defendants Corporation Sole, Diocesan Administration, and Diocesan Service, effective on June 20, 2014, when the closing of the Asset Sale occurred, or at least prior to the issuance of the 2015 Catholic Directory.[72]

At all relevant times, each of the Defendants knew that if the Plan ceased to qualify as a Church Plan, it would become subject to ERISA.[73]

On March 18, 2013, Prospect Medical signed a Letter of Intent that proposed a joint venture to operate Fatima Hospital and Roger Williams Hospital with Defendant CCCB, that involved Prospect Chartercare, Prospect SJHSRI, Prospect RWH, Prospect Medical and Prospect East paying off SJHSRI's and RWH's bonded indebtedness of approximately $31,000,000, paying $14,000,000 into the Plan, committing $50,000,000

[70] FAC ¶ 110.

[71] FAC ¶ 111.

[72] FAC ¶ 112.

[73] FAC ¶ 114.

over four years for capital projects and network development, and funding annual asset depreciation in the amount of $10,000,000.[74]

However, the $14,000,000 contribution to the Plan would only reduce SJHSRI's unfunded liabilities for the Plan to approximately $59,000,000. The Letter of Intent stipulated that liability for the Plan would remain with SJHSRI, and, therefore, that Fatima Hospital under the operation of its new owners could be relieved of these unfunded liabilities. Accordingly, the parties to the Letter of Intent had to determine if there was a way that they could make it appear lawful for SJHSRI to retain liability and for the Prospect entities to avoid that liability.[75]

Prior to Prospect Medical's signing the letter of intent, another for-profit hospital corporation (LHP Hospital Group, Inc.) had submitted a letter of intent that would have entailed paying $72,000,000 into the Plan.[76] However, the trustees[77] and executive management of SJHSRI, CCCB, and RWH did not favor paying off the unfunded pension liability,[78] and wanted to allocate more of the purchase money for other purposes[79] while keeping existing management in place.[80] Accordingly, they determined to proceed under the letter of intent from Prospect Medical.[81]

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[74] FAC ¶ 124.

[75] FAC ¶ 125.

[76] FAC ¶¶ 119–23 (detailing LHP's offer).

[77] As noted, the Bishop's designee Monsignor Paul Theroux was SJHSRI's chairman of the board at this time. See *supra* at 10 n.30.

[78] FAC ¶ 122.

[79] FAC ¶ 122.

[80] FAC ¶ 131.

[81] FAC ¶¶ 123–24.

As noted, Prospect Medical, Prospect Chartercare, Prospect SJHSRI, Prospect RWH, Prospect East, and Defendants SJHSRI, CCCB, RWH, Corporation Sole, Diocesan Administration, and Diocesan Service knew that if the Plan ceased to qualify as a Church Plan, it would become subject to ERISA, and, in that event, a company that took over the operations of Fatima Hospital could well have successor liability for the Plan.[82]

Accordingly, Prospect Medical Holding's proposal was conditioned upon the transaction being structured to make it appear lawful for the Plan to remain with SJHSRI and for it to continue to be claimed to be a Church Plan, to avoid the potential imposition of successor liability on the Prospect entities.[83] That condition required the cooperation of the Diocesan Defendants in continuing to allow SJHSRI to claim tax exempt status under the group ruling issued to the U.S. Conference of Bishops, by continuing to list SJHSRI in the Catholic Directory.[84]

Expressing concern over committing to the asset sale with Prospect Chartercare, Prospect SJHSRI, Prospect RWH, Prospect Medical Holdings, and Prospect East without this issue being resolved, CCCB's Chief Executive Officer Kenneth Belcher at a meeting of the Executive Committee of CCCB'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**." (emphasis supplied)[85] The conclusion of this meeting of the Executive Committee was to share the

[82] FAC ¶¶ 126–27.

[83] FAC ¶ 128.

[84] FAC ¶ 129.

[85] FAC ¶ 139.

current version of the asset purchase agreement ("APA") with Bishop Tobin and the Diocesan Defendants, and seek their support and agreement to maintaining SJHSRI in the Catholic Directory, prior to SJHSRI, RWH, and CCCB's signing the Asset Purchase Agreement.[86]

On August 14, 2013, counsel for SJHSRI, CCCB, and RWH, together with CCCB "senior leadership" met at the offices of the Diocesan Defendants with Bishop Tobin, Rev. Timothy Reilly (the Chancellor of the Diocese of Providence), and Msgr. Paul Theroux (who was also member of the Diocesan Finance Council).[87] Bishop Tobin, Rev. Reilly, and Msgr. Theroux attended and participated in the meeting on behalf of Defendants Corporation Sole, Diocesan Administration, and Diocesan Service.[88]

Counsel for SJHSRI, CCCB, and RWH brought the current version of the Asset Purchase Agreement to the meeting. That draft (and the final version actually signed by the parties to the sale) provided for the sale of all of the operating assets of SJHSRI, including ownership of Fatima Hospital. It also included the requirement that SJHSRI would retain liability for the Plan, and that the new owners and operators of New Fatima Hospital would have no obligations to or for the Plan.[89]

Counsel for SJHSRI, CCCB, and RWH also brought a document to that meeting, on the joint letterhead of counsel and CCCB, entitled "Overview of the Strategic Transaction with Prospect Medical Holdings, Inc., Presentation to the Board of

[86] FAC ¶ 140.

[87] FAC ¶ 141 (identifying individuals attending this meeting).

[88] FAC ¶ 141.

[89] FAC ¶ 142.

Directors," referring to the Board of Trustees for SJHSRI, CCCB, and RWH.[90] Counsel for SJHSRI, CCCB, and RWH showed it to Bishop Tobin, Rev. Reilly, and Msgr. Theroux and went over it with them.[91]

That document outlined the salient details of the 2014 Asset Sale.[92] The very first page of the presentation noted that only $14 million of the sales proceeds would be paid into "the Church-sponsored retirement plan (the 'Church Plan')."[93]

At this time, all of these Defendants (including the Diocesan Defendants) knew that SJHSRI's unfunded liability for the Plan was approximately $73,000,000. Thus, they knew that the Asset Purchase Agreement contemplated leaving SJHSRI an unfunded liability for the Plan of approximately $59,000,000, and that SJHSRI would have no operating assets.[94]

The document then detailed certain promises that would be made to the Diocesan Defendants as part of the transaction, which were described as follows[95]:

> Catholic identity covenants of Prospect and Newco
>
> - Our Lady of Fatima Hospital and other legacy SJHSRI facilities will be operated in compliance with the ERDs[96]
> - Roger Williams Medical Center and its facilities will not engage in prohibited activities
>   - Abortion

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[90] FAC ¶ 143.

[91] FAC ¶ 144.

[92] FAC ¶ 145.

[93] FAC ¶ 147.

[94] FAC ¶ 148.

[95] FAC ¶ 149.

[96] Ethical and Religious Directives for Catholic Health Care Services. See FAC ¶ 149.

  - 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

These "Catholic identity covenants" included essentially all the rights that the Diocesan Defendants and the Diocese of Providence were entitled to exercise over Old Fatima Hospital and Old Roger Williams Hospital, SJHSRI, and RWH, since 2009 when SJHSRI and RWH became part of CCCB.[97] Thus, notwithstanding the 2014 Asset Sale, the Diocesan Defendants were offered the promise that New Fatima Hospital and New Roger Williams Hospital would remain as Catholic as Old Fatima Hospital and Old Roger Williams Hospital had been before the asset sale.[98]

The Diocesan Defendants believed that Fatima Hospital would fail unless it was relieved of its pension liabilities, which concerned them because it would mean "that a consistent Catholic healthcare presence in the Diocese of Providence would be gravely compromised."[99]

In other words, the "deal" they were offered was that the Diocesan Defendants would be able to transfer to the new hospitals the "Catholicity" and associated controls that they had previously enjoyed over Old Fatima Hospital, Old Roger Williams Hospital,

[97] FAC ¶ 150.

[98] FAC ¶ 150.

[99] FAC ¶ 172.

SJHSRI, and RWH, while New Fatima Hospital would be freed from the unfunded liabilities of the Plan, at the expense of the Plan and the Plan participants.[100]

This "Overview of the Strategic Transaction" that counsel reviewed with Bishop Tobin, Rev. Reilly, and Msgr. Theroux during the meeting on August 14, 2013, 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.[101] Defendants SJHSRI, RWH, and CCCB, through their counsel, informed Bishop Tobin, Rev. Reilly, and Msgr. Theroux at this meeting that it was a "requirement" of the parties to the Asset Purchase Agreement that the Diocesan Defendants "[m]aintain the retirement plan of St. Joseph Health Services of Rhode Island as a 'Church Plan'."[102]

As further discussed in the FAC, SJHSRI's only "Catholic" attribute was through its operation of Fatima Hospital. Thus, the Diocesan Defendants knew that by agreeing to the proposed asset sale they were giving up any control over, association, or connection with SJHSRI.[103] All of the attendees at this meeting understood that continuing to list SJHSRI in the Catholic Directory would be a misrepresentation, and an unlawful evasion of tax law and ERISA, because the Diocesan Defendants would not control or be associated with SJHSRI after the closing of the 2014 Asset Sale.[104]

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[100] FAC ¶ 151.

[101] FAC ¶ 153.

[102] FAC ¶ 153.

[103] FAC ¶ 156.

[104] FAC ¶ 158.

At this meeting on August 14, 2013 (and again on several later occasions as summarized below and as detailed in the FAC), the Diocesan Defendants agreed to continue to list SJHSRI in the Catholic Directory.[105]

On September 11, 2013, the Diocesan Chancellor Msg. Reilly contacted counsel for SJHSRI, CCCB, and RWH (Keith Anderson) and stated that the "our Diocesan Finance Council and College of Consultors also need to consent to the act of alienation," and asked counsel to provide them with the Overview of the Strategic Transaction that he had shared with the Diocesan Defendants on August 14, 2013, because "[t]he Bishop thinks it would be a concise and helpful overview for the council members."[106] The next day counsel sent it to the Chancellor, addressing the document "[f]or the Bishop of the Roman Catholic Diocese of Providence, Rhode Island." The document set forth exactly the same bargain.[107]

On September 17, 2013 the Diocesan Finance Council and College of Consultors met to decide whether to vote in favor of alienation of the assets of SJHSRI pursuant to the proposed asset sale.[108] Bishop Tobin, Chancellor Reilly, and Monsignor Theroux attended as members of both, with Bishop Tobin as Chairman. Bishop Tobin also acted in his capacity as President of each of the Diocesan Defendants.[109] The Diocesan Finance Council and the College of Consultors approved the transaction.[110]

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[105] FAC ¶ 159.

[106] FAC ¶ 164.

[107] FAC ¶ 165.

[108] FAC ¶ 166.

[109] FAC ¶ 166.

[110] FAC ¶ 169.

The Diocesan Defendants controlled the Diocesan Finance Council and the College of Consultors, and knew that such approval was both improper and unlawful.[111]

Vatican approval of the transaction was required for the Diocesan Defendants to agree to the 2014 Asset Sale.[112] The Diocesan Defendants and Defendants SJHSRI, RWH, and CCCB all understood that the Vatican must approve specifically the "pension restructuring."[113] On September 18, 2013, Chancellor Reilly provided counsel for SJHSRI, CCCB, and RWH with a draft of Bishop Tobin's proposed letter to the Secretary of the Congregation for the Clergy in Rome requesting approval for the 2014 Asset Sale, and sought counsel's "comments/suggestions" concerning the letter.[114] Bishop Tobin's draft letter to the Vatican purported to summarize the transaction. It recounted the "merger" of SJHSRI and RWH into CCCB 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). The draft noted that the proposed sale would apply "approximately $14 million to fund **the Church-sponsored employee pension plan**"[115] (emphasis supplied).

Bishop Tobin then stated that "without [approval of] this transaction, it appears that a consistent Catholic healthcare presence in the Diocese of Providence would be

[111] FAC ¶ 169.

[112] FAC ¶ 139.

[113] FAC ¶ 180.

[114] FAC ¶ 170.

[115] FAC ¶ 171.

gravely compromised, and the financial future for employees-beneficiaries of the pension plan would be at significant risk. I believe that the APA [Asset Purchase Agreement] 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."[116]

The draft letter did not refer to or otherwise disclose the Diocesan Defendants' undertaking to "[m]aintain the retirement plan of St. Joseph Health Services of Rhode Island as a 'Church Plan'," which would have been impossible to justify given that SJHSRI would no longer operate as a hospital or have any connection to the Diocese of Providence or the Diocesan Defendants.[117]

Counsel for SJHSRI, CCCB, and RWH revised the draft by *deleting* the reference to "spiraling and gaping" liability, and substituted "significant" liability, stating that he preferred the revision "**in the event this letter was ever subject to discovery in a civil lawsuit**" (emphasis added).[118] Counsel for SJHSRI, CCCB, and RWH left untouched, however, all of the other statements quoted above.[119]

The Diocesan Defendants, SJHSRI, RWH, and CCCB knew that these statements were at best misleading if not simply false. They knew that even after the $14 million contribution, the Plan would remain seriously underfunded, and the financial future of the pensioners would be at much more than merely "significant risk." They knew that approval of the alienation would not avoid the "catastrophic implications" of

[116] FAC ¶ 172.

[117] FAC ¶ 174.

[118] FAC ¶ 175.

[119] FAC ¶ 176.

that failure. To the contrary, they knew that such approval would increase the risk of such failure by depriving SJHSRI of operating income it needed to meet its obligations under the Plan, and hindering if not completely frustrating the Plan participants' rights to demand contributions by or recover damages from an asset-holding and income-generating hospital.[120]

Bishop Tobin did not disclose in his letter to the Vatican that the proposed asset sale increased the probability of the Plan's failing. Instead Bishop Tobin, intentionally and with intent to deceive, omitted that information and, in effect, said the opposite, that approval of the asset sale was actually necessary to secure the Plan.[121]

On September 27, 2013, Bishop Tobin signed his letter as altered by counsel for SJHSRI, CCCB, and RWH and sent it to the Vatican. In so doing, Bishop Tobin acted individually and in his capacity as President of each of the Diocesan Defendants.[122] He also acted in furtherance of the conspiracy that included those entities and Defendants Prospect Chartercare, Prospect SJHSRI, Prospect RWH, Prospect Medical Holdings, Prospect East, and Angell.[123]

Vatican approval was obtained in early 2014, along with other necessary approvals, and the asset sale closed on June 20, 2014.[124] In conformity with the "strategic plan" to which the Diocesan Defendants and Defendants SJHSRI, RWH, and CCCB had agreed prior to the closing of the asset sale, SJHSRI was not deleted from

[120] FAC ¶ 177.

[121] FAC ¶ 178.

[122] FAC ¶ 179.

[123] FAC ¶ 179.

[124] FAC ¶ 182.

the 2014 Catholic Directory immediately after the 2014 Asset Sale, although it should have been.[125]

As the next step in that plan, counsel for SJHSRI, CCCB, and RWH contacted the Diocese in late 2014 to ensure that SJHSRI was being included in the Catholic Directory for the coming year, 2015.[126] However, on November 11, 2014, Diocesan Chancellor Reilly e-mailed one or more representatives of the Prospect Entities (including at least Otis Brown) and admitted that "Fatima and SJHSRI are not eligible for listing at this time."[127] He noted that "[r]ecently, the USCCB has instituted more formalized and rigorous policies and procedures, with increased expectations for the local Dioceses, in light of stricter IRS scrutiny of group rulings."[128] Moreover, the Chancellor observed that it was not a matter that could be handled discreetly out of public view.[129] Notwithstanding that the Prospect Entities purported to have no liability for the Plan, the response of the Prospect Entities' representative (Otis Brown) was to e-mail Chancellor Reilly and Monsignor Theroux on December 2, 2014, with copies to SJHSRI and CCCB, stating that if SJHSRI were not listed in the Catholic Directory, that would "mean that the SJHS[RI] pension would no longer be treated as a church plan."[130]

On December 23, 2014, counsel for SJHSRI sent an e-mail to counsel for the Diocesan Defendants, which he copied to representatives of the Prospect Entities and

[125] FAC ¶ 183.

[126] FAC ¶ 184.

[127] FAC ¶ 185.

[128] FAC ¶ 185.

[129] FAC ¶ 185.

[130] FAC ¶ 186.

Angell, that reminded everyone of the consequences of the Diocesan Defendants' not listing SJHSRI in the Catholic Directory:

> SJHSRI believes that if it is not included in the 2015 issue of the directory that the pension plan will no longer qualify as a church plan and that **the loss of that status will require that they immediately notify the applicable governmental authorities that the plan is currently underfunded**.[131]
>
> [Emphasis supplied]

In response, and to avoid that disclosure to governmental authorities, the Diocesan Defendants on December 31, 2014 again improperly agreed that SJHSRI would remain in the Catholic Directory for 2015, under the continuing "sponsorship" of the Diocese of Providence.[132] On or about January 1, 2015, the Diocesan Defendants contacted the editors of the Catholic Directory and saw to it that SJHSRI remained listed in the Catholic Directory for 2015, under the "miscellaneous" activities of the Diocese of Providence. The Diocesan Defendants falsely listed the Prospect Defendants' agent Otis Brown as the contact person for SJHSRI, so that the Prospect Defendants could help run interference on any inquiries into the Plan's falsely claimed church plan status.[133] The listing was repeated in the 2016 and 2017 editions of the Catholic Directory, the latter being the most recent edition as of June 2018 when this action was commenced.

The IRS should have been notified but was never informed that SJHSRI no longer was entitled to tax exempt status under the group ruling the IRS issued to the

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[131] FAC ¶ 188.

[132] FAC ¶ 189.

[133] FAC ¶ 194.

U.S. Conference of Bishops. From 2014 to 2017, SJHSRI thereafter continued to file informational nonprofit organization returns to the IRS that it was no longer entitled to file and failed to file income tax returns that it was required to file.[134] This included false IRS filings claiming that SJHSRI had tax exempt status under 26 U.S.C. § 501(c)(3) for those tax years.

The Diocesan Defendants knew that their agreeing to continue to list SJHSRI in the Catholic Directory would enable Defendant SJHSRI to file these false returns, and knew and expected that Defendant SJHSRI in fact would file these false returns.[135] These false claims were material in that they hindered or had the potential for hindering the IRS's efforts to monitor and verify Defendant SJHSRI's tax liability.

The Diocesan Defendants chose to prefer their interest in having New Fatima Hospital operated under the Catholic identity covenants, and having New Fatima Hospital freed of approximately $59,000,000 in liabilities, over the interests of the Plan participants in their hard-earned pensions.[136]

Another inducement for the Diocesan Defendants' improperly agreeing to retain SJHSRI in the Catholic Directory was that if the asset sale went forward, the Diocesan Defendants would receive nearly $640,000 in repayment of a loan from the Inter-Parish Loan Fund.[137] In connection with the 2014 Asset Sale, the Inter-Parish Loan Fund received proceeds of $638,838.25 from the proceeds of the sale of SJHSRI's assets.[138]

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[134] FAC ¶¶ 190--98 (detailing such IRS filings).

[135] FAC ¶ 198.

[136] FAC ¶ 204.

[137] FAC ¶¶ 206–08.

[138] FAC ¶ 209.

On August 22, 2014, Bishop Tobin directed that $100,000 of this amount be transferred to the Priests' Retirement Fund instead of the SJHSRI Plan, thereby favoring priests over Plan participants, and that the balance be applied towards a Diocesan Line of Credit.[139]

2. The Diocesan Defendants' Deception of State Regulators to Secure Approval for the 2014 Asset Sale

On February 14, 2014, pursuant to the conspiracy in which the Diocesan Defendants were participating with Defendants SJHSRI, RWH, CCCB, and Prospect Chartercare, Prospect SJHSRI, Prospect RWH, Prospect Medical Holdings, and Prospect East to relieve Fatima Hospital of any liability under the Plan at the expense of the Plan participants, Bishop Tobin (acting individually and as President of the Diocesan Defendants[140]) wrote to the Health Services Council to lobby in favor of regulatory approval of the for-profit hospital conversion:

> **I write on behalf of the proposed partnership between CharterCARE Health Partners and Prospect Medical Holdings. . . .**
>
> * * *
>
> 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 very 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 a significant risk. I believe that this partnership will help avoid**

[139] FAC ¶ 210.

[140] FAC ¶ 320.

> **the catastrophic implications of such a failure**, and at the same time, enhance the quality of care at SJHSRI/Our Lady of Fatima.[141]
>
> [Emphasis added]

However, as explained above, rather than believing the 2014 Asset Sale would help avoid pension failure, Bishop Tobin personally, and, through him and other officials, the Diocesan Defendants knew that "the proposed partnership between CharterCARE Health Partners and Prospect Medical Holdings" made pension failure much more likely, and, indeed, a virtual certainty, absent unanticipated and extremely improbable investment gains, because it would cut the link between the Plan and an operating hospital, and would transfer assets from SJHSRI that otherwise would be available to help fund the Plan.[142]

B. The Scheme and Conspiracy That the Diocesan Defendants Joined

As members of the conspiracy to which the Diocesan Defendants joined, they become liable for all of the following wrongful acts of their co-conspirators.

1. Misleading UNAP

Many of SJHSRI's employees were members of the United Nurses & Allied Professionals ("UNAP"), under a collective bargaining agreement that entitled them to pension benefits.[143] In connection with the 2014 Asset Sale, Defendants SJHSRI, RWH, CCCB, Angell, Prospect Chartercare, Prospect SJHSRI, Prospect RWH, Prospect Medical Holdings, and Prospect East sought UNAP's agreement to a freeze

[141] FAC ¶ 320.

[142] FAC ¶ 321.

[143] FAC ¶ 297.

on the accrual of pension benefits upon the closing of the asset sale.[144] In these negotiations, the Prospect Entities and these Defendants knew and understood that UNAP was acting on behalf of the Plan participants who belonged to the union.[145]

Beginning in August 2013 and continuing thereafter, Christopher Callaci of UNAP had discussions with representatives from Prospect Medical, including Thomas Reardon and Von Crockett, regarding the potential acquisition by Prospect Medical or its subsidiaries of the Fatima and Roger Williams Hospitals and the impact of such acquisition on UNAP's members.[146] In those discussions, Mr. Callaci was told that if the acquisition transaction closed, $14 million would be paid into the Plan in connection with the closing, and thereafter CCCB and its subsidiaries would make the annual actuarially recommended contributions to the Pension Plan.[147] In connection with these meetings, Mr. Callaci was given a calculation prepared by Angell that represented that even as of July 1, 2032, the Pension Fund would remain more than 70% funded under that promise.[148]

At the same time, a second calculation was prepared by Angell for internal use by SJHSRI, Prospect Chartercare, Prospect SJHSRI, Prospect RWH, Prospect Medical Holdings, and Prospect East, which showed the impact on the Plan from not making those annual contributions in the future, which showed that the Pension Fund would be

[144] FAC ¶ 297.

[145] FAC ¶ 297.

[146] FAC ¶ 298.

[147] FAC ¶ 299.

[148] FAC ¶ 301.

0% funded by July 1, 2032.[149] Prospect Chartercare, Prospect SJHSRI, Prospect RWH, Prospect Medical Holdings, and Prospect East knew that was the scenario SJHSRI actually intended to follow.[150]

2. Misleading State Regulators

In 2014 Defendants SJHSRI, RWH, and CCCB, and Prospect Chartercare, Prospect SJHSRI, Prospect RWH, Prospect Medical Holdings, and Prospect East, with the support of Angell, sought and obtained approval from the Rhode Island Department of Health and the Rhode Island Attorney General to convert Fatima Hospital and Rogers Williams Hospital into for-profit operations, pursuant to a common application.[151] This process entailed numerous submissions to the regulators, answers to application questions and supplemental questions, testimony at public hearings, newspaper op-eds, and statements to SJHSRI's employees. In the course of obtaining such regulatory approval, the applicants made numerous fraudulent misrepresentations and omissions, detailed in extenso at FAC ¶¶ 319–81.

These misrepresentations including generating and submitting false calculations concerning the effect of the proposed transaction on the solvency of the Plan, and numerous misrepresentations of the parties' intentions (not sincerely held) to fund the Plan. These misrepresentations also included false statements concerning the "local control" that would be exercised over the hospitals, notwithstanding that deadlocks in

[149] FAC ¶ 302.

[150] FAC ¶ 302.

[151] FAC ¶ 319.

vote between the Prospect-appointed directors and CCCB-appointed directors would be resolved by letting the Prospect-appointed directors' decisions control.

For example, in April 2014, the Attorney General was asking Supplemental Question S3-48, as follows:

> S3-48 Will the pension liability remain in place – how much, and what is the plan going forward to fund the liability?[152]

On April 15, 2014, SJHSRI, RWH, CCCB, Prospect Chartercare, Prospect SJHSRI, Prospect RWH, Prospect Medical Holdings, and Prospect East responded to the Attorney General and answered that question as follows:

> Response: The pension liability will remain in place post transaction. Subsequent to the $14 Million contribution to the Plan upon transaction, **future contributions to the Plan will be made based on recommended annual contribution amounts as provided by the Plan's actuarial advisors**. Moving forward, the investment portfolio of the plan will be monitored by the Investment Committee of the Board of Trustees.[153]
>
> [Emphasis supplied]

When that statement was made, however, SJHSRI, RWH, CCCB, Prospect Chartercare, Prospect SJHSRI, Prospect RWH, Prospect Medical Holdings, and Prospect East knew that it was the intention of SJHSRI, RWH, or CCCB *not* to make any future contributions, and, therefore, that "future contributions to the Plan" would *not* "be made based on recommended annual contribution amounts as provided by the Plan's actuarial advisors."[154] Indeed, between 2014 and the filing of the FAC in 2018,

[152] FAC ¶ 343.

[153] FAC ¶ 344.

[154] FAC ¶ 345.

not a single penny had been contributed to the Plan other than the $14,000,000 contribution which they made to secure regulatory approval for the 2014 Asset Sale.[155]

That is but one of the misrepresentations and omissions detailed at FAC ¶¶ 319–381 (encompassing twenty-four pages of context and detail). These misrepresentations and omissions succeeded in deceiving both the Rhode Island Department of Health and the Rhode Island Attorney General into approving the asset sale, and to prevent SJHSRI's employee unions, the general public, and Plan participants from learning of the grossly underfunded status of the Plan.[156]

C. Fraudulent Transfers

Although Plaintiffs have not asserted their fraudulent transfer counts (Counts V and VI) against the Diocesan Defendants, the factual allegations concerning such fraudulent transfers are incorporated into—and relevant to—counts that Plaintiffs have asserted against the Diocesan Defendants, including the counts for aiding and abetting breach of fiduciary duty (Counts III and XXII). Accordingly, the allegations concerning fraudulent transfers are briefly summarized herein.

1. The 2014 Asset Sale Was a Fraudulent Transfer

SJHSRI and RWH, not CCCB, owned the real estate and all of the assets used in operating Old Fatima Hospital and Old Roger Williams Hospital respectively.[157] Thus, virtually all of the personal property and real property transferred in the 2014 Asset Sale

[155] FAC ¶ 346

[156] FAC ¶ 336.

[157] FAC ¶ 439.

was owned both historically and immediately prior to the sale by CCCB's various subsidiaries, primarily SJHSRI and RWH, and not by CCCB, such that virtually all of the actual consideration provided by the sellers came from SJHSRI and RWH, not from CCCB.[158]

The consideration that Prospect East provided at the closing on or about June 20, 2014 included 15% of the shares of Prospect Chartercare.[159] The fair market value of that 15% at the time of the asset sale was at least $6,640,000 according to Prospect Chartercare's own audited financials.[160] The Asset Purchase Agreement had provided that CCCB would receive those shares, as follows:

> Sellers have designated CCHP (the "Seller Member") to be the holder of the units representing the Company's limited liability company memberships on behalf of all Sellers to be issued as partial consideration in respect of the sale by Sellers of the Purchased Assets.[161]

The consideration that Prospect Chartercare, Prospect SJHSRI, Prospect RWH, Prospect Medical Holdings, and Prospect East provided in return for the assets included the undertaking to provide long term working capital of $50,000,000, and ordinary working capital of $10,000,000 per year, which conferred a benefit on CCCB as 15% shareholder in the additional amount of $9,479,000, according to Prospect Chartercare's own audited financials.[162]

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[158] FAC ¶ 440.

[159] FAC ¶ 441.

[160] FAC ¶ 442.

[161] FAC ¶ 443.

[162] FAC ¶ 444.

Thus, notwithstanding that CCCB provided virtually none of the consideration for the transaction, the parties consummated the transaction so that CCCB obtained all of the 15% interest in Prospect Chartercare, totaling a fair market value of at least $15,919,000.[163] Although it was and should have been their property, SJHSRI and RWH kept none of that interest, and, therefore, that valuable asset was not available to satisfy claims of Plan participants, or any other creditors of SJHSRI.[164]

2. The $8.2 Million Transferred Pursuant to the 2015 *Cy Pres* Proceeding Was a Fraudulent Transfer

The 2014 Asset Sale itself injured Plaintiffs in many ways, including that it attempted to insulate their employer and their employer's assets from liability under the Plan.[165]

Those injuries included the fraudulent transfer from Defendants SJHSRI and RWH to their related entity CharterCARE Foundation of approximately $8,200,000 that should have been deposited into the Plan.[166] This fraudulent scheme had two parts. First SJHSRI, RWH, CCCB, CharterCARE Foundation, Prospect Chartercare, Prospect SJHSRI, Prospect RWH, Prospect Medical Holdings, and Prospect East conspired to persuade the Rhode Island Attorney General to disregard the mandatory requirements of the Hospital Conversions Act for an independent foundation, and second, SJHSRI, RWH, and CharterCARE Foundation misled the Rhode Island Superior Court into

[163] FAC ¶ 445.

[164] FAC ¶ 445.

[165] FAC ¶ 378.

[166] FAC ¶ 379.

approving this transfer in the 2015 *Cy Pres* Proceedings in violation of Plan participants' statutory right to those sums.[167]

R.I. Gen. Laws § 23-17.14-22 states on pertinent part as follows:

> § 23-17.14-22. Distribution of proceeds from acquisition – Selection and establishment of an independent foundation.
>
> (a) In the event of the approval of a hospital conversion involving a not-for-profit corporation and a for-profit corporation results in a new entity as provided for in § 23-17.14-7(c)(25)(i), it **shall be required** that the proceeds from the sale and any endowments, restricted, unrestricted and specific purpose funds shall be transferred to a charitable foundation operated by a board of directors.
>
> (b) The presiding justice of the superior court **shall have the authority** to:
>
> (1) Appoint the initial board of directors.
>
> (2) Approve, modify, or reject proposed bylaws and/or articles of incorporation provided by the transacting parties and/or the initial board of directors.
>
> [Emphasis supplied]

However, Defendants SJHSRI, RWH, CCCB, and CharterCARE Foundation wanted the money to go to CharterCARE Foundation, of which CCCB was the sole member, and not an "independent foundation," and wanted to name the board of directors for that foundation, instead of the directors being named by the Presiding Justice of the Superior Court.[168]

The transfer of $8.2 million to CharterCARE Foundation also violated R.I. Gen. Laws §§ 7-6-50, 7-6-51 & 7-6-61, which obligate nonprofit corporations in winddown to

[167] FAC ¶ 379.

[168] FAC ¶ 381.

pay their creditors first, before any funds can be transferred to other charities under the doctrine of *cy pres* or any other rationale.

The result was that the Superior Court in the 2015 *Cy Pres* Proceeding was misled into permitting approximately $8,200,000 of SJHSRI's assets to be transferred to CharterCARE Foundation.[169]

ARGUMENT

I. Standard of review

A. The applicable standard for a Rule 12(b)(6) motion to dismiss

Rule 12(b)(6) motions "are always facial, not factual, challenges to the complaint." Cebollero-Bertran v. Puerto Rico Aqueduct & Sewer Auth., 4 F.4th 63, 69 (1st Cir. 2021). "The place to test factual assertions for deficiencies and against conflicting evidence is at summary judgment or trial." Liu v. Amerco, 677 F.3d 489, 497 (1st Cir. 2012) (reversing grant of Rule 12(b)(6) motion to dismiss).

"To survive a Rule 12(b)(6) motion to dismiss, the facts alleged in the complaint, taken as true by the court, which also draws all inferences in the pleader's favor, 'must state a plausible, not merely conceivable, case for relief.'" Id. (quoting Sepulveda-Villarini v. Dep't of Educ. of Puerto Rico, 628 F.3d 25, 29 (1st Cir. 2010)). "This plausibility standard is 'not akin to a probability requirement' but it 'demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.'" Cebollero-Bertran, 4 F.4th at 70 (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)).

[169] FAC ¶ 405.

Thus, the Court must "accept as true all the factual allegations in the complaint and construe all reasonable inferences in favor of the plaintiff." Sanchez v. Pereira-Castillo, 590 F.3d 31, 41 (1st Cir. 2009) (citations omitted). The complaint "must contain sufficient factual matter to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citation omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citation omitted).

"The plausibility inquiry necessitates a two-step pavane." García-Catalán v. United States, 734 F.3d 100, 103 (1st Cir. 2013) (citing Rodríguez–Reyes v. Molina–Rodríguez, 711 F.3d 49, 53 (1st Cir. 2013)). "First, the court must distinguish 'the complaint's factual allegations (which must be accepted as true) from its conclusory legal allegations (which need not be credited).'" Id. (citation omitted). "Second, the court must determine whether the factual allegations are sufficient to support 'the reasonable inference that the defendant is liable for the misconduct alleged.'" Id. (quoting Ashcroft v. Iqbal, *supra*, 556 U.S.at 678).

"[T]he complaint must be read as a whole," and "there need not be a one-to-one relationship between any single allegation and a necessary element of the cause of action." García-Catalán v. United States, *supra*, 734 F.3d at 103 (1st Cir. 2013) ("We emphasize that the complaint must be read as a whole. As we have explained, '[t]here need not be a one-to-one relationship between any single allegation and a necessary element of the cause of action.'") (quoting Rodríguez–Reyes v. Molina–Rodríguez, *supra*, 711 F.3d at 55). The motion to dismiss should be denied if "the array of

circumstances described in the complaint suffices to support an inference." Rodríguez-Reyes v. Molina-Rodríguez, *supra*, 711 F.3d at 57.

B. The Court should not look to the Diocesan Defendants' documents outside the First Amended Complaint

The Diocesan Defendants attach a raft of exhibits to their motion and insist the Court should look at them without converting their motion to dismiss into a motion for summary judgment. See Diocesan Defendants' Memo. at v-vii ("Table of Exhibits"). As to five of these thirty exhibits, Diocesan Defendants do not pretend they are even *referenced* in Plaintiffs' First Amended Complaint, much less incorporated into or forming the basis for any of Plaintiffs' claims. For these[170], the Diocesan Defendants contend it is sufficient if someone posted documents somewhere on the Internet. It is not.

As to other exhibits, the Diocesan Defendants do pretend they are incorporated or referenced in Plaintiffs' First Amended Complaint, but they are not or are not sufficiently. For example, the Diocesan Defendants attach—and trumpet the truth of—a pile of actuarial reports generated by former-Defendant Angell (who stood accused of committing actuarial malpractice in this case), from which Plaintiffs had quoted misrepresentations concerning SJHSRI's funding policies.[171] The Diocesan Defendants

[170] Primarily actuarial reports which were obtained from the Defendants. See Diocesan Defendants' Exhibits 1 and 2. Neither of these is even referred to in the First Amended Complaint. The Diocesan Defendants also attach a 2010 Articles of Amendment to SJHSRI's articles of incorporation, their Exhibit 19, which is not the operative articles and is likewise not even referred to in the First Amended Complaint. The Diocesan Defendants further attach their own summaries and work product as Exhibits 9 and 30.

[171] Diocesan Defendants' Exhibits 3, 4, 5, 6, 7, 8.

also seize upon two passing references[172] to the existence of the Change in Effective Control application that Defendants submitted to the Rhode Island Department of Health, to attach as slew of excerpts from that Change in Effective Control application and the exhibits thereto.[173] None of these exhibits has anything to do with Plaintiffs' actual claims. The Diocesan Defendants also attach other documents which received passing references in other documents that were quoted by Plaintiffs for another purpose.[174]

None of this is appropriate practice on a Rule 12(b)(6) motion to dismiss. See Doe v. Pawtucket Sch. Dep't, 969 F.3d 1, 8 (1st Cir. 2020) ("[A] motion to dismiss under Rule 12(b)(6) generally provides no occasion upon which to consider documents other than the complaint.").

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[172] See Diocesan Defendants' Memo. at 24 (citing FAC ¶¶ 305 and 431(f)). These paragraphs state:

> Defendants SJHSRI, RWH, CCCB, Angell, Prospect Chartercare, Prospect Chartercare St. Joseph, Prospect Chartercare Roger Williams, Prospect Medical Holdings, and Prospect East made these misrepresentations and omitted this material information because they knew that such disclosure would create so much negative publicity and outcry that the applications to the Department of Health and the Attorney General for approval of the asset sale without fully funding the Plan would be denied or at the very least would be in serious jeopardy.

FAC ¶ 305.

> A May 20, 2014 email blast from CCCB's president Kenneth Belcher states: "Today Dr. Michael Fine, Director of the Department of Health, followed Friday's decision by the Attorney General and approved our Hospital Conversion[s] Act and Change in Effective Control applications. This was the final regulatory hurdle toward the successful completion of our joint venture agreement with Prospect Medical Holdings. . . . We are now prepared to plan the final closing which involves executing the financial and legal documents to make the joint venture agreement official."

FAC ¶ 431(f).

[173] Diocesan Defendants' Exhibits 10, 12, 13, 14, 15, and 16.

[174] For example, the Diocesan Defendants attach Exhibit 20 (Ethical and Religious Directives of the United States Conference of Catholic Bishops) because a 2013 PowerPoint slide quoted in the First Amended Complaint refers to "ERDs" and Plaintiff spelled out the acronym in a footnote for the benefit of an unfamiliar reader. See also *supra* at 48 & 48 n.172 (discussing paragraph 431(f) which happened to mention the Change in Effective Control application).

The Diocesan Defendants contend that the Change in Effective Control application "is public record, susceptible to judicial notice" inasmuch as it "is available through the Rhode Island Department of Health's website." Diocesan Defendants' Memo. at 24 & 24 n.15. However that is not the rule in the First Circuit, where district courts are not permitted to take judicial notice of documents simply by virtue of their being held in public repositories:

> The Freemans also claim that three submissions should have been considered as public records. These include a transcript of 911 calls and two Hudson Police incident reports. The Freemans ask us to adopt the expansive view that any document held in a public repository falls within the category of extrinsic materials that may be considered. It is true that, when reviewing a motion to dismiss for failure to state a claim, a court may "consider 'matters of public record.' " *Haley v. City of Boston*, 657 F.3d 39, 46 (1st Cir.2011). But there are limits to that license. **Many documents in the possession of public agencies simply lack any indicia of reliability whatsoever.** . . . **Rather, the phrase "official public records" when used in the present context, appears limited, or nearly so, to documents or facts subject to judicial notice under Federal Rule of Evidence 201.** . . .
>
> [Emphasis supplied]

Freeman v. Town of Hudson, 714 F.3d 29, 36–37 (1st Cir. 2013). See also Victoria v. City of San Diego, 326 F. Supp. 3d 1003, 1012 (S.D. Cal. 2018) ("Despite the fact that some records of a state agency may be proper subjects of judicial notice, a district court may not take judicial notice of documents filed with an administrative agency to prove the truth of the contents of the documents.") (citation omitted) (declining to take judicial notice of disputed facts recited in police report for purposes of motion to dismiss); Mirage Entm't, Inc. v. FEG Entretenimientos S.A., 326 F. Supp. 3d 26, 33 (S.D.N.Y. 2018). "Where a document's contents are disputed by a party, it is improper to permit defendants to simply attach documents referenced in a complaint to their motions to

dismiss and ask courts to consider the contents of those documents when they contradict the allegations of a complaint." Pledger v. Reliance Tr. Co., 240 F. Supp. 3d 1314, 1330 (N.D. Ga. 2017).

In addition, even as to the documents that Plaintiffs did reference in the First Amended Complaint, parties are permitted to refer to documents in a pleading without adopting every statement contained therein. See Doe v. Princeton Univ., No. 21-1458, 2022 WL 965058, at *3 (3d Cir. Mar. 31, 2022) ("When the truth of facts in an 'integral' document are contested by the well-pleaded facts of a complaint, the facts in the complaint must prevail."); In re Processed Egg Prod. Antitrust Litig., 821 F. Supp. 2d 709, 740 (E.D. Pa. 2011); Richards v. Gelsomino, 240 F. Supp. 3d 173, 178 (D.D.C. 2017). See also Casey v. Odwalla, Inc., No. 17-CV-2148 (NSR), 2018 WL 4500877, at *4 (S.D.N.Y. Sept. 19, 2018) (court could not take judicial notice of an FDA letter on motion to dismiss, where plaintiffs disputed the assertions contained therein).

> . . . Ordinarily, a "district court is not permitted to consider matters beyond the complaint." *Mediacom Southeast LLC v. BellSouth Telecomm., Inc.*, 672 F.3d 396, 399 (6th Cir. 2012). There is an exception, however, for exhibits attached to a motion to dismiss, "so long as they are referred to in the Complaint and are central to the claims contained therein." *Bassett v. Nat'l. Collegiate Athletic Ass'n.*, 528 F.3d 426, 430 (6th Cir. 2008). But the Court may only consider such materials if it is clear that they involve no disputed issues of material fact. *See MediaCom Southeast*, 672 F.3d at 400.
>
> That is not the case here. . . .

Reliable Carriers Inc. v. Moving Sites LLC, 309 F. Supp. 3d 473, 477 (E.D. Mich. 2018).

> Additionally, the Court declines to take judicial notice of the excerpts of the Homm Book pursuant to Federal Rule of Evidence 201(b) because the "facts" fail the "not subject to reasonable dispute" component of Rule 201(b). The portion of the Homm Book of which defendant seeks judicial

> notice contains information regarding the "sham" marriage between Susan Devine and Florian Homm, a matter which is disputed by the parties. . . .

Absolute Activist Value Master Fund Ltd. v. Devine, 233 F. Supp. 3d 1297, 1317 (M.D. Fla. 2017).

Moreover, as alleged in the Amended Complaint, the regulatory submissions contain affirmative misrepresentations and other inaccuracies and therefore should be properly excluded from the Court's consideration on a motion to dismiss on that basis alone. See Foley v. Wells Fargo Bank, N.A., 772 F.3d 63, 74 (1st Cir. 2014) (on a Rule 12(b)(6) motion, district court improperly considered documents that the plaintiff alleged were "untrustworthy" and contained "unreliable" statements); Gammel v. Hewlett-Packard Co., 905 F. Supp. 2d 1052, 1062 (C.D. Cal. 2012) (refusing to take judicial notice of press release on motion to dismiss, where "Plaintiffs dispute the accuracy of this document").

Moreover, even if (*arguendo*) the "facts" recited in the Diocesan Defendants' documents were accepted as true (which they should not be, especially on a motion to dismiss), they would not establish that Plaintiffs were informed of those "facts".

For example, the Diocesan Defendants point to paragraph 317 of the First Amended Complaint, which alleges that other Defendants drafted a PowerPoint slide deck for presentation to hospital employees but, before presenting it to employees, and "as part of a long history of concealment from the Plan participants," deleted a discussion of how "the Plan participants' benefits were not protected under ERISA." FAC ¶ 317. The Diocesan Defendants assert that it is untrue that Defendants concealed this lack of ERISA protection, because (the Diocesan Defendants contend) the Defendants stated in "documents submitted to state regulators" that the Plan was a

Church Plan. See Diocesan Defendants' Memo. at 28–29. This is an utter non sequitur, because the state regulators are not the Plaintiffs. Moreover, none of the references that the Diocesan Defendants cobble together in this portion of their memorandum even mention the significance of a plan being an ERISA-exempt (and thus uninsured) church plan. See id.

Other times the Diocesan Defendants appear to engage in willful misreading of the First Amended Complaint. One of the Amended Complaint's important allegations against the Diocesan Defendants is that the other Defendants' entering into the 2014 Asset Sale was "'subject to' if Bishop signs off on the pension piece," FAC ¶ 139, and that they obtained this sign off at a meeting on August 14, 2013 by offering "the promise that New Fatima Hospital and New Roger Williams Hospital would remain as Catholic as Old Fatima Hospital and Old Roger Williams Hospital had been before the asset sale." FAC ¶¶ 141–50. In other words, the Diocesan Defendants had certain rights vis-à-vis the legacy hospitals, and through an improper and tortious agreement injuring the Plan, obtained *the continuation* of those rights vis-à-vis the new Prospect-owned hospitals.

The Diocesan Defendants characterize that allegation as "absurd and implausible" by inaccurately citing paragraph 150 for the proposition that "Our Lady of Fatima was already under contractual restrictions to comply with various Catholicity requirements," and insist that Corporation Sole "already had all the authority it needed to maintain Our Lady of Fatima as a Catholic Institution or approve or reject any sale by virtue of the terms of the Affiliation Agreement and SJHSRI's Articles of

Incorporation."[175] Diocesan Defendants' Memo. at 30. In doing so, the Diocesan Defendants astonishingly disregard the fundamental difference between Old Fatima Hospital (i.e. the hospital as it existed pre-sale, which was burdened by pension obligations) and New Fatima Hospital (i.e. the hospital as it would exist post-sale under the aegis of Prospect Chartercare, which Defendants intended to set free of the pension obligations). By participating in the other Defendants' scheme to rob Peter to pay Paul, the Diocesan Defendants were obtaining something they very much valued: a "Catholic" hospital whose financial viability and "consistent Catholic healthcare presence in the Diocese of Providence"[176] would not depend on an ability to pay these pensions.

In the end, all of the Diocesan Defendants' disputes of fact simply underscore the futility of their motion to dismiss.

C. The Court, on a Rule 12(b)(6) motion to dismiss, cannot divide Plaintiff's claims into subparts based on time period or particular supporting allegations or legal theories

1. The Court cannot dismiss individual allegations or subparts of Plaintiffs' claims

Throughout the Diocesan Defendants' memorandum, they invite the Court to "dismiss" various *allegations* or various *subparts* of Plaintiffs' claims. The Diocesan Defendants' arguments fail in the details, but perhaps more fundamentally, the approach they advocate—chop all of Plaintiffs' claims into pre- and post-2008 time periods, or chop Plaintiffs' count for fraudulent misrepresentations into perhaps dozens

[175] The Diocesan Defendants' quoted assertion omits the fact that the corporation owning Old Fatima Hospital would cease to own a hospital at the closing. Any prior control over Old Fatima would be meaningless in terms of the hospital operated as New Fatima.

[176] FAC ¶ 172 (quoting Bishop Tobin's 2014 letter to the Vatican).

of sub-counts based on individual misstatements—is utterly flawed on a Rule 12(b)(6) motion to dismiss.

"A motion to dismiss under Rule 12(b)(6) doesn't permit piecemeal dismissals of parts of claims; the question at this stage is simply whether the complaint includes factual allegations that state a plausible claim for relief." BBL, Inc. v. City of Angola, 809 F.3d 317, 325 (7th Cir. 2015). See Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 594 (8th Cir. 2009) ("Finally, the complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible."); Rich v. BAC Home Loans Servicing, LP, No. CV-11-00511-PHX-SRB, 2013 WL 10104610, at *8 (D. Ariz. July 10, 2013) ("The Court finds it unnecessary to parse out Plaintiffs' various allegations and rule that some theories are adequate while others are not. On a Rule 12(b)(6) motion, Defendants may move to dismiss 'a claim,' not to dismiss or strike specific allegations or portions of a claim."); Fujifilm N. Am. Corp. v. M&R Printing Equip., Inc., No. 20-CV-492-LM, 2021 WL 722861, at *4 (D.N.H. Feb. 24, 2021) ("However, the court declines to evaluate the extent to which each of these four theories are adequately pled in the proposed amended complaint. At this early stage, Fujifilm need only allege a set of facts showing that a theory exists upon which Fujifilm may be able to hold defendants liable.") (denying piecemeal dismissals of parts of successor-liability claim); Fairhaven Health, LLC v. BioOrigyn, LLC, No. 2:19-CV-01860-RAJ, 2021 WL 5987023, at *5 (W.D. Wash. Dec. 17, 2021) ("Rule 12(b)(6) may not be used to challenge specific allegations in a complaint; Rule 12(f) is the proper mechanism."); Bilek v. Fed. Ins. Co., 8 F.4th 581, 587 (7th Cir. 2021) ("Since 'a motion to dismiss under Rule 12(b)(6) doesn't permit piecemeal dismissal of parts of claims,' our inquiry is

limited to only whether Bilek's complaint 'includes factual allegations that state a plausible claim for relief.'") (quoting BBL, Inc., *supra*).

As a widely cited decision from the District of Oregon explains:

> **Although Rule 12(b)(6) is the proper procedural mechanism to dismiss part of a complaint, many courts have recognized that a party may not use Rule 12(b)(6) to dismiss only part of a claim.** *See BBL, Inc. v. City of Angola*, 809 F.3d 317, 325 (7th Cir. 2015) ("A motion to dismiss under Rule 12(b)(6) doesn't permit piecemeal dismissals of parts of claims; the question at this stage is simply whether the complaint includes factual allegations that state a plausible claim for relief.") (emphasis in original); *Doe v. Napa Valley Unified Sch. Dist.*, No. 17-cv-03753-SK, 2018 WL 4859978, at *2 (N.D. Cal. Apr. 24, 2018) ("By its own terms, there does not appear to be any way to grant partial dismissal of a claim under Fed. R. Civ. P. 12(b)(6).") (quoting *In re Netopia, Inc., Sec. Litig.*, No. C-04-03364 RMW, 2005 WL 3445631, at *3 (N.D. Cal. Dec. 15, 2005)). **In other words, courts may not dismiss only some of the claim's allegations if the claim otherwise survives.** *See Thompson v. Paul*, 657 F. Supp. 2d 1113, 1129 (D. Ariz. 2009) ("The Court is unaware, however, of any situation in which a Rule 12(b)(6) motion may be used to strike certain allegations in support of a claim, where the underlying claim itself is not challenged."); *In re Netopia, Inc*, 2005 WL 3445631, at *3 (denying a motion to dismiss because Rule 12(b)(6) "should not be used on subparts of claims; a cause of action either fails totally or remains in the complaint"); *Limone v. United States*, 271 F. Supp. 2d 345, 364 (D. Mass. 2003) (holding that a defendant may not "seek dismissal of facts rather than claims" under Rule 12(b)(6)) (emphasis in original).
>
> **Here, Western Union moves to dismiss only one aspect of Redwind's retaliation and discrimination claim**—Western Union's decision to refer Redwind's grievance to outside counsel. **Granting Western Union's motion to dismiss this allegation would not dismiss Redwind's retaliation and discrimination claim** because she also alleges, among other things, that Western Union terminated her after she filed a charge with the EEOC. (Compl. ¶¶ 12, 15.) **Accordingly, the district judge should deny Western Union's motion to dismiss only part of Redwind's retaliation claim.** *See Finnegan v. Washoe Cty.*, No. 3:17-cv-00002-MMD-WGC, 2017 WL 3299040, at *3 (D. Nev. Aug. 2, 2017) ("While Defendant asks the Court to strike the paragraphs ..., the purpose

> of a Rule 12(b)(6) motion is not for the Court to strike selected portions of a plaintiff's complaint. Thus, although the allegations in these paragraphs of the [complaint] may not amount to acts of discrimination or adverse employment action under Title VII, [the plaintiff] is still permitted to include them.").
>
> [Emphasis supplied]

Redwind v. W. Union, LLC, No. 3:18-CV-02094-SB, 2019 WL 3069864, at *4 (D. Or. June 21, 2019), *report and recommendation adopted*, No. 3:18-CV-2094-SB, 2019 WL 3069841 (D. Or. July 12, 2019). In other words:

> The State Defendants filed a motion to dismiss claims. *See* Fed. R. Civ. P. 12(b)(6) (providing that a party may assert a defense of "failure to state a claim upon which relief can be granted") (emphasis added). **The State Defendants thus must establish the legal insufficiency of the retaliation claim as a whole**, by undermining at least one element. **They cannot move to dismiss one of two adverse action theories, or specific allegations relevant to the adverse action element.** *See In re Am. Express Anti-Steering Rules Antitrust Litig.*, 343 F. Supp. 3d at 101 ("As the Second Circuit has long held, 'part only of a single claim cannot be adjudicated with finality.' ") (quoting *Rieser v. Baltimore & Ohio R.R. Co.*, 224 F.2d 198, 204 (2d Cir. 1955)); *see also BBL, Inc. v. City of Angola*, 809 F.3d 317, 325 (7th Cir. 2015) ("A motion to dismiss under Rule 12(b)(6) doesn't permit piecemeal dismissals of parts of claims; the question at this stage is simply whether the complaint includes factual allegations that state a plausible claim for relief.") (emphasis in original).
>
> [Emphasis supplied]

Tromblee v. New York, No. 119CV0638LEKCFH, 2021 WL 981847, at *11 (N.D.N.Y. Mar. 16, 2021) (concluding plaintiff adequately alleged a claim based on hostile work environment theory).

2. The Court does not analyze the plausibility of individual allegations but rather the totality of Plaintiffs' claims for relief

Throughout their memorandum, the Diocesan Defendants also carve Plaintiffs' First Amended Complaint up into various discrete allegations and contend that particular allegations are "implausible" under a *Twombly*/*Iqbal* analysis. This is also inappropriate.

As the First Circuit has repeatedly emphasized:

> Additionally, **the district court erred when it failed to evaluate the cumulative effect of the factual allegations**. The question confronting a court on a motion to dismiss is **whether all the facts alleged**, when viewed in the light most favorable to the plaintiffs, render the plaintiff's entitlement to relief plausible. *See id.* [*Twombly*, 550 U.S.] at 569 n.14, 127 S.Ct. 1955; *Braden v. Wal–Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir.2009) (explaining that "**the complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible**"). No single allegation need "lead to the conclusion"—in the district court's words—of some necessary element, provided that, in sum, the allegations of the complaint make the claim as a whole at least plausible. *See Sepúlveda–Villarini*, 628 F.3d at 29 ("The make-or-break standard ... is that **the combined allegations**, taken as true, must state a plausible, not a merely conceivable, case for relief.") (emphasis added). Indeed, the Supreme Court has suggested that allegations that would individually lack the heft to make a claim plausible may suffice to state a claim in the context of the complaint's other factual allegations. *See Twombly*, 550 U.S. at 557, 127 S.Ct. 1955 . . . .
>
> [Emphasis supplied]

Ocasio-Hernandez v. Fortuno-Burset, 640 F.3d 1, 14–15 (1st Cir. 2011). See Hernandez-Cuevas v. Taylor, 723 F.3d 91, 103 (1st Cir. 2013) ("Here, despite our admonition that 'the complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible,' the government has done just that, electing in its appeal to challenge the complaint in a piecemeal fashion. . . . We

are unpersuaded by the government's balkanized approach.") (quoting Ocasio-Hernandez); Garayalde-Rijos v. Municipality of Carolina, 747 F.3d 15, 25 (1st Cir. 2014) ("Beyond that, the temporal analysis here is flawed. . . . [T]he complaint should be read in its entirety and 'not parsed piece by piece to determine whether each allegation, in isolation, is plausible. . . .'").

D. Plaintiffs are entitled to plead alternative and contradictory facts and theories

The Diocesan Defendants spend several pages complaining that Plaintiffs should not be permitted to allege facts that the Diocesan Defendants contend are mutually inconsistent. See Diocesan Defendants' Memo. at 38–43. That is not the law. "Under Federal Rule 8(d)(2) a party may include inconsistent allegations in a pleading's statement of facts." 5 Fed. Prac. & Proc. Civ. § 1283 (4th ed.). "Perfectly consistent with that principle is the notion that a pleader also may set forth inconsistent legal theories in his or her pleading and will not be forced to select a single theory on which to seek recovery against the defendant." Id. The Diocesan Defendants' approach rests on the defunct common law and code practice that the modern Federal Rules expressly abandoned:

> The federal rule [8(d)] abrogates the so called "theory of the pleadings" doctrine that characterized common law and code practice, which required a plaintiff to seek recovery on a single theory, and only permitted relief to be granted on the particular theory adopted by the pleader.
>
> . . . **In contrast to common law and code practice, the federal rules recognize that inconsistency in the pleadings does not necessarily mean dishonesty**, and that frequently a party, after a reasonable inquiry and for proper purposes, must assert contradictory statements when he or she legitimately is in doubt about the factual background of the case or the legal bases that underlie affirmative recovery or defense.

5 Fed. Prac. & Proc. Civ. § 1283 (4th ed.).

There are numerous authorities (including from the First Circuit) expressly recognizing *the pleading of alternative facts where one set of which is entirely opposite the other*. The First Circuit has expressly held:

> **Because procedural law allows alternative contentions, parties to a civil action involving such an array of factual and legal theories as this case presents may be allowed to defer choice at least until late stages of proceedings in the trial court.** For example, both plaintiffs and defendants in a civil case may be allowed to maintain alternative contentions **at least until the evidence is closed**, when the court may require some choices to be made about the form of verdict to be used in submitting the case to the jury—*see* Fed.R.Civ.P. 49—and about instructions to the jury.
>
> [Emphasis supplied]

Aetna Cas. Sur. Co. v. P & B Autobody, 43 F.3d 1546, 1555 (1st Cir. 1994). As this Court has previously noted:

> Moreover, **the relaxed pleading standard of Rule 8 governs the pleading of this count** [for civil liability for forgery], and therefore, as noted previously, Plaintiffs are free to allege in the alternative, and **factual allegations inconsistent with the crime of forgery are disregarded for purposes of considering this count** on a motion to dismiss. See Fed.R.Civ.P. 8(d)(2) & (3).
>
> [Emphasis supplied]

W. Rsrv. Life Assur. Co. of Ohio v. Caramadre, 847 F. Supp. 2d 329, 348 (D.R.I. 2012) (Smith, C.J.), *aff'd sub nom.* W. Rsrv. Life Assur. Co. of Ohio v. ADM Assocs., LLC, 793 F.3d 168 (1st Cir. 2015).

Both this Court's prior practice and the First Circuit's Aetna Cas. Sur. Co. authority are also consistent with authority in other circuits. See Henry v. Daytop Vill.,

Inc., 42 F.3d 89, 95 (2d Cir. 1994) ("Under Rule 8(e)(2)[177] of the Federal Rules of Civil Procedure, a plaintiff may plead two or more statements of a claim, even within the same count, regardless of consistency. The inconsistency may lie either in the statement of the facts or in the legal theories adopted.") (citations omitted); Guy James Const. Co. v. Trinity Indus., Inc., 644 F.2d 525, 530 (5th Cir.), modified, 650 F.2d 93 (5th Cir. 1981) ("A party may plead alternative and inconsistent facts or remedies against several parties without being barred."); Indep. Enterprises Inc. v. Pittsburgh Water & Sewer Auth., 103 F.3d 1165, 1175 (3d Cir. 1997) (Fed. R. Civ. P. 8 "permits inconsistency in both legal and factual allegations"); Wright & Miller, 5 Fed. Prac. & Proc. Civ. § 1283 (4th ed.) ("Under Federal Rule 8(d)(2) a party may include inconsistent allegations in a pleading's statement of facts.").

Thus, for example, a Section 1983 plaintiff alleging a wrongful search and seizure in violation of the Fourth Amendment is permitted to allege both that a drug-sniffing dog *alerted* to his vehicle *and did not alert* to the vehicle, notwithstanding that the two factual allegations are obviously mutually incompatible. See Collik v. Pohlabel, No. 3:20-CV-307, 2020 WL 7075632, at *3 (S.D. Ohio Dec. 3, 2020) ("Mr. Collik pleads alternative facts in the Complaint: the drug-sniffing dog did not alert or the drug-sniffing dog alerted towards the passenger compartment of the Vehicle. This type of pleading is permissible.")).

The Diocesan Defendants cite several cases (from outside the First Circuit) at pages 40–43 of their memorandum, which they contend stand for the Diocesan

[177] Presently renumbered as Fed. R. Civ. P. 8(d)(2).

Defendants' proposition that parties cannot plead inconsistent facts. These cases do not actually support that proposition, and/or are utterly distinguishable.

The Diocesan Defendants cite In re Livent, Inc. Noteholders Secs. Litig., 151 F. Supp. 2d 371, 407 (S.D.N.Y. 2001) as "stating both that plaintiffs had knowledge of a critical fact and that they had no such knowledge; or that plaintiffs had no awareness of specific information revealed in some particular document, while at the same time asserting that they relied upon the contents of that same document" were problematic for purposes of alleging a single "unitary claim" of fraud. In re Livent, Inc. Noteholders Sec. Litig., 151 F. Supp. 2d at 405. Here, in contrast, Plaintiffs have no personal knowledge of the inconsistent facts being asserted in the alternative, and Plaintiffs are bringing many multiple claims, rather than a single unitary claim.

The Diocesan Defendants cite Mrla v. Fed. Nat'l Mortg. Ass'n, No. 15-CV-13370, 2016 WL 3924112, at *5 (E.D. Mich. July 21, 2016) as stating: "Accordingly, courts have held that Rule 8(d)(3)'s 'alternative pleadings rule' does not cover inconsistent assertions of fact when the pleader holds the knowledge of which of the inconsistent facts is the true one." Of course, as noted, Plaintiffs lack such personal knowledge. The Mrla case expressly recognized that a party's uncertainty as to the true facts renders alternative pleading completely appropriate. See id. at *5 ("When inconsistent factual allegations are made for reasons other than the pleader's uncertainty as to which allegation was true, dismissal is appropriate.").

The Diocesan Defendants cite Ixotic AG v. Kammer, No. 09-cv-4345, 2015 WL 270028, at *14 (E.D.N.Y. Jan. 21, 2015) for the following quote, which they recite out of context: "But when they plead alternative claims based on mutually irreconcilable facts,

as they have done here, their embrace of such internal inconsistency deprives them of the benefit of the rule that otherwise establishes as true their factual allegations." The Diocesan Defendants' citation is misleading, because the referenced "rule" was neither Rule 8(d) nor Rule 12(b)(6), but rather Rule 8(b)(6), governing the effect of a defaulted party's failure to respond to a pleading. When a default judgment is entered, all "well-pleaded" allegations in the pleading are deemed admitted by the defaulted party, apart from damages. However, where the complaint alleges mutually inconsistent sets of facts, it becomes difficult to determine which of those sets of inconsistent facts is deemed admitted by such default judgment. See Ixotic AG, 2015 WL 270028, at *14 (noting the complaint's inconsistent factual allegations concerning the alleged RICO enterprise and concluding: "I therefore conclude that the plaintiffs have not adequately alleged the existence of any cognizable [RICO] enterprise upon which the court may properly rely **for purposes of awarding a default judgment**.") (emphasis supplied). Here, the Diocesan Defendants' motion practice does not involve any default judgment.

The Diocesan Defendants also cite Ohio Midland, Inc. v. Proctor, No. C2-05-1097, 2006 WL 3793311, at *5 (S.D. Ohio Nov. 28, 2006) ("Ohio Midland II") as purportedly "instructive". It is not, at least as to the types of inconsistent factual allegations that Plaintiffs have pled in our case.

In Ohio Midland, Inc. v. Proctor, No. C2-05-1097, 2006 WL 1645237 (S.D. Ohio June 13, 2006) ("Ohio Midland I"), the plaintiffs, who owned a private toll bridge, sued the Ohio Department of Transportation to force it to build a new bridge ramp to replace one that had been taken by eminent domain. In addition, they sued the governor of West Virginia, asserting the following contingent claim: "*if* Defendants ODOT are not

compelled to construct a ramp to keep the Bridge open, as required by law, and the bridge is deemed abandoned *then* the remainder of the bridge as a structure should be ordered to revert to the owners of the land pursuant to Ohio and West Virginia Laws." Ohio Midland I, 2006 WL 1645237, at *4. The court dismissed that claim as "not yet ripe". Id.

In Ohio Midland II, the plaintiffs moved for reconsideration and, in the alternative, sought to file an amended complaint stating that actually they had already abandoned the bridge. The court denied reconsideration and denied the amendment, concluding that under the circumstances of that case, the plaintiffs could not assert such prior abandonment consistent with Rule 11:

> Under Rule 8(e)(2) of the Federal Rules of Civil Procedure, a party may set forth two or more statements of a claim alternately or hypothetically. Rule 8(e)(2), however, is **limited by Rule 11** of the Federal Rules of Civil Procedure, which states that when presenting pleadings to the court, the party is certifying that "the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Plaintiffs may not, under Rule 11 limitations, assert contradictory statements of fact unless Plaintiffs are legitimately in doubt about the facts in question. Therein lies the rub.
>
> **In this case, Plaintiffs cannot legitimately be in doubt** about the facts relating to ownership or abandonment of the Bridge because abandonment lies within Plaintiffs' own intentions. . . .
>
> [Emphasis supplied]

Ohio Midland II, 2006 WL 3793311, at *4 (citations omitted). Here, as noted, Plaintiffs lack personal knowledge and, therefore, are legitimately in doubt and perfectly able to plead their inconsistent facts consistent with Rule 11.

Finally, the Diocesan Defendants cite Great Lakes Higher Educ. Corp. v. Austin Bank of Chicago, 837 F. Supp. 892 (N.D. Ill. 1993), which is yet another Rule 11 case. There, the court concluded it violated Rule 11 for the two plaintiff banks to allege that *both banks* were the *drawer* and *both banks* were the *drawee*, of a single check, in a suit against a third bank for conversion of the check under the Illinois UCC. See Great Lakes Higher Educ. Corp., 837 F. Supp. at 895. Although the banks had violated Rule 11, the court deemed the violation inadvertent and declined to impose Rule 11 sanctions. See id. at 895 n.2. Again, here there can be no credible suggestion that Plaintiffs have violated Rule 11.

II. The First Amended Complaint states a claim for "appropriate equitable relief" under ERISA

Count III (ERISA, Aiding and Abetting Breaches of Fiduciary Duty) alleges that the Diocesan Defendants "knowingly participated in, aided, and abetted breaches of fiduciary duty" by Plan fiduciaries (including SJHSRI). This count seeks "all appropriate equitable relief" and "all relief under 29 U.S.C. § 1132(a), or any other applicable law, that the Court deems proper, and such appropriate relief as the Court may order" including various examples of equitable relief. "Whether the relief sought will ultimately be deemed 'appropriate' equitable relief is not before the court on this motion" to dismiss. Sentara Virginia Beach Gen. Hosp. v. LeBeau, 182 F. Supp. 2d 518, 525 (E.D. Va. 2002).

The Diocesan Defendants assert two ERISA-related arguments: (1) that Plaintiffs' First Amended Complaint seeks *inappropriate* equitable relief; and (2) that

Plaintiffs have failed to state a claim for equitable estoppel under ERISA. Diocesan Defendants' Memo. at 13–15.

The Supreme Court in Harris Trust and Savings Bank v. Salomon Smith Barney, Inc., 530 U.S. 238 (2000) made clear that what constitutes "appropriate equitable relief" includes relief determined by the law of trusts:

> Salomon raises the specter of § 502(a)(3) suits being brought against innocent parties—even those having no connection to the allegedly unlawful "act or practice"—rather than against the true wrongdoer, i.e., the fiduciary that caused the plan to engage in the transaction.
>
> But this *reductio ad absurdum* ignores the limiting principle explicit in § 502(a)(3): that the retrospective relief sought be "appropriate equitable relief." The common law of trusts, which offers a "starting point for analysis [of ERISA] ... [unless] it is inconsistent with the language of the statute, its structure, or its purposes," plainly countenances the sort of relief sought by petitioners against Salomon here.

Harris Trust, 530 U.S. at 250–51 (quoting Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 447 (1999)). See Carlson v. Principal Financial Group, 320 F.3d 301, 308 (2d Cir. 2003) ("Under *Harris Trust*, a non-fiduciary may be a proper defendant under § 502(a)(3) if it would be a proper defendant under 'the common law of trusts'".) (quoting Harris Trust, 530 U.S. at 250).

Under the common law of trusts:

> Just as every owner of a legal interest has the right that others shall not, without lawful excuse, interfere with his possession or enjoyment of the property or adversely affect its value, so the beneficiary, as equitable owner of the trust *res* has the right that third persons shall not knowingly join with the trustee in a breach of trust. One acting with a trustee in performing an act that such person knows or should know is a breach of trust becomes a participant in the breach and subject to liability for any damages that result or to restore the trust property traced to such person's possession.

Bogert's, The Law of Trusts and Trustees § 901 (June 2018 update) (citations omitted). See Pension Ben. Guar. Corp. v. Ross, 733 F. Supp. 1005 (M.D.N.C. 1990) (holding that plaintiffs had a "cognizable cause of action against…a non-fiduciary for its knowing participation in a breach of trust"); Pension Ben. Guar. Corp. v. Ross, *supra*, 733 F. Supp. at 1008 ("The law of trusts recognizes a cause of action against third persons for their knowing participation in a breach of trust. Seen in this light, defendants' argument must falter to the extent that trust law cannot be ignored in an ERISA case.") (citations omitted).

The Diocesan Defendants contend that even if Plaintiffs have a claim that the Diocesan Defendants acted wrongfully under ERISA, Plaintiffs cannot recover anything because they have no equitable remedy against the Diocesan Defendants, and are, in reality, seeking money damages. Diocesan Defendants' Memo. at 14 ("No matter how couched, that is a claim for legal damages, a remedy unavailable against the Diocesan Defendants under ERISA."). In other words, even if the Diocesan Defendants are responsible for a breach of trust, they claim that Plaintiffs have no remedy.

That argument must be rejected as contrary to the "maxim of equity . . . that '[e]quity suffers not a right to be without a remedy.'" CIGNA Corp. v. Amara, 563 U.S. 421, 440 (2011) (quoting R. Francis, Maxims of Equity 29 (1st Am. ed. 1823)).

> Equity is primarily responsible for the protection of rights arising under trusts, and will provide the beneficiary with whatever remedy is necessary to protect him and recompense him for loss, in so far as this can be done without injustice to the trustee or **third parties**.
>
> The court is not confined to a limited list of remedies but rather **will mold the relief to protect the rights of the beneficiary according to the situation involved**. If equity cannot give the beneficiary the exact benefit

> to which the trust would entitle him, it will provide him the best possible substitute.
>
> [Emphasis supplied]

Bogert's, The Law of Trusts and Trustees § 861 (citations omitted). See In re PHC, Inc. S'holder Litig., 894 F.3d 419, 435 (1st Cir. 2018) ("The hallmark of equitable relief is its protean nature and—within wide limits—a court sitting in equity may tailor relief to fit the circumstances of a particular case.").

However, this is not a case in which an existing equitable remedy is lacking such that the Court needs to fashion relief. To the contrary, there are equitable remedies which would entitle Plaintiffs to a monetary payment by the Diocesan Defendants (such as for aiding and abetting breach of fiduciary duty), notwithstanding that it is not alleged that the Diocesan Defendants obtained Plan assets. (Indeed, the Diocesan Defendants received nearly $640,000 from the 2014 Asset Sale proceeds that should have gone to the Plan.[178])

The fact that "relief takes the form of a money payment does not remove it from the category of traditionally equitable relief" that may be awarded for a non-fiduciary's knowing participation in an ERISA fiduciary's breach of duty. CIGNA Corp. v. Amara, 563 U.S. 421, 441 (2011) ("But the fact that this relief takes the form of a money payment does not remove it from the category of traditionally equitable relief. Equity courts possessed the power to provide relief in the form of **monetary** '**compensation' for a loss resulting from a trustee's breach of duty**[179], or to prevent the trustee's

[178] FAC ¶ 206.

[179] As will be discussed *infra*, the Diocesan Defendants joined in a conspiracy between SJHSRI and the Prospect entities to do just that.

unjust enrichment.") (emphasis supplied) (quoting Restatement (Third) of Trusts § 95, and Comment a (Tent. Draft No. 5, Mar. 2, 2009) and J. Eaton, Handbook of Equity Jurisprudence §§ 211–212, at 440 (1901)). See also Lavery v. Restoration Hardware Long Term Disability Benefits Plan, 937 F.3d 71, 85 (1st Cir. 2019) (holding "that the 'appropriate equitable relief' is to affirm the district court's order of back benefits").

It should be noted, however, that in responding to the Diocesan Defendants' motion to dismiss, Plaintiffs are not required, and it is premature, to determine exactly what equitable remedies Plaintiffs ultimately may have against the Diocesan Defendants. See Smoak v. Cangialosi, No. CV 2:17-1709-RMG, 2017 WL 4481159, at *3 (D.S.C. Oct. 6, 2017) (denying motion to dismiss plaintiff's claims against a non-fiduciary for knowing participation in a fiduciary's breach of fiduciary duty) ("Third, the ADP Defendants argue that payment of money is not a remedy available in equity. That argument is without merit. Although money damages are considered a legal remedy, not an equitable one, many equitable remedies may require a party to remit money to another party—e.g., *quantum meruit*, restitution and disgorgement, and constructive trust. Again, **whether Plaintiffs ultimately have a remedy in equity is not a question the Court will decide at the pleading stage.**") (emphasis supplied); Sentara Virginia Beach Gen. Hosp. v. LeBeau, 182 F. Supp. 2d 518, 525 (E.D. Va. 2002) ("Whether the relief sought will ultimately be deemed 'appropriate' equitable relief is not before the court on this [Rule 12(b)(6) motion.").

Such remedies may include a monetary award sufficient to fully fund the Plan as Defendant SJHSRI promised Plan participants, in the form of a surcharge, as part of a claim for equitable estoppel, or as *quia timet* relief. See Schmitt v. Nationwide Life Ins.

Co., No. 2:17-CV-558, 2018 WL 4051835, at *3 (S.D. Ohio Aug. 24, 2018) (plaintiffs' knowing participation claim against nonfiduciary entitles them to monetary compensation including remedy of surcharge because no legal remedy is available under ERISA) ("Here, no such legal relief exists. Ms. Schmitt may therefore seek disgorgement, accounting, and **surcharge** remedies in equity.") (emphasis supplied); Enniss v. Enniss, 198 F. App'x 594, 596 (9th Cir. 2006) (where plaintiff proved equitable estoppel claim that defendants reneged on promise to establish a pension, ERISA remedies include an injunction ordering defendant to fund a trust as promised) ("We reject Appellants' argument that the district court's remedy for Chip's promissory estoppel claim was outside the scope of ERISA § 502(a)(3) (29 U.S.C. § 1132(a)(3)), which authorizes plan beneficiaries to bring civil actions against fiduciaries 'to obtain other appropriate equitable relief.'"); Gabriel v. Alaska Elec. Pension Fund, 773 F.3d 945, 956 (9th Cir. 2014) ("'[A]ppropriate equitable relief' may include the remedy of equitable estoppel, which holds the fiduciary 'to what it had promised' and 'operates to place the person entitled to its benefit in the same position he would have been in had the representations been true.' ") (quoting CIGNA Corp. v. Amara, *supra*, 131 S.Ct. at 1880); De Pace v. Matsushita Elec. Corp. of America, 257 F. Supp. 2d 543, 565 (E.D.N.Y. 2003) (approving award of front pay to compensate plaintiffs who retired based upon representations concerning their ERISA plan which defendants were equitably estopped from denying).

As to *quia timet* relief, Joseph Story's 1877 treatise *Commentaries on Equity Jurisprudence* explains:

> § 825. In the next place, let us proceed to the consideration of another class of cases, where the peculiar remedies administered by courts of

> equity constitute the principal although not the sole ground of jurisdiction; and that is, BILLS QUIA TIMET. . . .
>
> § 826 . . . **The manner in which this aid is given by courts of equity is, of course, dependent upon circumstances. They interfere sometimes by the appointment of a receiver to receive rents or other income, sometimes by an order to pay a pecuniary fund into court, sometimes by directing security to be given, or money to be paid over, and sometimes by the mere issuing of an injunction or other remedial process, thus adapting their relief to the precise nature of the particular case, and the remedial justice required by it.**
>
> [Emphasis supplied]

Story's Equity Jurisprudence (1884) §§ 825 & 826. This treatise (and edition) has been specifically cited by the Supreme Court in determining the categories of "appropriate equitable relief" available under ERISA. See CIGNA Corp. v. Amara, 563 U.S. 421, 440-43 (2011) (repeatedly citing Story's treatise). See also U.S. Fid. & Guar. Co. v. Arch Ins. Co., 578 F.3d 45, 49 (1st Cir. 2009) ("*Quia timet* and exoneration are time-honored and closely related equitable remedies commonly invoked in the surety industry.").

The Diocesan Defendants make the argument that "[s]urcharge, moreover, is not available for the additional reason that Plaintiffs do not allege that the Diocesan Defendants were ERISA fiduciaries." Diocesan Defendants' Memo. at 16 n.8. However, ERISA does not limit the availability of equitable relief to claims against ERISA fiduciaries. Under 29 U.S.C. § 1132(a)(3), "[a] civil action may be brought... by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) **to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan**." 29 U.S.C. § 1132(a)(3) (emphasis

supplied). In Harris Trust and Savings Bank v. Salomon Smith Barney, Inc., *supra*, 530 U.S. 238 (2000) the Supreme Court noted that the statute places no limits on who may be a defendant, stating:

> While § 502(a)(3) [29 U.S.C. § 1132(a)(3)] does not authorize "appropriate equitable relief" at large, but only for the purpose of "redress[ing any] violations or ... enforc [ing] any provisions' of ERISA or an ERISA plan . . ., **the section admits of no limit (aside from the "appropriate equitable relief" caveat) on the universe of possible defendants**. Indeed, § 502(a)(3) [29 U.S.C. § 1132(a)(3)] makes no mention at all of which parties may be proper defendants-the focus, instead, is on redressing the "act or practice which violates any provision of [ERISA Title I]."

Harris Trust and Savings Bank v. Salomon Smith Barney, Inc., *supra*, 530 U.S. at 239 (emphasis supplied). See Cyr v. Reliance Standard Life Ins. Co., 642 F.3d 1202, 1206 (9th Cir. 2011) (noting the Supreme Court in Harris Trust "rejected the suggestion that there was a limitation contained within [29 U.S.C. § 1132(a)(3)] itself on who could be a proper defendant in a lawsuit under that subsection"). Thus, the availability of equitable remedies against the Diocesan Defendants does not depend upon proof that they were fiduciaries.

III. The pre-2008 allegations alleged in the First Amended Complaint are properly pled and actionable

The Diocesan Defendants contend that all claims based on pre-2008 allegations should be dismissed, because the Diocesan Defendants contend the Plan was fully funded until 2008 and *ipso facto* anything that may have happened pre-2008 is irrelevant.

Legally, the Diocesan Defendants' argument has no place in a Rule 12(b)(6) motion to dismiss. See *supra* at 53–57 (explaining how it is impermissible on a Rule 12(b)(6) to dismiss "allegations" or subparts of claims).

Factually, there is no basis for the Diocesan Defendants' argument in the First Amended Complaint. They base it on actuarial valuation analyses prepared by Angell[180], which the Receiver obtained from Defendant SJHSRI and posted on his website in the interest of public transparency but without necessarily adopting their veracity. See Diocesan Defendants' Memo. at 44–45. Angell (until it settled with Plaintiffs) was not only a Defendant in this action, but was alleged to have committed actuarial malpractice (in addition to various intentional torts) in connection with the Plan generally and in connection with the preparation of these valuation analyses in particular. Angell's analyses are unreliable, and the Court cannot simply accept the Diocesan Defendants' characterizations of their contents, especially without expert testimony.[181] See Rollins v. Dignity Health, 338 F. Supp. 3d 1025, 1033 (N.D. Cal. 2018) ("When a non-governmental entity [tries] to seek judicial notice of its paper records, the request is properly rejected because such documents are subject to reasonable dispute. That the same entity posts them on a 'publicly available' website

[180] Five of the six actuarial reports were prepared by Angell. The sixth states it was prepared by Angell's predecessor, AON.

[181] Although the matter should not properly be considered by the Court on the instant Rule 12(b)(6) motion, Plaintiffs have elsewhere, in opposition to the Diocesan Defendants' separate motion for summary judgment, provided the sworn declaration of James E. Holland, Jr., Chief Actuary at Cheiron, Inc., opining about various misanalyses and miscalculations made by Angell. Clearly the Court cannot conclude as a matter of law, for purposes of the Diocesan Defendants' Rule 12(b)(6) motion, that Angel's analyses were actually correct.

does not change that essential fact and does not make them 'public records" for purposes of the judicial notice rules.'") (declining to take judicial notice of webpages).

The Diocesan Defendants' argument also lacks a logical basis. Even if (*arguendo*) facts outside the pleadings suggested the Plan was fully funded at some point in history (which is not established), that would only indicate that Plaintiffs' injuries have recently arisen, not that prior misrepresentations or other misconduct are somehow irrelevant. The Diocesan Defendants were under a continuing obligation to inform others who were relying on the prior misrepresentations and correct them. See, e.g., George Joseph Assets, LLC v. Chenevert, 557 S.W.3d 755, 766 (Tex. App. 2018) ("[W]e [have] identified three circumstances other than a fiduciary relationship in which a duty to disclose exists. . . . Second, if a party makes a representation, he has a duty to disclose new information when he is aware the new information makes the earlier representation misleading or untrue.") (citation omitted); Druckzentrum Harry Jung GmbH & Co. KG v. Motorola Mobility LLC, 774 F.3d 410, 418 (7th Cir. 2014) ("[A] party who had made a statement which at that time is true, but who subsequently acquires new information which makes it untrue or misleading, must disclose such information to anyone whom he knows to be acting on the basis of the original statement or be guilty of fraud.") (citing St. Joseph Hosp. v. Corbetta Const. Co., 316 N.E.2d 51, 71 (Ill. App. 1974) ("It is also well established that where one has made a statement which at that time is true but subsequently acquires new information which makes it untrue or misleading, he must disclose such information to anyone whom he knows to be acting on the basis of the original statement—or be guilty of fraud or deceit.")); In re Wayport, Inc. Litig., 76 A.3d 296, 323 (Del. Ch. 2013) ("The fact that a statement was true when

made does not enable the speaker to stand silent if the speaker subsequently learns of new information that renders the earlier statement materially misleading.").

A. The Diocesan Defendants improperly refer to other facts outside the First Amended Complaint, especially "facts" requiring expert testimony

1. The "Great Recession of 2008"

The Diocesan Defendants contend the Court should take judicial notice of the nationwide economic downturn in 2008. See Diocesan Defendants' Memo. at 44 (citing In re Irving Tanning Co., 555 B.R. 70, 85 n.11 (Bankr. D. Me. 2016), Eclectic Properties E., LLC v. Marcus & Millichap Co., 751 F.3d 990, 998 n.6 (9th Cir. 2014), and In re Merrill Lynch & Co., Inc. Research Reports Secs. Litig., 289 F. Supp. 2d 416, 420 n.6 (S.D.N.Y. 2003)). By "take judicial notice", the Diocesan Defendants evidently request that the Court rule, as a matter of law, that economic events outside the Diocesan Defendants' control broke any chain of causation between the Diocesan Defendants' prior misrepresentations and the Plan's underfunding.

It is one thing to take judicial notice that a historical event occurred. It's another to draw inferences in Defendants' favor from those facts on a motion to dismiss, as the Diocesan Defendants invite the Court to do. The three cases cited by the Diocesan Defendants are easily distinguishable and, in fact, support Plaintiffs' position.

The first of the Diocesan Defendants' cases, In re Irving Tanning Co., involved a bench trial,[182] not a motion to dismiss. In that case, in the course of weighing witness

[182] As the reader might surmise from the Diocesan Defendants' quotation referring to witness testimony. See Diocesan Defendants' Memo. at 44.

testimony about whether a corporate merger transaction involved an exchange of reasonably equivalent value, the bankruptcy court determined that such testimony comported with its understanding of prevailing economic conditions at the time. See In re Irving Tanning Co., 555 B.R. at 85 n.11. Such weighing of evidence is of course entirely proper during a bench trial but completely inappropriate on a motion to dismiss.

In Eclectic Properties, the Ninth Circuit affirmed dismissal of RICO claims based on a series of commercial real estate transactions in which plaintiffs purchased property whose value had been allegedly fraudulently inflated by the defendants. The Ninth Circuit noted that **the only factual basis for Plaintiffs' alleging any intent to defraud was the comparison of fair market values before and after the after the recession**. See Eclectic Properties, 751 F.3d at 999. The Ninth Circuit concluded these differences in real estate values were equally consistent with the innocent explanation that real estate prices had actually generally appreciated prior to the recession but subsequently collapsed—a fact of which they took judicial notice—especially in light of the fact that the Defendants had been making proportionately large lease payments for years (pursuant to a sale-leaseback arrangement) based on the same valuations. See id.

In In re Merrill Lynch & Co., Inc. Research Reports Secs. Litig., the district court examined the sufficiency of securities fraud claims under the special heightened pleading standard of the Private Securities Litigation Reform Act of 1995 and dismissed the claims as time-barred, because the "burst of the internet bubble" (of which the court took judicial notice) had put the plaintiffs on inquiry notice as to their securities fraud claims. See In re Merrill Lynch & Co., Inc. Rsch. Reps. Sec. Litig., 289 F. Supp. 2d 416,

424 (S.D.N.Y. 2003). The Diocesan Defendants, in all their motions to dismiss, have never asserted that the First Amended Complaint is time-barred.

The Diocesan Defendants' argument appears to be that the bear markets of 2008 rendered everything that had happened—or failed to happen—irrelevant as a matter of law. That argument makes no sense even for a claim of actuarial malpractice, let alone claims of fraud. Defined benefit pension plans are meant to weather both good economic times and bad. That there was a 2008 recession is conceded. The 2008 recession's effect in this case remains to be determined factually and cannot be simply held by the Court at this stage to have any specific effect.

2. The Actuarial Reports

The Diocesan Defendants contend that actuarial reports referenced in the Amended Complaint conclusively establish that the Plan was properly funded prior to 2008. See Diocesan Defendants' Memo. at 44–45. However, the First Amended Complaint, simply by referring to these documents for one purpose, did not adopt every statement or conclusion therein for all purposes. This is especially true here, where the accuracy (*vel non*) of assertions contained in the actuarial reports is a matter that can only be properly tested through expert evidence,[183] and where most[184] of the actuarial

[183] For example, the Diocesan Defendants' own "summary" of the actuarial reports indicates that Angell was recommending that SJHSRI make contributions to the Plan between 2006-2008 (recommendations that SJHSRI spurned), notwithstanding the Diocesan Defendants' contention that the Plan was fully funded during those years. Expert testimony is required to explain how Angell arrived at these various calculations or miscalculations, which are based on assumptions and other factors. Expert testimony is even necessary to test the Diocesan Defendants' fundamental proposition that a pension plan that is not receiving recommended contributions is nevertheless fully funded.

[184] From 2005 onward.

reports the Diocesan Defendants point to were created by one of their co-defendants whom Plaintiffs accused in this suit of committing actuarial malpractice.[185]

For example, the Diocesan Defendants state regarding a 2007 actuarial report:

> Having declared that they were following ERISA's funding guidelines, the actuaries then set forth a series of calculations to determine the minimum and maximum recommended contribution. *Id.* at 13 ("Development of Contributions"). The Report then declared that the minimum contribution was "$0." *Id.* at 2.

Diocesan Defendants' Memo. at 46. In other words, the Diocesan Defendants insist the Court must—on a motion to dismiss, no less—accept Angell's *ipse dixit* that it was "following ERISA's funding guidelines" accurately when rendering actuarial advice. That is, of course, disputed, as well as being the basis for one of the claims that Plaintiffs made against Angell.

The Diocesan Defendants complain that the First Amended Complaint alleges that the Diocesan Defendants knew the plan was underfunded but only specifically alleges facts supporting that allegation from 2008 forward. See Diocesan Defendants' Memo. at 47. Under Rule 9(b), however, knowledge may be alleged generally and need not be alleged with specificity. See Fed. R. Civ. P. 9(b) (". . . Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."); *infra* at 112–114 (addressing the Diocesan Defendants' arguments concerning the pleading of scienter).

[185] Count X (actuarial malpractice), lodged against Angell, who has since settled with the Plaintiffs.

B. Misrepresentations can be actionable no matter how longstanding, and contractual promises can be actionable no matter how recently broken

Recapitulating their prior argument, the Diocesan Defendants contend, based on "what is (and is not) in the" Amended Complaint that "[e]ach and every allegation of wrongdoing predating the stock market crash of September 2008 must be dismissed". Diocesan Defendants' Memo. at 48–49. However, it is claims upon which relief is sought that may be dismissed pursuant to a motion to dismiss, not "allegations." As previously discussed at length *supra* at 53–57, a court in deciding a motion to dismiss does not strike allegations. Moreover, none of the Diocesan Defendants' cited cases stand for the propositions for which they have been cited. See *supra* at 74–76.

The Diocesan Defendants contend "the causal link between alleged earlier misrepresentations or decisions and any future impact on the retirement benefits that Plan participants might receive was broken." Diocesan Defendants' Memo. at 49 (citing Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258, 268 (1992)). In Holmes, defendant Holmes had allegedly "conspired in a stock-manipulation scheme that disabled two broker-dealers from meeting obligations to customers, thus triggering SIPC's [Securities Investor Protection Corporation's] statutory duty to advance funds to reimburse the customers." Holmes, 503 U.S. at 261. In an effort to recoup these payments, SIPC asserted RICO claims against Holmes. The Supreme Court affirmed summary judgment entered in Holmes's favor, concluding that since RICO incorporated a "direct-injury limitation," id. at 272, and since SIPC's injuries were only "indirectly" caused by the stock-manipulation scheme—the direct injuries had been suffered by the broker

dealers—SIPC could not assert a statutory RICO claim for its indirect injuries. Holmes does not stand for the Diocesan Defendants' proposition about breaks in causation.

The Diocesan Defendants also, without explanation, cite First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 772 (2d Cir. 1994) for their own proposition that "the Great Recession cut off any liability for any alleged conduct of the Diocesan Defendants prior to 2008." Diocesan Defendants' Memo. at 49. First Nationwide Bank actually stands for nothing of the sort, as can be readily inferred from its date. In that case, the plaintiff bank asserted RICO claims against a mortgage broker who it alleged overvalued borrowers' real estate causing the bank's loans to be under-secured. First Nationwide Bank, 27 F.3d at 766–67. The court dismissed those claims, because the plaintiff had failed to properly quantify its losses: many of the loans had not yet been foreclosed, and "the loss FNB would suffer as to those loans [plaintiff] FNB has not finally foreclosed cannot yet be determined." Id. at 769. The complaint's allegations that properties had been overvalued were also based on post-hoc "estimates" following a collapse of the local real estate market[186], instead of proper "allegations regarding the 'actual' value of the collateral properties when the loans were made." See id. at 771. Adding up the plaintiff's "guesswork and inconsistencies" in alleging its damages, the court concluded:

> We do not mean to suggest that in all cases a fraud plaintiff will be unable to plead proximate cause when the claim follows a market collapse. In this case, it is the cumulative effect of the considerations discussed above, rather than any single factor, that compels our decision.

[186] Not a "recession" or even a stock market slump.

First Nationwide Bank, 27 F.3d at 772. In other words, the court (a) rested its ruling on considerations that are absent[187] from the instant case; and (b) expressly cautioned against drawing the very conclusion that the Diocesan Defendants now inappropriately invite this Court to draw.

The Diocesan Defendants also cite Dura Pharm., Inc. v. Broudo, 544 U.S. 336 (2005) for the proposition that "other factors besides misrepresentations, such as 'changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, or other events, which taken separately or together' could account for a lower price". Diocesan Defendants' Memo. at 49–50 (quoting Dura Pharm.). In that case, the Supreme Court held that merely alleging that stock shares were sold at a loss after having been purchased for an artificially inflated price failed to state a claim under the Securities and Exchange Act, where the investor made no effort to disentangle how much of the change in stock price was due to the manipulation and how much was due to other factors.

The Diocesan Defendants also cite In re Merrill Lynch & Co., Inc., 273 F. Supp. 2d 351, 362 (S.D.N.Y. 2003), which is both factually and legally inapposite. In that case, non-client investors, whose holdings declined after the Internet stock bubble burst at the end of the 1990s, sued Merrill Lynch on a fraud-on-the-market theory for having issued investment bulletins containing allegedly false statements. The court dismissed these claims as failing to meet the Private Securities Litigation Reform Act's special

[187] For example, there is no speculation needed to determine the value of the publicly traded securities held by the Plan.

heightened pleading standard for loss causation. See 15 U.S.C.A. § 78u-4(b)(4). Plaintiffs here, of course, are not asserting any PSLRA claims.

Conceding that the above cases are securities fraud cases, the Diocesan Defendants nevertheless insist: "Although often invoked in securities fraud cases, such causation principles are inherent to establishing causation for any garden variety tort." Diocesan Defendants' Memo. at 50. Attempting to generalize from these PSLRA cases, the Diocesan Defendants cite Bastian v. Petren Res. Corp., 892 F.2d 680, 685 (7th Cir. 1990) ("'Loss causation' is an exotic name—perhaps an unhappy one, *LHLC Corp. v. Cluett, Peabody & Co.*, 842 F.2d 928, 931 (7th Cir. 1988)—for the standard rule of tort law that the plaintiff must allege and prove that, but for the defendant's wrongdoing, the plaintiff would not have incurred the harm of which he complains."). Bastian is a pre-PSLRA Rule 10b-5 securities fraud case, with little relevance to the codified post-PSLRA securities fraud pleading standards, much less the ordinary pleading standards actually applicable to this case. The thrust of the First Amended Complaint is that the Diocesan Defendants' misrepresentations facilitated the systematic underfunding of the Plan, not that the price of individual securities held in the Plan was harmed by those misrepresentations. In any event, Plaintiff has expressly alleged loss causation. See, e.g., FAC ¶ 497 ("Plaintiffs suffered damages thereby.").

IV. Count VII (fraud through intentional misrepresentation and omission) should not be dismissed

A. The Diocesan Defendants are not improperly lumped together

The Diocesan Defendants contend that Plaintiffs have engaged in impermissible "group pleading" by expressly alleging that each of the three Diocesan Defendants,

acting in concert with the other two, committed various acts or incurred various liabilities. The Diocesan Defendants[188] no longer complain, as they did in connection with their prior motions to dismiss Plaintiffs' original Complaint, that Plaintiffs have referred to them by one collective moniker.[189] See Diocesan Defendants' Memo. at 8–12. Instead, since the Amended Complaint specifies which Diocesan Defendants performed which conduct, they now contend those now-particularized allegations are somehow likewise impermissible.

The Diocesan Defendants' argument is waived here, where they have never complied with R.I. Gen. Laws § 9-1-49:

> Whenever a corporation is served with a complaint it shall notify the plaintiff within twenty (20) days of service of its correct corporate name, its state of incorporation, its business address as designated in its state of incorporation, its registered agent, and the address of its registered agent, and if the corporation is aware that a subsidiary or affiliate is a proper party to the civil action, the corporation shall also provide the correct name and address of the subsidiary or affiliate. Failure of the corporation to so notify the plaintiff shall result in a defense on these issues being waived by the corporation, and the corporation **shall be estopped from asserting** that the complaint failed to identify the corporation by its correct corporate name, **or that the corporation is not a proper party to the civil action**.
>
> [Emphasis supplied]

R.I. Gen. Laws § 9-1-49(b). By failing to comply with this statute, each of the Diocesan Defendants is estopped from denying liability for claims asserted against the other Diocesan Defendants or any other affiliates. Under Rhode Island law, corporate

[188] Plaintiffs note that the Diocesan Defendants refer to themselves collectively throughout their own memorandum as the "Diocesan Defendants".

[189] While Plaintiffs believe such use of collective monikers in the Complaint (for affiliated defendants performing the same conduct) was appropriate, Plaintiffs in the First Amended Complaint abandoned that convenient shorthand in favor of extra specificity, out of an abundance of caution.

defendants cannot escape liability by hiding behind opaque and byzantine networks that obscure on whose particular behalf individual officers or agents were acting.[190] Rhode Island law is binding on this Court as to these Defendants, who are Rhode Island corporations being sued in the district of Rhode Island. See Fed. R. Civ. P. 17(b) ("Capacity to sue or be sued is determined as follows: . . .(2) for a corporation, by the law under which it was organized; and (3) for all other parties, by the law of the state where the court is located . . . .").

The Diocesan Defendants cite no case law actually supporting their argument. They cite[191] Beta Grp., Inc. v. Steiker, Greenaple, & Croscut, P.C., No. CV 15-213 WES, 2018 WL 461097 (D.R.I. Jan. 18, 2018) (Smith, C.J., accepting recommendation of Almond, U.S.M.J.), in which the Court denied dismissal of two individual defendants who *were* named in allegations of wrongdoing, while granting dismissal of six other individual defendants who were alleged only to be "potentially liable":

> **After a careful review of the allegations, the Court notes that Plaintiffs Amended Complaint contains allegations specifically tied to Defendants Wurpts and Kossow, but no detailed information as to any of the other Individual Defendants.** For example, Plaintiffs assert that they were instructed to raise all issues with the Plan or its operation with Defendant Wurpts and that he would ensure that all issues were addressed by SES or SGC Law Firm. Plaintiffs also claim they contacted Defendant Wurpts in 2007 and he responded by stating that the 4% MPPP has not been in the Plan since 2001. As to Defendant Kossow, he is alleged to have submitted a letter to the IRS in 2008 that included the 4% MPPP. **The alleged actions of these two Defendants form a significant part of the Plaintiffs' claims, and at this stage, are sufficient to withstand the Motion to Dismiss.**

[190] Here, as noted, the Bishop was acting as President and CEO of each of the Diocesan Defendants.

[191] Diocesan Defendants' Memo. at 8.

> As to the remainder of the Individual Defendants, however, the allegations are not "sufficiently precise" at this juncture to raise a right to proceed on this claim. **Plaintiffs concede that although they "cannot definitively allege...which of the individual defendants are liable..." they have alleged enough to state a plausible claim that each Defendant is potentially liable as a fiduciary. This Court disagrees. This type of speculative, catch-all pleading simply fails to meet the applicable plausibility standard established by the Twombly/Iqbal decisions.** As a result, I recommend that the District Court DENY the Motion to Dismiss Count I alleging Breach of Fiduciary Duty against Defendants Wurpts and Kossow and GRANT the Motion to Dismiss as to the remaining Individual Defendants without prejudice.
>
> [Emphasis supplied and citations omitted]

Beta Grp., Inc., 2018 WL 461097, at *9. Plaintiffs allege that the Diocesan Defendants *are* liable, not merely "potentially" liable.

The Diocesan Defendants' other cases are even less apposite. See Laurence v. Wall, No. CA08-109ML, 2010 WL 4137444, at *2 (D.R.I. Sept. 30, 2010) (Hagopian, U.S.S.M.J.) (dismissing Complaint for containing "no references to, or assertions against, any of the Moving Defendants by name"); Bagheri v. Galligan, 160 F. App'x 4, 5 (1st Cir. 2005) (per curiam) (affirming dismissal of pro se plaintiff's § 1983 claims after she failed to comply with order requiring her to amend her complaint, where she only offered the "frivolous" excuse that she did not know the defendants' home addresses, notwithstanding that she was "not required to include defendants' home addresses in her amended complaint"); W. Reserve Life Assur. Co. of Ohio v. Caramadre, 847 F. Supp. 2d 329, 342 (D.R.I. 2012) (Smith, D.J.) (dismissing claims that "all Defendants" committed or concealed forgeries, for failure to specify which of the defendants "put pen to paper and executed the forgeries"); Atuahene v. City of Hartford, 10 F. App'x 33, 34

(2d Cir. 2001) (summary order affirming dismissal of vexatious[192] pro se litigant's rambling complaint that failed to explain how the municipal defendants actually violated the Thirteenth Amendment's prohibition of slavery[193]); La Casse v. Aurora Loan Servs., LLC, No. CV 15-11672-MGM, 2016 WL 4535338, at *8 (D. Mass. Aug. 30, 2016) (dismissing self-help eviction claim against defendants who had foreclosed on plaintiff's property, where claim was likely time-barred but plaintiff failed to specify when the forcible entry occurred or which human being(s) had performed it); Ochre LLC v. Rockwell Architecture Plan. & Design, P.C., No. 12 CIV. 2837 KBF, 2012 WL 6082387, at *6 (S.D.N.Y. Dec. 3, 2012) (after repeated amendments, dismissing copyright-infringement claim for failure to allege which elements of plaintiff's lighting fixtures were even copyrightable, and where plaintiff failed to differentiate its key infringement allegations against four entirely separate entities—a design firm, an architect, a hotel, and a procurement agent), *aff'd*, 530 F. App'x 19 (2d Cir. 2013) (plaintiff failed to plead which elements of its light fixtures were even copyrightable as opposed to utilitarian); Sires v. Hefferman, No. CA 10-11993-MLW, 2011 WL 2516093, at *5 (D. Mass. June 21, 2011) (pro se prisoner's complaint against **29** defendants, receiving special screening by court under 28 U.S.C.A. § 1915A, dismissed as to most defendants but

[192] See Atuahene v. City of Hartford, No. 3:99 CV 631 (GLG), 2000 WL 433956, at *4 (D. Conn. Apr. 18, 2000) ("We learn from the City's reply papers, however, that the plaintiff is not a neophyte pro se litigant. Indeed, he has filed a dozen or so cases, mostly in Pennsylvania. Moreover, the plaintiff's litigation activities put forth frivolous legal arguments based on the claim that various public and private entities had been discriminating against him. These law suits (most or all of which he lost) resulted in an order last month by the Eastern District Court of Pennsylvania prohibiting him from filing any additional lawsuits without prior authorization of that Court.").

[193] See Atuahene v. City of Hartford, No. 3:99 CV 631 (GLG), 2000 WL 433956, at *1 (D. Conn. Apr. 18, 2000).

not dismissed as to particular correctional officers who injured prisoner extracting him from his cell).

It is unsurprising that the Diocesan Defendants cannot cite any case law supporting their argument, since even the subsidiary argument—that the use of collective monikers when discussing affiliated corporate defendants who all participated in the same conduct is inherently inappropriate—is both incorrect and waived.

The Bishop was president of all three Diocesan Defendants[194] and is alleged to have engaged in misconduct within the scope of his employment on behalf of all three. Plaintiffs are not obligated to surmise that he was only acting on behalf of one of the Diocesan Defendants at any particular time. To the contrary, the fact that he had this authority for all three Diocesan Defendants is sufficient to give rise to a reasonable inference that he was acting on behalf of all three, such that his conduct and statements can be attributed to all of the Diocesan Defendants, at least for purposes of the motion to dismiss, and in any event Plaintiffs have expressly alleged that he acted for all three. Issues relating to scope of employment are, of course, extraordinarily fact-specific and inappropriate for determination on a motion to dismiss or even summary judgment. See Fontana v. New Econo Laundromat Inc., 51 Misc. 3d 510, 514 (N.Y. Sup. Ct. 2016) ("[B]ecause the determination of whether a particular act was within the scope of the servant's employment is so heavily dependent on factual considerations, the question is ordinarily one for the jury.") (denying summary judgment); Weaver-Ferguson v. Bos. Pub. Sch., No. CV 15-13101-FDS, 2016 WL 1626833, at *4 (D. Mass. Apr. 22, 2016)

[194] FAC ¶¶ 26–28.

("BPS further contends that it is not liable in tort because its employees were not acting within the scope of their employment. The evidence may well prove those facts are true. Those contentions, however, involve questions of fact and law that may not be resolved on a motion dismiss, where the Court is required to take any plausible factual allegations by the plaintiff as true.") (denying motion to dismiss claims relating to off-worksite after-hours party); Doe v. St. Clair Cty., No. 18-CV-380-SMY-SCW, 2018 WL 3819102, at *4 (S.D. Ill. Aug. 10, 2018) (denying motion to dismiss respondeat superior claims); Hurd v. Clark Cty. Sch. Dist., No. 216CV02011GMNNJK, 2017 WL 4349231, at *5 (D. Nev. Sept. 29, 2017) ("[T]he Court cannot determine at this time that Doran's actions fell outside the scope of his employment.") (denying motion to dismiss vicarious liability claims).

Certainly there is nothing wrong with making an allegation that applies to all three Diocesan Defendants, where the Bishop is the actor or is making the statement. See In re Duramax Diesel Litig., 298 F. Supp. 3d 1037, 1056 (E.D. Mich. 2018) (plaintiff did not engage in impermissible group pleading by referring to the "Bosch Defendants" collectively, where various Bosch subsidiaries' employees had held themselves out as simply working for "Bosch" when acting in furtherance of the fraudulent scheme); Commonwealth of Kentucky v. Marathon Petroleum Co. LP, No. 3:15-CV-354-DJH-CHL, 2018 WL 4620621, at *9 (W.D. Ky. Sept. 26, 2018) ("Despite Defendants' contention, the Commonwealth's reference to Marathon as an integrated corporate unit implies that 'Marathon' often acts as a single entity rather than as separate corporate organizations. In light of that allegation, the government's use of 'Marathon' is sufficiently specific at this stage to inform Defendants that the Commonwealth alleges

that the various Marathon entities at times acted together to commit the alleged antitrust actions.") (denying motion to dismiss).

When affiliated corporations commit the same misconduct, it is entirely appropriate to refer to them collectively, especially when distinguishing those affiliated defendants from other defendants:

> . . . .Both this Court and the Eleventh Circuit have on many occasions condemned the practice of referring to multiple parties in a general, collective manner.
>
> **Here, however, TTCP has not grouped all Defendants together, but only the Sany Defendants, which are related entities alleged to have engaged in the same misconduct.**
>
> * * *
>
> At the motion-to-dismiss stage, TTCP is not required to articulate the precise role that each Defendant played. **Indeed, without discovery, it would be impossible for TTCP to more precisely describe the respective conduct of four related entities.**[195]
>
> [Emphasis supplied]

TTCP Energy Fin. Fund II, LLC v. Ralls Corp., 255 F. Supp. 3d 1285, 1289–90 (N.D. Ga. 2017) (citations omitted).

> Defendants also argue the Complaint must be dismissed because it is an improper group pleading. " '**Group pleading' does not violate**[ ] **Federal Rule of Civil Procedure 8 so long as the complaint provides sufficient detail to put the defendants on notice of the claims**." *Berkeley*IEOR v. Teradata Operations, Inc.*, 2019 WL 1077124, at *8 (N.D. Ill 2019). **MD Labs alleges Defendants are related corporate entities that share employees and each played a role in the audits.** Thus, these allegations are specific enough for Defendants "to understand they are specifically implicated." *Sanders v. JGWPT Holdings, Inc.*, 2016 WL 4009941, at *10 (N.D. Ill. 2016); *see also Receivership Mgmt., Inc. v.*

[195] Depositions and interrogatories in the instant case will undoubtedly assist in that regard.

> *AEU Holdings, LLC*, 2019 WL 4189466, at *10 n.15 (N.D. Ill. 2019) (noting **group pleading is permissible if it is plausible all defendants plausibly committed a certain act**).
>
> [Emphasis supplied]

MD Spine Sols., LLC v. UnitedHealth Grp., Inc., No. 21 C 3435, 2022 WL 124160, at *3 (N.D. Ill. Jan. 13, 2022).

B. The Diocesan Defendants' longstanding misrepresentations which recently injured Plaintiffs, are actionable

As to fraudulent misrepresentations, "[t]o establish a prima facie damages claim in a fraud case, the plaintiff must prove that the defendant made a false representation intending thereby to induce plaintiff to rely thereon and that the plaintiff justifiably relied thereon to his or her damage." Bitting v. Gray, 897 A.2d 25, 34 (R.I. 2006) (quotations omitted). A misrepresentation is "any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts." Travers v. Spidell, 682 A.2d 471, 473 n.1 (R.I. 1996); Stebbins v. Wells, 766 A.2d 369, 372 n.1 (R.I. 2001) (quoting Travers).

"[T]he concept of misrepresentation includes a false representation as to one's intention, such as a promise to act." Palmacci v. Umpierrez, 121 F.3d 781, 786 (1st Cir. 1997). "A representation of the maker's own intention to do a particular thing is fraudulent if he does not have that intention" at the time he makes the representation." Id. Thus, a false statement of understanding or intention will support a claim for fraudulent misrepresentation. Swift v. Rounds, 35 A. 45, 46 (R.I. 1896) ("The state of a man's mind at a given time is as much a fact as is the state of his digestion.") (action for deceit could be maintained where "defendant made it to appear, by the act of buying on

credit, that he intended to pay for the goods in question, while in fact he intended to cheat the plaintiffs out of them"); Hoefer v. Wisconsin Educ. Ass'n Ins. Trust, 470 N.W.2d 336, 340 (Iowa 1991) ("A mere statement of an honest opinion, as distinguished from an assertion of fact will not amount to fraud, even though such opinion be incorrect. When the statements become representations of fact, or the expression of opinion is insincere and made to deceive or mislead they may be treated as fraudulent. Whether such is their quality and character is ordinarily a jury question.") (emphasis supplied) (quoting International Milling Co. v. Gish, 137 N.W.2d 625, 631 (Iowa 1965)).

Other Rhode Island cases make clear that misrepresentation claims can be maintained as to statements regarding the future that also touch upon facts about the past and present, especially the speaker's subjective beliefs about the future. See Cheetham v. Ferreira, 56 A.2d 861, 864 (R.I. 1948) ("Upon such findings the assertions by the respondent amounted to more than a seller's 'puffing' or mere estimate as to possible future profit. They constituted positive representations of existing material facts that were known by her to be false and were made for the purpose of inducing the complainants to purchase the business. "); Robinson v. Standard Stores, 160 A. 471, 472 (R.I. 1932) ("Defendant's motion for a directed verdict was based on the ground that the statements made by its agents to plaintiff were promissory in character and were not shown to have been falsely made, and therefore were insufficient to sustain an action for deceit. The contention cannot be sustained.") (finding actionable the statements "that defendant would take back the stock any time plaintiff wished to dispose of it, and that defendant would loan money on the stock"); Bloomberg v. Pugh Bros. Co., 121 A. 430, 431 (R.I. 1923) ("The plaintiff should have been permitted to introduce evidence as

to the fraudulent representations of Frey which induced the plaintiff to enter into the contract of purchase, and the accompanying promises which Frey knew that neither he nor the defendant could perform and which they had no intention of performing. Accompanying these representations of a promissory nature were false statements of existing facts, and the latter, if established, would constitute actionable fraud, provided such statements were material.").

The First Circuit has also recognized that forecasts can constitute fraudulent misrepresentations. See Glassman v. Computervision Corp., 90 F.3d 617, 627 (1st Cir. 1996) ("While forecasts are not actionable merely because they do not come true, they may be actionable to the extent they are not reasonably based on, or are inconsistent with, the facts at the time the forecast is made."); Cummings v. HPG Int'l, Inc., 244 F.3d 16, 22 (1st Cir. 2001) ("Even a statement that in form is one of opinion may constitute a statement of fact if it may reasonably be understood by the recipient as implying that there are facts to justify the opinion or at least that there are no facts that are incompatible with it.").

The Diocesan Defendants contend that the misrepresentations allegedly made "in the 1970s through the mid 2000s" were "were not factually false and merely conveyed an intent to fund the Plan in a particular manner or make certain payments to Plan beneficiaries in the future and thus cannot be actionable misrepresentations." Diocesan Defendants' Memo. at 52. This blanket conclusion that the statements were "not factually false" does not actually address the particular allegations of the First

Amended Complaint, which not only sets forth particular misrepresentations but explains how they were deceptive.[196]

The assertion that statements of intent cannot be actionable misrepresentations under Rhode Island law is, as noted, incorrect. In any event, as discussed *supra* at 73–74, the Diocesan Defendants were under a continuing duty to correct such prior misrepresentations and inform employees and other Plan participants that the statements were no longer reliable.

Incredibly, the Diocesan Defendants eventually single out a statement that "[t]he Hospital will pay the entire cost of the Plan beginning January 1, 1973 – not only your pension but also all actuarial, legal and investment expenses incurred in the administration of the Plan" and assert it is unaccompanied by allegations of "facts to indicate this statement" was "false when made or that SJHSRI did not pay such costs.." Diocesan Defendants' Memo. at 53. In fact, the First Amended Complaint is replete with allegations that SJHSRI has failed to fund the Plan.

The Diocesan Defendants also argue that statements that "conveyed an intent to fund the Plan in a particular manner or make certain payments to Plan beneficiaries in the future" cannot be actionable. Diocesan Defendants' Memo. at 52. However, as noted *supra*, insincere expressions of intent to perform actions in the future are actionable. The Diocesan Defendants cite a footnote of St. Paul Fire & Marine Ins. Co. v. Russo Bros., 641 A.2d 1297, 1299 n.2 (R.I. 1994) for the proposition that alleged

[196] See, e.g., FAC ¶ 277 ("The statement that Plan assets were held in a trust established by the Diocese was intentionally false and deceptive, since in connection with the separation of the two plans in 1995, a new trust was established by SJHSRI, but SJHSRI did not inform Plan participants of the separation, much less that only a portion of the Diocesan Plan assets were transferred to the new trust for the Plan alone.")

misrepresentations "must relate to something that is a fact at the time the assertion is made". That is true, but as discussed *supra*, false statements of intention relate to the state of the speaker's present state of mind, and "[t]he state of a man's mind at a given time is as much a fact as is the state of his digestion." Swift v. Rounds, *supra*, 35 A. 45, 46 (R.I. 1896).

The Diocesan Defendants also cite Cote v. Aiello, 148 A.3d 537, 548 (R.I. 2016) for the proposition that "the general rule is that mere unfulfilled promises to do a particular thing in the future do not constitute fraud in and of themselves." That case itself noted the exception to that "general rule" discussed above. See id. at 549 ("The record is devoid of any evidence that indicates that Aiello's statements were 'made without any intention of performing them at the time of making them.'") (affirming judgment for defendant following bench trial). In their prior motion to dismiss the First Amended Complaint the Diocesan Defendants previously recognized this principle in the course of incorrectly asserting that "Plaintiffs have not alleged any facts sufficient to establish there was a lack of intent to keep promises made to the pensioners in the 1970s. . . ." See ECF # 67-1 (Diocesan Defendants' prior memorandum) at 23 (citing In re DeRosa, 103 B.R. 382, 386 (Bankr. D.R.I. 1989)); id. at 386 ("An additional factor to consider is that these statements involve promises to perform in the future. Such promises 'may be actionable where the maker did not intend to perform the promise at the time of making it.'").[197] In their instant motion, the Diocesan Defendants abandon this prior recognition without addressing its absence.

[197] Plaintiffs have indeed alleged such lack of intent. See, e.g., FAC ¶¶ 259-67.

C. Reliance is adequately pled and cannot be disproven on a motion to dismiss

The Diocesan Defendants contend that, notwithstanding the allegations of the First Amended Complaint to the contrary, various disclosures were actually made to state regulators in 2014, and therefore Plaintiffs cannot maintain claims sounding in fraud or conspiracy. See Diocesan Defendants' Memo. at 24.[198] This argument ignores the simple fact that Plaintiffs are not the state regulators, and Plaintiffs did not receive any of the disclosures that the Diocesan Defendants—referring to (and often misconstruing) facts outside the pleadings—contend the regulators received.

Moreover, issues of reasonable reliance on misrepresentations are highly fact-specific and cannot properly be decided on a motion to dismiss. See Samia Companies LLC v. MRI Software LLC, 898 F. Supp. 2d 326, 343 (D. Mass. 2012) (issue of plaintiff's reliance on oral representations was not ripe for decision at motion to dismiss stage despite existence of integration clause in written contract); Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC, 797 F.3d 160, 186 (2d Cir. 2015) ("In general, the reasonableness of a plaintiff's reliance is a 'nettlesome' and 'fact-intensive' question, which we, like our Circuit's many district courts, will not lightly dispose of at the motion-to-dismiss stage.") (citation omitted); Koesler v. Beneficial Fin. I, Inc., 267 F. Supp. 3d 873, 889 (W.D. Tex. 2016) ("In the context of common law fraud, courts have uniformly treated the issue of justifiable reliance as a question for the factfinder. The question of justifiable reliance depends heavily on the relationship between the parties and their

[198] The Diocesan Defendants offer a bowdlerized summary of Plaintiffs' claims at page 23. The true extent of Plaintiffs' claims is set forth in their 163-page First Amended Complaint.

relative sophistication."); EUSA-Allied Acquisition Corp. v. Teamsters Pension Tr. Fund of Philadelphia & Vicinity, No. CIV.A. 11-3181 JBS, 2012 WL 1033012, at *5 (D.N.J. Mar. 26, 2012) ("As to Defendant's argument that no dispute of fact exists as to Plaintiff's justifiable reliance on Defendant's representatives' statements, the Court finds that this element of the claim is not properly decided on a motion for summary judgment because whether a plaintiff's reliance was "reasonable" is a question of fact for the jury.") (denying summary judgment, much less a motion to dismiss); Bayerische Landesbank, New York Branch v. Barclays Capital, Inc., 902 F. Supp. 2d 471, 474 (S.D.N.Y. 2012) ("Whether or not reliance on alleged misrepresentations is reasonable in the context of a particular case is intensely fact-specific and generally considered inappropriate for determination on a motion to dismiss."); Luther v. Kia Motors Am., Inc., No. CIVA 08-386, 2008 WL 2397331, at *4 (W.D. Pa. June 12, 2008) ("We agree with Plaintiffs that 'the issue of whether reliance on a representation is reasonable (or justifiable) is generally a question of fact that should be presented to the jury.' Therefore, even if we were to consider the Franchise Agreement, it is not the role of the Court at this point to determine if Plaintiffs' reliance on the oral representations of the Kia Agents was justifiable.") (citations omitted); George v. McClure, 266 F. Supp. 2d 413, 419 (M.D.N.C. 2001) ("Whether Plaintiff did in fact rely on these statements and whether such reliance was reasonable are questions of fact.") (denying motion to dismiss).

In addition, although the Court need not decide the issue now, it is not necessary to prove individualized reliance in pension class actions. See Osberg v. Foot Locker, Inc., No. 07-CV-1358 (KBF), 2014 WL 5800501, at *2–6 (S.D.N.Y. Nov. 7, 2014).

The Diocesan Defendants cite[199] Williams v. Johnson & Johnson, No. 120CV00544MSMLDA, 2022 WL 157929, at *6 (D.R.I. Jan. 18, 2022) as stating: "Ms. Williams offers no specific statements, let alone assertions of where or when those statements were made, upon which she relied to her detriment. As a result, Ms. Williams' common law fraud claim fails as well." Id. at *6. As the quotation the Diocesan Defendants have selected makes clear, the failure in that case was the *pro se* plaintiff's failure to allege any misrepresentations with particularity under Rule 9(b). Here, Plaintiffs have indeed alleged specific misrepresentations attributable to the Diocesan Defendants and their co-conspirators, upon which Plaintiffs and others relied.

The Diocesan Defendants cite[200] Cliftex Clothing Co. v. Di Santo, 148 A.2d 273, 276 (R.I. 1959), in which the Rhode Island Supreme Court directed entry of judgment for the defendant on a fraud claim, **where there was no evidence adduced at trial that any intended recipient of the fraudulent statement was induced to rely on it**. See id. at 276. In other words, Cliftex Clothing Co. involved first-party reliance on a false statement made to third parties, not third-party reliance.

The Diocesan Defendants cite Ang v. Spidalieri, No. WC-2006-0569, 2018 WL 810086, at *14 (R.I. Super. Feb. 05, 2018), in which the Superior Court conducted a bench trial and concluded that allegedly concealed title defects had been disclosed by the defendant to the plaintiff and therefore could not support a claim for fraud. See Diocesan Defendants' Memo. at 67. Ang spectacularly fails to support the Diocesan Defendants' motion to dismiss.

[199] Diocesan Defendants' Memo. at 64 (misnaming the case as "*Williams v. Johnson v. Johnson*").

[200] Diocesan Defendants' Memo. at 65.

The Diocesan Defendants also cite Gorbey ex rel. Maddox v. Am. J. of Obstetrics & Gynecology, 849 F. Supp. 2d 162, 164 (D. Mass. 2012), in which the court dismissed Massachusetts consumer fraud claims against the publisher of an allegedly fraudulent medical journal article that had been introduced into evidence at various medical malpractice trials resulting in defense verdicts. In denying a motion to amend the pleadings to add a Massachusetts common law claim for fraud, the court found such amendment futile since the plaintiffs could not allege that any of the juries had actually relied on the medical article in reaching those verdicts. See id. at 166 ("In any event, the question [of third-party reliance] is academic because, as discussed above, the allegations do not give rise to an inference of reliance, reasonable or otherwise, on the part of the jury which resulted in plaintiffs' loss.").

Rhode Island law imposes greater duties on participants in business transactions to speak fully and correctly. See, e.g., Stebbins v. Wells, 766 A.2d 369, 373 (R.I. 2001) (selling party has "a duty to disclose in situations where he or she has special knowledge not apparent to the buyer and is aware that the buyer is acting under a misapprehension as to facts which would be important to the buyer and would probably affect its decision."); Cruz v. DaimlerChrysler Motors Corp., 66 A.3d 446, 453 (R.I. 2013) (used car dealership "assumed duty not to misinform" customers through even negligent misrepresentations when it "began volunteering information as to the vehicle in question") (affirming entry of summary judgment where the record contained no evidence of any actual misrepresentations).

1. The First Amended Complaint does indeed allege facts establishing that the Plan's dire condition was concealed in connection with the 2014 Asset Sale

The Diocesan Defendants also reference (without quoting) a portion of the Change in Effective Control Application submitted to the Department of Health, which the Diocesan Defendants only halfheartedly pretend is incorporated into the First Amended Complaint,[201] stating that the hospital system would "over the long term, incur significant losses" if "pension losses are taken into consideration."[202] Diocesan Defendants' Memo. at 25. This statement, which they do not contend was shared with Plaintiffs, does not even indicate that the Plan itself was underfunded, but rather that the hospitals were underfunded (assuming they were paying the pensions, which in actuality they were not doing). Likewise, even if the Department of Health might have combed the Change in Effective Control Application for references to the Plan's funding status in notes to financial statements incorporated in exhibits to that Application, see Diocesan Defendants' Memo. at 24–25 (describing a reticulated process of correlating different documents), there is no suggestion that such materials were actually disclosed to Plaintiffs.

The Diocesan Defendants similarly cherry-pick a statement from the Attorney General's May 2014 decision approving the 2014 Asset Sale:

> Of additional concern to [CCCB] is its pension funding (an issue that is impacting many hospitals around the country). If pension losses[203] are taken into consideration, in fiscal year 2012, the [CCCB] system sustained

[201] See *supra* at 48.

[202] This does not suggest that payments were not to be made into the Plan, let alone explain what is meant by "pension losses."

[203] See the prior footnote.

> losses of over $8 million dollars which are increasing without additional contributions. Such losses cannot be sustained by [CCCB].
>
> [Bracketed references to "CCCB" inserted by the Diocesan Defendants]

Diocesan Defendants' Memo. at 25. To the extent this statement even discusses the funding status of the Plan (which it does not), it is a misrepresentation suggesting that CCCB was suffering losses *because CCCB was funding the Plan*. CCCB was not funding the Plan. Nor was SJHSRI. Nor was anyone.

2. The Diocesan Defendants are not exculpated by the structuring of the 2014 Asset Sale or any disclosure of that structure to regulators

The Diocesan Defendants spend several pages insisting that the regulators understood that the 2014 Asset Sale involved a purchase of assets and not an assumption of liabilities. See Diocesan Defendants' Memo. at 25–26 (noting that the Asset Purchase Agreement was called an "asset purchase" agreement, that the Asset Purchase Agreement contained intervolving liability exclusion provisions buried in the agreement and its exhibits).

However, Plaintiffs allege that the regulators were misled. See FAC ¶¶ 319–381.

Moreover, the Diocesan Defendants do not explain what any of that filibustering has to do with Plaintiffs' allegations of reasonable reliance on the misrepresentations they actually received.

3. The Plan's true funding status and the impropriety of its claim of church-plan status were not disclosed to Plan participants

The Diocesan Defendants insist that they did not conceal that "the parties to the 2014 Asset Sale agreed to continue the Plan as a church plan not subject to ERISA."

Diocesan Defendants' Memo. at 28.[204] The Diocesan Defendants point to disclosures they contend were made by other Defendants to state regulators in the Asset Purchase Agreement and the Change in Effective Control Application (which is still not part of the First Amended Complaint), stating that "The Retirement Plan is a Church Plan" and "The Plan is a non-electing church plan under the Internal Revenue Service [sic] and is not subject to the participation, vesting, and provisions [sic] of the Internal Revenue Service code." Diocesan Defendants' Memo. at 29. Neither of these statements actually indicates that the Plan was exempt from ERISA or uninsured by PBGC, and there is no suggestion that either statement was shared with Plaintiffs. In any event, the issue of whether and when the Plan was actually exempt from ERISA itself is one of the central issues of disputed fact, alleged in the alternative by the First Amended Complaint, such that for purposes of the motion to dismiss, these statements were themselves misrepresentations.

The Diocesan Defendants also point to certain testimony in the October 21, 2021 Declaration of Christopher Callaci, which is no part of the First Amended Complaint, not least because it postdates the First Amended Complaint by nearly three years. Clearly this third-party testimony, to the effect that senior executives at SJHSRI told Mr. Callaci that the Plan was a church plan exempt from ERISA prior to the 2014 Asset Sale, cannot be considered on a Rule 12(b)(6) motion to dismiss for failure to state a claim, and emphasizes the need for factual determinations not available on a motion to dismiss. Nor do the Diocesan Defendants even explain the significance of this

[204] Anomalously, the Diocesan Defendants have simultaneously moved for summary judgment insisting that the Plan was actually an ERISA plan.

testimony vis-à-vis the thousands of Plan participants that were not then affiliated with UNAP.

Although the Diocesan Defendants invite the Court to "take judicial notice" of affidavit testimony in order to contradict a paragraph of the First Amended Complaint, they cite no case law properly permitting the court to do so on a Rule 12(b)(6) motion without converting it into a motion for summary judgment. See Rodi v. S. New England Sch. Of L., 389 F.3d 5, 12 (1st Cir. 2004) ("Rule 12(b)(6) permits courts to consider matters that are susceptible to judicial notice. . . . However, we may not consider at this stage the array of affidavits and miscellaneous documents proffered by the parties."); Medina v. Rudman, 545 F.2d 244, 247 (1st Cir. 1976) ("[T]he court below should either have treated defendants' motion to dismiss under Fed.R.Civ.P. 12(b)(6) as one for summary judgment, or else not given specific consideration, as it did in its opinion, to a number of facts outside the pleading, found principally in affidavits filed by the parties.").

The Diocesan Defendants cite Jefferson v. Ansari, No. CV 17-439WES, 2019 WL 5696291 (D.R.I. Nov. 4, 2019) (Sullivan, M.J.), in which the court dismissed a pro se prisoner's First Amendment claims against various Rhode Island Department of Corrections defendants in their personal capacities and, having taken judicial notice of the plaintiff's withdrawal of his request for injunctive relief, dismissed the balance of the complaint seeking injunctive relief. The Diocesan Defendants also cite Mohsen v. Morgan Stanley & Co., No. CV1307358MWFASX, 2015 WL 13914801 (C.D. Cal. Oct. 2, 2015) in which the court took judicial notice of the plaintiff's own judicial admissions, in a parallel proceeding brought in another forum by the plaintiff against the same defendants, in dismissing a re-filed complaint as time-barred. Neither of these cases

bears any factual or legal resemblance to the instant action, but rather show the desperate lengths to which the Diocesan Defendants have gone and will go to employ string cites blatantly inapposite and irrelevant.

The Diocesan Defendants also cite Munno v. Town of Orangetown, 391 F. Supp. 2d 263, 270 (S.D.N.Y. 2005), in which the court did note it was taking judicial notice of affidavits that the plaintiff had filed in a prior state court proceeding, but did not explain where those affidavits fit into the court's Rule 12(b)(6) analysis. See id. at 269 (citing Harris v. New York State Dep't of Health, 202 F. Supp. 2d 143, 146 (S.D.N.Y. 2002)). The Harris case on which the Munno court relied actually involved a Rule 12(b)(1) motion to dismiss for lack of **subject matter jurisdiction**. There is, of course, far greater leeway to consider matters outside the pleadings under Rule 12(b)(1) than under Rule 12(b)(6). See Valentin v. Hosp. Bella Vista, 254 F.3d 358, 363 (1st Cir. 2001) ("In conducting this [jurisdictional] inquiry, the court enjoys broad authority to order discovery, consider extrinsic evidence, and hold evidentiary hearings in order to determine its own jurisdiction."); Animal Sci. Prod., Inc. v. China Minmetals Corp., 654 F.3d 462, 470 n.9 (3d Cir. 2011) (court "is not permitted to make independent findings of fact when deciding a Rule 12(b)(6) motion" but "may examine evidence and resolve factual disputes on a Rule 12(b)(1) motion"). Here, the Court's subject matter jurisdiction is not in dispute.

4. The allegations of desired post-2014 hospital Catholicity do support a plausible claim of conspiracy

The Diocesan Defendants contend that it is "absurd and implausible" to suggest that "if the Diocesan Defendants wanted Our Lady of Fatima to remain Catholic then

they would have to knuckle under to the illicit demands of other defendants," because "Our Lady of Fatima was already under contractual restrictions to comply with various Catholicity requirements" and "saying no to the deal would not divest them of those rights". Diocesan Defendants' Memo. at 30–31 (characterizing FAC ¶¶ 150, 153-54). As discussed *supra* at 52–53, this argument factually conflates the Our Lady of Fatima hospital facility with the corporations that on the one side sold it and on the other side purchased it (the former going out of the hospital business and the latter coming into existence), and obscures the Diocesan Defendants' objective of obtaining a "Catholic" hospital within the Diocese of Providence that was free of the pension obligations. The Diocesan Defendants were not "knuckl[ing] under"; they very much wanted a "Catholic" hospital with a clean balance sheet, and they were motivated to sacrifice pensioners for what the Diocesan Defendants considered a higher purpose, i.e. establishing a "Catholic hospital" illicitly freed (or so they sought) from the pension liabilities.

Plaintiffs agree that the Diocesan Defendants had to approve the transaction. Indeed, that was the very leverage they had in requiring the Prospect purchasers—all for-profit entities—to engraft the Catholicity requirements upon the new businesses. All of the Defendants—including the Diocesan Defendants—saw benefit to themselves in the 2014 Asset Sale and took those benefits knowing that they were leaving the Pension Plan in the lurch.

5. Reasonable reliance has not been disproven as a matter of law, especially on this motion to dismiss

The Diocesan Defendants circle back to their earlier arguments that the above-discussed disclosures to state regulators disprove Plaintiffs' reliance on any fraudulent

statements as a matter of law. See Diocesan Defendants' Memo. at 31–33. These arguments fail for the reasons discussed above. Notwithstanding the Diocesan Defendants' rhetorical moving of goalposts, the disclosures referred to by the Diocesan Defendants were not made to Plaintiffs. Moreover, even if (*arguendo*) the particular disclosures referred to by the Diocesan Defendants had been made to Plaintiffs (which they were not), such fact-intensive issues cannot be properly decided on a motion to dismiss.

D. Whether the Plan properly qualified for the church plan exemption was not unknowable

The Diocesan Defendants contend that Defendants could not have conspired to improperly maintain the Plan's "church plan" status, because the case law about church plans was "so unsettled" at the time of the 2014 Asset Sale. Diocesan Defendants' Memo. at 34. This argument ignores the specific allegations in the First Amended Complaint concerning Defendants' fraudulent inclusion of SJHSRI in the Official Catholic Directory (which was a precondition to treatment of the Plan as a church plan under any theory). For example, the First Amended Complaint specifically alleges that, consistent with their prior discussions, representatives of Prospect and representatives of the Diocese discussed in December 2014 how deletion of SJHSRI from the Official Catholic Directory would necessarily mean the Plan would "no longer qualify as a church plan". See FAC ¶¶ 185–89. In other words, the Diocesan Defendants actually understood in 2014 what they now claim was unknowable in 2014.

E. Plaintiffs' post-filing conduct does not render the allegations in the First Amended Complaint implausible

The Diocesan Defendants rehash the parties' arguments on the withdrawal of Plaintiffs' prior motion for summary judgment and insist they demonstrate that any claim of church plan status was plausible and any claim of fraud is implausible. See Diocesan Defendants' Memo. at 36. Even assuming (*arguendo*) Plaintiffs' counsel made any concessions in connection with those motions (which they did not), concessions of counsel are inadmissible on a Rule 12(b)(6) motion. See Doe v. Princeton Univ., No. 21-1458, 2022 WL 965058, at *3 (3d Cir. Mar. 31, 2022) ("[C]oncessions by counsel may not be used in a motion to dismiss to decide disputed issues of material fact."). The Diocesan Defendants' contention also (a) ignores that Plaintiffs are entitled to plead inconsistent facts in the alternative (addressed *supra* at 58–64); and (b) conflates the Rule 12(b)(6) standard with different standards such as the ones under Rule 56 or Rule 11. None of this belongs in a Rule 12(b)(6) motion.

Nor does the Receiver's 26 U.S.C. § 410(d) election ("Receiver's Election"), filed with PBGC and other agencies in April 2019 more than six months after filing the First Amended Complaint, have any bearing on the validity of any claim of "church plan" status. See Diocesan Defendants' Memo. at 37 (so arguing); ECF #127-1 (a portion of the Receiver's Election filed by the Diocesan Defendants in supplement to their prior motion to dismiss). The Receiver's Election is of course utterly dehors the pleadings and cannot be considered on a Rule 12(b)(6) motion to dismiss. The only purported authority for considering it that the Diocesan Defendants cite is In re Colonial Mortg. Bankers Corp., 324 F.3d 12 (1st Cir. 2003), in which the court took judicial notice of prior bankruptcy adversary proceedings that had been expressly referenced in the

complaint and determined that the complaint was thereby barred on res judicata grounds. See id. at 16. That case, context, and result are completely inapposite.

As Plaintiffs previously explained when the Diocesan Defendants raised the Receiver's Election in supplement to their prior motion to dismiss:

> Plaintiffs have asserted their claims **in the alternative**, both on the assumption that the Plan ceased to qualify as a church plan and became subject to ERISA years ago, and on the assumption that the Plan continues to qualify as a church plan exempt from ERISA. The Receiver's Post-Complaint Regulatory Filings **embody that duality**, in that it makes the ERISA § 410(d) election "**without prejudice** to the position taken [in this litigation] that the Plan ceased to qualify as a church plan (and became subject to ERISA) on or prior to the Effective Date, possibly as of 2009 or earlier." [ECF] # 127-1 at § 3.
>
> Not inconsistently, the Receiver has chosen to administer the Plan as an ERISA plan, which requires, inter alia, the filing of the 2017 Form 5500 and payment of a premium to PBGC. However, mere payment of a premium to PBGC does not ensure coverage. To the contrary, to obtain coverage the Plain will have to be shown to be governed by ERISA. The Receiver filed the § 410(d) Election to increase the likelihood that the Plan will be determined to be **subject to ERISA going forward**, and that the premium was not paid in vain. In other words, the Receiver did not want to pay a premium for coverage that might not exist.
>
> The Diocesan Defendants, however, continue to refuse to accept that Plaintiffs are entitled to plead in the alternative. Any "blame" for the uncertainties surrounding mixed questions of fact and law in Plaintiffs' pleadings rests with the Defendants, who mistreated the Plan for years and left it to the Receiver to piece together, based on fragmentary document production, what happened and when. . . .
>
> [Emphasis supplied]

ECF # 130 (Plaintiff's Reply to the Diocesan Defendants' Supplemental Memorandum) at 3–4. In other words, the Receiver's Election cut the Gordian knot of Defendants' prior

claims that the Plan was an exempt church plan, to try to ensure that the Plan would be treated as an ERISA plan **going forward**.

That is, even if the Court considers this document on the motion to dismiss (which it cannot properly do), there is nothing the Court can conclude from it that has any bearing on the motion to dismiss.

F. The Vatican and Health Services Council letters contain actionable misrepresentations and omissions and do not contain only non-tortious "opinions"

The Diocesan Defendants misconstrue the letters that Bishop Tobin sent on their behalf[205] to the Vatican[206] and the Health Services Council[207] seeking approval of the 2014 Asset Sale. The Diocesan Defendants recite snippets of what was said in those letters and quibble about the veracity of those snippets, see Diocesan Defendants' Memo. at 53–55. They ignore those letters' other context, including other statements and omissions. The Diocesan Defendants also draw factual inferences in their own favor about these letters and the circumstances and motivations surrounding them, something that is inappropriate for movants to do on a motion to dismiss. All of this

[205] The Diocesan Defendants incorrectly insist: "Nothing in the FAC or in the letters themselves indicates that Bishop Tobin wrote those letters on behalf of RCB, DAC, or DSC." That is wrong. See FAC ¶ 179 ("On September 27, 2013, Bishop Tobin signed his letter as altered by counsel for SJHSRI, CCCB, and RWH and sent it to the Vatican. **In so doing, Bishop Tobin acted individually and in his capacity as President of Defendants Corporation Sole, Diocesan Administration, and Diocesan Service**.") (emphasis supplied); FAC ¶ 320 ("Bishop Tobin (**acting individually and as President of Corporation Sole, Diocesan Administration, and Diocesan Service**) personally wrote to the Health Services Council to lobby in favor of regulatory approval of the for-profit hospital conversion . . .").

[206] Vatican approval was a condition of 2014 Asset Sale, which included sale of SJHSRI's assets. See FAC ¶¶ 139, 180.

[207] The Health Services Council is an entity that advises the Rhode Island Department of Health on regulatory issues. "Bishop Tobin (acting individually and as President of Corporation Sole, Diocesan Administration, and Diocesan Service) personally wrote to the Health Services Council to lobby in favor of regulatory approval of the for-profit hospital conversion. . . ." FAC ¶ 320.

parsing and re-parsing of what Bishop Tobin meant, what he said, and what he should be excused for having not said, would be unavailing on a motion for summary judgment, much less on a motion to dismiss.

The Diocesan Defendants insist that "[t]he statements in these letters are not false." Diocesan Defendants' Memo. at 55. In making that assertion, they point to two sentences of each of the letters in which Bishop Tobin (1) stated that the Pension would be "at significant risk" if the 2014 Asset Sale were not approved; and (2) falsely stated that approval of the 2014 Asset Sale would "help avoid" such failure. Id. at 54–55. As alleged in the First Amended Complaint, the first sentence was incomplete and misleading, especially inasmuch as the next sentence expressly and falsely stated his belief that the 2014 Asset Sale "will help avoid the catastrophic implications of such a failure." FAC ¶ 172. As the First Amended Complaint explains:

> Defendants Corporation Sole, Diocesan Administration, Diocesan Service, SJHSRI, RWH, and CCCB knew that these statements were at best misleading if not simply false. They knew that even after the $14 million contribution, the Plan would remain seriously underfunded, and the financial future of the pensioners would be at much more than merely "significant risk." They knew that approval of the alienation would not avoid the "catastrophic implications" of that failure. To the contrary, they knew that such approval would increase the risk of such failure by depriving SJHSRI of operating income it needed to meet its obligations under the Plan, and hindering if not completely frustrating the Plan participants' rights to demand contributions by or recover damages from an asset-holding and income-generating hospital.

FAC ¶ 177.

The Diocesan Defendants insist no one was misled by Bishop Tobin's statements, pointing to materials outside the pleadings. See Diocesan Defendants' Memo. at 56. This is not only inappropriate as a matter of procedure, on a Rule

12(b)(6) motion to dismiss, but fundamentally misconstrues the role of Bishop Tobin's misrepresentations in securing approval of the 2014 Asset Sale. The fact that both the regulators and the Vatican accepted Bishop Tobin's statements at face value and approved the transaction merely demonstrates that he was successful in his design.

The Diocesan Defendants also insist that the letters contain non-actionable "opinions" which they contend cannot be actionable regardless of their falsity. See Diocesan Defendants' Memo. at 56–57. This argument proceeds on an incorrect premise, since "opinions" may be actionable as false statements of fact. As the U.S. Supreme Court has recognized:

> [A] reasonable investor may, depending on the circumstances, understand an opinion statement to convey facts about how the speaker has formed the opinion—or, otherwise put, about the speaker's basis for holding that view. And if the real facts are otherwise, but not provided, the opinion statement will mislead its audience.

Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund, 135 S. Ct. 1318, 1322 (2015). See Hoefer v. Wisconsin Educ. Ass'n Ins. Trust, 470 N.W.2d 336, 340 (Iowa 1991) ("A mere statement of an honest opinion, as distinguished from an assertion of fact will not amount to fraud, even though such opinion be incorrect. When the statements become representations of fact, or the expression of opinion is insincere and made to deceive or mislead they may be treated as fraudulent. Whether such is their quality and character is ordinarily a jury question.") (quoting International Milling Co. v. Gish, 137 N.W.2d 625, 631 (Iowa 1965)). See also *supra* at 89–93 (discussing other cases).

The Diocesan Defendants' three cases concerning the actionability of opinions are easily distinguished.[208]

The Diocesan Defendants cite St. Paul Fire & Marine Ins. Co. v. Russo Bros., 641 A.2d 1297, 1300 n.2 (R.I. 1994) for the "general rule" that "a misrepresentation should take the form of an expression of fact and not the offering of an opinion," which on its face concedes that there are exceptions in which opinions can be factually misleading.

The Diocesan Defendants cite Siemens Fin. Servs., Inc. v. Stonebridge Equip. Leasing, LLC, 91 A.3d 817, 822 (R.I. 2014). Siemens is distinguishable, and not least because it was decided on summary judgment and involved application of Massachusetts law instead of Rhode Island law.[209] It was undisputed that the Defendants in Siemens did not rely on the projections and so could not maintain a claim for misrepresentation regardless of whether the projections contained actionable misstatements of fact. See id. ("When Itani, appearing on behalf of Stonebridge pursuant to Rule 30(b)(6) of the Superior Court Rules of Civil Procedure, testified at a deposition, he was clear that he had not trusted the prediction of the number of

[208] The Diocesan Defendants cite Siemens Fin. Servs., Inc. v. Stonebridge Equip. Leasing, LLC, 91 A.3d 817, 822 (R.I. 2014) without informing the Court that although it was a Rhode Island Supreme Court case, it applied Massachusetts Chapter 93A consumer fraud standards and case law, not Rhode Island common law fraud standards and case law.

[209] It also appears that opposition to the plaintiff's summary judgment motion in Siemens was inadequately briefed by the defendants. See Siemens Fin. Servs., Inc. v. Stonebridge Equip. Leasing, LLC, C.A. No. PB 09-1677 (Feb. 15, 2013) at 15 ("Again, the Defendants provide no citation to the record to support this conclusion. Although counsel to the parties are responsible for directing the Court to the pertinent portions of the record, the Court came upon some relevant information in its review of portions of the record cited for other purposes and some uncited portions."). Indeed, it appears the court was not even provided with a copy of the financial projections. See id. at 16 n.9 ("A copy of this exhibit was not supplied in connection with this motion.").

procedures that the imaging center would perform. Instead, he said that he reduced those forecasts by half to arrive at his own expectations of the center's performance.").

The Diocesan Defendants also quote a portion of the opinion in Douse v. Bos. Sci. Corp., 314 F. Supp. 3d 1251, 1263 (M.D. Fla. 2018) out of context. The fuller context was:

> The other selections were statements of opinion. This is most readily indicated because they are introduced by subjective adjectives like "trusted," "timeless," "proven," and "established." (Doc. 27 at ¶¶ 185, 187). **In Florida**, "[a]n action for fraud generally may not be predicated on statements of opinion ... but rather must be based on a statement concerning a past or existing fact." *Mejia v. Jurich*, 781 So.2d 1175, 1177–78 (Fla. 3d DCA 2001). **An exception exists where "the person expressing the opinion is one having superior knowledge of the subject of the statement and the plaintiff can show that said person knew or should have known from facts in his or her possession that the statement was false."** *Id.* . . . .
>
> [Emphasis supplied]

Douse v. Bos. Sci. Corp., 314 F. Supp. 3d at 1263. The court went on to dismiss the particular misrepresentation claims, because the plaintiff had not pled how the misrepresentations were false, as required by Rule 9(b). Here, of course, Plaintiffs have expressly pled how the misrepresentations were false.

Finally the Diocesan Defendants cite Hogan v. E. Enterprises/Bos. Gas, 165 F. Supp. 2d 55, 64-65 (D. Mass. 2001), in which an employee alleged he was fraudulently induced to take an early retirement based on certain statements made by the employer. The court dismissed those claims for failure to allege that the statements were actually fraudulent at the time they were made. See Hogan, 165 F. Supp. 2d at 65 ("[T]here is no allegation in the complaint that this statement was fraudulent, i.e., that, in fact, at the time, Boston Gas did have the financial resources to retain much of the Essex County

Gas Company workers."); id. ("Also, there is no allegation that the statement was untrue when made. The allegation that later some employees received a Social Security supplement is not the equivalent of an allegation that the statement was false when made."). In contrast, the First Amended Complaint alleges *in extenso* how the Diocesan Defendants' statements were actually known to be false at the time they were made.

G. Plaintiffs have sufficiently alleged the Diocesan Defendants' knowledge and scienter

"Conclusory allegations are insufficient, but Rule 9(b) may be satisfied 'when some questions remain unanswered, provided the complaint as a whole is sufficiently particular to pass muster.'" United States v. Medtronic, Inc., 189 F. Supp. 3d 259, 267 (D. Mass. 2016) (quoting U.S. ex rel. Gagne v. City of Worcester, 565 F.3d 40, 45 (1st Cir. 2009)). See Foisie v. Worcester Polytechnic Inst., 967 F.3d 27, 50 (1st Cir. 2020) ("Rule 9(b) does not demand a blow-by-blow account; as long as a plaintiff has adequately pleaded the who, what, where, and when of the alleged fraudulent conduct, the rule does not obligate her to allege every conceivable detail incident to the fraud.").

The Diocesan Defendants again focus on Plaintiffs' pre-2008 allegations and repeat their argument that Plaintiffs have not pled the Diocesan Defendants' states of mind as to such pre-2008 wrongdoing with sufficient plausibility. See Diocesan Defendants' Memo. at 60–61. This is, again, completely improper. See *supra* at 57–58; Ocasio-Hernandez v. Fortuno-Burset, 640 F.3d 1, 14 (1st Cir. 2011) ("the complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible"); Hernandez-Cuevas v. Taylor, 723 F.3d 91, 103 (1st Cir. 2013) ("We are unpersuaded by the government's balkanized approach.").

The Diocesan Defendants also contend that Plaintiffs fail to allege the Diocesan Defendants' knowledge that Bishop Tobin's misrepresentations in connection with the regulatory and Vatican approvals of the 2014 Asset Sale were false, because "Plaintiffs do not allege that Bishop Tobin is an actuary, an ERISA expert, a healthcare executive, a financial professional, or privy to the actuarial analyses concerning the purported insufficiency of the proposed $14 million payment into the Plan allegedly shared with other defendants." Diocesan Defendants' Memo. at 62–63.

The Diocesan Defendants invent this supposed standard without any citation to authority. A plaintiff is not required to specifically allege all of the defendant's qualifications, sources of information, or level of expertise. The Diocesan Defendants seem to imply that Bishop Tobin lacked the qualification to properly assess the accuracy, *vel non*, of his own representations. It is unclear whether they are suggesting reasonable reliance by him on the other Defendants, or a mistaken belief as to the truth of those representations. That is not a matter to be decided on a motion to dismiss.

Moreover, the Diocesan Defendants' argument fails to draw all reasonable inferences in Plaintiffs' favor, Ocasio-Hernández, 640 F.3d at 7, from Bishop Tobin's participation in numerous meetings and briefings concerning the transactions (FAC ¶¶ 153, 164-169), as well as his initial inclusion and later deletion of reference to the Plan's "spiraling and gaping unfunded liability" (FAC ¶ 175, 254). The Diocesan Defendants' argument also disregards the imputation of knowledge from one co-conspirator to another. See *infra* at 139–141.

H. The Vatican and Health Services Council letters are an actionable component of the Diocesan Defendants' schemes

1. Plaintiffs were harmed by the Vatican and Health Services Council letters

The Diocesan Defendants baldly assert, without explanation, that Plaintiffs could not have been harmed by Bishop Tobin's letters to the Vatican and the Health Services Council, as well as misrepresentations made to the IRS in connection with listing SJHSRI in the Official Catholic Directory. Diocesan Defendants' Memo. at 64–65.

The First Amended Complaint sets forth in detail how Plaintiffs were harmed by the 2014 Asset Sale (which, inter alia, fraudulently dissipated the assets of SJHSRI, RWH, and CCCB otherwise available to the Plan) and the efforts to preclude application of ERISA to the Plan. As discussed *supra*, the Diocesan Defendants' and Vatican approvals of the 2014 Asset Sale were a prerequisite to its closing. So too was the regulatory approval that Bishop Tobin actively supported in writing, including his affirmative misrepresentations about the pension plan. Likewise, as discussed *infra*, misrepresentations to the IRS and the fraudulent listing of SJHSRI in the Official Catholic Directory were a means to the end of freeing Fatima Hospital from pension liabilities, and facilitated the mistreatment of the Plan as an exempt church plan.

2. It is unnecessary to allege that Plaintiffs were intended recipients of these particular misrepresentations

The Diocesan Defendants contend the letters to the Vatican and to the regulators were allegedly intended to deceive those entities, not Plaintiffs, and therefore cannot be the basis for claims for fraud. See Diocesan Defendants' Memo. at 65. This argument, even if credited, would not result in dismissal of any counts, since the Diocesan

Defendants do not dispute that they made other misrepresentations directly to Plaintiffs, and in any event are liable for their coconspirators' misrepresentations.

This argument also ignores that the First Amended Complaint alleges separate counts for fraudulent misrepresentations and omissions (Count VII) and fraudulent scheme (Count VIII). Rhode Island recognizes a cause of action in fraud at common law for scheme liability. See Rhode Island Economic Development Corp. v Wells Fargo Securities, LLC, No. PB-12-5616, 2013 WL 4711306, at *35 (R.I. Super. Aug. 28, 2013) ("Thus, the Complaint states a claim against MacLean for fraudulent misrepresentation and her participation in the greater fraud scheme.") (denying dismissal of separate counts for fraudulent scheme and fraudulent misrepresentations and omissions); H.J. Baker & Bro., Inc. v. Orgonics, Inc., 554 A.2d 196, 202 (R.I. 1989) (scheme to stall collection of debt from debtor company in order to unload its assets); E. Providence Const. Co. v. Simon, 172 A. 251, 252 (R.I. 1934) (scheme to obtain real property improvements by transferring property to minor wife, contracting and mortgaging property to obtain improvements, and subsequently disaffirming contracts and mortgage); Kroener v. Pancoast, 134 A. 6 (R.I. 1926) (scheme to defraud corporation by causing it to issue bonds for improper purpose). The letters to the Vatican and Health Services Council are actionable components of the scheme to consummate the 2014 Asset Sale[210] regardless of whether Plaintiffs were among the intended recipients.

[210] Both the Diocesan Defendants' approval and Vatican approval were required under APA § 7.5(e). See id. ("(e) Church Approvals. Sellers shall promptly apply for and use commercial reasonable efforts to obtain those ecclesiastical approvals required from officials within the Roman Catholic Church (the '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'). The Parties shall cooperate in the preparation

It is also impossible to reconcile the Diocesan Defendants' argument that Plaintiffs could not have relied on these letters with their argument that Plaintiffs had constructive notice of every scrap of paper submitted, or every oblique statement of fact made, to the state regulators in the thousands of pages of submissions to the regulators. The Attorney General received a copy of the Health Services Council letter and inquired about the Vatican approvals, which were required under the Asset Purchase Agreement.

In support of their contention that Plaintiffs were not intended recipients of these letters, the Diocesan Defendants again cite Ang v Spidalieri, No. WC-2006-0569, 2018 WL 810086 (R.I. Super. Feb. 05, 2018) (entering judgment on fraud claims after bench trial), Gorbey ex rel. Maddox v. Am. Journal of Obstetrics & Gynecology, 849 F. Supp. 2d 162 (D. Mass. 2012) (dismissing Massachusetts statutory consumer fraud claims and denying motion to amend complaint to add common law fraud claims for failure to allege reliance), and Cliftex Clothing Co. v. Di Santo, 148 A.2d 273, 276 (R.I. 1959) (directing entry of judgment for the defendant on a fraud claim, where there was no evidence adduced at trial that any intended recipient of the fraudulent statement was induced to rely on it), and add a citation to Saffaf v. Ally Fin., Inc., No. 4:20-CV-276-SPM, 2021 WL 3089039, at *4 (E.D. Mo. July 22, 2021) (addressing claims for negligent and fraudulent misrepresentations but not any claim for fraudulent scheme). See Diocesan Defendants' Memo. at 67–68. These cases are distinguishable for reasons discussed *supra* at 96–97.

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and prosecution of such application(s). Each of the Parties shall timely submit all information and documents requested in connection therewith by Church officials.").

3. Plaintiffs have alleged sufficient reliance on misrepresentations to third parties

In addition to the relevance of Defendants' various misrepresentations made to third parties for purposes of other counts such as Count VIII (fraudulent scheme) and Counts XVI through XIX (for civil liability for crimes under R.I. Gen. Laws § 9-1-2), Plaintiffs assert claims for such misrepresentations under Count VII (fraud through intentional misrepresentations and omissions).

Such allegations of third-party reliance on fraudulent misrepresentations have been held to state a claim for fraud under Rhode Island law. See State v. Purdue Pharma L.P., No. PC-2018-4555, 2019 WL 3991963, at *13 (R.I. Super. Aug. 16, 2019) (denying motion to dismiss "indirect fraud" claims, where "Defendants perpetrated the fraud upon doctors, those doctors wrote improper prescriptions for patients, which the State subsequently filled, which patients misused, thereby resulting in 'indirect consequences that harmed the State'") (Gibney, P.J.). See id. (noting and rejecting the opioid manufacturer defendants' argument that "under Rhode Island law, the [plaintiff] State cannot recover for indirect fraud directed at third parties"). Rhode Island is one of seven states to "recognize third-party reliance in cases where defendant has made a statement to a third party, who relies on that statement to the detriment of the plaintiff." XO Bistro, LLC v. Anthony Merrill & White Star, LLC, CASE NO. ST-18-CV-780, 2021 WL 3214788, at *5 (V.I. Super. July 21, 2021) (collecting cases and adopting Rhode Island's approach).

Thus, the Diocesan Defendants incorrectly contend that Rhode Island does not recognize so-called "third party reliance" claims, in which a plaintiff did not rely on any misrepresentation but instead was injured by a third party's reliance on such

misrepresentation. See Diocesan Defendants' Memo. at 65–67. The cases cited by the Diocesan Defendants do not stand for the proposition that Rhode Island rejects such third-party reliance claims, which have been recognized in jurisdictions outside Rhode Island.[211] In Ang v Spidalieri, No. WC-2006-0569, 2018 WL 810086, at *5 (R.I. Super. Feb. 05, 2018), discussed *supra*, the court concluded following a **bench trial** that the **plaintiff** was aware of the allegedly concealed facts. In Siemens Fin. Servs., Inc. v. Stonebridge Equip. Leasing, LLC, 91 A.3d 817 (R.I. 2014), the court entered summary judgment on a first-party misrepresentation claim, because the counterclaim-plaintiff testified at deposition it did not actually rely on the misrepresentation. See id. at 823. St. Paul Fire & Marine Ins. Co. v. Russo Bros., 641 A.2d 1297 (R.I. 1994) does not, as the Diocesan Defendants incorrectly assert, contain any comparison of Massachusetts law to Rhode Island law. See Diocesan Defendants' Memo. at 56 n.46 (citing St. Paul Fire, 641 A.2d at 1300 n.2). Instead, it affirmed entry of summary judgment on the plaintiffs' contract claims under Rhode Island law, because the defendants failed to present any evidence of anyone's reliance on fraudulent misrepresentations which the defendants had alleged in an effort to circumvent the parol evidence rule as to a written indemnity agreement. See id. at 1300.

[211] See, e.g., Bardes v. Massachusetts Mut. Life Ins. Co., 932 F. Supp. 2d 636, 640 (M.D.N.C. 2013) ("It is difficult to believe that North Carolina courts would not provide redress to an innocent citizen who was victimized by a malicious person or company providing false W2s to governmental entities.") (denying dismissal of fraud claims); Wheat v. Sofamor, S.N.C., 46 F. Supp. 2d 1351, 1365 (N.D. Ga. 1999) (recognizing but granting summary judgment on claim for fraud on the Food & Drug Administration, in absence of evidence that defendants intended to deceive the FDA); Hynix Semiconductor Inc. v. Rambus Inc., No. C-05-02298RMW, 2007 WL 4209399, at *8 (N.D. Cal. Nov. 26, 2007) ("Under the Restatement, one who misrepresents creditworthiness to a credit agency can be liable for fraud when a third party relies on the agency's representation that a person is creditworthy.") (citing Restatement Second of Torts § 533, comment f); Gregory v. Brooks, 35 Conn. 437, 449 (Conn. 1868) (jury should have been instructed that plaintiff was entitled to recover for fraud if defendant intended to harm plaintiff by impersonating wharfmaster and instructing third-party ship captain to unmoor from plaintiff's wharf).

While the issue of whether evidence of reliance by a third party is sufficient to meet a plaintiff's burden of proof has been addressed by the Rhode Island Superior Court,[212] it has not been addressed by the Rhode Island Supreme Court in the specific context of common law fraud. However, that court has held that reliance by a third party is sufficient to meet a plaintiff's burden of proof in proving apparent authority. See Vucci v. Meyers Bros. Parking System, Inc., 494 A.2d 53, 54 (R.I. 1985) ("The insurer argues that evidence about ASI's apparent authority to act on its own behalf was irrelevant and should have been excluded because Vucci failed to allege or prove that she personally relied upon such apparent authority. We disagree. The absence of personal reliance by a plaintiff does not necessarily preclude her from introducing evidence relating to apparent authority. **A trial justice may permit a plaintiff to introduce such evidence when the evidence indicates that a third party relied on the appearance of authority and a plaintiff was injured thereby**.") (emphasis supplied and citations omitted).

That is the essence of third party reliance in fraud cases. Thus, under Rhode Island law, unlike the law of some jurisdictions, a plaintiff may prove apparent authority based upon a third party's reliance. We submit that the holding in Vucci is either controlling that Rhode Island also allows third party reliance in fraud cases, or at least

[212] See *supra* at 117 (discussing State v. Purdue Pharma, L.P.). In the absence of controlling state supreme court authority, state superior court authority is entitled to deference in predicting state law. See Koppers Co. v. Aetna Cas. & Sur. Co., 98 F.3d 1440, 1453 (3d Cir. 1996) ("Absent some reason to believe that the supreme court would reach a different result, the superior court's holding is entitled to great deference in our endeavor to predict state law."); Barton v. Clancy, 632 F.3d 9, 17 (1st Cir. 2011) ("A federal court sitting in diversity or, as here, exercising supplemental jurisdiction over a state law claim must apply state substantive law. . . . If the highest court has not spoken directly on the question at issue, we predict 'how that court likely would decide the issue,' looking to the relevant statutory language, analogous decisions of the state supreme court, **decisions of the lower state courts**, and other reliable sources of authority.") (emphasis supplied).

strongly persuasive that the Rhode Island Supreme Court would so rule. See also State v. Purdue Pharma L.P., *supra*.

Plaintiffs have adequately alleged third party reliance. FAC ¶ 336 ("These misrepresentations and omissions concerning the Plan's funding level were made with an intent to deceive and succeeded in deceiving both the Rhode Island Department of Health and the Rhode Island Attorney General in approving the asset sale, and to prevent SJHSRI's employee unions, the general public, and Plan participants from learning of the grossly underfunded status of the Plan."). Moreover, issues of reasonable reliance on misrepresentations are highly fact-specific and cannot properly be decided on a motion to dismiss. See Samia Companies LLC v. MRI Software LLC, 898 F. Supp. 2d 326, 343 (D. Mass. 2012) (issue of plaintiff's reliance on oral representations was not ripe for decision at motion to dismiss stage despite existence of integration clause in written contract); Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC, 797 F.3d 160, 186 (2d Cir. 2015) ("In general, the reasonableness of a plaintiff's reliance is a 'nettlesome' and 'fact-intensive' question, which we, like our Circuit's many district courts, will not lightly dispose of at the motion-to-dismiss stage.") (citation omitted); Koesler v. Beneficial Fin. I, Inc., 267 F. Supp. 3d 873, 889 (W.D. Tex. 2016) ("In the context of common law fraud, courts have uniformly treated the issue of justifiable reliance as a question for the factfinder. The question of justifiable reliance depends heavily on the relationship between the parties and their relative sophistication."); George v. McClure, 266 F. Supp. 2d 413, 419 (M.D.N.C. 2001) ("Whether Plaintiff did in fact rely on these statements and whether such reliance was reasonable are questions of fact.") (denying motion to dismiss).

I. The First Amended Complaint sufficiently alleges that the listing of SJHSRI in the Official Catholic Directory was improper and fraudulent

1. The First Amended Complaint alleges that there was insufficient connection between SJHSRI and the Diocese of Providence for OCD listing, especially after 2009

The Diocesan Defendants contend that the First Amended Complaint "focuses on the purported lack of diocesan control over the corporate governance of SJHSRI beginning in 2011." Diocesan Defendants' Memo. at 69 (citing FAC ¶¶ 87–90). In fact, the First Amended Complaint alleges both lack of control and lack of connection. See FAC ¶ 112 ("At least since the 2014 Asset Sale, which included the transfer of all of SJHSRI's operating assets, SJHSRI was not 'operated, supervised, or controlled by or in connection with the Roman Catholic Church,' either in the Diocese of Providence or anywhere else."). That allegation, which would be sufficient standing alone, is supported by other detailed allegations throughout the First Amended Complaint, including quotes from public statements by Diocesan Defendants' representatives that the Diocese's "involvement" with SJHSRI "essentially ended" by 2014, and that "the Bishop's very limited role at SJHSRI—maintaining Catholicity at the hospitals—was mooted by the fact that SJHSRI no longer owned or ran any hospitals." FAC ¶¶ 161–62 (quoting the Diocese's Chancellor and Spokesperson, respectively).

Apparently seeking to impeach the credibility of its own admissions—a curious and utterly inappropriate exercise on a motion to dismiss—the Diocesan Defendants point to moribund provisions of amendments to SJHSRI's articles of incorporation filed with the Rhode Island Secretary of State's office in 2010, for the proposition that the Bishop maintained veto rights over Catholicity matters at SJHSRI. See Diocesan

Defendants' Memo. at 70. This document is outside the pleadings, is not in any way referred to therein, and cannot be considered on a motion to dismiss insofar as it pertains to disputes of fact between the parties. See Rollins v. Dignity Health, 338 F. Supp. 3d 1025, 1038 (N.D. Cal. 2018) ("Defendants cite to Dignity Health's website, bylaws, membership of its Board of Directors, and Sponsorship Council, and financial support of the Sponsoring Congregations. The majority of these materials cannot properly be considered on a motion to dismiss because they pertain to disputes of fact between the parties."). It is also disputed by other documents quoted by Plaintiffs in the pleadings. See FAC ¶ 87 ("Starting in 2011, SJHSRI has filed its Form 990 with the IRS stating that CCCB was SJHSRI's 'sole member.' This confirms the diminished or nonexistent roles of Bishop Tobin and the Diocese of Providence in SJHSRI's governance after the 2009 merger.").

In addition, if the Court examines this Article of Amendment offered by the Diocesan Defendants (which is beyond the pleadings and therefore should not be considered), the Court will see that these Catholicity provisions are simply the same provisions that the First Amended Complaint quotes Diocesan personnel as stating were "mooted" by the 2014 Asset Sale. The Diocesan Defendants contend such statements "are easily squared" with its arguments that SJHSRI continued—perhaps continues?[213]—to be operated in connection with the Catholic Church. See Diocesan Defendants' Memo at 71. Plaintiffs obviously disagree, and in any event the Court cannot be asked to perform such weighing of evidence on a motion to dismiss.

[213] According to the Diocesan Defendants, even now, they stand at the ready to prevent SJHSRI from "support[ing] abortion providers" while it "wind[s] up its affairs". Diocesan Defendants' Memo. at 72.

2. Plaintiffs do not confuse the fraudulent listing of SJHSRI in the Official Catholic Directory with exemption from ERISA as a church plan

In an apparent act of projection, the Diocesan Defendants contend that the First Amended Complaint commits "conflation" of "the OCD listing inquiry with that for church plan qualification." Diocesan Defendants' Memo. at 72. They contend that the U.S. Conference of Catholic Bishops does not require subordinate organizations wishing to be listed in the Official Catholic Directory to meet the Lown factors applicable to organizations seeking to operate ERISA-exempt church plans. See Diocesan Defendants' Memo. at 73–74 (discussing Lown v. Cont'l Cas. Co., 238 F.3d 543 (4th Cir. 2001)). This argument is an obtuse misreading of the First Amended Complaint, whose allegation that SJHSRI was improperly listed in the Official Catholic Directory does not depend in any way on whether SJHSRI also failed to meet those particular factors.[214] There is certainly no basis for asking the Court "to defer to the wide discretion afforded to local dioceses by the [U.S. Conference of Catholic Bishops" (Diocesan Defendants' Memo. at 74) on these issues, especially on a motion to dismiss. Cf. Rollins v. Dignity Health, 338 F. Supp. 3d 1025, 1038 (N.D. Cal. 2018) ("Defendants urge the Court not to adopt the test in *Lown v. Continental Casualty Co.*, 238 F.3d 543, 548 (4th Cir. 2001) to determine association. . . . However, Defendants provide this Court with no test, other than the statutory language and the Oxford English Dictionary, for evaluating whether Dignity Health and the sub-committee is associated with a church.") (denying motion to dismiss).

[214] The Lown factors remain relevant to whether the Plan is an ERISA-exempt church plan.

Listing SJHSRI in the Official Catholic Directory after 2014 enabled the mistreatment of the Plan as an ERISA-exempt church plan. Indeed, that was the primary reason why SJHSRI was even being listed at all, after it transferred its hospital assets in 2014. Regardless of whether the Defendants' own legal analysis was correct in December 2014, they expressly concluded that if SJHSRI were not listed in the Official Catholic Directory, that would "mean that the SJHSR[I] pension would no longer be treated as a church plan." FAC ¶ 186 (quoting Prospect's statement on December 2, 2014 to the Diocesan Defendants). If that should occur, it would jeopardize or destroy the ability of the Pension plan to continue to claim to be a "church plan" exempt from ERISA, and affirmatively require reporting to federal authorities the failure to make payments required under ERISA. In other words, even if (arguendo) the Diocesan Defendants did nothing wrong before the June 2014 Asset Sale, they post-sale joined the continuing conspiracy of the other Defendants to make the Plan appear to be a church plan.

3. Plaintiffs can challenge the sufficiency of SJHSRI's connection with the Diocese of Providence (here none) for purposes of listing SJHSRI in the Official Catholic Directory

The Diocesan Defendants contend that any inquiry into whether SJHSRI met Internal Revenue Service criteria for listing in the Official Catholic Directory as a subsidiary organization of the Catholic Church is barred by the First Amendment. See Diocesan Defendants' Memo. at 75. They contend that the Dioceses is the sole arbiter of "who is within its religious community." Id.

This argument ignores that the Diocese itself, as quoted in the First Amended Complaint, has publicly declared that SJHSRI lacked any legitimate connection with the

Diocese after the 2014 Asset Sale. When the Diocese Defendants insist that Plaintiffs "strive to minimize" the connection with the Diocese "as 'moot'" after the 2014 Asset Sale, Diocesan Defendants' Memo. at 75, they omit that such "striving" consists of quoting the Diocese's own spokesperson who described the Bishop's role at SJHSRI as "mooted". See FAC ¶¶ 161–62.

The only authority cited for the Diocesan Defendants' constitutional argument is Overall v. Ascension, 23 F. Supp. 3d 816 (E.D. Mich. 2014).[215] While there is some dicta in Overall cautioning against judicial inquiry into "a church's polity, administration, and community," id. at 832, the court found that plaintiffs lacked Article III standing to challenge their pension plan's purported church plan status, because they failed to allege any injury caused by the plan's claim of exemption from ERISA. See id. at 833 ("The [Complaint] does not allege any specific or concrete injury suffered by plaintiff as a consequence of being a participant in a church plan. The ERISA allegations, which are incorporated by reference, are of the same order. The allegations are not specific as to harms allegedly suffered by plaintiff as a result of the alleged ERISA violations."). Here, in contrast, Plaintiffs have amply alleged numerous such injuries. The logical extension of the Diocesan Defendants' argument is that no one could ever second guess the Diocese's declarations of religious affiliation (no matter how absurd), and the

[215] The Diocesan Defendants also reference Medina v. Cath. Health Initiatives, 147 F. Supp. 3d 1190, 1207 (D. Colo. 2015), but in that case the court simply applied the Lown factors and made findings that the organizations in question *did* share common religious bonds with the Catholic Church. See id. at 1201 ("CHI's obvious affinities with the Catholic Church recited above necessarily flow downward to and animate the Subcommittee as well . . . ."); id. at 1202 ("[T]he evidence overwhelmingly shows not only that, regardless of the personal convictions of any single employee, both CHI and the DB Plan Subcommittee are animated by and bound to Catholic doctrines in the performance of their duties.").

Diocese would be free to sell tax or ERISA exemptions to supermarkets, bus terminals, and driving ranges.

V. Count IX (Conspiracy) should not be dismissed

A. Elements of civil conspiracy

"Conspiracy is an agreement by 'two or more persons to commit an unlawful act or to perform a lawful act for an unlawful purpose.'" State v. Disla, 874 A.2d 190, 196 (R.I. 2005). Civil conspiracy is "a means for establishing joint liability for other tortious conduct; therefore, it 'requires a valid underlying intentional tort theory.'" Read & Lundy, Inc. v. Washington Trust Co. of Westerly, 840 A.2d 1099, 1102 (R.I. 2004). "'Once an agreement has been made, no further action in furtherance of the conspiracy is necessary to find a defendant guilty of the crime of conspiracy.'" State v. Tully, No. 2013-282-C.A., 2015 WL 1012366, at *10 (R.I. Mar. 9, 2015) (quoting State v. Disla, 874 A.2d 190, 197 (R.I. 2005) (quoting State v. Lassiter, 836 A.2d 1096, 1104 (R.I. 2003))). Each conspirator "'is responsible for everything done by one or all of his confederates, in the execution of the common design, as one of its probable and natural consequences, even though the act was not a part of the original design or plan, or was even forbidden by one or more of them.'" State v. Mastracchio, 612 A.2d 698, 706 (R.I. 1992) (quoting State v. Gordon, 508 A.2d 1339, 1349 (R.I. 1986)). "It is not necessary, to render one criminally liable as a conspirator, that he should have participated in the fraudulent scheme with the view of obtaining any pecuniary advantage for himself." State v. Bellin, 181 A. 804, 814 (R.I. 1935).

"A tacit understanding or a wink and a nod can be sufficient" to form a conspiracy. Steward Health Care Sys., LLC v. Blue Cross & Blue Shield of Rhode

Island, 311 F. Supp. 3d 468, 494 (D.R.I. 2018) (Smith, C.J.). Even on summary judgment, courts should not "slice and dice the record in a way that scrutinizes each individual piece of evidence for conspiratorial motive." Steward Health Care Sys., 311 F. Supp. 3d at 494. "Rather, the Court must evaluate the evidence based on its aggregate effect, and draw reasonable inferences from the evidence as a whole." Id. Conspirators generally do not take faithful notes of their conspiracies. See Zorzit v. Comptroller, 123 A.3d 627, 629 n.1 (Md. App. 2015) (quoting The Wire: Straight + True, Season 3, Episode 5) ("SHAMROCK: Robert Rules say we gotta have minutes for a meeting, right? These the minutes. STRINGER BELL: [I]s you taking notes on a criminal ... conspiracy?").

In addition:

> A defendant cannot escape criminal responsibility on the grounds that he or she did not join the conspiracy until well after its inception. Thus, one who joins a conspiracy after its formation is equally culpable with the original members and is deemed to have adopted prior acts and declarations of the conspirators made after the formation and in furtherance of the conspiracy. In other words, one who comes into a conspiracy after it has been formed with knowledge of its existence and with a purpose of forwarding its designs is as guilty as though he or she had participated in its original formation, and this is true even if he or she played only a minor role in the conspiracy.

16 Am. Jur. 2d Conspiracy § 21 (footnotes omitted).

The Diocesan Defendants contend that the pleading standard for conspiracy is governed by Stubbs v. Taft, 149 A.2d 706, 708 (R.I. 1959) and Smith v. O'Connell, 997 F. Supp. 226, 230 (D.R.I. 1998). See Diocesan Defendants' Memo. at 76–80. Stubbs, however, predated Rhode Island's adoption in 1966 of the modern Superior Court Rules

of Civil Procedure, patterned on the Federal Rules.[216] Smith v. O'Connell was decided on summary judgment. See id., 997 F. Supp. at 241. For obvious reasons, the standards for pleading of evidence under the pre-modern rules, as well as production of evidence at the summary judgment stage under the modern rules, are different from the applicable pleading rules at the motion to dismiss stage.

B. The First Amended Complaint sufficiently alleges an improper agreement concerning the listing of SJHSRI in the Official Catholic Directory

1. The OCD listing was improper

The Diocesan Defendants incorporate their prior argument and contend that "there was nothing false about SJHSRI's listing in the OCD following the 2014 Asset sale". Diocesan Defendants' Memo. at 72; id. at 77 (repeated). Plaintiffs, for the reasons set forth in the First Amended Complaint and discussed *supra*, completely disagree. The listing was even false on its face, since the Diocesan Defendants listed the Prospect Defendants' agent (!) Otis Brown as the contact person for SJHSRI, so that the Prospect Defendants could help run interference on any inquiries into the Plan's falsely claimed church plan status.[217]

[216] See Kent, Simpson, Flanders, Wollin, Rhode Island Civil Procedure § 1:1 (Superior Court Rules of Civil Procedure "became effective on January 10, 1966.").

[217] FAC ¶¶ 186–87, 194.

2. The Diocesan Defendants continue to misunderstand the significance of the allegations regarding the Official Catholic Directory listing

The Diocesan Defendants reiterate their prior argument that "the FAC improperly conflates the connection with the Catholic Church required for listing in the OCD with the requirements for control or association needed to qualify for church plan status." Diocesan Defendants' Memo. at 77. As previously discussed, this purported conflation is a figment of the Diocesan Defendants' imagination. Listing SJHSRI in the Official Catholic Directory after 2014 enabled the mistreatment of the Plan as an ERISA-exempt church plan. Indeed, that was the reason why SJHSRI was even being listed at all, after it had disposed of its hospital assets in 2014.[218]

The Diocesan Defendants also contend: "There is no requirement for a principal purpose organization for listing in the OCD." Diocesan Defendants' Memo. at 78. This observation is reminiscent of Alice's observation that a book "had no pictures nor conversations in it, 'and what is the use of a book,' thought Alice, 'without pictures or conversations?'"[219] The Official Catholic Directory, as the official listing of organizations entitled to tax exemption under 501(c)(3) of the Internal Revenue Code pursuant to the group ruling issued by the IRS to the U.S. Conference of Catholic Bishops, has criteria for being listed. SJHSRI did not meet those criteria, but nevertheless was listed, accomplishing a tortious result. See FAC ¶¶ 94 – 112.

[218] See FAC ¶ 188 (quoting 2014 email correspondence between SJHSRI's attorney and the Diocesan Defendants, stating: "SJHSRI believes that if it is not included in the 2015 issue of the directory that the pension plan will no longer qualify as a church plan and that the loss of that status will require that they immediately notify the applicable governmental authorities that the plan is currently underfunded."); FAC ¶ 189 ("In response, Corporation Sole, Diocesan Administration, and Diocesan Service on December 31, 2014 again improperly agreed that SJHSRI would remain in the Catholic Directory. . . .".

[219] Lewis Carroll, Alice's Adventures in Wonderland (1886 ed.) at 1.

3. Other allegations do not undermine Plaintiffs' allegations concerning the OCD, and in any event Plaintiffs are permitted to plead in the alternative

The Diocesan Defendants contend since "SJHSRI had a history of listing in the OCD prior to 2015," there "was nothing out of the ordinary then with the continued listing of the SJHSRI in the OCD after 2014 Asset Sale." Diocesan Defendants' Memo. at 78–79. This assertion rests on improperly ignoring all the allegations of the First Amended Complaint explaining in detail why it was wrongful. See FAC ¶¶ 183–94. The First Amended Complaint sets forth in detail, with respect to specific communications among specific persons on specific dates, how SJHSRI came to still[220] be listed in the Official Catholic Directory after the 2014 Asset Sale and the reasons for doing so.

The Diocesan Defendants point to an email that Chancellor Reilly sent to Prospect's agent Otis Brown on November 11, 2014[221] initially indicating that SJHSRI was "not eligible for listing," and infer from this email that Chancellor Reilly was "performing the function as gatekeeper to the OCD, so that no organization would be listed improperly." Diocesan Defendants' Memo. at 79. This email is discussed in the First Amended Complaint, see id. ¶ 185, and actually supports Plaintiffs' claims. It is an admission that the Diocesan Defendants (as well as the other Defendants) actually knew that SJHSRI was not eligible for listing, and yet later performed an about-face.

[220] The Diocesan Defendants' reference to "continued listing" ignores that SJHSRI's listing was modified from that of a "hospital" to that of a "miscellaneous entity," and that a representative of Prospect (not SJHSRI) was listed as the contact person since 2015. See FAC ¶¶ 190, 194.

[221] The Diocesan Defendants attach an incomplete email chain to their motion, omitting the identity of the email's respondent who insisted that SJHSRI was still eligible for listing.

Despite their insistence, the Diocesan Defendants are not entitled to have any contrary inferences drawn in their favor on a motion to dismiss.

The Diocesan Defendants insist that Chancellor Reilly's email stemmed from his mistaken understanding of various facts regarding SJHSRI's ineligibility for listing in the Official Catholic Directory. See Diocesan Defendants' Memo. at 79. That is an argument for the jury, certainly not an argument that belongs in a motion to dismiss.

The Diocesan Defendants also reiterate their prior argument, based on amended Articles of Incorporation that are outside the pleadings on this motion to dismiss, that Defendant Roman Catholic Bishop of Providence had a complete veto over SJHSRI's sale of hospital assets and therefore did not need an additional veto over SJHSRI's listing in or deletion from the Official Catholic Directory in order to be able to veto the 2014 Asset Sale. See Diocesan Defendants' Memo. at 80. This argument, as discussed *supra* at 52 and 102, obscures that, far from wanting to veto the 2014 Asset Sale, the Diocesan Defendants desired its consummation as means of getting Fatima into the hands of an entity who (fraudulently) would claim to have no pension liability. The fact that the Diocesan Defendants could extract $638,838.25 in proceeds from the sale, see FAC ¶¶ 206-10, was simply the cherry on top.[222]

The Diocesan Defendants also contend that "the presentation at the August 14, 2013 meeting with Bishop Tobin, Chancellor Reilly, and Msgr. Theroux . . . does not

[222] Plaintiffs are entitled to an inference, based on the allegations in the First Amended Complaint, that this money was recoupment of a bad debt, i.e. money that the Diocesan Defendants would not have obtained from SJHSRI (which was insolvent) if the 2014 Asset Sale had not been consummated with the Diocesan Defendants' blessing. The Diocesan Defendants' contention that "Inter-Parish Loan Fund is a non-profit corporation, distinct from the Diocesan Defendants" (Diocesan Defendants' Memo. at 82 n.62) is both dehors the record on a motion to dismiss and beside the point, in terms of framing the Diocesan Defendants' motivations for enabling and participating in the 2014 Asset Sale.

reflect an offer directed at the Diocesan Defendants, let alone the 'quid pro quo' described in the FAC." Diocesan Defendants' Memo. at 81. The PowerPoint presentation[223] that they improperly attach to their motion discussed both the Catholicity covenants and rights that the Diocesan Defendants would obtain in the post-sale for-profit hospitals, but also "Requirements" that included "Maintain the retirement plan of St. Joseph Health Services of Rhode Island as a 'Church Plan'". See Diocesan Defendants' Memo. at 82 (copying and pasting a portion of their exhibit). See also ECF # 238-23 at 13 (chart describing a "Proposed Post-Closing Structure" in which the "Bishop of Diocese of Providence" controlling a "Retirement Board" controlling "SJHSRI Church Plan"). In other words, notwithstanding that this document sets forth both a "quid" and a "quo," the Diocesan Defendants insist the two should not be considered a "quid pro quo".

After attempting "to put a more positive spin on the allegations,"[224] the Diocesan Defendants return to insisting that Stubbs v. Taft, 149 A.2d 706 (R.I. 1959) governs the pleading standard for conspiracy claims. As discussed *supra* at 127–128, Stubbs predated Rhode Island's adoption of the modern Superior Court Rules of Civil Procedure and does not even govern the pleading standard under those rules, much less under the Federal Rules of Civil Procedure.

[223] Of course, while a PowerPoint presentation prepared in advance of a meeting is some evidence of what was expected to be discussed at such a meeting, it does not and cannot purport to be a transcription of the meeting's actual discussions.

[224] Cf. U.S. ex rel. Barko v. Halliburton Co., 952 F. Supp. 2d 108, 113 (D.D.C. 2013) ("Although KBR attempts to put a more positive spin on the allegations, Barko gives sufficient facts to survive a motion to dismiss.").

The other cases the Diocesan Defendants string-cite without explanation are likewise distinguishable. See Diocesan Defendants' Memo. at 84 (citing RSM Prod. Corp. v. Freshfields Bruckhaus Deringer U.S. LLP, 682 F.3d 1043 (D.C. Cir. 2012) and Advanced Tech. Corp. v. Instron, Inc., 925 F. Supp. 2d 170 (D. Mass. 2013)). In RSM Prod. Corp., the plaintiff failed to allege any facts suggesting the defendant was aware of the alleged bribery scheme, much less participated in it,[225] whereas here the First Amended Complaint details specific discussions in which the Diocesan Defendants' participated on particular dates. In Instron, the alleged conspiracy to rig the vote of an industrial standards committee was implausible for various reasons, including because the plaintiff had alleged that either defendant, acting alone, could dictate the outcome of the committee's vote without the participation of the other defendant. See Instron, 925 F. Supp. 2d at 180. Here, the Diocesan Defendants could not accomplish their objectives of "a consistent Catholic health care presence in the Diocese" unburdened by the pension obligations, in addition to extraction of almost $640,000 in sale proceeds, if the 2014 Asset Sale were not consummated by and with the participation of the other coconspirators. See FAC ¶¶ 320, 206.

[225] See RSM Prod. Corp., 682 F.3d at 1050–51.

C. The First Amended Complaint alleges sufficient facts concerning the Diocesan Defendants' tortious conduct concerning the 2014 Asset Sale

1. Disclosure to the state regulators is still not disclosure to Plaintiffs, and Plaintiffs have sufficiently alleged underlying predicate wrongs to support a claim for conspiracy

The Diocesan Defendants reiterate their earlier argument that various disclosures about the 2014 Asset Sale were given to the state regulators. See *supra* at 51, 94. This argument continues to conflate Plaintiffs, who did not receive any disclosures, with the state regulators, who were also misled. See id.

The Diocesan Defendants also add citations to Eclectic Properties E., LLC v. Marcus & Millichap Co., 751 F.3d 990 (9th Cir. 2014), Fogarty v. Palumbo, 163 A.3d 526 (R.I. 2017), and Precision Assocs., Inc. v. Panalpina World Transp. (Holding) Ltd., No. 08-CV-00042 JG VVP, 2015 WL 4987751 (E.D.N.Y. Aug. 19, 2015), all of which are distinguishable.

Eclectic Properties E., LLC is addressed *supra* at 74–76, in connection with the Diocesan Defendants' "Great Recession" argument.

In Fogarty, the plaintiff alleged that the defendant attorney tortiously interfered with a contract or contractual expectations, committed legal malpractice, fraudulently breached fiduciary duties, and conspired with a codefendant to commit those various alleged tortious acts. The Rhode Island Supreme Court affirmed summary judgment for the defendant attorney on the grounds that there was no contract[226] or contractual

[226] See Fogarty, 163 A.3d at 539.

expectations,[227] that the attorney had no attorney-client relationship[228] with the plaintiff, that he owed plaintiff no fiduciary duties,[229] and that accordingly he had neither committed any wrongful acts nor conspired with anyone to do so. See Fogarty, 163 A.3d at 543. As noted, all of this was decided on summary judgment, not a motion to dismiss, and on wildly distinguishable facts.

In Precision Associates, Inc., the district court dismissed antitrust conspiracy claims against one set of defendants (the DHL defendants) relating to alleged acts occurring after the date the plaintiffs' pleadings themselves indicated the DHL defendants had withdrawn from the alleged conspiracy. According to Plaintiff's own allegations (asserted in a "Corrected Third Amended Complaint"), the DHL defendants had "turned [themselves] in" to "multiple antitrust enforcers around the world in exchange for cooperating against other co-conspirators," 2015 WL 4987751, at *4, and accordingly had withdrawn from the alleged conspiracy, thereby severing their liability for subsequent acts.[230] Here, there is no allegation that the Diocesan Defendants abandoned the alleged conspiracy, either before or after the 2014 Asset Sale. See FAC ¶¶ 109–10 (listing SJHSRI in the Official Catholic Directory in years before and after 2014).

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[227] See Fogarty, 163 A.3d at 540.

[228] See Fogarty, 163 A.3d at 541.

[229] See Fogarty, 163 A.3d at 543.

[230] The district court also, as an independent basis for dismissal, concluded the plaintiffs' pleadings did not allege any facts suggesting that the alleged conspiracy continued to exist after the DHL defendants started cooperating with law enforcement. See Precision Assocs., Inc., 2015 WL 4987751, at *5 ("While the allegations in the CTAC that establish DHL's withdrawal in October 2007 are fatal to the plaintiffs' position, so too is the dearth of factual allegations that the conspiracy extended until January 2011.")

The Diocesan Defendants baldly accuse Plaintiffs of basing their claims on "pejorative word choice throughout the FAC, not by alleging particular facts." Diocesan Defendants' Memo. at 84. Of course, the First Amended Complaint is replete with such particular facts, as discussed *supra*.

2. Plaintiffs have still sufficiently pled that the Bishop's letters to the regulators and to the Vatican were wrongful

The Diocesan Defendants reiterate their prior self-serving characterizations of the Bishop's letters to the Health Services Council and to the Vatican, discussed *supra* at 107–114. This time they also add the following about their impermissible motives, which Plaintiffs utterly dispute:

> Moreover, both letters on their face are far more consistent with an additional obvious lawful purpose: Bishop Tobin was deeply interested in doing what he could to help a community hospital system that all agree was suffering unsustainable losses and desperately need capital. . . .
>
> Now years later, after the sale and the influx of $14 million to the Plan, Plaintiffs are completely unconstrained and need not balance the many critically important interests that were at play in this decision: Whether that hospital system would survive? Whether the system would have access to sufficient capital to succeed? Whether its value exceeded its debt? Whether its thousands of employees would have jobs? Where and how healthcare would be delivered, if at all, to the underserved populations that had used that hospital system for decades? . . .

Diocesan Defendants' Memo. at 86 (insisting Bishop Tobin's letters reflected "consideration of such interests"). The Diocesan Defendants' *argumentum ad consequentiam*[231] in essence argues that if Plaintiffs' allegations about the Bishop's

[231] Like all improper arguments, argumenta *ad consequentiam* are disfavored in the First Circuit. See, e.g., United States v. Coker, 433 F.3d 39, 52 n.13 (1st Cir. 2005) (Howard, J. concurring) ("I acknowledge the merit of our concurring colleague's well articulated prudential concerns, but I cannot join his analysis

intentions are correct and that the Bishop has done something improper, then such a consequence is undesirable and therefore unlikely. But we know that as "undesirable" as it may be to recognize it, religious organizations can be guilty of wrongdoings and coverups.

The Diocesan Defendants will perhaps have an opportunity to present such vainglories—about why they felt compelled to sacrifice pensioners to maintain a Catholic healthcare presence in the Diocese—to the jury. Fraud committed to "save the business"[232] (even a Catholic hospital) is still fraud, and no ends justify unlawful means. They certainly do not belong in a motion to dismiss.

The Diocesan Defendants proceed again to cite Stubbs and Eclectic Properties E., distinguished *supra* at 74–76. The Diocesan Defendants also cite Read & Lundy, Inc. v. Washington Tr. Co. of Westerly, No. PC99-2859, 2002 WL 31867868 (R.I. Super. Dec. 13, 2002) in which the Superior Court entered summary judgment on the plaintiff's civil conspiracy claims, after having previously entered summary judgment on most of the underlying tort claims, and after plaintiff failed to produce competent evidence of any remaining tort claims. See id., 2002 WL 31867868, at *18–19. In the instant case, the

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of whether there has been a Sixth Amendment violation, because the analysis is in my view *argumentum ad consequentiam*.")

[232] See Eagle Pac. Ins. Co. v. Christensen Motor Yacht Corp., 959 P.2d 1052, 1060 (Wash. 1998) (en banc) "Because the assets were transferred to CSL to avoid the reach of the creditors, the transaction is fraudulent and successor liability attaches to CSL. The fact that the transaction was designed to 'save the business' does not defeat imposition of successor liability."); In re Blake-Ware, 155 B.R. 476, 478 (Bankr. N.D. Ill. 1993) ("[Debtor] intentionally embarked on a check kiting scheme in a desperate effort to save her business. The effort failed, and she got caught. Now she must face the consequences of her fraudulent scheme.") (debt held nondischargable because of fraud). See also In re MarketXT Holdings Corp., 426 B.R. 467, 474–75 (Bankr. S.D.N.Y. 2010) ("If the Debtor, which was in obvious financial distress, wished to attempt to avoid the Softbank Payoff Agreement and benefit its creditors other than Softbank, its remedy was not to conceal assets by transferring them to EIF but to file a Chapter 11 petition or take other lawful action.").

Diocesan Defendants' motion is a motion to dismiss, not a motion for summary judgment, and certainly not a second motion for summary judgment.

D. The other Defendants' conspiratorial acts, which are imputed to the Diocesan Defendants through their participation in the conspiracy, are not implausible

The Diocesan Defendants allude to—and "incorporate . . . by reference"—various arguments made by Angell in its prior (moot) motion to dismiss (ECF # 68-1), that "several other aspects of the alleged conspiracy concerning statements to Plan participants, regulators, and the Rhode Island Superior Court" are "implausible". See Diocesan Defendants' Memo. at 87 (purporting to "incorporate" ECF # 68-1 at "6-10[233], 24-28[234], 33-37[235], 41-50[236]").

This approach to briefing is inappropriate and violates LR Cv 7(a)(2) ("Grounds and Relief Sought. All motions must state with particularity the grounds for seeking an order, the relief sought, and the legal argument necessary to support it."). The Diocesan Defendants cannot require Plaintiffs and the Court to sift through other motion

[233] Pages 6-10 of ECF # 68-1 set forth a portion (actually beginning on page 5) of Angell's factual disagreement with the First Amended Complaint based on evidence outside the record. Angell improperly asked the Court to take judicial notice of such evidence pursuant to its separate Request for Judicial Notice (ECF # 69), which the Diocesan Defendants do not purport to incorporate, much less purporting to incorporate the contents of those exhibits.

[234] Pages 24-28 of ECF # 68-1 set forth Angell's contention that Count X (actuarial malpractice) was implausible. That count was only pled against Angell and is not incorporated into Plaintiffs' counts against the Diocesan Defendants. It is unclear why the Diocesan Defendants seek to incorporate those arguments.

[235] Pages 33-37 of ECF #68-1 set forth additional factual disagreement by Angell based on evidence outside the record. See *supra* n.233. None of this is actually before the Court, much less being properly before the Court on a Rule 12(b)(6) motion.

[236] Pages 41-50 of ECF # 68-1 set forth Angell's factual disagreement as to Angell's liability under Count XVI (Civil Liability under R.I. Gen. Laws § 9-1-2 for Violations of the Rhode Island Hospital Conversions Act), based on more evidence outside the record. See *supra* at n.233 & 235.

papers that are no longer pending before the Court to find "the legal argument to support" the Diocesan Defendants' instant motion.

The Diocesan Defendants' approach is also inappropriate for the reasons discussed *supra* at 57–58 (setting forth First Circuit authorities explaining that any implausibility analysis is supposed to be conducted in a holistic manner and not on an allegation-by-allegation basis).

E. Since Plaintiffs have sufficiently alleged conspiracy, the conduct and knowledge of the Diocesan Defendants' coconspirators may properly be imputed to the Diocesan Defendants

Under Rhode Island law, as elsewhere, co-conspirators' conduct and knowledge are imputed to other coconspirators. See *supra* at 126 (quoting *inter alia* State v. Mastracchio, 612 A.2d 698 (R.I. 1992)).

The Diocesan Defendants again contend that Plaintiffs have not sufficiently alleged any conspiracy, a contention that is still incorrect no matter how many times the Diocesan Defendants reiterate it. See Diocesan Defendants' Memo. at 87–88. This time, they again cite RSM Prod. Corp. v. Freshfields Bruckhaus Deringer U.S. LLP, 682 F.3d 1043 (D.C. Cir. 2012), discussed *supra* at 133.

The Diocesan Defendants also cite 16630 Southfield Ltd. P'ship v. Flagstar Bank, F.S.B., 727 F.3d 502 (6th Cir. 2013). See Diocesan Defendants' Memo. at 88. In that case, after having already refinanced a business loan once because of the borrowers' inability to pay, a bank declined to refinance a business loan for a second time, and, subsequently, was accused (in conclusory fashion) of discriminatory treatment of the borrowers because of their Iraqi origin, in violation of the Equal Credit Opportunity Act. See 16630 Southfield Ltd. P'ship, 727 F.3d at 503. The Sixth Circuit affirmed dismissal

of this discrimination claim as inadequately pled, because the plaintiffs "ha[d] not identified any similarly situated individuals whom [Defendant] Flagstar treated better" but instead "merely alleged their 'belief' that such people exist[ed]." Id. at 506. Noting "[t]o be sure, the mere existence of more likely alternative explanations does not automatically entitle a defendant to dismissal," id. at 505, the Sixth Circuit affirmed the district court's conclusion that in light of the "obvious alternative explanation" that the second refinancing had been denied in light of the prior history surrounding the first refinancing, the court concluded that plaintiffs were required to produce more than "naked assertions devoid of further factual enhancement" which they could not. Id. at 506.

Here, of course, Plaintiffs have offered well more than a hundred pages of factual enhancement in support of the First Amended Complaint which, together with its causes of action, comprises 558 paragraphs across 163 pages.

The Diocesan Defendants also contend that regardless of their alleged involvement in the conspiracy to consummate the 2014 Asset Sale, Plaintiffs have not adequately alleged the Diocesan Defendants' involvement in what they insist must have been "separate" schemes to "deceive regulators" and to accomplish the Cy Pres transfers. Diocesan Defendants' Memo. at 89. This contention about "separate" schemes has no basis in the First Amended Complaint, which alleges an overarching conspiracy to shield hospital assets from the pension liabilities. Obviously, deceiving regulators was a component of Defendants' consummation of the 2014 Asset Sale, since regulatory approval was a precondition to closing. So too was accomplishing the Cy Pres transfers, since the Attorney General included cy pres proceedings as

preconditions to closing of the 2014 Asset Sale.[237] There is also no factual basis, and certainly none alleged in the First Amended Complaint, for suggesting the Diocesan Defendants had withdrawn from the Defendants' conspiracy by 2015 when the Cy Pres transfers occurred, which also protected assets from pension liabilities, by transferring them to Chartercare Foundation. Indeed, the Diocesan Defendants "saw to it" that SJHSRI was still improperly listed in the Official Catholic Directory in 2015 and in years thereafter.[238]

The Diocesan Defendants also insist that "there is nothing" in the September 2013 PowerPoint presentation, attached to their motion, concerning "the establishment of Chartercare Foundation." Diocesan Defendants' Memo. at 89. Of course not. CharterCARE Foundation had already been established in 2007. Why would anyone be discussing establishing it in 2013?

VI. Count VIII (Fraudulent Scheme) should not be dismissed

Having gone out of order, the Diocesan Defendants circle back to Count VIII and contend that "fraudulent scheme" is not an independent cause of action but, rather, subsumed by Plaintiffs' counts for fraud and conspiracy. Diocesan Defendants' Memo. at 90. This contention stubbornly persists in ignoring the Rhode Island case law

[237] See FAC ¶ 391 ("The Attorney General's Decision on May 16, 2014 approving the sale of Fatima Hospital and Roger Williams Hospital was the genesis of the 2015 Cy Pres Petition, because that Decision imposed conditions, which included '(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 [the Superior Court].'") (bracketed language appearing in the FAC).

[238] FAC ¶¶ 190–91.

discussed *supra* at 115, which Plaintiffs previously presented in opposition to the Diocesan Defendants' prior motion to dismiss.

The only cases that the Diocesan Defendants cite for their proposition that "fraudulent scheme" is *not* an independent tort are W. Rsrv. Life Assur. Co. of Ohio v. Caramadre, 847 F. Supp. 2d 329, 341 (D.R.I. 2012) (addressing counts for fraudulent inducement) and Schlesinger v. O'Rourke, 124 A. 259, 259 (R.I. 1924) (addressing a count for common law deceit), neither of which actually stands for the Diocesan Defendants' proposition.

VII. Counts XVI through XIX (civil liability under R.I. Gen. Laws § 9-1-2 for particular crimes) should not be dismissed

R.I. Gen. Laws § 9-1-2 provides:

> Whenever any person shall suffer any injury to his or her person, reputation, or estate by reason of the commission of any crime or offense, he or she may recover his or her damages for the injury in a civil action against the offender, and it shall not be any defense to such action that no criminal complaint for the crime or offense has been made; and whenever any person shall be guilty of larceny, he or she shall be liable to the owner of the money or articles taken for twice the value thereof, unless the money or articles are restored, and for the value thereof in case of restoration.

R.I. Gen. Laws § 9-1-2.

"The purpose of § 9-1-2 is to provide an injured party civil remedies regardless of whether the defendant has been convicted of the underlying offense." Cady v. IMC Mortg. Co., 862 A.2d 202, 215 (R.I. 2004). "To prevail in a civil action, a plaintiff is required to prove his case by a preponderance of the evidence." Id.

R.I. Gen. Laws § 9-1-2 provides a civil remedy for violations of federal criminal law no less than for violations of Rhode Island criminal law. See Mello v. DaLomba,

798 A.2d 405, 411 (R.I. 2002) ("Furthermore, the trial justice erred by assuming that defendants' could not be civilly liable for federal criminal conduct under § 9–1–2 because there is no such limitation within the statute.") (reversing entry of judgment as a matter of law in favor of defendants for violations of federal anti-kickback statute). See also Transamerica Life Ins. Co. v. Caramadre, No. CV 09-470 S, 2017 WL 752145, at *3 (D.R.I. Feb. 27, 2017) (Smith, C.J.) (entering judgment in favor of plaintiffs on claims under § 9-1-2 for criminal violations of both federal and state law); Cady v. IMC Mortg. Co., 862 A.2d 202, 215 (R.I. 2004) (affirming judgment under R.I. Gen. Laws § 9-1-2 in favor of plaintiff for violations of federal anti-wiretapping statute).

Under Rhode Island law, persons who conspire to commit an unlawful act or who aid and abet its commission are equally criminally liable. See R.I. Gen. Laws § 11-1-6;[239] R.I. Gen. Laws § 11-1-3.[240] Likewise, whoever aids and abets or procures the commission of an offense against the United States is criminally liable as a principal. See 18 U.S.C. § 2.[241]

As to the Diocesan Defendants, Plaintiffs allege they were injured by four sets of crimes:

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[239] R.I. Gen. Laws § 11-1-6 provides: "Except as otherwise provided by law, every person who shall conspire with another to commit an offense punishable under the laws of this state shall be subject to the same fine and imprisonment as pertain to the offense which the person shall have conspired to commit, provided that imprisonment for the conspiracy shall not exceed ten (10) years."

[240] R.I. Gen. Laws § 11-1-3 provides: "Every person who shall aid, assist, abet, counsel, hire, command, or procure another to commit any crime or offense, shall be proceeded against as principal or as an accessory before the fact, according to the nature of the offense committed, and upon conviction shall suffer the like punishment as the principal offender is subject to by this title."

[241] Although Plaintiffs do not specifically cite these three statutes in the Complaint, that omission is consistent with general pleading standards under Rule 8. See Saintcome v. Tully, 296 F. Supp. 3d 377, 382 (D. Mass. 2017) ("Federal pleading rules call for 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Fed. R. Civ. P. 8(a)(2). They do not, however, require that a plaintiff enumerate every statute empowering their cause of action.") (citing Johnson v. City of Shelby, Miss., 574 U.S. 10, 11 (2014)).

- The Diocesan Defendants' participation in violations of R.I. Gen. Laws § 23-17.14-30, which makes it a crime to "knowingly violate[ ] or fail[ ] to comply with any provision of this chapter or willingly or knowingly give[ ] false or incorrect information" (Count XVI);

- The Diocesan Defendants' aiding and assisting SJHSRI's filing of false tax returns, in violation of 26 U.S.C. § 7206(2) (Count XVII);

- The Diocesan Defendants' participation in "knowingly giving to an agent, employee, servant in public or private employ, or public official a document in respect of which the principal, master, or employer was interested, which contained a statement which was false or erroneous, or defective in an important particular, and which, to said Defendants' knowledge, was intended to mislead the principal, master, employer, or state," in violation of R.I. Gen. Laws § 11-18-1 (Count XVIII); and

- The Diocesan Defendants' participation in obtaining property by false pretenses, in violation of R.I. Gen. Laws § 11-41-4 (Count XIX).

In other words, in the course of committing the other alleged torts, the Diocesan Defendants also participated in committing various crimes injuring Plaintiffs, for which Rhode Island provides a civil cause of action.

1. Violations of the Rhode Island Hospital Conversions Act and/or giving false or incorrect information

a. Elements of violations of the Rhode Island Hospital Conversions Act and/or giving false or incorrect information

R.I. Gen. Laws § 23-17.14-30 provides in relevant part:

> If any person **knowingly violates or fails to comply with any provision of this chapter** [The Hospital Conversions Act] **or willingly or knowingly gives false or incorrect information**:
>
> * * *
>
> (2) The Superior Court may, after notice and opportunity for a prompt and fair hearing, may impose a fine of not more than one million dollars ($1,000,000) **or impose a prison term** of not more than five (5) years.

R.I. Gen. Laws § 23-17.14-30 (emphasis supplied).

There is no case law yet applying R.I. Gen. Laws § 23-17.14-30. According to the plain meaning of the statute, it criminalizes "knowingly violat[ing] or fail[ing] to comply" with any provision of the Hospital Conversion Act and/or "willingly or knowingly giv[ing] false or incorrect information" in connection with hospital conversions. Reliance or deception of the recipient is not mentioned—and therefore is not—an element of this statutory crime. Cf. Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 648 (2008) ("If petitioners' proposed requirement of first-party reliance seems to come out of nowhere, there is a reason: Nothing on the face of the relevant statutory provisions imposes such a requirement.").

b. Diocesan Defendants' violations of the Rhode Island Hospital Conversions Act and/or giving false or incorrect information

The First Amended Complaint alleges the Diocesan Defendants committed this crime, causing injuries to Plaintiffs for which there is civil liability under R.I. Gen. Laws § 9-1-2. See FAC ¶¶ 531–34. Their violations include sending Bishop Tobin's February 14, 2014 letter to the Health Services Council (as part of the regulatory proceedings), in which the Diocesan Defendants gave false or incorrect information about their beliefs concerning the impact of the 2014 Asset Sale on the Plan. FAC ¶¶ 320–21. They also include participating in the other Defendants' violations in connection with the overall scheme and conspiracy. All of these violations caused injuries to Plaintiffs.

2. Aiding or assisting the filing of false tax returns

a. Elements of aiding or assisting the filing of false tax returns

26 U.S.C. § 7206 provides in relevant part:

> Any person who--
>
> * * *
>
> (2) Aid or assistance.--Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document;
>
> * * *
>
> **shall be guilty of a felony** and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.
>
> [Emphasis supplied]

26 U.S.C. § 7206(2). "[T]he elements of a violation of § 7206(2) include, inter alia, that the document in question was false as to a material matter and that the defendant acted willfully." Kawashima v. Holder, 565 U.S. 478, 484 (2012). "The identity of the principal need not be established, nor need the principal be convicted." United States v. Campa, 679 F.2d 1006, 1013 (1st Cir. 1982) (discussing aiding and abetting generally); United States v. Salerno, 330 F. Supp. 1401, 1402 (M.D. Pa. 1971) (it is "not a prerequisite to the conviction of the aider and abettor that the principal be convicted or even, in fact, identified") (discussing violations of 26 U.S.C. § 7206(2)). "Reliance by the government on the fraudulent information provided cannot be an element of a criminal tax offense."

United States v. Monteiro, 871 F.2d 204, 210 (1st Cir. 1989) (noting that if reliance were required, "no undercover operation in this area would be effective because government knowledge that the information provided was false would preclude a conviction").

Section 7206(2) is "not limited to tax return 'preparers'." United States v. Wolfson, 573 F.2d 216, 225 (5th Cir. 1978). See id. ("If it is proved on remand that [defendant] knowingly gave a false appraisal [of donated yachts' value] with the expectation it would be used by the donor in taking a charitable deduction on a tax return, it would constitute a crime."). A "person can be convicted of aiding the filing of a false return even though he did not actually prepare it. All that is required is that he "knowingly participate in providing information that results in a materially fraudulent tax return, whether or not the taxpayer is aware of the false statements." United States v. Nealy, 729 F.2d 961, 963 (4th Cir. 1984). See, e.g., United States v. Fumo, 628 F. Supp. 2d 573, 595 (E.D. Pa. 2007) (denying motion to dismiss indictment, where state senator made false statements to university's accountants misstating the purpose of university's polling expenditures).

The false or fraudulent document prepared by the defendant need not itself be filed with the IRS. See United States v. Monteiro, 871 F.2d 204, 210–11 (1st Cir. 1989). ("[T]he offense of aiding or assisting the preparation or presentation of a false or fraudulent tax document is certainly complete when the document has been presented to a person or entity which is required by law to transmit the information thereon to the IRS.") See also United States v. Cutler, 948 F.2d 691, 694–95 (10th Cir. 1991) (affirming conviction of defendant who "willfully provided false information to an

intermediary required by law to file an informational return pertaining to the defendant") (citing Monteiro).

b. The Diocesan Defendants' aiding or assisting of SJHSRI's filing of false tax returns

The First Amended Complaint alleges the Diocesan Defendants violated 26 U.S.C. § 7206(2) in connection with SJHSRI's filing of Form 900 tax returns, causing injuries to Plaintiffs for which there is civil liability under R.I. Gen. Laws § 9-1-2. See FAC ¶¶ 183–205, 535–38. The Diocesan Defendants participated in fraudulently listing SJHSRI in the Official Catholic Directory under the Diocesan Defendants' sponsorship, so that SJHSRI could falsely claim the U.S. Conference of Catholic Bishops' 501(c)(3) exemption. This injured Plaintiffs by facilitating SJHSRI's improper claim of ERISA-exempt church plan status for the Plan before, during, and after the 2014 Asset Sale.

3. Giving false or erroneous documents

a. Elements of giving false or erroneous documents

R.I. Gen. Laws § 11-18-1 states as follows:

> § 11-18-1. Giving false document to agent, employee, or public official
>
> (a) No person shall knowingly give to any agent, employee, servant **in public or private employ**, or public official any receipt, account, or other document in respect of which the principal, master, or employer, or state, city, or town of which he or she is an official is interested, which contains any statement which is false or erroneous, or defective in any important particular, and which, to his or her knowledge, is intended to mislead the principal, master, employer, or state, city, or town of which he or she is an official.
>
> (b) **Any person who violates any of the provisions of this section shall be deemed guilty of a misdemeanor**, and, upon conviction, shall

> be imprisoned, with or without hard labor, for a term not exceeding one year or be fined not exceeding one thousand dollars ($1,000).

R.I. Gen. Laws § 11-18-1 (emphasis supplied).

"The purpose of the statute is to protect the public and private entities named in the statute from fraud and deceit and the perversion which might result from the deceptive practices described." State v. Salvatore, 763 A.2d 985, 990 (R.I. 2001). To prove a violation, it is sufficient to prove that a "defendant caused a document to be prepared that was false or erroneous with an intent to mislead." State v. Smith, 662 A.2d 1171, 1177 (R.I. 1995). A violation is punishable as a crime, see R.I. Gen. Laws § 11-18-1(b), and is therefore actionable pursuant to R.I. Gen. Laws § 9-1-2. Here, again, reliance is not an element of the offense.

b. Diocesan Defendants' giving of false or erroneous documents

All of the false written statements disseminated by the Diocesan Defendants fall within the ambit of this statute. These include the Diocesan Defendants' direction to the editors of the Official Catholic Directory that SJHSRI remain listed, FAC ¶ 190, as well as the letters sent by Bishop Tobin to the Health Services Council and the Vatican seeking approval of the 2014 Asset Sale. FAC ¶¶ 320, 180. These violations also include participating in the other Defendants' violations in connection with the overall scheme and conspiracy. All of these violations caused injuries to Plaintiffs for which there is civil liability under R.I. Gen. Laws § 9-1-2.

4. Obtaining property by false pretenses

a. Elements of obtaining property by false pretenses

The crime of obtaining property by false pretenses is defined by R.I. Gen. Laws § 11-41-4 as follows:

> § 11-41-4. Obtaining property by false pretenses or personation
>
> Every person who shall obtain from another designedly, by any false pretense or pretenses, any **money**, goods, wares, **or other property**, with intent to cheat or defraud, and every person who shall personate another or who shall falsely represent himself or herself to be the agent or servant of another and shall receive any money or other property intended to be delivered to the person so personated, or to the alleged principal or master of that agent or servant, shall be deemed guilty of larceny.

R.I. Gen. Laws § 11-41-4 (emphasis supplied).

As quoted, the statute proscribes acquisition of either money or other property by false pretense(s). "The elements of obtaining money by false pretenses under § 11-41-4 are that the accused: (1) obtain money from another designedly, by any false pretense or pretenses; and (2) with the intent to cheat or defraud." State v. Grant, 840 A.2d 541, 549 (R.I. 2004) (internal quotations omitted). "Under the statute, a false pretense may be a misrepresentation of a past or existing fact. A promise to perform a future act may also constitute a false pretense." State v. Letts, 986 A.2d 1006, 1011 (R.I. 2010) (citation omitted). The "intent to permanently deprive a victim of his or her money or property" is not an essential element under Rhode Island law. State v. LaRoche, 683 A.2d 989, 997 (R.I. 1996). Obtaining money or property by false pretenses is a statutory crime, hence "the language of the statute setting forth the crime contains all the essential elements of the offense." State v. Markarian, 551 A.2d 1178, 1180 (R.I. 1988). Since "neither the word victim nor its synonym appears" in the statute,

even the existence of a victim is "not an essential element" of "obtaining property by false pretenses." Id. "Further, even proof that a victim has suffered no loss whatsoever or that the money fraudulently obtained has been repaid will not suffice as a defense." State v. Letts, 986 A.2d at 1012.

b. The Diocesan Defendants' obtaining money or property by false pretenses

The Diocesan Defendants committed the crime of obtaining property by false pretenses by participating in the fraudulent consummation of the 2014 Asset Sale, pursuant to which they obtained $638,838.25 in proceeds, and in which other Defendants obtained real estate and other property. Such crime caused injuries to Plaintiffs for which there is civil liability under R.I. Gen. Laws § 9-1-2.

B. The First Amended Complaint sufficiently alleges injuries caused "by reason of" the violations of criminal law

1. The Diocesan Defendants' temporal arguments do not disprove causation

The Diocesan Defendants contend that because the Plan was already underfunded prior to 2014, none of the Diocesan Defendants' alleged crimes beginning in 2014 could have injured the Plan. Diocesan Defendants' Memo. at 91.

First, as a matter of chronological fact, the Diocesan Defendants are incorrect to assert that these crimes began in 2014. Defendants' violations of the Hospital Conversion Act began in 2013 when they first submitted their application for conversion.

Second, and more significantly, Defendants (including the Diocesan Defendants) injured the Plan by diverting assets that were available to pay pensions and by furthering SJHSRI's improper claim of ERISA-exempt church plan status for the Plan.

The underfunding of the Plan and improper claim of ERISA exemption were not one-time events but ongoing wrongs as to which that the Diocesan Defendants conspired with other Defendants to perpetuate. Those wrongs also persisted during the three years of delay between the 2014 Asset Sale and the filing of the Plan Receivership Petition, resulting in damages for that period (in addition to the period prior to the 2014 Asset Sale).

2. Plaintiffs' injuries are not too attenuated from Defendants' crimes

R.I. Gen. Laws § 9-1-2 provides a remedy for injuries caused "by reason of the commission of any crime or offense." The Diocesan Defendants contend that the phrase "by reason of" requires a "direct" link between the crime and the injury, not an "indirect" link. Diocesan Defendants' Memo. at 92. This distinction between "direct" and "indirect" links does not have any basis in the statute, which "is an enabling act giving a person *injured as a result of* a crime or offense a right of action" for such injuries. Lyons v. Town of Scituate, 554 A.2d 1034, 1036 (R.I. 1989) (emphasis supplied); Mello v. DaLomba, 798 A.2d 405, 411 (R.I. 2002) (same).[242] That is certainly demonstrated by the allegations of the First Amended Complaint, which alleges that Defendants specifically intended to divert the assets away from paying Plan liabilities and specifically intended to deprive the Plan of ERISA protections. See, e.g., FAC ¶¶ 154-55.

[242] The Diocesan Defendants cite Cortellesso v. Cortellesso, No. C.A. NO. P.C. 95-457, 1997 WL 839911, at *8 (R.I. Super. Apr. 29, 1997) (Israel, J.), a Superior Court decision construing R.I. Gen. Laws § 9-1-2's phrase "by reason of" to mean "proximately caused by". Assuming (*arguendo*) that ordinary proximate causation is the correct standard, it is different from the standard that the Diocesan Defendants ask the Court to adopt here.

The Diocesan Defendants also cite Kelly v. Marcantonio, 187 F.3d 192, 203 n.8 (1st Cir. 1999) as purportedly stating that R.I. Gen. Laws § 9-1-2 "requires both actual and proximate causation." Diocesan Defendants' Memo. at 91 (misciting Kelly). It did not. The First Circuit in Kelly actually stated that R.I. Gen. Laws § 9-1-2 merely "requires a causal connection between the alleged crime and the claimed injury":

> Indeed, § 9–1–2 provides that "[w]henever any person shall suffer any injury to his or her person ... by reason of the commission of any crime or offense, he or she may recover his or her damages for such injury in a civil action against the offender...." R.I. Gen. Laws § 9–1–2 (emphasis added). The plain language of the statute thus requires a causal connection between the alleged crime and the claimed injury. Thus, to the extent plaintiff-appellants are asserting a claim under § 9–1–2 for an alleged cover-up, their claim also fails because of the lack of any nexus between the alleged cover-up and the injuries (and damages) that they claim.

Kelly v. Marcantonio, 187 F.3d 192, 203 n.8 (1st Cir. 1999). As discussed *supra* and *infra*, Plaintiffs here have alleged such causal connection *in extenso*.

a. Causation for Counts XVI, XVIII, and XIX

The Diocesan Defendants contend that Plaintiffs' injuries are too distant from the crimes relating to violations of the Hospital Conversion Act, giving of false documents, and obtaining of property by false pretenses to be compensable under R.I. Gen. Laws § 9-1-2. Diocesan Defendants' Memo. at 92–93. As noted above, these injuries were not only foreseeable but were the intended results of Defendants' crimes. They were directly inflicted by at least some of the Defendants (including SJHSRI) with the participation of the other Defendants.

The Diocesan Defendants again cite Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258 (1992), discussed *supra* at 78, in which the U.S. Supreme Court concluded that

Congress, in creating a civil RICO cause of action, adopted the "direct-injury" limitation of the Clayton Act and therefore did not allow subrogees (plaintiffs subrogated to other victims' claims) to obtain treble damages. See Holmes, 503 U.S. at 272. Plaintiffs have not asserted any RICO claims in this action, whether federal RICO or state RICO. There can be no legitimate suggestion that the Rhode Island General Assembly, in enacting R.I. Gen. Laws § 9-1-2 in 1905, intended to adopt a standard from the Clayton Act which was later enacted in 1914. In any event, Plaintiffs have alleged injuries directly flowing from Defendants' conduct which would satisfy even the standard articulated in Holmes. Plaintiffs are not merely "secondary victims" of Defendants' crimes, Holmes, 503 U.S. at 274, whose injuries were inflicted by other more direct victims.

b. Causation for Count XVII

The Diocesan Defendants contend that the IRS is the victim of the alleged tax crimes, not Plaintiffs. Diocesan Defendants' Memo. at 93. This is *ipse dixit* unsupported by any actual citation to applicable case law. The only citation the Diocesan Defendants offer is In re McNulty, 597 F.3d 344, 352 (6th Cir. 2010), in which a whistleblower who was fired for not participating in his employer's crimes was denied a writ of mandamus to enforce rights to restitution under the Crime Victims' Rights Act, 18 U.S.C. § 3771. In re McNulty, 597 F.3d at 349. The court reasoned that being wrongly fired was itself a tort claim rather than a criminal offense, and noted that the Crime Victims' Rights Act "was not enacted to short circuit civil litigation to those with valid civil remedies available." In re McNulty, 597 F.3d at 352, 352 n.8 (6th Cir. 2010). The court concluded McNulty was free to pursue those civil remedies against his former

employer without being granted restitution in connection with criminal proceedings. See id. Here, of course, Plaintiffs are seeking to enforce their civil remedies under a state statute that gives them a cause of action to recover damages caused by commission of a crime. Moreover, there are no pending criminal proceedings in which Plaintiffs could even ask for restitution, must less be granted it. And regardless, Plaintiffs do not assert claims under the Crime Victims' Rights Act and certainly do not seek mandamus under it.

The Diocesan Defendants contend that "a finding of 'direct injury' requires 'that the harm to the victim be closely related to the conduct inherent to the offense'" and that the "underfunding of a pension plan is in no way inherent to the offense of filing a false tax return". Diocesan Defendants' Memo. at 94 (quoting In re McNulty out of context). Again, Plaintiffs are not asserting rights under the Crime Victim Rights Act. The Court is not being asked to make any "finding of 'direct injury'" under that statute. The fact that *not every* filing of a false tax return is related to the underfunding of a pension plan does not foreclose that *this* filing was so related.

3. The alleged criminal violations are based on misrepresentations both to Plaintiffs and to the Regulators, and the latter are indeed actionable under R.I. Gen. Laws § 9-1-2

The Diocesan Defendants contend: "Where the alleged criminal violation is based on misrepresentations to a regulator—and not the plaintiffs—harm to those plaintiffs cannot have been caused 'by reason of' the underlying violation." Diocesan Defendants' Memo. at 94. This assertion lacks even a factual basis here, much less a

legal basis, inasmuch as the Defendants' crimes included misrepresentations made directly to Plaintiffs.

The only purported legal support the Diocesan Defendants offer is yet another RICO case, Hemi Grp., LLC v. City of New York, N.Y., 559 U.S. 1 (2010), notwithstanding that Plaintiffs are still not asserting any RICO claims. In Hemi Grp., LLC, the City of New York attempted to assert the following RICO claim:

> According to the City, Hemi committed fraud by selling cigarettes to city residents and failing to submit the required customer information to the State. Without the reports from Hemi, the State could not pass on the information to the City, even if it had been so inclined. Some of the customers legally obligated to pay the cigarette tax to the City failed to do so. Because the City did not receive the customer information, it could not determine which customers had failed to pay the tax. The City thus could not pursue those customers for payment. The City thereby was injured in the amount of the portion of back taxes that were never collected.

Hemi Grp., LLC, 559 U.S. at 2. The Supreme Court rejected that RICO claim:

> Here, the City's theory of liability rests not just on separate actions, but separate actions carried out by separate parties. The City's theory thus requires that the Court extend RICO liability to situations where the defendant's fraud on the third party (the State) has made it easier for a fourth party (the taxpayer) to cause harm to the plaintiff (the City). Indeed, the fourth-party taxpayers here only caused harm to the City in the first place if they decided not to pay taxes they were legally obligated to pay. Put simply, Hemi's obligation was to file Jenkins Act reports with the State, not the City, and the City's harm was directly caused by the customers, not Hemi. The Court has never before stretched the causal chain of a RICO violation so far, and declines to do so today.

Hemi Grp., LLC, 559 U.S. at 2–3.

The Diocesan Defendants seize upon Hemi Grp., LLC's discussion of "different parties" and insist that Defendant SJHSRI is a "fourth party" who caused Plaintiffs' injuries. Diocesan Defendants' Memo. at 94. This is wrong. SJHSRI is not only the

Diocesan Defendants' co-Defendant but their coconspirator. These are not "separate actions caused by separate parties" but the same action (assisting SJHSRI in filing a fraudulent Form 990 to facilitate its pretense that the Plan was exempt from ERISA) caused by the same parties.

4. R.I. Gen. Laws § 9-1-2 grants Plaintiffs a remedy as victims of criminal conduct regardless of whether state actors have acted to seek any remedy

The Diocesan Defendants contend that Plaintiffs are barred from asserting claims under R.I. Gen. Laws § 9-1-2 for any of the alleged crimes, because "[t]he alleged direct victims here (the state regulators and the IRS) are perfectly capable of pursuing appropriate remedies under their regulatory and statutory authority, without broadening the universe of civil actions to indirect victims." Diocesan Defendants' Memo. at 95. This is apparently a public policy argument in favor of repealing R.I. Gen. Laws § 9-1-2, improperly directed to this Court instead of to the General Assembly. As noted *supra* at 142, "[t]he purpose of § 9-1-2 is to provide an injured party civil remedies regardless of whether the defendant has been convicted of the underlying offense." Cady v. IMC Mortg. Co., 862 A.2d 202, 215 (R.I. 2004). These civil remedies do not depend in any way on whether governments separately seek to enforce the criminal laws and impose criminal sanctions on the Defendants. Certain misrepresentations were made to the state regulators and the IRS, but the "victims" include the Plan participants.

The Diocesan Defendants' series of citations to cases declining to imply a civil remedy into various other statutes, see Diocesan Defendants' Memo. at 95–96, simply ignore that R.I. Gen. Laws § 9-1-2 expressly creates a civil remedy for violations of all

Rhode Island and federal statutes. See *supra* at 158–165 (treating this argument in connection with the Diocesan Defendants' preemption arguments).

C. Count XVII is not preempted by federal law

1. R.I. Gen. Laws § 9-1-2 is not preempted by federal law

R.I. Gen. Laws § 9-1-2 provides a civil remedy for violations of federal criminal law no less than for violations of Rhode Island criminal law. See *supra* at 142–143 (discussing Mello v. DaLomba, 798 A.2d 405 (R.I. 2002), Transamerica Life Ins. Co. v. Caramadre, No. CV 09-470 S, 2017 WL 752145, at *3 (D.R.I. Feb. 27, 2017) (Smith, C.J.), and Cady v. IMC Mortg. Co., 862 A.2d 202 (R.I. 2004)). The Diocesan Defendants do not address any of this case law addressing the particular statute in question.

Instead, much of the Diocesan Defendants' memorandum is devoted to erecting and dismantling straw-man arguments about whether Congress intended to provide a private cause of action for violations of other various federal statutes (other than ERISA). These arguments misconceive Plaintiffs' crime-related claims, which are not brought directly under any federal statute but rather are brought under R.I. Gen. Laws § 9-1-2, which provides a private cause of action for persons injured by criminal violations regardless of whether Congress also intended to provide one. In other words, the question is not whether Congress has created a private cause of action but whether Congress has foreclosed Rhode Island from doing so. "[T]he absence of a private right of action in a federal statute actually weighs *against* preemption." Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 582 (7th Cir. 2012) (emphasis in the original).

As the Seventh Circuit has explained, the Diocesan Defendants' "preemption" / "end run"[243] argument is mistaken at its core:

> In addition to its formal preemption argument, USA Funds argues that Bible's state law claim is **"preempted"** because it is nothing more than a "disguised claim" for a violation of the HEA [Higher Education Act of 1965], and the HEA does not provide a private right of action. We considered and rejected this same theory in *Wigod* [*v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012)]. There the defendant-lender referred to it as an **"end-run"** theory rather than a "disguised claim" theory. The difference is merely semantic. **The defense theory in both cases is that the lack of a private right of action under a regulatory statute necessarily preempts or otherwise displaces a state law cause of action that makes the violation of that regulatory statute an element of the claim. This theory is mistaken at its core**: "The absence of a private right of action from a federal statute provides no reason to dismiss a claim under a state law just because it refers to or incorporates some element of the federal law. To find otherwise would require adopting the novel presumption that where Congress provides no remedy under federal law, state law may not afford one in its stead." *Wigod*, 673 F.3d at 581 (citation omitted).
>
> [Emphasis supplied]

Bible v. United Student Aid Funds, Inc., 799 F.3d 633, 654 (7th Cir. 2015).

The Diocesan Defendants' argument has also been rejected in the specific context of states' regulation of the submitting of false documents to the federal Internal Revenue Service. In State v. Radzvilowicz, 703 A.2d 767 (Conn. App. 1997), the defendant was convicted under state criminal law for forgery of federal income tax documents submitted to the federal Internal Revenue Service. On appeal, the

[243] Diocesan Defendants' Memo. at 97 ("Count XVII Must Be Dismissed Because R.I. Gen. Laws § 9-1-2 Is Preempted by Federal Law and Would Constitute an Impermissible End Run Around the Lack of a Private Right of Action Under the Internal Revenue Code") (emphasis supplied); id. at 100 ("Count XVII Seeks an Impermissible End Run Around the Lack of a Private Right of Action under the Internal Revenue Code") (emphasis supplied).

defendant unsuccessfully argued that his criminal prosecution was preempted by federal law. See id. at 784. Like the Diocesan Defendants, Radzvilowicz argued that 26 U.S.C. § 7206 provides the exclusive remedy for submitting false documents to the Internal Revenue Service. That argument was rejected:

> It has been said that "[s]ince the Federal Criminal Code confers upon the District Courts of the United States original jurisdiction, exclusive of state courts, of 'all offenses against the laws of the United States,' such courts by virtue of such provision of course have original and exclusive jurisdiction of prosecutions for offenses against the tax laws of the United States or more specifically, in violation of the Internal Revenue Code." 35 Am.Jur.2d 175, Federal Tax Enforcement § 125 (1967). Under 18 U.S.C. § 3231, "[t]he district courts of the United States shall have original jurisdiction, exclusive of the Courts of the States, of all offenses against the laws of the United States. Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof." **The defendant suggests that this section of the United States Code, which denominates the federal jurisdictional predicate for those federal crimes, i.e., 26 U.S.C. § 7206 (fraud and false statements)** and § 7207 (fraudulent returns, statements or other documents), **preempts the state prosecution of the forgery charges in this case**.
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> * * *
>
> Here, the crime at issue is forgery. In pursuing that charge in this particular case, the state is not at all trenching upon the IRS' pursuit of the code violations by the defendant. The IRS, as the witness Reheault explained, was pursuing the violations by its filing of tax liens and assessment of penalties. It chose not to proceed, although it could have, on the forgery and specifically not on 26 U.S.C. §§ 7206 and 7207. **The state's legitimate interest in enforcing its forgery statute is not at all incompatible with the federal regulatory scheme in this instance.**
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> [Emphasis supplied]

State v. Radzvilowicz, 703 A.2d 767, 786–87 (Conn. App. 1997). See also State v. Diaz-Rey, 397 S.W.3d 5, 8–9 (Mo. Ct. App. 2013) (criminal conviction under Missouri forgery statute for use of false social security card not preempted by federal law).

The Diocesan Defendants certainly have not carried their heavy burden of proof in establishing that the I.R.S. Code preempts R.I. Gen. Laws § 9-1-2:

> Implied preemption analysis does not justify a "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives"; such an endeavor "would undercut the principle that it is Congress rather than the courts that pre-empts state law." Our precedents "establish that a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act."

Chamber of Com. of U.S. v. Whiting, 563 U.S. 582, 607 (2011) (citations omitted).

2. Rhode Island has permissibly created a private cause of action for violation of federal criminal law

The Diocesan Defendants resume citing various cases mentioning the lack of implied private causes of action in various federal statutes. See Diocesan Defendants' Memo. at 100 (citing Levy v. World Wrestling Entm't, Inc., No. CIV.A.308-01289(PCD), 2009 WL 455258, at *2 (D. Conn. Feb. 23, 2009), Astra USA, Inc. v. Santa Clara Cty., Cal., 563 U.S. 110, 117-19 (2011), Grochowski v. Phoenix Const., 318 F.3d 80, 86 (2d Cir. 2003)). The Diocesan Defendants ignore that here it is R.I. Gen. Laws § 9-1-2 that creates these causes of action, and it does so expressly.

The first three of these cases also involved claims for breach of contract[244] and an "inability to assert a statutory right of action," Astra USA, Inc., 563 U.S. at 117,

[244] Astra USA, Inc., Grochowski, and Cooper involved third-party beneficiary claims, i.e. breach of contract claims asserted by plaintiffs who were not even parties to the contract. See Astra USA, Inc., 563

neither of which is present as to the Diocesan Defendants. A fourth case they cite, Cooper v. Charter Commc'ns Entertainments I, LLC, 760 F.3d 103, 110 n.6 (1st Cir. 2014), not only did *not* involve any federal statute, but actually concluded that the plaintiffs *did* have a claim under one Massachusetts statute for violations of the other (Massachusetts) statute:

> Although third-party beneficiary principles provide no basis on which the plaintiffs can sue Charter for breach of its promise to municipalities, Massachusetts' legislature has provided an alternative path to a similar destination, without requiring any inquiry into common law notions of intended beneficiaries. Specifically, Chapter 93A of the Massachusetts code authorizes consumers to sue for "[u]nfair methods of competition and

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U.S. at 117 ("Notwithstanding its inability to assert a statutory right of action, the County maintains that the PPAs implementing the 340B Program are agreements enforceable by covered entities as third-party beneficiaries."); Grochowski, 318 F.3d at 85 (2d Cir. 2003) ("Here, the plaintiffs did not bring a § 1983 action. Nor did they allege claims directly under the DBA [Davis-Bacon Act], but instead brought state-law claims for breach of contract as third party beneficiaries of the contracts and for quantum meruit."); Cooper, 760 F.3d at 110 ("We are nevertheless persuaded by the language of the contract as a whole that the parties did not intend individuals to hold power to enforce it."). Such claims require a multi-stage process of heaping implied contractual causes of action on top of implied statutory causes of action.

In addition, the Second Circuit's preemption analysis in Grochowski has been widely criticized, including by the New York Court of Appeals:

> Defendants urge us to accept the view of the Second Circuit Court of Appeals in *Grochowski* that since there is no federal claim for workers under the DBA [Davis-Bacon Act] there can be no state claim, because a state claim would be "an impermissible 'end run' around the DBA" (318 F.3d at 86). We agree with Judge Lynch, dissenting in *Grochowski*, that this reasoning is flawed. To say that Congress, in enacting the DBA, did not intend to create a federal right of action is not to say that Congress intended to prohibit, or preempt, state claims. Indeed, while it is clear that federal statutes will not ordinarily be read to create new federal rights absent an affirmative indication that that was Congress's intention, it is equally clear that Congress will not ordinarily be found to have preempted state law where it has not done so expressly. In other words, the default assumption, absent a showing to the contrary, is that Congress intended neither to create a new federal right of action nor to preempt existing state ones.

Cox v. NAP Const. Co., 891 N.E.2d 271, 276 (N.Y. 2008) (citations omitted). Grochowski thus bears the perhaps ignominious distinction of being a federal preemption case originating in the Southern District of New York that does not preempt any claims filed in New York state courts. Indeed, it has only been "begrudgingly" followed by federal district courts within the Second Circuit. See Garcia v. Skanska USA Bldg., Inc., 324 F. Supp. 3d 76, 83 n.6 (D.D.C. 2018) ("District courts in the Second Circuit have followed Grochowski only begrudgingly. *See Isufi v. Prometal Constr., Inc.*, 927 F.Supp.2d 50, 52 (E.D.N.Y. 2013) ('Even though Judge Lynch's dissent in *Grochowski* appears to be correct, federal courts operate within a hierarchical system.').").

> unfair or deceptive acts or practices in the conduct of any trade or commerce." Mass. Gen. Laws ch. 93A, § 2(a).
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> * * *
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> A recent decision by the Massachusetts Supreme Judicial Court makes clear that a failure by Charter to pay a credit in accord with its statutorily-imposed[245] contractual obligation would likely violate Chapter 93A. . . .
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> * * *
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> We acknowledge that this conclusion seems at first blush at odds with our conclusion regarding the third party beneficiary claim. Any such appearance is misleading. To the extent a duty is merely created by contract, it makes sense that Massachusetts law would leave it to the contracting parties to decide who can enforce it. To the extent that the duty also emanates from a legislative judgment that it reflects fair treatment of customers, however, the state legislature by enacting Chapter 93A has opted to let consumers seek relief in court. In short, the Massachusetts legislature created two potential causes of action in the event of a breach by Charter: an action for breach of contract, and an action under Chapter 93A, each subject to different procedures and remedies. The fact that Massachusetts, like other states, allows the contracting parties to decide who can maintain an action for breach of the contract does not mean that Massachusetts has allowed the contracting parties to take away the consumers' rights under Chapter 93A.

Cooper v. Charter Commc'ns Entertainments I, LLC, 760 F.3d 103, 111-12 (1st Cir. 2014).

The Diocesan Defendants also cite Brissenden v. Time Warner Cable of New York City, 25 Misc. 3d 1084, 1091 (N.Y. Sup. Ct. 2009) as purportedly stating: "A 'plaintiff cannot use [a state statute] to circumvent the lack of private right of action under [a] federal statute." Diocesan Defendants' Memo. at 101 (such bracketed

[245] Referring to a statutory obligation imposed by Mass. Gen. Laws ch. 166A, § 5. See Cooper, 760 F.3d 103, 108 (1st Cir. 2014).

language being inserted by the Diocesan Defendants). This use of brackets is so egregious that Plaintiffs once again[246] wonder how it can be reconciled with the Diocesan Defendants' duty of candor to the Court. The Brissenden decision actually stated:

> Plaintiff argues that Time Warner has violated the Cable Television Consumer Protection and Competition Act of 1992 (47 USC §§ 521-559), which prohibits a cable company from engaging in negative option billing, defined therein as charging a subscriber for any service or equipment that the subscriber has not affirmatively requested by name (47 USC § 543 [f]). **By installing and billing for optional converter boxes and remotes without the subscriber's affirmative consent, plaintiff alleges that Time Warner has committed a per se violation of General Business Law § 349. However, there is no private right of action for a violation of 47 USC § 543 (f), and plaintiff cannot use General Business Law § 349 to circumvent the lack of private right of action under this federal statute.** (Cf. *Broder v Cablevision Sys. Corp.*, 418 F3d 187, 199 [2d Cir 2005] [no private right of action for violation of the uniform rate requirement of 47 USC § 543 (d)].) Plaintiff must still prove each of the elements of an unfair trade practice, including actual injury.
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> [Emphasis supplied]

Brissenden, 25 Misc. 3d at 1091–92 (citing Broder v. Cablevision Sys. Corp., 418 F.3d 187, 199 (2d Cir. 2005)). In other words, the question was whether the violation of *a particular* federal statute constituted a per se violation of *a particular* state statute prohibiting unfair and deceptive business practices. The answer to that question turned on the intent of the New York legislature. See Broder, 418 F.3d at 199 ("Neither the text of GBL § 349 nor any other authority cited by Broder suggests that the New York

[246] See ECF # 96-1 at 90–91 (commenting on the Diocesan Defendants' same mutilation of the Brissenden decision in their prior memorandum, in relation to the Diocesan Defendants' duty of candor to the Court). The Diocesan Defendants' only reply was to insist: "General Business Law § 349 is, indeed, a New York state statute." ECF # 114 at 61 n.34. Evidently the Diocesan Defendants believe that gives them license to rewrite the Brissenden opinion to sweep far more broadly than it actually does, while obfuscating the extent of their revision.

legislature intended to cast its net so broadly."). Here, we do not need to guess at the Rhode Island General Assembly's intent in enacting R.I. Gen. Laws § 9-1-2, because we have Rhode Island Supreme Court decisions, and a prior decision of this Court, expressly concluding that R.I. Gen. Laws § 9-1-2 incorporates violations of federal criminal law.

D. Count XIX (obtaining property by false pretenses) should not be dismissed for failure to plead satisfaction of its elements

The Diocesan Defendants contend that Plaintiff has failed to plead facts alleging that the Diocesan Defendants obtained property by false pretenses. Diocesan Defendants' Memo. at 101. As noted *supra* at 151, Plaintiffs have indeed done so, and have also pled facts alleging that the Diocesan Defendants participated in the other Defendants' obtaining other property.

The Diocesan Defendants contend that "Plaintiffs have not alleged that the Diocesan Defendants obtained any property *from Plaintiffs*." Diocesan Defendants' Memo. at 101 (emphasis supplied). That is not an element of R.I. Gen. Laws § 11-41-4, which merely requires that property be obtained "from another". There is no dispute that the Diocesan Defendants obtained[247] cash proceeds from the 2014 Asset Sale, in addition to participating in other Defendants' obtaining real estate and other hospitals. Rather than needing to demonstrate ownership of the property, Plaintiffs need only demonstrate the "alter[ing] or terminat[ion]" of "rights or powers concerning the money or property." State v. Letts, 986 A.2d 1006, 1011 (R.I. 2010). While Plaintiffs do need

[247] FAC ¶¶ 206-10.

to demonstrate an injury for purposes of their false-pretenses R.I. Gen. Laws § 9-1-2 claim, there is no need to demonstrate that Plaintiffs or anyone else was the victim of the crime. See State v. Markarian, 551 A.2d 1178, 1181 (R.I. 1988) ("[F]or the statutory crimes of obtaining property by false pretenses and forgery, a victim is not an essential element as neither the word victim nor its synonym appears in either statute.").

The Diocesan Defendants also contend that Plaintiffs have failed to establish "actual reliance" which they contend is an element of obtaining property by false pretenses. See Diocesan Defendants' Memo. at 101–102 (citing Nat'l Credit Union Admin. Bd. v. Regine, 795 F. Supp. 59, 70–71 (D.R.I. 1992)). Reliance is not an element of this statutory crime, as the Rhode Island Supreme Court made clear in 2010:

> Section 11–41–4 provides that "[e]very person who shall obtain from another designedly, by any false pretense or pretenses, any money, goods, wares, or other property, with intent to cheat or defraud, * * * shall be deemed guilty of larceny." **"[T]he essential elements of obtaining property by false pretenses are that the accused (1) obtain property from another designedly, by any false pretense or pretenses; and (2) with the intent to cheat or defraud."** *State v. Markarian*, 551 A.2d 1178, 1180 (R.I. 1988).
>
> [Emphasis supplied]

State v. Letts, 986 A.2d 1006, 1010–11 (R.I. 2010). In any event, Plaintiffs have alleged reliance on the Diocesan Defendants' misrepresentations, as discussed *supra*. Of course, the injury to Plaintiffs under R.I. Gen. Laws § 9-1-2 has already been discussed and will not be repeated.

Finally the Diocesan Defendants contend that Plaintiffs have failed to plead "a false representation and intent to defraud" with particularity under Fed. R. Civ. P. 9(b).

See Diocesan Defendants' Memo. at 102 (referring back to their earlier arguments). This contention fails for the reasons previously discussed.

VIII. Count XXI (breach of fiduciary duty) should not be dismissed for failure to state a claim

A. The elements of breach of fiduciary duty under Rhode Island law

The elements of a claim for breach of fiduciary duty under Rhode Island law are "(1) the existence of a fiduciary duty; (2) breach of that duty; and (3) damage proximately caused by the breach." Filippi v Filippi, No. WC/KB-2016-0627, 2017 WL 6513602, at *18 (R.I. Super. Dec. 14, 2017) (Stern, J.); Rhode Island Resource Recovery Corp. v. Van Liew Trust Co., No. PC-10-4503., 2011 WL 1936011 (R.I. Super. May 13, 2011) (Silverstein, J.); Chain Store Maint., Inc. v. Nat'l Glass & Gate Serv., Inc., No. PB 01-3522, 2004 WL 877599, at *13 (R.I. Super. Apr. 21, 2004) (Silverstein, J.). Claims for breach of fiduciary duty are inherently fact-intensive. Filippi, 2017 WL 6513602, at *19 ("A breach of fiduciary duty claim is factually intensive, taking into consideration all the facts relevant to the action undertaken by the fiduciary.") (denying summary judgment).

The criteria for finding a confidential or fiduciary relationship are also highly factual:

> There are no hard and fast rules about when a confidential relationship will be found. The court may consider a variety of factors, including the reliance of one party upon the other, the relationship of the parties prior to the incidents complained of, the relative business capacities or lack thereof between the parties, and the readiness of one party to follow the other's guidance in complicated transactions. Bogert, *Trusts and Trustees* § 482 at 280–336 (2d rev. ed. 1978). There is no requirement in this jurisdiction that a defendant must occupy a position of dominance over a plaintiff.

Simpson v. Dailey, 496 A.2d 126, 129 (R.I. 1985). "Divining the existence of a fiduciary duty is a fact-intensive enterprise." Cafe La France, Inc. v. Schneider Securities, Inc., 281 F. Supp. 2d 361 (D.R.I. 2003) (Lagueux, J.) (citing A. Teixeira & Co., Inc., 699 A.2d at 1387). "Among the relevant factors are the degree to which one party relies upon the other, the history of the parties' relationship preceding the incident spawning the alleged breach, the parties' relative levels of business sophistication, and the willingness of one party to accept guidance from the other." Id. (citing Simpson v. Dailey, *supra*, 496 A.2d at 129).

The First Amended Complaint sets forth extensive and specific allegations whereby Plaintiffs placed trust and confidence in the Diocesan Defendants which they breached, causing damages. This trust and confidence stemmed from decades of communications to SJHSRI's employees and Plan participants, through the Bishop, assuring them that their pensions were secure and their interests were being protected by the Diocese.

B. Plaintiffs' claims for breach of fiduciary duty should not be dismissed

The Diocesan Defendants contend that Plaintiffs "have pled no factual allegations that would establish a fiduciary relationship between the Diocesan Defendants and the Plaintiffs or Plan participants." Diocesan Defendants' Memo. at 102. That contention is incorrect as discussed *supra*.

The Diocesan Defendants also contend that the existence of fiduciary duties is in tension with Plaintiffs' allegation of "'diminished or nonexistent roles of Bishop Tobin and the Diocese' from 2009 onward." Diocesan Defendants' Memo. at 103 (quoting a

portion of FAC ¶ 87 out of context). The allegation that the Diocesan Defendants have amputated from Plaintiffs' Complaint (and now attempt to engraft onto the issue of fiduciary obligation) actually concerned their role *in SJHSRI's governance*:

> Starting in 2011, SJHSRI has filed its Form 990 with the IRS stating that CCCB was SJHSRI's "sole member." This confirms the diminished or nonexistent roles of Bishop Tobin and the Diocese of Providence **in SJHSRI's governance after the 2009 merger**.
>
> [Emphasis supplied]

FAC ¶ 87. There is no suggestion in the First Amended Complaint (or anywhere else, until the filing of the Receivership) that Plan participants' trust and reliance both before and after 2009 had been should have ceased. There is certainly no suggestion that any such untrustworthiness was communicated to Plaintiffs prior to the breaches of fiduciary duty.

IX. Count XXII (aiding and abetting breaches of fiduciary duty) should not be dismissed

Under Rhode Island law, the elements of a claim for aiding and abetting a breach of fiduciary duty are: "'(1) there was a breach of fiduciary duty; (2) the defendant knew of the breach; and (3) the defendant actively participated or substantially assisted in or encouraged the breach to the degree that he or she could not reasonably be held to have acted in good faith.'" Martin v Pascarella & Gill P.C., No. PC-2014-6336, 2017 WL 1195896, at *16 (R.I. Super. Mar. 24, 2017) (Silverstein, J.) (quoting Rhode Island Resource Recovery Corp. v Van Liew Trust Co., No. PC-10-4503, 2011 WL 1936011, at *8 (R.I. Super. May 13, 2011) (Silverstein, J.)). Like claims for breach of fiduciary duty, see *supra* at 167–168, claims for aiding and abetting breaches of fiduciary duty are extremely fact-intensive and are ill-suited for even summary judgment, let alone a

motion to dismiss. See In re Good Tech. Corp. Stockholder Litig., No. CV 11580-VCL, 2017 WL 2537347, at *2 (Del. Ch. May 12, 2017) ("Aiding-and-abetting claims are fact intensive and ill-suited for summary judgment."). See also U.S. Claims, Inc. v. Flomenhaft, 519 F. Supp. 2d 532, 540 (E.D. Pa. 2007) ("Finally, as to the alleged aiding and abetting of the Flomenhaft Defendants' breach of fiduciary duty, the Court is sufficiently persuaded that the question of the existence of a fiduciary duty is a fact-specific inquiry generally ill-suited for dismissal at the Rule 12(b)(6) stage.").

The Diocesan Defendants contend that Plaintiffs have not alleged sufficient facts to establish their knowledge of other Defendants' breaches of fiduciary duty or their active participation, assistance, or encouragement of such breach. Diocesan Defendants' Memo. at 104. That is incorrect for the reasons previously discussed. Plaintiffs have alleged specific details with respect to specific meetings on specific dates, as well as other communications, where these issues were discussed with the Diocesan Defendants and their agreement was reached.

The Diocesan Defendants also contend: "The fact that the Diocesan Defendants were made aware of the terms of the 2014 Asset Sale, and expressed their support for it does not, without more, constitute active participation or substantial assistance or encouragement of a breach." Diocesan Defendants' Memo. at 105. Of course, the First Amended Complaint alleges "more", including the Diocesan Defendants' participation in a scheme to deprive the Plan and Plan beneficiaries of the protections of ERISA by ensuring SJHSRI was not deleted from the Official Catholic Directory. All of these allegations, for purposes of the motion to dismiss, are sufficient to establish that the

Diocesan Defendants were not passive participants in other Defendants' breaches of fiduciary duty.

Finally, the Diocesan Defendants circle back to their fraud and conspiracy arguments. These are addressed elsewhere.

X. If any portion of the First Amended Complaint should be dismissed, it should be dismissed *without* prejudice and with leave to re-plead, since pleadings amended once "as a matter of course" do not receive any sort of heightened scrutiny, and any dismissal with prejudice would be an abuse of discretion

The Diocesan Defendants conclude by exhorting the Court to dismiss the First Amended Complaint with prejudice. See Diocesan Defendants' Memo. at 106. They provide no argument to support this exhortation. In their prior motion to dismiss, they argued that Plaintiffs have already amended their pleading once as of right under Fed. R. Civ. P. 15, Plaintiffs should not get another "bite at the apple". ECF # 67-1 at 8. The Diocesan Defendants have now abandoned that meritless argument and offer nothing to replace it.

While Plaintiffs contend that no portion of the First Amended Complaint should be dismissed, if (*arguendo*) the Court is inclined to dismiss any portion (which Plaintiffs respectfully believe it should not), the Court should do so without prejudice and with leave to re-plead.

Courts considering the question have concluded that an amendment "as a matter of course" under Fed. R. Civ. P. 15 does not prevent a plaintiff from ordinarily receiving an additional opportunity to amend in response to the court's ruling on the sufficiency (*vel non*) of his complaint. See In re Verilink Corp., 410 B.R. 697, 701 (N.D. Ala. 2009) ("When a plaintiff has amended a complaint once as a 'matter of course,' it cannot be

said that he has been given opportunity to amend by leave of court or that he has repeatedly failed to cure deficiencies through previously allowed amendments."); Nodd v. Integrated Airline Servs., Inc., 41 F. Supp. 3d 1355, 1368 (S.D. Ala. 2014) (same result). Circuit Courts considering the question have held that denial of leave to amend on this basis is an abuse of discretion:

> Ronzani's original complaint was amended, pursuant to Rule 15(a), "as a matter of course ... before a responsive pleading [was] served." In his supplemental memorandum in opposition to the motion to dismiss, Ronzani offered to amend his pleading to correct any perceived deficiencies with respect to his claims under the federal securities laws. In dismissing the amended complaint, however, the district court did not mention Ronzani's offer to amend and gave no reason for denying it. Since Ronzani had not previously been given leave to amend, and had offered to amend his complaint, we hold that the court abused its discretion in dismissing the complaint without leave to amend.

Ronzani v. Sanofi S.A., 899 F.2d 195, 198 (2d Cir. 1990).

> [T]he district court stated that the plaintiffs already had been "given one opportunity to amend their complaint." This assertion apparently refers to the plaintiffs' Amended Complaint, filed in response to the defendants' original motion to dismiss. Under Rule 15(a), an amendment may be made either as "a matter of course" or "by leave of court." See Fed.R.Civ.P. 15(a). The Amended Complaint was filed as a matter of course, and until the renewed motion to dismiss came before the court, the plaintiffs had not asked for leave to amend. Therefore, it cannot be said that the plaintiffs already had been given an opportunity to amend or that the plaintiffs repeatedly had failed to cure deficiencies through previously allowed amendments.

Bryant v. Dupree, 252 F.3d 1161, 1163–64 (11th Cir. 2001).

XI. Conclusion

The Diocesan Defendants' motion to dismiss should be denied.

Respectfully submitted,
All Plaintiffs,
By their Attorney,

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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.