UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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

REPLY IN FURTHER SUPPORT OF THE
DIOCESAN DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

DATED: June 29, 2022

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

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Defendants Roman Catholic Bishop of Providence, a corporation sole ("RCB"), Diocesan Administration Corporation ("DAC") and Diocesan Service Corporation ("DSC", and collectively with RCB and DAC, the "Diocesan Defendants") respectfully submit this reply memorandum in further support of their Motion for Summary Judgment, ECF No. 236.

PRELIMINARY STATEMENT

Plaintiffs' opposition to the pending summary judgment motion is like a squid spewing ink all around it to sneak away undetected. Here, Plaintiffs are slinking away from their own earlier motion for summary judgment that raised identical grounds, identical facts, and identical law. Nothing in their opposition disputes the facts or law as laid out in their prior motion for summary judgment, reiterated here by the Diocesan Defendants They offer nothing to contradict the conclusion that, as a matter of law and undisputed fact, the St. Joseph Health Services of Rhode Island Retirement Plan (the "Plan") became subject to ERISA by at least April 29, 2013, because it was not maintained by a principal purpose organization ("PPO") as required by U.S. Supreme Court precedent. Accordingly, that is where this Court must start its analysis – this Plan was subject to ERISA by at least April 29, 2013 because there was no PPO maintaining the Plan.

With that settled, the Court need only consider whether Plaintiffs have succeeded in explaining why the uncontroverted law and facts set out in that earlier motion should not control this case moving forward. Plaintiffs offer two clouds of ink in their attempt to do so – a fallacious claim of a new-found, *potential*, later PPO, and an equally flawed claim that the Diocesan Defendants are estopped from making the arguments that Plaintiffs made and seeking the relief that Plaintiffs sought against the Diocesan Defendants.

The Newly Minted *Possible* PPO. Plaintiffs claim that they have recently discovered that there *may* have been, *maybe*,[1] a cure of the nonexistence of a PPO after April 29, 2013, that eluded everyone until now. They argue that St. Joseph Health Services of Rhode Island ("SJHSRI") *or* its Board of Trustees somehow fell into being a PPO administering the Plan after the June 20, 2014 sale of assets ("2014 Asset Sale") from SJHSRI, Roger Williams Hospital/Medical Center ("RWH"), and CharterCARE Health Partners ("CCHP") to entities associated with Prospect Medical Holdings (collectively, "Prospect"). To support this newfound PPO argument, Plaintiffs raise two flawed assertions. They argue that SJHSRI had nothing left to do after the sale of its operating assets except fund and administer the plan. Further, Plaintiffs contend that SJHSRI and its Board had no discretion to do anything other than administer and fund the Plan as a result of the Attorney General's Decision approving the 2014 Asset Sale and the 2015 Cy Pres proceedings that followed. Both fail as a matter of law for several independent, but equally fatal, reasons.

First, as a matter of law, an entity cannot simply stumble into the role of a PPO. The Court can be guided by legal arguments Plaintiffs asserted in their original summary judgment motion. SJHSRI could not have been a PPO because it is undisputed that SJHSRI was not created to maintain, administer, or fund the Plan. SJHSRI's controlling organizational and corporate governance documents define SJHSRI's roles and mission as the management of the entire non-profit corporate entity. Those organizational documents have never been amended to change SJHSRI's global corporate purpose, function, or mission. The new "facts" and

[1] Critically, Plaintiffs do not say there **was** a cure or that there even **was** a new, later PPO. They do not assert that their arguments mean that the Plan was an exempt church plan. That is because Plaintiffs are not attempting to assert an actual position here. They are merely trying to deflect the result of what they already proffered to the Court when they moved for summary judgment on the PPO issue in the first instance. They do not want to resolve this issue. They want the hazy confusion of ink-filled water.

conclusory affidavit Plaintiffs introduce are irrelevant to this purely legal issue. Further, the legal documents Plaintiffs point to in support of their new *possible* cure argument (the Attorney General's Decision and the 2015 Cy Pres Petition and Order) simply do not support the construction Plaintiffs give them.

Second, as a matter of law, a non-profit corporate entity in winddown simply cannot be a PPO charged solely or primarily with the administration of a pension plan. Any such board or corporate entity is winding down the entirety of its operations. It must deal with all of the assets, obligations, rights, liabilities, lingering legal commitments, etc., of the corporate entity, not just one. Not even if that one issue is its largest liability. When Plaintiffs and their affiant, Richard Land, were not trying to trump up a new PPO candidate, they were unequivocal when they described, under oath, SJSHRI's broader and more diffuse focus.

Third, and ironically, Plaintiffs are judicially estopped from arguing that SJHSRI *might* be a PPO based upon their current interpretation of the 2015 Cy Pres Petition and Order. When seeking and receiving settlement and attorneys' fee approval in this Court, Plaintiffs argued that the Cy Pres Order ***did not require*** SJHSRI to direct its remaining assets to the Plan, but rather only gave it "permission" to do so. They now argue that this same order took away all discretion from SJHSRI or its Board to do anything but fund and administer the Plan. Plaintiffs cannot now take a completely contrary position about the meaning and effect of the 2015 Cy Pres Proceedings, a position which forms the fulcrum of their newly discovered PPO argument. The very law Plaintiffs cite in their flawed attempt to apply judicial estoppel to the Diocesan Defendants makes that determination clear.

Fourth, Plaintiffs' contradiction cited in the preceding paragraph is not the only glaring contradiction in their opposition papers. In fact, Plaintiffs' entire attempt to claim that

SJHSRI somehow (*maybe*) fell into the role of the Plan's PPO and cured any defect in the Plan's church plan status is based upon alleged facts that contradict prior testimony, affidavits and admissions to the Court by Plaintiffs and Mr. Land. This is not surprising given that the Plaintiffs have completely reversed position, but it is settled law that a party cannot defeat summary judgment by creating questions of fact by contradicting their own pleadings, interrogatory answers and prior sworn statements.

Plaintiffs' Judicial Estoppel Argument. Plaintiffs contend that the Diocesan Defendants should be judicially estopped from bringing this motion because they and/or SJHSRI (on their behalf) allegedly told state regulators in 2013/2014 that the Plan was a church plan and/or satisfied the PPO requirement. This argument fails as a matter of law for several reasons.

First, it is well-settled that a party cannot be estopped from taking different positions where there has been an intervening change in controlling law. Even assuming the Diocesan Defendants took the position attributed to them in 2013/2014 (they did not), and were now taking the opposite stance, any such change in position would be justified by an intervening change in the law governing the PPO requirement. In 2017, the U.S. Supreme Court decided *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017), which changed and clarified the law surrounding PPOs. That includes abrogating a line of decisions (including from district courts in the First Circuit) that held that a non-church's benefit plan could qualify for the church plan exemption even if they were not maintained by a PPO. This fatal flaw in Plaintiffs' estoppel argument presents a pure question of law.

Second, in order for judicial estoppel to apply, Plaintiffs must show that state regulators actually decided or relied upon the issue of whether the Plan was a church plan. Nothing in the decisions approving the hospital conversion and change-in-effective-control

applications indicated that the Plan's qualification (or lack thereof) for the church plan exemption—let alone SJHSRI's satisfaction of the PPO requirement—impacted the regulators. Those decisions simply do not discuss these issues *at all*. Thus, there is no genuine issue of material fact as to whether the Diocesan Defendants should be estopped, nor grounds for discovery on estoppel. The meaning and intent of these regulatory decisions are pure questions of law ripe for summary judgment.

Third, Plaintiffs' requested application of estoppel is logically and legally flawed. To make this argument, Plaintiffs twist ERISA and ignore its comprehensive remedial scheme. They do not ask the Court to preclude the Diocesan Defendants from arguing that the Plan is an ERISA plan, so that the parties can proceed as if the Plan is a church plan, as allegedly represented to Plaintiffs and the regulators. That is how estoppel works. But Plaintiffs assiduously seek to avoid that conclusion. Instead, Plaintiffs apparently desire a ruling that continues the inky darkness, where Plaintiffs can choose to apply certain aspects of ERISA or state law as they see fit while denying the Diocesan Defendants other ERISA or state law arguments. That is not how estoppel works. Principles of fairness and equity conflict with the application of any estoppel with respect to this Motion.

Plaintiffs' opposition releases only more ink and raises more confusion. There are no genuine issues of material fact. Judicial estoppel does not preclude the Diocesan Defendants from following clear Supreme Court precedent. Rule 56, and the local rules requiring the identification of real facts, evidentiary facts, are designed to see through attempted obfuscation. They are designed to define and get to the merits. This case cries out for a serious and purposeful assessment by this Court. Clear of the ink, the contradictions, and the rhetoric, the arguments and facts presented originally by Plaintiffs compel the conclusion that the Plan

ceased to qualify as a church plan no later than April 29, 2013 because it was not maintained by a principal purpose organization.

ARGUMENT

I. AS A MATTER OF LAW AND UNDISPUTED MATERIAL FACT, SJHSRI DID NOT BECOME A PPO FOLLOWING THE 2014 ASSET SALE

ERISA provides that a pension plan is a church plan if it is (1) established and maintained by a church or a convention or association of churches or (2) maintained by an organization the principal purpose or function of which is administration or funding of the pension plan, if such organization is controlled by or associated with a church or convention or association of churches. *See* 29 U.S.C. § 1002(33)(A) & (C)(i); *Medina v. Catholic Health Initiatives*, 877 F.3d 1213, 1221 (10th Cir. 2017). The parties agree that SJHSRI is not a church. Accordingly, for the Plan to qualify for the church plan exemption, it must, among other things, have been "maintained by an organization … the principal purpose or function of which is the administration or funding of a plan" (i.e., "principal purpose organization" or "PPO"). *See Stapleton*, 137 S. Ct. at 1656-1657 (quoting 29 U.S.C. § 1002(33)(C)(i)). Plaintiffs and the Diocesan Defendants agree that as of April 29, 2013 (at the latest) the Plan was not maintained by a PPO until at least June 20, 2014. Plaintiffs do not dispute that earlier lapse. Where the parties differ is with Plaintiffs' latest about-face; their contention that this default could, *maybe*, have been cured because SJHSRI, or its Board, *may* have become a PPO by simple happenstance after the 2014 Asset Sale.

A. The Legal Standard For Qualifying As A PPO

In assessing whether an organization qualifies as a PPO, courts look to the relevant plan provisions and the documents that created or govern the organization. *See Boden v. St. Elizabeth Med. Ctr., Inc.*, 404 F. Supp. 3d 1076, 1093 (E.D. Ky. 2019). In *Boden*, the district

court reviewed whether a hospital's "Pension Plan Administrative Committee" was a PPO. *Id.* at 1080, 1093. The court noted: "The Plan document itself indicates that the objective and goal of the of the [sic] Committee is to 'manage and administer the Plan.'" *Id.* Moreover, "[t]he Resolution creating the Committee indicates the same—that the objective of the Committee is to 'administer' the Plan." *Id.* Ergo, the court concluded that: "The Resolution and the Plan Document are the relevant documents which lay out the 'objective, goal, [and] end' of the Committee—in other words, they define the Committee's purpose." *Id.* (citation omitted). Thus, the Pension Plan Administrative Committee "clearly falls within the definition of a principal-purpose organization." *Id.*; *see also Hanshaw v. Life Ins. Co. of No. Am.*, No. 3:14-CV-00216-JHM, 2014 WL 5439253, at *8 & n.9 (W.D. Ky. Oct. 24, 2014) (reviewing articles of incorporation to conclude that "St. Clare Medical Center is a healthcare organization; its principal purpose is the provision of healthcare, not the administration of a benefits plan."); *cf. Medina*, 877 F.3d at 1226 (reviewing the charter of the Defined Benefit Plan Subcommittee to determine if the Subcommittee is an "organization").

Construing § 1002(33)(C)(i) narrowly to limit PPOs to entities established to administer or fund a plan ensures that the focus of the entity remains centered on serving the interests of the beneficiaries, rather than the myriad other purposes and functions that a business must address (whether operating or in winddown). *See Casto v. Unum Life Ins. Co. of Am.*, 508 F. Supp. 3d 243, 248 (E.D. Tenn. 2020). As ***Plaintiffs*** wrote earlier:

> Indeed, Justice Sotomayor's concurrence in Stapleton focused particularly on future courts' adjudication of the requirements for "principal purpose organizations" and directed courts to construe those provision "with a view toward effecting ERISA's broad remedial purposes":
>
> > In the end, I agree with the majority that the statutory text compels today's result. Other provisions also impact the scope of the "church plan" exemption. Those provisions—including the provisions governing which

> organizations qualify as principal purpose organizations permitted to establish and maintain "church plans," *see, e.g.*, *ante*, at 1658, n. 3—need also be construed in line with their text and with a view toward effecting ERISA's broad remedial purposes.
>
> Stapleton, *supra*, 137 S. Ct. at 1663-64. In other words, "the provisions governing which organizations qualify as principal purpose organizations permitted to establish and maintain 'church plans,'" must [sic] construed with a view toward *narrowing* and *limiting* the church plan exemption from ERISA."

Pls.' Reply to Prospect's Mem. of Law in Opp'n to Pls.' Mot. for Summ. J. ("Pls.' Prospect Reply"), ECF No. 197, at 39.

Although Plaintiffs have wandered from their prior exposition of the law for tactical reasons, the Court should not. This Court should focus its attention on the Plan and SJHSRI's governing documents to assess whether the "main job" of SJHSRI (or its Board of Trustees) was administering or funding the Plan. *See Stapleton*, 137 S. Ct. at 1656-1657.

B. The Controlling Legal Documents That Define The Purpose And Mission Of SJHSRI And Its Board Establish As A Matter Of Law That Neither Was Or Could Have Been A PPO

Applying the law just discussed, the Court must assess Plaintiffs' newly identified *potential* suitors for the Plan's PPO by reviewing the relevant Plan documents and the corporate governance documents that established and control the role of the posited PPO. *See Boden*, 404 F. Supp. 3d at 1093. Doing so here negates any argument that SJHSRI or its Board were a PPO.

The 2011 and 2016 Plan named SJHSRI the Plan Administrator and assigned it various responsibilities over the Plan. ECF No. 237-4 (2011 Plan) § 8.1; ECF No. 237-5 (2016 Plan) § 8.1. The Plan documents, however, did not establish or govern SJHSRI, or what roles or responsibilities that corporate entity had. The 2011 and 2016 Plans instead define SJHSRI as "the Employer" i.e., the entity operating the business that employs the Plan's participants. ECF No. 237-4 (2011 Plan) at 1; ECF No. 237-5 (2016 Plan) at 1. Beyond that, these documents are

silent on whether SJHSRI's "main job" is plan administration or funding. *See Stapleton*, 137 S. Ct. at 1656-1657.

SJHSRI's governing documents resolve that question in the negative. The 1892 act that established SJHSRI provided that it was incorporated "for the purpose of providing medical aid and surgical treatment for the sick of all denominations." *See* Ex. 40 to Diocesan Defs.' Resp. to Pls.' PPO Facts (1892 Act) at 1. SJHSRI's bylaws, effective January 4, 2010, provide that SJHSRI's Board of Trustees "shall be responsible for the management and control of the operation of the Corporation." ECF No. 237-10 (SJHSRI Bylaws) § 4.1. The "***Corporation,***" not the "Plan." *See id.* The bylaws also provide: "The Mission of the Corporation [SJHSRI] as an Affiliate of the System[2] shall be to foster an environment of collaboration among its partners, medical staff and employees that supports high quality, patient focused and accessible care that is responsive to the needs of the communities it serves." *Id.* § 3.2.

On December 15, 2014 (during the winddown period), SJHSRI's bylaws were revised to reflect changes in SJHSRI's governance wrought by the 2014 Asset Sale. ECF No. 243-89, Tab A (December 15, 2014 Written Consent of Class A Member), at SJHSRI1725. The sections concerning SJHSRI's Board's charge and mission, however, were not revised then or thereafter to even reference the Plan, let alone indicate that SJHSRI (or its Board) had the limited purpose or function of administering or funding the Plan.

By operation of its own governing documents then, winddown SJHSRI's, and its Board's, "main job" could not have been maintaining, administering, or funding the Plan. Rather, it was to wind down the operations, liabilities and obligations of the corporation

[2] The "System" refers to the collective of SJHSRI, Roger Williams Medical Center, and CharterCARE Health Partners. ECF No. 237-10 (SJHSRI Bylaws) § 3.1.

established "for the purpose of providing medical aid and surgical treatment for the sick of all denominations," Ex. 40 to Diocesan Defs.' Response to Pls.' PPO Facts (1892 Act) at 1, or supervising such efforts (the Board of Trustees). *See, e.g., Hanshaw*, 2014 WL 5439253, at *8 & n.9 ("St. Clare Medical Center is a healthcare organization; its principal purpose is the provision of healthcare, not the administration of a benefits plan."). That "main job" may have been different or more limited because SJHSRI was winding down its hospital operations, rather than actively running a hospital after June 20, 2014, but that does not change the "job" SJHSRI assigned itself.

The caselaw is consistent. No court has held that a corporate entity established with a purpose and function completely distinct from administering or funding a retirement or benefit plan can qualify as a PPO. Rather, the entities held to meet the qualifications for a PPO (exclusively, specialized committees) looked nothing like winddown SJHSRI. Their names (and common sense) instead indicate that these organizations were created (and existed) to manage retirement or benefit plans for beneficiaries. *See, e.g.*, *Sanzone v. Mercy Health*, 954 F.3d 1031, 1035, 1040-1045 (8th Cir. 2020) ("In consequence, we find that the [Mercy Health Benefits] Committee, with the powers alleged in the complaint, maintains the Plan and is a principal-purpose organization under the statute"); *Medina*, 877 F.3d at 1219, 1227 ("We therefore find the [Defined Benefit Plan] Subcommittee is a principal-purpose 'organization' in the meaning of the statute, and that it 'maintains' the CHI Plan."); *Boden*, 404 F. Supp. 3d at 1080, 1093 ("Accordingly, the Court finds that the [St. Elizabeth Medical Center Employees' Pension Plan Administrative] Committee is a principal-purpose organization . . . ."); *Overall v. Ascension*, 23 F. Supp. 3d 816, 829 (E.D. Mich. 2014) ("Both the Ascension Health Pension Plan and the St. John Health Pension Plan are church plans. Both plans are administered by the Ascension Health

Pension Committee."); *Thorkelson v. Publ'g House of Evangelical Lutheran Church in Am.*, 764 F. Supp. 2d 1119, 1127 (D. Minn. 2011) ("Applying this statutory language to AFP's Plan, it is clear that the Plan is a church plan. First, the Plan is sponsored by AFP and administered by AFP's Pension Committee.").

Moreover, the Private Letter Rulings ("PLR") from the IRS that Plaintiffs cite in support of their newly crafted PPO argument actually support the Diocesan Defendants' position (i.e., Plaintiffs' original position). *See* Pls.' Mem. of Law in Opp'n to Diocesan Defs.' Mot. for Summ. J. ("Pls.' MSJ Opp'n"), ECF No. 245, at 69-72 (discussing I.R.S. Priv. Ltr. Rul. 96-19-073, 1996 WL 241530 (Feb. 13, 1996) ("1996 PLR") and I.R.S. Priv. Ltr. Rul. 2003-32-6045, 2003 WL 21483128 (Apr. 2, 2003) ("2003 PLR")). The 1996 PLR involved a specialized committee (Committee M) that was "established under Article 15, section 7 of the Amended Bylaws . . . to oversee and supervise the activities of Plan T." 1996 PLR (see ninth paragraph following "Gentlemen").[3] It is indisputable that winddown SJHSRI (and its Board of Trustees) did not meet that paradigm.

Conversely, the 1996 PLR noted that plans being administered day-to-day by the Corporation's Vice President of Human Resources did not qualify as a PPO. *See id.* (see fourth paragraph before "sincerely yours"). The 1996 PLR, moreover, cautioned that these other plans' failure to comply would not be cured "unless and until such time as the aforementioned committee [i.e., a separate administrative committee similar to Committee M] is established, whose sole purpose . . . must be to administer" the other plans. *Id.* (see third paragraph before "sincerely yours"). It is undisputed that a separate administrative committee similar to Committee M was not established here.

[3] The PLRs are not * paginated.

The 2003 PLR similarly supports granting the Diocesan Defendants' motion. In the 2003 PLR, a Catholic nursing home administered two plans and the IRS correctly noted that such an entity "is not an organization described in section 414(e)(3)(A) of the Code [the tax code equivalent of 29 U.S.C. § 1002(33)(C)(i)]." 2003 PLR (see seventh and eighth paragraphs before "sincerely yours"). It was only after, as Plaintiffs' explain, the nursing home "established Committee N" – a separate committee – to administer the Plan that it cured the defect. Pls.' MSJ Opp'n, ECF No. 245, at 72. No such specialized committee was established here.

The PLRs and the cases cited on this issue (by both parties) speak with a consistent voice, especially after *Stapleton.* BOTH require a separate or special committee. It is undisputed that a separate administrative committee similar to "Committee M" or "Committee N" was not established here. Plaintiffs did not dispute the following proffered Statement of Undisputed Fact offered in support of this motion:

> The records of SJHSRI do not reflect that at any time on or after April 29, 2013, SJHSRI's Board of Trustees held separate meetings in their capacity as the Retirement Board, devoted any specific part of their regular meetings to their function as the Retirement Board, or proceeded by an agenda specific to their function as the Retirement Board. Instead, records show that SJHSRI's Board of Trustees considered and decided matters concerning the Plan as part of the Board of Trustee's regular meetings and pursuant to the agenda of the meetings of the Board of Trustees, and did not keep separate minutes concerning its actions as the Retirement Board.

Diocesan Defs.' Statement of Facts, ECF No. 237, ¶ 37; *compare id.* with Pls.' Resp. to Diocesan Defs.' Statement of Facts, ECF No. 244 (not responding to paragraph 37 of the Diocesan Defendants' Statement).

At one point, Plaintiffs construed ERISA's requirements as set forth here. In contesting Prospect's argument that the CCHP Investment Committee qualified as a PPO, Plaintiffs explained:

> Finally, like CCHP's Finance, Audit & Compliance Committee (and unlike the prior Bishop-appointed Retirement Board), CCHP's Investment Committee ***was neither specially created to maintain or administer the Plan nor had that as its sole responsibility.*** CCHP's Investment Committee was also created on January 4, 2010, nearly eighteen months before SJHSRI been had the power to administer the Plan or delegate administration "by action of its Board of Trustees." Thus, it is completely unlike the organizations found to be "principal purpose organizations in Sanzone v. Mercy, *supra*, Medina v. Catholic Health Initiatives, supra, or Boden, et al. v. St. Elizabeth Medical Ctr., *supra*, and Thorkelson v. Publishing House of Evangelical Lutheran Church in America, *supra*.

Pls.' Prospect Reply, ECF No. 197, at 88-89 (emphasis added). Plaintiffs' previous analysis is spot-on and applies with equal force to winddown SJHSRI and its Board of Trustees. The law did not change since Plaintiffs filed their reply to Prospect. Only Plaintiffs' motives.

An entity that was established with a purpose and function completely distinct from maintaining, administering, or funding a retirement plan cannot qualify as a PPO, especially when the entity (like SJHSRI and its Board) takes no steps to bring its corporate mission in alignment with plan maintenance, administration, or funding. The entity cannot, as Plaintiffs would have the Court hold, stumble into being a PPO, without affirmatively choosing to become one and taking steps to shed its other competing responsibilities. Such a construction would leave church plan beneficiaries without an organization established to look out for their interests. *See Stapleton*, 137 S. Ct. at 1663-1664 (Sotomayor, J.) (concurring). Plaintiffs cite no case to the contrary. Accordingly, this Court should grant summary judgment as requested herein.

C. SJHSRI Could Not Be A PPO As A Matter Of Law Because A Corporate Entity In Winddown By Definition Has A Different Principal Purpose And Function

Even if the operational documents did not dispose of this question (and they do), Plaintiffs cannot create an issue of material fact that meets the PPO requirements, here. As a matter of law, a non-profit corporate entity in winddown, even one that includes maintaining,

administering, or funding a pension plan as one of its responsibilities, cannot be a PPO. Definitionally, the board or corporate entity is winding down the entirety of its operations (which go well beyond any one particular liability). 16A Fletcher Cyc. Corp. § 7966 ("Modern corporation law has reversed the view that dissolution is analogous to death, as modern corporation statutes authorize a dissolved corporation to continue its corporate existence for the purpose of winding up and liquidating its business and affairs[.]"). It must deal with all of the assets, obligations, rights, liabilities, lingering legal commitments, etc., of the corporate entity, not just one.

That is apparent from Rhode Island's statutes governing the dissolution of non-profits like SJHSRI. R.I. Gen. Laws § 7-6-50 (providing that a non-profit corporation that has resolved to dissolve "shall proceed to collect its assets and apply and distribute them as provided in this chapter"); R.I. Gen. Laws § 7-6-51 (setting forth distribution schedule for assets of dissolving non-profit corporation). Although irrelevant to this pure legal issue—but ratifying this reality and the legal authorities cited herein—Plaintiff Receiver's sworn interrogatory answers conceded that SJHSRI's winddown consisted of the "hundreds of purposes and actions involved in winding down a hospital and related entities." Ex. 41 to Diocesan Defs.' Resp. to Pls.' PPO Facts (Pl. Receiver's Interrog. Answers) at 11 (answer to No. 5). In light of that, a corporate entity in winddown, like SJHSRI, could not, as a matter of law, qualify as a PPO. Again, this conclusion compels entry of summary judgment as requested herein.

D. The Attorney General's Decision And The 2015 Cy Pres Proceedings Did Not Have The Legal Effect Plaintiffs *Now* Seek To Give Them

Plaintiffs *now* attempt to construe the Rhode Island Attorney General's Decision ("AG Decision") and the 2015 Cy Pres Petition and Order to deprive SJHSRI of all discretion and agency over its winddown, except with respect to the Plan. Per Plaintiffs' revisionist

argument, these legal documents constrained SJHSRI's winddown purpose and function to the single primary task of maintaining the Plan, thus (maybe) curing the pre-2014 Asset Sale principal purpose organization lapse. After quoting and paraphrasing from the AG Decision and the 2015 Cy Pres Petition, Pls.' Statement of Undisputed & Disputed Facts ("PSUDF"), ECF No. 243, ¶¶ 161-167, Plaintiffs conclude:

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

Pls.' MSJ Opp'n, ECF No. 245, at 66 (footnotes omitted and emphasis in original); PSUDF, ECF No. 243, ¶ 168. As a matter of proper legal interpretation, those documents do not support that characterization, nor the legal conclusions or effect Plaintiffs (or their affiant) draw from them.

AG Decision. The AG Decision speaks only briefly on the winddown hospital entities. Plaintiffs point to Condition No. 8 in that ruling (concerning what would become the 2015 Cy Pres proceedings) to support their argument that SJHSRI was supposedly handcuffed with respect to every aspect of its winddown, apart from matters concerning the Plan:

> That (a) a proposed opening balance sheet for the CCHP Foundation and the Heritage Hospitals [SJHSRI and RWH] as of the close of the transaction identifying the source and detail of all charitable assets to be transferred to the CCHP Foundation be provided to the Attorney General promptly following the close of the transaction; (b) a proposed *Cy Pres* petition satisfactory to the Attorney General be prepared promptly following the close of the transaction allowing certain charitable assets to be transferred to the CCHP Foundation and requesting that other charitable assets remain with the Heritage Hospitals, in each case for disbursement in accordance with donor intent, with such proposed

> modifications as agreed to by the Attorney General, and (c) the approved *Cy Pres* petition be filed with the Rhode Island Superior Court.

ECF No. 243-82 (AG Decision) at 52. By its terms, Condition 8 did nothing except require the preparation of proposed balance sheets and a Cy Pres Petition by SJHSRI and the other winddown entities, which the Attorney General had to approve. *See id.* Condition 8 did not provide that the Attorney General would draft the Cy Pres Petition and that SJHSRI (and the other wind-down entities) must file the petition presented to it without changes or input. It did not instruct SJHSRI how to conduct its winddown or take away its authority to determine how or whether to compromise ongoing disputes, or how and when to pay post-closing liabilities. It certainly did not purport to create those liabilities or SJHSRI's obligation to pay them.

The other portions of the AG Decision that reference the winddown entities are of a similar character: For example:

> A multi-year wind-down process is typical in the dissolution of a hospital corporation due to the time it typically takes to settle government cost reports and the like. It is particularly appropriate where the expected hospital's liabilities are projected to exceed the amount of the unrestricted assets available at the time of closing but where there is also an expectation that additional unrestricted assets will be available in the future, as is the case here. The corporation retains during the wind-down process those restricted charitable assets that provide unrestricted earnings which can be used to address its remaining liabilities, and the corporation remains open until such time as it is concluded that it has completed the winding-down of its affairs.

Id. at 25. Likewise, the AG Decision noted that SJHSRI and RWH would use income from perpetual trusts to "to pay their respective wind-down expenses" and that "CCHP intends to seek trustee and *Cy Pres* approval to use the perpetual trust income received by RWMC to partially satisfy the payment of SJHSRI expenses, if needed, after all of RWMC's liabilities have been paid." *See id.* at 27.

Although the AG Decision does not speak at length about winddown SJHSRI, everything just referenced negates the argument that the decision essentially confined SJHSRI to maintaining, administering or funding the Plan. The AG Decision notes:

- SJHSRI is a "hospital corporation" in "dissolution," *id.* at 25;
- the wind-down is a multi-year process, *id.*;
- the wind-down will require SJHSRI to "settle government cost reports and the like," *id.*;
- SJHSRI will need "to pay their respective wind-down expenses," *id.* at 27.

Nothing in these provisions, or the AG Decision writ large, cabins SJHSRI's conduct of its winddown or limits SJHSRI's purposes or functions to managing the Plan.

2015 Cy Pres Proceedings. The AG Decision does no more than state that the 2015 Cy Pres proceedings would provide approval (i.e., permission) for winddown RWH and winddown SJHSRI to apply certain charitable assets (or income therefrom) to liabilities incurred before and after the 2014 Asset Sale. *See id.* The order granting the 2015 Cy Pres Petition and the Petition itself bear that out.

Plaintiffs reference paragraphs 24, 27-30 and 32 of the 2015 Cy Pres Petition. PSUDF, ECF No. 243, ¶¶ 163-165. These paragraphs refer to requests for approval by SJHSRI and RWH to apply certain assets or income streams to pay remaining liabilities. ECF No. 243-89, Tab C (2015 Cy Pres Petition) ¶¶ 24, 27-30, 32. And that is what the 2015 Cy Pres Order did. It granted SJHSRI and RWH *permission* to use the assets to that end:

> 6. As set forth in paragraph 28 of the Petition, (a) approval is granted for RWH to use the annual income or principal distributions from the perpetual trusts identified therein to satisfy the Outstanding Pre and Post Closing Liabilities on its behalf, and (b) *cy pres* approval is granted for RWH and/or the Trustee (or any successor Trustee) to transfer such annual income or principal distributions to SJHSRI after such RWH liabilities have been satisfied and to transfer such annual income or principal distributions to CCHP Foundation after the Outstanding Pre and Post Closing Liabilities of SJHSRI have been satisfied.

> 7. As set forth in paragraph 29 of the Petition, approval is granted for RWH to use the trust funds that it will receive, if any, upon the death of Barbara S. Boyden to pay the Outstanding Pre and Post Closing Liabilities. To the extent such obligations have been paid prior to receipt of the trust funds or are fully paid thereafter, *cy pres* approval is granted for RWH and/or the Trustee (or any successor Trustee) to transfer the trust funds to SJSHRI to satisfy the Outstanding Pre and Post Closing Liabilities on its behalf.
>
> 8. As set forth in paragraphs 28 through 30 of the Petition, (a) approval is granted for SJHSRI to use the annual income or principal distributions from the perpetual trusts identified therein to satisfy the Outstanding Pre and Post Closing Liabilities on its behalf, and (b) *cy pres* approval is granted for SJHSRI and/or the Trustee (or any successor Trustee) to transfer such annual income or principal distributions to CCHP Foundation after such liabilities have been satisfied.[4]

Id., Tab D (2015 Cy Pres Order) ¶¶ 6-8; *id.* ¶ 3 ("As set forth in paragraph 24 of the Petition, approval is granted for RWH to use the following funds: • $12,288,848.00 reflecting unrestricted accumulated earnings from RWH permanently restricted assets to satisfy the Outstanding Pre and Post Closing Liabilities as and when due.").

The 2015 Cy Pres Petition did not ask the Superior Court for anything more than that. Plaintiffs cite paragraphs 14 and 17 of the 2015 Cy Pres Petition. Paragraph 14 simply referenced the AG Decision and noted that "it approved the concept of . . . (2) the use of certain of the charitable assets during the Heritage Hospitals' wind down to satisfy the Outstanding Pre and Post Closing Liabilities subject to cy pres approval from this Court." *See id.*, Tab C (2015 Cy Pres Petition) ¶ 14. Likewise, Paragraph 17 flagged that "Outstanding Pre and Post Closing Liabilities" remained, *"including, without limitation, malpractice insurance tail policies, third party payor obligations and worker's compensation payments." Id.* ¶ 17 (emphasis added). The paragraph explained that it was "anticipated" that such liabilities would "be paid during the

[4] Indeed, each of these provisions of the Cy Pres Order expressly contemplate the referenced funds could be used for purposes ***other than (or in addition to)*** funding the Plan.

wind-down period of RWH and SJHSRI over the next approximately three years," with SJHSRI's liability with respect to the Plan to continue after the winddown. *Id.*

The Cy Pres Petition and Cy Pres Order did not limit winddown SJHSRI to maintaining, funding or administering the Plan. Nor did the 2015 Cy Pres Proceedings deprive SJHSRI of discretion or agency over how to conduct its winddown, including how or in what priority it would pay outstanding pre- and post-closing liabilities or how, whether, or if it might compromise ongoing workers' compensation and liability disputes. Nor did they purport to constrain SJHSRI's discretion or authority to just maintaining the Plan. Whether on their own, or in tandem, the Cy Pres Petition and Order, by their terms, could not (and did not) turn SJHSRI or its Board into a PPO.

***

The effect of the AG Decision and 2015 Cy Pres proceedings is a question of law for the Court. Disputing what they mean does not create a question of fact blunting the force of the Diocesan Defendants' motion or the Court's obligation to decide it. And the interpretation of those documents is quite clear on their face. The AG Decision and the 2015 Cy Pres Petition and Order did exactly what their terms set forth. It authorized SJHSRI to wind down all of the operations, liabilities, assets, and obligations of the corporation and approved the use of certain assets to facilitate the winddown. The Court should grant the Diocesan Defendants' motion on this dispositive legal ground.

II. PLAINTIFFS (AND THEIR AFFIANT) CANNOT CONTRADICT THEIR OWN PLEADINGS, ADMISSIONS AND TESTIMONY TO DEFEAT SUMMARY JUDGMENT AND THE COURT SHOULD DISREGARD THOSE ARGUMENTS

A. Plaintiffs Are Judicially Estopped From Arguing That The 2015 Cy Pres Proceedings Eliminated SJHSRI's Discretion

Plaintiffs' opposition to essentially their own motion for summary judgment is replete with abject inconsistencies and about faces. More ink. One particular inconsistency has dispositive import to Plaintiffs' gambit of now claiming that SJHSRI, *maybe, might* have been, a PPO after June 20, 2014.[5] Specifically, Plaintiffs are judicially estopped from asserting that SJHSRI (or its Board) was a PPO after the 2014 Asset Sale based upon interpretations of the 2015 Cy Pres Petition and Order that contradict their earlier interpretation of those same documents *in this very proceeding*.

Plaintiffs' current argument is premised upon their claims *now* that (1) there were no operating assets for SJHSRI to manage after the sale, and (2) the AG Decision approving the

[5] It is hard to see how Plaintiffs can assert in good faith that the *possible* existence of a later, alternative PPO, could be an issue of ***material*** fact given the allegations of the complaint and Plaintiffs' continuing positions in this lawsuit. This issue does not become material *unless* Plaintiffs are willing to concede that the other requirements of a church plan are met – namely that SJHSRI was tax exempt and that it was associated with the Catholic Church at the time this PPO sprang into being. As Plaintiffs themselves explained, to qualify for the church plan exemption, all three criteria must be met; otherwise, the Plan is subject to ERISA. Pls.' MSJ Opp'n, ECF No. 245, at 62-64. Plaintiffs' have pled that these other two criteria were not met. First Am. Compl., ECF No. 60, ¶¶ 82-113. Indeed, Plaintiffs assert (and continue to assert) the Diocesan Defendants engaged in fraud and conspiracy by continuing to claim there was an association with SJHSRI after the 2014 Asset Sale. While Plaintiffs' positions on these other two elements of the church plan exemption are wholly without merit, the Court need not decide them. So long as Plaintiffs contend they are not met, Plaintiffs bogus PPO dispute is immaterial.

Looked at through the prism of another legal construct injected into this case by Plaintiffs, were the Plaintiffs to prevail on this issue, that would necessarily mean that the PPO issue is a material issue of fact. *Clarke v. JPMorgan Chase Bank, N.A.*, No. 08 Civ. 2400(CM)(DCF), 2010 WL 1379778, at *9 (S.D.N.Y. Mar. 26, 2010) ("Moreover, not every disputed factual issue is material in light of the substantive law that governs the case."). Because the existence of a PPO only becomes material if the other two elements of the test are met (or not contested), Plaintiffs at that point would be judicially estopped from contending that the Plan was *not* a church plan. In turn, Plaintiffs' substantive claims of fraud and conspiracy based upon misrepresentations that the Plan *was* a church plan would fail. Of course, that is not what Plaintiffs contend. Indeed, given that they have couched the existence of a new PPO as only a *possibility*, they apparently are taking the position that the Court should deny the pending motion – *their* original motion – on this ground but at some point in the future, they can contest even this assertion if it suits their purposes.

It is only this convoluted because Plaintiffs' positions keep changing and conflicting with one another. This is just another stark indication that Plaintiffs' opposition is an empty tactic. Their original motion for summary judgment had the law and facts correct.

sale and the order resulting from the 2015 Cy Pres petition determined "the sources and amount of SJHSRI's charitable and other assets and SJHSRI's obligation to apply them to pay its pre and post-closing liabilities…" Pls.' MSJ Opp'n, ECF No. 245, at 66. The result, Plaintiffs claim, is that SJHSRI stumbled into being a PPO because the Cy Pres Order constricted its role to administering and/or funding the Plan and nothing else.

However, back in 2019, Plaintiffs took a diametrically opposite position in this very litigation with respect to the meaning and impact of the 2015 Cy Pres Petition and Order. Those positions were accepted by the Court and Plaintiffs were awarded relief based upon those prior positions, thus satisfying all of the elements of judicial estoppel and precluding Plaintiffs from making contradictory arguments *now*.

Early in these proceedings, the Diocesan Defendants opposed the settlement between Plaintiffs and SJHSRI, as well as Plaintiffs' counsel's motion for attorneys' fees. The Diocesan Defendants argued that the 2015 Cy Pres proceedings provided that the assets remaining with SJHSRI after the 2014 Asset Sale would flow during winddown to pay post-closing obligations, which included the Plan. Diocesan Defs.' Opp'n to J. Mot. for Settlement Approval, ECF No. 73, at 20, 26-28; Diocesan Defs.' Post-Hr'g Br. Addressing Proposed Orders on Prelim. Settlement Approval, ECF No. 115, at 7-8.

Plaintiffs responded by accusing the Diocesan Defendants of offering "reckless misreadings" of the Cy Pres Petition and other documents. Pls., CCHP, RWH, and SJHSRI's Post-Hr'g Mem., ECF No. 109, at 11. They argued that the 2015 Cy Pres proceedings did not obligate SJHSRI to make any payments to the Plan beyond the $14 million payment that followed the 2014 Asset Sale. Pls.' Reply to Dioc. Defs.' Post-Hr'g Mem., ECF No. 120, at 14 ("The 2015 *Cy Pres* Petition sought permission to use funds to pay post-closing liabilities *as*

defined by the 2015 Cy Pres Petition, which only allocated $14 million to the Plan (which was paid in 2014)." (emphasis in original)). They accused the Diocesan Defendants of "parroting and doubling down" on statements in the Cy Pres Petition that Plaintiffs *then* claimed were in service of a fraud.[6] Pls., CCHP, RWH, & SJHSRI's Post-Hr'g Mem., ECF No. 109, at 11-12.

Plaintiffs' 2019 prevailing argument is apparently no longer convenient for them. *Now,* Plaintiffs stand before the Court arguing for the exact opposite conclusion. Their objection here argues:

- "In addition, the sources and amount of SJHSRI's charitable and other assets and SJHSRI's obligation to apply them to pay its pre and post-closing liabilities were **already determined in the Cy Pres proceeding** and the prior Decision of the Attorney General." Pls.' MSJ Opp'n, ECF 245, at 55-56 (emphasis added).

- "Accordingly, **the disposition of SJHSRI's charitable assets following the sale to Prospect** was pursuant to the conditions imposed by the Attorney General, including the requirements for a Cy Pres petition satisfactory to the Attorney General, and **were not subject to the discretion of SJHSRI or SJHSRI's Board of Trustees** as would have been the case if SJHSRI were operating without such control." *Id.* at 53-54 (emphasis added).

To top it off, during that same 2019 dispute Plaintiffs elicited testimony from Mr. Land that flatly contradicts his present affidavit. In 2019, Mr. Land testified that the 2015 Cy Pres proceedings did not obligate SJHSRI (or any of the winddown entities) to apply its post-closing assets to the Plan; it just gave "permission" to do so. Ex. 39 to Diocesan Defs.' Resp. to Pls.' PPO Facts (Land Dep.) 133:13-134:3 (Q. [Mr. Sheehan] It [the Cy Pres Order] did not, however, order that those funds be used to pay St. Joseph's liabilities. Correct? It gave permission. A. [Mr. Land] That's how I understand it, yes.).

[6] When they raised their objection, the Diocesan Defendants made the mistake, apparently, of assuming the good faith of the 2015 Cy Pres proceedings and SJHSRI's representations in the Receivership Petition that "the net assets of Petitioner [SJHSRI], RWH and CCCB may become available to assist with the Plan" after the wind-down. ECF No. 243-89, Tab G (Receivership Petition) ¶ 16. That was folly, at least according to Plaintiffs circa 2019.

The Special Master appointed by the Court to review the dispute over Plaintiffs' counsel's fees relied on the arguments Plaintiffs now contradict. Special Master's Report and Recommendation, ECF No. 165 at 17-18 (rejecting argument "that the assets of the settling defendants [SJHSRI, RWH, and CCHP] would have poured into the Plan anyway and, therefore, this suit was unnecessary") (adopted by the Court via October 24, 2019 text order). The Diocesan Defendants' objections were rejected. The settlement between Plaintiffs and SJHSRI was approved, Mem. & Order Approving Settlement, ECF No. 164, at 12-14, 16, 20, and Plaintiffs' counsel's motion for attorneys' fees was granted.

This strategic inconsistency hits every element of judicial estoppel. The following recitation of First Circuit law on judicial estoppel is taken word-for-word (with certain elisions for brevity) from Plaintiffs' memorandum in opposition to the Diocesan Defendants' Motion. The Diocesan Defendants accept this portion of Plaintiffs' recitation as an accurate quotation of controlling First Circuit authority:

> The First Circuit has summarized the doctrine of judicial estoppel as follows:
>
> > "As a general matter, the doctrine of judicial estoppel prevents a litigant from pressing a claim that is inconsistent with a position taken by that litigant either in a prior legal proceeding or in an earlier phase of the same legal proceeding." *InterGen N.V. v. Grina*, 344 F.3d 134, 144 (1st Cir. 2003); *accord Pegram v. Herdrich*, 530 U.S. 211, 227 n. 8, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000). The doctrine's primary utility is to safeguard the integrity of the courts by preventing parties from improperly manipulating the machinery of the judicial system. *New Hampshire*, 532 U.S. at 750, 121 S.Ct. 1808; *United States v. Levasseur*, 846 F.2d 786, 792 (1st Cir.1988). In line with this prophylactic purpose, courts typically invoke judicial estoppel when a litigant is "playing fast and loose with the courts." *Patriot Cinemas, Inc. v. Gen. Cinema Corp*., 834 F.2d 208, 212 (1st Cir. 1987) (*quoting Scarano v. Cent. R. Co*., 203 F.2d 510, 513 (3d Cir. 1953)).
> >
> > The contours of the doctrine are hazy, and there is no mechanical test for determining its applicability. *See New Hampshire*, 532 U.S. at 750–51, 121 S.Ct. 1808; *Patriot Cinemas*, 834 F.2d at 212. Each case tends to turn

> on its own facts. It is, however, widely agreed that, at a minimum, two conditions must be satisfied before judicial estoppel can attach. *See, e.g., Hall*, 327 F.3d at 396; *Hamilton v. State Farm Fire & Cas. Co.,* 270 F.3d 778, 783–84 (9th Cir. 2001); *Levinson v. United States*, 969 F.2d 260, 264–65 (7th Cir. 1992); *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir.1982). First, the estopping position and the estopped position must be directly inconsistent, that is, mutually exclusive. See *Faigin v. Kelly*, 184 F.3d 67, 82 (1st Cir. 1999); *Levasseur*, 846 F.2d at 794. Second, the responsible party must have succeeded in persuading a court to accept its prior position. *Lydon v. Boston Sand & Gravel Co*., 175 F.3d 6, 13 (1st Cir. 1999); *Gens***,** 112 F.3d at 572–73. The presence of these elements creates the appearance that either the first court has been misled or the second court will be misled, thus raising the specter of inconsistent determinations and endangering the integrity of the judicial process. *See New Hampshire*, 532 U.S. at 750–51, 121 S.Ct. 1808.
>
> ***
>
> Synthesizing these various points, we recently concluded that, in a prototypical case, judicial estoppel applies when "a party has adopted one position, secured a favorable decision, and then taken a contradictory position in search of legal advantage." *InterGen*, 344 F.3d at 144.

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

Pls. MSJ Opp'n, ECF No. 245, at 74-75. As discussed *infra* at Part III, there is also a third factor concerning the unfair advantage to be gained by the party asserting the inconsistent position. The lack of fairness here is patent – Plaintiffs (and their counsel) received millions of dollars by way of the earlier argument they used to obtain settlement and fee approval. They now hope to gain leverage against the Diocesan Defendants with an opposite argument.

Much of Plaintiffs' objection to the facts and arguments they once proffered reeks of "playing fast and loose with the courts," *Alternative Sys. Concepts*, 374 F.3d at 33, and warrants rejecting their arguments for a variety of different reasons. *See Infra* Part II.B (dealing with the judicial admission and sham affidavit doctrines). Indeed, Plaintiffs' reversal on the effect of the 2015 Cy Pres proceedings on SJHSRI is nothing but "playing fast and loose with"

this Court. *Alternative Sys. Concepts*, 374 F.3d at 33. Plaintiffs sought summary judgment on one set of "undisputed facts" and then withdrew that motion.[7] They are now objecting to basically their own motion by denying and rewriting history because their goal changed from pressuring one set of defendants via successor liability to pressuring another set by seeking to avoid decision of an issue Plaintiffs pled as "essential" to the resolution of this case. First Am. Compl. ("FAC"), ECF No. 60, ¶ 66. They are "playing fast and loose" with the Court when they press an argument that SJHSRI *might* be a PPO to the Plan, not that it was or that the Plan meets the church plan exemption because of this new epiphany. *See Alternative Sys. Concepts*, 374 F.3d at 33.

Plaintiffs—too clever by half—withdrew their fully briefed motion for summary judgment before it was decided. That does not allow them to contradict positions they have taken on matters that were decided to their benefit. Positions were taken regarding the approval of their settlement with SJHSRI and their counsel's petition for attorneys' fees. Relief was granted based on those positions. The "machinery of the judicial system" was fully engaged and resolved Plaintiffs' earlier request for settlement approval (and their counsel's request for fees) in their favor. *Id.*

Having successfully argued that the 2015 Cy Pres Petition and Order left SJHSRI with sufficient discretion to do anything, other than not pay the $14,000,000 specifically designated for the Plan from the closing of the 2014 Asset Sale, Plaintiffs cannot now argue that the same Petition and Order were so clear and restrictive that they turned winddown SJHSRI into a de facto PPO, whose only role was to fund and administer the Plan. Further, this argument (that winddown SJHSRI might have been a PPO) is Plaintiffs' only argument addressed to the

[7] *Compare* Pls.' Mot. for Summ. J., ECF No. 173 *with* Pls.' Mot. to Withdraw Mot. for Partial Summ. J., ECF No. 226 (granted via December 10, 2021 text order).

substantive merit of the Diocesan Defendants' motion. Because this tactic is barred, the Court should enter an order granting the Diocesan Defendants' motion for summary judgment on Count IV and declaring that there was no PPO for the Plan on and after April 29, 2013, and therefore, from that date forward, the Plan was subject to ERISA.

B. Neither Plaintiffs (Nor Their Affiant) Can Create Questions Of Fact By Contradicting Pleadings And Prior Admissions and Testimony

As discussed above, the Court need not (and should not) look past the controlling legal documents (the Plan, SJHSRI's bylaws, AG Decision, 2015 Cy Pres Petition and Order), and consider arguments from Plaintiffs that are inconsistent with those terms, when assessing whether winddown SJHSRI was a PPO, thus curing the agreed upon lapse in SJHSRI's satisfaction of that element of the church plan exemption. Based upon the terms of those documents and not Plaintiffs' spin on them, the Diocesan Defendants are entitled to summary judgment. But Plaintiffs (and their affiant) go farther in their pursuit of derailing the Court from issuing the relief they originally sought. They turn shameless contradiction into the routine and commonplace.

1. *Plaintiffs' Contradictions*

Plaintiffs' opposition and Mr. Land's 2022 affidavit contradict Plaintiffs' allegations, testimony, and prior arguments to this Court and Mr. Land's earlier testimony. The inconsistency was not inadvertent. Plaintiffs contradict themselves in a desperate attempt to cloud the clear record that ***Plaintiffs*** created[8] and therefore prevent the Court from providing the relief that ***Plaintiffs*** asked for in their 2019 motion for summary judgment (and ostensibly still seek). The contradictions between what Plaintiffs argued then versus now are blatant.

[8] And which the Diocesan Defendants adopted in relevant part.

THEN	NOW
"After the closing of the 2014 Asset Sale, SJHSRI's Board of Trustees and the CCCB Finance Committee ceased any administration of the Plan. By resolution dated December 15, 2014, CCCB caused SJHSRI to delegate 'the administration, management and potential wind-down' of the Plan to SJHSRI's president and to one of SJHSRI's attorneys, 'each acting alone.' Neither of these individuals was an organization, much less a principal-purpose organization, or associated with a church." FAC, ECF No. 60, ¶ 80; *id.* ¶¶ 70-81 (under the heading "The Plan Did Not Satisfy the 'Principal Purpose' Requirement"); *see* Compl., ECF No. 1, ¶ 82 (alleging substantially the same as paragraph 80 of the FAC).	"After the sale of all of the operating assets of SJHSRI on June 20, 2014, SJHSRI no longer had an operating business to run, and, thereafter, the maintenance and funding of the Plan was the principal purpose of SJHSRI and its Board of Trustees, such that SJHSRI and its Board of Trustees qualified as a "principal purpose organization" after June 20, 2014, and such qualification is given retroactive effect under ERISA's 'cure' provisions." Pls.' MSJ Opp'n, ECF No. 245, at 7. *** "SJHSRI's main job after June 20, 2014 was administering or funding the Plan." Pls.' MSJ Opp'n, ECF No. 245, at 66.
"It is also the Receiver's conclusion that from the closing of the asset sale on June 20, 2014 until the Plan was placed into Receivership in August of 2017, the principal purpose of SJHSRI was winding down its operations." Ex. 41 to Diocesan Defs.' Resp. to Pls.' PPO Facts (Pl. Receiver Interrog. Answers) at 6 (answer to No. 3).	"However, *after* the closing on June 20, 2014, it is clear from Attorney Land's declaration and his reasoning as set forth therein that the administration and funding of the Plan *were* the principal purpose of SJHSRI and SJHSRI's Board of Trustees." Pls.' MSJ Opp'n, ECF No. 245, at 66 (emphasis in original).
"Following the closing of the asset sale on June 20, 2014 until the Plan was placed into Receivership in August of 2017, SJHSRI's other purposes and activities (in addition to administering, maintaining, and funding the Plan) were the hundreds of purposes and actions involved in winding down a hospital and related entities." Ex. 41 to Diocesan Defs.' Resp. to Pls.' PPO Facts (Pl. Receiver Interrog. Answers) at 11 (answer to No. 5).	"Consequently, by that time, virtually all ordinary business decisions that SJHSRI management would normally make and the board of trustees normally would be expected to supervise were pre-determined or non-existent for SJHSRI's Board of Trustees." Pls.' MSJ Opp'n, ECF No. 245, at 66; *see also* PSUDF, ECF No. 243, ¶¶ 168-69.
"In short, there was no principal purpose organization maintaining or administering the Plan from July 1, 2011 to the present." Pls.' Prospect Reply, ECF No. 197, at 98.[9]	"Given these facts, it cannot be said as a matter of law that SJHSRI did not qualify as a 'principal purpose organization.'" Pls.' MSJ Opp'n, ECF No. 245, at 68.

[9] Although more of an evidentiary admission than a binding judicial admission, the Diocesan Defendants cite this final contradiction for two reasons. First, it highlights how complete and blatant Plaintiffs' reversal is. Second, it totally undermines their suggestion that their new cure argument was prompted by consideration of a subject matter that they had not previously analyzed.

Most of the statements in the "then" column—specifically those in Plaintiffs' pleadings and Plaintiff Receiver's interrogatory answers—are judicial admissions and Plaintiffs are bound by them. They cannot defeat summary judgment by contradicting themselves on this point.[10]

"A party's assertion of fact in a pleading is a judicial admission by which it normally is bound throughout the course of the proceeding." *Schott Motorcycle Supply, Inc. v. Am. Honda Motor Co., Inc.*, 976 F.2d 58, 61 (1st Cir. 1992) (Citations omitted). "Unlike ordinary admissions, which are admissible but can be rebutted by other evidence, judicial admissions are conclusive on the party making them." *Atlas Glass & Mirror, Inc. v. Tri-North Builders, Inc.*, 997 F.3d 367, 373 (1st Cir. 2021). The judicial admissions doctrine works to enforce the well-settled rule that a "complaint cannot be amended merely by raising new facts and theories in plaintiffs' opposition papers, and hence such new allegations and claims should not be considered in resolving the motion." *Southwick Clothing LLC v. GFT (USA) Corp.*, No. 99 CV 10452(GBD), 2004 WL 2914093, at *6 (S.D.N.Y. Dec. 15, 2004). Courts in this district have regularly invoked the judicial admissions doctrine to prevent just the type of fancy footwork in which Plaintiffs are engaged. *See Mejia v. Charette*, No. 12-cv-449-JD, 2014 WL 576140, at *4 (D.R.I. Feb. 12, 2014); *No. Am. Catholic Educ. Programming Found., Inc. v. Sprint Corp.*, 2006 WL 1207670, at *7 (D.R.I. May 2, 2006). The Court should do so here.[11]

[10] Or on their new construction of the effect of the 2015 Cy Pres proceedings. As discussed, *supra* at Part II.A, Plaintiffs (and their counsel) already prevailed earlier in this proceeding (and received millions of dollars) using an opposite construction and are judicially estopped from arguing otherwise.

[11] The Court's words from more than three years ago were prophetic as to what was coming from Plaintiffs:

> THE COURT: Well, it does, but it seems like there's just a lot of fancy footwork going on here, and it kind of bothers me a little bit; that is, you don't want to say it's really an ERISA plan, but you actually want me to make declaratory rulings about the application of state law that you say are appropriate or important to the settlement. And I feel like – I feel a little bit like, you know, you want it all ways here.

ECF No. 118 (Feb. 12, 2019 Hr'g Tr.) at 16:3-11.

Plaintiffs will surely cry: "But we pled in the alternative!" And, "[t]o be sure," as the First Circuit has observed, "a pleading should not be construed as a judicial admission against an alternative or hypothetical pleading in the same case." *Schott Motorcycle*, 976 F.2d at 61 (citing Wright & Miller, Federal Practice & Procedure § 1282 at 525 (2d ed.) for the proposition that "generally an alternative claim is drafted in the form of 'either-or' and a hypothetical claim is in the form of 'if-then'"). But the First Amended Complaint does nothing of the sort.

Simply, Plaintiffs' argument that the Plan is an ERISA plan "was not made in the context of an alternative or hypothetical pleading." *Id.* at 62. Plaintiffs pled a declaratory judgment count requesting that the Court declare that the Plan is an ERISA plan. FAC, ECF No. 60, ¶¶ 473-476 (Count IV). Plaintiffs pled that SJHSRI failed the PPO requirement after the 2014 Asset Sale. *Id.* ¶ 80. They did not ask the Court to declare that the Plan is a church plan in the alternative. Plaintiffs did not plead, in the alternative, that SJHSRI satisfied the PPO requirement. They instead pled state law causes of action—which might be preempted if ERISA applied—as a potential backstop in case they did not obtain the declaration they wanted (that ERISA applied because SJHSRI, among other things, failed the PPO requirement). *Id.* ¶ 32.

Even if the Court "scoured the complaint," as the First Circuit did in *Schott Motorcycle*, it would only find that Plaintiffs have "expressly incorporated" in all counts against the Diocesan Defendants (ERISA and state law) an allegation fatal to their argument that they have pled in the alternative that the Plan was a church plan. *See* 976 F.2d at 62. The following allegation appears at paragraph 55(d)(ii):

> Next, to evade federal law imposing liability on control groups and successors under ERISA, SJHSRI and Defendants CCCB, RWH, Prospect Chartercare, Prospect Chartercare St. Joseph, Prospect Chartercare Roger Williams, Prospect Medical Holdings, and Prospect East conspired with Corporation Sole, Diocesan

> Administration, and Diocesan Service to ***falsely claim that the Plan continued to qualify as a "church plan," which if true would have exempted it from ERISA***. This claim violated federal tax laws and ERISA.

FAC, ECF No. 60, ¶ 55(d)(ii) (emphasis added); *see id*. ¶¶ 470, 473, 494, 498, 503, 531, 535, 539, 543, 551, 554 (ERISA and state law counts against the Diocesan Defendants incorporating paragraph 55). In other words, Plaintiffs have only alleged that the Plan was an ERISA plan, not that it was a church plan in the alternative. They must be held to their complaint and cannot contradict it to defeat summary judgment. *Schott Motorcycle*, 976 F.2d at 62; *see Mejia*, 2014 WL 576140, at *4 ("Therefore, Mejia's attempt to create a factual dispute to avoid summary judgment by providing a different version of events in his declaration [from that in his complaint] is unavailing.").

Plaintiffs make a feeble attempt to argue that they should be permitted to contradict themselves because they previously only "sought to prove that the Plan was subject to ERISA by the time of the closing of the 2014 Asset Sale and did not consider SJHSRI's limited function after then to be either material or relevant to the motion." Pls.' MSJ Opp'n, ECF No. 245, at 7-8. This statement cannot be squared with Plaintiffs' own statements. Plaintiffs directly considered the state of winddown SJHSRI when they vehemently opposed Prospect's argument that Plaintiffs' motion for summary judgment should be denied because the PPO defect *might* have been cured. *See* Pls.' Prospect Reply, ECF No. 197, at 95-98. Even more blatantly, Plaintiff Receiver analyzed winddown SJHSRI and testified under oath that after the closing of the 2014 Asset Sale "the principal purpose of SJHSRI was winding down its operations," Ex. 41 to Diocesan Defs.' Resp. to Pls.' PPO Facts (Pl. Receiver's Interrog. Answers) at 6 (answer to No. 3), which consisted of "***the hundreds of purposes and actions involved in winding down a hospital and related entities***," in addition to administering the Plan. *Id.* at 11 (answer to No. 5)

(emphasis added). That is a separate judicial admission to which they are bound. *See In re Kaiser*, 566 B.R. 550, 556-67 (N.D. Ill. 2015) (treating interrogatory response as judicial admission and precluding party from contradicting it on summary judgment); *Lopez-Oviedo v. Marvin*, No. 08-CV-1909 (JS)(ARL), 2012 WL 4483038, at *3 (E.D.N.Y. Sept. 27, 2012) (same). It is also fatal to their PPO contention.

Plaintiffs had all the same documents then that they rely on now to make their new argument. *Atlas Glass*, 997 F.3d at 373 ("But even assuming that Atlas's spot-on admission left room for such relief, the remaining documents authored by Atlas itself eliminate that room with equally spot-on admissions."). They reverse their position not in good faith, but because they perceive their original position (and the allegations in their complaint) as no longer convenient. The Court should disregard the PPO component of Plaintiffs' opposition as it is fundamentally based upon contradictions of their own pleadings and prior testimony, as well as arguments they have raised in this litigation. *Melendez-Ortiz v. Wyeth Pharm. Co.*, 775 F. Supp. 2d 349, 374 (D.P.R. 2011) ("Courts generally cannot entertain claims on summary judgment that never appeared in the complaint, as the defendant has an 'inalienable right to know in advance the nature of the cause of action being asserted against him.'" (internal citation omitted)).

2. *Mr. Land's Contradictions*

At least twice now, Plaintiffs have turned to Mr. Land in an attempt to obtain their preferred relief from this Court. In support of this opposition, Plaintiffs submit Mr. Land's 2022 affidavit, ECF No. 243-89. Mr. Land's 2022 affidavit does not just (predictably) contradict Plaintiffs' allegations, arguments and testimony, but also Mr. Land's 2019 sworn testimony. For the reasons discussed *supra* at Part II.B.1, Plaintiffs are bound by their judicial admissions and the Court should disregard their entire argument on the PPO requirement, including whatever

Mr. Land says now. But Mr. Land's contradictions with his own prior sworn statements independently mandate that the Court disregard Mr. Land's 2022 affidavit.

"When an interested witness has given clear answers to unambiguous questions, he cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory, but does not give a satisfactory explanation of why the testimony is changed." *Colantuoni v. Alfred Calcagni & Sons, Inc.*, 44 F.3d 1, 4-5 (1st Cir. 1994). "The timing of the change in testimony, i.e., in response to a summary judgment request, is probative of an attempt to manufacture an issue of fact." *Melendez-Ortiz*, 775 F. Supp. 2d at 365. When confronted with such contradictions, the court may disregard the affidavit. *Colantuoni*, 44 F.3d at 5. "[T]he district court need not specifically enumerate each contradiction between the witness' prior testimony and the later-filed affidavit in order to disregard the evidence." *A.J. Amer Agency, Inc. v. Astonish Results, LLC*, No. 13-351 S, 2014 WL 3496964, at *12 (D.R.I. July 11, 2014).

Mr. Land's Contradictory Testimony on the Effect of the 2015 Cy Pres Proceedings. The Diocesan Defendants discussed Plaintiffs' complete reversal on the construction of the 2015 Cy Pres Petition and Order *supra* at Part II.A. And like Plaintiffs, Mr. Land now construes the AG Decision and 2015 Cy Pres proceedings as greatly restricting SJHSRI's discretion over how to conduct its winddown in all respects, except as it concerns the Plan. Those legal decisions, of course, speak for themselves and did not have the effect that Plaintiffs and Mr. Land now give to them. *Supra* at Part I.D. But Mr. Land also had a different opinion in 2019 as to what the Cy Pres Order did than he does today.

Today, Mr. Land testifies:

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

SJHSRI's Board of Trustees as would have been the case if SJHSRI were operating without such control. ECF No. 243-89 (2022 Land Aff.) ¶ 11 (emphasis added).

- Consequently, virtually all ordinary business decisions which a board of trustees normally would be expected to supervise were pre-determined or non-existent for SJHSRI's Board of Trustees following the sale of SJHSRI's operating assets. There were no operating issues to be managed or for the Board to supervise, because SJHSRI had no remaining operating business or operating assets. In addition, the sources and amount of SJHSRI's charitable and other assets and SJHSRI's obligation to apply them to pay its pre and post-closing liabilities *were already determined in the Cy Pres proceeding and the prior Decision of the RIAG*. *Id.* ¶ 17 (emphasis added).

Three years ago, Mr. Land told a different story. First, in 2019, Plaintiffs elicited testimony from Mr. Land, where he adopted their position that the 2015 Cy Pres proceedings did not require SJHSRI to do anything, but merely gave it "permission" to take action:

> Q. [Mr. Sheehan] Now, at the time you wrote that, you understood that it was the plaintiff's contention that the references in the Cy Pres petition to the pension plan were intended to lull the court into believing that there was sufficient money to pay the plan.
> A. [Mr. Land] I do understand that that was the plaintiff's position.
> Q. And you understand that the Order that the court entered did not -- let me back up a bit. The Order that the court entered allowed certain funds that Roger Williams had to be used to pay liabilities of St. Joseph's. Correct?
> A. Correct.
> Q. It did not, however, order that those funds be used to pay St. Joseph's liabilities. Correct? It gave permission.
> A. That's how I understand it, yes.

Ex. 39 to Diocesan Defs.' Resp. to Pls.' PPO Facts (2019 Land Dep.) 133:13–134:3. The Court cannot rely on an affidavit of a witness who testified in 2019 that the Cy Pres proceedings did not impact winddown SJSHRI's discretion and obligations, but avers the opposite in 2022. *Serio v. Dwight Halvorson Ins. Servs., Inc.*, No. 04-CV-3361 (KMK), 2007 WL 9701070, at *7-8 (S.D.N.Y. Oct. 4, 2007) (disregarding sworn declaration submitted in opposition of summary judgment when subsequent deposition testimony contradicted declarant's claim "about FSIM's obligation to secure unpaid" debt "and the implications under Bermuda law if FSIM failed to honor its obligations").

Second, Mr. Land's 2022 testimony that there were no "operating issues to be managed" also contradicts his earlier testimony. ECF No. 243-89 (2022 Land Aff.) ¶ 17. Three years ago, Mr. Land testified: "Q. [Mr. Halperin] Have any portion of those funds been used to pay liabilities over the past four years? A. [Mr. Land] Oh, absolutely. There's been ongoing liabilities. There's -- including just *ordinary operating expenses and costs of running, you know, winding down the business*." Ex. 39 to Diocesan Defs.' Resp. to Pls.' PPO Facts (2019 Land Dep.) 20:4-9 (emphasis added).

Finally, Mr. Land now asserts: "the *sources* and *amount* of SJHSRI's charitable and other assets and SJHSRI's obligation to apply them to pay its pre and post-closing liabilities were already determined in the Cy Pres proceeding and the prior Decision of the RIAG." ECF No. 243-89 (2022 Land Aff.) ¶ 17 (emphasis added). In 2019, however, he testified:

> Q. [Mr. Halperin] What is it that caused those funds to go from being a relatively small amount of one to three million, I think you testified, up to this $14 million over the last four years?
> A. [Mr. Land] Um, there are a lot of factors. I mean, there were investment returns which can cause part of it. There were settlements with the Medicare, Medicaid, CMS that resulted in significantly greater recoveries than were anticipated and was anticipated by the -- that folks at the hospital who prepared the sources and use funds in the analysis at the time of sale. That might be the most significant portion. There were some settlements of litigation matters that were disputed that resulted in considerably greater returns than again the same folks estimated at the time of the sale. And we've had some charitable trust distributions. The charitable trust ran for a period of time. I believe there are charitable remainder trusts and those resulted in distributions. So that's a considerable portion as well.

Ex. 39 to Diocesan Defs.' Resp. to Pls.' PPO Facts (2019 Land Dep.) 19:9–20:3. Both of these statements cannot be true. The Court should disregard Mr. Land's 2022 Affidavit. *See Serio*, 2007 WL 9701070, at *7-8 ("The clash between Halvorson's Declaration and his deposition is fatal to FSIM's attempt to thwart summary judgment on this claim.").

Mr. Land's Contradictory Testimony on the Conduct of SJHSRI's Winddown.

Mr. Land devotes several paragraphs of his affidavit to explaining that, despite being a hospital corporation in winddown, SJHSRI's purpose and function following the 2014 Asset Sale were essentially constrained to the maintenance, administration, and funding of the Plan. *See, e.g.*, ECF No. 243-89 (Land Aff.) ¶¶ 7, 17-18, 21-22, 29-30. He further states, for example, that "the principal matter going forward for SJHSRI and SJHSRI's Board of Trustees was the maintenance and funding of the Plan" and that "the ultimate goal of the wind-down of RWH and SJHSRI was to fund SJHSRI's obligations under the Plan."[12] *Id.* ¶ 18.

Back in 2019, Mr. Land testified under oath repeatedly that the winddown activities of CCCB, RWH, and SJHSRI were far different and broader than that:

> Q. [Mr. Halperin] So what were your responsibilities generally over the last four years as agents for those entities?
> A. [Mr. Land] So, I think it's easier to – I'll describe it this way. When the hospitals were -- when hospital operating entities were sold to Prospect, there were no employees left, and so I performed, as agent, essentially functions that employees would do to try to wind down ordinary operating issues and all of the issues that might come up in a wind-down of an entity.
> Q. So is it fair to say that the wind-down of the entities was your principal role in some way, shape or form either as agent or attorney?
> A. I guess that's fair. Principal role.
> Q. What other roles were there other than that which related to the wind-down of the entities?
> A. Well, I counseled the board of directors in the context of my services as a -- as an attorney.
> Q. So, that would be in connection with, like, routine corporate matters?
> A. Routine corporate matters, what was going on with the wind-down itself, legal issues that might arise during that process.

Ex. 39 to Diocesan Defs.' Resp. to Pls.' PPO Facts (2019 Land Dep.) 9:8–10:5.

[12] Yet, even today, Mr. Land cannot completely maintain this assertion. His 2022 affidavit acknowledges: "when needed, the [SJHSRI] Board also provided supervision over some of the more discretionary decisions involved in the wind-down, such as authorizing settlement of claims pursuant to my recommendations." ECF No. 243-89 (Land Aff.) ¶ 18 n.2.

> Q. [Mr. Halperin] Did you communicate with a board in making decisions as to how monies were going to be spent, or was this something you had some level of authority to do independently?
> A. [Mr. Land] When you say "spent," we -- there were wind-down expenses, so wind-down expenses were paid with – you know, to the extent that board approval was required for extraordinary expenses or settlement of disputes or things like -- of that nature, I involved Dan Ryan, and Dan would have determined what to do next.

Id. 12:15–12:24.

> Q. [Mr. Halperin] So if I understood your answer, approximately 13 million is available for liabilities? Wind-down liabilities?
> A. [Mr. Land] Yeah, approximately. Today.
> Q. Yes, yes. Let's mark the Order on the Petition as Exhibit Number 2, please.
> (Exhibit No. 2 marked)
> Q. What is it that caused those funds to go from being a relatively small amount of one to three million, I think you testified, up to this $14 million over the last four years?
> A. Um, there are a lot of factors. I mean, there were investment returns which can cause part of it. There were settlements with the Medicare, Medicaid, CMS that resulted in significantly greater recoveries than were anticipated and was anticipated by the -- that folks at the hospital who prepared the sources and use funds in the analysis at the time of sale. That might be the most significant portion. There were some settlements of litigation matters that were disputed that resulted in considerably greater returns than again the same folks estimated at the time of the sale. And we've had some charitable trust distributions. The charitable trust ran for a period of time. I believe there are charitable remainder trusts and those resulted in distributions. So that's a considerable portion as well.
> Q. Have any portion of those funds been used to pay liabilities over the past four years?
> A. Oh, absolutely. There's been ongoing liabilities. There's -- including just ordinary operating expenses and costs of running, you know, winding down the business. There have been CMS claims back against the hospitals for recoupment as well. So the net positive effect of those transactions is what you see now in the increase in assets, but there were negative transactions as well.

Id. 19:2–20:13.

Mr. Land also explained the thought-process as to where the Plan figured in the wind-down:

> Q. [Mr. Halperin] What did CCCB contemplate would happen with respect to the money under its control after the wind-down period concluded?
> MR. SHEEHAN: Objection, beyond the scope of the deposition.

> A. [Mr. Land] After the wind-down period concluded, there would be a process undertaken to finalize the wind-down and to -- ultimately if the only -- if the only remaining obligation of these entities in the aggregate, assuming all to be one, was the pension, then presumably we would have sought to have the pension get the remaining assets.
> Q. So your -- the way you are handling this was to deal with the liabilities as part of the wind-down, and then afterwards the pension would have been addressed in some way, shape or form. Is that fair?
> A. That's how I understood the paradigm.

Id. 24:23–25:13. In defending the good faith of the settlement struck between SJHSRI and Plaintiff, Mr. Land reiterated that the winddown was not completed when SJHSRI put the Plan into receivership: "At the time of filing of the Petition to Appoint Receiver, the Heritage Hospitals [SJHSRI and RWH] were not certain of how much, if any, funds might be available for the Plan following completion of the wind down of the Heritage Hospitals." ECF No. 109-2 (2019 Land Aff.) ¶ 5. Indeed, it was "anticipated that the wind down of the Heritage Hospitals could take several years, if not longer, to complete." *Id.* ¶ 6.

The above testimony contradicts Mr. Land's (and Plaintiffs') current position that SJHSRI was principally focused on the Plan following the 2014 Asset Sale. Rather, it is consistent with Plaintiffs' earlier position that SJHSRI's focus was elsewhere—"the hundreds of purposes and actions involved in winding down a hospital and related entities." Ex. 41 to Diocesan Defs.' Resp. to Pls.' PPO Facts (Pl. Receiver's Interrog. Answer) at 11 (answer to No. 5). The Plan was just one of SJHSRI's responsibilities, FAC, ECF No. 60, ¶ 16, one that SJHSRI was looking to shirk. Pls.' Counsel's Final Approval Mem. in Supp. of Mot. for Atty's Fees, ECF No. 150, at 15-17. Plaintiffs (and Mr. Land) told one story three years ago and now that this story is inconvenient, Plaintiffs (with Mr. Land's help) weave a different tale to defeat the Diocesan Defendants' request for the same declaration that Plaintiffs asked for in 2019. The Court should disregard Mr. Land's 2022 Affidavit. *See A.J. Amer*, 2014 WL 3496964, at *16

("Based on this [contrary deposition] testimony, Mr. Amer's inconsistent averment in his Affidavit that he was promised a totally unique website, with no feature identical to what he saw during his due diligence must be disregarded pursuant to the sham affidavit doctrine." (internal citation omitted)).

C. Mr. Land's 2022 Affidavit Does Not Create A Dispute Of Fact

If the Court does not disregard Mr. Land's 2022 Affidavit (and it should), the affidavit does not create a disputed issue of material fact for three reasons. First, because it is indisputable that SJHSRI was a hospital in winddown, was not created to maintain, administer or fund the Plan and did not amend its operating documents to conform its mission to that end, nothing in Mr. Land's 2022 Affidavit is material. *Supra* Part I.A-C; *see Anderson v. Liberty Lobby, Inc.*, 477 U. S. 242, 248 (1986) ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted."); *Clarke v. JPMorgan Chase Bank, N.A.*, No. 08 Civ. 2400(CM)(DCF), 2010 WL 1379778, at *9 (S.D.N.Y. Mar. 26, 2010) ("Moreover, not every disputed factual issue is material in light of the substantive law that governs the case.").

Second, Mr. Land's 2022 affidavit rests on legal conclusions dependent on Mr. Land's interpretation of legal documents (AG Decision, 2015 Cy Pres Petition and Order). ECF No. 243-89 (Land Aff.) ¶¶ 10-18, 21-22, 25, 30. The effect of the AG Decision and the 2015 Cy Pres proceedings are legal conclusions for this Court alone to make. Mr. Land's construction of those documents is irrelevant (and wrong for the reasons discussed *supra* at Part I.D).

Third, although the Diocesan Defendants do not think that such statements are material to the inquiry, Mr. Land's 2022 affidavit also provides the Court with little more than

opinions and characterizations. *Fleet Nat'l Bank v. H&D Entm't., Inc.*, 96 F.3d 532, 540 (1st Cir. 1996) (disregarding conclusory affidavit). Mr. Land's 2022 affidavit does not set out how many meetings the winddown SJHSRI board held; how often the Plan was a topic of discussion at those meetings; whether the Plan was the only thing discussed at those meetings; or what percentage of the SJHSRI Board's time was allotted to the Plan at those meetings versus other topics. Plaintiffs have already conceded, moreover, that after April 29, 2013, SJHSRI's Board of Trustees considered and decided matters concerning the Plan as part of the Board of Trustees' regular meetings and pursuant to the agenda of the meetings of the Board of Trustees, and did not keep separate minutes concerning its actions as a Retirement Board. *See* Pls.' Resp. to Diocesan Defs.' Statement of Facts, ECF No. 244 (not responding to paragraph 37 of the Diocesan Defendants' Statement, ECF No. 237).[13]

Mr. Land's 2022 affidavit just indicates that the Plan was discussed at three meetings, ECF No. 243-89 (Land Aff.) ¶¶ 23-24, 29, references a CharterCARE Community Board agenda, *id.* ¶ 24, some emails with the Plan's actuary and a trustee, *id.* ¶¶ 21, 29, acknowledges other matters that the SJHSRI Board handled, *id.* ¶ 18 n.2, and extrapolates therefrom, relying on Mr. Land's legal conclusions as to the effect of the AG Decision and the

[13] Plaintiffs' (and Mr. Land's) use of a board agenda to make their PPO argument is reminiscent of a contention that Plaintiffs chastised Prospect for making:

> Moreover, the minutes of the meetings of the SJHSRI Board of Trustees during the period from July 1, 2010 through June of 2014 have several instances in which the Board of Trustees acted in connection with the Plan as part of their regular meetings as the Board of Trustees, without either specially convening or being referred to as the Retirement Board. Prospect has identified no minutes in which SJHSRI's Board of Trustees specially convened as the Retirement Board or purported to act in that capacity. Simply put, SJHSRI's same Board of Trustees *both* oversaw a hospital business *and* oversaw the Plan.

Pls.' Prospect Reply, ECF No. 197 at 17-18 (emphasis in original). This argument is equally applicable to winddown SJHSRI. Plaintiffs do not dispute that winddown SJHSRI Board acted in connection with the Plan as part of their regular meetings as the Board of Trustees, without either specially convening or being referred to as the Retirement Board. Plaintiffs have identified no minutes (or agendas) in which SJHSRI's Board of Trustees specially convened as the Retirement Board or purported to act in that capacity. Simply put, SJHSRI's same Board of Trustees *both* oversaw a hospital corporation's business in winddown *and* dealt with the Plan as needed.

2015 Cy Pres proceedings to do the rest. Absent non-conclusory evidence as to what (if anything) winddown SJHSRI was doing, such documents (and incorrect legal opinions) are insufficient to create a genuine issue of fact as to the principal purpose or function of winddown SJHSRI (or its board). *See Fleet Nat'l Bank*, 96 F.3d at 540 ("The affidavit contains only the conclusory assertion that in the negotiations there were 'specific discussions' adopting his [the affiant's] best-efforts interpretation. No dates, names or actual statements are supplied; not a single 'specific' is set forth to demonstrate, or even illustrate, the content of the alleged 'specific discussions'" instead there "is only some lawyer-like argument in a further paragraph as to why Hartstone's 'best efforts' gloss conformed to the general tenor of the agreement.").

***

Even if Plaintiffs (and Mr. Land) were allowed to blatantly contradict themselves, summary judgment for the Diocesan Defendants would still be proper because none of Plaintiffs' proffered "facts" are material. Following the 2014 Asset Sale, SJHSRI was a hospital in winddown. *Supra* Part I.C. SJHSRI was not created to maintain, administer, or fund the Plan; it did not change its corporate mission to serve those ends. *Supra* Part I.B. Likewise, the AG Decision and the 2015 Cy Pres proceedings did not limit SJHSRI to such activity. *Supra* Part I.D. The material facts are not in dispute. They confirm that SJHSRI (or its Board of Trustees) could not have been a principal purpose organization as a matter of law and the Court should award the Diocesan Defendants' summary judgment.

Having addressed Plaintiffs' response to the merits of the Diocesan Defendants' motion, there is no easy transitional turn of phrase for the remainder of this brief. So, the Diocesan Defendants will be more blunt: Everything that follows has nothing to do with the principal purpose organization requirement. Plaintiffs' contention that the Diocesan Defendants are judicially estopped is frivolous and can (and should) be rejected as a matter of law.

III. PLAINTIFFS' CLAIM THAT THE DIOCESAN DEFENDANTS ARE JUDICIALLY ESTOPPED IS NOTHING MORE THAN A BASELESS, STALL TACTIC

Although there is no precise or rigid formula to guide the application of judicial estoppel, the U.S. Supreme Court has recognized several factors as relevant. *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001). First, a party's position must be clearly inconsistent with a position that party took earlier. *Id.* at 750. Second, the party must have prevailed on the basis of its earlier position, such that judicial acceptance of an inconsistent position in a later proceeding would create the perception that a court was misled. *See id.* at 750. Third, the party asserting the inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Id.* at 751. "Fairness must be viewed in the context of the defendants' motive in changing positions and not solely in the context of any "unfavorable result" to the opposing party. *See Jarrard v. CDI Telecomms., Inc.*, 408 F.3d 905, 915 (7th Cir. 2005). Judicial estoppel does not lie where the inconsistency can be excused or reconciled. *See Biomedical Patent Mgmt Corp. v. Cal., Dept. of Health Servs.*, 505 F.3d 1328, 1342 (Fed. Cir. 2007); *Seneca Nation of Indians v. State of N.Y.*, 26 F. Supp. 2d 555, 566 (W.D.N.Y. 1998).

Plaintiffs devote the vast majority of their summary judgment opposition papers to their contention that the Diocesan Defendants are judicially estopped from seeking the same relief that Plaintiffs sought or any benefits that might redound from such relief. One-hundred fifteen of Plaintiffs' one-hundred forty-six "undisputed and disputed" facts (**78.7 percent!!**) and roughly sixty-three pages of their opposition brief are in service of this argument. Therein, Plaintiffs lay out a convoluted conspiracy theory, but the estoppel component largely depends on the Diocesan Defendants' purported receipt of some documents and other parties' statements.

The Diocesan Defendants undertook the painstaking process of setting forth why all of the 115 Statements proffered by Plaintiffs in support of this estoppel argument lead nowhere and are rife with evidentiary and substantive deficiencies. The Diocesan Defendants were hesitant to file this hefty document because it plays into the obvious tactic being pursued by Plaintiffs of discouraging this Court from grappling with the real issues in this case because of the sheer volume of filings.

That is why the Diocesan Defendants responded to the estoppel statements separately from the PPO statements. They are a tactical and superfluous side-show. The Court need not delve into that thicket of factual averments at all, however. It can and should reject Plaintiffs' estoppel defense as a matter of law and logic. First, even assuming an inconsistent position has been taken by these defendants (it has not) such a position could not form the basis of an estoppel because of an intervening change in the law. Second, state regulators did not decide that the Plan was a church plan, allude to the Plan's status under ERISA, or indicate that such status figured in their decisions, much less delve into the minutia of whether there was a PPO and what law applied to resolve that issue. Third, the Diocesan Defendants never made representations on this issue before the regulators. Fourth, the Diocesan Defendants neither controlled nor were in privity with SJHSRI. Fifth, as the motion seeks to grant the very relief previously sought by Plaintiffs against the Diocesan Defendants in this action, it would not serve principles of fairness or equity to estop the Diocesan Defendants from seeking that same relief, simply because Plaintiffs wish to change tactics. If the Court agrees with any one of these points, it need go no further.

A. The Diocesan Defendants Cannot Be Judicially Estopped Because The Controlling Law Changed Between When They Purportedly Took A Position And When They Changed It

The United States Supreme Court's 2017 decision in *Stapleton* (and cases post-*Stapleton*) loom large in the Diocesan Defendants' and Plaintiffs' discussions of the church plan exemption and the PPO requirement. Pls.' Mot. for Summ. J., ECF No. 173, at 20-26; Diocesan Defs.' Mot. for Summ. J., ECF No. 236, at 14-19; Pls.' MSJ Opp'n, ECF No. 245, at 61-63. This is important because, as Plaintiffs explain: "It should be noted that the wrongdoing on which Plaintiffs' claims against the Diocesan Defendants are primarily based took place from 2010 – June 20, 2014 . . . ." Pls.' MSJ Opp'n, ECF No. 245, at 12. This 2010-2014 timeframe also covers when the Diocesan Defendants (and/or their alleged co-conspirators) ***purportedly*** took a position on SJHSRI's qualification for the church plan exemption and/or its satisfaction of the PPO requirement. *Id.* at 86-92. *Stapleton* was decided in 2017, after the regulators' review of the 2014 Asset Sale and before the current (and Plaintiffs' earlier) motion in this Court. *Stapleton* substantially clarified and changed the law governing the PPO requirement. Even if one were to incorrectly assume that the Diocesan Defendants now take a position inconsistent from one they allegedly took in 2013/2014, any such change would be excused, indeed compelled, on account of the change in the law wrought by *Stapleton*.

1. *Legal Standard*

It is well settled that there can be no judicial estoppel where a shift in positions results from an intervening change in the law. *Longaberger Co. v. Kolt*, 586 F.3d 459, 471 (6th Cir. 2009) (collecting cases and holding: "We therefore adopt the position of our sister circuits and hold that judicial estoppel is not applicable where a party argues an inconsistent position based on a change in controlling law."), *abrogated on other grounds*, *Montanile v. Bd. of Trs. of*

Nat'l Elevator Indus. Health Benefit Plan, 577 U.S. 136, 146-51 (2016). Some courts reason that a change in the law that intervenes between two inconsistent positions "reconciles" them. *Seneca Nation*, 26 F. Supp. 2d at 566 ("The change in the legal standard for congressional ratification enunciated in *Oneida II* and *United States v. Clarke* reconciles the change in the United States' legal position from almost twenty years earlier in *Seneca I.*" (internal citation omitted)). Others explain that the change in law excuses a party's switch in positions. *Biomedical Patent Mgmt.*, 505 F.3d at 1342 ("Perhaps it is more precise to say that, although DHS's positions were inconsistent, the inconsistency is excused by an intervening change in the law."). Regardless of the terminology, "the end result . . . is the same." *Id.* Parties "[are] not judicially estopped from asserting a new position that resulted from a change in the law." *See id.*

The U.S. Court of Appeals for the Seventh Circuit's decision in *Jarrard v. CDI Telecommunications, Inc.*, 408 F.3d 905 (7th Cir. 2005), is illustrative. In *Jarrard*, the district court refused to apply judicial estoppel where the defendants successfully argued before a Workers Compensation Board that it had no jurisdiction and then sought (and obtained) dismissal "in the district court on the basis that the Board in fact does have exclusive jurisdiction." *See id.* at 915. The Seventh Circuit affirmed. The appeals court reasoned that "the position the defendants took before the Board—that the Board did not have jurisdiction because the statute was not retroactive—was a fair reading of the statute." *Id.* The defendants "were well within their rights to advocate this interpretation in good faith, and the Board agreed with that interpretation." *Id.* But then, "[t]he law changed in the interim, when the Indiana courts interpreted the statute the other way." *Id.* As a result, "the defendants argued a position in federal court opposite from the one taken before the Board." *Id.* "There is nothing fraudulent or

otherwise untoward about this shift," the Seventh Circuit explained, "even though the results ended up being favorable to the defendants in each instance." *Id.* at 915.

The *Jarrard* Court noted the plaintiff's objection "that it would be 'unconscionable' to let defendants get away with this shift, a fairness argument implicating the third factor." *Id.* "In conformance with the doctrine's antifraud purpose, however," the court recognized that "fairness must be viewed in the context of the defendants' motive in changing positions and not solely in the context of the unfavorable result to Jarrard. In light of the change in Indiana law, the defendants' motives are not suspicious." *Id.* "Judicial estoppel should not be used to work an injustice," the court concluded, "particularly when the defendants' change in position resulted from circumstances outside their control—namely, a change in controlling … law." *Id.*

Other courts have reached similar conclusions. *See Saleh v. Bush*, 848 F.3d 880, 887 n.5 (9th Cir. 2017) ("Thus, even assuming that the current position of the United States were clearly inconsistent with the position taken at the Nuremberg Trials, the new position rests on an intervening change in law and therefore is not subject to judicial estoppel."); *Longaberger*, 586 F.3d at 470-71 ("Longaberger's arguments, though facially inconsistent, were not an attempt to abuse the judicial process through cynical gamesmanship. Rather, Longaberger altered its theory of recovery in response to the change in the law brought by *Sereboff*."); *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268-69 (5th Cir. 1988) (declining to apply judicial estoppel where, at the time defendant asserted "that it lacked grounds for removal," it "did not have the benefit of the Supreme Court's opinion on removability based on ERISA preemption."); *Davey v. Fed. Nat'l Mortg. Ass'n*, No. 17-cv-244-JL, 2018 WL 4854631, at *6 (D.N.H. Oct. 5, 2018) (rejecting judicial estoppel argument and noting: "While Wells Fargo's present argument may have been

available to it in 2012, in theory, its current position [based on a 2016 New Hampshire Supreme Court decision] lacked definitive authority in settled law at the time of the [2012] Land Board hearing.").

2. *Stapleton Worked An Intervening Change In Controlling Law That Precludes Judicial Estoppel Against The Diocesan Defendants*

Plaintiffs portray the Diocesan Defendants' motion for summary judgment as a cynical departure from an alleged earlier position that the Plan was a church plan in order to gain an upper hand over Plaintiffs by way of ERISA's limitations on relief and preemption. What Plaintiffs miss is that, even assuming the Diocesan Defendants actually took this earlier position in 2013-2014 (with their alleged co-conspirators), it was hardly obvious that the Plan was not a church plan under the then existing law.[14] This was especially so with respect to controlling law in the First Circuit. Only after the Supreme Court handed down *Stapleton* in 2017 did it become clear, in hindsight, that (1) SJHSRI absolutely needed to comply with the PPO requirement to qualify for the exemption and (2) SJHSRI had not done so. Such circumstances reconcile and justify any inconsistency between any position incorrectly ascribed to the Diocesan Defendants eight or nine years ago and their position taken in this motion and originally pressed by Plaintiffs themselves.

The Law Before *Stapleton*. Any suggestion that the law of the church plan exemption was sufficiently clear at any time relevant to Plaintiffs' claim that the Plan's qualification for the exemption could be the subject of a fraud is belied by the caselaw. That is

[14] This entire argument, and Plaintiffs' claims as to what position the Diocesan Defendants did and did not take as regards the Plan's qualification for the church plan exemption must be placed in proper context. The Diocesan Defendants did not take a position as to the Plan's status, either before the regulators or otherwise. This was SJHSRI's pension plan. SJHSRI was the Plan sponsor. For that reason, this entire argument is flawed and illusory. That said, for the purposes of this argument on this motion, even if the position ascribed to the Diocesan Defendants, directly or through others, was taken, Plaintiffs' argument is fatally flawed because the law changed.

especially so as it concerns the law of the PPO requirement. Although Plaintiffs paint the concept of a "principal purpose organization" as simple, defined, and well understood, it was anything but. (One need only look at Plaintiffs' own conflicting and shifting arguments on this issue to reach that conclusion – and that is wholly apart from any changes wrought by *Stapleton*.) As late as 2019, the Seventh Circuit declared that the proper construction of the PPO requirement—what matters in assessing the PPO, what can/must it do, how frequent/long should it meet, how much of its authority can it delegate, are corporate formalities enough, etc.—presented "genuine issues of material *law*." *Smith v. OSF HealthCare Sys.*, 933 F.3d 859, 868-70 (7th Cir. 2019) (emphasis in original).

Prior to *Stapleton*, decisions from courts across the country (including district courts in the First Circuit), held that church affiliated entities (like hospitals) could have church plans without a PPO. The U.S. District Court for the District of Maine, for example, construed 29 U.S.C. § 1002(33)(C)(ii) as broadening the church plan exemption to plans "established or maintained by a non-church organization" simply if "that organization is 'controlled by' or 'associated with' a church." *See Catholic Charities of Me., Inc. v. City of Portland*, 304 F. Supp. 2d 77, 84-86 (D. Me. 2004). When confronted with the claim that § 1002(33)(C)(i) required the church associated charity to maintain the plan via a PPO—which the charity did not have—the court rejected it as irrelevant. *See id.* at 86 n.4. The District of Maine explained:

> Catholic Charities reads this provision [§ 1002(33)(C)(i)] as limiting the non-church entities that may be considered to have church plans and argues that its plans may therefore not be considered "church plans." I am not persuaded. By its terms, this provision is an alternative means of satisfying the "church plan" definition, and does not restrict the definition, whose language quoted in text, albeit circuitous, clearly covers Catholic Charities' plans. The provision was likely included simply to ensure that any third party administrator of a church plan was included within the church plan exemption.

Id. (internal citation omitted). Two federal judges in the District of Puerto Rico construed the statute in similar fashion. *Torres v. Bella Vista Hosp.*, No. 06-CV-2158 (JAG), 2009 WL 10717769, at *4-5 (D.P.R. Apr. 13, 2009), *report and recommendation adopted by*, 630 F. Supp. 2d 188, 192-93 (D.P.R. 2009). Many courts across the country did as well.[15] No district court in the First Circuit had ruled to the contrary. The First Circuit, for its part, had not construed the church plan exemption—let alone the confusing PPO requirement—before *Stapleton* (and has yet to do so after *Stapleton*).

Stapleton Changed The Game. Following *Stapleton*, the construction of ERISA discussed above was no longer tenable in the First Circuit or anywhere else. The Supreme Court explained:

> The term "church plan," as just stated, initially "mean[t]" only "a plan established and maintained ... by a church." But subparagraph (C)(i) provides that the original definitional phrase will now "include" another—"a plan maintained by [a principal-purpose] organization." That use of the word "include" is not literal—any more than when Congress says something like "a State 'includes' Puerto Rico and the District of Columbia." Rather, it tells readers that a *different* type of plan should receive the same treatment (*i.e.,* an exemption) as the type described in the old definition. And those newly favored plans, once again, are simply those "maintained by a principal-purpose organization"—irrespective of their origins.

Stapleton, 137 S. Ct. at 1658 (internal citation omitted) (brackets and italics in original). Thus, as the Tenth Circuit summarized: "As *Advocate* makes clear, two types of organization qualify for the church-plan exemption: churches and so-called principal-purpose organizations." *Medina*, 877 F.3d at 1221. The cases that wrote the PPO requirement out of the statute and held

[15] *See, e.g.*, *Hall v. USAble Life*, 774 F. Supp. 2d 953, 958 (E.D. Ark. 2011); *Ward v. Unum Life Ins. Co. of Am.*, No. 09-C-431, 2010 WL 4337821, at *2 n.1 (E.D. Wis. Oct. 25, 2010); *Welsh v. Ascension Health*, No. 3:08cv348/MCR/EMT, 2009 WL 1444431, at *5-7 (N.D. Fla. May 21, 2009); *Rinehart v. Life Ins. Co. of N. Am.*, No. 3:08-5486 RBL, 2009 WL 995715, at *3 (W.D. Wash. Apr. 14, 2009); *Friend v. Ancilla Sys. Inc.*, 68 F. Supp. 2d 969, 972-73 (N.D. Ill. 1999); *see also Overall v. Ascension*, 23 F. Supp. 3d 816, 827 (E.D. Mich. 2014) (addressing a plan maintained by a PPO but acknowledging: "Several courts have agreed that plans sponsored by non-church organizations, such as hospitals, can qualify for the 'church plan' exemption but have followed a simpler rule. Specifically, courts require only that the non-profit organization sponsoring the plan be controlled by or associated with a church").

that a non-church entity could maintain a church plan simply if it was controlled by or associated with a church are no longer viable. *See Casto*, 508 F. Supp. 3d at 247-48 (discussing line of cases permitting non-church entities to administer church plans absent a PPO and recognizing these courts did not have the benefit of *Stapleton*).

Because SJHSRI was not a church and did not maintain the Plan in compliance with the PPO requirement as now defined by *Stapleton*, it is not possible in 2022 to adhere to a prior position from 2013-2014 that the Plan qualified as a church plan. Nor is there anything improper with applying the law now, as set forth in controlling Supreme Court precedent, to argue – as Plaintiffs did in their well-reasoned and factually supported 2019 motion for summary judgment that the Plan had no PPO as defined by *Stapleton.* Like the representations by the *Jarrard* defendants, any supposed "switch" in position would be justified because it was prompted by—indeed, compelled by—a change in the law (*Stapleton*) and is therefore excused. *See Jarrard*, 408 F.3d at 915. The Diocesan Defendants should not be penalized for conforming their argument to controlling Supreme Court precedent. *See Caribbean I Owners' Ass'n, Inc. v. Great Am. Ins. Co. of N.Y.*, 619 F.Supp.2d 1178, 1185 (S.D. Ala. 2008) ("Far from making a mockery of the judicial process or constituting 'shenanigans,' as plaintiff puts it, XL Specialty's change of position in this case is directly tied to the emergence of controlling law in *Rogers*, whereas in the previous suit no such authority existed.").

Plaintiffs' argument is apparently that—themselves excluded—once a party has taken a position, "it is bound to that position for all time in all future litigation in which that entity may ever participate at any time, irrespective of any changes to controlling law" in the interim. *Id.* at 1184-85. Such an interpretation contravenes "the equitable purposes" of judicial estoppel "by enabling an opportunistic party to foreclose entire lines of legal argument to its

opponent based on statements that the opponent may have made in unrelated litigation years earlier, without regard to intervening changes in law or other reasonable, good-faith explanations for the change in position." *See id.* As the *Caribbean I* Court explained: "It would be manifestly inappropriate to exercise the Court's discretion to apply judicial estoppel in such a heavy-handed manner." *Id.* at 1185. But that is what Plaintiffs are trying to do.

In short, judicial estoppel does not apply here as a matter of law.[16] *Stapleton* changed the game and clarified the law in a way that compels the relief that the Diocesan Defendants seek. It would be improper for the Diocesan Defendants to take a different approach. The proof of that is in the studied slyness of Plaintiffs' objection to the very motion they proffered. They do not contest—AT ALL—that the factual record they presented to the Court (as resubmitted by the Diocesan Defendants) when measured against the exacting law regarding PPOs set forth in *Stapleton*, compels the conclusion that there was no PPO as of April 29, 2013.[17] They cannot—and neither can the Diocesan Defendants. That alone proves the sophistry of Plaintiffs' estoppel argument.

[16] It is especially ironic that Plaintiffs ask the Court to judicially estop the Diocesan Defendants for allegedly reversing position, while Plaintiffs have done the same thing in an even clearer and more egregious fashion both with respect to their arguments regarding the impact and meaning of the 2015 Cy Pres proceedings and their objection to entry of the relief they sought on the same record and law. The Court should decline that request. *See Folio v. City of Clarksburg*, 134 F.3d 1211, 1217-1218 & n.3 (4th Cir. 1998) (rejecting plaintiff-appellants' request for judicial estoppel and noting the irony of such an ask, given the contradictory positions that appellants had taken between the state court and federal court and between the district court and on appeal: "appellants ask us to prohibit the City from doing precisely what they do so freely. We decline."). If anyone should be estopped, it is Plaintiffs. *Supra* Part II.A.

[17] In so doing, they rely heavily on *Stapleton* and church plan cases decided thereafter to make their PPO argument. Pls.' Mot. for Summ. J., ECF No. 173, 20-24 (citing *Stapleton* (June 2017), *Smith* (2019), *Medina* (Dec. 2017), *Boden* (2019), and *Capello* (2019)).

B. State Regulators Were Not Deciding, And Did Not Decide, Whether The Plan Was A Church Plan And Nothing In Their Decisions Indicates That They Considered The Issue

Review of the hospital conversion and change-in-effective control decisions make plain that the Attorney General and the Department of Health did not decide that the Plan was a church plan or even mention the Plan's status (or lack thereof) under ERISA as a relevant consideration in issuing their approvals. The Court need not look past the terms of the decisions themselves. *See Forty-Eight Insulations, Inc. v. Aetna Cas. & Sur. Co.*, 162 B.R. 143, 148 n.5, 148-49 (N.D. Ill. 1993) ("Thus, it is irrelevant what Forty–Eight argued in its briefs in that case when they won on the grounds expressed in the opinion itself."). Plaintiffs have failed to create a genuine dispute of material fact on this issue.

"The party proposing an application of judicial estoppel must show that the relevant court actually accepted the other party's earlier representation." *Perry v. Blum*, 629 F.3d 1, 11 (1st Cir. 2010). "Acceptance," the First Circuit has explained, "is a term of art." *Id.* The "proponent of judicial estoppel must affirmatively show, by competent evidence or inescapable inference, that the prior court adopted or relied upon the previous inconsistent assertion." *Knowlton v. Shaw*, 704 F.3d 1, 11 (1st Cir. 2013); *see Perry*, 629 F.3d at 11 ("The showing of judicial acceptance must be a strong one."). The key point of inquiry is the content of the prior decision itself, not the parties' briefs, applications, or any other voluminous material that the parties might have put before the earlier tribunal. *See Forty-Eight Insulations*, 162 B.R. at 148 n.5 ("It is a much more consistent and reliable practice to look at the prior court's opinion itself. . . when applying the doctrine of judicial estoppel.").

State regulators considered significant and varied criteria and asked many questions as part of their hospital conversion and change-in-effective control reviews. ECF No.

243-80 (Project Review Committee CEC Decision) at 11-21 (four overarching criteria and several sub-criteria); ECF No. 243-78 (DOH HCA Decision) at 1, 9 (seventy-three questions and eight criteria); ECF No. 243-82 (AG Decision) at 3-6, 10 (thirty criteria and 213 questions). But neither the Attorney General, nor the Department of Health were asked to decide that the Plan was (or was not) a church plan. Their decisions did not mention—at all—that the Plan was a church plan. They did not state that the Plan was exempt from ERISA. The regulators, moreover, did not provide that their decisions would have been different if the Plan was covered by ERISA. They gave no indication that the Plan's status under ERISA was a factor.

In such circumstances, courts decline to invoke judicial estoppel on the ground that the prior tribunal did not adopt or accept the allegedly inconsistent earlier position. They make that determination ***through review of the prior court's decision***. *See, e.g.*, *Knowlton*, 704 F.3d at 11 (rejecting argument that prior statements concerning viability of § 1983 action required estoppel and explaining: "The Court's ruling in that case resolved one issue: whether the State had waived its sovereign immunity regarding Knowlton's breach of contract claim" and "[n]othing about the decision permits us to draw even the slightest inference that the Court determined the State had not waived its sovereign immunity based on any acceptance of or reliance upon the AAG's representation that Knowlton might have a viable § 1983 claim."); *Wight v. BankAmerica Corp.*, 219 F.3d 79, 90-91 (2d Cir. 2000) (declining to apply judicial estoppel "because the Ninth Circuit did not address in any way the question of whether management misconduct could be imputed to BCCI, and could therefore deprive the Liquidators of standing to assert claims against SPIB."); *King v. Advance Am.*, No. 07-CV-00237, 2011 WL 3861898, at *7 (E.D. Pa. Aug. 31, 2011) ("Even assuming Defendants made the representations Plaintiffs allege, which Defendants dispute, judicial estoppel is not appropriate because the

Commonwealth Court predominantly relied on other grounds to deny the Department of Banking's request."); *Fluor Intercontinental, Inc. v. IAP Worldwide Servs., Inc.*, No. 09-CV-00331, 2010 WL 3610449, at *3 (N.D. Fla. Sept. 13, 2010) ("Here, the ASBCA opinion simply adopts the settlement agreement of the parties and sustains the appeal. There is no reference to RMS's notice to the Air Force or any factual issues. Therefore, the ASBCA did not 'adopt' Fluor's position regarding RMS's notice, and judicial estoppel does not apply.") (internal citation omitted).

The decisions of the Rhode Island regulators did not reference the Plan's status under ERISA, let alone decide whether the Plan qualified for the church plan exemption or satisfied the PPO requirement. The Court need look no further than the regulatory decisions to reject Plaintiffs' judicial estoppel argument. *See Forty-Eight Insulations*, 162 B.R. at 148 n.5 **(**"The Court refuses to accept the Insurers' suggestion that we must ignore the language of the Sixth Circuit's opinion in the *INA* case and look instead at Forty–Eight's briefs in that case to establish Forty–Eight's prior position.").

C. The Diocesan Defendants Did Not Communicate Any Position Regarding Church Plan Status To Regulators

To be judicially estopped, a party must first take an initial position and then an inconsistent position. *See Knowlton*, 704 F.3d at 10 ("First, a party's earlier and later positions must be clearly inconsistent" (internal quotation marks and citation omitted)). Plaintiffs contend that the Diocesan Defendants or SJHSRI (who the Diocesan Defendants allegedly controlled or had a substantial identity of interest with) made representations to state regulators that the Plan was a church plan exempt from ERISA and/or that SJHSRI satisfied the PPO requirement. Pls.' MSJ Opp'n, ECF No. 245, at 86-92. This argument is legally and factually deficient. The direct

statements that Plaintiffs attempt to attribute to the Diocesan Defendants do not establish that the Diocesan Defendants took a position on church plan status before the regulators.

First, Plaintiffs point to the Diocesan Defendants' alleged *receipt* of the Asset Purchase Agreement ("APA"), which stated that the Plan was an ERISA exempt church plan and was maintained by a PPO. Pls.' MSJ Opp'n, ECF No. 245, at 86, 90; PSDUF, ECF No. 243, ¶¶ 81, 87. As a threshold matter, receiving a document, in this case a contract, obviously is not taking a position before a tribunal. That is especially so when the recipient of the contract is not a party or signatory of the contract. ECF No. 243-50 (Executed APA) at PCEC000089-PCEC000092 (signature pages). There is no representation to regulators here.[18]

Second, Plaintiffs refer to the Most Reverend Bishop's April 29, 2013 Resolution. PSUDF, ECF No. 243, ¶¶ 116-17; Pls.' MSJ Opp'n, ECF No. 245, at 87. Nothing on the face of that document indicates that it was intended to be submitted to regulators. Plaintiffs do not contend that the resolution was provided to the regulators. And, putting aside that the April 29, 2013 Resolution does not indicate that it is from any of the Diocesan Defendants, this document does not assert that the Plan was, in fact, a church plan or was maintained by a PPO. ECF No. 237-18 (April 29, 2013 Resolution). Rather, the resolution merely provides that "the Plan is *intended* to qualify" as a church plan. There is no evidence that anyone did not intend for the Plan to qualify as a church plan and certainly no evidence that the Most Reverend Bishop had any different intent or understanding.[19]

[18] The APA, moreover, does not even name any of the Diocesan Defendants as a third-party beneficiary. ECF No. 243-50 (Executed APA) § 15.5(b). It instead names the Most Reverend Bishop in his capacity as the holder of an ecclesiastical office as a third-party beneficiary. *Id.* ("the Bishop of the Roman Catholic Diocese of Providence, Rhode Island").

[19] Bizarrely enough: assuming statements in the APA and the April 29, 2013 Resolution were inaccurate, they would have been made retroactively accurate had the PPO defect been cured, as Plaintiffs posit elsewhere in their opposition. *See* Pls.' MSJ Opp'n, ECF No. 245, at 68-73. That puts the lie to Plaintiffs' estoppel argument.

Third, Plaintiffs cite the Most Reverend Bishop's letter to the Health Services Council. PSUDF, ECF No. 243, ¶ 121. Again, nothing in this letter indicates that it is from the Diocesan Defendants. ECF No. 243-60 (HSC Letter). The letter, moreover, simply states that "without this transaction, it appears that . . . the financial future for employee-beneficiaries of the pension plan would be at significant risk." *Id*. at 1-2. It says nothing about the Plan's status under ERISA, nor represents that the Plan was a church plan. *See id.*

The statements that Plaintiffs' claim came from the Diocesan Defendants' mouth (or pen) in 2013-2014 have no bearing whatsoever on the estoppel argument, except to show that Plaintiffs cannot point to any statement made by the Diocesan Defendants that contradict the Diocesan Defendants' present position. In none of Plaintiffs' examples did the Diocesan Defendants assert, as a fact, that the Plan qualified as a church plan or that SJHSRI satisfied the PPO requirement. To be more specific, the Diocesan Defendants have now adopted Plaintiffs' position that, based upon the facts and the law as clarified by *Stapleton*, there was no PPO in charge of the Plan by April 29, 2013 at the latest. The Diocesan Defendants did not address PPOs in any way, shape or form before the regulators in 2013/2014. Even Plaintiffs do not have the temerity to allege otherwise. The estoppel theory fails on this ground as well.

D. The Diocesan Defendants Did Not Control And Were Not In Privity With Or Virtually Represented By SJHSRI

Plaintiffs try to impute SJHSRI's representations to regulators that the Plan qualified as a church plan (or was maintained by a PPO) to the Diocesan Defendants by arguing that the Diocesan Defendants (or the Most Reverend Bishop) controlled SJHSRI or had a substantial identity of interest with SJHSRI. Pls.' MSJ Opp'n, ECF No. 245, at 84-92. Plaintiffs fail to create a genuine dispute of material fact on this issue.

1. *Control*

Plaintiffs, themselves, have already explained in exacting detail why the Diocesan Defendants and the Most Reverend Bishop ***did not*** control SJHSRI. Pls.' Resp. to Prospect Defs.' Statement of Facts, ECF No. 196, Resp. Nos. 29-30, 49, 87; *see also* Pls.' Opp'n to Prospect Defs.' Mot. for Summ. J. ("Pls. Prospect Opp'n"), ECF No. 202, at 46 ("SJHSRI was not controlled by the Catholic Church."). SJHSRI was controlled by its board of trustees (a majority of which was appointed by CCHP). ECF No. 237-10 (SJHSRI Bylaws) §§ 4.1-4.2. Once appointed, those individuals owed a fiduciary duty of "undivided" loyalty to SJHSRI. Pls.' Prospect Opp'n, ECF No. 202, at 39-40 (citing 3 Fletcher Cyc. Corp. § 837.60 and *Ed Peters Jewelry Co., Inc. v. C & J Jewelry Co., Inc.*, 124 F.3d 252, 276 (1st Cir. 1997)). It borders on sanctionable that Plaintiffs now take the exact opposite position – while pressing an estoppel argument, no less. Shameful.

2. *Substantial Identity Of Interest Or Privity*

Plaintiffs argue that the Diocesan Defendants shared a sufficient identity of interest with SJHSRI such that SJHSRI's statements to regulators should be treated as the Diocesan Defendants' own. Pls.' MSJ Opp'n, ECF No. 245, at 84-92. "Courts normally refuse to apply judicial estoppel to one party based on the representations of an unrelated party." *Perry*, 629 F.3d at 9 (citations omitted). As the District of Massachusetts has recognized: "the only two situations in which the First Circuit has held that judicial estoppel may apply to litigants that were not parties in the prior cases: 'when the estopped party was responsible in fact for the earlier representation or when the estopped party was the assignee of a litigation claim or assumed the original party's role.'" *Janssen Biotech, Inc. v. Celltrion Healthcare Co.*, Ltd., 296

F. Supp. 3d 336, 351-52 (D. Mass. 2017). There is no evidence that the Diocesan Defendants fit that paradigm (they do not).

But even if, for some reason, the Court were to adopt a more general interpretation that a party may be estopped when it is in privity with another who made the earlier inconsistent statement, that does not help Plaintiffs. In "the context of judicial estoppel, privity means that one of the parties to the earlier suit is so closely aligned with the non-party's interests as to be its virtual representative." *Meritage Homeowners' Ass'n v. Bank of N.Y. Mellon*, No. 26-CV-00300-AA, 2018 WL 1787183, at *9 (D. Or. Apr. 13, 2018) (citations and quotation marks omitted). Non-parties to a prior proceeding (like the Diocesan Defendants) may be in privity with parties to that proceeding (like SJHSRI) when (1) the non-party controls the proceeding, (2) the non-party has agreed to be bound by the adjudication between others, or (3) the non-party is represented by the party. Restatement (Second) of Judgments §§ 39-41. There is no evidence that the Diocesan Defendants controlled SJHSRI's regulatory applications or SJHSRI's communications with the regulators or that the Diocesan Defendants agreed to be bound by whatever the regulators might have decided with respect to the Plan's status under ERISA (which was nothing).

Section 41 of the Restatement (Second) of Judgments describes when a person is represented by another. It provides, in relevant part:

> A person is represented by a party who is:
> (a) The trustee of an estate or interest of which the person is a beneficiary; or
> (b) Invested by the person with authority to represent him in an action; or
> (c) The executor, administrator, guardian, conservator, or similar fiduciary manager of an interest of which the person is a beneficiary; or
> (d) An official or agency invested by law with authority to represent the person's interests; or
> (e) The representative of a class of persons similarly situated, designated as such with the approval of the court, of which the person is a member.

Id. § 41. Plaintiffs have no evidence that any the above circumstances existed between the Diocesan Defendants and SJHSRI during the 2013-2014 hospital conversion proceedings. It is not possible, therefore, to conclude that SJHSRI was the "virtual representative" of the Diocesan Defendants during the regulatory review. *Bison Res. Corp. v. Antero Res. Corp.*, No. 16-CV-00107, 2017 WL 1164500, at *5 (N.D. W.Va. Mar. 28, 2017) ("While Antero argues that judicial estoppel applies to a party in privity with a party to prior litigation, Antero fails to demonstrate that Bison Resources' interests in this civil action are 'so closely aligned with the … interests [of Bison Interests] as to be its virtual representative.'" (brackets and ellipsis in original) (internal citation omitted)); *Help at Home, Inc. v. Cam Enters., LLC*, No. 14-CV-80255-CIV-MARRA, 2015 WL 11255646, at *2 (S.D. Fla. Mar. 10, 2015) (holding judicial estoppel "inappropriate," where defendant rested estoppel contention on fact that inconsistent statement was made by persons who owned plaintiff "in its entirety").

E. What Plaintiffs Call Estoppel Is Not Estoppel, Is Incompatible With ERISA, And Nonsensical

The Diocesan Defendants cannot be judicially estopped for the reasons set forth *supra* at Part III.A-D. Plaintiffs close their estoppel discussion with an argument that feints towards what looks like equitable estoppel, contending the Diocesan Defendants should not be able to benefit from the Plan being an ERISA plan, not because of an inconsistent position taken before a court, but because the Plan was "operated for over forty years" as a church plan." Pls.' MSJ Opp'n, ECF No. 245, at 96. This argument is fundamentally flawed.

1. *Incompatible With ERISA*

First, Plaintiffs' argument that applying ERISA to the Plan and in this case would be somehow inequitable conflicts with ERISA's remedial scheme and is unsupported in the law. Plaintiffs confusingly assert:

> A plan cannot be operated for over forty years without the plan participants receiving any of the benefits or protections of ERISA, including minimum annual contributions, reporting, and insurance from the Pension Benefit Guaranty Corporation, in reliance on the 'church plan' exemption, and then having the responsible parties argue that the plan participants are limited to the remedies allowed under ERISA….

Id. Plaintiffs cite no case to support this bizarre proposition because there is none.

The premise of the argument is incorrect. Plaintiffs assume an ERISA finding only limits Plaintiffs' recovery. However, if a purported church plan was actually an ERISA plan because it failed to qualify for the exemption at some point, a whole host of benefits and protections (unavailable under state law) become available. Immediate coverage of basic benefits from the Pension Benefit Guaranty Corporation ("PBGC")[20] may be available and successor liability would attach.[21] Plan beneficiaries may well be significantly better off because PBGC coverage would be available even if premiums were not paid. 29 U.S.C. § 1307(d) ("The corporation shall not cease to guarantee basic benefits on account of the failure of a designated payor[22] to pay any premium when due."). Finally, the PBGC could take over such a plan with an arsenal of additional relief to recover monies owed to the Plan. *Pension Benefit Guar. Corp. v. Beverley*, 404 F.3d 243, 248-51 (4th Cir. 2005) (permitting PBGC to bring separate, subsequent suits against the same defendants for improper transfers of plan assets and termination liability in its statutory trustee and corporate capacities respectively). There is no inequity to resolve here if ERISA applies. Even if there were, ERISA's remedial scheme would conflict with the hodge-

[20] As explained at note 6 of the Diocesan Defendants' Memorandum Regarding Plaintiffs' Pending Motion for Summary Judgment, ECF No. 222, the potential for immediate full coverage from the PBGC existed, had the Court granted Plaintiffs' motion, because the Plan would been (unknowingly) subject to ERISA for more than five years (and the same is true of the Diocesan Defendants' pending motion). It is inexplicable why Plaintiffs are resisting this finding, which has the end result of making all pensioners whole regardless of the outcome of the claims against the Diocesan Defendants.

[21] Pls.' Mem. of Law in Opp'n to Prospect's Cross-Mot. for Summ. J., ECF No. 202, at 5 n.9 (citing various authorities in support of the argument that the "doctrine of successor liability that is applicable to ERISA plans" would have likely reached Prospect had the Court granted Plaintiffs' motion for summary judgment).

[22] The plan's sponsor or administrator. *See* 29 C.F.R. § 4007.12.

podge application of inconsistent state law relief that Plaintiffs seek. Plaintiffs know that. That is why they have so suddenly reversed course.

2. *Inequitable Estoppel*

Regardless of what Plaintiffs wish to call their version of estoppel, it is most certainly an *inequitable* one. And both judicial and equitable estoppel are equitable and discretionary doctrines. *Janssen Biotech, Inc.*, 296 F. Supp. 3d at 353 ("[J]udicial estoppel is an equitable, discretionary doctrine" (internal citations omitted)); 28 Am. Jur. 2d Estoppel & Waiver § 28 ("[T]he decision to apply the doctrine of equitable estoppel is within the court's discretion."). Given Plaintiffs' own decision to seek the determination sought by this motion against the Diocesan Defendants in 2019, it is hard to see how the Court should exercise its discretion to invoke these principles of equity and fairness against the Diocesan Defendants to preclude them from asking for that very same declaration. There is no basis in fundamental fairness to bind the Diocesan Defendants under principles of equity.

Instead, Plaintiffs twist "estoppel doctrine," whether equitable or judicial, "into a shape that the law does not recognize." *Plumley v. So. Container, Inc.*, 303 F.3d 364, 374 (1st Cir. 2002) (denying equitable estoppel claim). The Diocesan Defendants' position on Count IV—that the Plan lost its church plan exemption—is ***Plaintiffs'*** position. It is the position Plaintiffs pled in their Complaint (and not in the alternative). FAC, ECF No. 60, ¶¶ 473-76; *supra* Part II.B.1. It is the position Plaintiff Receiver chose for the Plan going-forward, ECF No. 126-1 (Pl. Receiver's § 410(d) Election), despite the much ballyhooed cure provisions in 29 U.S.C. § 1002(33)(D) that Plaintiffs once derided as indisputably not invoked, Pls.' Prospect Reply, ECF No. 197, at 95-98, but now cling to tightly. Pls.' MSJ Opp'n, ECF No. 245, 51-60, 68-73. If Plaintiff Receiver and his special counsel wished to proceed under state law, they

could have cured the PPO lapse, at least before Plaintiff Receiver's irrevocable § 410(d) election in 2019. Plaintiffs affirmatively chose to walk down the ERISA path in this litigation (and outside of it), with all of its pros and cons. If the Court grants the Diocesan Defendants' motion, Plaintiffs do not now get to avail themselves of state law benefits that ERISA would otherwise deprive them.

But that is the muddled result Plaintiffs seek here. Plaintiffs do not argue that they can use estoppel to preclude the Diocesan Defendants from arguing that the Plan is an ERISA plan so that both the parties and the Court can proceed under the facts as allegedly represented to Plaintiffs (or the regulators)—i.e., the Plan was a church plan. That would require Plaintiffs to come off the fence on the issue that they have pled is "essential" for the Court to determine. FAC, ECF No. 60, ¶ 66. Plaintiffs have assiduously refused to do so (despite such refusal being belied by how they pled this case). *Supra* Part II.B.1. Instead, Plaintiffs purport to apply estoppel in such a way as to retain the ability to argue both X and Not X, ERISA plan and church plan, not ERISA plan and not church plan… depending on what suits them at the time.

Plaintiffs apparently believe that if they can estop the Diocesan Defendants from claiming the Plan is an ERISA plan, Plaintiffs can still obtain a declaration that the Plan is an ERISA plan somewhere down the line ***and then***, at the very same time, bar the Diocesan Defendants from arguing that ERISA limits Plaintiffs' recovery or ability to bring claims under state law. *See* Pls.' MSJ Opp'n, ECF No. 245, at 96. A true "heads I win, tails you lose" situation that permits them to enjoy the benefits of both federal and state law, and none of the drawbacks. Such a result has no support in the law. Plaintiffs cite no cases at Part V.C.e of their opposition, let alone one where a party precludes the other from making an argument and then, having done so, ***that same party*** argues the estopped position themselves. *Maitland v. Univ. of*

Minn., 43 F.3d 357, 364 (8th Cir. 1994) (rejecting application of estoppel and explaining: "estoppel is an equitable doctrine, and it should not be given effect beyond what is necessary to accomplish justice between the parties." (internal citation omitted)).

That position does not just strain equity, but credulity. It is certainly not the outcome in any of the cases Plaintiffs cite in support of their judicial estoppel argument, even those where a party is estopped. Instead, the cases hew to traditional form and some even indicate Plaintiffs are the ones who should be judicially estopped for reversing field after (1) leveraging a favorable settlement out of Prospect via their claim that the Plan is an ERISA plan on account of a PPO failure, and (2) obtaining court approval of another settlement and their attorneys' fees based on a conflicting construction of the 2015 Cy Pres proceedings. *See, e.g.*, *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 606 (9th Cir. 1996) ("We are thus confronted with the question whether obtaining a favorable settlement is equivalent to winning a judgment for purposes of applying judicial estoppel. We answer in the affirmative."); *Patriot Cinemas, Inc. v. Gen. Cinemas Corp.*, 834 F.2d 208, 211-15 (1st Cir. 1987) (holding that party having told state court that it would not proceed on state antitrust claim to obtain denial of motion to stay in state court, could not change its mind and attempt to proceed on such a claim).

F. <u>Other Estoppel Matters</u>

At multiple points throughout their opposition, Plaintiffs reference arguments that "it is anticipated" the Diocesan Defendants will raise to contest Plaintiffs' estoppel theory. *See, e.g.*, Pls.' MSJ Opp'n, ECF No. 245 at 87-88. The Diocesan Defendants have, indeed, raised certain additional arguments in their response to Plaintiffs' Statement of Facts. The Diocesan Defendants dispute, for example, that they took the actions attributed to them or that the Most Reverend Bishop, Chancellor Reilly, or any other diocesan official acted on behalf of the

Diocesan Defendants when those persons acted. Diocesan Defs.' Resp. to PSUDF at Resp. Nos. 81-82, 85-88, 94, 104. 119-120, 124. They dispute that the Most Reverend Bishop, Chancellor Reilly, etc., understood the nuances of the law governing the church plan exemption, either now or in 2013-2014 when those issues were even more unsettled. *Id.* at Resp. No. 81, 87. And, the Diocesan Defendants maintain that Plaintiffs' conspiracy theory is bunk. *See* Diocesan Defs.' Renewed Mot. to Dismiss, ECF No. 238, at 7-12, 17-43, 52-78.

The Diocesan Defendants refrain from detailing such arguments in this reply for two reasons. First, such areas are not appropriate for decision on summary judgment (at this time). Second, they are extraneous and immaterial. The Court can dispose of Plaintiffs' estoppel theory as a matter of law for the reasons discussed *supra* at Part III.A-E. The relative merits (or lack thereof) of the conspiracy theory can be resolved in the Diocesan Defendants' motion to dismiss, outside of the context of the Court's consideration of an estoppel argument meant to do nothing more than delay entry of relief that Plaintiffs requested in 2019 and still seek via Count IV in their complaint.

G. Plaintiffs Are Not Entitled To Discovery

As Plaintiffs' estoppel arguments fail as a matter of law, the Court should deny their conditional Rule 56(d) motion for discovery for the reasons stated in Part III.A-E and in the Diocesan Defendant's Opposition to Plaintiffs' conditional motion filed contemporaneously herewith. The areas Plaintiffs' claim require further factual development are red herrings, moreover, as discussed in Response Nos. 118 and 119 in the Diocesan Defendants' response to Plaintiffs' statement of facts relevant to the judicial estoppel argument. The conditional motion should be unconditionally denied.

CONCLUSION

For the foregoing reasons, the Court should grant the Diocesan Defendants' motion for summary judgment.

Respectfully Submitted,

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

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of June 2022, the foregoing document has been filed electronically through the Rhode Island ECF system, is available for viewing and downloading, and will be sent electronically to the counsel who are registered participants identified on the Notice of Electronic Filing.

/s/ Howard Merten

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