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.	Civil Action No. 1:18-cv-00328-WES-LDA

THE DIOCESAN DEFENDANTS'
REPLY MEMORANDUM IN FURTHER SUPPORT OF THEIR
RENEWED MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

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Defendants Roman Catholic Bishop of Providence, a corporation sole ("RCB"), Diocesan Administration Corporation ("DAC") and Diocesan Service Corporation ("DSC") (collectively, the "Diocesan Defendants") respectfully submit this reply in further support of their Renewed Motion to Dismiss.[1]

PRELIMINARY STATEMENT

The First Amended Complaint ("FAC") suffers from significant material deficiencies (most prominently, improper group pleading, Rule 9(b) non-compliance). Each of those deficiencies, which are set out in detail in the Motion, independently merits dismissal. Confronted with the reality that the particulars of the FAC fail to state a claim, Plaintiffs' Opposition implores this Court to examine the FAC "holistically." But such an examination *confirms* that Plaintiffs' core theory of liability against RCB, DAC and DSC fails both as a matter of logic and a matter of law. Though long in pages, the FAC is short on facts. When stripped of conclusory allegations (as Rule 12(b)(6) commands) what remains does not state a claim upon which relief can be granted.

For example, Plaintiffs make serious accusations that RCB, DAC and DSC engaged in a fraudulent scheme. The underlying "lie," according to Plaintiffs, was "to falsely claim that the Plan continued to qualify as a 'church plan'" (*see*, *e.g.*, FAC ¶ 55(d)(ii)); but in this very litigation Plaintiffs *admit* the Plan might have continued to qualify as a "church plan" all along (or at least at the time the challenged representation was allegedly made, which is what matters for a fraud claim). In this litigation, Plaintiffs contend ***both*** that the Plan might have been a church plan, ***and*** that it was fraud to state that it was (or was intended to be). According to

[1] The Diocesan Defendants' Renewed Motion to Dismiss Plaintiffs' First Amended Complaint (ECF No. 238) (the "Motion") is cited herein as "Mot. __." Pls.' Mem. in Opposition to [the Diocesan Defendants'] Renewed Motion to Dismiss Plaintiffs' First Amended Complaint (ECF No. 247) is cited as "Opp. __."

Plaintiffs, *the Court should hold the Plan was not an ERISA plan, even though it was, because the Diocesan Defendants said it was a church plan, even though it wasn't (or maybe it was).* There simply is no logic or consistency to Plaintiffs' contentions.

Plaintiffs trumpet that they are contradicting themselves in their Preliminary Statement. *See* Opp. 3-5. Plaintiffs claim that they are not subject to the same rules as the Diocesan Defendants, and Plaintiffs contend that their options concerning how the Plan should be treated as a matter of ERISA "remain open." *Id.* at 4. Their Opposition argues, unashamedly and with vigor, that the Plan's status is an open question subject to reasonable and good faith disagreement (between them and Prospect for example).[2] Plaintiffs insist that they "have the right to make inconsistent claims at this time—and probably up until the closing of the evidence at trial." *Id.*

Examined "holistically," Plaintiffs' contentions concerning the ERISA status of the Plan should be the death knell of their fraud and conspiracy claims. This is because if there is no clear answer to the question of Plan status *today*, then predicting the outcome of that legal question in 2010, 2012, or 2014 couldn't possibly have been a material misrepresentation of fact when made. To this day, Plaintiffs cannot even say that their allegedly "false claim" (*i.e.*, that the Plan qualified as a "church plan") was false, because they cannot even say that this position is *different than theirs today or even wrong.* Plaintiffs' position viewed "holistically" is beyond implausible: it is self-refuting. Plaintiffs' position makes a mockery of this Court, its rules, the

[2] Worse, they make this argument after two sets of lawyers have investigated this very issue for several years now and well after the two complaints were drafted and filed. Those lawyers drafted the complaints after having had the benefit of reviewing over a million pages of documents. Thereafter, those same attorneys conducted discovery directed at resolving the legal question of the Plan's ERISA-status. Having conducted hundreds of hours of legal research and briefing, taken depositions, served interrogatories, document requests, and subpoenas, Plaintiffs claim the question is open and say that both positions can be maintained in good faith. Yet they ask this Court to allow them to pursue fraud and conspiracy claims against lay people for allegedly believing one of those positions was accurate. This is simply not tenable.

judicial process, and the search for truth. It also establishes (if there was any doubt) that Plaintiffs' claims against RCB, DAC and DSC fail as a matter of law.

Plaintiffs hope that this Court will excuse their self-refutation so long as is it done out in the open, and so long as it is done for the "right reason." Plaintiffs' most recent about face (there have been others) on whether this Plan is or is not governed by ERISA unmasks the baselessness of Plaintiffs' claims in a way that no amount of briefing could. It follows that there is no well-pleaded conspiracy, fraud, "fraudulent scheme," or, for that matter, *statutory liability for criminal acts.* There is no basis to hold RCB, DAC and DSC responsible for the alleged conduct of others or for conduct Plaintiffs cannot now plausibly claim was wrongful.

Plaintiffs hope that the Court will be put off by the volume of briefing and decline to invest the effort needed to sort out the deficiencies in Plaintiffs' legal theories and pleadings. To be sure, what follows will be a lengthy (and, at times, dry) legal analysis. But the length and scope of all of this briefing is driven by Plaintiffs' utter failure to set forth a short and plain statement of their claim and exasperated by Plaintiffs' convoluted, contradictory, and conclusory claims and arguments. But the Court should not reward Plaintiffs for their tactics of obfuscation and confusion. At bottom, none of the arguments in Plaintiffs' Opposition refute RCB, DAC and DSC's showing that the FAC does not state a claim against them as to Counts III, VII, VIII, IX, XVI, XVII, XVIII, XIX, XXI and XXII (*i.e.*, the only substantive claims asserted against them).

REPLY POINTS

I. PLAINTIFFS' SO-CALLED "FACTS" SECTION SHOULD BE DISREGARDED BECAUSE WHAT MATTERS ON A MOTION TO DISMISS ARE THE FACTS ALLEGED IN THE COMPLAINT

In the Motion, RCB, DAC and DSC explained that—by design—the FAC is prolix, vague, and confusing, which obscures the implausibility of Plaintiffs' claims asserted against them. *See* Mot. 1. In Opposition, Plaintiffs seek to have their cake and eat it, too. While

Plaintiffs proclaim that they are "content to rely upon the existing FAC" (Opp. 2), they simultaneously contradict themselves by proffering forty pages' of text purportedly summarizing (but in effect, recasting) the allegations of the FAC. *See* Opp. 5-45. Of course, "[t]he Court need not consider new factual allegations set forth in Plaintiff's opposition memorandum" because "'assertions in an opposition to a motion [to dismiss] are not the equivalent of factual pleadings.'"[3] Instead, the court must—as Plaintiffs concede—engage in a well-established two-step process to evaluating whether a complaint states a plausible claim:

> At the first step, we "distinguish the complaint's factual allegations (which must be accepted as true) from its conclusory legal allegations (which need not be credited)." At step two, we must "determine whether the factual allegations are sufficient to support the reasonable inference that the defendant is liable."

Saldivar v. Racine, 818 F.3d 14, 18 (1st Cir. 2016) (citations omitted) (quoting *Cardigan Mtn. Sch. v. N.H. Ins. Co*., 787 F.3d 82, 84 (1st Cir. 2015). The Court is not obligated to assume the truth of conclusory allegations that are "so threadbare or speculative that they fail to cross the line between the conclusory and the factual." *Peñalbert-Rosa v. Fortuño-Burset*, 631 F.3d 592, 595 (1st Cir. 2011) (internal quotations omitted) (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 577 n.5 (2007)). Also, the Court may "disregard[] facts which have been conclusively contradicted by plaintiffs' concessions or otherwise." *Lister v. Bank of Am., N.A.*, 790 F.3d 20, 23 (1st Cir. 2015) (quotations omitted) (citing *Wilson v. HSBC Mortg. Servs., Inc.,* 744 F.3d 1, 7 (1st Cir. 2014). The rule permitting a court to disregard concessions and the pleader's self-contradictions takes especial force here, because Plaintiffs filed a motion for summary judgment on a key legal issue in this case—but subsequently flip-flopped on that very issue.

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[3] *Emrit v. Universal Music Grp., Inc.*, No. 13-181-ML, 2013 WL 3730423, at *1 (D.R.I. July 12, 2013) (*quoting Steele v. Turner Broad. Sys., Inc.*, 607 F. Supp. 2d 258, 263 (D. Mass. 2009)) (alterations omitted).

Plaintiffs have declined to "file a complaint that is short, clear, and to-the-point – and based upon factual allegations, not conclusions and conjecture." Mot. 2. Instead, they doubled down on the FAC in the Opposition, stating that they are "content to rely upon the existing FAC." *See* Opp. 2. Accordingly, dismissal of the FAC is appropriate on Rule 8 grounds.

To be clear, however, dismissal of the FAC is also appropriate upon an *Iqbal*/*Twombly* review of the (very few) well-pleaded factual allegations in the FAC. The sheer length of the FAC does not establish that it states a claim upon which relief can be granted. Applying the *Iqbal*/*Twombly* "two-step pavane" to the FAC (which Plaintiffs concede *must* be done to resolve this Rule 12(b)(6) motion), confirms that dismissal is merited. Because the FAC is so prolix, vague, and confusing, RCB, DAC and DSC have prepared a table to assist the Court with its analysis. Attached as **Exhibit A** is a table: (i) setting forth every allegation in the FAC identifying RCB, DAC and DSC (or referencing other individuals alleged to be affiliated with the Roman Catholic Diocese of Providence, like Bishop Tobin); (ii) striking out the conclusory legal allegations (which need not be credited); and (iii) setting forth a non-exhaustive list of reasons explaining how the remainder does not state a claim against RCB, DAC or DSC.

II. THE COURT CAN (AND SHOULD) REVIEW THE EXHIBITS APPENDED TO THE MOTION, BUT DOING SO IS NOT A PREREQUISITE TO GRANTING IT

On a Rule 12(b)(6) motion to dismiss, courts may consider documents referenced or summarized in a complaint, and if a document does not support the allegation, the document controls. *See* Mot. 6-7. The Table of Exhibits shows, as applicable, for each document, (i) where it is referenced in the FAC, (ii) where it is publicly available, including those posted on the Receiver's own website, and/or (iii) how it was compiled. *See* Mot. *v-vii*. Plaintiffs urge the Court to ignore these documents. *See* Opp. 47-53. But none of the reasons proffered by Plaintiffs withstand scrutiny.

A. Plaintiffs Do Not Refute RCB, DAC and DSC's Showing That First Circuit Law Permits the Court To Review the Exhibits

Plaintiffs do not even mention—let alone attempt to distinguish—*Beddall v. State Street Bank & Tr. Co.*, 137 F.3d 12 (1st Cir. 1998) or *Jones v. Bank of New York*, 542 F. Supp. 3d 44 (D. Mass. 2021), both of which are cited in the Motion. *See* Mot. 6-7. Instead, Plaintiffs cite *Doe v. Pawtucket Sch. Dep't* for the proposition, "a motion to dismiss under Rule 12(b)(6) generally provides no occasion upon which to consider documents other than the complaint." Opp. 48; *see also* 969 F.3d 1, 8 (1st Cir. 2020).[4] Plaintiffs' citation to *Doe* is disingenuous because Plaintiffs omit the very next sentence: "***There are exceptions, to be sure.***" *Id.* (emphasis added). Then, the *Doe* court goes on to list those exceptions, and that list contains the very reasons why it is appropriate to consider the documents annexed to the Motion, including those set forth in *Beddall*. *See id.* Plaintiffs' attempt to obfuscate the law is glaring.

Here, unlike *Doe*, Plaintiffs' allegations are explicitly tied to and dependent upon the documents. This case is like other First Circuit cases where the use of documents was permitted to assist in deciding a motion to dismiss by gauging the plausibility of the complaint's allegations. *See In re Montreal, Me. & Atl. Ry., Ltd.*, 888 F.3d 1, 7 n.2 (1st Cir. 2018) (holding a document "is fair game in gauging the plausibility of the complaint" because "the complaint's averments are explicitly tied to and dependent upon" that document).

[4] The holding of *Doe* is inapposite. The defendants in that case proffered medical and police reports which the district court relied on in granting a motion to dismiss. The First Circuit reversed, finding that the reliance on those documents was improper because the "reports [were] not expressly referenced in the complaint, the complaint [did] not rely upon them or incorporate them, and the allegations in the complaint [were] not 'dependent' upon their contents." *Doe*, 969 F.3d at 8. Here, in contrast, there is no dispute that the proffered documents were either referenced in the FAC, or submitted in connection with the challenged transaction, which Plaintiffs allege is the "fraudulent scheme" in the FAC.

The only two First Circuit cases the Opposition cites directly are distinguishable.[5] Contrary to those cases, here, the Motion's Exhibits are referenced in the FAC, and/or are public records capable of judicial notice. And they are all directly related to matters discussed in the FAC. Moreover, Plaintiffs here have had an opportunity to contest consideration of the Exhibits, and Plaintiffs do not challenge the authenticity of the Exhibits.[6] Instead, Plaintiffs resist the implications of those admittedly authentic, publicly available documents because they contradict the conclusory allegations of the FAC. But the fact that Plaintiffs' own documents contradict their conclusory allegations is *not* a reason to ignore those documents. *See Lister v. Bank of Am., N.A.,* 790 F.3d 20, 22 n.2 (1st Cir. 2015). It is reason to dismiss the FAC. Accordingly, the Court can, and should, review the Motion's Exhibits.

B. The Court Can Properly Review Administrative Records Referenced In The FAC (Exhibits 10-17, 24-26, & 28)

Plaintiffs allege that certain former defendants in this case (but ***not*** RCB, DAC or DSC) sought and obtained approval for the asset sale, which, Plaintiffs allege, "entailed numerous submissions to the regulators, answers to application questions and supplemental questions, testimony at public hearings, newspaper op-eds, and statements to SJHSRI's employees." Opp.

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[5] In *Foley v. Wells Fargo Bank, N.A.*, 772 F.3d 63, 70-75 (1st Cir. 2014), the district court improperly referred to evidence submitted during a preliminary injunction hearing to grant a subsequent motion to dismiss, including a letter that the plaintiff alleged that the bank had told him was coming, but which the plaintiff had not received prior to filing his complaint. The First Circuit ruled that the plaintiff had no reason to expect the lower court to rely on such documents in considering the motion to dismiss. *See id.* at 73-75. Likewise, in *Freeman v. Town of Hudson*, 714 F.3d 29, 36-37 (1st Cir. 2013), the plaintiffs sought consideration of deposition excerpts in opposing a motion to dismiss, which were "unrelated to any matter discussed in the complaint." In addition, they sought review of a transcript of 911 calls and police reports, but made no effort to justify review of those documents apart from calling them "public records," and apparently had not referenced them in their complaint. *See id.* The First Circuit held it was proper for the district court to refrain from reviewing such documents. *Id.*

[6] *Watterson v. Page*, 987 F.2d 1, 4 (1st Cir. 1993) ("The problem that arises when a court reviews statements extraneous to a complaint generally is the lack of notice to the plaintiff. Where plaintiff has actual notice and has relied upon these documents in framing the complaint the necessity of translating a Rule 12(b)(6) motion into one under Rule 56 is largely dissipated.") (alterations and omissions omitted) (quoting *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991).

39. Plaintiffs broadly allege that "the applicants" (but again, ***not*** RCB, DAC or DSC) "made numerous fraudulent misrepresentations and omissions, detailed in extenso at FAC ¶¶ 319–81." Plaintiffs' "fraud on the regulators" theory of the case, however, falls apart because the regulators that Plaintiffs claim were "defrauded" were in fact made fully aware of the matters that were the subject of the claimed misrepresentations or omissions. *See* Mot. 23-33.[7] Plaintiffs then pivot, cry "*non sequitur*," and claim that these documents may be disregarded "because the state regulators are not the Plaintiffs." Opp. 52. But the *non sequitur* beam is clearly in Plaintiffs' eye on this point: Plaintiffs' claim is that the *regulators* were defrauded.

Moreover, Plaintiffs are simply wrong on the law. Courts routinely review administrative records/proceedings in connection with motions to dismiss.[8] The Opposition, nonetheless, resists the Diocesan Defendants' proffer of administrative records (Exhibits 10-17, 24-26 & 28) in connection with their motion. Plaintiffs cannot pursue "fraud on the regulators" (which fails to state a claim for relief even if it were supported by adequate factual allegations) while claiming simultaneously that what was filed with the regulators (*i.e.*, the alleged misrepresentations and omissions) is out of bounds on a dismissal motion subject to Rule 9(b) heightened scrutiny.

Plaintiffs also argue that the Diocesan Defendants are proffering these documents for the truth of their contents. Opp. 49-51. That is *not* the purpose for which these documents are presented. Rather, the very documents referenced in the FAC flatly contradict the conclusory assertions of concealment made in the FAC. To determine whether the document discloses

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[7] And, as they must, Plaintiffs do not maintain that any of the allegedly "defrauded" regulators have ever claimed that they were misled.

[8] *See, e.g.*, *Town of Norwood, Mass. v. New Engl. Power Co.,* 202 F.3d 408, 412 n.1 (1st Cir. 2000) (taking judicial notice of records in "underlying FERC proceeding" in reviewing order granting motion to dismiss); *Barber v. Verizon New Engl., Inc.*, No. C.A. 05-CV-00390-ML-DLM, 2005 WL 3479834, at *1 n.1 (D.R.I. Dec. 20, 2005) (reviewing discrimination charge filed with the Rhode Island Commission for Human Rights and granting motion to dismiss).

something that allegedly was not disclosed, the Court need not accept, or weigh at all, the truth of the contents of the document. It need only read the document. Multiple courts have reached this conclusion.[9]

C. The Court May Also Review The Actuarial Reports (Exhibits 1-8 & 29) In Connection With The Motion To Dismiss

The Motion explains why the Court may consider the Actuarial Reports, Exhibits 1-8 & 29. Mot. 44-48.[10] Although Plaintiffs do not contest the authenticity of any of these reports, they nevertheless oppose the Court's review of these documents. The Opposition (but not the FAC) argues that the reports are unreliable because Plaintiffs have accused former defendant Angell Pension Group, Inc. of malpractice. Opp. 47. This challenge is meritless. The FAC does not allege that there was any error in the Actuarial Reports (say, for example, that Angell got its math wrong). The Opposition does not pretend to cite any such allegation.[11] And when Angell was still a defendant in this case, Plaintiffs conceded that they "***do not allege that Angell's***

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[9] *See*, *e.g.*, *Kramer v. Time Warner Inc.*, 937 F.2d 767, 774-75 (2d Cir. 1991) (affirming taking of judicial notice of Offer to Purchase and Joint Proxy Statement because the documents were filed with the SEC and "are the very documents that are alleged to contain the various misrepresentations or omissions and are relevant not to prove the truth of their contents but only to determine what the documents stated"); *In re Lantus Direct Purchaser Antitrust Litig.*, No. 16-CV-12652-JGD, 2018 WL 6629708, at *8 (D. Mass. Oct. 24, 2018) (taking judicial notice of letters to the FDA for their content), *rev'd on other grounds,* 950 F.3d 1 (1st Cir. 2020).

[10] Summarily, the Court can review the Actuarial Reports because they are matters of public record, posted to the Receiver's website under the heading, "Public Data Associated with this Matter," whose authenticity is not questioned. Mot. 44-48. The Receiver is an officer of the Superior Court. *See R.I. Hosp. Tr. Co. v. R.I. Covering Co.*, 182 A.2d 438, 441 (R.I. 1962) ("A receiver is an officer of the court that appointed him[.]"). Additionally, there is absolutely no question that the Court can consider Exhibit 3 ("2006 Actuarial Report") and Exhibit 4 ("2007 Actuarial Report") for the additional reason that these documents are specifically referenced in the Amended Complaint. FAC ¶ 230(c).

[11] Elsewhere, the Opposition argues that the "Actuarial Malpractice" claim extends to "these valuation analyses in particular." Opp. 72. The FAC, however, does not take issue with any of these specific reports or claim that Angell provided SJHSRI with inaccurate calculations in the Actuarial Reports. Count X (Actuarial Malpractice) incorporates paragraphs 1-54, 238-251, 255, 259-264, 270, 288-297, 298-312, and 323-335 of the Amended Complaint. (*See* FAC ¶ 506.) Conspicuously absent from this list is paragraph 230(c), which referenced the 2006 and 2007 Actuarial Reports.

calculations were inaccurate."[12] There is no basis challenge to the Actuarial Reports on grounds of "unreliability;" it follows they can be reviewed on a 12(b)(6) motion.[13]

III. THE COURT SHOULD REJECT PLAINTIFFS' MISCHARACTERIZATION OF THE MOTION AS SEEKING DISMISSAL OF CERTAIN ALLEGATIONS OR SUBPARTS OF CLAIMS

The Motion is clear at the outset: "[t]he FAC alleges no facts against RCB, DAC or DSC that state a legally cognizable claims for relief." Mot. 1. The Motion was equally clear that its length and complexity stem directly from the numerous and overlapping pleading infirmities in the FAC. *Id.* at 1-2. The proper way to test the sufficiency of the FAC *as a whole* is to engage in the two-step pavane dictated by *Twombly*/*Iqbal*. *Id. at* 2; *see also García-Catalán v. United States,* 734 F.3d 100, 103 (1st Cir. 2013). This process necessarily requires evaluating specific factual allegations and legal claims, as well as separately evaluating different allegations of misconduct that are conflated into a single "count." For example, Count VII (for fraud) purports to challenge a wide variety of statements (none pleaded with particularity) made by multiple speakers over the course of decades, only a handful of which were allegedly made by persons that Plaintiffs contend were affiliated with the Diocese of Providence. *See infra* § VII.A. Likewise, according to Plaintiffs, Count IX (conspiracy) involves "four separate but related factual scenarios and schemes," only two of which even pretend that RCB, DAC and/or DSC were involved. FAC ¶ 55. But the fact that Plaintiffs have mushed together numerous theories

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[12] Pls.' Mem. in Opp'n to Angell's Mot. to Dismiss, ECF 97-1, at 61 (emphasis added).

[13] Plaintiffs appear to believe that if they can keep the Actuarial Reports out of the record, they can defeat the Motion. Not so. The Court may dismiss this entire case based on the arguments in the Motion even if the Court concludes the record on this Motion does not include the Actuarial Reports posted on the Receiver's website. The Diocesan Defendants' argument is predicated entirely on what allegations ***are missing*** from the FAC, especially concerning no one's belief pre-2008 that the Plan was underfunded. While the Actuarial Reports certainly help demonstrate ***why*** the FAC avoided including allegations on that score, none of it is required to grant the Diocesan Defendants' Motion. Instead, the Actuarial Reports demonstrate why Plaintiffs ***cannot allege*** in any subsequent amended complaint (consistent with Rule 11 at least) that anyone believed that the Plan was underfunded prior to the Great Recession sufficient for a representation to the contrary to be fraudulent, and that is because no one considered the Plan underfunded at any time prior to 2008.

into one "count" (contravening Rule 10(b)'s command that "each claim founded on a separate transaction or occurrence . . . be stated in a separate count") does not preclude the Court from separately evaluating distinct claims of wrongdoing on a motion to dismiss.

Plaintiffs mischaracterize this process as the Diocesan Defendants "invit[ing] the Court to 'dismiss' various allegations or various subparts of Plaintiffs' claims." Opp. 53. To be clear, RCB, DAC and DSC seek dismissal of this case *entirely*, and the well-settled process by which to do that is to separate the factual allegations from the conclusory assertions and "test the legal sufficiency of the factual allegations directed *against them*." Mot. 1. It follows from this that Plaintiffs are knocking down a straw man when they furnish lengthy string cites and block quotes for the proposition that "[a] motion to dismiss under Rule 12(b)(6) doesn't permit piecemeal dismissals of parts of claims." Opp. 54-56. The plausibility arguments made in the Motion are directed at claims and elements of claims, and those arguments show that the FAC does not allege sufficient *facts* to state a claim for relief that is "plausible on its face" and actionable as a matter of law.[14] Accordingly, the cases cited by Plaintiffs reversing dismissal where the district court did not read the complaint holistically are inapposite.[15] Unlike the cases cited by Plaintiffs, here the Court should find that the "cumulative effect" of the well-pleaded factual allegations in the FAC—that are entitled to the presumption of truth—is *zero*. The Court

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[14] *See*, *e.g.*, Mot., Part III ("Plaintiffs' claims are conclusory, inconsistent, and contradicted by documents referenced in the FAC and in the public record and should be dismissed on the pleadings as implausible."); *id.,* Part IV ("The FAC does not set forth a plausible causation claim for any acts or omissions prior to the Great Recession in 2008"); *id.,* Part VI ("The FAC does not plausibly allege that the Diocesan Defendants entered into an agreement for an unlawful enterprise and so Plaintiffs' claim for conspiracy (Count IX) should be dismissed.")

[15] In *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1, 15 (1st Cir. 2011), the Court reversed dismissal of the plaintiffs' political discrimination claim, because the complaint pleaded adequate factual material to support a reasonable inference that the four defendants had knowledge of their political beliefs. *See* 640 F.3d at 15-16. Here, in contrast, Plaintiffs do not allege *any* factual material when evaluated cumulatively to support the inference of an illicit conspiracy to divert assets from the Plan's beneficiaries.

can test this assertion by reviewing the analysis explaining how each allegation fails to state a claim. *See* Exhibit A.

None of this means that the Court is prohibited from ultimately granting the Motion in part. Plaintiffs do not cite a single case holding that courts may not dispose of claims to the extent they are premised on non-actionable allegations.[16] For example, the Court could hold that some, but not all, of the "counts" state a claim, that certain defendants should be dismissed, that certain legal theories do not state a claim for relief, or that certain claims cannot be predicated on certain allegations of misconduct.

IV. RULE 8(d)(2) DOES NOT PERMIT PLAINTIFFS TO CONTRADICT THEMSELVES ON MATTERS THAT HAVE BEEN THE SUBJECT OF EXTENSIVE DISCOVERY

The Rules of Civil Procedure do not permit Plaintiffs to plead legal contradictions, *i.e.*, that they were deceived that the Plan was both an ERISA plan and an ERISA-exempt church plan. Mot. 38-43. In response, Plaintiffs mischaracterize this argument (it has nothing to do with requiring "code" pleading) and argue that all they are doing is presenting the "alternative claims" under Fed. R. Civ. P. 8(d)(2). Opp. 58-63. Plaintiffs are wrong. The FAC doesn't read like an unjust enrichment claim pleaded in the alternative to a breach of contract claim. In fact,

[16] *See W. Reserve Life Assur. Co. of Ohio v. Caramadre*, 847 F. Supp. 2d 329, 349 (D.R.I. 2012) ("Insofar as Plaintiffs have attempted to revive their counts for rescission and declaratory judgment in case 09–471 on the basis that the annuities were void ab initio due to fraud in the factum, those counts also are dismissed."); *Catholic Charities of Me., Inc. v. City of Portland*, 304 F. Supp. 2d 77, 96 (D. Me. 2004) ("The City's motion for summary judgment on Count I is GRANTED with respect to the time between the Ordinance's enactment and Catholic Charities' section 410(d) election and with respect to those benefits offered by Catholic Charities that are not covered by ERISA."). Indeed, Plaintiffs cite such a case themselves. *Pledger v. Reliance Tr. Co.*, 240 F. Supp. 3d 1314, 1327-1328, 1337 (N.D. Ga. 2017) (dismissing claim to the extent it was premised on facts that were time-barred) (cited in Opp. 50).

the FAC's allegations read worse than the old joke about the lawyer's answer to a dog bite lawsuit.[17]

Wright & Miller—the very treatise that Plaintiffs cite—shows how wrong Plaintiffs are. Plaintiffs elided the following passage from their extensive quotation of Section 1283 at Opp. 58-59:

> Under the present federal procedure a party may plead inconsistently, *subject only to the requirements of making a reasonable inquiry under the circumstances and interposing a pleading only for proper purposes, which are the limits set forth in Federal Rule of Civil Procedure.*

Federal Practice & Procedure ("FPP") § 1283 (4th ed.) (emphasis added). While Rule 8(d)(2) permits parties to plead alternatively, such pleading is nonetheless *always* subject to the terms of Rule 11. A pleader may plead inconsistent facts only when legitimately in doubt about the facts in question.[18] So while Plaintiffs deride the authorities cited in the Motion as being "Rule 11" cases (*see* Opp. 62-64), the truth is that Rule 11 is implicated in this case precisely because Plaintiffs' allegations are contradictory, internally inconsistent and irreconcilable with each other, and cannot be the product of ignorance in light of the discovery that has taken place to date.[19] There are only two possible explanations: Plaintiffs seek tactical advantage by avoiding taking a position; or it is not possible to definitively determine the status of the Plan.

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[17] I don't own a dog. My dog didn't bite you. And my dog bit you only because you provoked him. *See* Diocesan Defs.' Reply in Further Supp. of Mot. for Summ. J., § II.B1 (discussing how Plaintiffs failed to plead the Plan's status as an ERISA plan or a church plan in the alternative).

[18] FPP § 1285 ("A party therefore should not set forth inconsistent, or alternative, or hypothetical statements in the pleadings unless, after a reasonable inquiry, the pleader legitimately is in doubt about the factual background or legal theories supporting the claims or defenses or is otherwise justified in pleading in this fashion and the pleader can represent that he is not doing so for an improper purpose."); *see also Am. Int'l Adjustment Co. v. Galvin*, 86 F.3d 1455, 1461 (7th Cir. 1996) ("[A] pleader may assert contradictory statements of fact only when legitimately in doubt about the facts in question.").

[19] *See*, *e.g.*, *Great Lakes Higher Educ. Corp. v. Austin Bank of Chicago*, 837 F. Supp. 892, 894-95 (N.D. III. 1993) (dismissing arguments pleaded in alternative when plaintiffs were not in doubt as to facts in question as inappropriate application of Rule 8(e)(2)).

Either way, Plaintiffs lose. Moreover, Plaintiffs' claim that they lack "personal knowledge" does not work in a fraud case. If Plaintiffs, as they claim, "reasonably relied upon . . . Defendants' misrepresentations and omissions" (FAC ¶ 496), they should know (and be able to plead) what specifically deceived them (and when), how they were deceived, and what about the deception was untrue (in addition to the other matters required by Rule 9(b)). And separate from Rule 9(b), Plaintiffs have a Rule 11 obligation to make reasonable inquiry. Lack of personal knowledge is not plausible here because of the discovery they have taken including very substantial discovery undertaken before suit was even filed. Plaintiffs completed discovery in this case on the very subject of whether and when ERISA applied to the Plan. They then filed for summary judgment taking a position on this issue identical to that presented in this (renewed) Motion. The notion that Plaintiffs can insulate their flip-flopping by resorting to Rule 8(d)(2) "pleading in the alternative" is wrong. Courts have been suspicious and are right to be.[20]

Plaintiffs' pleading defect is not limited to their flip-flopping about the Plan's ERISA status depending on who the defendant is. All counts of the FAC directed at RCB, DAC and DSC incorporate various contradictory allegations, like those highlighted in the Motion and set out in detail at Exhibit 30. Mot. 39-40 & Ex 30. It follows that Plaintiffs have failed to state a plausible entitlement to relief as *Twombly* and *Iqbal* require.

[20] FPP § 1283, n.21 (*quoting Am. Transp. Grp. LLC v. Cal. Cartage Co., LLC*, 168 F. Supp. 3d 1074, 1079-1080 (N.D. Ill. 2016) ("Although ***pleading*** in the alternative is permitted, obtaining judgments against multiple defendants for the very same loss without proving any kind of joint or derivative liability is plainly inconsistent with the law. It is a double recovery. 'Why should one be entitled to win the first suit by demonstrating A and the second suit by establishing not-A? One of these must be wrong; indeed, inconsistency probably demonstrates a violation of Fed. R. Civ. P. 11.'") (emphasis in original) (*quoting Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp.*, 910 F.2d 1540, 1548 (7th Cir. 1990)).

V. THE OPPOSITION DOES NOT IDENTIFY ANY ALLEGED MISCONDUCT OSTENSIBLY COMMITTED BY RCB, DAC OR DSC

RCB, DAC and DSC should be dismissed from the case because the FAC makes only conclusory allegations against those entities, and the FAC does not plead any specific actions taken or statements made by or on behalf of them. *See* Mot. 7-12. This is true under both Rule 8 (Mot. 8-11) and Rule 9(b) (*id.* at 11-12) principles. In response, the Plaintiffs argue, without citation, that the FAC "specifies which Diocesan Defendants performed which conduct." Opp. 82. The lack of citation here is telling. As explained in the Motion, all Plaintiffs did to provide "extra specificity" (*see* Opp. 82 n.189) was to perform a "find and replace" more than a hundred times to locate instances of "Diocesan Defendants" and replace that term with "Corporation Sole, Diocesan Administration, and Diocesan Service" in every instance. *See* Mot. 7 n.3. That does not (and cannot) cure Plaintiffs' fatal pleading defect. In fact, **Exhibit A** identifies each paragraph formulaically reciting "Corporation Sole, Diocesan Administration, Diocesan Service," and explains why none of those allegations suffice to state a claim against RCB, DAC or DSC or suffices to impute any other party's alleged misconduct to those entities.

In apparent recognition of the fact that their pleading is inadequate, Plaintiffs then pivot to an estoppel-based argument relying on R.I. Gen. Laws § 9-1-49. *See* Opp. 82-83. But their argument cannot be squared with the statute itself. It requires disclosure of correct identifying information when there are technical defects (*e.g.*, a typographical error in the corporate name, or the plaintiff sued the wrong corporate affiliate). That statute has no applicability here, because there is no information to provide. The statute provides, "if the corporation is aware that a subsidiary or affiliate is a proper party to the civil action, the corporation shall also provide the

correct name and address of the subsidiary or affiliate." R.I. Gen. Laws § 9-1-49(b).[21] RCB, DAC and DSC's position is (and has been all along) that there are ***no*** diocesan "affiliates" that are "proper parties" in this litigation or that should be substituted for the ones that are named. No diocesan entity should have been named in the first place. There is no "proper party."

Plaintiffs do not cite any legal authority permitting group pleading simply because a religious leader (or a temporal one, for that matter) happened to be the President/CEO of the lumped-together defendants. *See* Opp. 87-89. Instead, Plaintiffs' cases permit limited group pleading concerning an integrated corporate unit[22] (not the case here), or where the two subsidiaries intermingled employees making it impossible to identify the relevant employer[23] (also not the case here). Plaintiffs' other cases are similarly inapplicable.[24]

Plaintiffs attempt to distinguish RCB, DAC and DSC's persuasive legal authorities miss the mark. *See* Opp. 83-86. For example, Plaintiffs quote a passage from *Beta Grp., Inc. v.*

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[21] The statute also requires disclosure of a corporate entity's "correct corporate name, its state of incorporation, its business address as designated in its state of incorporation, its registered agent, and the address of its registered agent." *See* R.I. Gen. Laws § 9-1-49(b). But that clause is inapplicable because Plaintiffs do not argue that they lack any of that information for RCB, DAC or DSC.

[22] *Commonwealth of Kentucky v. Marathon Petroleum Co. LP*, No. 3:15-CV-354-DJH-CHL, 2018 WL 4620621, at *9 (W.D. Ky. Sept. 26, 2018) (holding that "imprecise use of 'Marathon' is acceptable given its reference to Marathon as a fully integrated distributor of gasoline and other petroleum-based products which owns and/or operates an integrated refining, marketing and transportation system") (cleaned up).

[23] *See In re Duramax Diesel Litig.*, 298 F. Supp. 3d 1037, 1056 (E.D. Mich. 2018). The plaintiffs in *Duramax*, unlike here, took pains that the "acts of individuals described in this Complaint have been associated with [specific corporate defendants] whenever possible." *Id.* That did not happen here, as the FAC repeats "Corporation Sole, Diocesan Administration, and Diocesan Service" but nowhere distinguishes between the three entities.

[24] Plaintiffs' quote *TTCP Energy Fin. Fund II, LLC v. Ralls Corp.* for the proposition that, "Indeed, without discovery, it would be impossible for TTCP to more precisely describe the respective conduct of four related entities." Opp. 88 (citing 255 F. Supp. 3d 1285, 1289-90 (N.D. Ga. 2017)). This does not help Plaintiffs because they have already had the opportunity for extensive pre-suit (and post-filing) discovery. And *MD Spine Sols., LLC v. UnitedHealth Grp., Inc.*, No. 21-CV-03435, 2022 WL 124160 (N.D. Ill. Jan. 13, 2022) (cited at Opp. 88-89) merely provides, "group pleading is permissible if it is plausible all defendants plausibly committed a certain act." *UnitedHealth Grp., Inc.,* No. 21-CV-03435 at. *3 (quotations and citation omitted). Here, there is no such plausibility because Plaintiffs have alleged only that Bishop Tobin "was acting within the scope of his employment . . . with respect to all of his actions and omissions alleged herein" as to all three entities. FAC ¶¶ 26-28.

Steiker, Greenaple, & Croscut, P.C., No. 15-CV-213-WES, 2018 WL 461097 (D.R.I. Jan. 18, 2018), noting that the complaint at issue involved allegations specifically tied to two defendants, "but no detailed information as to any of the other Individual Defendants." Opp. 83. But this passage (which Plaintiffs bolded) *supports* dismissal of RCB, DAC and DSC, because the Plaintiffs pleaded "no detailed information" as to RCB, DAC and DSC. *See Beta Grp.,* 2018 WL 461097 at *9. That the plaintiffs in *Beta Group* apparently conceded their pleading defect does not change the analysis or the result. *See id.* The Opposition's attempt to distinguish the other cases cited in the Motion fall flat because repeating the formula "Corporation Sole, Diocesan Administration, and Diocesan Service" more than a hundred times simply does not add any additional detail concerning what each of those three entities is alleged to have done. *See* Opp. 84-86.

Plaintiffs do not even attempt to address the binding case of *Doe v. Gelineau*, 732 A.2d 43, 44, 49 (R.I. 1999), wherein the Rhode Island Supreme Court previously held that the corporate form matters when dealing with religiously affiliated corporations. *See* Mot. 10-11. Nor does the Opposition attempt to acknowledge or distinguish that Bishop Tobin had other roles and capacities, including his religious role as the Most Reverend Bishop of the Diocese of Providence. *Id.* at 10. The Court should find that Plaintiffs' group pleading was improper.[25]

Because this group pleading deficiency permeates the entire FAC, that pleading should be dismissed in its entirety and with prejudice.

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[25] Plaintiffs also cite out-of-state cases standing for the uncontroversial proposition that determining scope of employment in a *respondeat superior* case can be a fact-intensive enterprise. *See* Opp. 86-87. Those cases have no bearing here, because the Plaintiffs allege no facts *whatsoever* indicating that Bishop Tobin was acting within the scope of his "employment" (assuming that term properly encompasses Bishop Tobin's role with RCB, DAC and DSC). Instead, it is obvious that Plaintiffs claims do not rest on anything like Bishop Tobin acting like an ordinary employee acting within the scope of his duties but rather "rest on the Bishop's status as a corporation sole and the ecclesiastical head of the diocese" and should be dismissed as courts in this district have already held. *See Devaney v. Kilmartin*, 88 F. Supp. 3d 34, 58 (D.R.I. 2015) (cleaned up) (cited in Mot. 11 n.5).

VI. THE OPPOSITION DOES NOT EXPLAIN HOW ALLEGED MISCONDUCT FROM DECADES AGO COULD HAVE CAUSALLY BEEN THE SOURCE OF PLAINTIFFS' HARM

The FAC does not allege that the Plan was underfunded prior to the Great Recession. Mot. 43-51.[26] Nowhere does the Opposition claim that the opposite is true. Instead, Plaintiffs admit, "That there was a 2008 recession is conceded." Opp. 76. Plaintiffs go onto argue that the Diocesan Defendants' "argument makes no sense even for a claim of actuarial malpractice, ***let alone claims of fraud.***" *Id.* (emphasis added). Plaintiffs have it backwards. They are asserting claims for fraud (as opposed to malpractice) against RCB, DAC and DSC, so a challenged statement from one of those entities "must relate to something that is a fact *at the time the assertion is made* in order to be a misrepresentation." *St. Paul Fire & Marine Ins. Co. v. Russo Bros.*, Inc., 641 A.2d 1297, 1299 n.2 (R.I. 1994) (quotation omitted) (emphasis added). To be sure, Plaintiffs conclusorily assert fraud, dating back to 1973. FAC ¶ 265. But Plaintiffs do not—and cannot—adequately plead a single contemporaneously factual representation about the Plan's status pre-2008 (suppose, for example, someone claimed the value of the assets was $X when the truth was the value was materially less than $X). This is especially true for bystanders like RCB, DAC and DSC, who concededly neither sponsored nor administered the Plan from at least 1995 forward (and could not be the entity responsible for communicating information about the Plan to participants). *See* FAC ¶¶ 215-17. Not a single allegation that formulaically recites "Corporation Sole, Diocesan Administration, Diocesan Service" comes close to doing so, and certainly does not do so with well-pleaded, non-conclusory factual allegations. *See* **Exhibit A**.

[26] Moreover, Plaintiffs cannot plead this fact consistent with Rule 11. The Actuarial Reports posted on the Receiver's website demonstrate that the Plan's actuaries consistently reported that the Plan was more than appropriately funded until the Great Recession of 2008 crippled it. Mot. 44-48.

Nowhere does the Opposition cite well-pleaded factual allegations establishing that RCB, DAC and DSC (or anyone else) believed the Plan was underfunded pre-2008. Nor do they even plead that the Plan funding *was actually* inadequate pre-2008.[27] Rather, Plaintiffs argue that "[t]he 2008 recession's effect in this case remains to be determined factually and cannot be simply held by the Court at this stage to have any specific effect." Opp. 76. Plaintiffs also assert that "the "accuracy (vel non) of assertions contained in the actuarial reports is a matter that can only be properly tested through expert evidence." *Id.* That cannot be right, because Plaintiffs accuse RCB, DAC and DSC of *fraud*. If "expert evidence" is needed in 20***22*** to show that pre-2008 Actuarial Reports contained errors (which is not even alleged in the FAC), then it *cannot possibly be the case* that a lay, non-actuary bystander is liable for *fraud*.[28]

A. Courts Can Consider Economic Crises When Considering Whether A Complaint Plausibly Alleges Causation

Plaintiffs dispute that the Court can consider the impact of a global economic crisis in determining whether Plaintiffs have plausibly alleged claims. Opp. 74-76. The Motion cited multiple cases where courts have done just that on a motion to dismiss.[29]

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[27] The one change Plaintiffs made between their original complaint and the Amended Complaint implicitly acknowledges that Plan funding was adequate. *Compare* Compl. ¶ 65, ECF No. 1 ("At various times during the period from 1995 to the present, SJHSRI did not fund the Plan in accordance with the requirements of ERISA and the recommendations of the Plan's actuaries, with the result that the Plan is grossly underfunded") *with* FAC ¶ 63 ("At various times during the period from 1995 to the present, SJHSRI did not fund the Plan in accordance with the requirements of ERISA and the recommendations of the Plan's actuaries, including but not limited to 2010, 2011, 2012, 2013, 2014, 2015, and 2016, with the result that the Plan is grossly underfunded"). To be clear, whether the plan was "underfunded" or "unfunded" depends in no small measure, if not entirely, on a legal question: whether the Plan was a church plan or an ERISA plan. The FAC makes clear that the Plan itself contained Exculpatory Provisions that would indicate that the Plan could not be underfunded under its own terms – terms that are not precluded under state law as a church plan. FAC ¶ 218.

[28] Again, the actuarial documents state that the actuaries applied ERISA funding standards to its calculations even though the Plan was a church plan. Any claim of fraud based on these documents would not only require actuarial expertise but legal as well (including whether the Plan's Exculpatory Provisions applied).

[29] *See, e.g., Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 998-99 (9th Cir. 2014) (affirming dismissal of complaint because allegations were equally consistent with the "innocent alternative[] that the recession decreased business viability and property values"); *In re Merrill Lynch & Co., Inc.*, 273 F. Supp. 2d 351, 362 (S.D.N.Y. 2003) ("The alleged omissions are not the 'legal cause' of the plaintiff's losses. There was no causal connection between the burst of the bubble and the alleged omissions; it was the burst which caused

Before the Court are the Actuarial Reports that show that the Plan's assets exceeded its liabilities in a string of years, ending with a precipitous drop from 2008 to 2009, the exact timeframe of a well-recognized and very dramatic economic downturn. The standards of Rule 12(b)(6), and the law surrounding judicial notice, do not require the Court to affirmatively maintain a false ignorance that flouts reality. The Court can connect these open, obvious and compelling dots. *See, e.g., Eclectic Props.*, 751 F.3d at 998-99. And taking account of such a global crisis is particularly appropriate in assessing the validity of Plaintiffs' *fraud* claims.

B. Plaintiffs Cite No Legal Authority Supporting Their Theory That The "Conceded" 2008 Market Crash Which Caused The Plaintiffs' Losses Can Transform Decades-Old Predictions Into Actionable Fraud

In an apparent attempt at poetic flourish, the Opposition proclaims, "Misrepresentations can be actionable no matter how longstanding, and contractual promises can be actionable no matter how recently broken." Opp. § III.B. Plaintiffs' couplet is, however, unsupported by any well-pleaded factual allegations, or any law standing for their fraud-by-meteor-strike legal theory. Plaintiffs appear to claim that statements allegedly made between 1973 and 1998—some as far as 50 years ago and all more than two decades ago (*see* FAC ¶ 277 (*quoted in* Opp. at 15))—even if true at the time they were made all *became* fraudulent because the unforeseen Great Recession (occurring a decade or so after the last challenged statements were made) radically altered the financial landscape.

Unsurprisingly, Plaintiffs do not cite a single case where similarly alleged facts were held to state a claim for relief. Instead, Plaintiffs attempt to distinguish the Motion's cases. *See* Opp. 78-81. While Plaintiffs attempt to distinguish these cases on their facts, nowhere do Plaintiffs

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the market drop and the resultant losses . . . ."). Plaintiffs attempt to distinguish *Eclectic Properties* and *Merrill Lynch* on their facts. Opp. 75-76, 80-81. Such distinctions do not change that these cases support the Diocesan Defendants' position that courts can consider economic crises on a motion to dismiss.

provide contrary legal authority refuting the legal principles cited in those cases. Plaintiffs' Opposition does not persuasively controvert the legal propositions cited in the Motion's cases: namely, that alleged misconduct predating the 2008 Great Recession had nothing to do with any harm to Plaintiffs precisely because something else—global economic calamity— caused the Plan to become "underfunded." The Court, therefore, should hold that Counts III, VII, VIII, IX, XXI and XXII cannot be plausibly premised on allegations regarding conduct or alleged misrepresentations predating September 2008. Mot. 48-51.

VII. THE FRAUD-BASED CLAIMS COUNT VII (FRAUD THROUGH INTENTIONAL MISREPRESENTATION AND OMISSION) AND COUNT VIII (FRAUDULENT SCHEME) SHOULD BE DISMISSED

A. None Of The FAC Allegations Cited In Plaintiffs' Opposition Amounts To Actionable Misrepresentation

Plaintiffs claim, "the Diocesan Defendants do not dispute that they made . . . misrepresentations directly to Plaintiffs." Opp. 114-15. They also claim "[t]he Diocesan Defendants contend [that] the letters to the Vatican and to the regulators were allegedly intended to deceive those entities." Opp. 114. Plaintiffs' assertions are unsupported, demonstrably false, and outrageous.

Proof of this is found in the Motion, which establishes that the letters were not misrepresentations of fact at all, and ***also*** that they cannot be actionable because they were not transmitted to the Plaintiffs. As such, they could not have been intended to deceive them. Mot. 52-76. That is *not* the same as conceding that the letters were sent to defraud regulators or the Vatican. Plaintiffs' twisted assertion and mischaracterization is completely inappropriate.

Nowhere in their 46 pages of Opposition briefing do Plaintiffs cite a case where any court held that allegations like those pleaded state a claim for fraud or fraudulent scheme. *See* Opp. 81-126, 141-42.

Plaintiffs are never specific—as required by Rule 9(b)—about what the claimed "fraud" is. Instead, the FAC swirls together allegedly false statements through time and actors, without differentiation as to when statements were made, who made them, to whom, or whether the alleged statements are fraudulent in themselves or as part of some so-called "fraudulent scheme." *See generally* FAC. The FAC blurs together what is an affirmative representation as opposed to an omission. *See generally id.* Nothing alleged by the Plaintiffs amounts to a misrepresentation, *i.e.*, "any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts." *See Stebbins v. Wells*, 766 A.2d 369, 372 n.4 (R.I. 2001) (defining "misrepresentation") (quoting *Travers v. Spidell*, 682 A.2d 471, 473 n.1 (R.I. 1996) (per curiam)).

To the contrary, many of Plaintiffs' citations to the FAC in Sections IV and VI of the Opposition (ostensibly in support of Counts VII and VIII, the fraud and fraudulent scheme claims, respectively) do not even identify statements that were allegedly made by RCB, DAC or DSC.[30] Other FAC citations identify statements made by Bishop Tobin (and other clerics) personally, without any claimed basis for the conclusory assertion that they were "acting on behalf of" the named Diocesan Defendants: RCB, DAC and DSC.[31] Other citations are to

[30] Opp. 86 n.194 (citing FAC ¶¶ 26-28) (no statements by anyone); Opp. 92 n.196 (citing FAC ¶ 277) (quoting a handout published by an unidentified speaker, but presumably the Hospital); Opp. 103 (citing FAC ¶¶ 150, 153-54) (no statements by RCB, DAC or DSC); Opp. 107 n.206 (citing FAC ¶ 139) (alleging statement by CCCB's Chief Executive Officer Kenneth Belcher); Opp. 113 (citing ¶¶ 153, 164-169) (no statements by RCB, DAC or DSC); Opp. 120 (citing FAC ¶ 336) (no statements made by RCB, DAC or DSC); Opp. 121 (citing FAC ¶¶ 87-90) (no statements made by RCB, DAC or DSC); Opp. 121 (citing FAC ¶ 112) (no statements made by anyone); Opp. 122 (citing FAC ¶ 87) (SJHSRI's Form 990 is not a statement by RCB, DAC or DSC); and Opp. 124 (citing FAC ¶ 186) (quoting Prospect's statement on December 2, 2014). The FAC paragraphs cited in the Opposition, to the extent they implicate RCB, DAC and/or DSC, are addressed in **Exhibit A**.

[31] Opp. 99 (citing FAC ¶¶ 319-81). These paragraphs do ***not*** allege any statements made by RCB, DAC or DSC. Apart from Bishop Tobin's February 14, 2014 letter to the Health Services Council (discussed *infra*), these paragraphs do not allege any statements made by any diocesan-affiliated actor. FAC ¶¶ 320-22. Plaintiffs' conclusory allegation that Bishop Tobin was acting as President of RCB, DAC and DSC is not entitled to the presumption of truth. *See* FAC ¶ 320.

paragraphs comprising impermissible group pleading; no statements are specifically attributed to RCB, DAC and DSC.[32] Other citations are to statements that were allegedly made after the Plan was put into receivership.[33] And portions of Section IV (ostensibly supporting Plaintiffs' fraud claims) instead address the alleged conspiracy. *See*, *e.g.*, Opp. § IV.C.4

At bottom, despite the prolixity of the Plaintiffs' Opposition on the fraud-based claim, there are only four allegations that arguably amount to "representations" concerning speakers affiliated with the Diocese of Providence (without pleading facts justifying an inference that they were made or authorized by RCB, DAC or DSC):

1. Ancient Statements made by unspecified speakers about the Plan (or its predecessor) long before the Plan was allegedly underfunded (*see* FAC ¶¶ 265 & 277) (cited in Opp. 89-93);

2. Bishop Tobin's September 27, 2013 letter to the Vatican (Mot. Ex 21) (*see* FAC ¶¶ 172-179) (cited in Opp. 107-09, 114-16);

3. Bishop Tobin's February 14, 2014 letter to the Health Services Council (Mot. Ex 24) (*see* FAC ¶¶ 320-22) (cited in Opp. 107-09, 114-16); and

4. The listing of SJHSRI in the Official Catholic Directory from 2015-2017 (*see* FAC ¶¶ 109-10, 185-91) (cited in Opp. 104, 114, 121-26).

But none of these statements amount to actionable misrepresentation.

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[32] Opp. 93 n.197 (citing FAC ¶¶ 259-67). Paragraph 259 does not identify the speaker, instead alleging that "SJHSRI, [RCB], [DAC], [DSC], Prospect Chartercare, and Angell made or provided statements to Plan participants, on different occasions, in many different contexts, over many years." FAC ¶ 259. Such an allegation flouts Rule 9(b). Importantly, this paragraph does not allege statement made by any speaker authorized to speak on behalf of RCB, DAC and/or DSC. This paragraph does not purport to allege the contents of each statement or the time they were made. Such context is especially important here, because, for example, the Plan was sufficiently funded prior to 2009. The booklets cited in subsequent paragraphs are from the 1970s, a quarter century before the alleged plan split in 1995. There is no allegation that any statements made in those booklets were false when made.

[33] Opp. 121, 125 (citing FAC ¶¶ 161-62) (statements made after the Plan was put into receivership). In fact, it does not even appear that Plaintiffs are challenging those statements as misrepresentations.

1. **Alleged Ancient Statements to Plan Participants**

The FAC contains a 62-paragraph section entitled "Misrepresentations to Plan Participants." FAC ¶¶ 256-318. Plaintiffs' theory concerning the so-called "Diocesan Defendants' longstanding misrepresentations" does not state a claim for fraud for several independent reasons.

First, *none of the purported misrepresentations were allegedly uttered by RCB, DAC or DSC*. As explained in the Motion, only three of these statements, all from decades ago—allegedly made circa 1973, 1994, and 1998—even arguably reference actors related to the Diocese of Providence (as opposed to "SJHSRI" or "the Hospital"). *See* Mot. 52-53, 63-64 (citing FAC ¶¶ 265, 272 & 277). The FAC does *not* allege that any of the alleged "booklets" "statements" or "handouts" were published by RCB, DAC or DSC—and Plaintiffs' Opposition does not argue otherwise. *See* Opp. § IV.B, at 89-93. The only FAC citation *at all* in Section IV.B is Paragraph 277, which alleges that a "handout was provided to Plan participants" referencing the "Roman Catholic Bishop of Providence" and the "Diocese." Paragraph 277 does not, however, allege that RCB, DAC or DSC spoke the quoted statement or published the "handout." To the contrary, that paragraph also alleges that "**SJHSRI** did not inform Plan participants of the separation" (emphasis added) occurring in 1995, which justifies the inference that SJHSRI [*i.e.*, **not** RCB, DAC or DSC] was the original speaker. Although not referenced in Section IV.B, the Plaintiffs' nearest miss is Paragraph 272, but that allegation also falls short of identifying a statement made by RCB, DAC or DSC.[34] Because RCB, DAC and DSC are not

[34] Paragraph 272 alleges that "[p]rior to 1995, the Diocese's Retirement Board [i.e., **not** RCB, DAC or DSC] sent terminated or retiring employees of SJHSRI documents entitled "STATEMENT OF INFORMATION FOR TERMINATED EMPLOYEES WITH VESTED RIGHTS." Importantly, the FAC does not allege what form of statements this individual received *after* 1995. It strains credulity to believe that a statement dated "January 15, 1994" noting that benefits would "commenc[e] on 4/1/2020" was the only communication sent over the intervening quarter century.

alleged to have been speakers of any of the "Misrepresentations to Plan Participants," no fraud claim can lie against those defendants for any of those challenged statements.

Second, after incorrectly presuming that RCB, DAC and DSC can be liable for fraud on account of statements they did not allegedly utter, the Opposition then goes on to argue that those mostly unattributed statements should be deemed misrepresentations because they might be either "false representation as to one's intention" or perhaps "statements regarding the future that also touch upon facts about the past and present" or perhaps "forecasts." *See* Opp. 89-91. The Opposition does not stake out a position, however. Nor does the Opposition explain how the cases apply to the specific allegations made in the FAC. *See id*.[35] The FAC cannot allege that RCB, DAC or DSC misrepresented its own intention to make good on a promise at the time of the representation, because it does not allege any representations by those entities <u>at all</u>. But even if the Court were to accept Plaintiffs' invitation to conflate all the challenged statements (which it should not do because that would violate Rule 9(b)), the inescapable conclusion is that such allegations at most involve "unfulfilled promises to do a particular thing in the future"—here, decades into the future. *See Cote v. Aiello,* 148 A.3d 547, 548 (R.I. 2016). It is well settled that such statements "do not constitute fraud in and of themselves." *Id.* Plaintiffs cannot escape

[35] For example, *Cheetham v. Ferreira*, 56 A.2d 861 (R.I. 1948) has no application here, because in that case the defendant "positively represented as an existing material fact that she was actually making a weekly profit of $200 for herself in that rug business as conducted by her; that the manufacturing cost of each 18 by 30 inch rug was 40 cents and the selling price thereof was 80 cents; and that such cost and selling price were material elements of the profit which she asserted she was making for herself at the time of the negotiations." *Id.* at 863-64. Here, in contrast, Plaintiffs' allegations about the Plan from pre-2008 do not involve "an existing material fact" about the Plan. *Robinson v. Standard Stores*, 160 A. 471 (R.I. 1932), is inapplicable because the Court held that the representation at issue related to the value of stock purchased (and therefore the proper measure of damages was the difference between the value of the stock and the amount plaintiff paid for it). *Id.* at 472. In *Glassman v. Computervision Corp*., 90 F.3d 617 (1st Cir. 1996), the First Circuit affirmed the denial of a motion for leave to file a second amended complaint because the plaintiffs did not plead factual allegations sufficient to reasonably allow the inference that the defendants' statements were false when made. *Id. at* 629-30.

the basic truth that "[f]uture events *or promises* are not considered factual." *Id.* at 549 (emphasis added).[36]

Third, any fraud claim fails for the independent reason that the FAC does not adequately plead scienter as to any challenged statements in the FAC pre-dating 2008. Mot. 60-62. In response, Plaintiffs (i) forswear any obligation to plead scienter concerning any alleged fraud pre-dating 2008 (Opp. 112); but also (ii) assert that they have indeed alleged lack of intent to keep promises (Opp. 93 n.197 (citing FAC ¶¶ 259-67)). Both responses lack merit.

i. Plaintiffs are wrong on the law. A fraud plaintiff must plead "specific facts that make it reasonable to believe that defendant knew that a statement was materially false or misleading." *See N. Am. Catholic Educ. Programming Found., Inc. v. Cardinale*, 567 F.3d 8, 13 (1st Cir. 2009) (quotations omitted) (quoted in Mot. at 58-59). To state a claim for fraud in this context, Plaintiffs must plead facts establishing that RCB, DAC and DSC lacked intent to keep any promises when they were made to the pensioners in the 1970s to 2008. *See id.* at 13. [37]

ii. To support their claim of scienter, Plaintiffs cite allegations having nothing to do with intent. *See* FAC ¶¶ 259-67. Those allegations are, read most charitably, conclusory assertions relating to other elements. *See* FAC ¶ 259 (statements to Plan participants); *id.* ¶ 260 (reliance); *id.* ¶¶ 261-62 (general understandings amongst Plan Participants and labor union). The cited passage lacks any assertion (conclusory or otherwise) that anyone prior to 2008 ever intended to not honor the alleged "assurances" (assuming *arguendo* they were made).

It follows that the Plaintiffs have not sufficiently alleged scienter.

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[36] Plaintiffs concede that a representation regarding future intention is only fraudulent if the maker "does not have that intention at the time he makes the representation." Opp. 89. Likewise, Plaintiffs recognize that forecasts are only actionable if "they are not reasonably based on, or are inconsistent with, the facts at the time the forecast is made." *Id.* at 91. And the cases that the Opposition cites conform to this rubric. *Palmacci v. Umpierrez*, 121 F.3d 781, 788-93 (1st Cir. 1997) (upholding finding that defendant "did not intend to defraud the [plaintiff] when he promised to contribute . . . his own personal funds to the project" because "there was no knowing misrepresentation"); *see Cummings v. HPG Int'l, Inc.*, 244 F.3d 16, 22-23 (1st Cir. 2001) (holding that manufacturer of roofs was not liable in deceit for making false statements that its roofs would last for 20 years and that they were suitable for the New England climate absent evidence that the manufacturer knew, or should have known of the falsity of its statements when they were made).

[37] Plaintiffs' cases are inapposite. *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1 (1st Cir. 2011), does not help Plaintiffs because unlike that case, there are no allegations at all that "make the claim as a whole at least plausible." *Id.* at 15. Because Plaintiffs' assertion of scienter is not supported with any particulars at all, *Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 103 (1st Cir. 2013), is likewise inapplicable.

Fourth, the FAC's allegations preclude Plaintiffs' argument that the "Diocesan Defendants were under a continuing duty to correct such prior misrepresentations and inform employees and other Plan participants that the statements were no longer reliable." Opp. 92; *see also id.* 73-74. This argument fails at the outset because the FAC does not allege that any of the purported misrepresentations were allegedly uttered by RCB, DAC or DSC. Statements allegedly made *about* diocesan entities (although not allegedly made *by* the Diocesan Defendants) occurred years before the Great Recession, in 1973 and 1998. FAC ¶¶ 265, 277. Plaintiffs do not cite any Rhode Island law in support of their theory, and Rhode Island law recognizes a duty to speak in limited circumstances not alleged here.[38]

Based on the facts alleged by the FAC, no duty to speak could exist, assuming it ever did, after 1995, because the FAC alleges that the Plan split in 1995 and was thereafter administered by SJHSRI. *See* FAC ¶¶ 64, 216-17. The FAC clearly identifies numerous statements made by parties *other* than RCB, DAC or DSC about the Plan and its funding and operation. *See, e.g.*, FAC ¶¶ 268-71, 273-75, 279-81. Plaintiffs allege that the diocesan role lessened over many years. FAC ¶¶ 75, 84, 87, 203. There is no basis for the Court to find a duty to speak under the circumstances. In addition, none of Plaintiffs' out-of-state cases hold that any "continuing duty to correct" endures for decades (and the statute of limitations would preclude such liability in any event). *See* Opp. 73-74.[39] Plaintiffs' "continuing duty to correct" theory also fails for the

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[38] Under Rhode Island law, "mere silence in the absence of a duty to speak is not fraudulent." *McGinn v. McGinn*, 146 A. 636, 638 (R.I. 1929); *see also Home Loan & Inv. Ass'n v. Paterra*, 255 A.2d 165, 167 (R.I. 1969) ("[O]ne party to a transaction is under no duty to speak out to the other concerning everything he knows about the matter, and that silence, even if meditated and upon a material fact, will not necessarily allow the other party to the transaction to set it aside as fraudulent"). A duty cannot arise simply because one party has been remiss in inquiry or failed to investigate. *See Home Loan,* 255 A.2d at 167.

[39] The Opposition's cases are all inapposite because they involved parties to a business transaction (unlike RCB, DAC or DSC, which Plaintiffs pleaded all had no role in administration after 1995), and involved a much shorter interval of time between the alleged "representation" and the receipt of new information. For example, in *George Joseph Assets, LLC v. Chenevert*, 557 S.W.3d 755 (Tex. App. Ct. 2018), the transaction was a settlement agreement requiring real estate conveyancing, and the alleged non-disclosure occurred within six

additional reasons that Plaintiffs do not allege: (1) what the new information allegedly was, (2) when and how RCB, DAC or DSC became aware of the new information; and (3) how the new information makes the earlier representation untrue. The challenged statements allegedly made to Plan participants are also unactionable because none of the named Plaintiffs allegedly received them. *See* FAC ¶¶ 3-10, 256-318.

2. **Bishop Tobin's September 27, 2013 letter to The Vatican**

In response to Plaintiffs' outrageous claim that Bishop Tobin defrauded the Vatican in his September 27, 2013 letter (Mot. Ex. 21), the Motion established, among other things, that the letter cannot support a fraud claim for numerous reasons. The Opposition does not effectively refute the Motion's showing as set forth in the following table:

	Exhibit 21 Cannot Support A Fraud Claim	**The Opposition Does Not Refute this Showing**
1.	Nothing in the FAC or in the letters themselves indicates that Bishop Tobin wrote those letters on behalf of RCB, DAC, or DSC. *See* Mot. 53 & Mot. Ex. 21.	The Opposition does not point to any facts supporting such an inference. Instead, the Opposition repeats its conclusory allegation that "Bishop Tobin acted individually and in his capacity as President of Defendants [RCB], [DAC], and [DSC]." Opp. 107 n.205 (quoting FAC ¶ 179).[40]

months (and before the real estate was transferred). *Id.* at 762-63, 766. Likewise, *In re Wayport, Inc. Litigation*, 76 A.3d 296 (Del. Ch. 2013) involved a stock sale, and the speaker learned of the untruthfulness of the statement a mere month after it was made (and before the sale occurred). *Id.* at 323. In *St. Joseph Hospital v. Corbetta Construction Co.*, 316 N.E.2d 51, 70-71, 73 (Ill. App. Ct. 1974), the speaker knew that the statements were deceptive at the time they were made. *Id.* No such allegation was made in this case about RCB, DAC or DSC. The case of *Druckzentrum Harry Jung GmbH & Co. KG v. Motorola Mobility LLC*, 774 F.3d 410 (7th Cir. 2014), supports the Diocesan Defendants' position, because the court in that case held that there was no duty to disclose where the plaintiff had failed to identify "anything in the updated forecasts that was inaccurate, much less willfully false." *Id.* at 419.

[40] In fact, a literal reading of the enactment of the General Assembly creating the corporation sole makes clear that there is no civil impediment to RCB's power "to sell, convey, transmit, mortgage and dispose of [property] subject to the laws of the state." Section 2 of the 1941 R.I. Acts & Resolves at 450–51. That is, the process by which Bishop Tobin obtained permission for the proposed alienation in no way derived from RCB's statutorily authorized property-holding and – conveyancing powers; that process was wholly dictated by Canon Law. As such the process of obtaining ecclesiastical approval for the proposed alienation is an internal canonical matter not subject to review in any civil court.

	Exhibit 21 Cannot Support A Fraud Claim	**The Opposition Does Not Refute this Showing**
2.	The FAC does not identify a single false representation of fact in Exhibit 21. Instead, Plaintiffs try to transform a letter describing the economic terms of a negotiated transaction into "fraud" by disagreeing, in retrospect, with the impact the transaction would have on the Plan. *See* Mot. 53-55 & Mot. Ex. 21.	The Opposition does not identify any false statements of fact in rebuttal. *See* Opp. 108. Plaintiffs agree that the Plan had a "significant unfunded liability," was at "significant risk" of failure and that such failure would have been "catastrophic." Instead, Plaintiffs repeat ¶ 177, which is a wholly conclusory statement as to what RCB, DAC and DSC purportedly "knew." *Id.* But this claimed "fact" is merely Plaintiffs' belief that the Plan would have been better off had the transaction not been consummated. (This belief is unsupported even with the benefit of hindsight.) Then, Plaintiffs ask this Court to presume their belief to be a "fact" such that any belief to the contrary is fraud. But that is not fraud.
3.	The challenged statements in Bishop Tobin's letter (*see*, *e.g.*, FAC ¶¶ 176-77) are unactionable opinions. Mot. 56-57.	The Opposition does not rebut the Motion's showing. For example, Plaintiffs cite *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175 (2015). Opp. 109. *Omnicare* involved opinion statements in registration statements, which are "formal documents, filed with the SEC as a legal prerequisite for selling securities to the public." 575 U.S. at 190. An intra-Church letter cannot reasonably be expected to be held to Section 11's "stringent standard of liability." *See id.* at 191 n.9. Yet even in this more stringent context, "a statement of opinion is not misleading just because external facts show the opinion to be incorrect." *Id.* at 188. In this case, the FAC does not allege that the facts recited in the letter forming the basis of the letter are incorrect. Instead, Plaintiffs claim that—based on the facts available at the time (many of which were noted in the letter itself)—Bishop Tobin should have reached a different opinion considering the same set of facts. But that is not fraud.
4.	The challenged statements are not material, and the "wordsmithing" allegations do not support a claim for fraud when the net result is accurate. Mot. 53-58.	The Opposition does not address this argument, except to assert that the revision is evidence of scienter (which it is not). Opp. 113. Plaintiffs do not offer any theory about why the alleged editing is, in itself, fraudulent. The alleged editing cannot be fraudulent because the statement is accurate regardless of the alleged edits. In addition, the challenged revision is not material: there is no reason to believe that the recipient (the Vatican) would have acted differently but for the change. Plaintiffs do not allege, for example, that the Vatican would have acted differently if the original "spiraling and gaping" verbiage had been retained. (If anything, more garish adjectives would tend to *increase* the likelihood of approval.) What Plaintiffs are really claiming is that anything that furthered the transaction (which they now claim they don't like) is "bad" and anything that would have halted the transaction is "good." But a disagreement over the appropriate go-forward plan is not a fraud case.

	Exhibit 21 Cannot Support A Fraud Claim	**The Opposition Does Not Refute this Showing**
5.	The FAC does not adequately plead scienter. Mot. 62-63.	The Opposition does not rebut the Motion's showing that the FAC does not come close to supporting an inference of scienter. *See* Opp. 113. The FAC pleads *zero* contemporaneous facts—despite at this juncture of the case having the benefit of voluminous discovery—that Bishop Tobin was told or otherwise put on notice that the opinions expressed in his letter were inaccurate. There is no basis to conclude that Bishop Tobin's letter was written with knowledge of any falsity or intended to mislead.
6.	Exhibit 21 is an unactionable statement to a non-party, which could not have caused any harm allegedly suffered by Plaintiffs, because Plaintiffs were not the intended recipients of the letter, and they did not rely on any alleged statements. Mot. 64-68.	The Opposition does not rebut the Motion's showing that a fraud claim does not lie where the alleged victim is ultimately a non-recipient of the allegedly false representation. The case Plaintiffs cite *State v. Purdue Pharma L.P.*, No. PC-2018-4555, 2019 WL 3991963, at *13 (R.I. Super. Aug. 16, 2019), is inapposite. The chain of causation for the "indirect fraud" claims alleged in that case was that "Defendants perpetrated the fraud upon doctors, those doctors wrote improper prescriptions for patients, which the State subsequently filled, which patients misused, thereby resulting in indirect consequences that harmed the State." *Id. at *13.* Here, in contrast, the Plaintiffs did not receive any information "indirectly" from the Vatican (unlike the prescriptions allegedly tainted by fraud, which the State filled). Because the Plaintiffs did not receive any information at all—indirectly or otherwise—they cannot state a *Purdue*-type "indirect fraud" claim (assuming *arguendo* that the Rhode Island Supreme Court ultimately agrees with Judge Gibney). For the same reason, there can be no reliance where, unlike the State that allegedly relied on improper prescriptions in filling them, the FAC pleads no "indirect consequences" of the Vatican letter other than the approval of a perfectly legal transaction, which Plaintiffs had no power to stop. Once again, Plaintiffs' theory boils down to anything that facilitated an otherwise legal, fully disclosed business transaction, must be fraud simply because Plaintiffs don't like the outcome.

From the foregoing, it follows that the Opposition does not rebut the showing that Exhibit 21 cannot form the basis of a fraud claim.

But there are additional, constitutional reasons why the Court should find that a claim for fraud cannot be premised on internal Church correspondence, here, a letter from Bishop Tobin to the Congregation for the Clergy made pursuant to Canon 1292, § 2 of the Code of Canon Law.

See Mot. Ex. 21. By challenging the propriety of Bishop Tobin's September 27, 2013 letter, Plaintiffs are squarely asking the Court to adjudicate whether the Vatican was properly informed. Do Plaintiffs foresee this Court ordering the deposition of Pope Francis to ascertain whether he was deceived or misled by the letter or allowing Plaintiffs to present evidence to a jury of the Church's internal assessment and consideration of the Bishop's letter? The Supreme Court has prohibited that kind of inquiry as violative of the Church's Constitutional rights.[41] Stated differently, whether Bishop Tobin misrepresented anything to the Vatican or failed to communicate something the Vatican would expect him to are questions that only the Roman Catholic Church can answer according to Canon law. And contemplating that such a dispute could be adjudicated in a civil court is chilling in the extreme. It simply cannot be the basis for civil liability as a matter of Constitutional law.

3. **Bishop Tobin's February 14, 2014 letter to the Health Services Council**

In response to Plaintiffs' claim that Bishop Tobin defrauded the Health Services Council in his February 14, 2014 letter (Mot. Ex. 24), the Motion established, among other things, that the letter cannot support a fraud claim. The Opposition does not effectively refute the Motion's showing as set forth in the following table:

	Exhibit 24 Cannot Support A Fraud Claim	**The Opposition Does Not Refute this Showing**
1.	Nothing in the FAC or in Exhibit 24 itself indicates that Bishop Tobin wrote the letter on behalf of RCB, DAC, or DSC. *See* Mot. 53 & Mot. Ex. 24.	The Opposition does not point to any facts supporting such an inference. Instead, the Opposition repeats its conclusory assertion that Bishop Tobin was "acting individually and as President of [RCB], [DAC], and [DSC]."") Opp. 107 n.205, 207 (quoting FAC ¶ 320). Yet Paragraph 320 contradicts itself because it alleges that "Bishop Tobin . . . personally wrote" the HSC. FAC ¶ 320.

[41] *Serbian E. Orthodox Diocese for U.S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 724-25 (1976) ("[T]he First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them.")

	Exhibit 24 Cannot Support A Fraud Claim	**The Opposition Does Not Refute this Showing**
2.	The FAC does not identify a single false representation of fact in the letter. Mot. 53-55 & Mot. Ex. 24.	The Opposition does not purport to challenge any statements of fact at all. *See* Opp. 36-37 & 108. Instead, Plaintiffs assert that Bishop Tobin "knew" that the transaction "made pension failure much more likely." FAC ¶ 321. But statements that merely amount to second-guessing the "true" beliefs of other people (here, the Bishop) about the appropriateness of the transaction and its potential impact on the Plan are not facts. Information about the transaction, funding of the plan, and assets available to pension-holders after the 2014 Asset Sale were available to regulators.
3.	The challenged statements in Bishop Tobin's letter (*see*, *e.g.*, FAC ¶¶ 320-21) are unactionable opinions. Mot. 56-57 & Mot. Ex. 24.	The Opposition does not rebut the Motion's showing. The *Omnicare* case, discussed *supra*, is equally relevant here. The FAC does not allege that the facts recited in the letter forming the basis of Bishop Tobin's opinion about the propriety of the transaction are incorrect. Instead, Plaintiffs claim that Bishop Tobin should have reached a different opinion based on the facts available at the time (which were accurately recited in the letter).
4.	The challenged statements are not material. Mot. 62-63.	Plaintiffs do not allege any wordsmithing concerning this letter. *Cf.* Opp. 113. In addition, there is insufficient pleaded factual material to justify an inference that allegedly fraudulent material in the challenged letter is material; that is, there is no reason to believe that the recipient (the Health Services Council) would have acted differently in the absence of this letter. It had much more substantially vetted, and authoritative factual information available to it. There is no allegation of reasonable reliance upon the letter at all.
5.	The FAC does not adequately plead scienter. Mot. 62-63.	The Opposition does not identify any facts pleaded in the FAC supporting an interference of scienter concerning Exhibit 24. *See* Opp. 112-13. There is no basis to infer that this letter was written with knowledge of any falsity or intention to mislead.
6.	Exhibit 24 is an unactionable statement to a non-party, which could not have caused any harm allegedly suffered by Plaintiffs, because Plaintiffs were not the intended recipients of the letter, and they did not rely on any alleged statements. Mot. 64-68.	The Opposition does not rebut the Motion's showing that a fraud claim does not lie where the alleged victim is ultimately a non-recipient of the allegedly false representation. The *Purdue Pharma* case, discussed *supra*, is equally inapposite here. Because the Plaintiffs did not receive any information at all—indirectly or otherwise—it follows that: (1) they cannot state a *Purdue*-type "indirect fraud" claim; and (2) there can be no reliance. Once again, Plaintiffs' theory boils down to anything that facilitated an otherwise legal, fully disclosed business transaction, must be fraud simply because Plaintiffs don't like the outcome.

From the foregoing, it follows that the Opposition does not rebut the showing that Exhibit 24 cannot form the basis of a fraud claim.[42]

4. **The Listing of SJHSRI in the Official Catholic Directory Was Proper and, in any Event, Cannot Be Challenged in These Circumstances**

In the Motion, DAC, DSC, and RCB established that Plaintiffs cannot sustain Count VII (or any other claim) premised on listing SJHSRI in the Official Catholic Directory (OCD) because (1) SJHSRI was, in fact, operated in connection with the Church (Mot. 68-74); and (2) the First Amendment precludes judicial inquiry into the sufficiency of the Church's determination of Catholicity (Mot. 75-76). Plaintiffs' Opposition does not adequately refute the Motion's showing.

Out of context quotations post-dating the Receivership do not suffice to support an inference that SJHSRI was not operated "in connection with" the Diocese of Providence. Based on basic Rule 12(b)(6) principles, the Court should not assume the truth of Plaintiffs' conclusory assertion that SJHSRI "was not 'operated, supervised or controlled by or in connection with the Roman Catholic Church.'" *See* Opp. 121 (*quoting* FAC ¶ 111). The Opposition does not point to any facts pleaded in the FAC supporting such an inference. Instead, they point to allegations of statements *post-dating the receivership* taken out of context. *See id*. (*quoting* FAC ¶ 161-62). Neither of the alleged statements support an inference that SJHSRI lacked any connection with the Diocese of Providence. *See* Mot. 71.

[42] If the Court holds that Plaintiffs state a claim premised on petitioning activity such as submitting the HSC letter, the Diocesan Defendants anticipate asserting a *Noerr-Pennington* immunity defense, which protects the legitimate exercise of the constitutional right to petition the government after retributive civil claims were brought by parties harmed by petitioning activity. The Rhode Island Supreme Court has applied *Noerr–Pennington* protection to common-law tort claims. *Hometown Properties, Inc. v. Fleming*, 680 A.2d 56, 60 (1996) (claims "must be examined under the rubric of *Noerr–Pennington* immunity inasmuch as the provisions of the United States and Rhode Island constitutions *take precedence over common-law tort doctrines*") (emphasis added). Accordingly, common-law tort liability of any kind cannot be premised on the legitimate exercise of the constitutional right to petition the government.

There is no basis to exclude Exhibit 19—the Amended Articles—which conclusively demonstrate the existence of a legal connection between SJHSRI and RCB during the entire challenged period. Mot. 70-71.[43] Plaintiffs do not question their authenticity. Plaintiffs also do not meaningfully dispute that the Amended Articles establish a legal connection; instead, they resort to name-calling (*i.e.*, labeling them "moribund"). *See* Opp. 121-22. Plaintiffs do not dispute that these provisions were in effect during the entire challenged period, however. Implicitly conceding that the Amended Articles establish the requisite legal connection, Plaintiffs argue that the Court should not look at the Amended Articles. Opp. 121-22. This is wrong. Courts may properly take judicial notice of official public records, like articles of incorporation filed with a state agency.[44]

Moreover, the FAC independently establishes the existence of a legal connection between SJHSRI and the Diocese of Providence during the challenged period. Plaintiffs allege:

> Upon the conclusion of the 2014 Asset Sale, the Diocese of Providence had no meaningful role in the governance of SJHSRI. To the contrary, *the only rights it had concerned the "Catholicity" of SJHSRI's operation of the hospital and provision of health care.* Since SJHSRI no longer operated a hospital or otherwise provided health care as a result of the 2014 Asset Sale, that role was rendered completely moot.

FAC ¶ 88 (emphasis added). Two points follow from Plaintiffs' concession. *First*, the Diocese did have rights concerning the enforcement of Catholicity vis-à-vis SJHSRI. *Id.* This refutes Plaintiffs' assertion that the FAC pleads a "lack of connection." Opp. 121. *Second*, Plaintiffs' qualification that "the Diocese of Providence had no ***meaningful*** role" (emphasis added) is an acknowledgement that there was a role for the Diocese of Providence in the governance of

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[43] The Diocesan Defendants also attached the ERDs. Mot. Ex. 20. Although referenced in the FAC and capable of review at this stage of the proceedings on that ground, FAC ¶ 149 & n.3, the ERDs are also susceptible to judicial notice. *Overall v. Ascension*, 23 F. Supp. 3d 816, 825 (E.D. Mich. 2014).

[44] *See, e.g.*, *Overall v. Ascension*, 23 F. Supp. 3d 816, 825 (E.D. Mich. 2014); *Singleton v. Volunteers of Am.*, No. C 12-CV-5399 LHK (PR), 2013 WL 5934647, at *2 n.3 (N.D. Cal. Nov. 4, 2013); *In re Greater Se. Cmty. Hosp. Corp.*, 333 B.R. 506, 527 n.25 (Bankr. D.D.C. 2005).

SJHSRI. *Id.* Plaintiffs attempt to downplay the existence of a connection between SJHSRI and the Diocese, by quoting statements post-dating the Receivership. *See* Opp. 124-25 (*citing* FAC ¶¶ 161-62). But those statements do not support Plaintiffs' claim. To the contrary, Plaintiffs excise from their quotation the very text that contradicts their conclusory assertion.[45] So, while Plaintiffs assert that there was no connection between SJHSRI and the Diocese of Providence at all, they must ultimately concede that there *was* a connection.[46]

In reality, Plaintiffs simply dispute the sufficiency of that connection, and they admit this in the title of Section IV.I.1:

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

Opp. 121-22 (italics and underlining added). Plaintiffs are unquestionably asking the Court to decide whether the relationship between SJHSRI and the Diocese is "meaningful" enough for listing in the OCD. This invitation to a civil authority to inquire into the "sufficiency" of the connection between SJHSRI and the Church is impermissible, as explained below.

First Amendment. Judicial inquiry into whether a connection is "meaningful" enough for the Diocese to decide that SJHSRI is associated with the Catholic Church and worthy of

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[45] In fact, the letter cited in FAC ¶ 161, which is available at *www.providencejournal.com/story/opinion/letters/2017/09/05/letter-timothy-reilly-troubled-pension-fund-was-managed-by-corporation/18894700007/*, provides, ". . . .And upon the 2014 transaction with Prospect, that involvement essentially ended. **In fact, within that time, the diocese's only role had been a spiritual one, maintaining Catholic identity and presence at the hospital.**" Plaintiffs omitted the bolded text from their quotation of Father Reilly's letter.

[46] Plaintiffs' critical legal error here is their continued unjustified conflation of the standards for listing an organization in the OCD (any connection whatsoever) versus qualification under ERISA as a "church plan" (which Plaintiffs contend requires application of the harshly criticized *Lown* test). *See* Mot. 72-74. Plaintiffs' argument that they do not conflate the test for admission to the OCD with that for qualification as a "church plan" is easily dispatched. *See* Opp. 123-24. *First*, it is belied by the FAC. *See* FAC ¶¶ 158 ("[C]ontinuing to list SJHSRI in the Catholic Directory would be a misrepresentation, and an unlawful evasion of tax law and ERISA, because the [the Diocesan Defendants] would not control or be associated with SJHSRI after the closing of the 2014 Asset Sale."). *Second*, Plaintiffs cite only *Rollins v. Dignity Health*, 338 F. Supp. 3d 1025, 1028 (N.D. Cal. 2018), but that citation does not support Plaintiffs' argument because *Rollins* involved a challenge to whether a purported "church plan" was controlled by or associated with a church within the meaning of ERISA. *See id.*

inclusion in the OCD is precisely the kind of inquiry precluded by the First Amendment. Mot. 75-76. The Opposition raises the specter of a slippery slope. *See* Opp. 124-26. They contend that if the Court accepts Church "declarations of religious affiliation (no matter how absurd)" then local dioceses across the country will be able to sell federal tax and ERISA exemptions to "supermarkets, bus terminals, and driving ranges." *Id.* at 125-26. Plaintiffs' argument is as dangerous as it is incorrect.

First, it should be axiomatic that civil courts like this Court cannot adjudicate the veracity (or absurdity) of "declarations of religious affiliation." It is well-settled First Amendment jurisprudence that any adjudication second-guessing the Church's determination of who it chooses to identify as Catholic is far outside the bounds established by the Religion Clauses.[47]

Second, Plaintiffs' assertion that civil authorities can adjudicate these issues otherwise "supermarkets, bus terminals, and driving ranges" could be deemed "associated" with the Catholic Church misses the point. Opp. 125-26. If the Catholic Church associated with a non-profit "supermarket" (*i.e.*, a food bank) any declaration of association with the church is non-justiciable in this Court. Whether that food bank qualifies as a tax-exempt public charity is a separate question entirely. It could, for example, be challenged in the appropriate court—but not

[47] "'[W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them.'" *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 185-86 (2012) (*quoting Watson v. Jones*, 80 U.S. 679, 727 (1871)). "As we would put it later, our opinion in *Watson* "radiates ... a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 186 (*quoting Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952)). *See also Milivojevich*, 426 U.S. at 724 ("[T]he First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters.").

in this Court, and never by Plaintiffs.[48] But public charity status is not dependent on the Church's declaration that the organization shares its faith and morals (or *vice versa*).

Third, Plaintiffs' purported concerns ring hollow, because the USCCB's group tax exemption does *not* automatically apply upon listing in the OCD.[49] No one claims it does. To the contrary, the USCCB Memorandum (quoted liberally in the FAC, *see*, *e.g.*, ¶¶ 106-07) expressly provides that "public charity[50] status does *not* automatically extend to subordinate organizations covered under the Group Ruling" and that "[e]ach subordinate organization in the Group Ruling must establish its own public charity status under section 509(a)(1), 509(a)(2), or 509(a)(3) as a condition to inclusion in the Group Ruling." Mot. Ex. 18 at 3 (emphasis in original).

Ultimately, Plaintiffs' argument fails because the declaration of religious affiliation encompassed by listing in the OCD does *not*, by itself, confer a tax exemption. Plaintiffs' concerns are thus baseless, and they certainly do not justify adjudicating the decision—entirely protected by the First Amendment—to declare an organization to be "Catholic."

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[48] Congress has enacted careful limitations of judicial review of the IRS's § 501(c)(3) determinations. To litigate the "continuing qualification of [a § 501(c)(3)] organization" in court, "an appropriate pleading" must be filed in "the United States Tax Court, the United States Court of Federal Claims, or the district court of the United States for the District of Columbia." 26 U.S.C. § 7428(a). And such a pleading is "appropriate" only if filed "by the organization the qualification or classification of which is at issue," *id.* § 7428(b)(1)-not by a third-party opponent of that organization.

[49] *See* Mot. Ex. 18 (2017 Memorandum from U.S. Conference of Catholic Bishops) (*cited in* FAC ¶¶ 106-107).

[50] A "public charity" is an organization that not only qualifies as tax exempt under 26 U.S.C. § 501(c)(3), but also meets certain requirements under § 509(a). *Create (Christian, Research, Educ., Action, Tech., Enter., Inc.) v. C.I.R.*, 634 F.2d 803, 809 (5th Cir. 1981) ("Section 501(c)(3) allows an exemption from federal income taxes for certain charitable organizations . . . . Section 509(a) provides that all organizations exempt under s[ection] 501(c)(3) are private foundations, except for certain classes of public charities."). Plaintiffs, notably, do not allege that the Diocesan Defendants erred in determining that SJHSRI met those requirements.

B. Dismissal For Failure To Plead Reasonable Reliance Is Permissible Where, As Here, The Facts Alleged Preclude Any Finding of Reasonable Reliance

In response to the Motion's showing that the FAC pleads no facts giving rise to an inference of reasonable reliance (*see* Mot. 63-68), Plaintiffs double down and assert that "issues of reasonable reliance on misrepresentations are highly fact-specific and cannot properly be decided on a motion to dismiss." Opp. 94. Plaintiffs misstate the law. Courts have held that "[w]hen . . . the facts alleged in the complaint preclude a finding of reasonable reliance, a court may enter an order of dismissal under Rule 12(b)(6)." *Rodi v. S. New England Sch. of Law*, 389 F.3d 5, 16 (1st Cir. 2004).

Here, a finding of reasonable reliance is impermissible because the FAC does not allege that any of the putative class representatives received any of the challenged statements. *See* FAC ¶¶ 3-10, 256-318. None of the putative class representatives claim that they would have behaved differently if purportedly concealed information was disclosed. Without this, Plaintiffs' conclusory assertions of "reliance" by the class representatives fail as a matter of law—and the Court need not reach the question of whether such reliance was reasonable. *See* Mot. 64.[51] Plaintiffs' response does not meet this argument. They argue that Plaintiffs "have indeed alleged specific misrepresentations attributable to the Diocesan Defendants and their co-conspirators, upon which Plaintiffs and others relied." Opp. 96. But this non-response misses the point,

[51] Plaintiffs also argue they are relieved from having to plead reliance by class representatives simply because this is a pension class action. *See* Opp. 95 (citing *Osberg v. Foot Locker, Inc.*, No. 07-CV-1358 (KBF), 2014 WL 5800501, at *1 (S.D.N.Y. Nov. 7, 2014)). *Osberg*, however, was resolved in the context of class certification and stated that reliance "can be demonstrated on a ***generalized basis***" for that purpose. *Id.* (emphasis added). *Osberg* does not hold that putative class representatives are relieved of any obligation to allege that they actually received the purportedly misleading communication or relied on it, when their common law fraud claim confronts a motion to dismiss for failure to state a claim. *See id.*

because it fails to identify the Plaintiffs that received the statements, and how they allegedly relied on those statements.[52]

Plaintiffs also fail to allege reliance on the challenged statements made to third-parties. *See* Mot. 64-68. The Opposition purports to distinguish *Cliftex Clothing Co. v. Di Santo*, 148 A.2d 273, 276 (R.I. 1959), on the grounds that *Cliftex* "involved first-party reliance on a false statement made to third parties, not third-party reliance." Opp. 96.[53] Plaintiffs thus concede that they were not the intended recipients of purported misrepresentations (*see* Mot. 65-67), and Plaintiffs instead appear to be arguing only that they pleaded that the *third-parties* relied on the challenged statements. *See* Opp. 117-20. But that's not what the FAC actually pleads. Plaintiffs cite FAC ¶ 336 to support their claim that they have adequately alleged third-party reliance. Opp. 120. But that paragraph does not plead any facts concerning reliance.[54] It is wholly

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[52] Plaintiffs' response here underscores the need for Rule 9(b), a purpose of which is to "to preclude the use of a groundless fraud claim as a pretext to discovering a wrong or as a "'strike suit.'" *New Eng. Data Servs., Inc. v. Becher*, 829 F.2d 286, 289 (1st Cir. 1987). Plaintiffs were able to obtain substantial pre-suit discovery from the defendants before filing their complaint, which afforded their counsel plenty of opportunity to comb through the documents and cobble together a fraud claim using documents the individual named plaintiffs never claimed to have seen. Of course, if any of the named Plaintiffs had truly been defrauded, he or she would have been able to state a claim before receiving a single piece of paper from the defendants.

[53] Plaintiffs' attempt to distinguish the Motion's other cases fails, too. *See* Opp. 96-97. In *Ang v Spidalieri*, No. WC-2006-0569, 2018 WL 810086 (R.I. Super. Ct. Feb. 05, 2018), the Rhode Island Superior Court found that the plaintiff had failed to demonstrate a defendant was liable to her for fraud because the allegedly fraudulent statement was made to a third party—not the plaintiff—which the third party—not the plaintiff—relied on. *Id.* at *14. The court reasoned: "It was a false statement that [the defendant] made to Finan, which Finan and his principal, WaMu, relied and acted upon. At no time did [the defendant] make a false statement of fact to [the plaintiff] which [the plaintiff] then relied upon." *Id.* Similarly, in *Gorbey v. Am. Journal of Obstetrics & Gynecology*, 849 F. Supp. 2d 162 (D. Mass. 2012), the district court denied the plaintiffs' motion to amend their complaint to add a fraud count based on two doctors' publicly published statements that third parties—not the plaintiffs—relied on. *Id.* at 166. Tellingly, Plaintiffs provide no case law to refute these cases or holding that statements like those to the Vatican, HSC, or OCD properly formed the basis for someone else's fraud claim.

[54] That allegation states: "These misrepresentations and omissions concerning the Plan's funding level were made with an intent to deceive and succeeded in deceiving both the Rhode Island Department of Health and the Rhode Island Attorney General in approving the asset sale, and to prevent SJHSRI's employee unions, the general public, and Plan participants from learning of the grossly underfunded status of the Plan. These misrepresentations and omissions constituted intentionally false statements of material fact by Defendants SJHSRI, RWH, CCCB, Angell, Prospect Chartercare, Prospect Chartercare St. Joseph, Prospect Chartercare Roger Williams, Prospect Medical Holdings, and Prospect East." FAC ¶ 336.

inconsistent with Count VII (fraud) and Count VIII (fraudulent scheme), which assert, respectively, that "Plaintiffs reasonably relied upon said Defendants' misrepresentations and omissions" and "Plaintiffs relied upon Defendants' acts, practices, and courses of business that operated as a fraud upon Plaintiffs." FAC ¶¶ 496, 500. The only third-party reliance alleged in the FAC at all are conclusory assertions concerning the "employee unions" (FAC ¶ 262) and the Court's approval of the 2015 Cy Pres Petition (FAC ¶ 403). No well-pleaded factual allegations undergird these conclusory assertions, so they may be disregarded on this motion. Moreover, those allegations of reliance do not concern the purported statements to the Vatican, HSC, or OCD, which are the alleged statements conclusorily tied to the Diocesan Defendants.

Plaintiffs also contend that they have alleged "sufficient reliance on misrepresentations to third parties," based on *State v. Purdue Pharma L.P.*, No. PC-2018-4555, 2019 WL 3991963, at *13 (R.I. Super. Aug. 16, 2019) and fraud cases from other jurisdictions.[55] *See* Opp. 117-18, 118 n.211. But the reality remains that Plaintiffs do not plead the reliance element for "indirect fraud" because, unlike here, the State (the plaintiff in that case) ultimately *did something* with the improper prescriptions (namely, filled them) written by the doctors (the third parties) who were

[55] Among these cases is *Wheat v. Sofamor, S.N.C.*, 46 F. Supp. 2d 1351, 1365 (N.D. Ga. 1999), which Plaintiffs describe as "recognizing but granting summary judgment on claim for fraud on the Food & Drug Administration, in the absence of evidence that defendants intended to deceive the FDA." Opp'n at 46 n.33. There are two major problems with Plaintiffs' reliance on *Wheat*. First, *Wheat* ***rejected*** the plaintiffs' common law fraud claim because they "***failed to identify a material, false statement of fact made by Defendants to any plaintiff***[.]" *Id.* at 1364 (emphasis added). Second, to the extent *Wheat* recognized a "fraud on the FDA" claim, it has no basis in law and offers no support for Plaintiffs' argument as it concerns third-party reliance. To recognize a "fraud on the FDA" claim, *Wheat* followed the lead of *In re Orthopedic Bone Screw Products Liability Litigation*, 159 F.3d 817 (3d Cir. 1998). *See Wheat*, 46 F. Supp. 2d at 1364 n.17 (citing *Bone Screw Prods.*). The U.S. Supreme Court subsequently reversed *Bone Screw Products* under the name *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001), holding that state law claims for "fraud on the FDA" were impliedly preempted. Plaintiffs may be familiar with *Buckman* since the Motion cited it extensively in connection with their argument that federal law preempts Plaintiffs' "fraud on the IRS" claim (Count XVII of the Amended Complaint). Mot. 97-99.

ostensibly defrauded by the defendant pharmaceutical company. Here, in contrast, there is nothing like the improper prescriptions that Plaintiffs received and acted upon.

Plaintiffs also rely on *Vucci v. Meyers Bros. Parking System, Inc.*, 494 A.2d 530, 534 (R.I. 1985), but that case involved a *personal injury action*, holding that a trial justice may admit evidence relating to apparent authority when the evidence indicates that a third party relied on that appearance of authority and plaintiff was injured as a result. *Vucci,* 494 A.2d at 534. Accordingly, the Supreme Court's holding relates strictly to admission of evidence to prove negligence. *See id.* Plaintiffs argue that this holding is somehow "the essence" of third party reliance in fraud claims, *see* Opp. 119, ignoring that the essence of a fraud claim is that a "defendant made a false representation intending to induce the plaintiff to rely thereon . . . ." *McNulty v. Chip*, 116 A.3d 173, 184 (R.I. 2015) (stating elements of a *prima facie* fraud claim) (citations omitted). *Vucci* contains no discussion as to whether the defendant intended the plaintiff to rely on the apparent authority that the employee did not have, and cannot be stretched as far as the Opposition attempts to take it.

C. The Opposition's Fallback To Fraudulent Scheme/Vicarious Tort Liability Cannot Save Plaintiffs' Common Law Fraud Claim Against RCB, DAC and DSC, Nor Do Plaintiffs State A Separate Claim For "Fraudulent Scheme"

Plaintiffs argue that, even if statements to, and reliance by, third parties cannot be the basis for a fraud claim, RCB, DAC and DSC would still be "liable for their coconspirators' misrepresentations." Opp. 115. The Plaintiffs go on to argue that Rhode Island recognizes a cause of action in fraud at common law for scheme liability, but they fail to cite a case recognizing fraudulent scheme as a tort *independent* of fraud and conspiracy. *See id.* at 115. Plaintiffs' cited cases all involve allegations (or proof) of fraud, conspiracy or both and, importantly, Plaintiffs cite no case where the fraud and conspiracy was dismissed but the separate claim for "fraudulent scheme" was allowed to proceed.

The "fraudulent scheme" allegations cannot, however, be deployed to transmogrify otherwise unactionable statements into misrepresentations simply because they were uttered as part of a conspiracy or scheme. *See Fogarty v. Palumbo*, 163 A.3d 526, 543 (R.I. 2017) (providing that conspiracy "is not an independent basis of liability," but "requires a valid underlying intentional tort theory"). Because fraud claims cannot rest on alleged statements to third parties or third parties' reliance on such statements, Counts VII and VIII must be dismissed to the extent it is based on Bishop Tobin's letters to the Vatican and the HSC, the listing in the OCD, or anything else that did not ultimately reach the Plaintiffs.

VIII. THE OPPOSITION FAILS TO SHOW THAT THE AMENDED COMPLAINT'S CONSPIRACY THEORY (COUNT IX) IS PLAUSIBLE

The FAC, in its "Overview" Section, purports to assert "(at least) four separate but related factual scenarios and schemes." FAC ¶ 55. But there is no mention of RCB, DAC and/or DSC in FAC ¶ 55(a) or (c). That is, the only two "schemes" that RCB, DAC or DSC allegedly participated in are:

- FAC ¶ 55(b): the conspiracy "[f]or most of at least the past ten years . . . to conceal [that the Plan was grossly underfunded] from Plan participants through fraudulent misrepresentations and material omissions regarding the Plan."
- FAC ¶ 55(d), the "scheme [with] four key stages" to allegedly orphan the Plan, which posits that the role of RCB, DAC and/or DSC (the FAC doesn't specify which) participated in a conspiracy to falsely claim that the Plan continued to qualify as a "church plan," allegedly in violation of federal tax laws and ERISA.

The Motion established how both alleged schemes fail as against RCB, DAC and DSC as a matter of law. *See generally* Mot. §§ III & VI, at 17-43 & 76-89. Plaintiffs' Opposition does not refute this showing. *See generally* Opp. § V, at 126-41. There is simply no plausible basis to hold RCB, DAC or DSC liable for the alleged acts of the other defendants.

A. Plaintiffs Misstate The Substantive Law Of Conspiracy, And Ignore Controlling Federal Pleading Standards

Implicitly acknowledging that they do not adequately plead a civil conspiracy under Rhode Island law, Plaintiffs assert that *Stubbs v. Taft*, 149 A.2d 706 (R.I. 1959), is not applicable because that case predates the adoption of the Superior Court Rules of Civil Procedure in 1966. Opp. 127-28. Plaintiffs' unsupported assertion that *Stubbs* is inapplicable at the pleading stage is easily refuted. Both state and federal courts applying Rhode Island substantive law have dismissed civil conspiracy claims on a Rule 12(b)(6) motion, and those courts cited *Stubbs* in holding that the plaintiffs did not state a claim for conspiracy. *ERI Max Entm't v. Streisand*, 690 A.2d 1351, 1353-1354 (R.I. 1997) (affirming grant of motion to dismiss and citing *Stubbs*); *Guilbeault v. R.J. Reynolds Tobacco Co.*, 84 F. Supp. 2d 263, 268 (D.R.I. 2000) (dismissing civil conspiracy claim resting mainly on allegations of fraud and citing *Stubbs*). Plaintiffs, in contrast, do not cite any case holding that *Stubbs* is bad law, or that the *Stubbs* case is somehow inapplicable on a motion to dismiss. *See* Opp. 127-28.[56]

Moreover, apart from paying lip service to *Twombly* and *Iqbal* in the standard of review section (and falsely accusing the Motion of not analyzing "the totality of Plaintiffs' claims for relief"), Plaintiffs wholly ignore those cases. *See* Opp. 45-46, 57. As explained in the Motion, *Twombly* and *Iqbal* require an assessment of the plausibility of the alleged conspiracy overall and specifically whether it is more or equally plausible that the facts actually alleged – not conclusions and characterizations – point to lawful activity. Mot. 17-18. Accordingly, *Twombly, Iqbal*, and *Stubbs*, mandate consideration of lawful alternative explanations when reviewing a conspiracy claim on a motion to dismiss. Therefore, the Court may (and should) apply these

[56] Instead, Plaintiffs cite several *criminal* conspiracy cases and out of state case law. *See* Opp. 126. But this case involves a claim for *civil* conspiracy involving *Rhode Island* substantive law (if not ERISA preempted).

cases (and the other authorities cited in the Motion) to the well-pleaded facts in the FAC and hold that the Plaintiffs do not state a claim for civil conspiracy as a matter of Rhode Island substantive law or controlling federal pleading standards. *See generally* Mot. §§ III & VI, at 17-43 & 76-89. Nothing in the Opposition refutes (or even responds to) this showing.

B. Plaintiffs Do Not Adequately Plead RCB, DAC Or DSC's Involvement In A Conspiracy To Fraudulently Conceal Alleged Plan Underfunding (*See* FAC ¶ 55(b))

The Motion established that Plaintiffs' "¶ 55(b) Conspiracy" fails. *See* Mot. § VI.B, at 84-87; *see also* Mot. § III.A.1. In response, Plaintiffs unsuccessfully attempt to distinguish the Motion's legal authorities (either on irrelevant facts or procedural posture), but Plaintiffs do not explain why the legal principles cited in those cases do not mandate dismissal. *See* Opp. 134-38. Moreover, Plaintiffs do not cite a single case where a court held that facts like those alleged in the FAC *sufficed* to state a claim for civil conspiracy. *See id.*

At bottom, the entire alleged "¶ 55(b) Conspiracy" collapses under its own weight. The "concealment" of the Plan's funding status that was ostensibly the conspiracy's purpose is contradicted by the FAC's own allegations establishing public disclosures about funding status in 2014. *See* Mot. 24-25. That the conspirators allegedly frustrated their own conspiracy's alleged purpose makes the assertion implausible. But *even if* the Court concludes that Plaintiffs' 55(b) Conspiracy allegations somehow established the *existence* of a conspiracy under *Twombly, Iqbal*, and *Stubbs*, Plaintiffs still have not adequately pleaded that RCB, DAC and/or DSC joined or participated in the conspiracy. This is true because, among other reasons, there is:

- No plausible allegation of motive, because from at least 1995 forward, no diocesan entity (and certainly not RCB, DAC or DSC) was the sponsor nor the administrator of the Plan. FAC ¶¶ 215-17. It follows that there is no rational basis to expect RCB, DAC and/or DSC to involve itself with making representations about issues concerning the Plan. Nor have Plaintiffs alleged any facts that would give rise to the opposite inference.
- No plausible allegation concerning the particulars of how or why RCB, DAC and/or DSC allegedly *joined* this alleged conspiracy. The FAC does not allege specific facts about the asserted meeting of the minds or circumstances under which the alleged agreement

was formed, such as which individuals participated, when it was formed, or what RCB, DAC and/or DSC's specific role would be in concealing that the Plan was grossly underfunded.

– No plausible allegation that RCB, DAC and/or DSC *participated* in this alleged conspiracy. The FAC does not identify a single "fraudulent misrepresentation" made by RCB, DAC and/or DSC to Plan participants regarding funding status during the entire time the conspiracy allegedly existed (and then some). *See* FAC ¶¶ 279-318. Nor does the FAC plead any facts implying a duty to speak during that timeframe, which precludes any omission or concealment theory of liability. *See id.*

If anything, the (only) two communications that Plaintiffs identify as coming from Bishop Tobin (not RCB, DAC, or DSC) affirmatively disclose that the Plan faced a "significant unfunded liability" and was at substantial risk. These are the statements of someone revealing concerns with the Plan, not concealing them. It would defy "judicial experience and common sense" to buy into Plaintiffs' conclusory assertion that these letters were dispatched *in furtherance of a conspiracy*. *See Iqbal*, 556 U.S. at 679.

Having failed to adequately plead RCB, DAC or DSC's involvement in the ¶ 55(b) Conspiracy, the FAC asserts that the alleged wrongdoing "is imputed to" RCB, DAC and DSC. FAC ¶ 318. But adequately pleading participation in a conspiracy *logically precedes* imputation, and on this score Plaintiffs utterly fail.

C. Plaintiffs Do Not Adequately Plead RCB, DAC Or DSC's Involvement In A Conspiracy To Falsely Claim "Church Plan" Status (*See* FAC ¶ 55(d))

The Motion also established that Plaintiffs' "¶ 55(d) Conspiracy" fails. *See* Mot. § VI.A, at 77-84; *see also* Mot. § III.A & B. Plaintiffs do not allege (nor could they allege) that the 2014 Asset Sale (which Plaintiffs mischaracterize as "stripping of SJHSRI's assets") was inherently illegal. Indeed, the FAC pleads that certain defendants (but not RCB, DAC or DSC) "attempted to structure the 2014 Asset Sale to avoid any obligations by [other, non-Diocesan Defendants] under the Plan, and the Asset Purchase Agreement expressly stated that responsibility for the Plan after the asset sale closed would remain with SJHSRI." FAC ¶ 301. That is, while

Plaintiffs label the transaction a "scheme," that label is not entitled to the presumption of truth on a motion to dismiss. The parties to the transaction fully disclosed the materials terms and the issues prompting the transaction being sought in the first place—warts and all—all of which was acknowledged and approved by the pertinent regulators, RIDOH and RIAG. Mot. § III.A.1-5.[57] Plaintiffs' broad assertion of conspiracy is implausible on its face and falls far short of meeting the minimum pleading threshold set by *Twombly* for conspiracies generally.

But *even if* the Court concludes that Plaintiffs' 55(d) Conspiracy allegations somehow established the *existence* of a civil conspiracy under *Twombly, Iqbal*, and *Stubbs* by other (now former) defendants to orphan the Plan, Plaintiffs still have not adequately pleaded that RCB, DAC and/or DSC joined or participated in that conspiracy. This is true for several reasons.

First, Plaintiffs do not plausibly allege an agreement between other alleged conspirators on one hand and RCB, DAC and/or DSC on the other. According to Plaintiffs, the other conspirators induced RCB, DAC and/or DSC (the FAC doesn't specify which) to violate federal law (ostensibly subjecting RCB, DAC and/or DSC to prosecution) for absolutely *no additional benefit*. The alleged "quid pro quo" (*i.e.*, continued Catholicity) is illusory. Our Lady of Fatima Hospital was already under contractual restrictions to comply with various Catholicity requirements" and "saying no to the deal would not divest them of those rights." FAC ¶¶ 150,

[57] In Opposition, Plaintiffs argue that "Disclosure to the state regulators is still not disclosure to Plaintiffs" (Opp. 134) but this argument makes no sense. This is because the object of the scheme (as Plaintiffs alleged) was to ostensibly "maintain the retirement plan of [SJHSRI] as a 'Church plan,'" but determining "Church Plan" status has nothing to do with what Plaintiffs *believe* about the Plan. Plaintiffs further confuse matters by simultaneously alleging the contradictory propositions that (i) the conspirators falsely claimed the Plan was a church plan knowing that the Plan was actually an ERISA plan, thereby deceiving the Plan participants into believing that ERISA *did not apply* (*see* FAC ¶ 55(d)(ii)); and (ii) the conspirators never told Plan participants that the Plan was a church plan to trick them into believing that *ERISA did apply* (*see* FAC ¶ 318). The only inference to draw from these contradictory allegations is that *Plaintiffs don't know what they believe* (other than they believe the Plan should have more funding), and lacking a coherent legal theory they are willing to throw everything and anything at the Court to see what sticks. This sort of pleading is improper as explained earlier. Mot. § III.C.

153-54; Mot. 30-31. The Opposition pivots when confronted with this showing; the Opposition argues instead that what that the Diocesan Defendants wanted was a "'Catholic' hospital with a clean balance sheet." Opp. 102-03. But that is not the "quid pro quo" that Plaintiffs pleaded. *See* FAC ¶¶ 151-54. And Plaintiffs' pivot makes plain that consent to the transaction is at least as consistent with a lawful purpose as it is with an unlawful undertaking. *See* Mot. 22.[58]

Second, Plaintiffs do not plausibly allege that RCB, DAC or DSC joined Plaintiffs' 55(d) Conspiracy. Plaintiffs scoff at the notion of conspirators taking "faithful notes of their conspiracies" (Opp. 127), but do not see the absurdity that the "Overview of the Strategic Transaction" presentation[59] "laid out the *quid pro quo.*" FAC ¶ 153. The very existence of this presentation belies that it is a "term sheet" of an unlawful conspiracy. No facts are pleaded justifying an interference that this document is anything other than it appears to be, namely, a proposal to attempt to save a failing hospital system.

That said, if the Court gets past the absurdity that *these* conspirators do not take faithful notes but apparently are big fans of laying out their conspiracy via PowerPoints, a review of the contents of Exhibit 23 establishes that this document does not reflect an offer directed at RCB, DAC or DSC at all, let alone a "quid pro quo" forming the basis of an illegal secret scheme to defraud. Rather, the "requirements" that Plaintiffs allege in Paragraph 153 refer to

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[58] This includes providing support for a transaction that would bring needed capital and pension contributions to a failing hospital and its pension plan; working to preserve a Catholic health care presence in Rhode Island; recognizing a continuing connection between SJHSRI and the Roman Catholic Church; seeking approvals needed to move forward with a long-sought after solution to save a hospital system in crisis.

[59] Mot. Ex. 23. The Motion attached this document as an Exhibit because Plaintiffs characterize the "Overview of the Strategic Transaction" and purport to quote from this document at length. Although Plaintiffs claim Exhibit 23 "laid out the *quid pro quo*" they also insist that it was improperly attached to the Motion. How can Plaintiffs possibly object to consideration of Exhibit 23 if they honestly believe it is the veritable blueprint of a conspiracy and the communication by which the other defendants procured the complicity of RCB, DAC and DSC in their so-called conspiracy. The answer, of course, is that this document does not do what they claim it does. The presentation does not set forth a quid pro quo or obligations on the part of RCB, DAC or DSC. Mot § VI.A.3.

"Requirements of the post-Closing structure of CCHP," not RCB, DAC or DSC. The Court is not, however, required to assume a deliberate misreading of a document on a dismissal motion.

Third, RCB, DAC and/or DSC cannot be implicated in a conspiracy to falsely claim "Church Plan" status because whether the Plan qualified for the church plan exemption was not a knowable fact and therefore not capable of fraud. *See* Mot. III.B, at 33-38. Therein, the Plaintiffs' conspiracy allegations were shown to be self-refuting because Plaintiffs allege *both* that Plan participants were deceived into thinking that the Plan was a church plan *and* no one told them that the Plan was a church plan. *Id.* at 33-34. In response, Plaintiffs argue that "fraudulent inclusion" of SJHSRI in the OCD "was a precondition to treatment of the Plan as a church plan under any theory." Opp. 104. Apparently, Plaintiffs have no problem admitting when they contradict themselves. Importantly, Plaintiffs do not meet the substance of the argument, which is that until *Stapleton* came down in 2017, neither the Diocesan Defendants nor Bishop Tobin could have known the impact *Stapleton* would have on the law of principal purpose organizations. Mot. 34-36. Even with *Stapleton*, courts still view this matter as extremely complex. In 2019 (a year *after* this case was filed), the U.S. Court of Appeals for the Seventh Circuit declared that the proper construction of the principal purpose organization requirement—what matters in assessing the principal purpose organization, 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).

Moreover, to this day, Plaintiffs contend that they can, consistent with Rule 11, still argue either that the Plan qualified as a church plan or an ERISA plan. Mot. 36-38. Plaintiffs' own admissions and conduct since filing this lawsuit confirms that whether the Plan qualified for the

church plan exemption was not an established and certain fact and therefore not capable of fraud. *See id.* At bottom, listing SJHSRI in the OCD did not maintain the Plan as a church plan, and there are no well-pleaded factual allegations permitting an inference that Bishop Tobin (or his subordinates) believed they could.

Fourth, listing of SJHSRI in the Official Catholic Directory was proper, and is protected First Amendment activity in any event. Mot. 68-76; *see* FAC ¶ 88 (conceding the continued connection between SJHSRI and the Diocese of Providence).

Fifth, Plaintiffs' allegations of events after the 2014 Asset Sale closed belie the Diocesan Defendants' participation in any conspiracy. Plaintiffs' FAC discloses that Chancellor Reilly questioned whether SJHSRI could remain in the OCD, because he thought that the Prospect Entities, a for-profit company, had acquired SJHSRI.[60] Prospect had not, however, acquired SJHSRI, but just its assets. FAC ¶ 11. Just as conspirators don't keep notes (or PowerPoints) laying out their devious plans, nor do they write letters immediately after executing their scam to raise questions about the very scam they just pulled off. If Father Reilly were a knowing participant in the conspiracy, it makes no sense to question the listing.

For that reason, the Court should hold that the conspiracy allegations are implausible and dismiss Count IX. The Court should also refuse to impute the alleged wrongdoing on any other defendants on RCB, DAC and/or DSC.

[60] Ex. 22 (November 11, 2014, Email from Chancellor Reilly, misleadingly quoted at FAC ¶ 185). The Chancellor's concern in this regard related to the other requirement for listing in the OCD, discussed in the Motion, that an entity not only be operated in connection with a Catholic diocese, but also qualify as a "public charity" within the meaning of 26 U.S.C. § 509(a). *See* Mot. 79-80.

IX. THE OPPOSITION DOES NOT SAVE COUNTS XVI THROUGH XIX (CIVIL LIABILITY UNDER R.I. GEN. LAWS § 9-1-2) FROM DISMISSAL

Before turning to the specific arguments that Plaintiffs make in Opposition to dismissal of the Section 9-1-2 claims (Opp. 142-67), it is important to note what is conspicuously missing from those 25 pages: Plaintiffs fail to cite a single case in which a court either (i) found criminal liability for conduct of the kind set forth in the FAC; or (ii) held that a plaintiff (anywhere, anytime) stated a claim of "civil liability for criminal conduct" under Section 9-1-2 based on conduct like Bishop Tobin's alleged letter writing or religious determinations on which organizations are "Catholic."

Instead, the Opposition cites statutes that RCB, DAC and DSC unquestionably did not violate, along with inapposite cases involving alleged (or proven) misconduct that does not come remotely close to what anyone was alleged to have done concerning the Plan.[61] Not one of Plaintiffs' cases suggests that religious corporate organizations can be held criminally liable for Bishop Tobin (who was not even in acting as any formal capacity respecting those organizations) exercising his First Amendment rights by opining on a transaction. The FAC does not come close to alleging conduct like those cases cited by Plaintiffs where Section 9-1-2 liability attached. It would be a miscarriage of justice to continue to indulge the Plaintiffs' "wishcasting" of actionable wrongdoing in this case. Apparently, the Plaintiffs simply hope that anti-Catholic or anti-religious

[61] For example, in *Cady v. IMC Mortg. Co.*, 862 A.2d 202, 207 (R.I. 2004) the Defendant's CEO eavesdropped on employee telephone conversations. *Id.* at 207. Here, in contrast, Bishop Tobin simply sat through a presentation by CharterCare executives and their counsel explaining the proposed transaction. *See* FAC ¶¶ 141-49, 153, 164-69. The case of *Mello v. DaLomba*, 798 A.2d 405 (R.I. 2002) involved alleged failure to pay prevailing wages, filing false payroll reports, extortion, and taking kickbacks. *See id.* Here, in contrast, Bishop Tobin sent letters to the Vatican and Health Services Council that do not even contain any misrepresentations. The "stranger-initiated annuity transaction" (i.e., "STAT") schemes at issue in *Transamerica Life Ins. Co. v. Caramadre*, No. CV 09-470 S, 2017 WL 752145 (D.R.I. Feb. 27, 2017), have "been described at length not only by this Court, but also by the First Circuit Court of Appeals and the Rhode Island Supreme Court." *Id.* at 1. There is, of course, no suggestion that Bishop Tobin (let alone the religious corporate organizations sued herein having nothing to do with writing those letters) engaged in mail fraud, wire fraud, identity fraud, etc.

bias will fill in the gaps in an FAC lacking actual allegations of misconduct. But such a failure of pleading cannot—must not—win the day.

A. There Is No Legal Basis For The Court To Permit Plaintiffs To Assert Unpleaded Claims For Alleged Criminal Conspiracy

The Court should reject Plaintiffs' attempt to obfuscate the bases for the claims asserted in the FAC by making vague references to conspiracy and aiding and abetting under R.I. Gen. Laws §§ 11-1-3, 11-1-6, and 18 U.S.C. § 2. Opp. 143. These new "claims" are not pleaded, and the Court should not permit Plaintiffs to shift their allegations to avoid a motion to dismiss for failure to state a claim.[62] Moreover, the Court should reject Plaintiffs' attempt to obfuscate their claims by claiming the Section 9-1-2 claims are really about "participating in the other Defendants' violations." *See*, *e.g.*, Opp. 149. That is just improper group pleading, thinly disguised. In any event, "the crime of conspiracy is separate and distinct from the substantive offense," and, therefore, must be pled independently. *See State v. LaPlume*, 375 A.2d 938, 941 (R.I. 1977). The FAC did not do so, and the Court should not allow backdoor amendment (effectively an end-run around Rule 11) via the Opposition.[63] The *sine qua non* of a Section 9-1-2 claim is injuries resulting from a criminal act, and Plaintiffs have utterly failed to plead that.

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[62] By way of example, in order "to prove criminal liability for aiding and abetting a criminal act, under [R.I. Gen. Laws § 11-1-3], a party must show two distinct elements: (1) 'the alleged aider and abettor share in the criminal intent of the principal,' and (2) 'a community of unlawful purpose" exists between them.' *Willis v. Omar*, 954 A.2d 126, 131 (R.I. 2008) (citation omitted) (finding no Section 9-1-2 civil liability). The FAC pleads no facts giving rise to an inference of *either* criminal intent *or* a community of unlawful purpose.

[63] Plaintiffs' argument that Section 9-1-2 liability attaches to an unpleaded Section 11-1-6/18 U.S.C. § 2 *criminal* conspiracy makes no sense, either. "'The essential elements required to establish a civil conspiracy are the same as required to establish a criminal conspiracy.'" *Chain Store Maint., Inc. v. Nat'l Glass & Gate Serv., Inc.*, No. PB-01-3522, 2004 WL 877599, at *10 (R.I. Super. Ct. Apr. 21, 2004) (Silverstein, J.) (quoting 15A C.J.S. Conspiracy, § 1(2) (1967 & Supp.1995). But as Judge Silverstein recognized, "[a] criminal conspiracy claim, however, focuses on the agreement, while a civil conspiracy claim focuses on the resulting damage to the plaintiff." *Id.* Yet as recognized in another case, an agreement, without more, cannot cause injury. *See Cortellesso v. Cortellesso*, No. P.C. 95-457, 1997 WL 839911, at *10, 13 (R.I. Super. Apr. 29, 1997) (holding that "[o]f course the conspiracy itself cannot cause injury" and "it is impossible to harm anyone by an agreement without conduct"). It follows that any Section 9-1-2 claim predicated on an alleged criminal conspiracy can fail for want of an injury. This conclusion is corroborated by the fact that Plaintiffs cite no case imposing Section 9-1-2 liability by virtue of participation in a criminal conspiracy. *See* Opp. 149.

B. The FAC Alleges No Injuries Caused "By Reason Of" The Violations Of Criminal Law

1. The Court Should Reject Plaintiffs' Obfuscation of the Pleadings Concerning Actual Causation

In the Motion, RCB, DAC and DSC established that the Section 9-1-2 claims asserted against them were premised on offenses that allegedly took place after the Plan was allegedly underfunded. Mot. 91. Plaintiffs implicitly concede the point, because the Opposition does not point to an offense allegedly committed by RCB, DAC or DSC to establish actual causation. Instead, Plaintiffs pivoted to making assertions about the "Defendants" generally—*i.e.*, not just the Diocesan Defendants—and their unspecific, implausible allegations of conspiracy. Opp. 151-52. This is, however, insufficient to plead actual causation.

2. Plaintiffs Do Not Refute That Section 9-1-2 Requires That Claimed Injuries Be the Direct and Proximate Result of a Crime

In the Motion, RCB, DAC and DSC established that the injury alleged by Plaintiffs is indirect and is far too attenuated from the alleged criminal violations to constitute proximate causation. Mot. 92-94. In response, Plaintiffs cite two cases that do not appear to address causation at all, let alone construe the meaning of term "by reason of" in Section 9-1-2.[64] Opp. 152. In a footnote, Plaintiffs acknowledge *Cortellesso v. Cortellesso*, No. P.C. 95-457, 1997 WL 839911, at *7-8 (R.I. Super. Apr. 29, 1997) (cited at Mot. 92), which is the only court to specifically analyze proximate causation under Section 9-1-2. Opp. 152 n.242. Plaintiffs do not attempt to distinguish *Cortellesso* but instead assert (without explanation) that "ordinary

[64] *Lyons v. Town of Scituate*, 554 A.2d 1034, 1036 (R.I. 1989), did not address the proper causation standard; that case held that the limitation period set forth in Section 9-1-14 for "injuries to the person" is appropriate for claims arising out of an alleged assault and battery. *Id.* at 1036. *Mello v. DaLomba*, 798 A.2d 405, 411 (R.I. 2002), which did not address causation, was distinguished above. Plaintiffs accuse the Motion of "misciting" *Kelly v. Marcantonio*, 187 F.3d 192, 203 n.8 (1st Cir. 1999). Plaintiffs are wrong; demonstrating "a causal connection between the alleged crime and the claimed injury" entails a need to show both actual and proximate causation. *Cf.* Opp. 153.

proximate causation . . . is different from the standard that the Diocesan Defendants ask the Court to adopt here." *See id*. RCB, DAC and DSC are not, however, advocating for an "extraordinary" standard. *See* Mot. 92-94.

The Court should find unpersuasive Plaintiffs' attempt to distinguish *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992) on the grounds that it is a "civil RICO case." Opp. 153-54. Both Rhode Island's RICO statute and Section 9-1-2 use substantively identical phrasing.[65]

The Court should find equally unpersuasive Plaintiffs' unsupported assertion that their allegations of injuries would satisfy the standard under *Holmes*. *See id.* at 154. Tellingly, Plaintiffs do not explain why, and do not even point to a single alleged fact to support their conclusion. *Id.* at 153-154. Plaintiffs cannot do so, because proximate cause is *not* established if a court must "go beyond the first step" to find a plaintiff's injury. *Holmes*, 503 U.S. at 271 (internal citations omitted). Plaintiffs fail to assert facts that demonstrate a single step between the alleged crimes and their asserted injuries, and therefore, as a matter of law, those injuries were not caused "by reason of" the alleged violations. *See Cortellesso*, 1997 WL 839911, at *7-8.[66] The Opposition offers no case interpreting Section 9-1-2, or any other analogous statute, to support their position regarding the requisite proximate cause for their claims. The Section 9-1-2 claims fail.

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[65] *Compare* R.I. Gen. Laws § 9-1-2 ("Whenever any person shall suffer any injury to his or her person, reputation, or estate by reason of the commission of any crime or offense . . . ") *with* R.I. Gen. Laws §§ 7-15-4 ("Any person injured in his, her, or its business or property by reason of a violation of this chapter . . ."). Accordingly, Judge Israel in *Cortellesso* read "by reason of" in both statutes to mean "proximately caused by." 1997 WL 839911, at *7-8.

[66] Plaintiffs also attempt to undermine the Diocesan Defendants' citation to *In re McNulty*, 597 F.3d 344 (6th Cir. 2010), on the grounds that it involved the Crime Victims' Rights Act, 18 U.S.C. § 3771 ("CVRA"). Opp. 154-155. The CVRA, however, requires a showing that a movant is "directly and proximately harmed as a result of the commission of a Federal offense" in order to receive the benefits of the CVRA, and therefore, *In re McNulty* speaks directly to the inquiry in this case. 597 F.3d at 350.

C. Count XVI (Alleged Violations Of The R.I. Hospital Conversions Act)

In opposition, Plaintiffs assert Bishop Tobin's letter to the Health Services Council, FAC ¶¶ 320-21 amounts to a violation of R.I. Gen. Laws § 23-17.14-30. Opp. 145. But as explained in the Motion and above, Plaintiffs have failed to state any plausible claims that Bishop Tobin made any fraudulent misrepresentations in that letter *at all*. In fact, Plaintiffs concede the point by admitting that their HCA-based Section 9-1-2 claim hinges on Bishop Tobin's misstating his "*beliefs* concerning the impact of the 2014 Asset Sale on the Plan." Opp. 145 (emphasis added). Leaving aside the arrogance of Plaintiffs' presuming to know Bishop Tobin's "real" beliefs on the merits of this complicated proposal, Plaintiffs are literally asking this Court to punish a Bishop of the Roman Catholic Church for a statement about his "beliefs" on a matter of obvious public and religious significance – the survival and future of a Roman Catholic Church-affiliated hospital. A statement about one's beliefs, of course, is not a misrepresentation. And a statement of one's beliefs to a public tribunal are protected by the First Amendment's Free Speech and Petition Clauses, which will need to be litigated if this motion is denied (*see supra* note 42). *A fortiori*, Plaintiffs have failed to adequately allege that RCB, DAC or DSC willingly or knowingly gave false or incorrect information to state regulators in connection with the HCA application or otherwise violated the HCA.

In addition to the fact that Plaintiffs do not come close to alleging a violation of the HCA, Count XVI fails to state a claim for other reasons:

- Plaintiffs do not purport to respond to the Diocesan Defendants' showing that this letter, even if it contained false representations (which it does not) could not have actually "caused" the injury, *i.e.*, alleged underfunding. *See* Mot. 91.
- Plaintiffs do not purport to explain how this letter proximately caused any injury to any of the Plaintiffs. *See* Mot. 92-93.

- The FAC is devoid of any factual allegation supporting an inference that Bishop Tobin (let alone RCB, DAC or DSC) intended to commit a crime by sending the letter. *See Willis v. Omar*, 954 A.2d 126, 131 (R.I. 2008).

Count XVI may be properly dismissed for any one of these reasons.

1. **A Section 9-1-2 Claim Premised on an HCA Violation Lacks Plausibility In Light of Express Limitations Of Enforcement As Well As Subsequent Amendments To That Statute**

The Motion noted that the HCA provides no private right of action and, instead, grants to the Attorney General and the Director of the Department of Health the exclusive right "to take corrective action necessary to secure compliance under this chapter." Mot. 96 (*quoting* R.I. Gen. Laws § 23-17.14-30). Plaintiffs' Opposition does not meaningfully respond.[67] Plaintiffs should not be permitted to use Section 9-1-2 to unwind the appropriate regulatory agencies' acceptance and approval made pursuant to the HCA, which expressly prohibits non-transacting parties (like Plaintiffs) from challenging administrative decisions made pursuant to that statute.

Moreover, Plaintiffs' Opposition purports to inform the Court of what the HCA "provides in relevant part" (Opp. 144), but Plaintiffs do *not* inform the Court that the General Assembly amended Section 23-17.14-30 in 2019 to remove the very provision they claim to rely on. 2019 R.I. Pub. Laws ch. 280, § 1 (eff. July 16, 2019). The 2019 Amendment to the HCA *struck from the statute* the possibility of any criminal penalty or prison term, which is the provision that Plaintiffs quoted (and emphasized) in the Opposition.[68] So the Opposition claims that the HCA

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[67] The HCA limits those who may seek review to only a "transacting party" (defined as only "the acquiree and the acquirer"), whereas the Administrative Procedures Act (APA) permits any "aggrieved" party to seek judicial review. *Compare* R.I. Gen. Laws §§ 23-17.14-4(17) (HCA) & 34 *with* R.I. Gen. Laws § 42-35-15 (APA).

[68] In particular, the 2019 Amendment amended subsection 23-17.14-30(2), replacing the provision that Plaintiffs quoted (and emphasized) "The superior court may, after notice and opportunity for a prompt and fair hearing, may impose a fine of not more than one million dollars ($1,000,000) **or impose a prison term** of not more than five (5) years" with "The attorney general may, after notice and opportunity for a prompt and fair hearing to one or more transacting parties, take any corrective action necessary to secure compliance under this chapter, and impose a fine of not more than two million dollars ($2,000,000)." The 2019 Amendment thus removed the possibility of any jail time, and gave the Attorney General—not the courts—the ability to impose monetary penalties.

provides (present tense) for prison time, but that provision was amended out of the HCA in 2019.

Moreover, Count XVI also underscores how implausible and flawed Plaintiffs' claims are. If the Court holds that Plaintiffs' allegations state a claim for relief against diocesan entities, then it follows that every director of CCCB, SJHSRI and RWH is also a proper defendant in this lawsuit. This is because those directors would be as informed (or know more) in 2014 about the asset sale, the Plan and its so-called "orphaning" than Bishop Tobin or anyone associated with the Diocese of Providence. Even the *Attorney General* knew more.[69] What's more, if the Court accepts Plaintiffs' conclusory allegations that Bishop Tobin "was acting within the scope of his employment" of RCB, DAC and DSC (*see* FAC ¶¶ 26-28) (which it should not do, *see supra* § V), then it further follows that these directors and regulators' *employers* could be impleaded (and possibly anyone else who knew as much as or more than Bishop Tobin). Such possible defendants would include judges, the judiciary, Providence College, banks, financial consulting firms, attorneys and law firms, union members and officials, etc. Applying Plaintiffs' conspiracy theory consistently to all those involved in the 2014 Asset Sale proves the absurdity of Plaintiffs' claims.

D. Count XVII (Alleged Violations of 26 U.S.C. § 7206(2))

Plaintiffs' Opposition confirms that the sole basis of Count XVII asserted against the Diocesan Defendants is that they allegedly "participated in fraudulently listing SJHSRI in the Official Catholic Directory under the Diocesan Defendants' sponsorship." Opp. 148. However, the Opposition does not cite a single case where subsection 7206(2) liability (or liability on any other basis, for that matter) attached to a determination whether to include or exclude an entity in

[69] Indeed, the FAC pleads that Mr. Belcher *told* the Project Review Committee that investment risk for the Plan "stays with the old CharterCare," *i.e.*, that the Plan was being "orphaned." FAC ¶ 355. Yet the regulators nonetheless approved the transaction.

the Official Catholic Directory. *See* Opp. 146-48. It has already been established that Plaintiffs' claim "would require the court to determine whether the Catholic Church properly has designated [SJHSRI] as an official part of the Church" and "[t]hat path is not one which a judicial officer is authorized to follow." *Medina v. Catholic Health Initiatives*, 147 F. Supp. 3d at 1199-20 n.16 (rejecting "Plaintiff's suggestion that continued inclusion in The Official Catholic Directory is suspect"). In fact, the Internal Revenue Code contains specific restrictions on efforts to inquire into a church's tax-exempt status. [70] *A fortiori*, Plaintiffs have failed to adequately allege aiding or assisting tax fraud under 26 U.S.C. § 7206(2).

Plaintiffs' improper conflation of a religious determination beyond judicial review to tax fraud is fatal to Count XVII. Yet there are other reasons why Count XVII fails to state a claim:

- Plaintiffs fail to establish the materiality of any statement allegedly made as a matter of tax law. There is no allegation that, even if SJHSRI did not fall within the ambit of the Group Exemption, SJHSRI was not entitled to tax exempt status.
- Plaintiffs fail to establish a causal connection between the alleged tax crimes committed and the injuries they have allegedly suffered. *See* Mot. 91.
- Plaintiffs do not purport to explain how this letter proximately caused any injury to any of the Plaintiffs. *See* Mot. 92-93.
- The FAC is devoid of any factual allegation supporting an inference that the Bishop (let alone RCB, DAC or DSC) intended to commit a crime by sending the letter. *See also Willis v. Omar*, 954 A.2d 126, 131 (R.I. 2008).

1. **Federal Law Preempts Plaintiffs' Attempt To Enforce 26 U.S.C. § 7206(2) Via Section 9-1-2**

Count XVII cannot state a claim because any state law remedy for claimed violations of federal tax law, even if proven, would be preempted by federal law. Mot. 97-100. In their

[70] 26 U.S.C. § 7611 provides, *inter alia*, that inquiry may only be commenced by the Secretary of the Treasury or another appropriate high-level Treasury official; the inquiry must begin within 3 years; and suit over the charitable status may only be brought by the government in the United States District Court for the District of Columbia.

Opposition, Plaintiffs do not cite a single case where any court upheld a claim under Section 9-1-2 (or any other comparable statute conferring a civil cause of action upon crime victims) premised on an underlying violation of the federal tax laws.[71] *See* Opp. 158-61. Although Plaintiffs accuse the Diocesan Defendants of not "address[ing]" certain cases (*see* Opp. 156), the reality is that none of those cases involved a Section 9-1-2 claim premised on "Fraud-on-the-IRS"—or any other federal criminal statute where the victim (and the only party who can plausibly "suffer any injury . . . by reason of the" violation of the statute) is the government agency charged with enforcement. To the contrary, Plaintiffs' cases all involve Sections 9-1-2 claims premised on violation of criminal statutes of general applicability, none involving alleged violation of the Internal Revenue Code (or a similarly comprehensive regulatory scheme).[72]

Congress has dictated that "the administration and enforcement of" the Internal Revenue Code "shall be performed by or under the supervision of the Secretary of the Treasury" "[e]xcept as otherwise *expressly* provided by law." 26 U.S.C. § 7801(a)(1) (emphasis added). Yet Plaintiffs seek to enforce the Internal Revenue Code for their benefit. In the FAC, Plaintiffs' claimed injury ostensibly stems solely from a false claim of a Section 501(c)(3) exemption, but Congress has enacted careful limitations of judicial review of the IRS's § 501(c)(3)

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[71] This is for good reason. *First*, the only party that conceivably "suffer[ed] any injury . . . by reason of the" claimed violation is the federal government. *Second*, that Congress has legislated that enforcement of the federal tax code is exclusively the responsibility of the IRS. 26 U.S.C. § 7801(a); *see also United States v. Euge*, 444 U.S. 707, 711 n.3 (1980) ("Responsibility for administration and enforcement of the revenue laws is vested in the Secretary of the Treasury. The [IRS], however, is organized to carry out those responsibilities for the Secretary.")

[72] *Caramadre* involved mail fraud, wire fraud, identity fraud, etc., all of which are defined as crimes under Title 18 of the United States Code. No. 09-CV-00470, 2017 WL 752145 at *2-3 & n.3. The section 9-1-2 claim in *Cady* was premised on an alleged violation of federal wiretapping statute found at 18 U.S.C. § 2510. 862 A.2d at 209. The section 9-1-2 claim in *Mello v. DaLomba* was premised in part on 18 U.S.C. § 874, which prohibits kickbacks in connection with federally financed construction projects. 798 A.2d at 411. Rhode Island law permits victims of federal crimes to recover under Section 9-1-2, but none of those cases considered preemption issues—and given the nature of the crimes at issue in those cases, there was no reason for those courts to consider preemption.

determinations. To litigate the "continuing qualification of [a § 501(c)(3)] organization" in court, "an appropriate pleading" must be filed in "the United States Tax Court, the United States Court of Federal Claims, or the district court of the United States for the District of Columbia." 26 U.S.C. § 7428(a). And such a pleading is "appropriate" only if filed "by the organization the qualification or classification of which is at issue," *id.* § 7428(b)(1)-not by a third-party opponent of that organization. Thus, the structure and purpose of the law shows a clear Congressional intent to preserve exclusive federal administration of a federal regulatory regime, and it follows that state law cannot interfere in Congress' decision to do so. Allowing Plaintiffs to invoke Section 9-1-2 to work around these federal enforcement restrictions would conflict with Congress's clear directives.[73]

The Opposition does not even attempt to distinguish *Buckman v. Plaintiffs' Legal Committee*, 531 U.S. 341, 347-53 (2001), and the several other fraud-on-the-agency cases cited in the Motion. Mot. 97-100. Yet just as the plaintiffs in *Buckman* could not use state law to usurp the FDA's authority to police fraud under the Food, Drug, and Cosmetic Act, the Plaintiffs here cannot purport to invoke Rhode Island law to litigate whether the Diocesan Defendants "aided or assisted" SJHSRI in submitting false Form 990s in violation of the Code. *See* FAC ¶ 536.

Instead of purporting to address the U.S. Supreme Court's unequivocal holding in *Buckman*, Plaintiffs counter with cases from the Seventh Circuit and two state courts, *see* Opp.

[73] Still further, Congress has made its intent to limit litigation about § 501(c)(3) compliance to the specific channels described above even clearer by prohibiting back-door challenges mounted through the *federal* False Claims Act. Congress carved federal tax filings out of the Act, providing that the otherwise-comprehensive prohibition on false claims, records, and statements "does not apply to claims, records, or statements made under the Internal Revenue Code." 31 U.S.C. § 3729(d). This provision emphasizes Congress's intent to keep litigation concerning allegedly "false" Section 501(c)(3) exemptions within the exclusive purview of the IRS. Surely it cannot be that Congress would prohibit FCA claims on the government's behalf but permit private plaintiffs to recover because they were allegedly negatively affected by a business transaction involving a non-profit entity.

158-61, but these cases do not support denial of the Motion.[74]

2. Count XVII Seeks an Impermissible End Run Around the Lack of a Private Right of Action under the Internal Revenue Code

The Opposition tries to differentiate the Motion's cases cited in support of the argument that Count XVII represents an improper end run on the lack of a private right of action under the Internal Revenue Code on the ground that those cases involved breach of contract claims. *See* Opp. 161-65. This is a distinction without a difference. Plaintiffs fail to give any reason why the Supreme Court would preclude third-party beneficiary breach of contract claims for circumventing the lack of a private right of action but would permit the same action if it were brought under a state statute. *See Astra USA, Inc. v. Santa Clara Cty., Cal.*, 563 U.S. 110, 117-20 (2011). As the Supreme Court has stated, "'any private right of action for violating a federal statute . . . must ultimately rest on congressional intent to provide a private remedy,'" regardless of whether the remedy is based in statute or common law. *Id.* at 117 (quoting *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991)). The fact that § 9-1-2 is a state statute does not save it from preemption. But for the alleged violations of federal law, there is no state law basis for a claim. *See In re Pennsylvania*, No. 13-CV-1871, 2013 WL 4193960, at *14 n.15, *16 (E.D. Pa. Aug. 15, 2013). Count XVII should be dismissed.[75]

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[74] In *Bible v. United Student Aid Funds, Inc.*, 799 F.3d 633, 639 (7th Cir. 2015), the Seventh Circuit held that the plaintiff's "state law breach of contract claim is not preempted because it does not conflict with federal law. The contract at issue simply incorporates applicable federal regulations as the standard for compliance." Here, in contrast, the Plaintiffs seek to challenge the propriety of a Form 990 submitted to the IRS in clear contravention of the federal statutory scheme. Neither *State v. Radzvilowicz*, 703 A.2d 767, 786–87 (Conn. App. Ct. 1997), nor *State v. Diaz-Rey*, 397 S.W.3d 5, 8–9 (Mo. Ct. App. 2013), helps Plaintiffs. Those cases (i) involved state criminal prosecutions for violations of state forgery laws based on conduct that may have also constituted a violation of federal law; (ii) do not grapple with *Buckman*; and (iii) do not involve private citizens attempting to enforce federal law though state law-based claims when there is no federal private right of action.

[75] Plaintiffs continue to cast unfounded aspersions regarding the Diocesan Defendants' candor in their discussion of *Brissenden v. Time Warner Cable of N.Y. City*, 25 Misc. 3d 1084 (N.Y. Sup. Ct. 2009). *See* Opp. 164 n.246. N.Y. Gen. Bus. Law § 349 is part of New York's Deceptive Practices Act (DPA, also referred to as New York's "Little FTC Act") which prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service" in New York.

E. Count XVIII (Alleged Violations of R.I. Gen. Laws § 11-18-1)

Count XVIII fails to state a claim because the alleged "false and erroneous documents"—*viz.*, the Official Catholic Directory entry and Bishop Tobin's letters—do not contain false or erroneous statements. *See* Mot. 53-57. Count XVIII fails for the additional reason that intent is an element of this offense, and Plaintiffs have not adequately alleged scienter. *See* Mot. 58-63.

In addition, Plaintiffs cannot "suffer any injury" from a violation of this statute as a matter of law. Plaintiffs do not refute the Diocesan Defendants' showing that the alleged misstatements were not "given" to Plaintiffs; at most, Plaintiffs were "secondary victims" of the alleged offense. *See* Mot. 92-93. Plaintiffs' Opposition further supports this point. In the Opposition, Plaintiffs quote the Rhode Island Supreme Court for the proposition that the purpose of Section 11-18-1 is "to *protect the public and private entities named in the statute* from fraud and deceit and the perversion which might result from the deceptive practices described." Opp. 149 (*quoting State v. Salvatore*, 763 A.2d 985, 990 (R.I. 2001) (emphasis added). The Plaintiffs, however, are *not* "named in the statute;" Section 11-18-1 protects only "any agent, employee, servant in public or private employ, or public official." R.I. Gen. Laws § 11-18-1(a). RCB, DAC and DSC never "knowingly gave" any of the challenged documents to any of the Plaintiffs. It follows that Plaintiffs cannot possibly have "suffer[ed] any injury" for any alleged violation.

Count XVIII fails to state a claim for additional reasons:

- Plaintiffs fail to establish a causal connection between the challenged documents and the alleged underfunding of the plan, which is the injury they claim to have allegedly suffered. *See* Mot. 91.
- The Opposition cites to no authority holding that a non-recipient of a challenged document "given" to someone else "suffer[ed] any injury" for any alleged violation of the statute. A Section 9-1-2 claim requires a finding that the plaintiff "has suffered injury to his person as a direct and proximate result" of the defendants' violation, but there are no factual allegations supporting an inference of proximate causation. *Cady*, 862 A.2d at 215.

F. Count XIX (Alleged Violations of R.I. Gen. Laws § 11-41-4)

The FAC lacks any allegations that RCB, DAC or DSC obtained money or property from Plaintiffs. *See* Mot. 101-02. In response, Plaintiffs assert that the Diocesan Defendants "obtained $638,838.25 in proceeds." Opp. 151; *see also id.* 165 ("There is no dispute that the Diocesan Defendants obtained cash proceeds from the 2014 Asset Sale," citing to FAC ¶¶ 206-10.) But that is a blatant mischaracterization of the FAC, which alleges that a ***non-party*** (the Inter-Parish Loan Fund) received the proceeds as repayment for a legitimate loan. FAC ¶ 209. The FAC *does not* allege the receipt of any money by RCB, DAC or DSC. *See* FAC ¶¶ 206-10. Perhaps recognizing this fatal pleading defect, the FAC meekly suggests that it is sufficient that the Diocesan Defendants "participat[ed] in other Defendants' obtaining real estate and other hospitals" (*see* Opp. 165) but that is not sufficient to plead that RCB, DAC or DSC violated R.I. Gen. Laws § 11-41-4, which requires that the violator "obtain … property."

Plaintiffs' Opposition likewise fails to refute RCB, DAC and DSC's showing that Count XIX fails to establish any other elements of a violation of R.I. Gen. Laws § 11-41-4. Plaintiffs argue "there is no need to demonstrate that Plaintiffs or anyone else was the victim of the crime." Opp. 166. That is hogwash. Plaintiffs cite no case in which a Section 9-1-2 plaintiff obtained recovery for a crime allegedly committed against someone else. The Rhode Island Supreme Court has made clear that Section 9-1-2 is "the statute providing civil liability *for the victims of criminal offenses*." *Goddard v. APG Sec.-RI, LLC*, 134 A.3d 173, 178 (R.I. 2016) (emphasis added). Plaintiffs' pretention that they need not establish that they were the alleged crime victim puts the legal infirmity of the FAC's allegations on full display. If Plaintiffs' reading of Section

9-1-2 were adopted, it would permit the statute to be used by bounty hunters to recover for third-party transactions to which they are strangers.[76]

In addition to the fact that Plaintiffs have failed to plead sufficient facts to demonstrate a violation of R.I. Gen. Laws § 11-41-4, Count XIX fails to state a claim for other reasons:

- The FAC fails to establish this causal connection because the alleged violation of Section 11-41-4 is alleged to have occurred in 2014, but Plaintiffs allege no losses that occurred during that time frame. *See* Mot. 91.
- Any alleged violation of Section 11-41-4 based on alleged misrepresentations to regulators fails as a matter of law, because Plaintiffs are not the primary victims of the asserted violation and cannot demonstrate proximate causation. *See* Mot. 92-93.

Count XIX may be properly dismissed for either of these reasons.

X. COUNT XXI (RHODE ISLAND LAW, BREACH OF FIDUCIARY DUTY) FAILS AS AGAINST RCB, DAC OR DSC BECAUSE THEY WERE NOT FIDUCIARIES

None of the arguments in Plaintiffs' Opposition refute the Motion's showing that Count XXI does not state a claim for breach of fiduciary duties under Rhode Island law against RCB, DAC and DSC. *See* Mot. 102-04. Although the Plaintiffs declare that the "First Amended Complaint sets forth extensive and specific allegations whereby Plaintiffs placed trust and confidence in the Diocesan Defendants which they breached, causing damages" (*see* Opp. 168), they neglect to support that assertion by any citation to factual allegations or law. The Opposition does nothing to contradict the fact that that text of Count XXI recites only that RCB, DAC and DSC "all owed Plaintiffs fiduciary duties" and asserts that those entities—without

[76] Plaintiffs' assertion that they need not be "victims" is also belied by the cases cited in support of that absurd proposition. In *State v. Letts*, 986 A.2d 1006, 1012 (R.I. 2010), the trial justice found that the perpetrator's "acceptance of a $400 deposit, knowing his bleak financial circumstances, establishes his intent to cheat and defraud the [victims]." That case does not establish that a non-victim who did not tender a payment could pursue the perpetrator for Section 9-1-2 liability. In *State v. Markarian*, 551 A.2d 1178, 1180 (R.I. 1988), the Rhode Island Supreme Court held that a victim is not an essential element of either obtaining property by false pretenses or forgery. But that case, which did not address Section 9-1-2 liability does not help Plaintiffs here. It simply affirmed the conviction. Unless the hitherto unidentified victim came forward, no one could recover the stolen proceeds from the perpetrator under 9-1-2.

putting those parties on notice of how or when—"all breached their fiduciary duties to Plaintiffs, causing damages." FAC ¶ 552, 553. Those allegations are wholly conclusory and should be rejected. As demonstrated in the Motion, this Court has repeatedly dismissed breach of fiduciary duty claims where the alleged fiduciary relationship is premised on nothing more than a plaintiff's claims of trust and reliance.[77] Plaintiffs do not even attempt to distinguish these authorities, nor do Plaintiffs attempt to distinguish the other authorities cited in Section XI of RCB, DAC and DSC's Motion. *Compare* Mot. 102-04 *with* Opp. 167-69.

In the Opposition, Plaintiffs attempt to argue that RCB, DAC and DSC's fiduciary obligations arose out of "decades of communications to SJHSRI's employees and Plan participants, through the Bishop" assuring them that "their interests were being protected by the Diocese." *See* Opp 168. Plaintiffs' Opposition mischaracterizes what those documents say. Even so, none of the cases cited by Plaintiffs support the idea that the alleged statements (as mischaracterized) state a claim for relief.[78] Plaintiffs' breach of fiduciary duty claims against RCB, DAC and DSC fail as a matter of law.

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[77] *Sterman v. Brown Univ.*, 513 F. Supp. 3d 243, 255-56 (D.R.I. 2021) (dismissing breach of fiduciary duty claim for "fail[ure] to sufficiently allege a fiduciary duty or a breach "); *Coccoli v. D'Agostino*, No. 19-CV-00489 WES, 2020 WL 1848032, at *4 (D.R.I. Apr. 13, 2020) (dismissing breach of fiduciary duty claim).

[78] Plaintiffs' reliance on *Van Liew Trust* is misplaced. The court in that case declined to dismiss a claim for breach of fiduciary duty under Rhode Island's more lenient Rule 12(b)(6) standard, but that case involved allegations against a pension fund manager alleging unsuitable investment choices and failure to disclose conflicts of interest. *Rhode Island Res. Recovery Corp. v. Van Liew Trust Co.*, No. PC-2010-4503, 2011 WL 1936011, at *1-2, *7 (R.I. Super. Ct. May 13, 2011). No such allegations of wrongdoing are present here. Yet the reasoning in that case establishes the infirmity of Plaintiffs' allegations in this case. In *Van Liew Trust*, Judge Silverstein noted that an allegation that "'[a]s investment manager, trustee and pension fund manager, and because of the influence [VLC, VLTC, and Van Liew] held over RIRRC's investment strategies for its EPA Trust Funds and Pension Plan, a relationship of trust and confidence existed between the parties, and Van Liew was subject to a fiduciary duty toward RIRRC' . . . . alone may be insufficient to set forth a claim against the Defendants." *Id.* at *7 (alterations in original). Rather, more is needed to establish that particular defendants were in fact managing a fund. *See id.* (relying on facts listing defendants "as part of the staffing responsible for investment management services" to allow claim for breach of fiduciary duty to survive). Here, the facts in the FAC unequivocally demonstrate that RCB, DAC and DSC had no role in the management of the Plan when any alleged breach occurred. FAC ¶¶ 75-77, 87. The case *Chain Store Maint., Inc. v. Nat'l Glass & Gate Serv., Inc.*, No. CIV.A. PB 01-3522, 2004 WL 877599 (R.I. Super. Apr. 21, 2004), supports RCB, DAC and DSC. In that case, Judge Silverstein granted summary judgment in favor of defendants finding that no fiduciary duty existed under circumstances that apply in this case. *Id.* at *14 ("This Court finds that [the alleged fiduciaries]

First, alleging that a communication was made "through the Bishop" does not support an inference that RCB, DAC and DSC owed fiduciary duties to Plan participants. The Opposition does not allege a single communication supporting an inference of a relationship of trust and confidence between RCB, DAC or DSC on one hand and Plan participants on the other. To the contrary, the most recent allegation set forth in the FAC concerning a statement referencing the Bishop and the Diocese (made in 1998) (*see* FAC ¶ 277) states that "[t]he Roman Catholic Bishop of Providence *has appointed a Retirement Board to administer the Plan*." That statement does not establish a fiduciary relationship.

Further, the Rhode Island Supreme Court has previously held that the corporate form matters when dealing with religiously affiliated corporations. *See* Mot. 10-11 (*citing Doe v. Gelineau*, 732 A.2d 43 (R.I. 1999)). Plaintiffs do not allege that RCB, DAC and DSC were appointed to the Retirement Board; nor do Plaintiffs allege that anyone told Plan participants that RCB, DAC and DSC were appointed. It follows that they are not fiduciaries as a matter of law (nor could anyone reasonably have reposed trust and confidence in unrelated corporate entities).

Second, timing matters. A fiduciary relationship that exists at one point in time does not continue in perpetuity.[79] Here, the last of the communications made referencing "the Bishop" and the Diocese occurred in 1998—more than two decades ago. FAC ¶ 277 (*quoted in* Opp. at

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shared no fiduciary relationship with Plaintiff. None of these parties possessed a duty to act for or to give advice for the benefit of Plaintiff. Likewise, Plaintiff did not repose confidence, faith, or trust in [the alleged fiduciaries], nor did it rely upon the judgment and advice of the same. Finally, [the alleged fiduciaries] did not exercise influence over Plaintiff, and Plaintiff did not depend on these parties."). On these allegations, Count XXI must be dismissed.

[79] *See Rohe v. Bertine, Hufnagel, Headley, Zeltner, Drummon & Dohn, LLP*, 160 F. Supp. 3d 542, 552 (S.D.N.Y. 2016) ("[L]ack of evidence of any ongoing legal relationship between plaintiffs and defendants after August 2009 demonstrates that" defendants had not "carried on a fiduciary relationship with plaintiffs within three years of" filing the action.); *Lyons v. Midwest Glazing*, 265 F. Supp. 2d 1061, 1076-77 (N.D. Iowa 2003) (rejecting breach of fiduciary duty claim following bench trial because at the time these alleged breaches occurred, the counterclaim defendant "no longer owed [counterclaim plaintiff] a fiduciary duty").

15). While Plaintiffs' Opposition also cites more recent communications (Opp. 16 n.49, citing FAC ¶¶ 279-86), *none* of those allegations even *mention* "the Bishop" or the Diocese.[80] Instead, the FAC quotes statements that the "Hospital" or "SJHSRI" or the "Company" funds the Plan. FAC ¶¶ 267, 269, 280-81, 284. The actual conclusion, certainly the only plausible conclusion, to be drawn from these allegations is that whatever relationship the then-incumbent Bishop (but not the distinct corporate entities RCB, DAC and DSC) had with the Plan *circa* 1998 ceased long before any of the alleged breaches.

Third, the Court should reject Plaintiffs' suggestion that they can state a claim for breach of fiduciary duties against RCB, DAC and DSC because those entities never expressly disavowed a fiduciary relationship that never existed. Opp. 168-69. The Opposition cites no authority to support this startling contention.[81] *See id.* Courts considering this question have held that no affirmative disavowal is necessary even where, unlike here, a fiduciary relationship actually existed in the first place. *Rohe*, 160 F. Supp. 3d at 552 (holding a "lack of evidence of any ongoing legal relationship" was sufficient to find that previously existing fiduciary duty ceased). The reason this rule makes sense is that the burden of proof is on the Plaintiffs to establish the existence of a fiduciary relationship *at the time the duty was allegedly breached*. Here, the "lack of evidence" after 1998 of any relationship between the Diocese and Plan

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[80] As of 2009, Plaintiffs themselves concede that SJHSRI was the named fiduciary of the Plan, and reference "the diminished or nonexistent roles of Bishop Tobin and the Diocese" with SJHSRI long ago. FAC ¶ 87. These allegations demonstrate that any fiduciary duty that any diocesan entity may have had decades ago would have terminated. *See id.* The Opposition attempts to minimize this fact by emphasizing that the Diocesan Defendants' role no longer existed with respect to SJHSRI's governance, but simultaneously arguing that the Diocesan Defendants still maintained a fiduciary duty to the Plan. *See* Opp. 168-69. This argument is contradictory. According to Plaintiffs, the Diocesan Defendants (undistinguished) had little to no role in governing the Plan administrator (SJHSRI), yet retained a special fiduciary duty with respect to the Plan that they no longer had a role in administering. *See id.* Plaintiffs cannot have it both ways.

[81] Nor is that lack of support surprising. By that logic non-fiduciaries like the Attorney General's office could be fiduciaries for not expressly asserting they were not. Liability could also extend to the employers of every trustee on the boards of CCHP, SJHSRI and RWH. That is not – and again, cannot be right.

participants—let alone a fiduciary one—is palpable: *all* alleged representations to Plaintiffs about the Plan come from and reference "the Hospital" or "SJHSRI". *Id.* ¶¶ 76, 273-287. Moreover, the notice in 2009 to Plan Participants stating that SJHSRI was freezing the Plan—signed by SJHSRI as the Plan Administrator—clearly demonstrates SJHSRI's control over the Plan. FAC ¶ 76.

XI. COUNT XXII (RHODE ISLAND LAW, AIDING AND ABETTING BREACHES OF FIDUCIARY DUTY) MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM

The Motion established that Plaintiffs failed to state a claim for aiding and abetting breach of a fiduciary duty. Mot. 104-06. In response, Plaintiffs do not cite a single case where a court held that allegations like the ones Plaintiffs pleaded in the FAC stated a claim for aiding and abetting breach of a fiduciary duty. Opp. 169-71.[82] Plaintiffs would have the Court think that claims of aiding and abetting a breach of a fiduciary duty *always* survive a dispositive motion, but this is not true. *See*, *e.g. Arcidi v. Nat'l Ass'n of Govt. Employees, Inc.*, 856 N.E. 2d 167, 173-74 (Mass. 2006); *Brien*, 2012 R.I. Super. LEXIS 113, at *47-48. Moreover, they certainly have cited no case where a breach of fiduciary duty was found to lie where the breach was *expressly permitted* by the trust document itself, like here. In that circumstance, a non-

[82] Instead, Plaintiffs cite trial court-level cases that are inapposite and unpersuasive. In *Martin v. Pascarella & Gill P.C.*, 2017 WL 1195896 (R.I. Super. Mar. 24, 2017), the defendants argued "without more" that the plaintiff's complaint "should be dismissed because the Rhode Island Supreme Court has not yet addressed or adopted aiding and abetting a breach of fiduciary duty as a cognizable tort claim." *Id.* at *16. Plaintiffs cite *In re Good Technology Corp. S'holder Litig.*, No. 11580-VCL, 2017 WL 2537347, at *3 (Del. Ch. May 12, 2017), for the proposition that "Aiding-and-abetting claims are fact intensive and ill-suited for summary judgment," but Plaintiffs failed to inform the Court that the evidence in that case, at summary judgment, raised a genuine issue of material fact that "J.P. Morgan engaged in ... manipulation by lying to the Board about the prospects for completing an IPO in March 2015." *Id.* Here, the FAC contains no allegations sufficient to survive Rule 9(b) scrutiny that RCB, DAC or DSC ever misled or lied to Plan participants. Plaintiffs also cite *U.S. Claims, Inc. v. Flomenhaft*, 519 F. Supp. 2d 532, 540 (E.D. Pa. 2007) (applying New York law), for the proposition that "the question of the existence of a fiduciary duty is a fact-specific inquiry generally" but that case does not hold that aiding-and-abetting claims can *never* be resolved on a motion to dismiss (nor could it). *See id.* Moreover, the *Flomenhaft* court's cursory analysis does not consider the specific allegations that would meaningfully assist the Court in determining whether the allegations in this case state a claim for aiding-and-abetting.

fiduciary cannot be liable for aiding and abetting breach of fiduciary duty because they would not have the requisite *mens rea* of "knowing," let alone the ability to conclude that the defendant could not have reasonably been acting in good faith (i.e., doing nothing prohibited by the trust document itself).

Being contemporaneously aware of the terms of the Proposed Transaction, without more, does not support a claim of active participation, assistance, or encouragement in any purported breach of fiduciary duty. For example, in *In re General Motors (Hughes) Shareholder Litigation*, No. 20269, 2005 WL 1089021 (Del. Ch. May 4, 2005), *aff'd* 897 A.2d 162 (Del. 2006), shareholders challenged a series of transactions through which The News Corporation Limited ("News") acquired a significant interest in Hughes Electronics Corporation, a former wholly-owned subsidiary of General Motors Corporation ("GM"). In an effort to plead knowing participation in a breach of fiduciary duty, the shareholders alleged that News had participated in the negotiations, structuring and disclosures concerning the transactions. *Id.* at *26-27. The court rejected those allegations as insufficient to support an aiding and abetting claim, holding that "it was clearly necessary for News to actively participate in the negotiation and structuring of the[] transactions, as it was a party to those transactions. But that alone does not imply knowing participation on News' part in a breach of fiduciary duty by GM's directors." *Id.* at *27. Here, RCB, DAC and DSC are not even alleged to have been party to the transaction. *A fortiori*, they cannot be liable for "aiding and abetting" breach of fiduciary duties.

Plaintiffs' Opposition cites a 2011 Judge Silverstein decision rendered in the case of *Rhode Island Resource Recovery Corp. v Van Liew Trust Co.*, No. PC-10-4503, 2011 WL 1936011 (R.I. Super. May 13, 2011), but a subsequent decision issued by Judge Silverstein a year later in 2012 establishes that the allegations Plaintiffs make in this case fail to state a claim

for relief (even under Rhode Island's more-lenient-than-*Iqbal/Twombly* standard). *R.I. Resource Recovery Corp. v. Albert G. Brien & Assocs.*, No. PB-2010-5194, 2012 R.I. Super. LEXIS 113 (R.I. Super. Ct. July 16, 2012).[83] RCB, DAC and DSC analyzed this more recent Judge Silverstein decision (in which Judge Silverstein performed an in-depth Rule 12(b)(6) analysis of a 73-count, 622-paragraph Amended More Definite Statement) in detail. *See.* Mot. 76. But Plaintiffs do not even attempt to distinguish that case or dispute its reasoning.

Apparently, Plaintiffs hope that this Court will not do what Judge Silverstein did in *Albert G. Brien & Assocs.* and take the time to analyze the factual allegations (once stripped of legal conclusions, aspersions, and conjecture). But Judge Silverstein's example is the right one, the one required by Rule 12(b)(6), *Iqbal,* and *Twombly.*

XII. THE OPPOSITION FAILS TO SAVE PLAINTIFFS' ERISA CLAIMS AGAINST THE DIOCESAN DEFENDANTS

A. Plaintiffs Do Not State A Claim For Aiding and Abetting Breaches of ERISA Fiduciary Duties

Plaintiffs assert that "Under *Harris Trust [and Savings Bank v. Salomon Smith Barney*, Inc., 530 U.S. 238 (2000)], a non-fiduciary may be a proper defendant under § 502(a)(3) if it would be a proper defendant under 'the common law of trusts." Opp. 65 (quoting *Carlson v. Principal Financial Group*, 320 F.3d 301, 308 (2d Cir. 2003)).[84] Plaintiffs' Opposition does not, however, cite a single case where a court held that allegations like those pleaded in the FAC

[83] This Decision is also available at *https://www.courts.ri.gov/Courts/DecisionsOrders/decisions/10-5194.pdf*.

[84] In particular, *Harris Trust* involved an action for restitution against a transferee of tainted plan assets, who was a "party in interest" to a transaction barred by § 406(a). 530 U.S.at 253. Likewise, the Second Circuit in dicta in *Carlson* opined that the defendant "may be a proper defendant under § 502(a)(3)" if the plaintiff can demonstrate that the defendant "had actual or constructive knowledge of the circumstances that rendered its transaction … unlawful." 320 F.3d at 308. That presumes participation in a transaction. In this case, RCB, DAC and DSC are not alleged to be "transferee[s] of tainted plan assets" or in receipt of property of any kind. *See* FAC at 142, Count III. Instead, Plaintiffs alleged that the "Inter-Parish Loan Fund received proceeds of $638,838.25 from the proceeds of the sale of SJHSRI's assets" (FAC ¶ 209), but the Inter-Parish Loan Fund is a separate corporate entity.

stated an ERISA claim for "aiding and abetting breach of a fiduciary duty." *See* Opp. 64-66. Nor do Plaintiffs cite a single case stating what the elements of a *prima facie* ERISA claim for "aiding and abetting breach of a fiduciary duty" might look like. *See id.*[85] But assuming *arguendo* that "ERISA" as well as common law claims for aiding and abetting breach of a fiduciary duty have the same elements, then RCB, DAC and DSC already demonstrated in the immediately preceding section, *supra,* that Plaintiffs do not state a claim against RCB, DAC and DSC. Adding the "ERISA" label does not change the analysis, precisely because the Plaintiffs claim the "the common law of trusts" applies. Opp. 65.

B. Plaintiffs Fail To Establish That The Monetary Relief They Seek Is Within The Scope Of ERISA Section 502(a)(3)

Count III should be dismissed because 29 U.S.C. § 1132(a)(3) does not permit a court to enter a monetary damages judgment against non-ERISA fiduciaries or non-trustees to cure a funding deficiency. Mot. 13-14. Seizing on dicta in *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011), Plaintiffs argue that if a monetary payment is the only way to make them whole, then equity will provide for that remedy in the form of a surcharge against a non-fiduciary or non-trustee. Opp. 68-71. *Amara* does not, however, bear the construction Plaintiffs give it. *See* 563 U.S. at 441-44. In *Amara*, surcharge is "appropriate equitable relief" under § 1132(a)(3) only when turned against an ERISA fiduciary or trustee. *See id*. *Amara* itself states:

> "The surcharge remedy extended to a breach of trust committed by a ***fiduciary*** encompassing any violation of a duty imposed upon that ***fiduciary***. Thus, insofar as an award of make-whole relief is concerned, the fact that the defendant in this case, unlike the defendant in *Mertens*, is ***analogous to a trustee makes a critical difference***."

[85] Courts may not "infer [additional] causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254 (1993) (internal quotation marks omitted) (*quoted in Gabriel v. Alaska Elec. Pension Fund*, 773 F.3d 945, 953-54 (9th Cir. 2014) (cited at Opp. 69). Under ERISA, the issue is not whether the statute bars a particular cause of action, but rather "whether the statute affirmatively authorizes such a suit." *Mertens*, 508 U.S. at 255 n.5.

Id. at 442 (emphasis added) (internal citation omitted).

Interpreting *Amara* in this fashion is the only way to read it so it is consistent with *Mertens*, which held that ERISA does not permit an award of money damages against a non-fiduciary to make up a funding deficiency resulting from a breach of fiduciary duty. *See Mertens*, 508 U.S. at 254-56; *see also id.* at 262 ("All that ERISA has eliminated, on these assumptions, is the common law's joint and several liability, for *all* direct and consequential damages suffered by the plan, on the part of persons who had no real power to control what the plan did." (emphasis in original)). The Opposition's read of *Amara*, conversely, would have the effect of overruling *Mertens*, which the Supreme Court has expressly declared *Amara* did not do. *See Montanile v. Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan*, 577 U.S. 136, 148 n.3 (2016) (rejecting interpretation of *Amara* that would have "all but overrul[ed] *Mertens*," and instead confirming that "our interpretation of 'equitable relief' in *Mertens* . . . remains unchanged" (internal citations omitted)). Instead, as *Amara* observed, whether the defendant's status is "analogous to a trustee" is the key factor to determining if "make-whole" monetary relief via a surcharge is appropriate. 563 U.S. at 442. Surcharge is not available because RCB, DAC or DSC were not alleged to be ERISA fiduciaries or trustees. Mot. 16 n.8.[86]

Courts that have considered the scope of § 1132(a)(3) surcharge post-*Amara* have consistently restricted the remedy in this fashion:

[86] The Motion cites *Depot, Inc. v. Caring for Montanans, Inc.* (*Depot I*), No. 16-CV-00074-M-DLC, 2017 WL 3687339, at *4-5 (D. Mont. Feb. 14, 2017). Mot. 16 n.8. *Depot I* declined to grant a request for "make-whole" relief pursuant to § 1132(a)(3) on account of the plaintiffs' failure to allege that the defendants were ERISA fiduciaries. No. 16-CV-00074-M-DLC, 2017 WL 3687339, at *5 ("As discussed above, Plaintiffs have not alleged that Defendants were fiduciaries under ERISA law. Thus, 'make-whole' relief is not available."). On appeal, the Ninth Circuit did not disturb this portion of *Depot I*'s holding. *Depot, Inc. v. Caring for Montanans, Inc. (Depot II)*, 915 F.3d 643 (9th Cir. 2019). Instead, the Ninth Circuit reinforced it, indicating that certain equitable remedies like "an accounting for profits" and surcharge were only appropriate against fiduciaries. *Depot II*, 915 F.3d at 664 n.15 ("But fiduciary status is '[t]he important ingredient.'" (brackets in original)). Plaintiffs do not attempt to distinguish this persuasive authority.

- *McCravy v. Metro. Life Ins. Co.*, 690 F.3d 176, 181 (4th Cir. 2012) ("The Supreme Court has made quite clear that surcharge is available to plaintiffs ***suing fiduciaries*** under Section 1132(a)(3).")(emphasis added);

- *Gearlds v. Entergy Servs., Inc.*, 709 F.3d 448, 451 (5th Cir. 2013) ("The [Supreme] Court believed it 'critical' that the *Amara* defendant's position as a fiduciary was analogous to a trustee, and it concluded that 'an award of make-whole relief' in the form of surcharge was within the scope of 'appropriate equitable relief' for purposes of § [1132](a)(3).");

- *Kenseth v. Dean Health Plan*, 722 F.3d 869, 878-79 (7th Cir. 2013) ("The [*Amara*] Court thus clarified that equitable relief may come in the form of money damages when the ***defendant is a trustee*** in breach of a fiduciary duty" (emphasis added));

- *Gabriel v. Alaska Elec. Pension Fund*, 773 F.3d 945, 957 (9th Cir. 2014) ("Because *Amara* involved a suit by a beneficiary ***against a plan fiduciary***, and it was within the power of traditional equity courts to grant a demand for make-whole relief in the form of the equitable remedy of surcharge, such a remedy was available to the beneficiaries in *Amara*." (internal citations and quotation marks omitted) (emphasis added)); *id.* ("The Court therefore distinguished *Mertens*, in which the plan participants had sued a defendant who was ***not a trustee***. Because such a lawsuit would fall outside of traditional equitable jurisprudence, the make-whole relief in that case constituted compensatory damages against a nonfiduciary, which . . . was legal, not equitable, in nature." (internal citations and quotation marks omitted) (emphasis added));

- *Silva v. Metro. Life Ins. Co.*, 762 F.3d 711, 720 (8th Cir. 2014) ("In *Amara*, the Supreme Court identified three possible 'equitable' theories of recovery under § 1132(a)(3) for an ***administrator's*** breach of fiduciary duty: surcharge, reformation, and estoppel"); *id.* at 722 (describing *Amara* as concerning "an equitable remedy under ERISA for breaches of fiduciary obligations ***by plan administrators***" (emphasis added)).

- *In re DeRogatis*, 904 F.3d 174, 199 (2d Cir. 2018) ("[P]laintiffs asserting a claim under section [1132](a)(3) may seek remedies such as . . . a monetary surcharge to recompense 'a loss resulting from a [***fiduciary's***] breach of duty, or to prevent the [***fiduciary's***] unjust enrichment." (second and third brackets in original and internal quotation marks omitted).

These authorities include many of the cases that Plaintiffs cite in connection with their § 1132(a)(3) arguments.

Plaintiffs cite *Schmitt v. Nationwide Life Ins. Co.*, No. 2:17-CV-558, 2018 WL 4051835 (S.D. Ohio Aug. 24, 2018), for the proposition that the surcharge remedy is available for a knowing participation claim against a nonfiduciary. Opp. 68-69 (describing *Schmitt* as

concluding that "plaintiffs' knowing participation claim against [a] nonfiduciary entitles them to monetary compensation including [the] remedy of surcharge because no legal remedy is available under ERISA"). Plaintiffs ***omit*** from their quotations that the surcharge remedy was available in that case only "because the defendant is analogous to a trustee." *Id.* at *3 ("Here, because the defendant is analogous to a trustee, the disgorgement, accounting, and surcharge remedies fall within the scope of the term appropriate equitable relief." (internal quotation marks omitted)). The defendant in *Schmitt* was analogous to a trustee because that plan in that case "contracted with [the defendant] to provide services such as record-keeping and customer service." *Id.* at *1. Nothing in *Schmitt* suggests a surcharge is appropriate against a non-fiduciary or non-trustee. The Plaintiffs in this case have not, however, alleged facts suggesting that the Diocesan Defendants held a role "analogous to a trustee" at any time when the Plan was an ERISA plan. To the contrary, the Amended Complaint asserts that the Plan's conversion to an ERISA plan in 2009 coincided with SJHSRI's finance committee's takeover of the administration of the Plan. *See* FAC ¶¶ 75, 84.

Importantly, *Schmitt* did not involve a request for an order to compel a non-fiduciary or non-trustee to pay money from its general assets to make up a funding deficiency purportedly arising from its participation in a breach of fiduciary duty. *See Mertens*, 508 U.S. at 254-56. Yet that is precisely the relief that Plaintiffs pray for in connection with Count III. The Opposition essentially concedes the point, but contends that such relief is available under the guise of "surcharge." Opp. 64-71. Clever word choice, however, cannot save this claim. *See Mertens*, 508 U.S. at 255. Count III should be dismissed.

CONCLUSION

For the foregoing reasons, the Court should dismiss the First Amended Complaint with prejudice.

Dated: June 30, 2022

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 30th 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 A. Merten

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EXHIBIT A

Del Sesto, et al., v. Prospect CharterCARE, LLC, et al. E I

Why Plaintiffs' Allegations Against RCB, DAC and DSC Fail

r A d d A E r d ___ T B
r d r r B Ad r r r A d r r r d
r d
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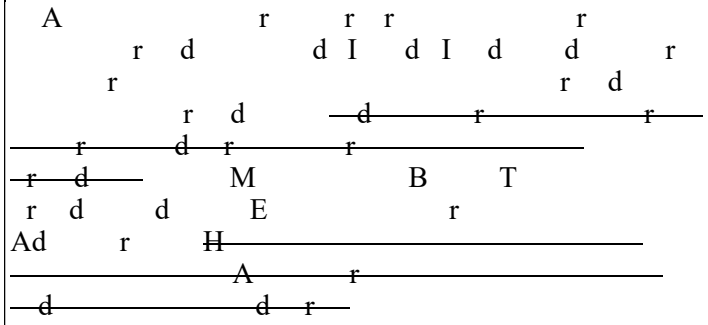
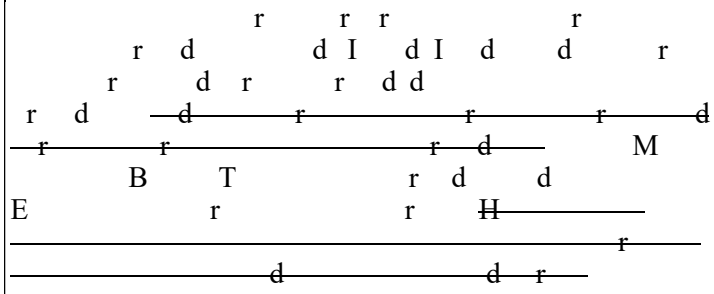
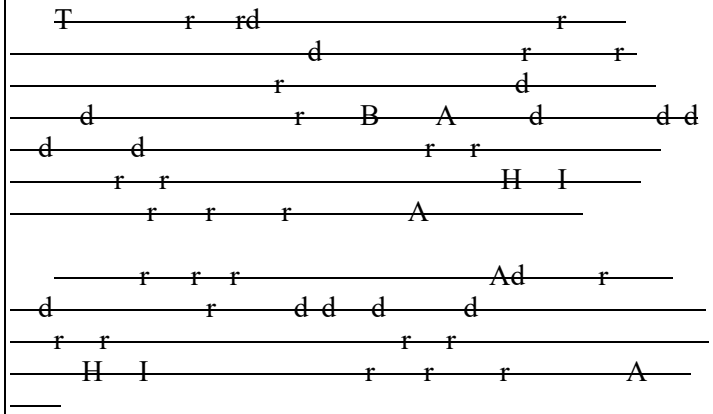
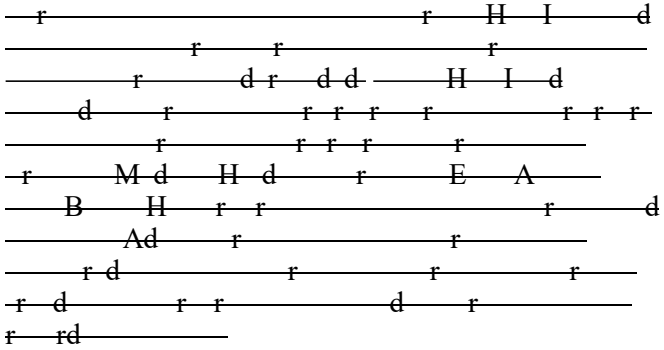
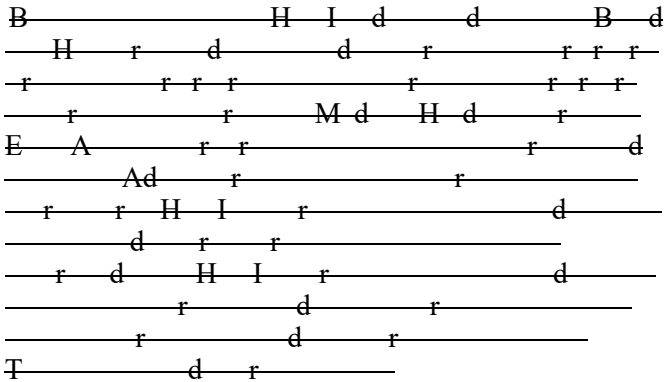
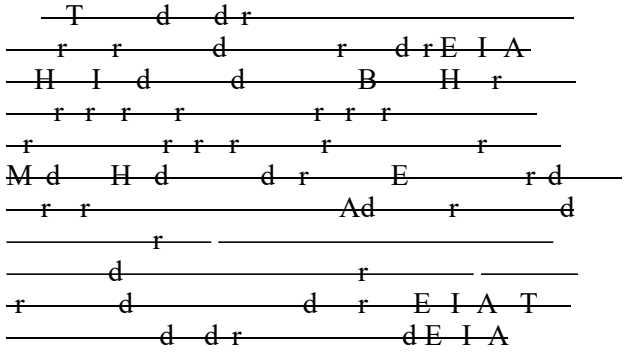
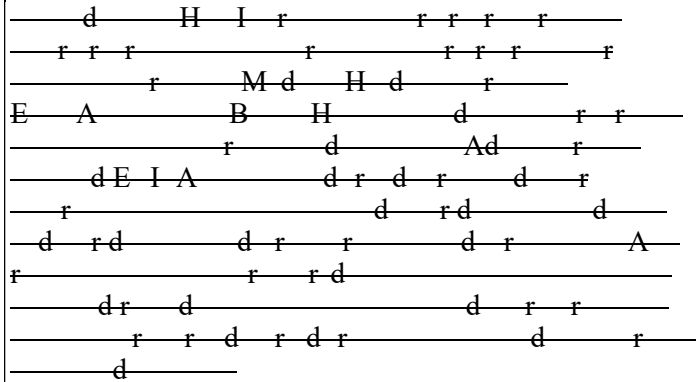
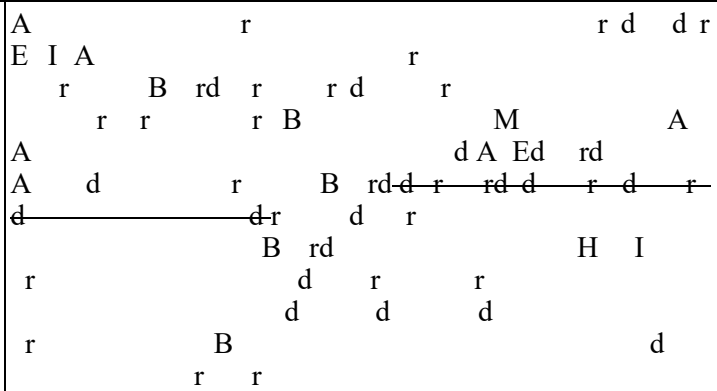
d r d r d B A d r

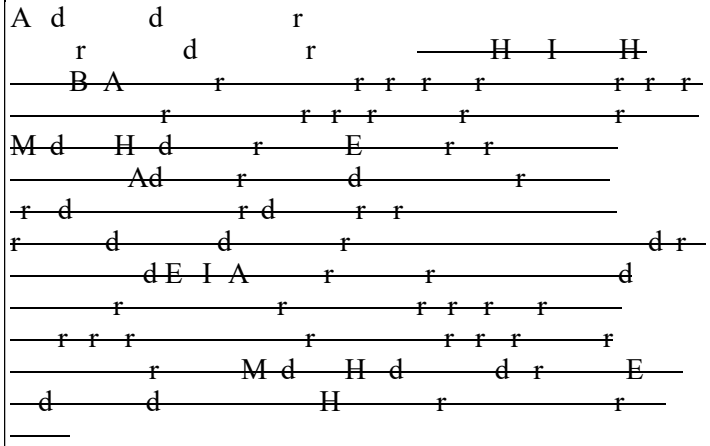
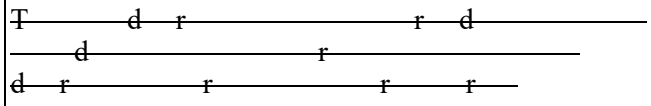
FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
	H I B H r r Ad r r r r r r r r r r r r r r r r M d H d d r E r d r d d r d r d r H d r H r d r r r r r r r r r r r r r M d H d d r E d r E d B d r d r r	**Legal Conclusion.** T r r r r r r d r r **Rule 9(b)/Improper Lumping.** T r r d r r r d r r r r d r d A d r r r d d B A r **Conclusory assertions not entitled to the presumption of truth are stricken.** T A d r B A r r r r d d B A r d r XI r r r d d r d *See* A
	B r r r r d d I d M B T T r d d E r r r H d r r r d d r	**Conclusory assertions not entitled to the presumption of truth are stricken.** r d r r r r d r *Roggio v. City of Gardner* M M r *see also Filler v. United States* A d r d r d d d r r r r r d r r d

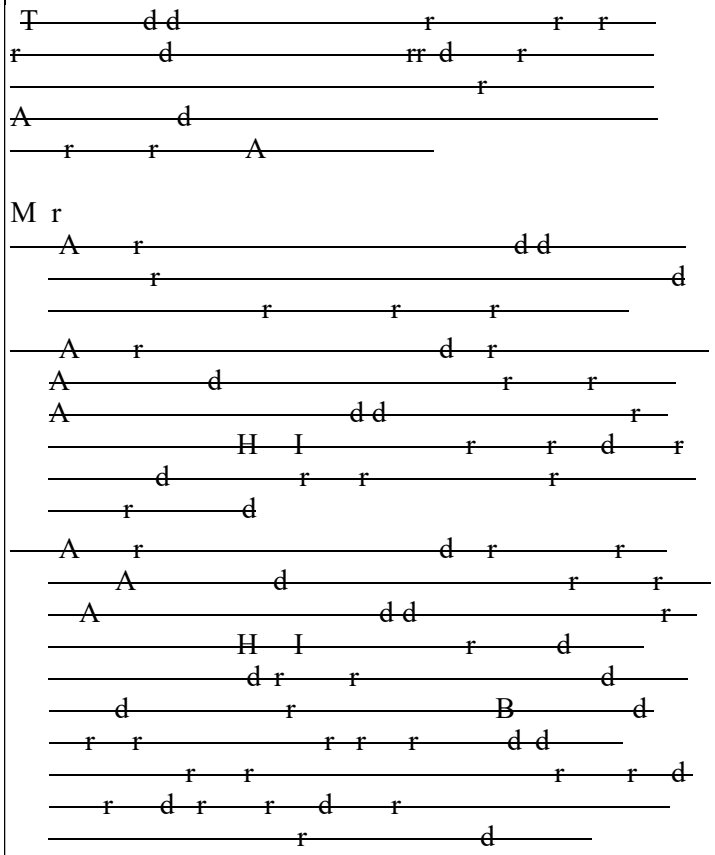
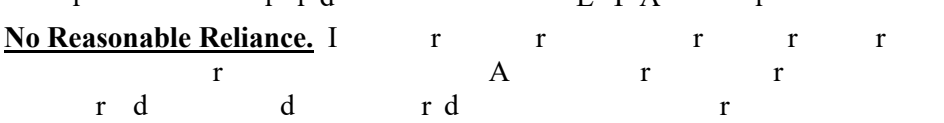
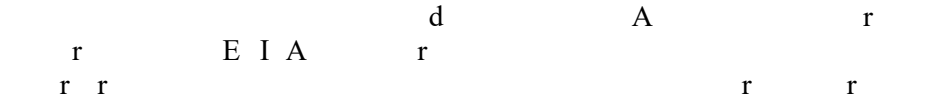
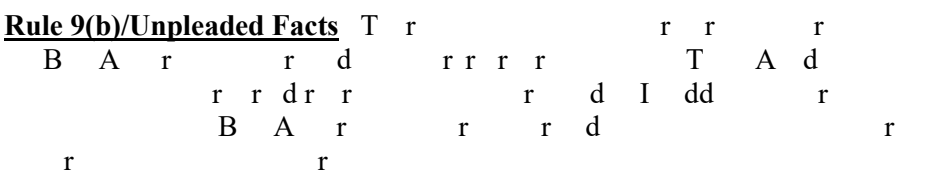
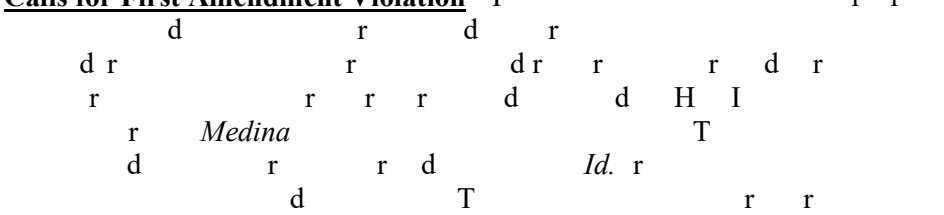
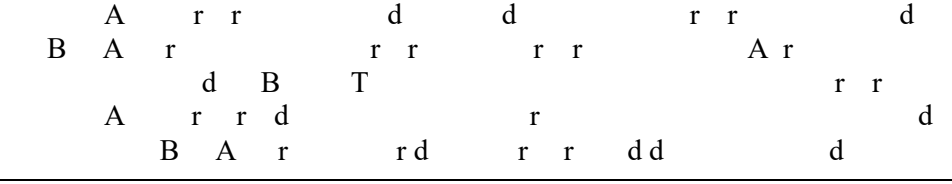
FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory assertions not entitled to the presumption of truth are stricken.** **Unpleaded Facts.**
		**Conclusory assertions not entitled to the presumption of truth are stricken.** **Unpleaded Facts.**
		**Conclusory assertions not entitled to the presumption of truth are stricken.** **No Private Enforcement of Internal Revenue Code/Federal Preemption.** *inter alia* *See generally* IX **Calls for First Amendment Violation.** *Medina v. Catholic Health Initiatives* *aff'd* *Id.*

FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.** **Conclusory Assertions Contradicted by Other Factual Allegations in FAC** **Unpleaded Facts.** **Implausible.** **Rule 9(b)/Improper Lumping.**

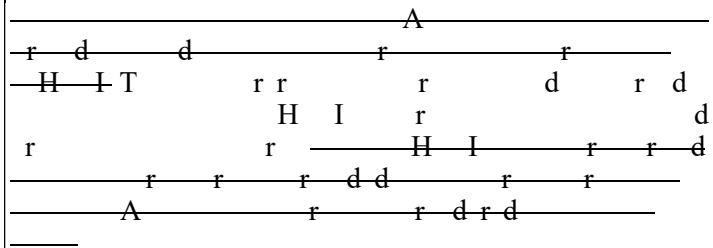
FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
	 *No mention of RCB, DAC and/or DSC*  *No mention of RCB, DAC and/or DSC* *No mention of RCB, DAC and/or DSC*	**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.** **Indeterminacy Makes Fraud Impossible** **Implausible** *approved by regulators* *Bell Atlantic Corp. v. Twombly* *See* **Rule 9(b)/Improper Lumping.** **Unpleaded Facts.** **Calls for First Amendment Violation**

FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.** **Improper Lumping** **Unpleaded Facts** **Rule 9(b).** **ERISA Is Limited to Particular Equitable Relief**
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.** **No Legal Duty** **No Causation** **Does Not Implicate RCB, DAC and/or DSC**

FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.** **Indeterminacy Makes Fraud Impossible** **Improper Lumping** **Implausible** *approved by regulators* **Rule 9(b).** *Williams v. WMX Techs., Inc.*
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.** **Indeterminacy Makes Fraud Impossible** **No Misrepresentation.** *sine qua non* *when made* *Cote v. Aiello* *neither* *nor*

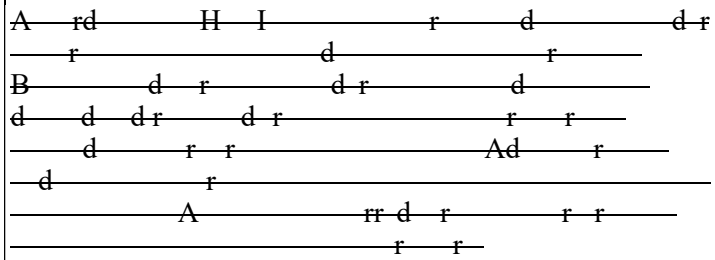
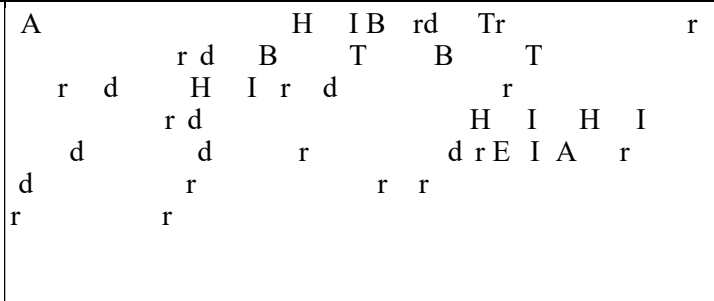
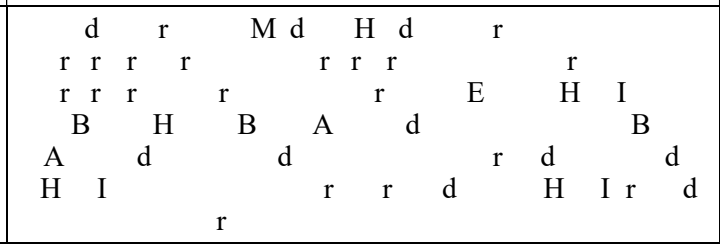
FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.**  **Unactionable Statements** B **No Reasonable Reliance.** I  **Plaintiffs' Litigation Conduct Forecloses the Possibility of Misrepresentation** *contradicted themselves in these proceedings*  **Rule 9(b)/Unpleaded Facts** T  **Calls for First Amendment Violation** T  **RCB, DAC and/or DSC Are Not Implicated.**
	Facts § A.2 ("The Plan Did Not Satisfy the "Principal-Purpose" Requirement")	

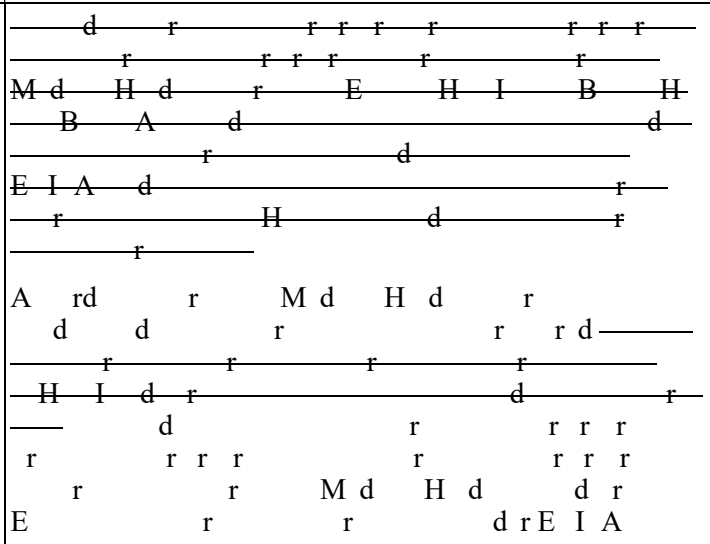
FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
	A r B T d r d d r r T B rd Tr H r d I d r B rd r d H r d I d Ad r r T B rd Tr H r d I d r r r r d r r r d d T B rd Tr H r d I d d r r A E H r r r d r r r	**No Allegation of Wrongdoing.** T A d r d **No Misrepresentation.** T A d r d **Implausible Conspiracy Theory** r r r d r d r A B r r r r r d d r r d d r d d d r r r r r r r r r d d r E I A E d E I A r r r d r r d d r r r **RCB, DAC and/or DSC Are Not Implicated** d r d B A r T r r r r r T r d H I B rd Tr r B rd T B rd Tr r r r r d r H I d r d H d r r r r r T A d d r B T r B A r
	r H I d r I B H I r ~~T r d d r r~~ ~~B T d r d H I~~ ~~r r r r~~	**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.** T r r d r *at all* B A r d d r T r r **Conclusory Assertions Contradicted by FAC** T d d r r H I r r d r T B A r d d r d r r r T d r r r r d d d r r r r r d r r

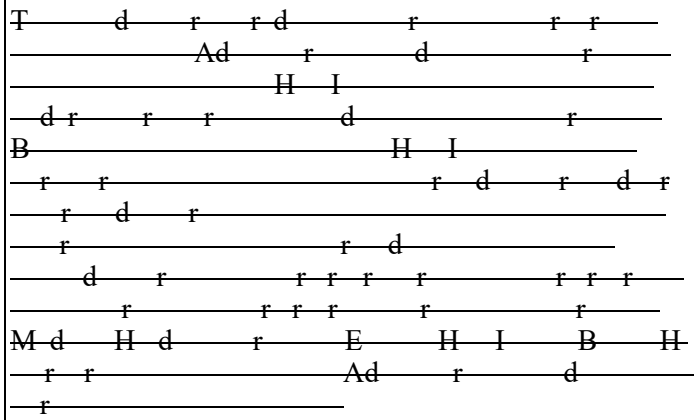
FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.** **No Allegation of Wrongdoing.** **Conclusory Assertions Contradicted by FAC & Documents.** **Calls for First Amendment Violation** **Implausible Conspiracy Theory**
		No Allegation of Wrongdoing **RCB, DAC and/or DSC Are Not Implicated.**
		No Allegation of Wrongdoing

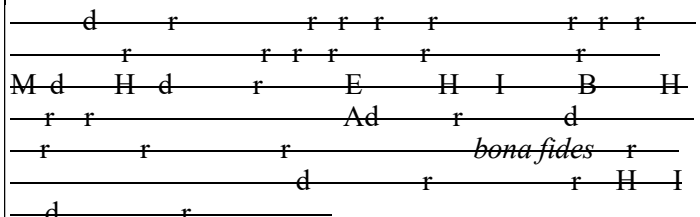
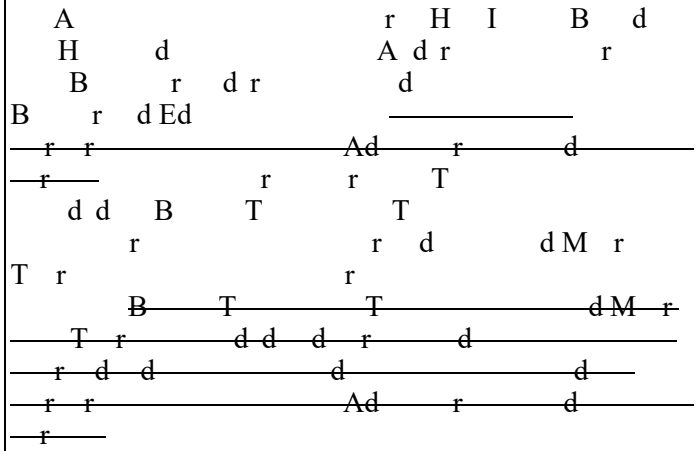
FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
	I d d d d r r r d r H I r r Ad r d r A r r d H I r d r d d d r r r	**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.** d r r d r r d r d **No Allegation of Wrongdoing.** T r r B A r r d d r d d r d B A r d r r d r d d r r r r d d r r r d rr d d r
	These paragraphs purport to describe the legal obligations pertaining to the Official Catholic Directory and purports to quote a memorandum from the U.S. Conference of Bishop's Office of General Counsel	**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.** r r r d r r **Calls for First Amendment Violation** T r r d d r H I r r r A d r d r
	A r d r r Ad r d r d H I r r rd r r d r d r r d r r r d	**Calls for First Amendment Violation** T d d r B r d d r d r d r H I r r r d r A d d d r *Overall* d I **The Listing of SJHSRI in the OCD is Not Actionable Fraud.** *See* II A **Rule 9(b)** T r r d r r r d r r r r d M r r d d **Improper Lumping** T r r d B A r I r B A r d d d H I

FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
	I d d r r Ad r d r d H I r r rd r r d r d r r d r r r d	**Calls for First Amendment Violation** T d r d H I r d r A d d d r *Overall* d I **The Listing of SJHSRI in the OCD is Not Actionable Fraud.** *See* II A **Rule 9(b)** T r r d r r r d r r r r d M r r d d **Improper Lumping** T r r d B A r I r B A r d d d H I
	~~A A d d~~ ~~r r H I r H I~~ ~~r d r d r r d r~~ ~~r r~~ ~~r d r r~~	**Conclusory Assertions not Entitled to Presumption of Truth are Stricken** **Conclusory Assertions Contradicted Elsewhere by Plaintiffs** T A d r d d r r H I A r r r r r r r r r r d r r d d r d r dd r r r r r A d r r **The Listing of SJHSRI in the OCD is Not Actionable Fraud.** *See* II A **Calls for First Amendment Violation** **RCB, DAC and/or DSC Are Not Implicated.**

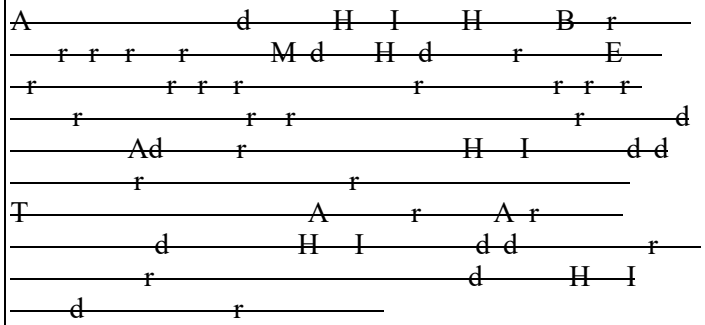
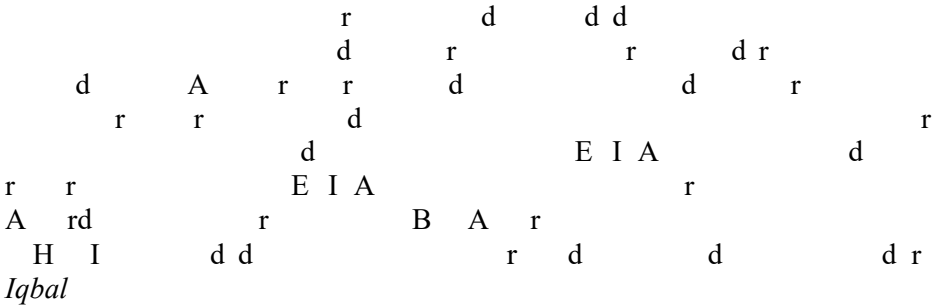
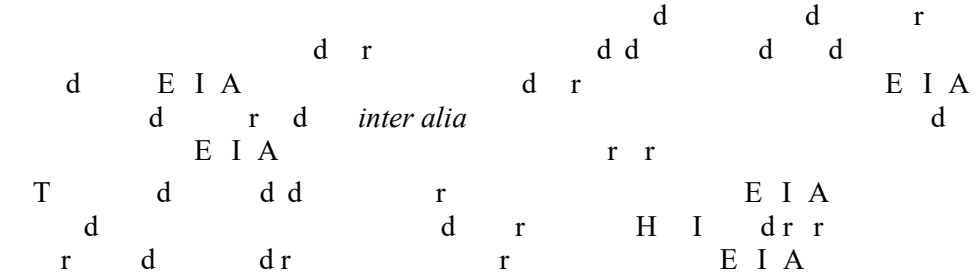
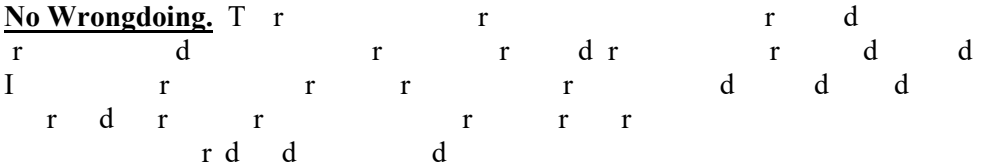
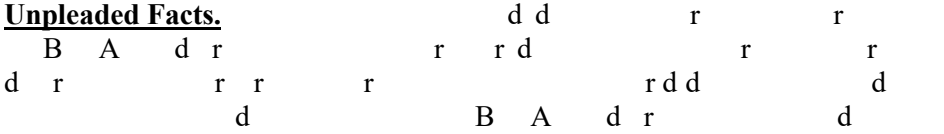
FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken** **Improper Lumping.** **The Listing of SJHSRI in the OCD is Not Actionable Fraud.** *See* II A **Calls for First Amendment Violation** *Overall*
		**No Allegation of Wrongdoing.** **No Misrepresentation.** *to* *against* **RCB, DAC and/or DSC Are Not Implicated.**
		**No Allegation of Wrongdoing.** **Calls for First Amendment Violation** *Overall* **Improper Lumping of RCB, DAC and DSC with Other Defendants**

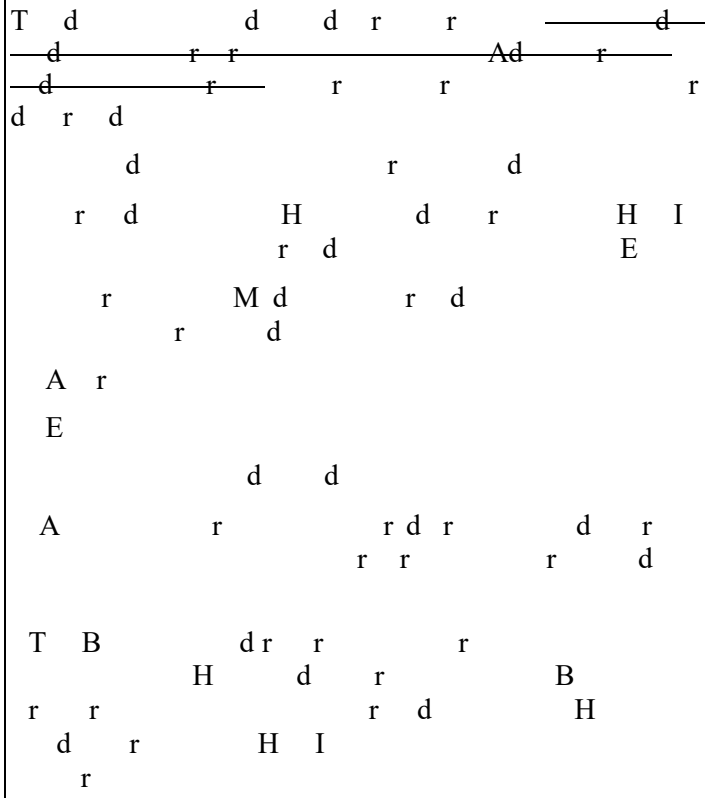
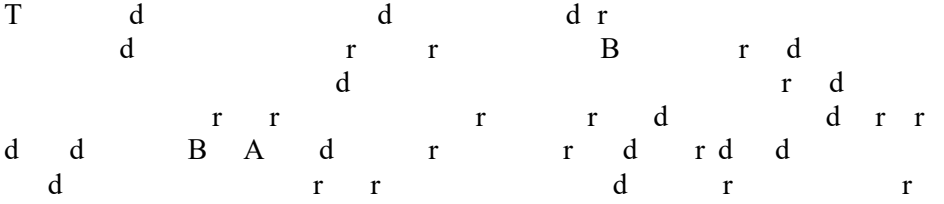
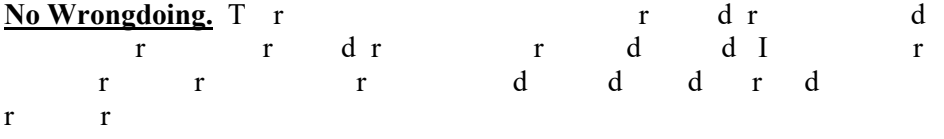
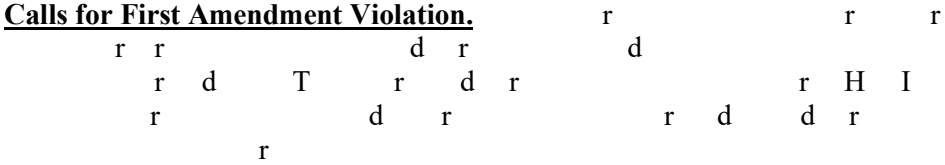
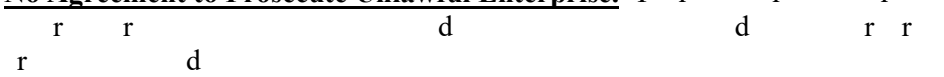
FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken** **No Scienter.** *See* M III B **Improper Lumping of RCB, DAC and DSC with Other Defendants Rule 9(b).** **Implausible Conspiracy Theory** I

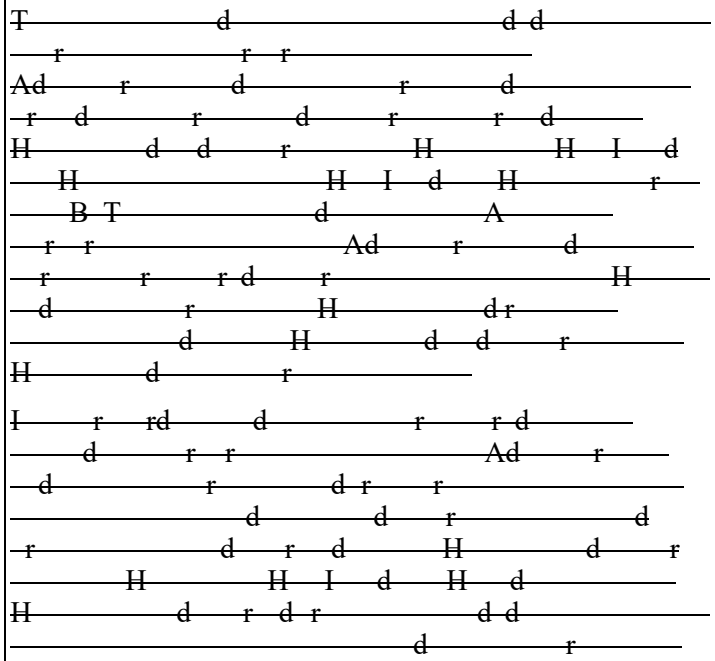
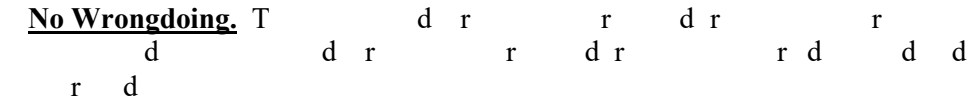
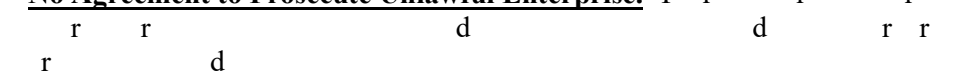
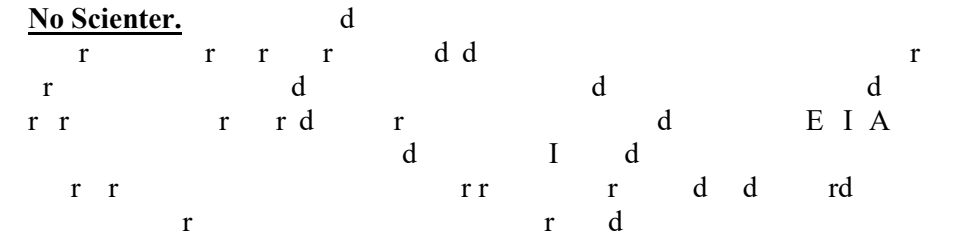
FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken** **Improper Lumping of RCB, DAC and DSC with Other Defendants** **The Listing of SJHSRI in the OCD is Not Actionable Fraud.** *See* **No Scienter.** **Calls for First Amendment Violation** *Medina* *i.e.* **Implausible Conspiracy Theory**

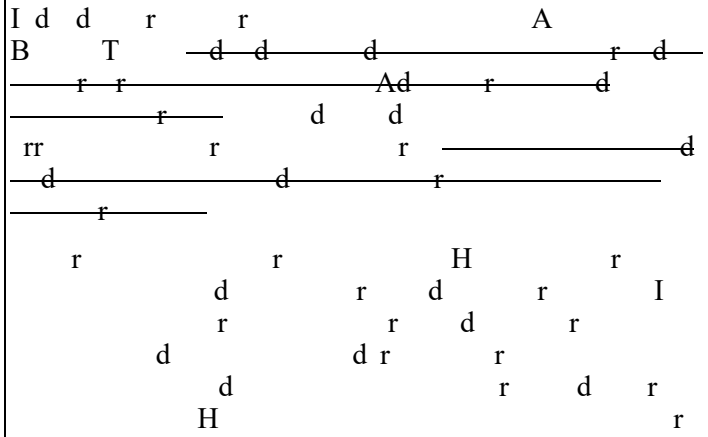
FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken** *bona fides* *Ashcroft v. Iqbal* *bona fides* *see* **Improper Lumping of RCB, DAC and DSC with Other Defendants** **No Scienter.** *bona fides*
		**Conclusory assertions not entitled to the presumption of truth are stricken.** *Roggio* **No Agreement to Prosecute Unlawful Enterprise.** *Twombly* *Iqbal* **Improper Lumping of RCB, DAC and DSC**

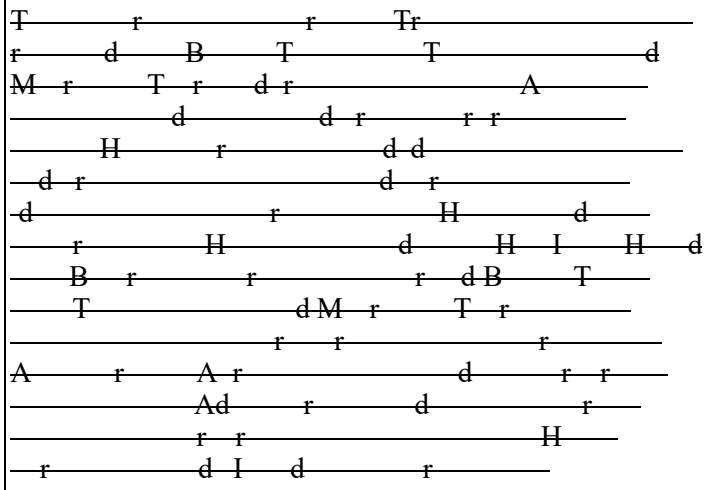
FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
	r H I B d H d A d r r rr r A r A r T dr d r d r r d d r r H I d r H I d d r r H I d r r d r d r r H d	**No Agreement to Prosecute Unlawful Enterprise.** T r r d r T r r r r r r d d r r d r d T r r r rd d dr A r A r **RCB, DAC and/or DSC Are Not Implicated.**
	r H I B d H d A d r r A B T T d M r T r d r d d B d r r Tr r M d H d I r B rd r r r rr B rd Tr r H I B d H T r d d d r d d d A r r r H I B d H d A d r d B T T d M r T r d r *This paragraph purports to characterize transaction terms, and does not mention RCB, DAC and/or DSC* T d d d B d r r r r T r r r d r d d d r r d r r r	**No Agreement to Prosecute Unlawful Enterprise.** T r r d r T r r rd d r r r r r r r r d d r r r d d d r d r r *See* M E T r r r d r d T r r rd r **RCB, DAC and/or DSC Are Not Implicated.** d r r d r r B A r T r r r r d r r r r H I r B r r d B A r r d r r r r B A r r d r r r r **Unpleaded Facts.** d d d r r r d d r d d r r r d r r

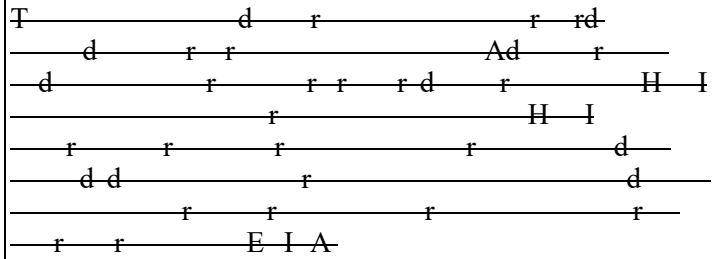
FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory assertions not entitled to the presumption of truth are stricken.**  *Iqbal* **No Scienter.**  **Improper Lumping of RCB, DAC and DSC with Other Defendants** **No Wrongdoing.**  **Unpleaded Facts.** 

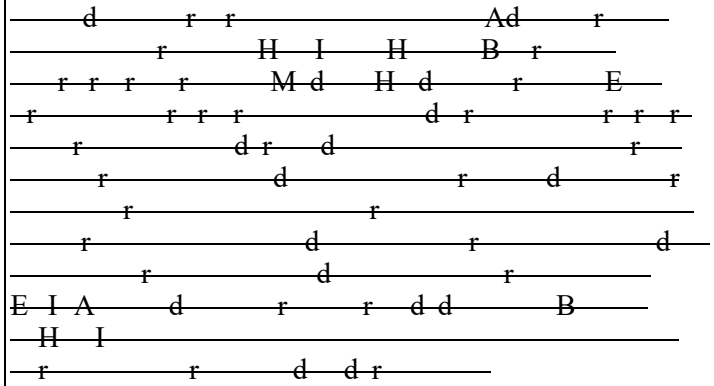
FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory assertions not entitled to the presumption of truth are stricken.**  **No Wrongdoing.**  **Calls for First Amendment Violation.**  **No Agreement to Prosecute Unlawful Enterprise.** 

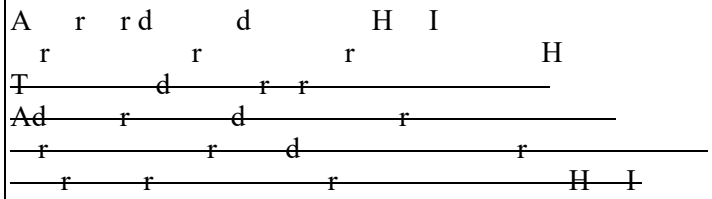
FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory assertions not entitled to the presumption of truth are stricken.**  **No Wrongdoing.**  **The Listing of SJHSRI in the OCD is Not Actionable Fraud.** *See* II A **No Agreement to Prosecute Unlawful Enterprise.**  **Calls for First Amendment Violation.** **No Scienter.** 

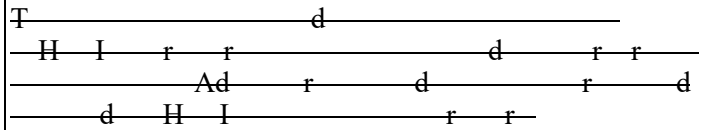
FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory assertions not entitled to the presumption of truth are stricken.** *See Roggio* **No Causation.** **No Duty to Speak in an Omissions Case.** *Home Loan & Inv. Ass'n v. Paterra* **No Actionable Fraud**

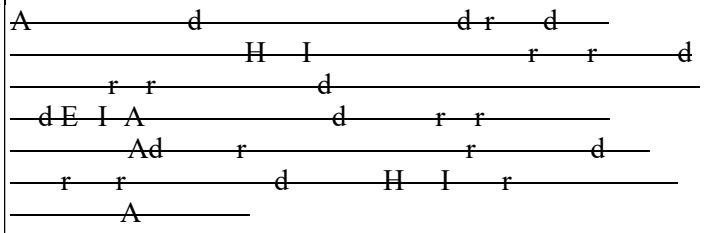
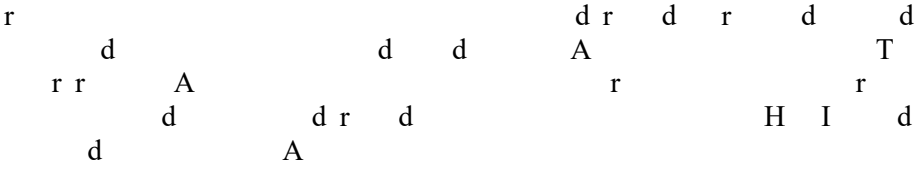
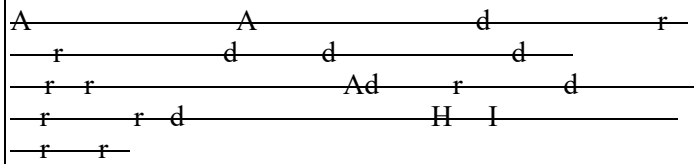
FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.** *United States v. AVX Corp.* *Id.* **Implausibility.** **Impossibility.** **Calls for First Amendment Violation**

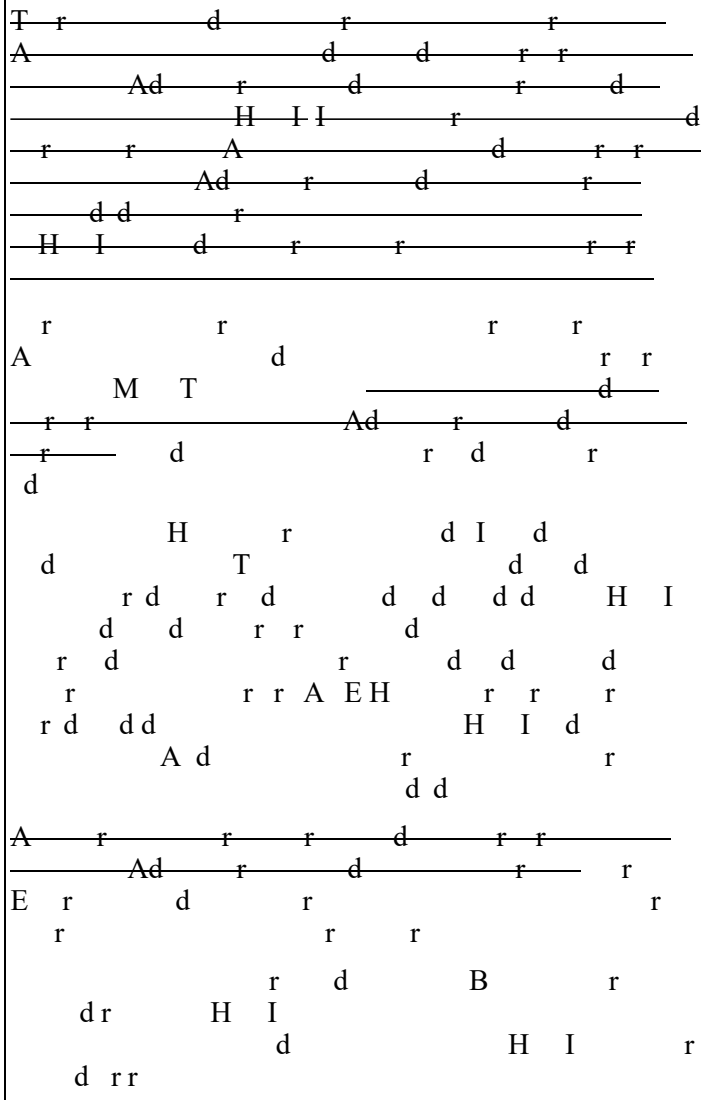
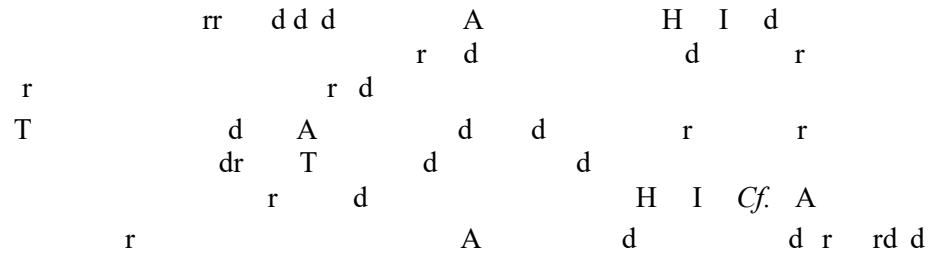
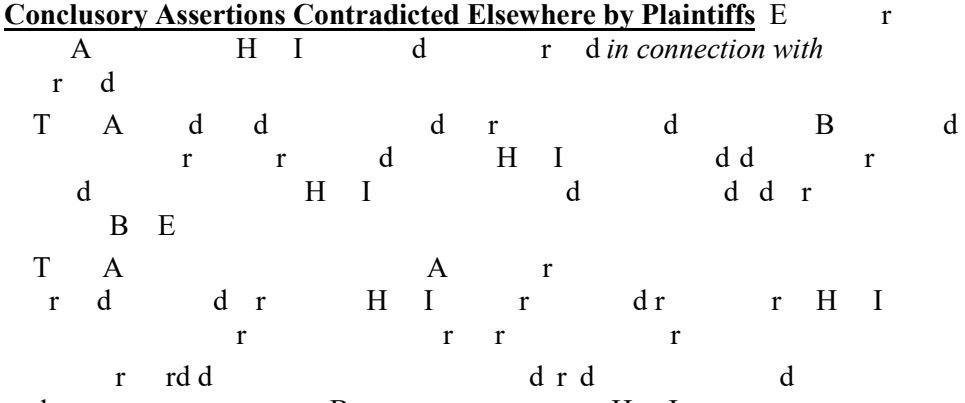
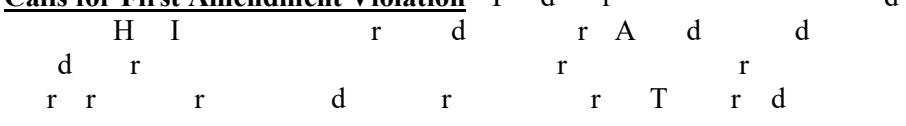
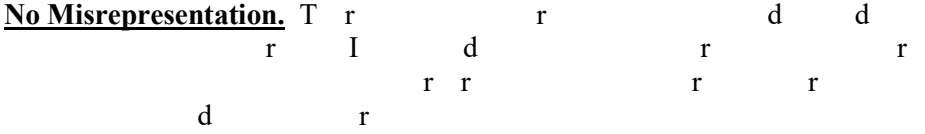
FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.** **No Misrepresentation.** **Improper Lumping of RCB, DAC and DSC.** **No Wrongdoing.** **Implausible Conspiracy Theory** **No Scienter.** **Calls for First Amendment Violation**

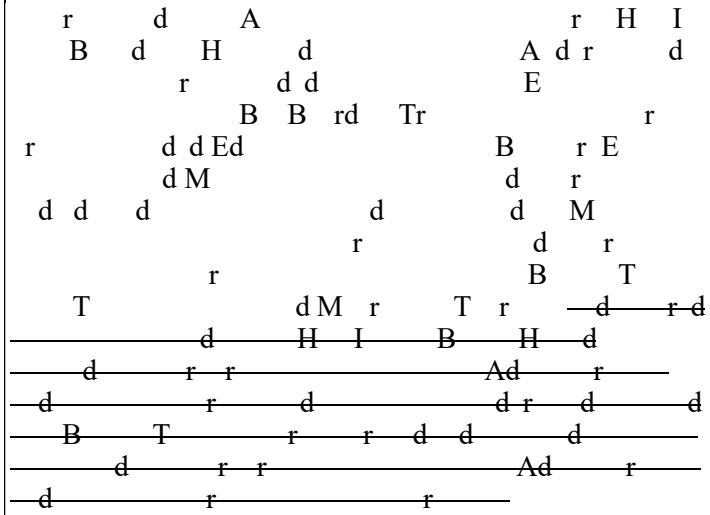
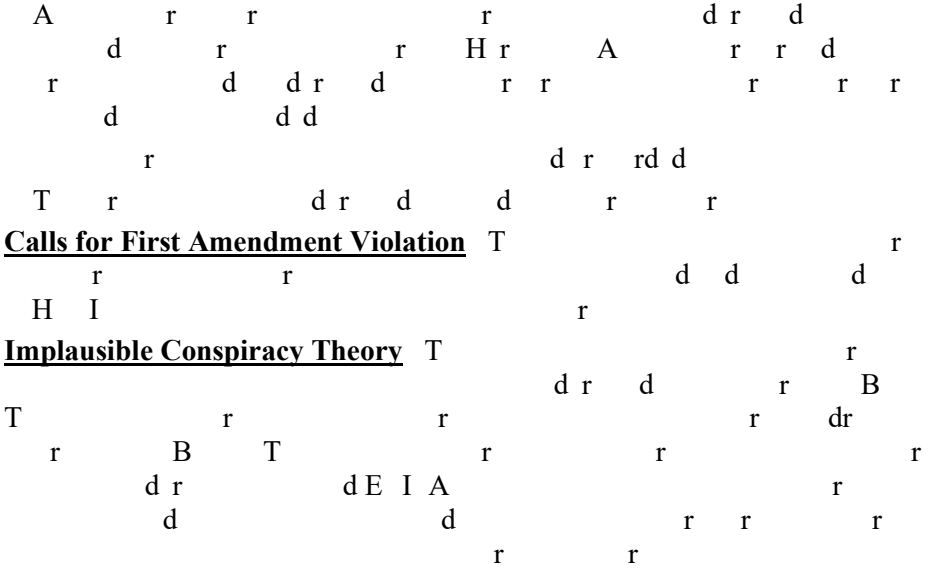
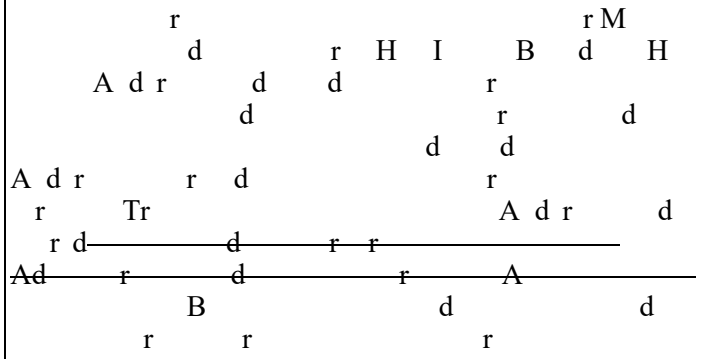
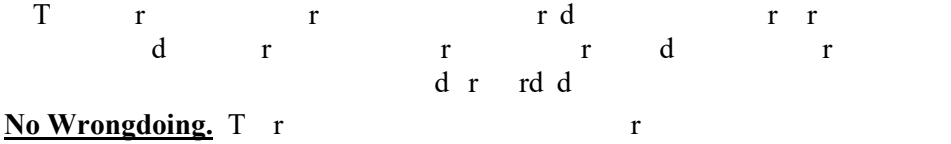
FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.** **Unpleaded Facts** **Implausible Conspiracy Theory** *approved by regulators* **No Misrepresentation.** **Improper Lumping of RCB, DAC and DSC with Other Defendants** **Calls for First Amendment Violation**

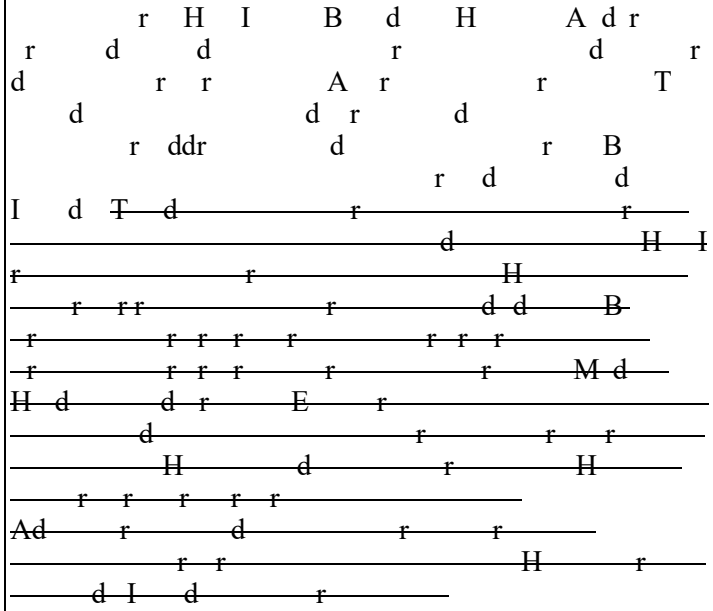
FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.** **Conclusory Assertions Contradicted by FAC & Documents.** **Calls for First Amendment Violation** **Improper Lumping of RCB, DAC and DSC** **No Scienter.**

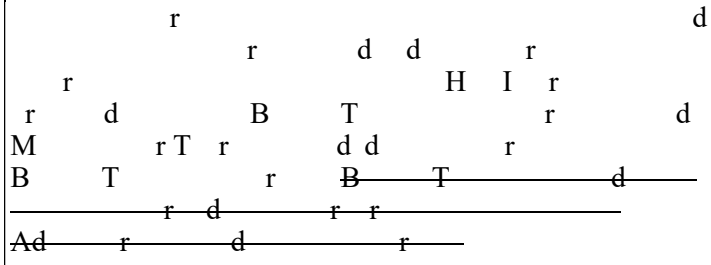
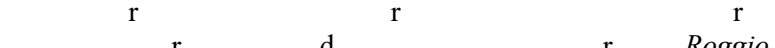
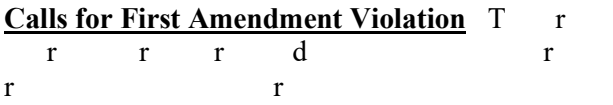
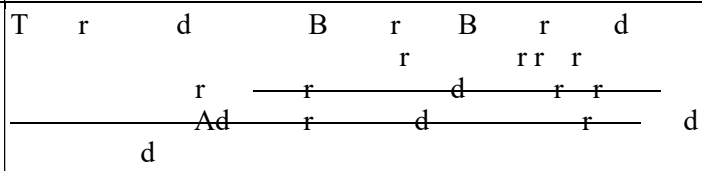
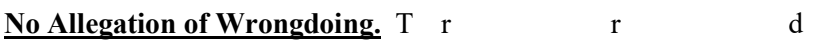
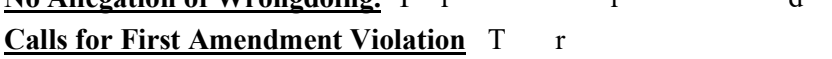
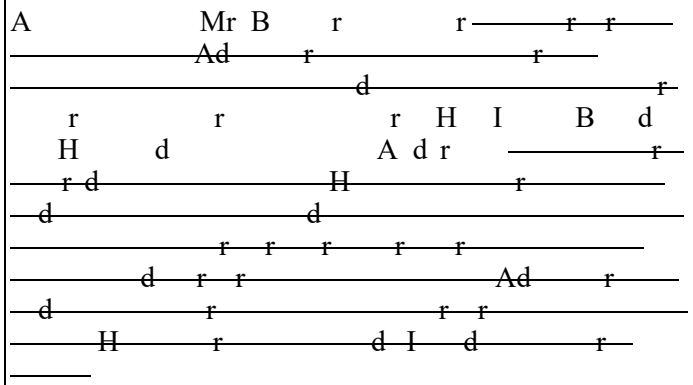
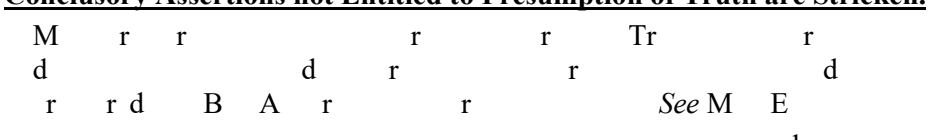
FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.** **Conclusory Assertions Contradicted by FAC & Documents.** **The Listing of SJHSRI in the OCD is Not Actionable Fraud.** *See* II A **Improper Lumping of RCB, DAC and DSC** **Implausible Conspiracy Theory** **Calls for First Amendment Violation** **Legal Error.**

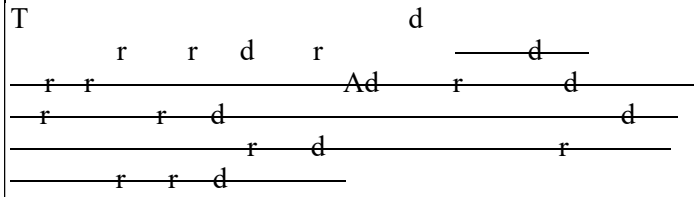
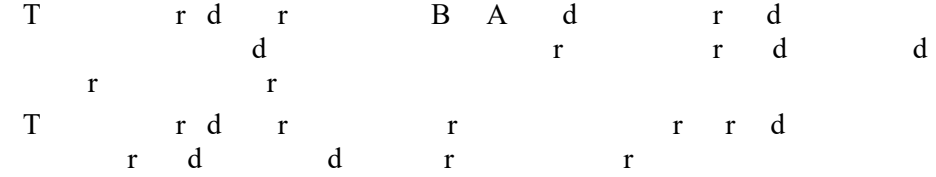
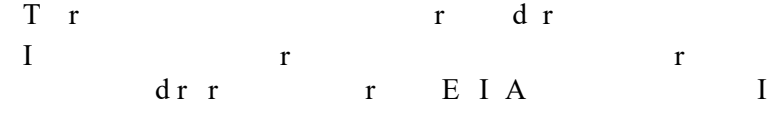
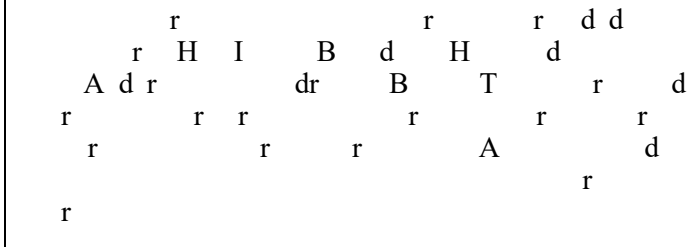
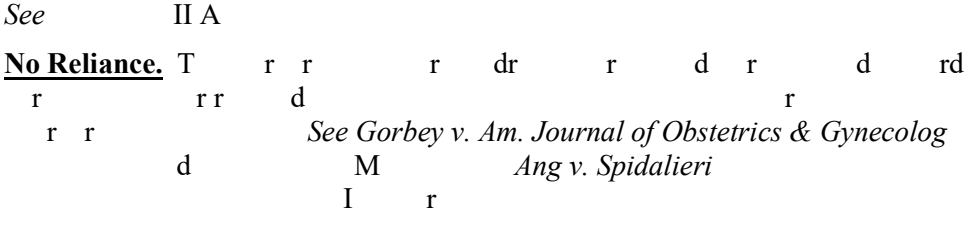
FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.**  **Conclusory Assertions Contradicted Elsewhere by Plaintiffs**  **The Listing of SJHSRI in the OCD is Not Actionable Fraud.** *See* II A **Calls for First Amendment Violation** T d r d H I r d r A d d d r r r r d r r **Unpleaded Facts.** T r r r r d r d r d A d d d r d d r B A r
		**Improper Lumping.** T r r d B A r d r B A r d d H I r r **Conclusory Assertions Contradicted Elsewhere by Plaintiffs** T d r r d d A r d d d d H I r r r A A **Calls for First Amendment Violation** T d r d H I r d r A d d d r r r r d r r

FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.**  **Conclusory Assertions Contradicted Elsewhere by Plaintiffs** E r  **The Listing of SJHSRI in the OCD is Not Actionable Fraud.** *See* II A **Improper Lumping of RCB, DAC and DSC** **Calls for First Amendment Violation** T d r d  **No Misrepresentation.** T r r d d 

FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.**  **Calls for First Amendment Violation** T **Implausible Conspiracy Theory** T **Improper Lumping of RCB, DAC and DSC** **No Reasonable Reliance.** *See* II B
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.**  **No Wrongdoing.** T r **No Misrepresentation.** T r d I **Inconsistent with Conspiracy/Implausibility.**

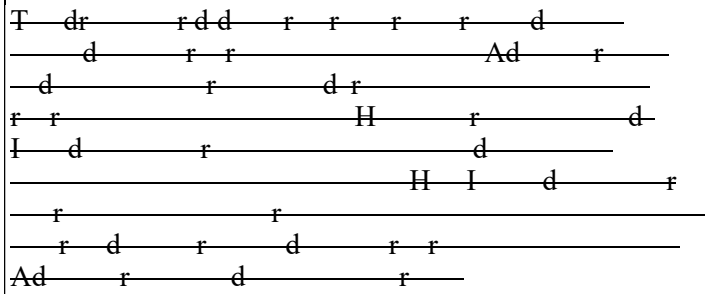
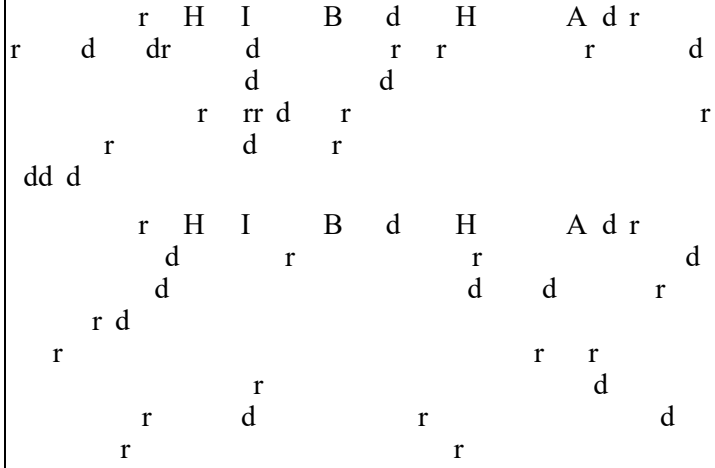
FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.** **No Agreement to Prosecute Unlawful Enterprise.** **Legal Error.** **RCB, DAC and/or DSC Are Not Implicated.** **Calls for First Amendment Violation**

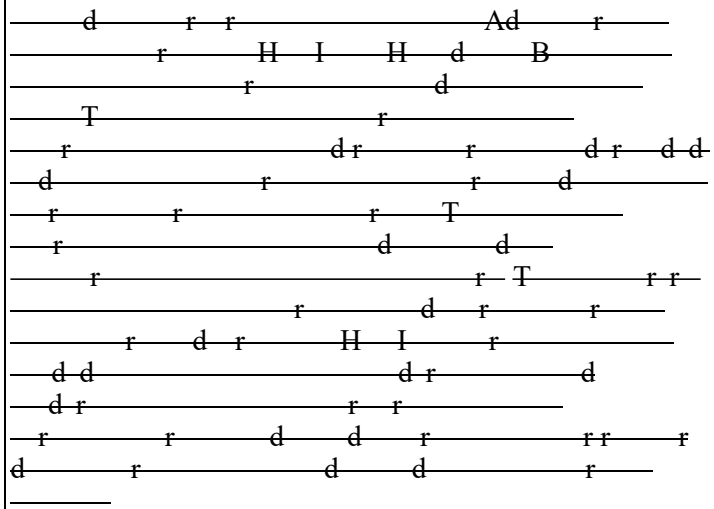
FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken**  
		**Improper Lumping**  **Rule 9(b)/ Unpleaded Facts.**  **No Allegation of Wrongdoing.**  **Calls for First Amendment Violation** 
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.**  **Improper Lumping**  **No Agreement to Prosecute Unlawful Enterprise.**  **Legal Error.** 

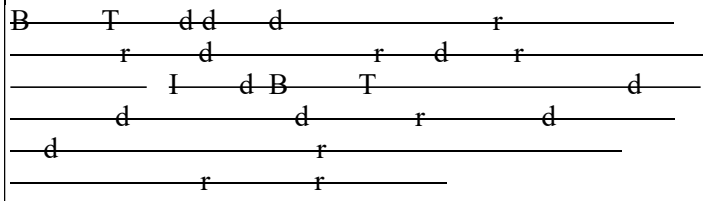
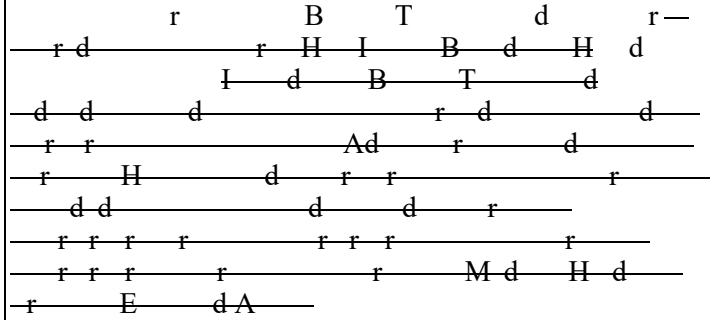
FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.**  **Improper Lumping** **No Agreement to Prosecute Unlawful Enterprise.**  **Calls for First Amendment Violation** 
	 *These paragraphs purport to quote the draft letter, which should be considered its entirety.*	**No Allegation of Wrongdoing.**  **Bishop Tobin's Letter to the Vatican (Mot. Ex. 21) is Not Actionable Fraud.** 

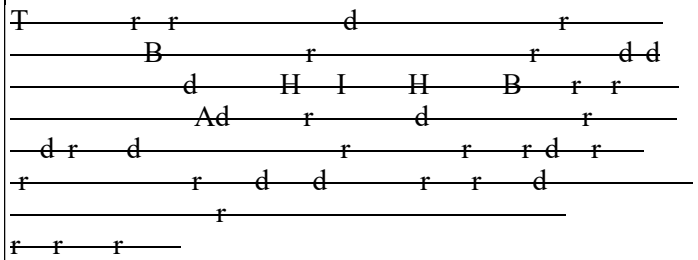
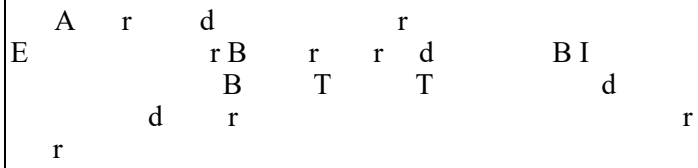
See Gorbey v. Am. Journal of Obstetrics & Gynecolog

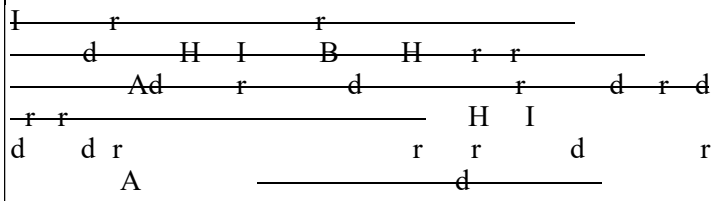
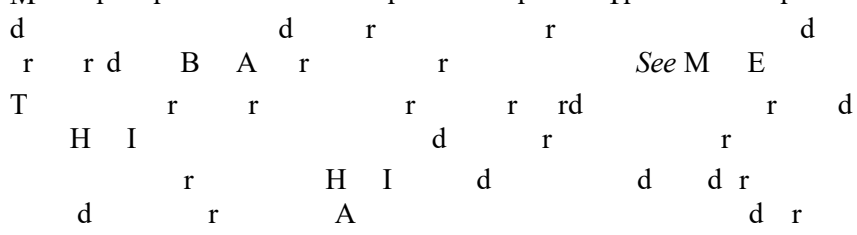
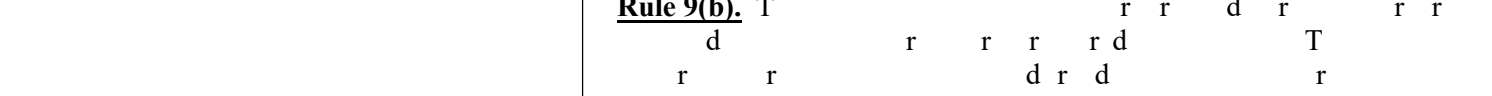
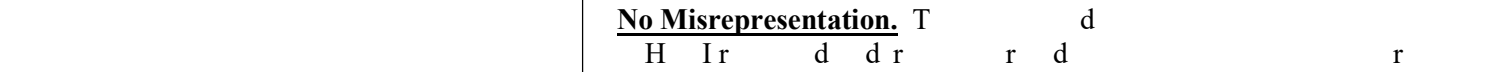
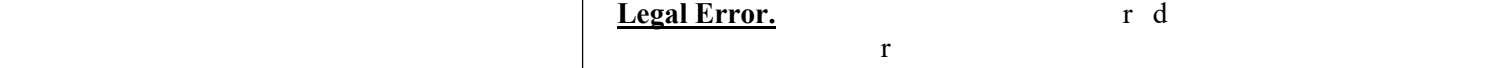
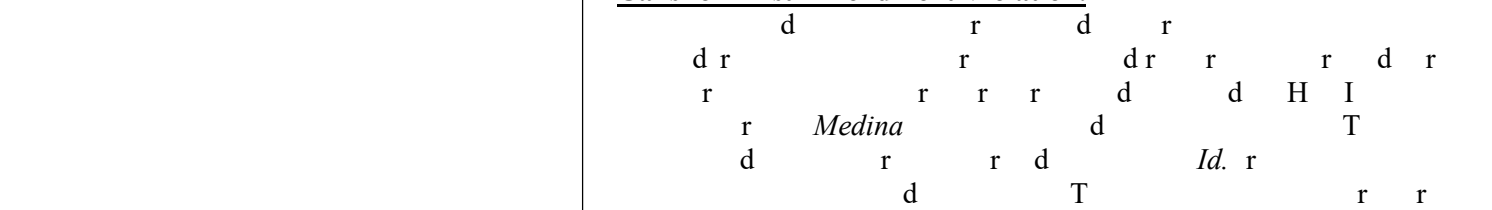
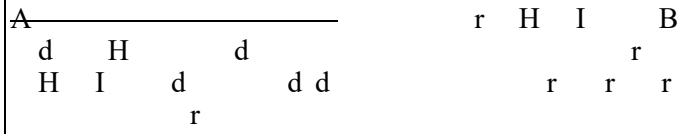
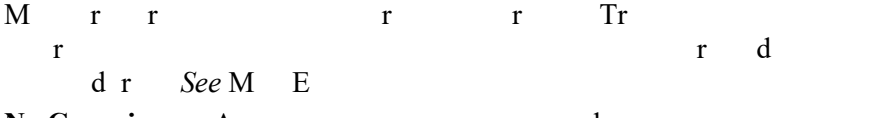
Ang v. Spidalieri

FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.** M r r r r Tr r d d r r d r r d B A r r *See* M E d d r r **Bishop Tobin's Letter to the Vatican (Mot. Ex. 21) is Not Actionable Fraud.** *See* II A **No Duty to Speak in an Omissions Case.** A d r r r d d d **Calls for First Amendment Violation** T r r r r d r r r r
		**No Allegation of Wrongdoing.** T r r r dr r r r d r r rd **Bishop Tobin's Letter to the Vatican (Mot. Ex. 21) is Not Actionable Fraud.** *See* II A **No Scienter.** d r r B A r d r d r r d d d B A d r r r d r r **Calls for First Amendment Violation** T r r r r d r r r r

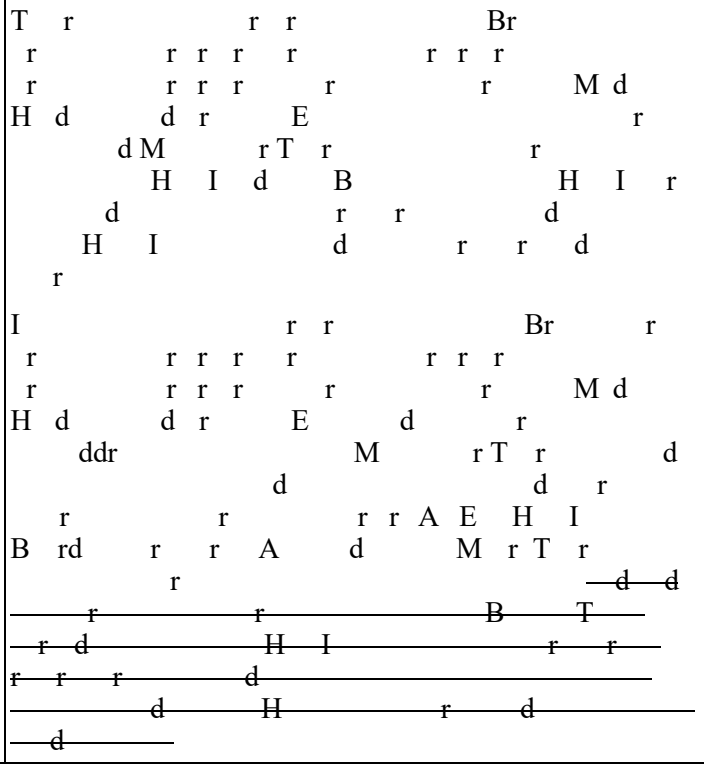
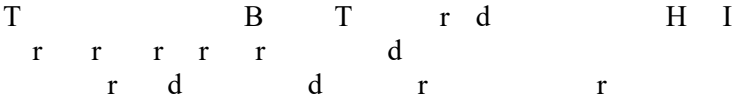
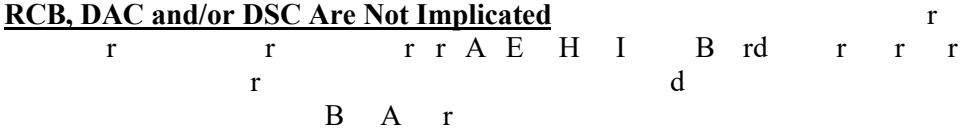
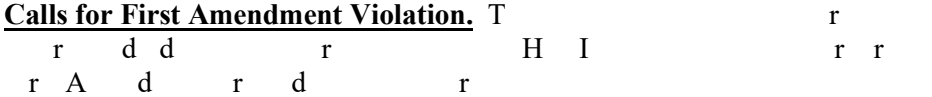
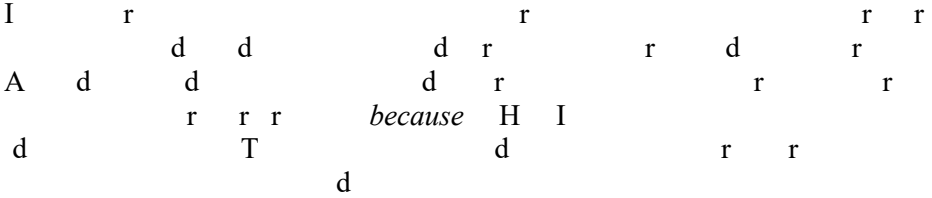
FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken** *See Iqbal* **Bishop Tobin's Letter to the Vatican (Mot. Ex. 21) is Not Actionable Fraud.** *See* II A **No Scienter.** **Improper Lumping.** **Calls for First Amendment Violation**

FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory assertions not entitled to the presumption of truth are stricken.** **Bishop Tobin's Letter to the Vatican (Mot. Ex. 21) is Not Actionable Fraud.** *See* II A **Calls for First Amendment Violation**
		**Conclusory assertions not entitled to the presumption of truth are stricken.** **Implausible Conspiracy Theory** **Bishop Tobin's Letter to the Vatican (Mot. Ex. 21) is Not Actionable Fraud.** *See* II A **Improper Lumping of RCB, DAC and DSC with Other Defendants** **Calls for First Amendment Violation**

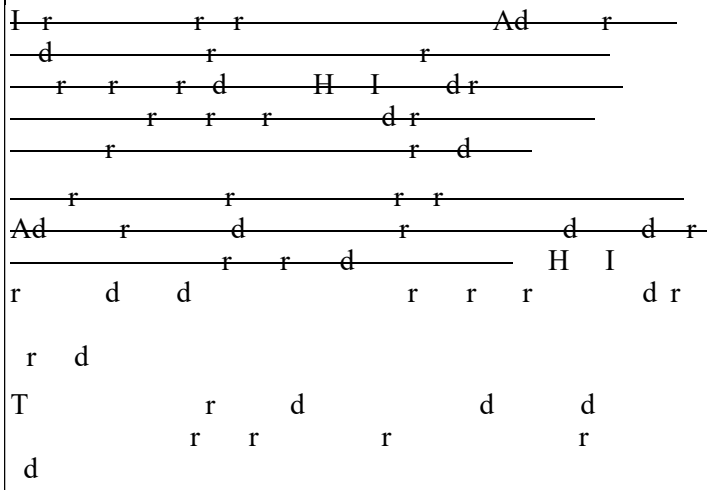
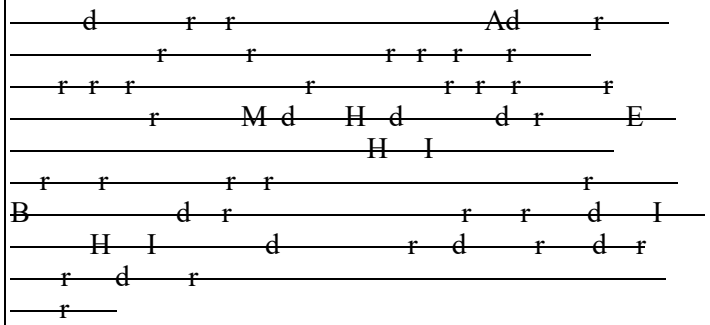
FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.** **Bishop Tobin's Letter to the Vatican (Mot. Ex. 21) is Not Actionable Fraud.** *See* II A **Improper Lumping of RCB, DAC and DSC** *there was no conspiracy* **Calls for First Amendment Violation**
		**No Allegation of Wrongdoing.** **Bishop Tobin's Letter to the Vatican (Mot. Ex. 21) is Not Actionable Fraud.** *See* II A **Calls for First Amendment Violation**

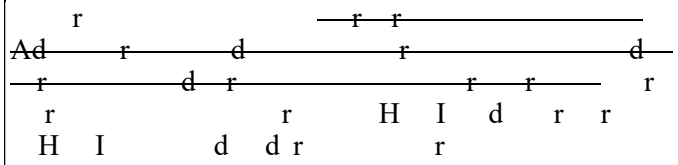
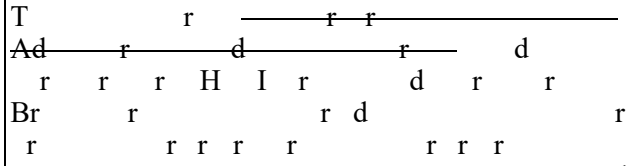
FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.**  **Rule 9(b).**  **No Misrepresentation.**  **Legal Error.**  **Calls for First Amendment Violation.** 
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.**  **No Conspiracy.** 

FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
	H r r r d r r r d r r r r r r r r r r r r r M d H d d r E d Br d d d d H I r r H d r B d r r d d r r d r d r r d r r r I r r r M r r r r d r d d d d r r r r A E r r r d r r r r r d H I	**The Document Trumps** r d d r r d *See* M E **Implausible Conspiracy Theory** T r r d r d r d I A r d rr r d r B A d r r r H r d I d r d r d r d H I *never would have sent this email* I r d r H I r r A r r d r r r d r d r r r d B A d *a fortiori* r d r d r *Cf.* A **RCB, DAC and/or DSC Are Not Implicated.** **Calls for First Amendment Violation.** T r r d d r H I r r r A d r d r

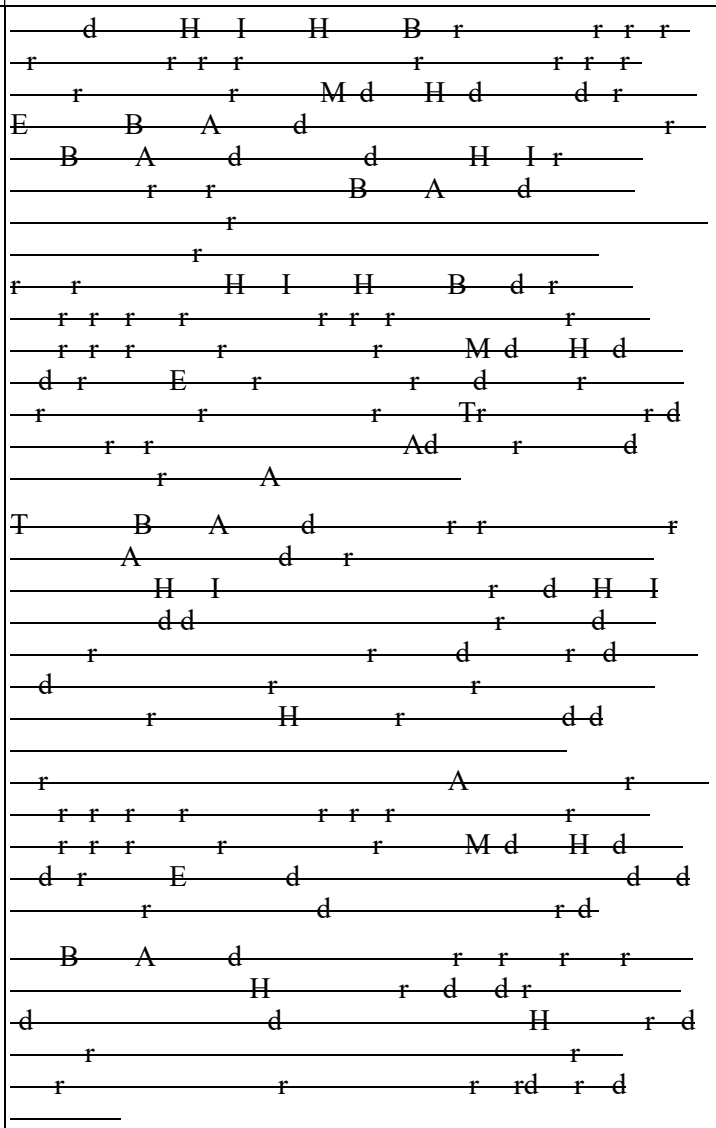
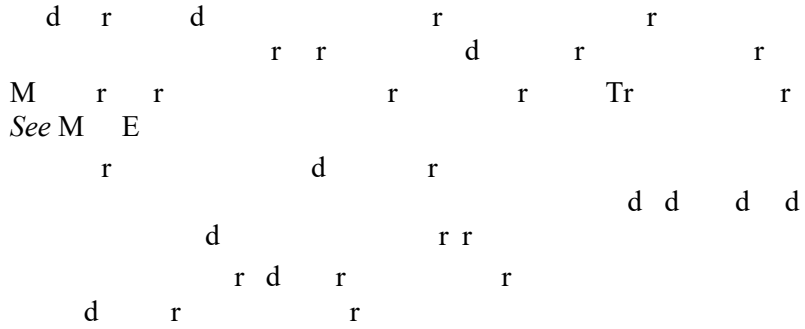
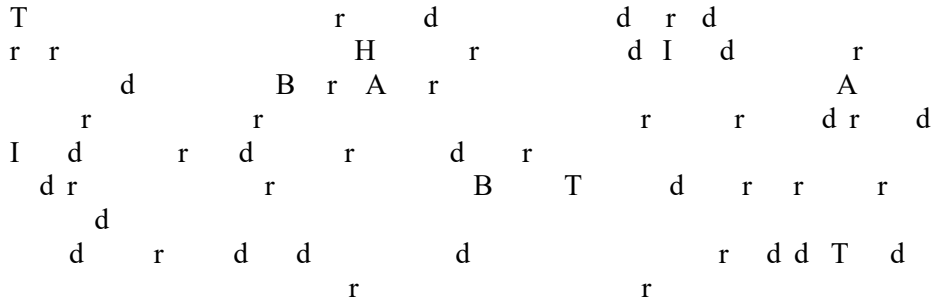
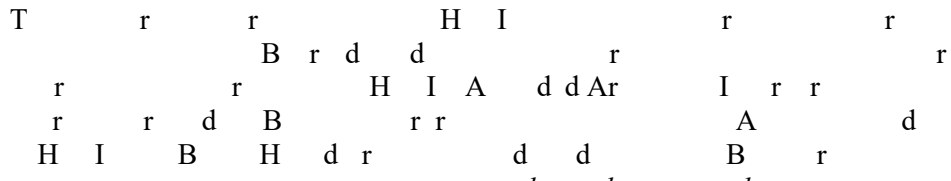
FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.**  **RCB, DAC and/or DSC Are Not Implicated**  **Calls for First Amendment Violation.**  **No Misrepresentation/No Agreement to Prosecute Unlawful Enterprise.** 

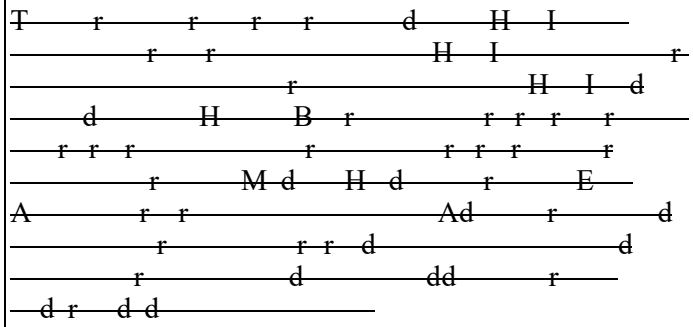
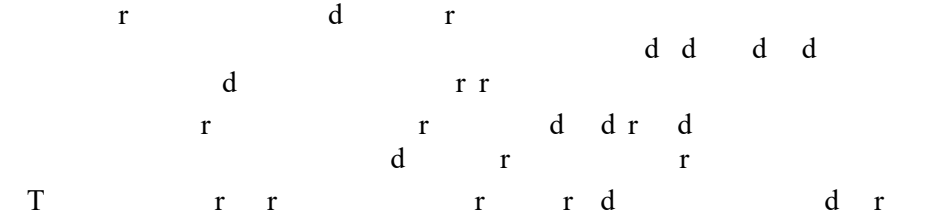
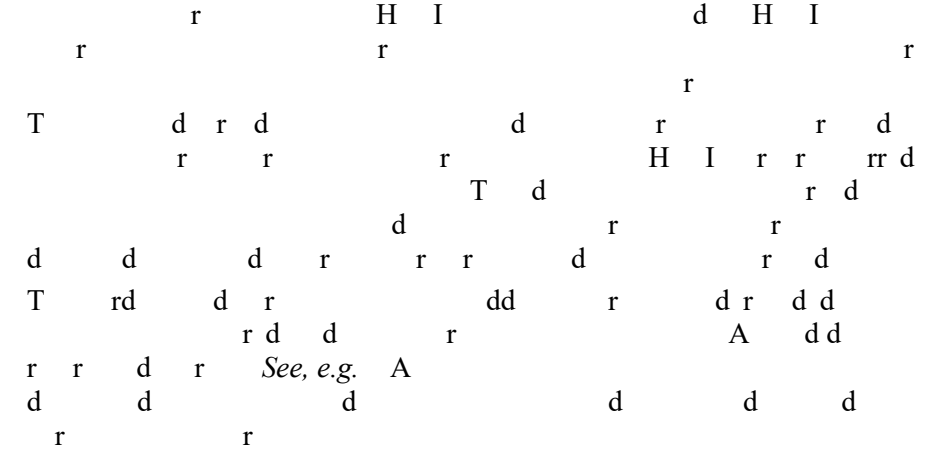
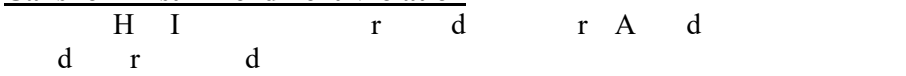
FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
	the loss of that status will require that they immediately notify the applicable governmental authorities that the plan is currently underfunded.	**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.** **Improper Lumping.** **No Wrongdoing/No Agreement to Prosecute Unlawful Enterprise** **Calls for First Amendment Violation.**

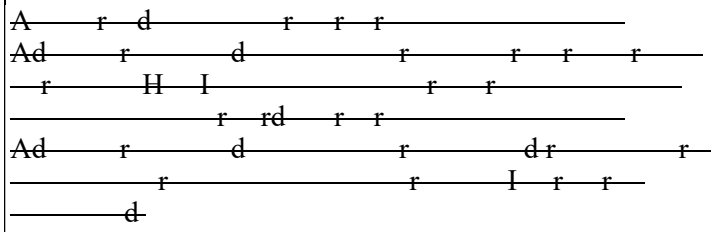
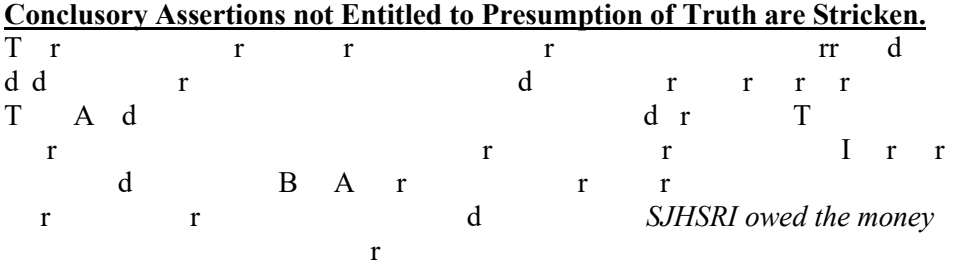
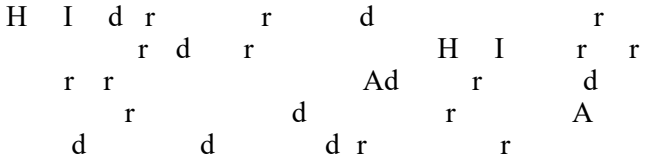
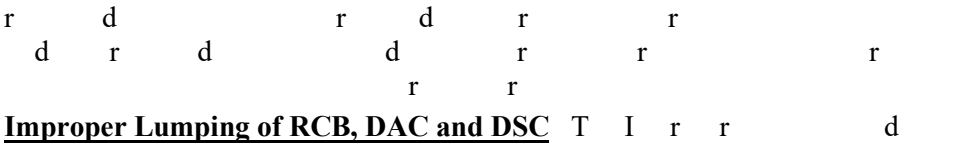
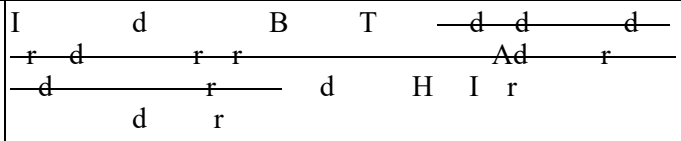
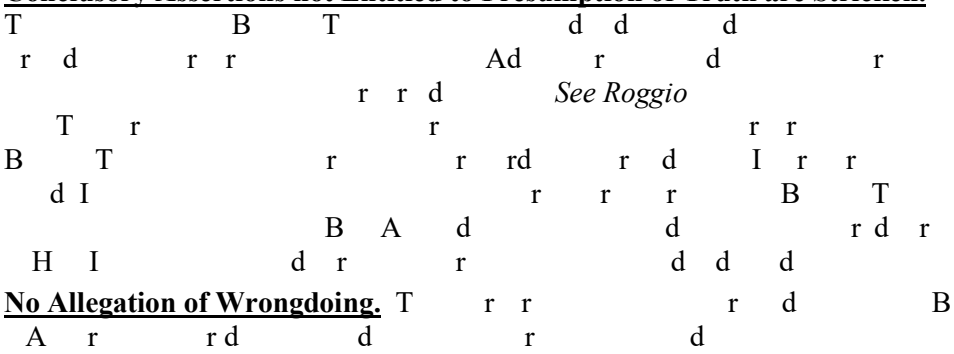
FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.** **Improper Lumping of RCB, DAC and DSC.** **No Wrongdoing/No Agreement to Prosecute Unlawful Enterprise.** **The Listing of SJHSRI in the OCD is Not Actionable Fraud.** *See* II A **No Misrepresentation.** **Rule 9(b).** **Calls for First Amendment Violation.**
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken** **The Listing of SJHSRI in the OCD is Not Actionable Fraud.** *See* II A **Improper Lumping of RCB, DAC and DSC with Other Defendants.** **Calls for First Amendment Violation.**

FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken** **The Listing of SJHSRI in the OCD is Not Actionable Fraud.** *See* II A **Improper Lumping of RCB, DAC and DSC.** **Calls for First Amendment Violation.**
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken** **Immaterial.** **No Reliance/No Causation.** **Improper Lumping of RCB, DAC and DSC.** **Calls for First Amendment Violation**

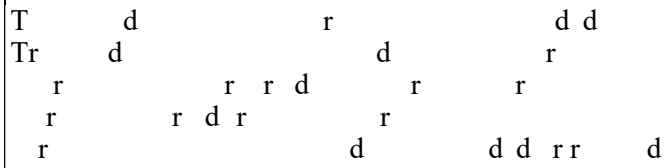
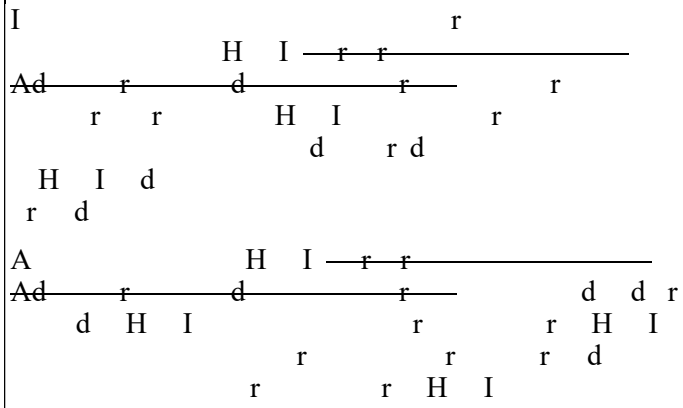
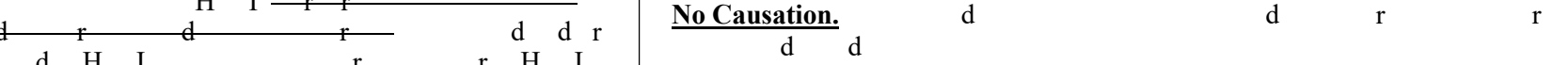
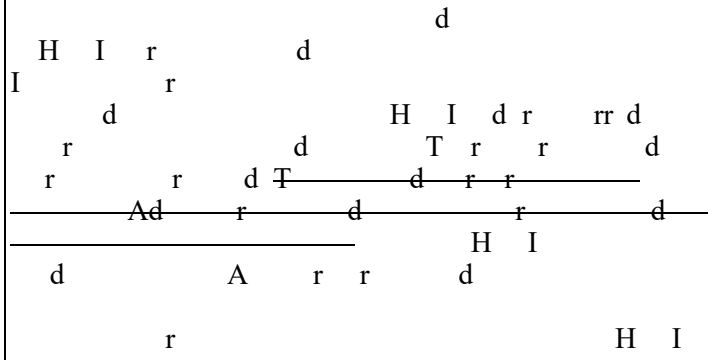
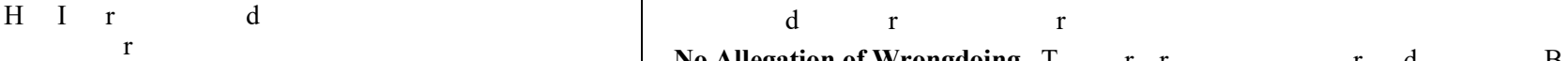
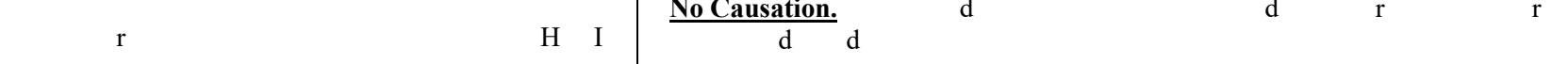
FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
	These paragraphs, which do not mention RCB, DAC, and DSC purport to allege inaccurate tax filings by SJHSRI	**Conclusory Assertions not Entitled to Presumption of Truth are Stricken**
		No Reliance/No Causation
		Improper Lumping of RCB, DAC and DSC.
		Implausible Conspiracy Theory. *See generally*
		Federal Law Preempts Plaintiffs' Attempt To Enforce 26 U.S.C. § 7206. *See generally*

FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.**  *See* M E **Implausible Conspiracy Theory.** *See generally* III  *is exactly what the regulators did*  *even absent the supposed agreement* **Improper Lumping of RCB, DAC and DSC with Other Defendants.** **Calls for First Amendment Violation** T d r d H I d r d **The Listing of SJHSRI in the OCD is Not Actionable Fraud.** *See* II A

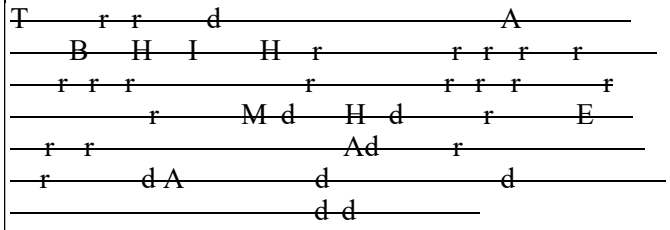
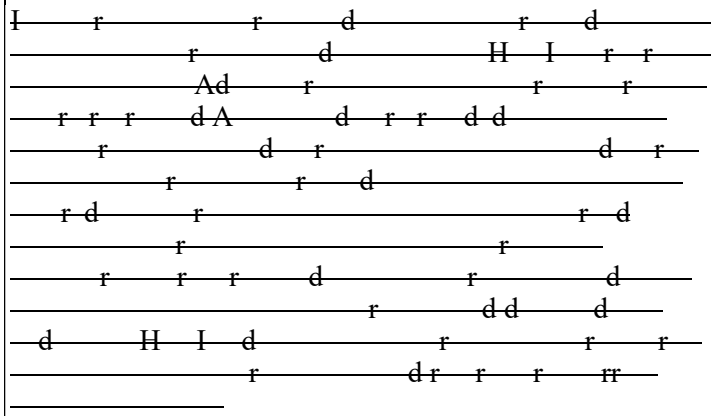
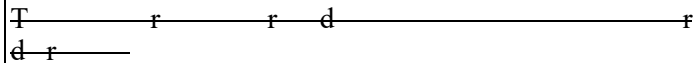
FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.**  **The Listing of SJHSRI in the OCD is Not Actionable Fraud.** *See* II A **Legal Error.**  **Improper Lumping of RCB, DAC and DSC with Other Defendants.** **Calls for First Amendment Violation** 

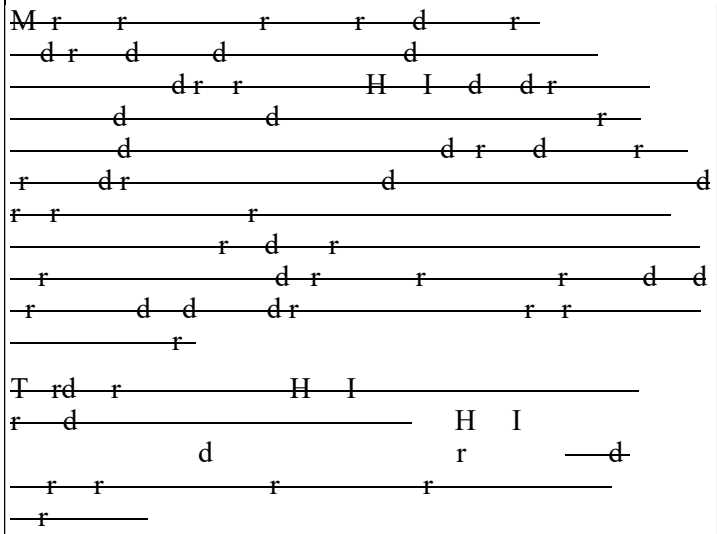
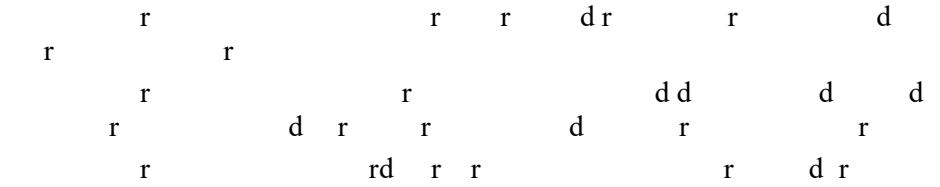
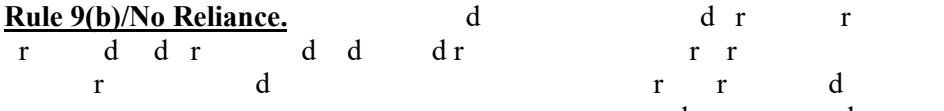
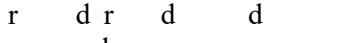
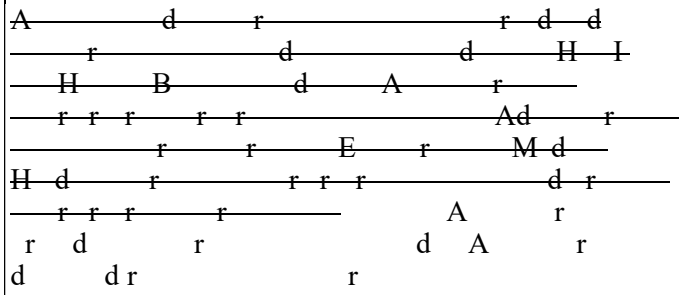
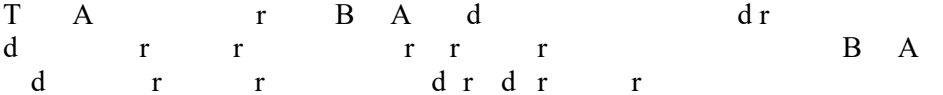
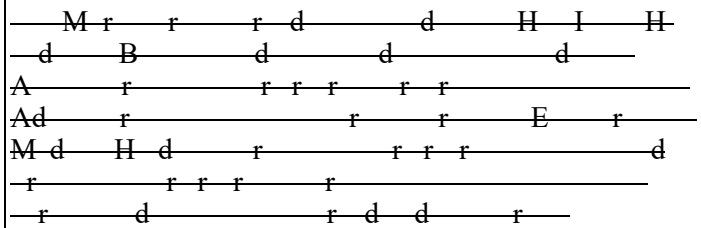
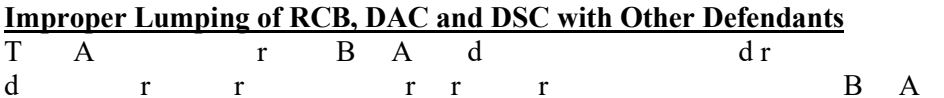
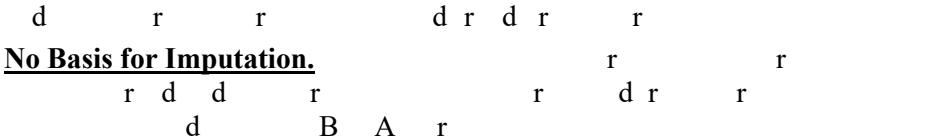
FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.**  *SJHSRI owed the money* **Improper Lumping of RCB, DAC and DSC** **The Listing of SJHSRI in the OCD is Not Actionable Fraud.** *See* II A **Calls for First Amendment Violation**
		**No Allegation of Wrongdoing.**  **Improper Lumping of RCB, DAC and DSC**
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.**  *See Roggio* **No Allegation of Wrongdoing.**

FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
	I A I r r d r d r d r r d H I	**No Allegation of Wrongdoing.** T r r r d B A r r d d r d **RCB, DAC and/or DSC Are Not Implicated** T I r r d r r B A r r d r r d
	A B T d r d r rr d r r d d H I r r r r r d d rd r d	**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.** T r r r r r r **RCB, DAC and/or DSC Are Not Implicated** T r r d r r B A d r d d r d **No Allegation of Wrongdoing.** d d d rd d r d r r r d r rr d d r
	r H I r d r r Ad r d r d r r d	**No Allegation of Wrongdoing.** T r r r d B A r r d d r d **Irrelevant.** A d d d r d r r rr d **Improper Lumping of RCB, DAC and DSC**
	r r r H I r r r d r r r r d r r A r r r r d r r d r	**No Allegation of Wrongdoing.** T r r r d B A r r d d r d **Irrelevant.** A d d d r d r r rr d **RCB, DAC and/or DSC Are Not Implicated**

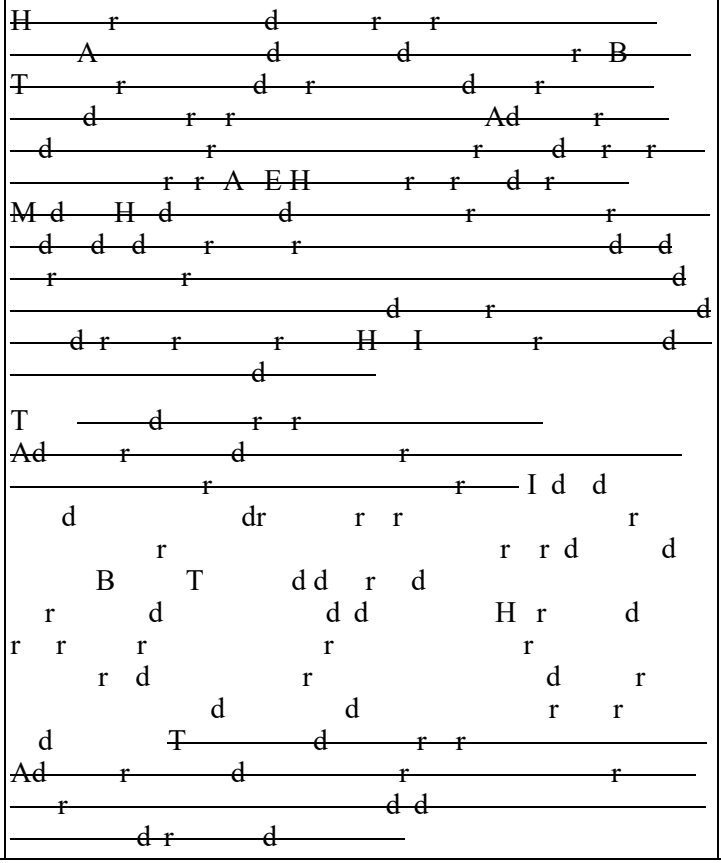
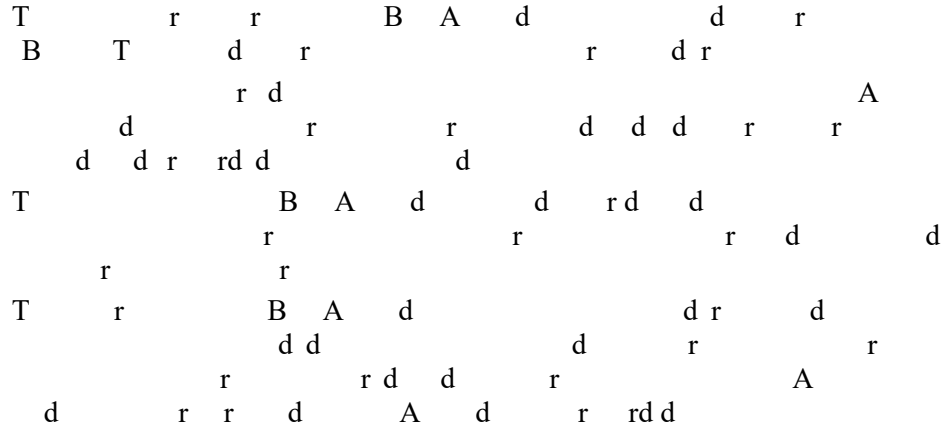
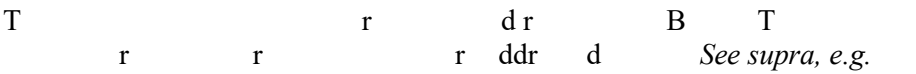
FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**No Allegation of Wrongdoing.** **Irrelevant.** **RCB, DAC and/or DSC Are Not Implicated**
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.** **No Allegation of Wrongdoing.** **No Causation.**  **Improper Lumping of RCB, DAC and DSC**
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.**  **No Allegation of Wrongdoing.** **No Causation.**  **Improper Lumping of RCB, DAC and DSC**

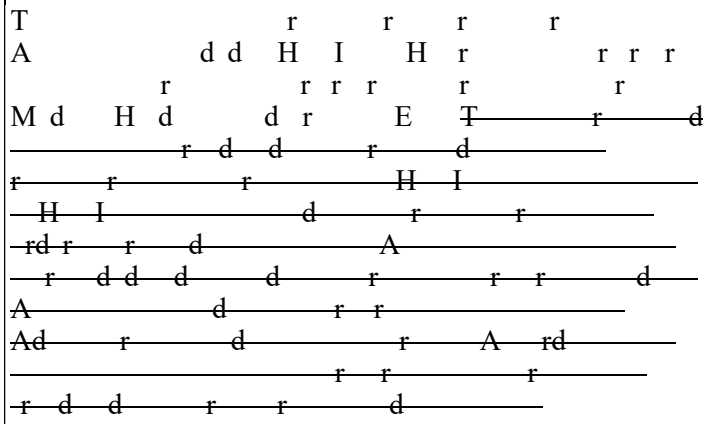
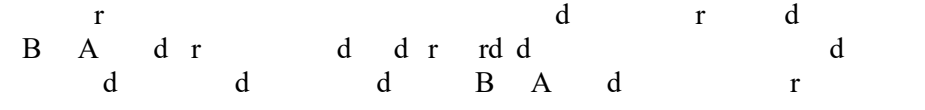
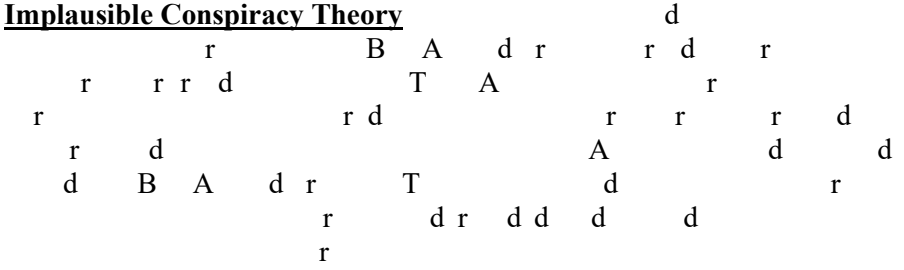
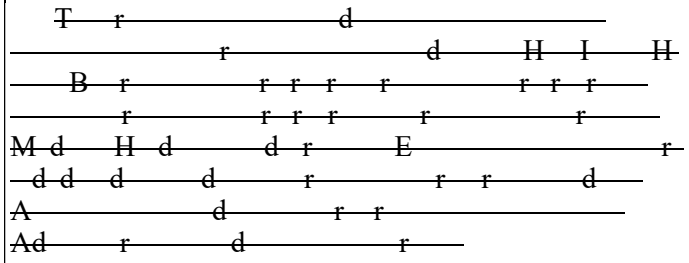
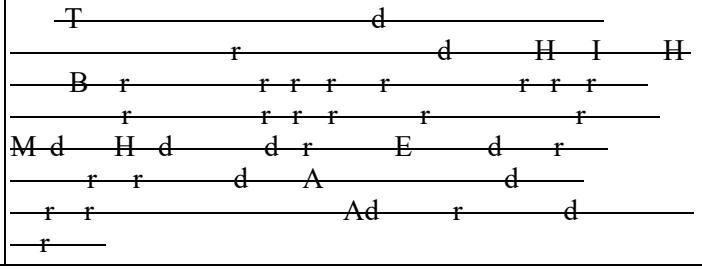
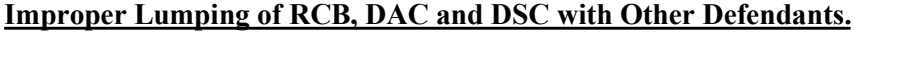
FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
	r r r r d H I r d	**RCB, DAC and/or DSC Are Not Implicated** T *SJHSRI* d r r **No Allegation of Wrongdoing.** M r r rd r d r r d r d
	These Paragraphs challenge the "Exculpatory Provisions" in Plan documents	**RCB, DAC and/or DSC Are Not Implicated** T r r d r B A d r r r r r d r r
	~~T r E r r r d r r r d d H I H B r r Ad r d r d r r r d r r d r d d T r d r r r d d d d~~	**Legal Error.** r E r r d r *per se* d r d d r r A r d A r r r r r d r r r d Tr **Implausible Conspiracy Theory** T E r r d E I A r d r r d d r r d I r d r r r r d r d d r r d **Improper Lumping of RCB, DAC and DSC with other Defendants.** r d r d d r r r r d r r d r d d r d d d r r
	These Paragraphs concern SJHSRI's funding obligations, alleged underfunding and financial statements	**RCB, DAC and/or DSC Are Not Implicated** T r r d r B A d r r r r r d r r
	~~r r Ad r d r r r r d d I d d d r B T d d r d r d d d~~	**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.** r B A d r r d d d rr d r B A d r r d r r d d r r r d r **Improper Lumping of RCB, DAC and DSC** T r B T r dr r B A r

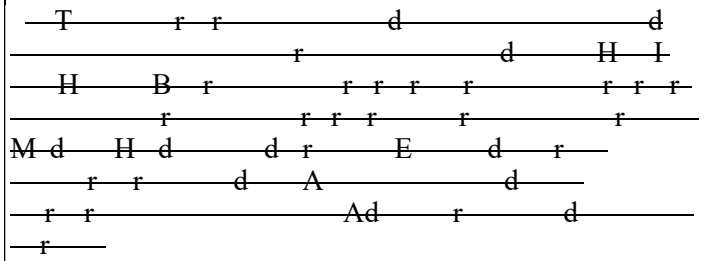
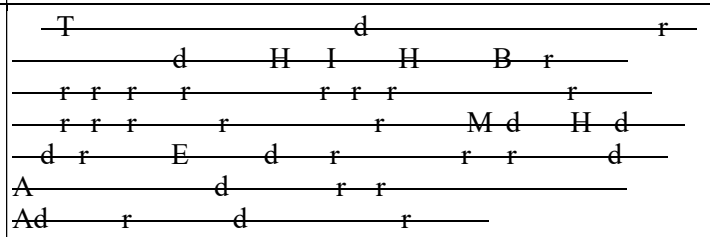
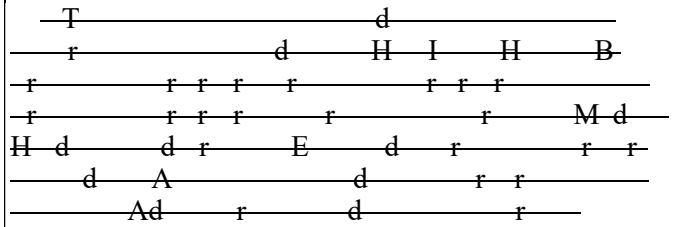
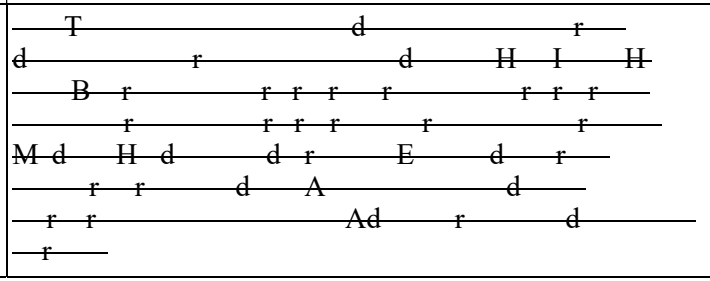
FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory Assertions not Entitled to Presumption of Truth are Stricken.** **No Concealment.** **Improper Lumping of RCB, DAC and DSC with Other Defendants**
		**Conclusory assertions not entitled to the presumption of truth are stricken.** **Improper Lumping of RCB, DAC and DSC with Other Defendants** **Alleged Ancient Statements to Plan Participants are Not Actionable Fraud.** *See* II A
		**Conclusory assertions not entitled to the presumption of truth are stricken.** **Rule 9(b)/No Reliance.**

FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory assertions not entitled to the presumption of truth are stricken.**  **Rule 9(b)/No Reliance.**  **No Misrepresentation.** A 
		**Conclusory assertions not entitled to the presumption of truth are stricken.**  **Improper Lumping of RCB, DAC and DSC with Other Defendants**  **No Agreement to Prosecute Unlawful Enterprise.** 
		**Conclusory assertions not entitled to the presumption of truth are stricken.**  **Improper Lumping of RCB, DAC and DSC with Other Defendants**  **No Basis for Imputation.** 

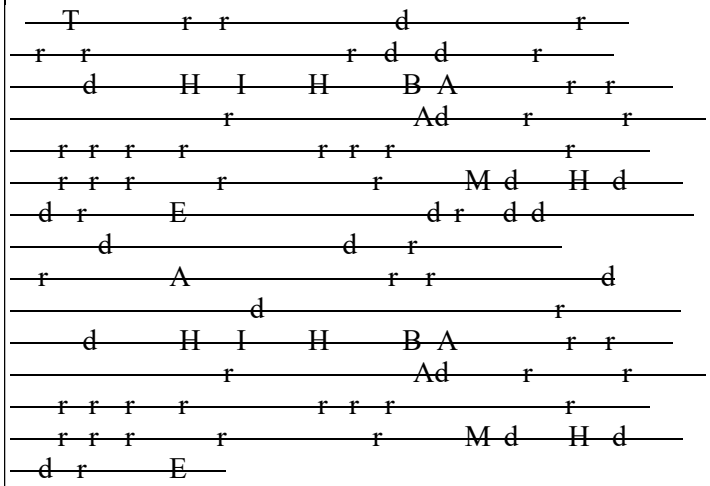
FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
	and the financial future for employee-beneficiaries of the pension plan would be at a significant risk. I believe that this partnership will help avoid the catastrophic implications of such a failure	**Conclusory assertions not entitled to the presumption of truth are stricken.** **Implausible Conspiracy Theory** **Improper Lumping of RCB, DAC and DSC with Other Defendants** **Bishop Tobin's Letter to the Health Services Council (Mot. Ex. 24) is Not Actionable Fraud.** *See* II A

FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory assertions not entitled to the presumption of truth are stricken.**  **Improper Lumping of RCB, DAC and DSC** **Bishop Tobin's Letter to the Health Services Council (Mot. Ex. 24) is Not Actionable Fraud.** *See*   *See supra, e.g.* 

FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory assertions not entitled to the presumption of truth are stricken**  **Implausible Conspiracy Theory**  **Plaintiffs' "Aiding and Abetting" Claim Fails.** *See* M XI
		**Conclusory assertions not entitled to the presumption of truth are stricken**  **Rule 9(b).**  **Improper Lumping of RCB, DAC and DSC with Other Defendants.**
		**Conclusory assertions not entitled to the presumption of truth are stricken**  **Rule 9(b).**  **Improper Lumping of RCB, DAC and DSC with Other Defendants.**

FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory assertions not entitled to the presumption of truth are stricken** **Rule 9(b).** **Improper Lumping of RCB, DAC and DSC with Other Defendants.**
		**Conclusory assertions not entitled to the presumption of truth are stricken** **Rule 9(b).** **Improper Lumping of RCB, DAC and DSC with Other Defendants.**
		**Conclusory assertions not entitled to the presumption of truth are stricken** **Rule 9(b).** **Improper Lumping of RCB, DAC and DSC with Other Defendants.** **Conclusory Assertions Contradicted by Documents in Public Record**
		**Conclusory assertions not entitled to the presumption of truth are stricken** **Rule 9(b).** **Improper Lumping of RCB, DAC and DSC with Other Defendants.** **Conclusory Assertions Contradicted by Documents in Public Record**

FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
	~~I d r r r~~ ~~r r r d~~ ~~r r r r B H I H r~~ ~~r r r r r r r r~~ ~~r E r M d H d~~ ~~r r r d r r~~ ~~Ad r r d A~~ ~~r r A r r d r~~ ~~H r r d r~~ ~~d d r d~~ ~~r d d r d r r~~ ~~r~~	**<u>Conclusory assertions not entitled to the presumption of truth are stricken</u>** T r r r **<u>Rule 9(b).</u>** T r r d d B A d r **<u>Improper Lumping of RCB, DAC and DSC with Other Defendants.</u>** **<u>Conclusory Assertions Contradicted by Documents in Public Record</u>**
	~~T d~~ ~~r d H I H B~~ ~~r r r r r r r r~~ ~~r r r r r r M d~~ ~~H d d r E d r r r~~ ~~d A d r r~~ ~~Ad r d r~~	**<u>Conclusory assertions not entitled to the presumption of truth are stricken</u>** T r r r **<u>Rule 9(b).</u>** T r r d d B A d r **<u>Improper Lumping of RCB, DAC and DSC with Other Defendants.</u>** **<u>Conclusory Assertions Contradicted by Documents in Public Record</u>**
	~~T r r d d~~ ~~r d H I~~ ~~H B r r r r r r r r~~ ~~r r r r r r~~ ~~M d H d d r E d r~~ ~~r r d A d~~ ~~r r Ad r d~~ ~~r~~	**<u>Conclusory assertions not entitled to the presumption of truth are stricken</u>** T r r r **<u>Rule 9(b).</u>** T r r d d B A d r **<u>Improper Lumping of RCB, DAC and DSC with Other Defendants.</u>** **<u>Conclusory Assertions Contradicted by Documents in Public Record</u>**
	~~T r r d d~~ ~~r d H I~~ ~~H B r r r r r r r r~~ ~~r r r r r r~~ ~~M d H d d r E d r~~ ~~r r d A d~~ ~~r r Ad r d~~ ~~r r rd r r r r~~ ~~r r~~	**<u>Conclusory assertions not entitled to the presumption of truth are stricken</u>** T r r r **<u>Rule 9(b).</u>** T r r d d B A d r **<u>Improper Lumping of RCB, DAC and DSC with Other Defendants.</u>** **<u>Conclusory Assertions Contradicted by Documents in Public Record</u>**

FAC	Text of Plaintiffs' Allegation	Non-Exhaustive List of Reasons Why Plaintiffs' Allegations Cannot Form the Basis of a Legal Claim against RCB, DAC and/or DSC
		**Conclusory assertions not entitled to the presumption of truth are stricken**
	No mention of RCB, DAC and/or DSC	**RCB, DAC and/or DSC Are Not Implicated**
	No mention of RCB, DAC and/or DSC	**RCB, DAC and/or DSC Are Not Implicated**