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.	:	C.A. No:1:18-CV-00328-WES-LDA
PROSPECT CHARTERCARE, LLC, ET AL.	:	
Defendants.	:	

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF CONDITIONAL RULE 56(d) MOTION TO DEFER OR DENY DIOCESAN DEFENDANTS' MOTION FOR SUMMARY JUDGMENT PENDING DISCOVERY ON JUDICIAL ESTOPPEL

Plaintiffs file this reply memorandum of law to address the Diocesan Defendants' Opposition to Plaintiffs' Conditional Rule 56(d) Motion for Discovery on Judicial Estoppel.[1]

I. Introduction

A. Inappropriate invective

Before the merits are addressed, the Diocesan Defendants' aspersions[2] require comment. They are inappropriate. Plaintiff Del Sesto is a Receiver appointed by the Rhode Island Superior Court years after the events in question. He has no personal or

[1] Plaintiffs' motion is ECF # 246 and supporting memorandum is ECF # 246-1. The Diocesan Defendants' opposition is ECF # 254.

[2] For example, the Diocesan Defendants state that Plaintiffs' positions are "fabrications," "post hoc falsehoods," and based on "feigned ignorance." ECF # 254 (Diocesan Defendants' Opp. Memo.) at 6 & 7. Moreover, even in Rhode Island where calamari is the official state appetizer (see R.I. Gen. Laws § 42-4-19), the Diocesan Defendants' repeated references in their reply memorandum (ECF # 253) to Plaintiffs and Plaintiffs' counsel as squids squirting black ink are over the top.

institutional knowledge of the facts, but he and his counsel had and continue to have the duty to zealously assert and prosecute the claims they have filed on behalf of the Plan and the 2,700 Plan participants. The other Plaintiffs are seven individuals who worked many years reasonably expecting and relying upon a pension that is now severely threatened, and who were never told that the Plan was severely underfunded.[3] (To this day, the Diocesan Defendants incredibly insist that their own coconspirators were overly generous in their treatment of the Plan.[4])

Plaintiffs' complaint focuses a harsh light on the Diocesan Defendants. Of course, Plaintiffs are not merely permitted but, indeed, are required to state their fraud claims against the Diocesan Defendants with particularity. Moreover, Plaintiffs are not required to elect facts, theories, or remedies prior to final judgment.[5] If and when

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[3] ECF ## 243-9 through 243-15 (Declarations of Gail J. Major, Nancy Zompa, Ralph Bryden, Dorothy Willner, Caroll Short, Donna Boutelle, and Eugenia Levesque) at 1 (attesting that they were "never informed that: a. SJHSRI for years had failed to make recommended minimum contributions to the Plan; b. the Plan was underfunded; or c. that the purpose and effect of the sale of Our Lady of Fatima Hospital to Prospect in 2014 was to protect SJHSRI's operating assets from its liabilities to the Plan and Plan participants.").

[4] See ECF # 251 (Diocesan Defendants' Response to Plaintiffs' Statement of Undisputed and Disputed Material Facts) at 21 ("Prospect contributed $14 million to the Plan as part of the 2014 Asset Sale. This was outsized contribution based upon the valuation of SJHSRI (not even counting Plan related debt).") (record citation omitted); id. at 35 ("$14 million was, if anything, an outsized contribution, especially when SJHSRI only accounted for 43.7% of the 2013 combined revenue of RWH and SJHSRI.").

[5] See Colstrip Energy Ltd. P'ship v. Thomason Mech. Corp., No. CV-03-150-BLG-RFC, 2006 WL 6843711, at *2 (D. Mont. Oct. 30, 2006) ("It is a well-settled rule that where a particular set of facts gives rise to alternative causes of action, they may be brought together and where several remedies are requested, an election is not required prior to final judgment."); Indus. Hard Chrome. Ltd. v. Hetran, Inc., 64 F. Supp. 2d 741, 747 (N.D. Ill. 1999) ("The Federal Rules of Civil Procedure allow for a flexible system of pleading, allowing plaintiffs to assert more than one position. . . . Although plaintiffs cannot obtain double recovery, the court does not need to force plaintiffs to elect one remedy over the other."); Breeding v. Massey, 378 F.2d 171, 178 (8th Cir. 1967) ("The right of a plaintiff to try his case on alternate theories has uniformly been upheld in the federal courts and plaintiff cannot be required to elect upon which theory to proceed."); Silva v. Metro. Life Ins. Co., 762 F.3d 711, 726 (8th Cir. 2014) (rejecting defendant's argument that, because ERISA plaintiff could not obtain double recoveries, he "must choose between § 1132(a)(1)(B) or § 1132(a)(3) at the pleading stage"); Donaldson v. Pharmacia Pension Plan, 435 F. Supp. 2d 853, 869 n.5 (S.D. Ill. 2006) ("'Although plaintiffs may not obtain a duplicative recovery, there is no requirement that they elect one remedy over another prior to final judgment.' Plaintiffs are entitled to assert claims under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), and ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), in the same complaint, and are not required to elect a remedy before entry of final judgment.") (citations omitted).

Plaintiffs' claims are proven, it will have been established that the Diocesan Defendants were instrumental in intentionally cheating over 2,700 plan participants out of their hard-earned retirement security.

Finally, the Diocesan Defendants' reference to the travel of this case as a "bizarre and troubling path"[6] also requires preliminary comment. Rather than following the normal route of open discovery after the Defendants' motions to dismiss were denied, the Diocesan Defendants as well as the other Defendants (and over Plaintiffs' opposition) successfully urged the Court to order that the parties submit summary judgment motions concerning the applicability of ERISA to the Plan, with discovery limited to the issues raised by those motions and any opposition thereto. In fact, the approach ordered by the Court was remarkably successful. Thus far, the litigation has resulted in settlements by all of the other Defendants and payments approaching $50,000,000.

What is bizarre and troubling is that, notwithstanding the Diocesan Defendants' advocacy for that approach, during the first round of summary judgment motions the Diocesan Defendants expressly made clear that they had no position on the issue of whether and when ERISA became applicable to the Plan, made no meaningful effort to settle the case, and then initiated another round of summary judgment motions in which the Diocesan Defendants urge the Court to adopt the very conclusion on which they claimed to have no position during the earlier round. Indeed, it appears that by filing their motion for summary judgment now, outside of the procedure to which the parties and the Court agreed in connection with the prior round of summary judgment motions, the Diocesan Defendants are seeking to preclude Plaintiffs from obtaining the discovery

[6] ECF # 254 (Diocesan Defendants' Opp. Memo.) at 3.

to which Plaintiffs would have been entitled if the Diocesan Defendants' current motion had been filed during the prior round of summary judgment motions.

B. Plaintiffs' motion is conditional

Plaintiffs filed their opposition (ECF # 245) to the Diocesan Defendants' motion for summary judgment at the same time as they filed their Rule 56(d) motion for discovery (ECF # 246 & 246-1). Plaintiffs contend that through such opposition they have already properly raised genuine disputes of material fact such that the Diocesan Defendants' motion can and should be denied on the merits without further discovery, both (1) on the grounds that the Diocesan Defendants are judicially estopped from asserting their current position that the Plan did not meet the factual requirements for the church plan exemption,[7] and (2) on the ultimate issue of whether the Plain was administered or funded by a principal purpose organization.[8] On the latter issue, the affidavit testimony of Richard Land (ECF # 243-89), even standing alone, presents insuperable[9] disputed issues of material fact, especially as to whether any noncompliance with ERISA's church plan exemption was retroactively cured.[10]

The Diocesan Defendants recognize that the disputed issues of fact are voluminous. In response to Plaintiff's forty-seven (47) pages of genuine disputes of

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[7] ECF # 245 at 74–96.

[8] ECF # 245 at 61–73.

[9] The Diocesan Defendants' bootless recriminations that the affidavit is a "sham" underscore this point. See ECF # 252, *passim*.

[10] Under ERISA's cure provision, 29 U.S.C. §1002(33)(D), compliance with the church plan exemption at any point between June 20, 2014 and October 20, 2017 retroactively cured any of the alleged noncompliance to which the Diocesan Defendants point in their motion. See ECF # 245 (Plaintiffs' Memorandum of Law in Opposition to the Diocesan Defendants' Motion for Summary Judgment) at 61–73.

material fact (ECF # 243), the Diocesan Defendants have filed not one but two[11] responses of their own totaling one hundred thirty (130) pages of disputes upon disputes (ECF # 251 and 252).[12]

If the Diocesan Defendants' Motion for Summary Judgment is denied on the merits (either because of all the disputed issues of material fact or because of the Diocesan Defendants' misapplication of the law to those facts), then Plaintiffs' Fed. R. Civ. P. 56(d) motion may be denied as moot.[13] In other words, if the Court agrees with Plaintiffs that the Diocesan Defendants have not demonstrated that they are entitled to judgment as a matter of law, the Court need not even consider Plaintiffs Rule 56(d) motion.

The alternative of addressing Plaintiffs' Rule 56(d) motion first and delaying any consideration of the merits until after Plaintiffs have conducted further discovery would have the disadvantage of further delaying these proceedings with another round of limited discovery if, as Plaintiffs contend, Plaintiffs have already properly raised genuine disputes as to material facts such that the Diocesan Defendants' motion can and should be denied on the merits without further discovery. As discussed herein and in Plaintiff's motion, because of the fact-intensive nature of the doctrine of judicial estoppel, discovery relevant to judicial estoppel is largely coextensive with general discovery.

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[11] The Diocesan Defendants have improperly and artificially balkanized Plaintiff's Statement of Undisputed and Disputed Material Facts (ECF # 243) into one set of facts concerning the principal purpose organization issue and another set of facts concerning estoppel issues, responding separately to a dichotomy of the Diocesan Defendants' own invention. Plaintiffs' disputes of fact are simultaneously material to multiple issues, on multiple grounds. See ECF # 243 at 2 ("The following facts are addressed to three issues:" [not two issues]).

[12] See, e.g., *infra* at 23 n.36 (quoting the Diocesan Defendants' disputes that various Diocesan officials acted on behalf of the Diocesan Defendants, by receiving documents, attending meetings, or otherwise).

[13] ECF # 246-1 at 2.

II. Summary of Argument

The Diocesan Defendants make two (and only two) arguments why Plaintiffs' Rule 56(d) motion should be denied. They contend (1) that Plaintiffs have failed to show good cause for their failure to have conducted discovery on the issue of judicial estoppel, because Plaintiffs allegedly should have conducted such discovery in connection with the discovery afforded under the prior round of summary judgment motions; and (2) that Plaintiffs' judicial estoppel theory fails as a matter of law because the Diocesan Defendants allege that their change in position allegedly is justified by an intervening change of controlling law, represented by the Supreme Court's decision in Advocate Health Care Network v. Stapleton, 137 S. Ct. 1652 (2017).

The first argument fails for three separate but related reasons:

- Plaintiffs' prior motion for summary judgment was never decided and, indeed, was withdrawn, such that the case should proceed as if Plaintiffs' motion for summary judgment had never been filed;
- The Diocesan Defendants expressly refused to take any position in connection with the prior round of summary judgment motions on the issue of whether and when the Plan became subject to ERISA, thereby making the doctrine of judicial estoppel completely inapplicable at that time, and leaving Plaintiffs with no right or reason to conduct discovery on the fact-intensive issues involved in judicial estoppel; and
- The procedure agreed to in connection with the prior round of summary judgment motions actually supports Plaintiffs' right to conduct discovery now, since through that procedure the parties and the Court agreed that the parties would be afforded discovery on any issues actually raised by any summary judgment motion or any opposition thereto.

In short, the Diocesan Defendants cannot be permitted to evade discovery on the facts relevant to judicial estoppel by sitting on the sidelines during the first round of summary judgment motions (when such discovery would have been expressly allowed if the Diocesan Defendants had taken the position they now assert) and then initiating a

second round of summary judgment motions which raises the issue of judicial estoppel for the first time.

The Diocesan Defendants' second argument, *viz.*, the claim that their change in position was based upon an intervening change in controlling law, fails for three related reasons.

First, the Diocesan Defendants do not even contend, much less provide any evidence to prove, that their original position that the Plan qualified as a church plan was affected by the change in the law to which they now refer. They do not even explain why in fact they originally believed the Plan qualified as a church plan. There is no such statement even by counsel in their memorandum, no factual declaration under penalties of perjury, and they identify no evidence in the record that would tend to prove the legal basis for their original conclusion that the Plan qualified as a church plan. Without that information it is impossible to say whether or not their conclusion that the Plan qualified as a church plan was affected by an intervening change in the law. Instead, all the Diocesan Defendants do is offer reasons why their conclusion that the Plan qualified as a church plan *reasonably could* have been premised on law that later changed for the conclusion that the Plan qualified as a church plan. They do not even allege that they *did* base their claim on law that was later changed.

The claim that the Supreme Court's decision in Advocate Health Care Network v. Stapleton represents an intervening change in controlling law involves questions of fact concerning intent, causation, and reliance (by the Diocesan Defendants). The Diocesan Defendants admit that they must prove that their "shift in positions **results** from an intervening change in law." ECF # 253 at 43 (emphasis supplied). In other words, the Diocesan Defendants must offer supporting evidence to prove that, in fact, the Diocesan Defendants based their original position on the legal issue changed by the Supreme Court's decision in Advocate Health Care Network v. Stapleton, and shifted their

position based upon that change of law. However, the Diocesan Defendants make no such contention and offer absolutely no supporting evidence.

Second, the only evidence in the record on this issue of the Diocesan Defendants' reliance is that they did *not* rely upon the legal issue changed by the Supreme Court's decision in Advocate Health Care Network v. Stapleton. In other words, the only relevant evidence in the record tends to prove that the legal issue on which the Diocesan Defendants successfully based their original position that the Plan qualified as a church plan was *not* changed by the Supreme Court in Advocate Health Care Network v. Stapleton or by any other court. To the contrary, the relevant facts and the law on which the Diocesan Defendants actually originally relied are unchanged. All that has changed is the Diocesan Defendants' conclusion with respect to those facts and law. Originally, they contended that these facts and the law supported the conclusion they successfully asserted that the Plan qualified as a church plan, and now they now ask the Court to conclude that these facts and law are insufficient. That is the "classic case" for judicial estoppel to apply.[14]

Third, at the very least, the defense of an alleged intervening change in controlling law cannot be accepted without Plaintiffs having had the opportunity to conduct discovery on the reasons why the Diocesan Defendants originally claimed that the Plan qualified as a church plan and why they shifted their position.

[14] A "classic case" for the application of judicial estoppel is when "a litigant asserts inconsistent statements of fact or adopts inconsistent positions on combined questions of fact and law." Patriot Cinemas, Inc. v. General Cinemas Corp., 834 F.2d 208, 214 (1st Cir. 1987).

III. Facts relevant to the Diocesan Defendants' opposition to Plaintiffs Rule 56(d) motion

As noted, the Diocesan Defendants' opposition to Plaintiffs' Rule 56(d) motion is based on solely two grounds: the Diocesan Defendants allege that 1) Plaintiffs have failed to show good cause for not having already conducted discovery concerning the fact issues involved in judicial estoppel, and 2) the Diocesan Defendants' change of position is allegedly the result of an intervening change in controlling law. However, they fail to address all of the relevant facts concerning these two grounds.

A. Concerning the prior round of summary judgment motions

In their opposition, the Diocesan Defendants argue that the discovery afforded to Plaintiffs in connection with the prior round of summary judgment motions shows that Plaintiffs failed to show good cause for not already conducting discovery concerning judicial estoppel. However, the Diocesan Defendants ignore several key facts concerning that prior round.

First, although the Diocesan Defendants heavily rely upon the summary judgment motion filed by the Plaintiffs, the Diocesan Defendants fail to even acknowledge that it was expressly linked to Plaintiffs' substantive claims against only the Prospect Defendants.[15] Second, the Diocesan Defendants fail to note that the motion was never decided. Third, the Diocesan Defendants fail to address the fact that

[15] Plaintiffs' summary judgment motion noted the effect the ruling Plaintiffs were seeking would have on Plaintiffs' claims against the Prospect Defendants under the federal common law of successor liability. The declaratory relief sought by Plaintiffs did not address the merits of any of Plaintiffs' claims against the Diocesan Defendants.

the Court granted Plaintiffs' motion to withdraw their prior summary judgment and that the motion was in fact withdrawn.[16]

Fourth, the Diocesan Defendants fail to acknowledge much less address Plaintiffs' claim that the procedure ordered by the Court as followed by the parties concerning that prior round of summary judgment motions did not allow for discovery on judicial estoppel, because the Diocesan Defendants' then-refusal to take their current position meant that judicial estoppel was inapplicable by definition. Judicial estoppel requires both an original position and a changed position that the party to be estopped is asking the Court to adopt.[17] The Diocesan Defendants asserted no position that they were asking the Court to adopt.

The Stipulations and Orders that established and regulated that procedure provided that:

- First, Plaintiffs would produce to the Defendants the documents that Plaintiff Receiver had obtained by subpoena and court orders in the receivership proceeding;
- then Plaintiffs would file their motion for summary judgment;
- which would be followed by a short period of discovery limited to the issues raised by Plaintiffs' motion; and
- then the Defendants were directed to file their opposition and their own cross-motions for summary judgment;
- which would be followed by another short period of discovery "limited to the issues raised by those cross-motions in addition to the principal purpose issue";

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

[17] See Sexual Minorities Uganda v. Lively, 899 F.3d 24, 32 (1st Cir. 2018) ("It is settled that a party may be judicially estopped when its current position is plainly inconsistent with its earlier position, such that the two positions are mutually exclusive.") (citations omitted).

- concluding with the submission of reply memoranda.[18]

In other words, Plaintiffs would be allowed to conduct discovery concerning either the positions espoused by opposing parties in cross-motions or any arguments asserted in opposition to Plaintiffs' motion for summary judgment concerning the principal purpose issue.

At no time when discovery was open did the Diocesan Defendants contend that the Plan either had or had not qualified as a church plan. To the contrary, the Diocesan Defendants repeatedly informed the Court and the parties, before, during, and even after such discovery, that they took no position on the issue of whether the Plan had been exempt from ERISA.

Prior to any discovery, in a filing with the Court on December 21, 2018, the Diocesan Defendants stated that they took no position on the issue:

> The Diocesan Defendants take no position at this time as to whether the Plan lost church plan status prior to its placement in receivership.

ECF # 73 at 4 n.4.

During a hearing on September 10, 2019, the Court specifically inquired about the Diocesan Defendants' position on the issue, and their counsel stated that they had no position on the issue (which would likely require an evidentiary hearing to decide):

> **THE COURT: What's your position as to whether this is a church plan or an ERISA plan?**

[18] ECF # 170 (Stipulation and Proposed Order Concerning Limited Discovery and Related Summary Judgment Motions) ¶ 1(f-g); "TEXT ORDER entering [170] Stipulation and Proposed Order Concerning Limited Discovery and Related Summary Judgment Motion…So Ordered by Chief Judge William E. Smith on 10/29/2019"; ECF # 175 (Stipulation and Proposed Order Concerning Limited Discovery and Related Summary Judgment Motions) ¶¶ 2-5; "TEXT ORDER Entering [175] Stipulation and Schedule for Limited Discovery and Briefing Schedule on Related Summary Judgment Motions. So Ordered by District Judge William E. Smith on 1/13/2020."

> MR. KESSIMIAN: Your Honor, we think that is an evidentiary question that, if the Court were to try to adjudicate, **would likely require discovery and an evidentiary hearing**.
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> **THE COURT: You mean, you represent the Diocese.**
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> MR. KESSIMIAN: Yes.
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> **THE COURT: You don't have a position on it?**
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> MR. KESSIMIAN: **No.** We didn't run the Plan. We had -- I think if you look at our motion to dismiss papers, we lay out that there was a connection between the Diocese and St. Joe's, but whether or not St. Joe's was administering a church plan requires more than that and things for which we don't have control.
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> THE COURT: Okay. All right. Thank you.
>
> [Emphasis supplied]

ECF # 158 (September 10, 2019 morning hearing transcript) at 63.[19]

On June 26, 2020, the Diocesan Defendants responded to Plaintiffs' motion for partial summary judgment (since withdrawn) and stated that they took no position on the issue:

> First, the **Diocesan Defendants state that they take no position** concerning the only question posed in Plaintiffs' pending Motion: Whether the St. Joseph Health Services of Rhode Island Retirement Plan ("the Plan") became subject to ERISA by April 29, 2013 because of an alleged failure to meet any principal purpose organization requirement.
>
> [Emphasis supplied]

ECF # 189 at 1.

On November 20, 2020, after the close of discovery, the Diocesan Defendants filed a response to Prospect's statement of facts and took no position on the issue:

[19] A copy of this transcript is also filed herewith as Exhibit 1.

> PROSPECT'S STATEMENT NO. 7:
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> At all relevant times, the Plan was consistently treated by SJHSRI, and by its trustees, officers and employees, as a non-electing church plan exempt from the provisions of ERISA. (Plaintiffs' Exhibit 1; Petition for the Appointment of a Receiver, Para. 6; Raucci Decl. at para. 4; Declaration of Kenneth H. Belcher dated June 26, 2020 ("Belcher Decl.") at para 4.)
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> DIOCESAN DEFENDANTS' RESPONSE NO. 7:
>
> **Undisputed that the Most Reverend Bishop and, at relevant times, RCB understood that the Plan was intended to be treated as a non-electing church plan exempt from the provisions of ERISA. The Diocesan Defendants take no position as to whether the Plan was "consistently treated" as such after the adoption of the 2011 Plan.**
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> [Emphasis supplied]

ECF # 199 at 8.

Also on November 20, 2020, the Diocesan Defendants filed a memorandum (ECF # 200) entitled *Diocesan Defendants' Response to Prospect's Cross-Motion for Summary Judgment*. In it, the Diocesan Defendants reiterated that they took no position on the issue:

> **The Diocesan Defendants take no position on whether St. Joseph Health Services of Rhode Island**, Inc. ("SJHSRI") **satisfied the principal purpose organization requirement under ERISA for Church Plans after 2010**. **They also take no position** on how the Court should resolve the dispute between Plaintiffs and Prospect **as to whether SJHSRI failed to meet the requirements for qualification of a Church Plan on or before April 29, 2013** . . . .
>
> [Emphasis supplied]

ECF # 200 at 3.

Discovery pursuant to the stipulations and orders closed on October 1, 2020.[20] However, it was not until eleven months later, on August 31, 2021, that the Diocesan Defendants claimed for the first time that they had a position on the issue of whether the Plan had been subject to ERISA, and asked the Court to enter judgment in support of that position.[21] It was that event that triggered the possible application of judicial estoppel.

B. Concerning the reasons why the Diocesan Defendants changed their position

In their opposition memorandum (ECF # 254) the Diocesan Defendants do not even attempt to explain how the Supreme Court's decision in Advocate Health Care Network v. Stapleton represents an intervening change in the law. Thus, their contention is merely a bald assertion, an *ipse dixit*, without any explanation or factual support whatsoever. However, in their reply memorandum (ECF # 253 at 43–51) in support of their motion for summary judgment, the Diocesan Defendants identify what they claim represented the change in controlling law. Accordingly, we address the relevant facts here (and discuss the legal arguments *infra* at 27-45) given the possibility that the Court may give the Diocesan Defendants the benefit of considering their argument.

The law is discussed in detail *infra* at 27-45, but the legal argument can be summarized to set the stage for identifying the facts that are relevant for judicial estoppel. The Diocesan Defendants point to the law that was espoused by several courts (and rejected by several others) prior to the Supreme Court's decision in

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[20] See ECF #195 (Fifth Stipulation and Order Concerning Limited Discovery and Related Summary Judgment Motions) ¶¶ 2 & 3.

[21] ECF # 221 (Diocesan Defendants' Notice of Assent to Relief requested in Plaintiffs' Motion for Summary judgment) filed August 31, 2021.

Advocate Health Care Network v. Stapleton in 2017, in which those several courts held that a retirement plan could meet the requirements for the "church plan" exemption either of two alternative ways, 1) if the plan was administered by a principal purpose organization, or 2) if the plan was administered by the church-affiliated sponsor itself.[22] The Diocesan Defendants point out that the second alternative was no longer viable after the Supreme Court's decision in Advocate Health Care Network v. Stapleton in 2017, and they argue that this justifies their current change in position.[23]

However, the Diocesan Defendants do not even assert in their memorandum, much less identify any evidentiary support in the record for the conclusion, that in fact their original position (in the 2013–2014 administrative proceedings) that the Plan qualified as a church plan was based upon the second alternative, *viz.*, that the plan was administered by the church-affiliated sponsor itself, and was not based upon the first alternative, that the Plan was administered by a principal purpose organization.

Indeed, such evidence as exists in the record is directly to the contrary, and shows that at all relevant times, the Diocesan Defendants, together with the Prospect Defendants and St. Joseph Health Services of Rhode Island ("SJHSRI"), based their contention that the Plan qualified as a "church plan" on the ground that the Plan was administered by a principal purpose organization, and not on the alternative basis for the church plan exemption that was allowed by some courts but was eventually rejected by the Supreme Court in Advocate Health Care Network v. Stapleton.

Much of the evidence proving those facts is contained in the Diocesan Defendants' own submissions in support of their motion for summary judgment,

[22] Diocesan Defendants' Opp. Memo. at 46–47.

[23] Diocesan Defendants' Opp. Memo. at 48–50.

especially the Diocesan Defendants' Statement of Undisputed Material Facts ("DDSUMF") (ECF # 237).

The Diocesan Defendants note therein that the need for a principal purpose organization was referred to in the minutes of a meeting on October 31, 2008 of SJHSRI's Finance Committee/Strategic Planning Committee of SJHSRI's Board of Trustees, in which it is noted that "[a]fter review with the Hospital's outside counsel, as long as the Bishop controls the Pension Board, the Church Plan status would remain intact." DDSUMF ¶ 13 (attaching minutes as Exhibit 7 (ECF # 237-7)). The Diocesan Defendants also note therein that the full legal explanation of the requirement of a "principal purpose organization" to ensure church plan status was provided to SJHSRI's Chief Executive officer on November 12, 2008. DDSUMF ¶¶ 14-18 (attaching opinion letter of John Reid as Exhibit 8 (ECF # 237-8)).

The following paragraphs from the Diocesan Defendants' Statement of Undisputed Material Facts are quoted verbatim because they establish that SJHSRI pinned its hopes for the church plan exemption on satisfying the requirement for a "principal purpose organization":

> 15. In the letter Attorney Reid stated that "Section 414(e)(3)(A) of the [Internal Revenue] Code [26 U.S.C. § 414(e)(3)(A)] and ERISA Section 3(33)(C)(i) [29 U.S.C. § 1002(33)(C)(i)] includes in the definition of church plan a plan maintained by an organization, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church, if such organization is controlled by or associated with a church." See Exhibit 8 at 2; see also Pls.' SOF ¶ 21.
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> [DDSUMF ¶ 15]
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> 16. In his letter, Attorney Reid noted that "Section 414(e)(3)(B)(ii) of the [Internal Revenue] Code defines 'employees of a church' to include an

> employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under Section 501 and which is controlled by or associated with a church or a convention or association of churches." See Exhibit 8 at 2; see also Pls.' SOF ¶ 22.
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> [DDSUMF ¶ 16]
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> 17. In his letter, Attorney Reid noted that the Plan was "administered by a Retirement Board appointed by the Bishop," referring to "the Catholic Bishop of Rhode Island." See Exhibit 8 at 2. He also noted that "[t]he Retirement Board is an organization controlled by a church by virtue of the fact that its members include the Bishop and at least nine other members appointed by the Bishop to serve at his pleasure. **The Retirement Board has no other function than the administration of the Plan.**" See Exhibit 8 at 3 (emphasis supplied); see also Pls.' SOF ¶ 23.
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> [DDSUMF ¶ 17 (emphasis by Diocesan Defendants)]
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> 18. Attorney Reid's opinion was that, among the requirements necessary "[i]n order to maintain the status of the Plan as a church plan in accordance with the Code, ERISA and the interpretations of the IRS and DOL", was that "**the Retirement Board must continue to be appointed by the Bishop or by another representative of the Roman Catholic Church and must continue to administer the Plan...**" See Exhibit 8 at 3-4 (emphasis supplied); see also Pls.' SOF ¶ 24.
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> [DDSUMF ¶ 18 (emphasis by Diocesan Defendants)].

ECF # 237 at 4–5. All of these facts evidence that it was SJHSRI's position that compliance with the requirements for a principal purpose organization was required for the Plan to qualify for the church plan exemption.

The Diocesan Defendants cannot separate their state of mind from SJHSRI's understanding concerning this issue, and certainly not on this summary judgment record. It is undisputed that the Bishop controlled SJHSRI at the time it obtained Attorney Reid's opinion, and thereafter until the reorganization of SJHSRI,

CharterCARE Health Partners, and Roger Williams Hospital effective January 4, 2010.[24] It is also undisputed that, until then, the Bishop served as Chairman and appointed all members of both SJHSRI's Board of Trustees and the Plan's Retirement Board.[25]

However, the amendment of the Plan in 2011 identified SJHSRI as the Plan administrator and did not provide for a retirement board.[26] The Bishop's direct cooperation with SJHSRI in attempting to qualify the Plan as a "church plan" after 2011 is evidenced in the resolution that SJHSRI allegedly[27] prepared and the Bishop signed as of April 29, 2013 (the "Bishop's Resolution") which stated in pertinent part as follows:

> RESOLVED: That the adoption of the Amendment to the St. Joseph Health Services of Rhode Island Retirement Plan ("Plan"), effective September 30, 2011, a copy of which is attached, as adopted by the Board of Trustees of St. Joseph Health Services of Rhode Island on July 21, 2011, be ratified and confirmed.
>
> RESOLVED: That the adoption of the amendment and restatement of the Plan, effective as of July 1, 2011, a copy of which is attached, as adopted by the Board of Trustees of St. Joseph Health Services of Rhode Island on July 21, 2011, be ratified and confirmed.
>
> RESOLVED: That the Board of Trustees of St. Joseph Health Services of Rhode Island is the Retirement Board with respect to the Plan and acts on behalf of St. Joseph Health Services of Rhode Island as the Plan Administrator of the Plan.
>
> RESOLVED: That the Board of Trustees of St. Joseph Health Services of Rhode Island has the authority, pursuant to the terms of the

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[24] See the organizational chart attached hereto as Exhibit 2, which SJHSRI submitted to the Rhode Island Attorney General and Department of Health in support of the application for regulatory approval for this reorganization in 2009. See also the cover sheet to such application attached hereto as Exhibit 3, certifying that the Diocese reviewed the application prior to submission.

[25] ECF # 243 (Plaintiffs' LR Cv 56(a)(4) Statement) ¶ 41; Diocesan Defendants' Response to Plaintiffs' Statement of Undisputed and Disputed Facts Concerning Judicial Estoppel (ECF # 251) ¶ 41.

[26] ECF # 237 (DDSUMF) ¶¶ 21-30.

[27] However, there has been no discovery into how this resolution came about.

> Plan, to appoint a committee to act on its behalf with respect to administrative matters related to the Plan.
>
> RESOLVED: That the Board of Trustees of St. Joseph Health Services of Rhode Island has appointed the Finance Committee of CharterCARE Health Partners to act on its behalf with respect to administrative matters related to the Plan.
>
> RESOLVED: That the Plan is intended to qualify under Section 401(a) of the Internal Revenue Code of 1986, as amended (the "Code") as a non-electing church plan within the meaning of Section 414(e) of the Code and Section 3(33) of the Employee Retirement Income Security Act of 1974, as amended.[28]

There has been no discovery into how this resolution (which is central to the Diocesan Defendants' pending motion for summary judgment) came about. The Diocesan Defendants, for the first time in their reply papers, offer vague and self-serving hints. For example, they allege that SJHSRI's Director of Personnel, Darleen Souza, drafted the Bishop's Resolution, and they speculate as to why:

> Ms. Souza, **presumably** with the advice of counsel, prepared the April 29, 2013 Resolution to try to square how the Plan had been administered since 2011 with the terms of the Plan. There is no documentation indicating that Ms. Souza sought or obtained the action from the SJHSRI Board of Trustees described in the April 29, 2013 Resolution.

ECF # 251 (Diocesan Defendants' Response to Plaintiffs' Statement of Undisputed and Disputed Material Facts) at 62–63 (emphasis supplied and citations to correspondence, from which the Diocesan Defendants improperly draw inferences in their own favor, omitted).

The accuracy of that "explanation" is ultimately a question of fact which cannot be addressed on the current record, but it should be noted that the Plan from 2011

[28] ECF # 243 (Plaintiffs' LR Cv 56(a)(4) Statement) ¶ 116.

onwards did not provide for a "Retirement Board," such that (contrary to the Diocesan Defendants' current speculation) employing the Bishop's resolution to appoint SJHSRI's Board of Trustees as the Retirement Board did *not* "square how the Plan had been administered since 2011 with the terms of the Plan." On the other hand, as the Diocesan Defendants themselves note in their statement of facts, SJHSRI had previously received the advice of counsel that plan administration by a "retirement board" was essential to preserving the church plan exemption based upon the Plan being administered by a principal purpose organization. In addition, the 2013–2014 Hospital Conversion Act application (which the Attorney General in his approval ordered[29] be implemented as filed) described a post-conversion organizational structure with the "SJHSRI Church Plan" under the authority of a "Retirement Board" under the authority of the "Bishop of the Diocese of Providence".[30]

Thus, it is much more likely that the Bishop's Resolution is an attempt to characterize the way the Plan was administered after 2011 in terms more consistent with the requirements for a "principal purpose organization". As such, it is more evidence that the Diocesan Defendants based their conclusion that the Plan qualified as a church plan on the contention that the Plan was administered by a principal purpose organization, and not the alternative basis for the church plan exemption which was no longer viable after the Supreme Court's decision in Advocate Health Care Network v.

[29] See ECF # 243-82 (Rhode Island Attorney General's Decision of May 16, 2014) at 52 ([Condition 9:] "That the transaction be implemented as outlined in the Initial Application, including all Exhibits and Supplemental Responses").

[30] See ECF # 226-10 (excerpt of Hospital Conversion application); ECF # 226-11 (Post-Conversion Organizational Structure chart, provided as an exhibit to the Hospital Conversion application)

Stapleton. Plaintiffs are entitled to conduct discovery to establish that was the Diocesan Defendants' actual intent, in support of their claim of judicial estoppel and to refute the Diocesan Defendants' present (but completely unsupported) claim that their change of positions is based upon an intervening change in controlling law by the Supreme Court in Advocate Health Care Network v. Stapleton.

It is also undisputed that SJHSRI submitted the Asset Purchase Agreement ("APA") in draft to the Diocesan Defendants for their review and approval several times before the APA was signed. Each draft and the final version of the APA contained an express warranty that the Plan was a "church plan" because it was administered by a principal purpose organization, which the Diocesan Defendants now seek to disprove. For obvious reasons, the APA was among the Exhibits (i.e. Exhibit 18[31]) to the HCA Application and therefore was among the transactional documents that the Attorney General ordered be implemented as a condition to granting regulatory approval to the HCA Application.[32]

On August 8, 2013, SJHSRI's counsel provided the Diocesan Defendants (by email to the Chancellor of the Diocese of Providence) with the then-current draft of the APA.[33] That draft contained the following statement as part of the "Warranties of Sellers":

> Schedule 4.17(i) lists each Seller Plan that is a "church plan" within the meaning of Code Section 414(e) (a "Church Plan"), and, if later than the date on which the Seller Plan was established, the date on which such

[31] See ECF # 243-82 (Rhode Island Attorney General's Decision of May 16, 2014) *passim* (referring at least fifteen times to the Asset Purchase Agreement as Exhibit 18 to the HCA Application).

[32] See *supra* at 20 n.29.

[33] ECF # 243 (Plaintiffs' LR Cv 56(a)(4) Statement) ¶ 81.

> Seller Plan first became a Church Plan. **Each Church Plan has at all times been administered by an organization described in Section 414(e)(3)(A) of the Code** and Seller has not made, with respect to any Seller Plan listed on Schedule […], an election pursuant to Section 410(d) of the Code.[34]

This provision is key to applicability of judicial estoppel, both as the provision was set forth in the first draft to the Diocesan Defendants and in the form it took in subsequent drafts and the final version of the APA, since the Plan was listed as a "Church Plan" in the APA and schedules to the APA,[35] and the meaning of the reference to "an organization described in Section 414(e)(3)(A) of the Code" is clear. That is the definition of a "church plan":

> **(3) Definitions and other provisions**
>
> For purposes of this subsection—
>
> (A)Treatment as church plan
>
> A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.

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

In short, "an organization described in Section 414(e)(3)(A) of the Code," as required and warranted in the APA, is "an organization, whether a civil law corporation

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[34] ECF # 243 (Plaintiffs' LR Cv 56(a)(4) Statement) ¶ 81 (emphasis supplied).

[35] ECF # 243 (Plaintiffs' LR Cv 56(a)(4) Statement) ¶¶ 101, 102.

or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches…."

On September 11, 2013, SJHSRI through its counsel again provided the Diocesan Defendants (by email to the Chancellor of the Diocese of Providence[36]) with a draft of the APA for their review and approval.[37] That draft had the same language quoted previously from the version that the Diocesan Defendants had received on August 8, 2013, which stated that:

> Schedule 4. l 7(i) lists each Seller Plan that is a "church plan" within the meaning of Code Section 414(e) (a "Church Plan"), and, if later than the date on which the Seller Plan was established, the date on which such Seller Plan first became a Church Plan. **Each Church Plan has at all times been administered by an organization described in Section 414(e)(3)(A) of the Code** and Seller has not made, with respect to any Seller Plan listed on Schedule […], an election pursuant to Section 410(d) of the Code.[38]

[36] In their responses to Plaintiffs' statement of disputed and undisputed material facts, the Diocesan Defendants dispute that the Chancellor (as well as various other Diocesan officials including the Bishop himself) acted at various times in any particular capacity *on behalf of the Diocesan Defendants*. See, e.g., ECF # 251 at 31 ("Disputed that the Chancellor received the [APA] document on behalf of the Diocesan Defendants or in any capacity other than in his canonical/ecclesiastical role as Chancellor of the Diocese of Providence."); id. at 33 ("Disputed that the Most Reverend Bishop, Chancellor Reilly, or Msgr. Theroux attended the August 14, 2013 meeting [where the draft APA was discussed] on behalf of any of the Diocesan Defendants."); id. at 45 ("Disputed that Chancellor Reilly received the red-lined revisions [of the Bishop's letter] on behalf of the Diocesan Defendants for the same reasons he did not receive drafts of the APA or the slide presentation on behalf of those entities.") These factual disputes concerning agency capacity are among the voluminous disputed issues of material fact that preclude summary judgment here.

[37] ECF # 243 (Plaintiffs' LR Cv 56(a)(4) Statement) ¶ 87.

[38] ECF # 243 (Plaintiffs' LR Cv 56(a)(4) Statement) ¶ 87 (emphasis supplied).

On September 24, 2013 the APA was signed.[39] The APA included Warranties and Representations of Sellers.[40] Many of the Warranties and Representations of Sellers are qualified as being "[t]o Sellers' knowledge."[41] Certain other Warranties and Representations of Sellers were not qualified.[42] Certain of the Warranties and Representations of Sellers concerned the Plan, which the APA referred to as the "Retirement Plan."[43] The Warranties and Representations of Sellers as to the Plan were not qualified, but, rather, were categorical, such as follows:

> **The Retirement Plan is a Church Plan. The Retirement Plan has been a Church Plan since the date on which the Retirement Plan was established, and has continuously maintained such status since that date. The Retirement Plan has at all times been administered by an organization described in Section 414(e)(3)(A) of the Code** and Seller has not made, with respect to the Retirement Plan, an election pursuant to Section 410(d) of the Code.[44]

As noted, the organization described in Section 414(e)(3)(A) of the Internal Revenue Code is a "principal purpose organization," and the Diocesan Defendants now contend that this warranty is false, that the Plan was *not* "a Church Plan," and that the Plan was *not* "administered by an organization described in Section 414(e)(3)(A) of the Code."[45]

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[39] ECF # 243 (Plaintiffs' LR Cv 56(a)(4) Statement) ¶ 95.

[40] ECF # 243 (Plaintiffs' LR Cv 56(a)(4) Statement) ¶ 96.

[41] ECF # 243 (Plaintiffs' LR Cv 56(a)(4) Statement) ¶ 97.

[42] ECF # 243 (Plaintiffs' LR Cv 56(a)(4) Statement) ¶ 98.

[43] ECF # 243 (Plaintiffs' LR Cv 56(a)(4) Statement) ¶ 99.

[44] ECF # 243 (Plaintiffs' LR Cv 56(a)(4) Statement) ¶ 100 (emphasis supplied).

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

Although the Bishop was not a signatory to the APA, the APA expressly provides that the Bishop is a third party beneficiary.[46] The APA states as follows:

> 15.5 Third-Party Beneficiaries.
>
> (a) Except as provided in Section 15.5(b) below, the terms and provisions of this Agreement are intended solely for the benefit of the Prospect, the Prospect Member, the Company, the Company Subsidiaries, Sellers, Company/Prospect Indemnified Persons, Seller Indemnified Persons and their respective permitted successors or assigns, and it is not the intention of the Parties to confer, and this Agreement shall not confer, third-party beneficiary rights upon any other person.
>
> (b) Notwithstanding Section 15.5(a) above, the Parties hereby acknowledge and agree that the provisions of Section 13.16[47] hereof, including the accompanying Exhibits M and N, are for the specific benefit of the Bishop of the Roman Catholic Diocese of Providence, Rhode Island. The parties further acknowledge and agree that any breach or violation of such provisions shall cause irreparable harm as to which no adequate remedy at law exists and that the Bishop may seek specific performance and injunctive relief in addition to all other remedies in equity or at law. If, in such circumstances, the Bishop is unsuccessful in obtaining specific performance and/or injunctive relief, the Company and the Company Subsidiaries shall, if requested by the Bishop in his sole discretion, cease operating under the names "St. Joseph" or "Our Lady of Fatima" or any other name that implies Catholicity.

In addition to his approval being required by SJHSRI's by-laws, the APA expressly was conditioned upon the Bishop's approval. The Sellers' obligations under the APA were subject to the condition precedent of "Sellers shall have received the Church Approvals."[48] The APA states that the Sellers, including SJHSRI, "shall promptly apply for and use commercially reasonable efforts to obtain those

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[46] ECF # 243 (Plaintiffs' LR Cv 56(a)(4) Statement) ¶ 108.

[47] Concerning "Catholic identity and Covenants." See ECF # 243 (Plaintiffs' LR Cv 56(a)(4) Statement) ¶ 95 (APA at 66–67).

[48] ECF # 243 (Plaintiffs' LR Cv 56(a)(4) Statement) ¶ 110.

ecclesiastical approvals required from officials within the Roman Catholic Church (the 'Church') in order to consummate the Transactions, including the authorization of the Bishop of the Roman Catholic Diocese of Providence, Rhode Island, and the permission of the Holy See through the Vatican Congregation of Bishops (the 'Church Approvals.')."[49]

On October 18, 2013, CharterCARE Health Partners, Roger Williams Hospital, SJHSRI, Prospect Medical, Prospect East Advisory Services, LLC,[50] Prospect East Holdings, Inc.,[51] Prospect CharterCARE, LLC,[52] Prospect CharterCARE RWMC, LLC,[53] and Prospect CharterCARE SJHSRI, LLC[54] (collectively the "HCA Applicants") submitted to the Rhode Island Department of Health and the Rhode Island Attorney General a hospital conversion application ("HCA Application") pursuant to the Rhode Island Hospital Conversion Act for permission to convert all health care facilities owned and operated by non-profit RWH and non-profit SJHSRI, including the Fatima Hospital and Roger Williams Hospital, to a for profit joint venture, Prospect CharterCARE, in which Prospect East Holdings would initially have an 85% interest and CCHP would have the remaining 15% interest.[55]

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[49] ECF # 243 (Plaintiffs' LR Cv 56(a)(4) Statement) ¶ 109.

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

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

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

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

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

[55] ECF # 243 (Plaintiffs' LR Cv 56(a)(4) Statement) ¶ 105.

The HCA Application contained a sworn and notarized certification signed by all of the HCA Applicants, including SJHSRI, which certified that "all the information contained in this application is complete, accurate and true."[56] The information contained in the HCA Application included the APA dated as of September 24, 2013.[57] Accordingly, the HCA Applicants certified that the APA itself was "complete, accurate and true."

Thus, the evidence in the record already establishes that the claim for church plan status asserted by the Diocesan Defendants and the other defendants was always based upon the assertion that the plan was administered by a principal purpose organization. The Diocesan Defendants now ask the Court to reject that assertion.

IV. Argument

A. Plaintiffs have good cause for not conducting discovery concerning judicial estoppel during the prior round of summary judgment proceedings because it was not an issue at the time

It is indisputable that, if the Diocesan Defendants during the prior round of summary judgment proceedings had filed their same motion for summary judgment that is now pending before the Court, Plaintiffs would have been entitled to conduct discovery on the fact issues of reliance and causation raised by the Diocesan Defendants' claim that their change in position resulted from an intervening change in the controlling law, and the three factual issues that are always involved in determining

[56] ECF # 243 (Plaintiffs' LR Cv 56(a)(4) Statement) ¶ 106. On January 2, 2014, the HCA Applicants resubmitted the HCA Application, accompanied by the same certification. See ECF # 243 (Plaintiffs' LR Cv 56(a)(4) Statement) ¶ 115. The Diocesan Defendants dispute that the Attorney General relied on the information submitted by the HCA Applicants in the HCA Applications, including the assertions that the Plan was a church plan. See ECF # 251 at 54 ("To the extent Statement No. 106 is offered for the purposes of establishing that state regulators decided, accepted, or relied on the Plan's alleged status as a church plan in approving the HCA Application, disputed."). This is clearly a disputed issue of material fact precluding summary judgment.

[57] ECF # 243 (Plaintiffs' LR Cv 56(a)(4) Statement) ¶ 107.

whether a party's current assertion of a position is barred by judicial estoppel, including: 1) whether the party has now changed position; 2) whether the party prevailed on the original position (which of necessity would include discovery establishing what their original position was, since even now Plaintiffs and the Diocesan Defendants disagree on that point); and 3) whether the party would derive an unfair advantage if allowed to change position.[58] It should be noted that, in the absence of a claim of judicial estoppel, none of these issues would be relevant to whether the Plan was subject to ERISA.

It is equally indisputable that the Diocesan Defendants had the right to file their own motion and to oppose or join in the motions filed by Plaintiffs or the Prospect Defendants, but expressly chose not to file their own motion, expressly declined to join in any of the summary judgment motions filed by Plaintiffs or Prospect, and informed the Court that the Diocesan Defendants had no position on the ultimate issue of whether and when the Plan had ceased to qualify for the church plan exemption from ERISA, or any of the issues raised by Plaintiffs' or the Prospect Defendants' motions.[59]

It should be noted that even now, the Diocesan Defendants offer no explanation whatsoever for why they took no position then but are taking a position now. Did they agree with Prospect not to take any position, and, if so, why? Surely that issue can and

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[58] Diaz-Baez v. Alicea-Vasallo, 22 F.4th 11, 21 (1st Cir. 2021) ("In general, three conditions must be satisfied for the doctrine of judicial estoppel to apply: 'First, the estopping position and the estopped position must be directly inconsistent,' *Alt. Sys.*, 374 F.3d at 33, '[s]econd, the responsible party must have succeeded in persuading a court to accept its prior position,' *id.*, and '[t]hird, the party seeking to assert the inconsistent position must stand to derive an unfair advantage if the new position is accepted by the court,' *Knowlton v. Shaw*, 704 F.3d 1, 10 (1st Cir. 2013) (citation omitted).").

[59] See ECF # 189 at 1 ("First, the Diocesan Defendants state that they take no position concerning the only question posed in Plaintiffs' pending Motion: Whether the St. Joseph Health Services of Rhode Island Retirement Plan ('the Plan') became subject to ERISA by April 29, 2013 because of an alleged failure to meet any principal purpose organization requirement.") & ECF # 200 at 1 ("The Diocesan Defendants take no position on whether St. Joseph Health Services of Rhode Island, Inc. ('SJHSRI') satisfied the principal purpose organization requirement under ERISA for Church Plans after 2010. They also take no position on how the Court should resolve the dispute between Plaintiffs and Prospect as to whether SJHSRI failed to meet the requirements for qualification of a Church Plan on or before April 29, 2013 (Plaintiffs' position) or on or after December 15, 2014 (Prospect's position).").

should be the proper subject of discovery before the Court addresses the Diocesan Defendants' current assertion of a position.

The Diocesan Defendants now contend that Plaintiffs could and should have conducted discovery concerning judicial estoppel in connection with the prior round of summary judgment motions.[60] It is easy for the Diocesan Defendants to make that assertion now, when that time has passed and they are making the argument in support of denying Plaintiffs such discovery. However, if Plaintiffs had somehow (through some process of clairvoyance) anticipated that the Diocesan Defendants would later do an about-face, and had sought to conduct discovery on the issues relevant to judicial estoppel back when the Diocesan Defendants were taking no position, the Diocesan Defendants would have been entitled to oppose it on the grounds that judicial estoppel was irrelevant since there was nothing they could be estopped from asserting. A *sine qua non* for judicial estoppel to apply is that the party to be estopped is asserting a current position. The Diocesan Defendants were expressly asserting no position in the litigation and had not signaled that they would contradict their earlier assertions that the Plan qualified as a church plan.

For example, if Plaintiffs had subpoenaed Bishop Tobin (and his counsel if the Diocesan Defendants claim they relied on advice of counsel[61]) during the prior round of

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[60] ECF # 254 (Diocesan Defendants' Opp. Memo.) at 1.

[61] See Rizka v. State Farm Fire & Cas. Co., No. 13-CV-14870, 2014 WL 3123681, at *8 (E.D. Mich. July 8, 2014) ("Because State Farm has not yet taken any discovery (such as, for example, taking the deposition of Ms. Rizka's bankruptcy counsel and asking him about his conversations with Ms. Rizka concerning the extent of her real property and personal property ownership), it is not in a position to dispute—with citations to the record—Ms. Rizka's contention that any failure to disclose an ownership interest in the Woodcrest Home to the Bankruptcy Court resulted from the advice of counsel.") (denying summary judgment on judicial estoppel grounds); Gass v. Cbocs, Inc., No. 4:10-CV-0225-HLM, 2011 WL 13323675, at *3, *9 (N.D. Ga. Oct. 28, 2011) ("Defendant obtained permission to take, and took, the depositions of Attorney Kelly and Attorney Rimmer. . . . Given Plaintiff's declaration and the deposition

summary judgment motions, to obtain testimony establishing *inter alia* the Diocesan Defendants' position in 2013–2014 concerning whether the Plan qualified as a Church Plan[62] as a predicate for the application of judicial estoppel, the Diocesan Defendants would have been entitled to move to quash the subpoena on the grounds that judicial estoppel was irrelevant as a matter of law because the Diocesan Defendants had expressly taken no position on that issue in connection with the motions for summary judgment and certainly had not contradicted their prior assertion that the Plan qualified as a church plan.

The "specific facts" which "plausibly exist," but which have not yet been the specific focus of discovery, or the subject of a deposition of the knowledgeable individuals, include the following:

- the Bishop controlled SJHSRI's participation in the 2014 Asset Sale;[63]
- the Bishop and SJHSRI had a sufficient identity of interest in the 2014 Asset Sale being approved by state regulators such that the Bishop and SJHSRI should be treated as the same party for purposes of judicial estoppel;[64]
- SJHSRI and the Bishop expressly agreed that the Plan would continue as a "church plan" and that the state regulators would be so informed;[65]

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testimony of Plaintiff's bankruptcy attorneys, a genuine dispute remains as to whether Plaintiff intended to deceive the judicial system by failing to disclose this litigation in her bankruptcy schedule of assets.").

[62] As noted, the Bishop on April 23, 2013 signed a resolution which stated in pertinent part as follows:

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

[63] ECF # 243-8 (Sheehan Dec.) ¶ 16.

[64] ECF # 243-8 (Sheehan Dec.) ¶ 16.

[65] ECF # 243-8 (Sheehan Dec.) ¶ 16.

- The Bishop intended to deceive state regulators by his representation that approval of the Asset Sale would benefit the Plan participants;[66]
- Both SJHSRI and the Bishop understood that if the Plan were governed by ERISA, the decision to "orphan" the Plan with an entity (SJHSRI) stripped of its operating assets would violate ERISA;[67]
- The Bishop expressly agreed to issue the "Bishop's Resolution" to facilitate SJHSRI's warranty that the Plan was a "church plan" and that the Plan was "administered by an organization described in Section 414(e)(3)(A) of the Code;"[68]
- SJHSRI and the Bishop's representation that the plan was a "church plan" was not a "mistake" made in "good faith" as they may now contend;[69] and
- Assuming, *arguendo*, it was a "mistake" in "good faith", neither SJHSRI nor the Bishop exercised ordinary care as would be required to constitute a defense to judicial estoppel.[70]

To be clear, Plaintiffs believe that these factual assertions are already adequately supported in Plaintiffs' LR Cv 56(a)(4) Statement (ECF # 243) or have been admitted by the Diocesan Defendants in their motion for summary judgment. Plaintiffs are able to make that showing because Plaintiffs' counsel has combed through the hundreds of thousands of pages of document production obtained in the Receivership Proceeding in response to subpoenas seeking documents concerning the Plan. Plaintiffs seek focused discovery concerning these issues, including depositions, to bolster Plaintiffs' factual submissions in the event the Court were to find Plaintiffs' LR Cv 56(a)(4) Statement to be insufficient to establish these assertions at least as disputed issues of

[66] ECF # 243-8 (Sheehan Dec.) ¶ 16.

[67] ECF # 243-8 (Sheehan Dec.) ¶ 16.

[68] ECF # 243-8 (Sheehan Dec.) ¶ 16.

[69] ECF # 243-8 (Sheehan Dec.) ¶ 16.

[70] ECF # 243-8 (Sheehan Dec.) ¶ 16.

fact. Plaintiffs also strongly believe that such discovery will likely lead to the discovery of additional factual issues relevant to the applicability of judicial estoppel.[71]

"Because 'evaluating the potential significance of unknown facts in regard to unadjudicated issues is something of a metaphysical exercise.... [T]he threshold of materiality at this stage of a case is necessarily low.'" In re PHC, Inc. S'holder Litig., 762 F.3d 138, 143 (1st Cir. 2014) (quoting Resol. Tr. Corp. v. N. Bridge Assocs., Inc., 22 F.3d 1198, 1203 (1st Cir. 1994)).

Plaintiffs easily cross the threshold of materiality. Indeed, the materiality of these specific facts is obvious upon review of the section on judicial estoppel in Plaintiffs' Opp. Memo.[72] From that it is clear how each of these specific facts would be relevant to the adjudication of Plaintiffs' claim that the Diocesan Defendants are judicially estopped.

In addition, while Plaintiffs have pointed to specific facts that if elicited would justify applying judicial estoppel to the Diocesan Defendants, the Court should be mindful that application of the doctrine of judicial estoppel entails a wide-ranging inquiry into all of the facts of the case. See Alternative Sys. Concepts, Inc. v. Synopsys, Inc., 374 F.3d 23, 33 (1st Cir. 2004) ("The contours of the [judicial estoppel] doctrine are hazy, and there is no mechanical test for determining its applicability. Each case tends to turn on its own facts.") (citations omitted). That inquiry extends well beyond the limited scope of discovery that was previously allowed in this case, and to reach a decision on the merits would properly entail a discovery process akin to general discovery.

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[71] ECF # 243-8 (Sheehan Dec.) ¶ 17.

[72] See ECF # 245 (Plaintiffs' Opp. Memo) at 74–97.

The Diocesan Defendants do not dispute the merits of Plaintiffs' claim that there is a basis for concluding that additional facts supporting their claim of judicial estoppel "plausibly exist," such that Plaintiffs' Rule 56(d) motion meets the test of materiality. Indeed, the Diocesan Defendants' only argument on materiality is that "none of Plaintiffs' proffered facts are relevant to the Diocesan Defendants' summary judgment arguments that judicial estoppel is precluded as a matter of law," in that "[n]o amount of additional discovery will affect whether the Stapleton decision effected an intervening change in the law…." Diocesan Defendants' Opp. Memo. (ECF # 254) at 12. However, it does not matter whether the Stapleton decision effected a potentially intervening change in the law. The Diocesan Defendants do not even claim (and certainly have not proven) that this change in the law actually affected the basis for the Diocesan Defendants' original position that the Plan qualified for the church plan exemption or is the reason they shifted their position. Indeed, all of the evidence in the record tends to prove the contrary.

B. Plaintiffs were not on notice that the Diocesan Defendants were taking the position they now assert in their pending motion for summary judgment

The Diocesan Defendants allege that Plaintiffs have not shown good cause for their failure to take discovery on the issue of judicial estoppel, allegedly because "Plaintiffs were on notice regarding the application of judicial estoppel as to the Diocesan Defendants prior to and during the open discovery period." Diocesan Defendants' Opp. Memo. (ECF # 254) at 8. In support of that argument, they refer to the fact that on September 17, 2018, they filed a motion to dismiss which argued that certain of Plaintiffs' claims were preempted by ERISA, and repeated that argument in

the motion to dismiss they filed on December 4, 2018. Diocesan Defendants' Opp. Memo. (ECF #254) at 9.[73]

That argument should be foreclosed by the Diocesan Defendants' subsequent and express representations to Plaintiffs and the Court, in connection with the prior round of summary judgment motions, that the Diocesan Defendants had no position on whether or when the Plan was or was not subject to ERISA. The Diocesan Defendants four times informed Plaintiffs and the Court that they affirmatively took no position concerning whether and when the Plan became subject to ERISA:

> The Diocesan Defendants take no position at this time as to whether the Plan lost church plan status prior to its placement in receivership.

ECF # 73 at 4 n.4 (filed December 21, 2018).

> **THE COURT: What's your position as to whether this is a church plan or an ERISA plan?**
>
> MR. KESSIMIAN: Your Honor, we think that is an evidentiary question that, if the Court were to try to adjudicate, **would likely require discovery and an evidentiary hearing**.
>
> **THE COURT: You mean, you represent the Diocese.**
>
> MR. KESSIMIAN: Yes.
>
> **THE COURT: You don't have a position on it?**
>
> MR. KESSIMIAN: **No.** We didn't run the Plan. We had -- I think if you look at our motion to dismiss papers, we lay out that there was a connection between the Diocese and St. Joe's, but whether or not St. Joe's was

[73] However, the Diocesan Defendants' preemption arguments in their motions to dismiss and at the hearing on their motion to dismiss were not accompanied by any contention as to whether or when ERISA applied to the Plan. See ECF # 67-1 (Diocesan Defendants' memorandum in support of their original motion to dismiss the First Amended Complaint) *passim*; ECF # 222-1 (hearing transcript) *passim*; ECF # 238 (Diocesan Defendants' renewed motion to dismiss) at 6 n.1 ("Count IV is irrelevant to this motion"). As such, they are completely consistent with the Diocesan Defendants taking no position on that issue, and would apply only if and when the Court decided that the Plan was subject to ERISA.

> administering a church plan requires more than that and things for which we don't have control.
>
> THE COURT: Okay. All right. Thank you.
>
> [Emphasis supplied]

ECF # 158 (September 10, 2019 morning hearing transcript) at 63.[74]

> First, the Diocesan Defendants state that **they take no position concerning the only question posed in Plaintiffs' pending Motion**: Whether the St. Joseph Health Services of Rhode Island Retirement Plan ("the Plan") became subject to ERISA by April 29, 2013 because of an alleged failure to meet any principal purpose organization requirement.

ECF # 189 at 1 (filed June 26, 2020) (emphasis supplied).

> **The Diocesan Defendants take no position on whether St. Joseph Health Services of Rhode Island, Inc. ("SJHSRI") satisfied the principal purpose organization requirement under ERISA for Church Plans after 2010. They also take no position on how the Court should resolve the dispute between Plaintiffs and Prospect as to whether SJHSRI failed to meet the requirements for qualification of a Church Plan on or before April 29, 2013 (Plaintiffs' position) or on or after December 15, 2014 (Prospect's position).**

ECF # 200 at 1 (filed November 20, 2020) (emphasis supplied). Plaintiffs and the Court were entitled to rely on these express representations.

The Diocesan Defendants' answers to interrogatories[75] were (and remain) equally if not more misleading. During the period of limited discovery, Plaintiffs served interrogatories on the Diocesan Defendants to determine if they would be taking any position in this litigation concerning when and whether the Plan was subject to ERISA. If the Diocesan Defendants had answered these interrogatories by stating that they are

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[74] As noted *supra*, a copy of this transcript is filed herewith as Exhibit 1.

[75] ECF # 254-1.

taking the position they now assert, *viz.*, that the Plan did not qualify as a church plan, Plaintiffs would have been entitled to conduct discovery to establish that this was directly opposite to the position they and the other Defendants had previously asserted in connection with securing regulatory approval for the asset sale in 2014. Instead, they denied having any position. As the Diocesan Defendants themselves note in their opposition memorandum:

> On February 12, 2020 (i.e. during the open discovery period), the Diocesan Defendants answered instead that "they have not formed any contention at this point in the proceedings as to any organization that maintained the Plan or had as its principal purpose or function the administration or funding of the Plan, within the meaning of 29 U.S.C. § 1002(33)(C)(i) for the years referenced in this interrogatory." Ex. A (Diocesan Defs.' Feb. 26, 2020 Answers to Pls.' Interrogs.) at 3 (answer to No. 1). On June 26, 2020, the Diocesan Defendants supplemented their answer to Interrogatory No. 1 to clarify that, for the period 2011 to 2017, they "have no contention as to whether an organization maintained the Plan and had as its principal purpose or function the administration or funding of the Plan, within the meaning of 29 U.S.C. § 1002(33)(C)(i)." Ex. B (Diocesan Defs.' June 26, 2020 Supplemental Answers to Pls.' Interrogs.) at 4 (supplemental answer to No. 1).

ECF # 254 (Diocesan Defendants' Opp. Memo) at 10. It should be noted that the Diocesan Defendants have not amended these answers to interrogatories even now, such that the sworn interrogatory answers remain in effect and stand in direct contradiction to the position the Diocesan Defendants now assert in their motion for summary judgment, precluding summary judgment.

These statements in the Diocesan Defendants' memoranda in connection with the prior round of summary judgment motions and sworn answers to interrogatories answered during the period of limited discovery surely entitled Plaintiffs to conclude throughout the period of limited discovery that the Diocesan Defendants had no

position, notwithstanding their prior references to ERISA preemption in their 2018 motions to dismiss. Moreover, as previously noted, the Diocesan Defendants' preemption arguments in their motions to dismiss and at the hearing on their motion to dismiss were not accompanied by any contention as to whether or when ERISA applied to the Plan.[76] As such, they were completely consistent with the Diocesan Defendants' taking no position on that issue.

The Diocesan Defendants now claim that their statements and sworn answers that they were taking no position were statements of a current position:

> In other words, the Diocesan Defendants twice communicated to Plaintiffs that they were not contending that an organization maintained the Plan and had as its principal purpose or function the administration or funding of the Plan for a period covered by Plaintiffs' now-withdrawn motion for summary judgment.

ECF # 254 (Diocesan Defendants' Opp. Memo.) at 10–11. The Diocesan Defendants claim that, as a result, Plaintiffs should have conducted discovery to prove they were judicially estopped from "not contending that an organization maintained the Plan and had as its principal purpose or function the administration or funding of the Plan…."

However, the statements that they had no position one way or the other is not the same as the statement "that they were not contending that an organization maintained the Plan and had as its principal purpose or function the administration or funding of the Plan…."

More importantly, judicial estoppel requires both an original position and a contradictory litigation position that the party seeks to have the Court adopt. See

[76] See *supra* at 34 n.73.

Sexual Minorities Uganda v. Lively, 899 F.3d 24, 32 (1st Cir. 2018) ("It is settled that a party may be judicially estopped when its current position is plainly inconsistent with its earlier position, such that the two positions are mutually exclusive.") (citations omitted). It is clear that the Diocesan Defendants were not asking the Court to adopt their position of no position on the issue of the applicability of ERISA to the Plan. Indeed, the Diocesan Defendants followed their disclaimer of any position with the statement that "[t]he Diocesan Defendants strongly believe that a prompt resolution of this legal question will benefit the Court and the Parties." ECF # 189 at 1. The Diocesan Defendants cite no authority for the use of judicial estoppel to force a party to take a litigation position that would be consistent with an earlier pre-litigation position, when the party claims to have no position at the time of the litigation and is asking the Court to decide the issue however the Court deems appropriate.

In short, Plaintiffs were entitled to rely on the Diocesan Defendants' answers to interrogatories and statements to the Court that they had no position as definitive, and certainly not did not anticipate that the Diocesan Defendants would later initiate another round of summary judgment motions seeking summary judgment on the very issue for which they disclaimed having any position.

C. Plaintiffs are not complaining concerning the limited scope of discovery allowed in connection with the prior round of summary judgment motions

The Diocesan Defendants contend that "Plaintiffs cannot complain about limitations imposed by their own stipulated discovery agreements." Diocesan Defendants' Opp. Memo. (ECF # 254) at 11. The Diocesan Defendants are referring to the stipulations and orders that set forth the procedure for the prior round of summary

judgment motions. However, it is not accurate to describe those as "stipulated discovery agreements" without also noting the Plaintiffs initially opposed any limitations on discovery[77] and entered into the stipulations only after the Court ruled that discovery would be limited and directed the parties to attempt to agree on the terms and procedure therefore.[78] Plaintiffs were entitled (indeed, required) to follow the Court's direction, without prejudice to Plaintiffs' original objection.

More importantly, Plaintiffs are not complaining that scope of discovery allowed under the stipulations was too limited. Plaintiffs are merely noting that the scope of discovery allowed thereunder extended only to issues raised by the summary judgment motions or opposition thereto concerning the principal purpose requirement. As such, the scope of discovery did not extend to issues concerning judicial estoppel, especially in the circumstance where the Diocesan Defendants were expressly taking no position that they could be estopped from asserting.

D. The Diocesan Defendants' change in position is not based upon an intervening change in controlling law

As previously noted, in their opposition memorandum (ECF # 254) the Diocesan Defendants do not even explain how the Supreme Court's decision in Advocate Health Care Network v. Stapleton represents an intervening change in the law. Thus, their argument fails because it is merely bald assertion, an *ipse dixit*, without any explanation or factual support whatsoever.

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[77] ECF # 169 (September 10, 2019 Fairness Hearing Transcript) at 71 ("MR. SHEEHAN: Your Honor, to go through an entire round of depositions devoted to one set of issues, brief all of those issues, submit them to your Honor for motions for summary judgment, is just going to delay this case…").

[78] ECF # 231 at 16–17.

However, the Diocesan Defendants offer an explanation in their reply memorandum in support of their motion for summary judgment (ECF # 253 at 46–49). They point to the several lower court decisions rendered prior to the Supreme Court's decision in Stapleton that construed ERISA to permit the church plan exemption for to Plans administered either by a principal purpose organization or to Plans administered by the church-affiliated organization itself. ECF # 253 at 47–48. The Diocesan Defendants claim that "[o]nly after the Supreme Court handed down Stapleton in 2017 did it become clear, in hindsight, that (1) SJHSRI absolutely needed to comply with the PPO requirement to qualify for the exemption and (2) SJHSRI had not done so." ECF # 253 at 46.

The second statement—that it only became clear after Stapleton that SJHSRI had not complied with the requirements for a principal purpose organization—is simply false. Nothing in Stapleton changed the law concerning those requirements in relation to SJHSRI.

The first statement—that only then did it become clear that SJHSRI had to comply with the requirements for a principal purpose organization—is clearly very carefully argued. The Diocesan Defendants do not even allege that, prior to the Supreme Court's decision in Advocate Health Care Network v. Stapleton, the Diocesan Defendants based their claim that the Plan was a church plan exempt from ERISA on the alternative basis for that exemption which the Supreme Court rejected in Advocate Health Care Network v. Stapleton. Indeed, read carefully, it is clear that all the Diocesan Defendants are saying is that an entity in their position at the relevant times *reasonably could have based a claim for the church plan exemption on this alternative basis*. They do not claim they actually relied upon (or even were aware of) that alternative basis. Consequently, they cannot claim that their shift in position resulted

from the Supreme Court's rejection of that alternative basis in Advocate Health Care Network v. Stapleton.

It is highly implausible—and at least presents a genuine dispute of material fact—that the Diocesan Defendants actually relied on any of these cherry-picked pre-2017 cases. Catholic Charities of Me., Inc. v. City of Portland, 304 F. Supp. 2d 77 (D. Me. 2004) involved a plan that was claiming to be an ERISA plan, and indeed had expressly filed an election to become an ERISA plan, in order to preempt a city ordinance requiring employee benefits to be extended to same-sex domestic partners. See id. at 83, 86. Torres v. Bella Vista Hosp., Inc., CIVIL 06-2158 (JAG), 2009 WL 10717769 (D.P.R. Apr. 13, 2009), *report and recommendation adopted*, 639 F. Supp. 2d 188 (D.P.R. 2009), involved a plan that *was indeed* administered by a principal-purpose entity (a "Retirement Committee" appointed by the church-affiliated hospital). See 2009 WL 10717769, at *1. Accordingly, its plan would also qualify as a church plan after Advocate Health Care Network v. Stapleton.

Whether the Diocesan Defendants in fact relied on this alternative basis is key to whether this alternative basis is relevant to judicial estoppel, or merely a red herring. The Diocesan Defendants cite no authority for the absurd proposition that a change to a law that theoretically (but not in fact) could have supported a party's original position entitles the party to change that position if the other requirements for judicial estoppel are met.[79] The importance of the party's actual intent was noted in In re Advanced Telecomm. Network, Inc.:

[79] Indeed, it is absurd to think it should. For example, if a party takes "Position A" in reliance on "Legal Argument Y," the fact that the party could have also relied on "Legal Argument X" and the law concerning

> The remaining dispute is one of "intent." If there exists a question of material fact whether a party had the motive and intent to manipulate the judicial system, then a court should deny summary judgment on judicial estoppel grounds.
>
> ATN argues that the Eleventh Circuit's decision of *Harwell* altered when a law firm is liable under Section 550 of the Bankruptcy Code and when ATN could assert a sufficient "change in the law" to justify these new allegations who is the initial transferee of the alleged fraudulent transfer. Was ATN just changing its arguments to find a deeper pocket? Or, instead, is ATN judicially estopped from changing its position because it made a mockery of the judicial system? This is an issue best left for the trial. A factual issue exists as to ATN's intent precluding summary judgment.

In re Advanced Telecomm. Network, Inc., No. 6:03-BK-00299-KSJ, 2016 WL 6407366, at *3 (Bankr. M.D. Fla. Oct. 28, 2016).

In fact, the evidence concerning whether that was the Diocesan Defendants' actual intent is completely to the contrary. Indeed, the Diocesan Defendants' failure even now to affirmatively show (even *prima facie*) that they actually relied upon the alternative basis for that exemption which the Supreme Court rejected means that there is no dispute on this issue.

It should be noted that the Diocesan Defendants' reference to the alternative basis for that exemption in their opposition to Plaintiffs Rule 56(d) motion is the first time they have made that claim. Until then, Plaintiffs had no knowledge or reason to suspect that the Diocesan Defendants were relying on that alternative basis in any respect whatsoever. Moreover, none of the documents produced in discovery hint that any of the Defendants ever were even aware of, much less relied upon, that alternative basis

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Legal Argument X changed does not entitle the party to later change Position A if the law concerning Legal Argument Y is unchanged.

for the church plan exemption. The introduction of this new argument at this time is even more reason to allow Plaintiffs the opportunity to conduct discovery. Given that intent,[80] reliance,[81] and causation[82] are questions of fact, Plaintiffs are entitled to discovery to determine the true facts.

If "[m]uch of the information sought [is] within [the opposing party's] control," that is "'a factor which weighs heavily in favor of relief under Rule 56(f).'" In re PHC, Inc. S'holder Litig., *supra*, 762 F.3d at 143 (quoting Reid v. New Hampshire, 56 F.3d 332, 342 (1st Cir. 1995)).

> In a case like this when "plaintiffs' case turns so largely on their ability to secure evidence within the possession of defendants, courts should not

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[80] Any questions of intent (including inadvertence or mistake) and bad faith involved in judicial estoppel are issues of fact. See Aguilar v. Zep Inc., No. 13-CV-00563- WHO, 2014 WL 4245988, at *6 (N.D. Cal. Aug. 27, 2014) (denying summary judgment on judicial estoppel because there were material issues of fact regarding inadvertence or mistake); Black v. State Farm Fire & Cas. Co., No. 1:12-CV-02240-CL, 2013 WL 4835041, at *3 (D. Or. Sept. 10, 2013) (denying motion for summary judgment on judicial estoppel and holding that jury had to decide questions of fact regarding plaintiff's conduct); Moore v. United States, No. 13CV931-DMS (WVG), 2014 WL 12637954, at *3 (S.D. Cal. Oct. 28, 2014) (denying summary judgment on judicial estoppel because court was precluded from making credibility determinations and the "quintessentially personal fact of state of mind" had to "remain open for trial"); Ritchie v. Onewest Bank, FSB, No. 5:12-CV-333-OC-10PRL, 2013 WL 12155517, at *5 (M.D. Fla. Apr. 17, 2013) ("Moreover, the question of judicial estoppel is a fact intensive inquiry during which the Court would be required to ascertain Mr. Ritchie's intent in omitting these claims on his bankruptcy petition."); Benjamin v. Nat'l R.R. Passenger Corp., No. CIV.A. 09-4885, 2011 WL 2036702, at *5 (E.D. Pa. May 23, 2011) (holding that the existence of bad faith for purposes of judicial estoppel "is generally a question of fact for the jury to decide"). While a party may be judicially estopped even where it adopted its prior position in good faith, the existence of any bad faith is highly relevant to judicial estoppel. See Bos. Gas Co. v. Century Indem. Co., 708 F.3d 254, 263 (1st Cir. 2013) ("Although we have characterized the archetypal judicial estoppel case as one in which a litigant is playing fast and loose with the courts, such tactics are not a prerequisite for application of the doctrine. A party is not automatically excused from judicial estoppel if the earlier statement was made in good faith.") (quoting (Guay v. Burack, 677 F.3d 10, 16 (1st Cir. 2012)).

[81] See, e.g., SPS of Oregon, Inc. v. GDH, LLC, 309 P.3d 178, 184 (Or. App. 2013) ("[W]hether a defendant sought and relied on the advice of counsel in good faith is a question of fact for the jury"). See generally Swift v. Rounds, 35 A. 45, 46 (R.I. 1896) ("The state of a man's mind at a given time is as much a fact as is the state of his digestion.").

[82] Oahn Nguyen Chung v. StudentCity.com, Inc., 854 F.3d 97, 102 (1st Cir. 2017) ("Causation, by contrast, generally presents a question of fact within the special province of the jury."); Martinez v. Bryant, No. CV06-5344-GW (AGR), 2009 WL 1456399, at *9 (C.D. Cal. May 19, 2009) ("The issue of causation is fact-intensive and often not susceptible to resolution by summary judgment.").

> render summary judgment because of gaps in a plaintiff's proof without first determining that plaintiff has had a fair chance to obtain necessary and available evidence from the other party."

In re PHC, Inc. S'holder Litig., *supra*, 762 F.3d at 143 (quoting Carmona v. Toledo, 215 F.3d 124, 133 (1st Cir. 2000)). "Unless the movant has been dilatory, or the court reasonably concludes that the motion is a stalling tactic or an exercise in futility, it should be treated liberally." Resolution Trust Corp., *supra*, 22 F.3d at 1203 (citing 6 Moore's Federal Practice ¶ 56.24, at 797–800 (2d ed. 1993)).

Plaintiffs have met the requirement of showing "good cause for the failure to have discovered the facts sooner" by demonstrating that it would have been virtually impossible and certainly unreasonable for Plaintiffs to have done so earlier. The individual named plaintiffs have no relevant information, and Plaintiff Receiver had no personal knowledge concerning any of the events in question, since he was not appointed until 2017.[83] There has been no Rule 16 conference in this case, and the only discovery that has been allowed has been narrowly cabined, as discussed above. See Armijo v. Bd. of Cty. Commissioners of Cty. of Socorro, No. CV 20-355 GBW/SMV, 2020 WL 4734771, at *4 (D.N.M. Aug. 14, 2020) (noting absence of Rule 16 conference in granting Rule 56(d) relief); Bland v. LVNV Funding, LLC, No. 4:15 CV 425 RWS, 2015 WL 10963745, at *1 (E.D. Mo. Oct. 15, 2015) (similarly noting absence of Rule 16 conference).

Indeed, as noted, the Diocesan Defendants are directly responsible for Plaintiffs' not having conducted discovery on the issues involved in judicial estoppel. If at the

[83] ECF # 243-8 (Sheehan Dec.) ¶ 7.

proper time the Diocesan Defendants had given Plaintiffs notice that they claimed that the Plan lost Church Plan status on or before April 29, 2013, Plaintiffs could (and would) have conducted discovery during that ninety-day period relevant to the issue of judicial estoppel.[84]

An irony of the current situation is that the Diocesan Defendants were very much in favor of the initial round of summary judgment motions on the issue of the applicability of ERISA to the Plan, yet when the time came for them to state their position, the Diocesan Defendants said they had none. Then, to make matters worse, after the time for discovery closed, the Diocesan Defendants filed their own belated motion for summary judgment on the issue of the applicability of ERISA to the Plan, which they should have done back in 2020. Accordingly, the Diocesan Defendants are entirely to blame both for Plaintiffs' lack of discovery on the issues involved in judicial estoppel and for the delay and duplication of effort entailed by their motion for summary judgment.

V. Conclusion

For the foregoing reasons, the Plaintiffs' Conditional Rule 56(d) Motion should be granted, unless the Court denies the Diocesan Defendants' motion for summary judgment on the merits, in which event this motion may be denied as moot (whereupon

[84] ECF # 243-8 (Sheehan Dec.) ¶ 11. In that event Plaintiffs would have argued judicial estoppel against the Diocesan Defendants. However, judicial estoppel would not have applied against Prospect because judicial estoppel only applies when the party who asserted the contradictory positions would derive an unfair advantage absent estoppel. Díaz-Báez v. Alicea-Vasallo, 22 F.4th 11, 21 (1st Cir. 2021) ("'[T]he party seeking to assert the inconsistent position must stand to derive an unfair advantage if the new position is accepted by the court.'") (quoting Knowlton v. Shaw, 704 F.3d 1, 10 (1st Cir. 2013)). The applicability of ERISA offered no advantage to the Prospect Defendants but, rather, increased their potential for successor liability.

discovery concerning judicial estoppel issues could be conducted during normal discovery).

If Plaintiffs' motion is granted, Plaintiffs request that the Court allow them a reasonable period of time and the right to use all discovery tools concerning any issues that are relevant to or which may lead to the discovery of admissible evidence concerning whether the Diocesan Defendants should be judicially estopped from their current assertion that the Plan did *not* qualify as a "church plan and was *not* "administered by an organization described in Section 414(e)(3)(A) of the Code."

Respectfully submitted,
Plaintiffs,
By their Attorneys,

/s/ Max Wistow

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Dated: July 20, 2022

Exhibit 1

IN THE 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,	:	18-CV-00328(WES)
	:	United States Courthouse Providence, Rhode Island
vs.	:	
Prospect CharterCARE,LLC, et al., Defendants.	:	Tuesday, September 10, 2019 Morning Session

TRANSCRIPT OF CIVIL CAUSE FOR FINAL FAIRNESS HEARING
BEFORE THE HONORABLE WILLIAM E. SMITH
UNITED STATES CHIEF DISTRICT COURT JUDGE

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(In open court)

THE COURT: All right. Good morning. We're here in the matter of Del Sesto, et al., vs. Prospect CharterCARE, LLC, et al. And this morning we are here for the final fairness hearing on what we've been calling Settlement A. This afternoon we'll hear argument on the motion to dismiss.

So let's begin with counsel identifying themselves for the record, please. Plaintiffs first.

MR. LEDSHAM: Good morning, your Honor. Benjamin Ledsham for plaintiffs.

MR. WISTOW: Good morning. Max Wistow for plaintiffs.

MR. SHEEHAN: Good morning, your Honor. Stephen Sheehan for the plaintiffs.

MR. DEL SESTO: Good morning, your Honor. Stephen Del Sesto both in capacity as a plaintiff as well as the receiver for the St. Joseph's plan.

MR. LAND: Good morning, your Honor. Richard Land on behalf of the settling defendants, CharterCARE Community Board of Roger Williams Hospital and St. Joseph Health Services of Rhode Island.

MR. DIGOU: Good morning, your Honor. Andre Digou on behalf of the settling defendants.

MR. HALPERIN: Good morning, your Honor.

Preston Halperin on behalf of the Prospect entities.

MR. GODOFSKY: Good morning, your Honor. Dave Godofsky on behalf of Angell Pension Group.

MR. MERTEN: Your Honor, Howard Merten for the Diocesan defendants.

MR. KESSIMIAN: Paul Kessimian for the Diocesan defendants.

THE COURT: Okay. I don't think that everybody else needs to unless you're speaking, and I don't think those of you in the back are.

All right. So I'll hear first from the plaintiffs with respect to the settlement.

MR. SHEEHAN: Thank you, your Honor. We've already addressed many of these issues in connection with Settlement B. I'm going to try to focus on what's unique to Settlement A. But first, obviously, I need to point out that the Court has jurisdiction to approve the settlement, both federal subject-matter jurisdiction and Article III case or controversy, concrete injury jurisdiction.

The next point, your Honor, is the issue of the receiver's appointment by the state court. We did address that last week, and I made the point that anyone can be appointed administrator, but it's actually rather stronger than that. Under ERISA, 29

U.S.C. 1002, 16(A)(iii), the term "administrator" means, "the person specifically so designated by the terms of the instrument under which the plan is operated." That's what an administrator is under ERISA.

Now, the instrument under which the term is operated -- under which the plan is operated is the retirement plan itself. And it provides that the employer shall be the plan administrator, hereinafter called the administrator, and named fiduciary of the plan, unless the employer, by actions of its board of directors, shall designate a person or committee of persons to be the administrator and named fiduciary.

Now, your Honor, I had thought that the Plan was in the record in the federal court, and Mr. Ledsham just looked through the document just before the hearing started and I don't know that it is for sure. I would just ask for permission to supplement the record just with that one provision from the Plan so that the record is clear that the board of directors can designate the administrator.

Now, the fact is that St. Joseph Health Services of Rhode Island, the employer, board of directors specifically, unanimously and irrevocably appointed the receiver as administrator of the Plan. Your Honor, I

have the Secretary's Certificate attesting to that fact. I've already given it to my brothers.

May I hand up a copy to the Court?

THE COURT: Yes.

Go ahead.

MR. SHEEHAN: Your Honor, it's really self-explanatory. It appoints the receiver with all rights and powers of the corporation as sponsor and administrator of the Plan, including, but not limited to, the operations, management, oversight, administration, et cetera, et cetera, et cetera.

So what we have here, your Honor, is a state court-appointed receiver who has been appointed administrator of the Plan in accordance with the specific terms of ERISA. So my point the other day that anyone can be an administrator is true, but it particularly qualifies the receiver here by virtue of that compliance.

Now, the next point, your Honor, is the settlement meets the standards for final approval. The Rule 23 factors are addressed in the papers, Rule 23(e) factors. And I don't believe there's any dispute concerning the appropriateness of the final approval under those factors except for the allegation of collusion. So I'm going to limit myself to that point

and one other little point at the end.

On the defense of collusion, there's really two issues, your Honor. First is that collusion must be wrongful and tortuous. And we've cited Black's which defines collusion as an agreement to defraud another or to do or obtain something forbidden by law. Lawful agreements by definition are not collusive.

Now, we, your Honor, as putative class counsel and on behalf of our existing clients, are obligated to negotiate for any possible lawful advantage for our clients with utmost zeal. It would be unethical not to do so. It would be unethical to temper our zeal on behalf of our clients by some concern for the rights of anyone else, provided we act within the law.

Now, that obligation that we have would be severely chilled if collusive meant something other than wrongful and tortuous. We'd be left really in a very soft standard where we would not be allowed to regulate our conduct. That's bad public policy to put class counsel in that position of having to limit themselves against a standard that is not clear under the law. It's something that's unfair, something that's -- the defendants consider unfair, rather, something the defendants consider suspicious, et cetera.

The second point, your Honor, is that the burden of proving collusion in the absence of good faith is clearly on the non-settling defendants. Judge Lagueux's decision in the *Gray* case says that, and every other case that's addressed the issue says it also. And what Judge Lagueux says is that good faith is presumed unless the defendants prove otherwise.

Now, the defendants have had an extraordinary privilege in this case, your Honor, of conducting discovery into the settlement negotiations concerning their allegations of collusion. That is rarely allowed, but the Court allowed them that privilege. And even after that, your Honor, they cannot prove any unlawful or tortuous conduct. I would like to address the specific terms they focus on, your Honor.

The first is that it's somehow collusion for the settling defendants to pay plaintiffs ahead of possibly other creditors, including possibly Prospect. Mr. Land, on behalf of the Heritage Hospitals -- or Mr. Digou, I'm not sure who is arguing -- is going to address why the settling defendants don't believe they've paid plaintiffs ahead of any valid credit. But even if they did, it doesn't make it collusive or collusion because, under Black Letter Rhode Island law, a debtor has the common-law right to prefer one

creditor over the other. And that's the *Faiella* case, F-a-i-e-l-l-a, 72 A.2d 434, Rhode Island, 1950.

Now, Rhode Island is not alone in that respect. That's the common law across the United States, and this is from Am Jur 2nd, 37 Section 61. "In the absence of statutory regulation, and subject to certain exceptions, an individual debtor, in applying his or her assets to the discharge or securing of the debtor's obligations, may lawfully prefer one creditor over another. The transfer is not rendered illegal or fraudulent merely because the transferor was insolvent at the time, the transfer contributed to his or her insolvency or the conveyance exhausted his or her assets." In other words, debtors get to choose their creditors absent statutory prohibition.

Now, not only is that the law, it was confirmed between the settling parties in the course of settlement negotiations, and that's attested to in Mr. Del Sesto's declaration. We were very careful, your Honor, to follow the Rhode Island law in this respect.

Now, the only statutory authority that the defendants cite for the claim that this so-called preference is somehow unlawful is Rhode Island General Law 7-6-51 which is the priority of payment section having to do with voluntary dissolution of

corporations. That isn't applicable for two reasons. The first is, St. Joseph's to this day has not commenced voluntary dissolution proceedings which are commenced by notice to creditors that they're dissolving, which they haven't done.

But even if they had, your Honor, that scheduled priorities simply states that creditors must be paid. It makes no provision whatsoever for the rights of the creditors inter se, zero. So it does not in any way, shape or form obligate a debtor to somehow pay all creditors pro rata or something of that nature. So that provision in the agreement is not unlawful.

The second provision that they allege is unlawful is the admission of liability for breach of contract. Now, Judge, when settlements are paid over time, plaintiffs frequently obtain a confession of judgment from the settling defendant that they can file in the event that payments are not made when due and, boom, there's a judgment. And no one says that's unlawful.

Now, defendants commonly deny liability when paying large settlements. No one calls that unlawful, though it's quite disingenuous. They're not paying large settlements unless they believe that they're likely or reasonably likely or there's a significant

risk of liability. For the same reason defendants can admit liability, your Honor.

THE COURT: So let me just ask you a question about the first point about preferring one creditor over another. Assuming that that's true, that common law allows that, isn't there kind of an assumption that's built into that that creditors, in turn, will have sort of free rein to pursue each other for joint and several liability to kind of even the playing field out on the paying side? And that's being cut off here.

I mean, isn't that really -- isn't that the beef that the non-settling defendants have, which is to say that maybe you have the right to prefer the pension -- the receiver as a creditor over us, but you've also cut off our ability to seek any contribution with this statute. So we're put into this box that we can't get out of.

Isn't the combination of those things that is the problem, from their perspective?

MR. SHEEHAN: Judge, the law puts people into boxes all the time, and that's what the law requires in all cases. There are contribution laws, and they are what they are. They don't impinge on the common-law right of a debtor to prefer one creditor over another.

THE COURT: But here, I mean, the normal

contribution law is the tortfeasor statute and that's cut off.

MR. SHEEHAN: Your Honor, that's only the normal law in Rhode Island. There are 35 states that provide otherwise that it's on the basis of credit of the amount paid in settlement. There's no constitutional right. In this case, the legislature has addressed what the rights should be in the settlement statute which happens to be the law in Massachusetts for all settlements and many other states across the country.

Like I say, the law puts people in boxes all the time, but that's the problem with their argument on collusion, your Honor, is they come up with amorphous notions of unfairness, such as your Honor pointed out, and say that constitutes collusion. That way lies perdition, your Honor. There is no way for a plaintiffs' counsel such as myself to negotiate a settlement having to respect their rights. I have no obligation to do that. I have a duty to not wrongfully or tortuously injure them, but I have no obligation more than that.

THE COURT: But my obligation is different than your obligation, isn't it?

MR. SHEEHAN: No, your Honor. It's precisely the same, because your Honor has to accept that

plaintiffs' class counsel are permitted to act in accordance with the law. Not only are they permitted, they are obligated ethically to zealously advocate on behalf of their clients. And to hold otherwise would interfere with the law and put plaintiffs' counsel in an impossible position, your Honor.

THE COURT: Well, I don't know if there's a First Circuit or Rhode Island case that says it, but I think the *Masters, Mates & Pilots* pension case from the Second Circuit suggests at least that the rights of those who are not parties to the settlement when they're at stake, they should be considered by the Court before giving a stamp of approval to the settlement.

Now, maybe that's not the same as your -- maybe you don't have to worry about the effects on third parties, but I think the Court has a slightly different obligation to consider that.

MR. SHEEHAN: Your Honor, the *Masters, Mates and Pilots* decision is the law of the Second Circuit. The law of the First Circuit, as represented by three district courts interpreting the decisions of the First Circuit and United States Supreme Court, is that *Masters, Mates and Pilots* is wrong.

And what they say is that in ERISA, there is no

right of contribution at all and, therefore, there is no need to engage in some desire to protect a non-settling defendant's right of contribution under ERISA. That's the end of the discussion. The First Circuit does not stand with the Second Circuit. We would have a different result potentially if we were in the Second Circuit, but we're not.

Your Honor, going to the admission of liability, the receiver has a good-faith basis for requiring it. He's protecting the Plan and the plaintiffs against the Heritage Hospitals taking a release and then opposing their claims in liquidation. The plaintiffs are entitled to settle all of their disputes with the settling defendants, not just part of them and not leave out their future litigation adversarial relationship between the plaintiff and the settling defendants in the context of liquidation proceedings.

Now, that admission of liability, however, is binding only on the settling defendants. The determination of whether, in fact, they are liable in the liquidation proceedings is a question in fact and law decided in those proceedings, and their admission is in no sense binding on the non-settling defendants. They argued to the Court --

THE COURT: So what's the point of it?

MR. SHEEHAN: The point of it is to keep them from coming back at us. Not to keep the non-settling defendants from arguing their claims, but to keep the settling defendants from turning on us.

Your Honor, we believe that the settling defendants and Prospect together drafted the petition for receivership. That's an issue in the case. But they were, to use a word that my defendant brothers like to use rather loosely, colluding together in connection with the petition for receivership to damage the interest of the Plan participants. And we don't want to go back to those days.

The non-settling defendants are not bound, but we want to tie the settling defendants as much as we can to their word.

THE COURT: But I guess I don't see the -- what's the risk? I mean, they're turning over basically all of the assets to the Plan. When you say go back on things or -- what is it?

MR. SHEEHAN: Your Honor, there's going to be in the receivership a now undefined amount for probably somewhere between 600,000 and something in the range of seven figures in either what they've been allowed to keep in their cash account by virtue of the settlement and their currently nonliquid assets. They have

certain claims that are still pending involving Medicare and Medicaid that will result in money coming in. And the liquidation is going to address those residual assets.

THE COURT: But admitting to $125 million of liability seems a pretty heavy admission when you've got 6- or $700,000 at stake that you're worried about. And I'm not even sure there what the worry is because the settling defendants haven't -- if I'm understanding this correctly, the settling defendants haven't said the receiver has preference with respect to that 6- or $700,000. It's just that, you know, it's there and you have a right to claim it, just like anybody else has a right to claim it and that will be fair game.

So I'm not even sure that the admission on the 125 million, what the point of that is with respect to the $600,000.

MR. SHEEHAN: It's the same significance as the admission of liability. We don't want the settling defendants to have the right in the liquidation proceedings to say, yes, we admitted liability, but you never proved damages and we'd have to fight them about that issue.

THE COURT: Sure. I mean, that could have been achieved with an admission of liability of 12 million

or 13 million or 15 million. But 125 million, I mean, there's red flags about that. And I'm just asking.

So there must be some point to it other than to say that, well, we want to make sure we're in a good spot when it comes to going after the $600,000. Well, yeah, okay, but you wouldn't have picked 125 million just to get the 600,000. So there must be some other reason and, you know, these folks say, yeah, the reason is us.

MR. SHEEHAN: Your Honor, if it moves matters along, we would be happy to stipulate that this admission of liability and damages is only going to be applicable in the liquidation proceedings. We're fine with that. If they have some concern that we have something up our sleeves that we're trying to accomplish outside of that context, we'll stipulate to the limit of that admission. That's not a problem.

However, your Honor, the red-flag issue your Honor raised, collusion isn't based on red flags, your Honor; it's wrongful or tortuous conduct. And we have a legitimate basis for the $125 million number. It's taken directly from the petition for receivership. It is the amount that would be needed to pay into the Plan now to terminate the Plan and pay out the Plan obligations through an annuity. That's the

calculations that the Heritage Hospitals did and Angell did on behalf of the Heritage Hospitals in the petition for receivership.

That's the number. It's their number. It's not something dragged out arbitrary like Prospect intends. It's straight out of the petition that Angell has itself calculated.

The next provision that they point to, your Honor, in addition to the liability and damages, is the contention that the Heritage Hospitals' contention, and I emphasize the word "contention," that their proportion of fault in tort, if any, is less than the non-settling defendants. Now, that's just their contention. And it's consistent with the position that they have no liability in tort which Mr. Land testified to at his own deposition.

And like the admission of liability and damages, it's not binding on anyone except St. Joseph's. At the liquidation proceedings, the non-setting defendants will be free to prove that Heritage Hospitals have 90 percent of the fault, 99 percent of the fault, 100 percent of the fault. What we're trying to protect us from here is having the setting defendants come in and say, yeah, that's right, that's all. We don't want to hear the, yeah, that's right.

Your Honor, they're our creature for purposes of this settlement. We get to control their behavior. Just like you can demand a confession of judgment, that defendant is your creature in accordance with the terms of the lawful agreement. And we don't want to hear it.

And the significance of that, your Honor, is obvious. In the liquidation proceedings, there may be contribution claims asserted against the Heritage Hospitals in which they can be and they won't be affected by this, but we don't want the Heritage Hospitals to say, yeah, you're right, by the way, we were a hundred percent at fault and therefore Prospect, our old buddies, our old friends with whom we drafted the petition for receivership, you get whatever assets we have.

The next point, your Honor, that they object to is that the releases given to the directors who voted to authorize the settlements are not lawful. These releases are more narrow than what the Heritage Hospitals wanted and what defendants almost invariably receive. They don't release all officers, directors and agents of the settling defendants. They only release current officers, directors and agents with one exception, and that's Father Reilly because he actually has a long tenure that goes back into some of the

events that gave rise to liability.

The other directors, officers and agents came on the scene after the events that gave rise to the liability, for the most part. There wouldn't even be -- if there were any claims against officers and directors, it wouldn't be directed against them.

Now, on top of that, their D&O carrier has denied coverage for any liability these current officers, directors and agents may have to the plaintiffs. And on top of that, the Heritage Hospitals' position was that there's no settlement unless the plaintiffs give those releases. That's the deal.

THE COURT: So let me get this straight. So current directors and officers are released; former directors and officers are not. There's an exception to that for Father Reilly who apparently was a former director?

MR. SHEEHAN: He just is a long-tenured director.

THE COURT: He's both current and former?

MR. SHEEHAN: The current ones have only been in there a couple of years. Reilly's been there for many years. He's just a long-tenured current director.

THE COURT: All right. So former directors,

you're saying, are not released from liability pursuant to this settlement?

MR. SHEEHAN: Right.

THE COURT: Are they protected in any way by the settlement statute?

MR. SHEEHAN: No, your Honor. They may have protections -- no, your Honor, they're not. Their claim when we sue them, if we sue them, for indemnity from the Heritage Hospitals is not affected by the settlement statute which, by its terms, doesn't apply to indemnity. It expressly doesn't.

Your Honor, if we're --

THE COURT: Theoretically, if there's a finding of liability against the non-settling defendants at some point after trial or whatever, they could have a vehicle, an action for contribution back against the directors, even though they might be blocked by the settlement statute in seeking contribution from the Heritage Hospitals.

MR. SHEEHAN: Right. I don't think that -- the terms of the settlement statute says the settling party. It's not those old directors. They're not the settling party. So they don't have any protection against claims by the Prospect entities. If they want to say some old director for St. Joseph's has liability

and contribution between them, by all means, go to it. Maybe we'll join in the case.

All these things are done piece by piece, and that's why I want to keep our eye very tightly on the ball of wrongful and tortuous conduct because otherwise we go off into space.

THE COURT: When we talk about current directors versus former directors, are the current directors the directors that were in place at the time of the -- all the transactions that led to this situation?

MR. SHEEHAN: No, except for Father Reilly.

THE COURT: Okay. So it's a former set of directors --

MR. SHEEHAN: Yes.

THE COURT: -- was in place at the time?

MR. SHEEHAN: Right.

THE COURT: Okay.

MR. SHEEHAN: Your Honor, now, there's been a suggestion that somehow it was improper for the Heritage Hospital directors to insist on even this narrow release. Well, that's not unlawful or tortuous.

THE COURT: When you say "narrow release," describe to me why it's narrow.

MR. SHEEHAN: Because it's limited to who is released. By the way, your Honor --

THE COURT: It's narrow in the sense of which directors are covered. You're not saying the release itself -- it's a general release for those directors who are covered.

MR. SHEEHAN: It is, your Honor. It's also narrow in the sense that against the Heritage Hospitals the release is not effective as to the assets in liquidation. That's been carved out. Plaintiffs' claims remain valid in the liquidation. So it's narrow on that side too, but that doesn't affect the old directors.

But what I was going to say, your Honor, is that Mr. Land obtained the opinion of independent counsel on this settlement to address any suggestion that these directors, because they were interested, somehow couldn't vote to approve the settlement.

And by the way, your Honor, there are no directors that are interested in any settlement that involves a release of directors by definition. And that's the standard term. So if merely a director voting on a settlement that releases directors is disqualified for voting, there can be no settlements.

Then we get to conduct. They have some certain allegations as to conduct they claim was unlawful. Ten weeks to negotiate the settlement. That's absurd when

I say it, your Honor. I don't need to say anything further that that's not unlawful. That the negotiations were face to face, and that there aren't many exchanges of drafts. Although, there are some and some are redlined, that certainly is not unlawful.

They claim that the negotiations were not sufficiently contentious, which is absurd on its face, but there's no secret, your Honor, that the plaintiffs were as aggressive as could possibly be in these negotiations and the Heritage Hospitals resisted with contrary proposals, but ultimately the choice was -- the choice they had was take it or leave it and go to litigation. They initially proposed a settlement which involved no admission of liability or damages and you can simply go to liquidation like any other creditor. That was knocked out of the park by us, your Honor. So to describe it as not being contentious is really silly.

Then they argue that the timing of the settlements shortly -- that the negotiations being shortly after filing of the suit is somehow unlawful. Well, that on its face is not unlawful. We have the declaration of Mr. Del Sesto that he believed, as the receiver, that engaging in substantive settlement negotiations given that the defendants had not provided

any concrete proposals, even though he told them to do so, prior to the filing of suit, would be counterproductive. And there you have it.

We wanted them to see the complaint. We wanted them to know how serious this case was. We said to them before the suit was filed, if you have a settlement proposal, give it to us and they didn't. And that's true for Prospect, and that's true for the Heritage Hospitals.

Now, I've already discussed why public policy, your Honor, requires that collusion be unlawful conduct. There's another reason for not adopting the softer standard of red flags, something of that nature, and that is that it leads to more litigation and will cause havoc. And I mean havoc in the old middle-ages term of the phrase meaning pillage.

If the Court concludes that this settlement was collusive in the sense of unlawful and disapproves the settlement on that ground, the path forward will be relatively clear but by no means pleasant. Plaintiffs' counsel will have entered into an unlawful agreement, and defendants will move to disqualify and plaintiffs' counsel may have to voluntarily withdraw, in any event. The receiver also for that matter. I'm not getting there, but that's the direction this will go.

Now, if the Court disapproves the settlement on the basis of a soft standard of collusion, red flags or something of that nature, the way forward will be anything but clear. There will still be motions to disqualify the receiver and special counsel. We will oppose leading to more litigation.

And on top of that, your Honor, going forward in the case, we, special counsel, do not know how to balance our duty to our clients to be zealous advocates and the obligation to somehow be fair to non-settling defendants. We don't know how to do that. Our ethical obligations don't even permit us to do that.

So how do we proceed? No more settlements, your Honor, and therefore the settlement class is hampered by having counsel that cannot settle their claims and has to go to trial?

I'd like to move on, your Honor, to the point of constitutionality and preemption also addressed last week. It's not ripe, your Honor. And they have no standing to object to the Court's refusal to make determinations of constitutionality or preemption now because they're not injured by it. They'll have time if and when they are actually facing any rights that are effected by the settlement statute to litigate those issues. So they don't have standing to ask the

Court to rule on those issues now. They're not ripe.

Finally, your Honor, should the Court include the finding under the settlement statute in connection with settlement approval and the answer, your Honor, we would suggest is yes for several reasons. The first is: The Court is already, in connection with Rule 23(e), addressing whether the settlement was negotiated at arm's length. Collusion is the flipside of arm's length. Implicit in that finding, we contend would be the other.

The other issue, your Honor, is the statute requires judicial approval, the settlement statute does, so some court is going to have to do it. And the court that knows what's happening in connection with this negotiation that has allowed discovery into these issues is this court.

Finally, your Honor, the settlement approval that the Court is entering into under the Rule 23(e) analysis is ineffective and does not result in the settlement being approved unless the Court makes the finding of good faith under the settlement statute. That was a negotiated term between the parties. So this issue is definitely ripe.

THE COURT: So I think we've talked about this already last week, but I think the -- I just want to

make sure that we're all clear. Assuming I were to approve the settlement, part of that conclusion would be that I find that there's not collusion. And it doesn't seem to me to be any kind of stretch to say, well, if there's no collusion and if all the Rule 23 factors are met, that the settlement was negotiated in good faith. I don't think that's a stretch at all.

That may satisfy that term of the settlement statute.

MR. SHEEHAN: It will.

THE COURT: But it still leaves open the possibility of finding that the settlement statute itself is unconstitutional. And I think we covered this last week, but I just want to be clear that everybody understands that that's a possibility. If that were to be the finding, then the chips just fall wherever they fall, right?

MR. SHEEHAN: On behalf of the plaintiffs, I agree a hundred percent with your Honor. I'm sure your Honor will ask the same questions of the settling defendants when they get up, but we have discussed this issue so I don't anticipate they're going to say, ah-hah, I didn't realize that.

THE COURT: But let's assume that I approve the settlement and I don't make a decision on the

constitutionality issue for some time. If the settlement is approved, I mean, my expectation would be -- and I want to be sure this is your expectation and everyone's expectation -- that once it's approved, the money is transferred.

MR. SHEEHAN: Five days, your Honor, after your Honor enters that order, we are obliged to give them the releases, and five days after that they are obligated to give us the money.

Now, your Honor, there will be assets in addition that will be collected later on, and I can't tell you now how long those liquidation proceedings are going to take, but certainly the vast bulk of their assets are going to be gone by that time that substantive issue ever gets addressed.

THE COURT: That's my question, and I'm assuming everybody has that understanding.

MR. SHEEHAN: Yes. And I'm not carrying their brief, your Honor, but from their point of view, we're their main adversary and they're getting rid of us. Whether or not their contribution liability remains, they're getting rid of us and so the settlement makes sense from their point of view under these terms.

And I have nothing further, your Honor, other than the right I reserve to supplement the record with

that page from the Plan.

THE COURT: Could you talk just for a minute about the 15 percent ownership transfer.

MR. SHEEHAN: Yes.

THE COURT: I'd like to just hear you speak to that and sort of how that's going to play out.

MR. SHEEHAN: Okay. Your Honor, we have already provided the Court with a law that supports the following proposition, which is that in approving the settlement that involves assignments of rights, the Court does not adjudicate the validity of those assignments. Plaintiffs get what they get. And in a way, it's somewhat like what we're talking about with the settlement statute. Those assignments may end up being worthless or they may end being valuable, but it's premature until someone acts on the assignments to make that adjudication.

And in this particular case, your Honor, we're coming very close to the time when the put option can be exercised. And if the put option is exercised, your Honor, and the settling defendants are bought out of CharterCARE, they're obliged to give us the proceeds. We're never going to get the 15 percent directly; we're going to get the proceeds, if the put option is exercised before the Court acts on settlement approval.

After that, if the receiver exercises the put option, the receiver is being bought out. The receiver's not running a hospital or 15 percent interest in a hospital. So it's apt to go away on its own terms anyway even with Prospect's arguments about whether this interest should be assignable or not. The put option is probably going to blow it out anyway.

But it's obviously premature for your Honor to adjudicate issues of assignability before the assignment is attempting to be enforced. You have no context. There's an Article III problem there, your Honor. They have to have standing under Article III to ask your Honor to adjudicate those issues, and there is no concrete injury, immediate concrete injury or risk of real harm, at this time by virtue of that 15 percent assignment.

I mean, there's a lot more that can be said about that, but I hope I responded to your Honor.

THE COURT: Okay. Thanks very much.

Should we hear from Mr. Land, if you want to speak?

MR. LAND: Your Honor, I will defer at this point. Mr. Sheehan covered all the points that I wanted to cover at this point. Thank you.

THE COURT: Very good. Mr. Halperin, are you

going to go first?

MR. HALPERIN: Yes, your Honor.

THE COURT: All right.

MR. HALPERIN: Your Honor, I'm going to focus also on the issue of collusion because I think that's really at the heart of why we're here today.

THE COURT: Would you agree with the plaintiffs' essential definition of what collusion is?

MR. HALPERIN: Essentially. Both sides have sort of cited to an Eastern District of Virginia case, *Dacotah*, as sort of one of the standards where a court has actually interpreted similar language. And I think, for the most part, we're in agreement.

I noted when Mr. Sheehan was speaking, he mentioned that collusion involves obtaining something forbidden by law. And I definitely do agree that that is one way that collusion can be found. But there are other ways that I would like to speak to as to how the Court might find collusion, one of which I think is applicable to this case and one of which comes out of the *Dacotah* case itself or a case cited therein.

So I think it's a little broader than that. It could merely be the failure of the attorneys to fully and accurately present to the Court the nature of the settlement itself to the extent to which it might be

non-adversarial, the extent to which there might be elements of it that might cause you to look at that and determine that it's not arm's length. And I realize the Court made a preliminary determination of arm's length, and I'm going to ask the Court to revisit that in light of the discovery that we've elicited.

Your Honor, I also would like to just take 30 seconds and clear the air on something. In my view, the papers that were filed became a little bit of an attack, and I think that Mr. Fine filed a brief where he was defending the integrity of the attorneys. On behalf of Prospect, as someone who knows Richard Land and Stephen Del Sesto for many, many years, I can tell you that I'll be the first one to say that they both are of the highest integrity. And I don't believe for a second that they have anything but complete respect for the judicial process and would do anything intentionally to mislead the Court or to do anything that would be against the law. I know them well enough to say that.

However, we have a situation here. And the Court is being asked to look closely at how this settlement unfolded and whether or not the settlement is collusive and, therefore, should not be approved by the Court; never mind whether or not it's in good faith

within the meaning of the special act.

The depositions that we took were of attorney Land and of Mr. Del Sesto as receiver. And what we learned, your Honor, is that Mr. Land had a dual role from the point in time that he became involved when the transaction took place in 2014. He acted as attorney, and he also acted as an agent for the CCCB entity. And he understood his role to be that of an attorney overseeing and an agent overseeing a wind-down process of a business which no longer was operating.

And for several years, he did exactly that. He was addressing claims. He paid out millions of dollars to creditors to satisfy liabilities of CCCB, and he was bringing in money as they became available. So he was involved, as he understood it, in a process to resolve the creditor claims and wind down the affairs.

He also testified that he understood at the end of that process, whatever was left would be paid to the Plan. That was the starting point for where he -- for how he was handling this.

Now, he put the Plan into receivership. He did so because he obviously concluded that the Plan was insolvent, would be incapable of meeting its obligations and so now a receivership is filed. He says right in there that the Prospect entities don't

have responsibility. Whether that's self-serving or whatever it is, it doesn't really matter. It's consistent with what Mr. Land believed based upon the fact that he knew that everyone as of 2014 thought they were dealing with a church plan which, by the way, may in fact be true because that has not yet been determined with any certainty.

And if it is a church plan, that there's no funding obligations on the part of the sponsor. And he knew that the purchaser of the assets did not take on any liability for that plan. So that's the backdrop of at the moment in time that he files the petition.

Now, he approaches Mr. Del Sesto and indicates a desire to engage in settlement discussions. It goes nowhere until after a lawsuit is filed. The lawsuit is filed on June 18th, and on June 29th they schedule a settlement meeting. And by August 30th, they're dotting the Is and signatures are going on to a settlement agreement.

Now, Mr. Sheehan says it makes no difference whether or not it was contentious. It makes no difference whether or not it was contested. They come before the Court, the plaintiffs, and they have said to the Court, this was a highly contested and intensive negotiation and it was arm's length.

We believe after the depositions that that's not so. We believe that this was as close to a friendly lawsuit, inclusive lawsuit, as you can have. Yeah. And I'll explain why I say that. Some of that is inference, but it's based on the testimony.

We're not dealing with a private party here in CCCB which has shareholders and members who have an interest at stake to protect, to negotiate hard, to litigate in order to salvage as much as they can of their assets in the face of a claim. We're dealing with an entity which has a board of directors who is winding down the affairs who, in the end, are trying to simply do their duty to pay the creditor claims and they would like there to be a surplus to pay over to the Plan. Which they did not believe -- and this is critical -- they did not believe there was a liability to the Plan. They did not believe it was an obligation of CCCB to pay the Plan anything, which is why they were first paying off creditors and then they were willing to do that.

Now, Mr. Sheehan talked about payment ahead of creditors, and in his presentation he made this assumption; the Plan is a creditor. If the Plan is a creditor, his argument makes sense. They're litigating, they're going to pay one creditor, the

entity becomes insolvent, so what? That's what happens in litigation. But here CCCB has testified that it did not consider the Plan to be a liability or an obligation. And here's why that's important, your Honor.

If they had tried to settle this case pre-litigation and entered into agreement to just pay over the assets, the recipient of those funds would have been at risk for a claim that that's a fraudulent transfer if they're not even a creditor. They needed this Court to put a stamp of approval on a payment coming from CCCB and going to the Plan. With the Court's stamp of approval, they can eliminate the interest of any other creditor. They can eliminate the contractual obligation of CCCB to Prospect to indemnify Prospect in the event of any loss related to this plan.

That's a contractual obligation which Prospect will be completely without remedy for -- I won't say completely without remedy, but very much without remedy to seek monetary damages if all the assets go to an entity who is not even a creditor of CCCB.

This brings us back to is it a church plan or is it not a church plan? And we've been arguing for a long time in this case --

THE COURT: I hesitate to throw you off your

presentation because this is very helpful, I think, to understand your position, but before you get to the church plan/ERISA plan issue, why isn't it perfectly permissible for CCCB to have believed before the litigation that it had no liability to the Plan, that the Plan was simply another creditor but, frankly, to change its mind after the filing of the complaint and assessing the allegations in the complaint with counsel to really change its view about what its potential liability may be?

I mean, isn't that perfectly fine? And this is a sweeping complaint. And I have to believe that CCCB probably didn't really think about a lot of the kinds of allegations that are made in this complaint and the kinds of liability that go along with the allegations in this complaint until they read the complaint.

So why can't these entities change their mind?

MR. HALPERIN: So as it relates to whether or not it's an arm's length settlement, I think that's a relevant consideration that they might have changed their mind, they might have truly believed it. But as to whether or not it is actually a liability and that's the reason why they needed to wait for a lawsuit to be filed, I think those are slightly different points.

But let me -- let's look at what's on the other

side of that because your Honor's in I think a difficult position because you've got to look at, on balance, do you think this is a collusive settlement? So let's look at CCCB's perspective.

It's winding this down. There's no one who stands to benefit personally who is involved as to whether all the money gets paid to the Plan, part of the money gets paid to the Plan, none of the money gets paid to the Plan. It's either going to the creditors other than the Plan or it's going to the Plan. Those are the options.

I guarantee that there's a significant amount of sympathy for these retirees and their predicament. And it wouldn't surprise me at all, if asked, would you actually prefer to pay these monies to the Plan or would you prefer to pay them to other creditors or would you prefer to pay them to Prospect under some future indemnification, I would be surprised if these individual directors would not prefer to pay these monies to the Plan.

And that is at the heart of how we get to why this is a collusive suit. You do not have parties that are sufficiently adversarial, who care about what's happening here, and the evidence of that is that they pay over $400,000 voluntarily to fund the receivership

when they file it. They make -- they're asked to make a settlement proposal at the meeting that took place on June 29th, 11 days after the suit was filed.

And so Mr. Land sits down and he writes a proposal. His proposal is consistent with exactly the way he thought the law worked; pay the creditors and then the Plan. Well, that clearly was not acceptable to the plaintiff so they then submitted a draft settlement agreement on August 10th.

And that draft settlement agreement is essentially, with some tinkering, what was agreed to. The substance and the merits of that August 10th draft from the plaintiff are what was signed on August 30th for the most part, certainly with respect to the totality of the funds and the process and the structure. And they accepted, they accepted.

There is very little. There is no back and forth by way of e-mails --

THE COURT: I read your papers on this, and I understand the arguments that there aren't that many emails, there aren't that many exchanged redline drafts and all of that, but I guess I come back to the question of Mr. Sheehan cited the case that common law in Rhode Island is that there really is nothing wrong with preferring one creditor over another. And, you

know, it seems to me you're probably right; they probably, on balance, do prefer the Plan and are much more empathetic to the pensioners than they are to your clients.

And I guess I'm wondering, absent some kind of a duty that runs to your clients or to any other creditors, absent a duty, a legal duty, what's wrong with preferring one group over another group? It seems to me that that happens all the time. So, I mean, it sort of -- it's like tough luck; they like them better than they like you. That's the way it goes. Unless there's a legal duty that says you can't do that.

MR. HALPERIN: So that argument assumes that the Plan is a creditor, first, as a starting point. If they're not a creditor, then what they're doing is they're paying out their monies that should be going to satisfy their actual creditor liabilities to a third party who they prefer. Which comes back to, is it or is it not a church plan? Because if it's a church plan, there's no funding obligation and there's no liability and they're not favoring a creditor, they're favoring a third party who is not a creditor.

So we don't have that determination. But there's more, your Honor. I'm going to switch to another basis upon which --

THE COURT: Are you going to talk about this church plan versus ERISA plan now or are you going to get to that later? I think you're right. That seems to me to be a kind of critical distinction. If you're right and the Plan is not a creditor unless they're in an ERISA plan, if they're a church plan, then that could be effectively a problem of the transfer. That arguably could be collusive.

MR. HALPERIN: The only thing I can say about that at this stage of the proceeding is that it is contested, and the plaintiffs maintain that the Court is going to need to hear evidence on whether or not it met the requirements for a church plan at any given point in time. The only thing we know for sure is that the receiver made an election that went back to, I believe it would be, July of 2017 so that -- as of that point, but the operative time here is 2014.

And we only know that all the participants at that time believed that it was a church plan, but that's going to be to be a contested issue. So unless the Court is going to take evidence on that or allow for affidavits in some way to make that determination, I'm not sure how that can be adjudicated today. But I do think it's critical to the question of whether or not these monies are being paid to a preferred creditor

or to a third party who has no right to these in the absence of this Court putting its stamp of approval on a settlement at a very early stage.

Had this case gone forward, you would have had potentially cross-claims for indemnification by Prospect under its contract with CCCB. And if they came in and said we want to empty the coffers and pay the plaintiff, Prospect would be saying, well, wait a minute, Judge, we haven't been adjudicated responsible for anything and we're going to lose all of our ability to have access to any of those funds. First, we should determine the rights of the parties.

So I don't think we can adjudicate that -- I don't think you can adjudicate that on the record that's before you as to whether it is or it isn't a church plan at the time of this transaction because it's hotly contested by the plaintiff.

THE COURT: Well, just to play this out for a moment, and you can get back to the rest of your argument, but let's just assume that I do think it's a critical issue that needs to be decided now. What would be the process for that given the urgency of everything that's apparent here? An evidentiary hearing? Could it be done on affidavits?

MR. HALPERIN: Potentially, your Honor, it could

be done on summary judgment. There could be affidavits offered, and they would obviously have to come in with some critical material evidence to contradict our affidavit. But I suspect it may require some discovery and/or an evidentiary hearing to really get to the heart of it.

From the Prospect perspective, we weren't part of the team, we weren't part of the group that really knew the intricacies of how the Plan was being run or how it was being managed so for us to submit an affidavit would be not necessarily based on our actual firsthand knowledge.

THE COURT: You did have an opportunity to depose Mr. Land, and you were able to ask him questions about why he thought it was a church plan, right?

MR. HALPERIN: Not necessarily, your Honor. It was very -- discovery was limited intentionally by this collusion issue. And Mr. Land came on the scene at the time of the transaction, and he does not even necessarily have that knowledge as to what the elements are or were and whether he ever did an analysis. But we did not go down that road because it wasn't specifically pertinent to the collusion question itself, and I don't think we would have been permitted to had we tried to go into that. Really, it seems to

go to the merits of the case.

THE COURT: Okay.

MR. HALPERIN: Your Honor, I mentioned at the beginning of my remarks the *Dacotah Marketing* decision. And I want to focus on that because it opens up a slightly different perspective.

Dacotah has been cited for the basic proposition that collusion is based on tortuous or other wrongful conduct such as fraud, dishonesty between the plaintiff and the settling tortfeasor. And that is sort of one of the ways that the court gets to collusion. But in that case, there was another case that was cited that neither side really went into any detail on, but in preparing for this I thought I should call the Court's attention to it because I think it's very fact appropriate.

A case that's called *Spence-Parker vs. Maryland*, it's footnoted in the *Dacotah Marketing* case, it's 937 F.Supp. 551. It is two years' prior to the *Dacotah*, the same court, Eastern District of Virginia. And in that case there was a company picnic, and a plaintiff was injured as a result of a third-party company hired to run games for employees.

So a lawsuit is brought by the plaintiff, again to the company that organized the games. And the

insurer for that defendant refuses to come in and defend. So the plaintiff and the game company enter into a consent judgment for three-and-a-half million dollars. And part of that is that the plaintiff -- that the defendant is going to forbear from any collection efforts against from this plaintiff. And instead they are going to assign their rights against the insurance company.

So the case ends with this three-and-a-half million-dollar consent judgment therefore signed by the court. Now, with that assignment the lawsuit is brought against the insurance company by the plaintiff using the assigned rights. And there's a motion for summary judgment. And the court -- it's defended on the grounds that the first settlement is collusive. And the judge says we're going to send that back to the first judge to decide whether or not that was -- it's collusive.

First judge looks at it and says it wasn't disclosed to me by the parties that this was a non-adversarial settlement; that there was really no harm in the end to the defendant because they were not going to be pursued for any of these rights and that it should have been disclosed that this was essentially non-adversarial. Summary judgment denied.

The insurance company goes back to the first judge in same first case and says we want summary judgment on the question of whether -- on the issue of whether it was collusive. And that judge decides that, in fact, it's collusive. And they get there by essentially saying that it needed to be an adversarial process the product of arm's length negotiation or that needed to be fully disclosed to the court that it wasn't that type of a process.

Interestingly, there was no negotiation of the three-and-a-half million dollars; they just said fine, here it is, just take it. And the judge wasn't informed. The court found that that is within the definition of collusive because there was an omission, there wasn't a complete acknowledgement that these parties got together to essentially set this up for future litigation, and so summary judgment was entered. It was found to be collusive.

In this case, the parties came before you and said that this was contested, heated negotiations. It was lengthy, intensive arm's length negotiations. We don't think the facts support that. We think the facts support that CCCB was very compliant, very cooperative, provided whatever they wanted by way of financial discovery. Agreed to turn over the assets completely.

Agreed to the process. Did so in a matter of weeks with very little back-and-forth negotiations.

The only thing they cared about, frankly, was making sure that the directors and officers were released and they got that. That's not a very adversarial process. Now, why does that matter? It matters because, A, it wasn't stated that way to the court. Until we did discovery, we assumed that it was the result of contentious, good-faith negotiations.

But, in fact, what they're doing here is they're not only securing all of the money, but they're doing so in a manner that eliminates the rights of third-party creditors not before the Court who are all listed in the settlement agreement in a schedule of all the liabilities, including some for whom there's no insurance available. They're eliminating the rights of Prospect who has a contractual right of indemnification. And they're doing that with this $125 million admission that was not negotiated, at least based on anything that was produced. It was just here's the amount. First it was 120-, then they increased it to 125 million, for reasons that I'm not certain about, but there's no negotiation.

And even looking at that number, your Honor, they're telling us that number is based upon the

purchase of an annuity. That is not even the measure of damages necessarily. If you fail to fund a plan, presumably you have a funding obligation that would have to be proven and the annuity itself, it's using an interest rate factor of 2 to 3 percent. No negotiation over any of that.

In an arm's length transaction where someone has some skin in the game and something to protect, they're going to fight about the amount they're paying. They're going to fight about the calculation of an admission. None of that took place here.

So what do they gain by doing this? First and foremost, they are looking for an advantage in a future liquidation proceeding. They're not satisfied with getting all of the cash, the $11 million and the 15 percent. They've decided to leave behind some $600,000, and maybe a little bit more, to go into some future judicial liquidation proceeding. They want to come in and say in that liquidation proceeding that their claim has been determined to be $125 million and they don't have to prove it.

Mr. Del Sesto said that in his deposition that he believed he would not have to prove his damages if he had that $125 million acknowledgement in the settlement agreement. Now, who does that hurt? It

hurts all the creditors. That is to the detriment of the non-settling party Prospect and other third-party creditors if, in fact, that succeeds. That's not arm's length. CCCB had no reason to care. And that falls within the definition of collusive.

When asked to testify as to any particular issue that was difficult to resolve or contentious, neither Mr. Land nor Mr. Del Sesto could identify something specifically that they found -- that fell into that category in the settlement agreement itself. Your Honor, I think that the evidence supports that this was a lawsuit that would allow these funds to go to potentially a non-creditor. And I think that's why they waited for the lawsuit to be filed, and that's why they're a defendant, and that's why they're before this Court.

Because if the Court approves this, no one can challenge the fact that these monies went to a non-creditor. And that's within the definition of collusion the way this was presented, as well as the impact on the creditors -- of Prospect and non-creditors.

The other issues that we started this with when we saw the paragraphs that had the 125 million and the admission of liability, they had a purpose we now know.

It wasn't just window-dressing. Mr. Wistow misspoke in February when he said that Mr. Land had inserted that provision. In fact, this came from the receiver. They put those provisions in there about the extent of liability.

And they wanted it for a particular purpose. They wanted it, as they testified, to keep CCCB in line so they couldn't change their mind and hurt their position later, but they also wanted it for the judicial liquidation. They wanted to take the lion's share of the judicial liquidation proceeds, and they thought this would give them the ability to accomplish that.

So those are the reasons those provisions are in there. And they don't pass any sort of straight face test. We're talking about the Plan sponsor, the employer who was in control of this plan for years, and everyone acknowledges that when the Prospect entities came along in 2014, this plan was woefully underfunded through clearly no fault of the Prospect entities and yet they can put into an agreement that they have less responsibility in tort.

And the last point I want to make, your Honor, is with respect to the directors who are not being released, it's certainly possible that the statute of

limitations is going to impact those claims at this point in time given the fact that all of this has now been, you know, many, many, many years ago that this conduct took place. So it could be that that's the reason why it's sort of a nonissue. That's all I have, your Honor.

THE COURT: Let me just ask you a couple of questions. One is, I'm not sure I've ever really understood this.

When you say the Prospect entities are creditors of CCCB, what is it that makes the Prospect entities a creditor? I mean, how much do you believe is owed and for what?

MR. HALPERIN: Okay. What we have is an enforceable contract; he has a purchase agreement that says that if the Prospect entities are found to have any responsibility for this plan, that they have contractual indemnification rights to all the Alco (phonetic) entities. So we now have expended millions of dollars in defending this claim.

THE COURT: So it's for defense cost, basically.

MR. HALPERIN: But potentially there could be a finding of successor liability under state or federal law, and we would have the ability, if there were assets available, to go back and collect that.

Mr. Sheehan had said at one point that you can't go back from indemnity and tortuous conduct. Even if that's true, this is a contract that says if we're found responsible for any loss, you've got to indemnify us. But now all those monies will be gone.

So we're listed as a liability. In the settlement agreement on Schedule 16 and 17, Prospect entities have indemnification rights that are identified that maybe creditor is the wrong word, but liability, potential liability, contention liability.

THE COURT: Okay. I just wondered if it was anything beyond indemnification and the potential successor liability obligations.

So come back to this $125 million provision. Your suggestion is that that gives the receiver, and I think they would acknowledge this, the ability to not have to prove the damages in the judicial liquidation. But is that a result of -- I mean, it's in the settlement agreement. And so you're saying that if I approve the settlement agreement, I'm giving an imprimatur or approval to that figure such that it can be used in a liquidation setting.

MR. HALPERIN: That's what we believe, and we may have to litigate that at a later point in time. But that's the same as that *Spencer-Parker* case.

There's three-and-a-half million dollars where the Court signed off on it that they're now -- they were trying to use against the insurance company.

So here they're going to try to use this $125 million admission approved by the Court as the measure of damages. So if there's $600,000 available and they've got a $125 million claim, you can be sure that other creditors are going to get very, very little.

THE COURT: Well, why couldn't I deal with that just the way I could deal with the assertion of who is more liable than whom? I'm not making any finding with respect to that liability, that's the agreement between the parties, but it doesn't have any bearing on what the Rule 23 factors with respect to whether this is a fair settlement. And I could really basically just excise that and say I'm not making any findings about that; you can litigate that later.

MR. HALPERIN: I think you can absolutely do that to solve that particular problem. It just doesn't solve the problem of assets going to a party who is not entitled to them because they filed suit and the Court approved it and now other creditors and other liabilities go unsatisfied.

They're trying to do in court what they could not do in a settlement outside of court, and that's

where it becomes questionable and collusive. They haven't proven anything and yet other creditors are losing their opportunities. Essentially, it's a court-approved fraudulent transfer is what they're seeking here.

THE COURT: Okay. Thank you.

Why don't we take a five-minute break for the benefit of the court reporter.

COURTROOM DEPUTY: All rise.

(Recess taken)

THE COURT: All right. Mr. Kessimian.

MR. KESSIMIAN: Good morning, your Honor. Paul Kessimian for the Diocesan defendants. I tend to be brief and rely on my papers.

I think the Court is very well aware from the record submitted to it what we'll call the red flags that have been raised by this settlement and why we believe a finding under the Rhode Island special settlement statute that this settlement was reached in good faith and free of dishonesty and collusion -- dishonesty has been lost in this a little bit -- can't be found on this record.

But the reason we're making that argument -- I want to get to the practical points, Judge. The reason we're making that argument is we are concerned about

really two things, right. The first thing we're worried about is that an approval of the settlement could affect our contribution rights. And so it was raised during Mr. Sheehan's oral argument where he said, look, the directors and officers and agents that released, it's the current ones and they weren't really involved with what I'll paraphrase as the sum and substance of the dispute. And I just think that's not accurate.

The way I look at this settlement release language in the settlement agreement, your Honor, it uses a time frame in 2014 as the temporal cutoff and says after July 2014, those directors, officers and agents are released with some exceptions. I read the complaint to allege that violations of both ERISA and state law took place into and past 2014. So I'm very concerned that, obviously, I think one of the reasons the directors insisted on the release that they got was because they're concerned about potential exposure for alleged wrongful deeds from 2014 going forward which are released.

And we know that if the Rhode Island settlement statute applies here and the Court makes the factual finding and we know -- I just want to carve out and point out to the Court that I know the Court's leaving

aside the issue of whether or not that statute would be preempted under ERISA or whether that statute would be legally unconstitutional, two separate legal issues, but what's not going to be resolved, even if the Court does that, is factually we don't know whether the Court preempts the claim or finds it unconstitutional or doesn't, the Court could certainly at one point in time be faced with a proportionate liability adjudication.

That could happen a number of ways. The Court finds the statute constitutional and either the claim isn't preempted or it's not only not preempted because it doesn't conflict with ERISA, but even if the Court concludes it would be, there could be non-ERISA claims here, right. So we don't know.

In fact, Mr. Del Sesto submitted the document saying one of the reasons he insisted on the proportionate fault language in the settlement agreement that's been the subject of much conversation today is that he wanted attorney Land to fight hard to stick to the statement made in the settlement as to the small amount of the proportionate fault because I would have had to have been dealing with that at a point in time contribution issues both either in the judicial dissolution or in this lawsuit.

So our argument is if that can be dealt with,

the only way to deal with that is for the Court to say vis-a-vis the non-settling defendants, if we're ever faced with a proportionate fault adjudication, paragraph 30's statement about what they contend, all that's gone, it's not going to be considered, right. But if that doesn't happen, if we're faced within a hearing, look, the Court approved the settlement or made a good-faith finding, the Court now concludes the statute is either not preempted or is not constitutional, now we've got this to deal with.

THE COURT: You're mixing all of these things together. I mean, it could be that I find that the statute is not unconstitutional so the settlement statute applies. But I could also put in my order, and I think it's already been stated on the record here, that the contention of the settling parties that its proportionate liability is much less than the non-settling is just a contention and it has no binding effect on me and any future proceeding or any other court in a liquidation proceeding.

So these things are -- they need to be pulled apart, they're separate, and I'm not sure how one affects the other. I get how, you know, it matters to you and your client whether the settlement statute is found to be unconstitutional or not and enforceable or

not, but that really doesn't have any effect on whether that paragraph means anything in any other proceeding.

MR. KESSIMIAN: Right. Yes, your Honor. I agree with that as long as the Court makes some kind of statement with respect to paragraph 20 like it's out, it's somehow carved out of this process.

THE COURT: If I approve this, I plan to say that, but at this point I'm not even sure I need to say it because Mr. Sheehan has said it.

MR. KESSIMIAN: All right. Well, it's fine. I just wanted to point out that that at least was one of the express purposes of its inclusion. So I understand that, but I think part of this record is looking at why that provision was put in there. It was put in there I think, whether it would work or not, to prejudice.

THE COURT: Come back to your point about, because I'm not sure I fully understand it, the point about the 2014 cutoff and the worry about the board of directors.

Now, the board of directors, if I understand this correctly, they get a release from the receiver. But I think I asked the question of whether they're covered by the settlement statute, and the answer was they're not covered by the settlement statute or did I misunderstand that?

MR. KESSIMIAN: Well, if you did, I did.

THE COURT: Are the board of directors covered by the settlement --

MR. KESSIMIAN: Yes. I think if there's a release of the board of directors, which means the plaintiffs can't sue them anymore, they're released from the underlying claims, I believe that settlement statute applies. I don't have -- the Diocesan defendants do not have a contribution action if that statute applies; they're cut off. What we would be entitled to at most would be a pro-tanto reduction.

I do think that the way that statute operates is releases by the plaintiff of defendants extinguishes contribution rights and gives the defendant a setoff -- a pro-tanto setoff -- that's the exchange inherent in the act, as I understand it. And so I think the way, if the Court is trying to thread the needle, is to find if it approves the settlement, that it is with no prejudice to any contribution rights that the settling defendants would have against any of the released parties.

And I would point out, your Honor, that that provision doesn't just apply to the board, it applies to agents and officers. And I certainly believe that there are accusations including potentially against

Mr. Land as an agent post-2014 by the plaintiff.

THE COURT: But I'm sure that -- I've asked Mr. Sheehan this multiple times. Everybody understands that if the settlement is approved, it's approved irrespective of what happens with the settlement statute. So everybody's eyes are wide open on that. The settlement statute might apply, it might be determined not to apply and the chips fall where they may on that, right?

MR. KESSIMIAN: I think that's right with the caveat that at this point --

THE COURT: The settlement isn't undone. That's the point I asked Mr. Sheehan. The money gets transferred.

MR. KESSIMIAN: Yes.

THE COURT: I'm not going to get to this question about the enforceability of the settlement statute I'm sure for some time.

MR. KESSIMIAN: Right.

THE COURT: The money's already been transferred. The pensioners get their money if there's approval. And if I ultimately find that the settlement statute is unconstitutional, that's just the way it goes. That everybody understood that going in and now it plays out however it plays out, right?

MR. KESSIMIAN: I think that's right. I guess my only other caveat is the factors on how it plays out are the ERISA preemption issue, the constitutionality issue and what I'm asserting is, as well as the questions we've raised, the red flags as to this settlement, we don't want our contribution rights cut off based on this settlement.

So we should be able to proceed against a released director and not face the argument that we don't have contribution rights because the settlement agreement extinguished them. As long as those are carved out I think, in full, I think you've threaded the needle. And if the proportionate fault and the $125 million figures are also carved out in a way --

THE COURT: You're not a party to the settlement agreement so you're not giving a release to the directors or to anyone.

MR. KESSIMIAN: Right.

THE COURT: So if they don't have the protection of the settlement statute, at least vis-a-vis your client, they don't have any protection. They might have it against the plaintiff, the receiver --

MR. KESSIMIAN: That's right.

THE COURT: -- because that's who they have the release from.

MR. KESSIMIAN: I think that's right. I have no issue with the release operating vis-a-vis the plaintiffs and the directors they're releasing. That's fine. I just don't think there should be a consequence of that release to our rights.

THE COURT: Okay.

MR. KESSIMIAN: Okay.

THE COURT: What's your position as to whether this is a church plan or an ERISA plan?

MR. KESSIMIAN: Your Honor, we think that is an evidentiary question that, if the Court were to try to adjudicate, would likely require discovery and an evidentiary hearing.

THE COURT: You mean, you represent the Diocese.

MR. KESSIMIAN: Yes.

THE COURT: You don't have a position on it?

MR. KESSIMIAN: No. We didn't run the Plan. We had -- I think if you look at our motion to dismiss papers, we lay out that there was a connection between the Diocese and St. Joe's, but whether or not St. Joe's was administering a church plan requires more than that and things for which we don't have control.

THE COURT: Okay. All right. Thank you.

All right. Mr. Sheehan, I have a feeling you want to respond.

MR. SHEEHAN: Your Honor, the first point I want to address is this issue of this being a friendly lawsuit. And our papers point out that in our memorandum on attorneys' fees that issue is fully explored. I didn't get into it in my initial remarks but my brother did, and I need to get into it now.

This was anything but. Your Honor, my brothers contend that this money was going to go to the Plan anyway. That is contrary to the spirit and express allegations of the complaint and the facts. What happened, your Honor, was St. Joseph's conduct was to get its assets away from the Plan participants. It allowed 15 percent of the value of prospect CharterCARE to go to its controlling shareholder rather than it.

It transferred $8.2 million to a foundation that its controlling shareholder controlled. They didn't want their assets to go to the Plan. And then it filed a petition for receivership, your Honor, that asked for a 40 percent cut in benefits which, if allowed, under the conservative rates of return of 6.6 percent, would have protected their assets from the Plan ever reaching them.

Your Honor, they weren't going to pay their assets into the Plan. They at various times made noises like they were going to, but their conduct was

to siphon money away from the Plan. And that's what this lawsuit is about.

Now, does my brother think that CharterCARE Foundation coughed up $4.5 million back of that money in a friendly lawsuit, that was friendly too? That's the claim, that St. Joseph's transferred money to CharterCARE Foundation to get it away from the Plan and they're coughing that money back. Is that friendly too?

Your Honor, this was a wholesale scheme by St. Joseph's to --

THE COURT: I think the real issue here, and I know you're going to get to it, but I'd like for you to get to it right away, is this issue that Mr. Halperin brought up about this being is it a church plan or is it an ERISA plan. And he's right that if it's a church plan, then this is a third party, not a creditor.

If that's correct, and you may say that's not correct, but if that's correct, then putting aside all the pejorative definitions or meanings of collusion, I think there is an issue, potential issue, that if the lawsuit and the settlement of the lawsuit is done in order to facilitate what would otherwise be a fraudulent transfer, then that's a problem. So I'd like you to talk about that.

MR. SHEEHAN: Okay. Your Honor, the premise that if this is a church plan plaintiff has no claims against St. Joseph's, is categorically unjustified. We have state law claims against St. Joseph's for breach of contract for its obligation to fund the Plan and fraud. It on many, many different occasions represented to Plan participants that it was funding the Plan in accordance with the recommendations of the actuaries. It was not. We have state law claims that reach the same result and the same quantum of damages as would the ERISA claims. So that supposition is incorrect.

The Court would have to in order to get to the merits of -- the validity of plaintiffs' claims against St. Joseph's would have to adjudicate every issue in the case, the state law claims and the ERISA claims. That's number one.

Number two, your Honor, my brother until this argument never mentioned the word "fraudulent" transfer. He failed to cite the fraudulent transfer statute in his papers. This came up today for the first time. However, the fraudulent transfer statute, the definition of debtor is one who has a claim. And the law is that a disputed claim is a claim. One can settle disputed claims and give value under the

fraudulent transfer statute.

And, your Honor, whatever this Court does today is not giving -- changing the parties' rights under the fraudulent transfer statute. And by the way, your Honor, we cited in our memo this point about that a debtor includes one with a claim and that a disputed claim -- giving the settlement disputed claim its value, my brother has never addressed that.

THE COURT: So why -- if what Mr. Halperin says is correct, if I could kind of summarize what I think he's saying, which is that until the filing of the lawsuit, it was the -- whatever the entities would be.

MR. SHEEHAN: Heritage Hospitals.

THE COURT: -- the Heritage Hospital entities, it was their firm view that this was a church plan and that they didn't have these obligations. I think that is what he's saying.

MR. SHEEHAN: Which is not true, but he's saying that.

THE COURT: Okay. But that is what he's saying, right?

MR. SHEEHAN: That's right.

THE COURT: So then the receivership comes around, and then Mr. Land is taking the position in the receivership, although he's just new on the scene, but

he's taking a position that is essentially consistent with that until the lawsuit gets filed.

MR. SHEEHAN: Yes.

THE COURT: Then at that point there's suddenly this kind of "ah-hah" moment when they decide, oh, I guess we did have obligations or it's an ERISA plan and, either way, we'll just turn over all of our assets to you. That's basically the situation.

MR. SHEEHAN: That's his claim. May I address it?

THE COURT: Yes.

MR. SHEEHAN: Okay. Your Honor, the allegations in the complaint are that St. Joseph's fraudulently claimed church-plan status in order to protect its assets. So even if Mr. Land comes in here today and says, oh, no, we genuinely thought it was a church plan, we would at trial prove that that is false. Now, his client -- the issue of what his clients knew and understood, in fact, before Mr. Land even became their attorney is a question of fact, but that is what we will prove.

Now, even if one were to credit Mr. Land with, in good faith, when he filed the petition believing that the Plan was a church plan, as your Honor pointed out, he came on the scene in 2014 and later. And he

did not make a study of the law under ERISA as to what you have to do to preserve church-plan status, the principal purpose requirement being one of them. He did not make a study of the facts as to how his client administered the Plan before he came on the scene. All of that is dealt with in the complaint in great detail. So he could have in good faith believed prior to receiving the complaint that the Plan was a church plan and reading the complaint realized that it wasn't and it isn't.

So the idea that it was a friendly -- that he always was willing to pay the money, your Honor, what my brother is doing is trying to flip the burden. The burden of proof of demonstrating collusion is on my brother; it's not on the plaintiffs to negate the possibility. He has to prove it.

So there's a perfectly lawful, justifiable explanation for what happened that doesn't involve any collusion at all which is that when the complaint was filed, Mr. Land realized the jig was up, that the Plan up to that point was to keep assets from the Plan, as shown by the 15 percent that went to the controlling shareholder, the 8.2 million that went to the foundation controlled by the controlling shareholder and the petition that sought to limit St. Joseph's

liability to the existing assets of the Plan.

Now, he has to overcome that and prove that that wasn't the justification, but he's tried to flip the burden. And that's why at the outset I said there are two issues on collusion. One is what is collusion, and the other is who has the burden.

Judge Lagueux was quite clear; a settlement is presumed to be in good faith and that's consistent with every other case that deals with the issue. Otherwise, your Honor, the law favors settlements in general. And out of that comes this presumption which is said over and over again, so my brother should not be permitted to flip the burden in that fashion.

Your Honor, my brother essentially suggests that a litigant can never settle a disputed claim without the Court adjudicating the ultimate merits of that claim to determine whether or not it's the -- the plaintiff is a valid creditor under the fraudulent transfer statute. He cites no cases in support of that proposition.

And, your Honor, it's a big, big question. If they have no cases to support it, it's pretty significant. And to come up with this issue for the first time in argument today after -- your Honor, the papers that have been filed in connection with this

settlement approval are easily 500 and 600 pages. To come up with that for the first time today, your Honor, is highly suggestive that he hasn't met his burden on the law or the facts.

Now, how is Mr. Land going to litigate if the Court were to conclude that the Court has to decide the ultimate issues of state law liability and ERISA liability before the Court can approve the settlement and, say, postpones the approval of the settlement pending that adjudication?

What's Mr. Land supposed to do while that's adjudicated? Is he supposed to come in and say I agree with the plaintiffs' positions in support of the settlement or is he supposed to revert to his positions as a defendant in the case and oppose the plaintiff? How is he going to handle that? It can't be done.

On top of that, millions of dollars of legal fees are going to be spent by St. Joseph's depreciating the amount of money that can go to the settlement. The settlement won't be able to be performed because there won't be $11.25 million to pay over. Who knows what the market will do. This is years of delay we're talking about.

And, your Honor, not only -- my brother suggested summary judgment. It's trial, because we're

going to go to trial, I beg to suggest to your Honor subject to your Honor deciding, but the plaintiffs' position is going to be we're going to trial on either the ERISA claims or the state law claims or both. The issue of what the contract was, whether there was fraud, all of those are fact issues. They can't be decided in summary judgment.

So, essentially, my brothers are just going to block settlements of this case by the Heritage Hospitals entirely until the merits are reached, at which point they won't have the money anyway. If the law favors settlement, how does that scenario fit?

Which is why I go back to my first premise of what collusion is. And, your Honor, the settlement statute itself requires a demonstration of wrongful or tortuous conduct intended to prejudice the non-settling tortfeasors. The plaintiffs are attempting to reach a settlement with a defendant in satisfaction of their claims against the defendant. If the fact that that defendant has less money means that they're intending to wrongfully or tortuously prejudice the non-settling tortfeasors, then there can be no settlements for that reason.

He really is trying to come up with a standard of collusion. My brother, Mr. Kessimian, referred

again to red flags. That way lies perdition. There will be no settlements. Everything will be prospectively collusive because non-settling defendants don't like them.

By the way, your Honor, the same arguments could have been made against the CharterCARE Foundation settlement. My brothers have claimed that they have some right of contribution against them. Well, we got 4 1/2 million. They're only left with 4 million. They don't have enough money to pay their claims. We won't have any settlement there either.

You know, non-settling defendants want everything for themselves, of course. They don't want to pay the plaintiff, but they want to make sure that the money is there for them to get paid. The law favors settlements, your Honor. We can't have them if that's the way it's going to be.

Now, my brother cites this *Dacotah* case talking about a collusive entry of judgment between a plaintiff and defendant who assigned his rights against the insurance company without recourse to the defendant. If that -- in this case, the insurance company wouldn't be bound by that confession of judgment. We're asking the Court, in fact, the order we submitted to your Honor months ago expressly provides that the Court's

approval of the settlement is not a determination that any of the allegations in the complaint about admission of liability and damages or proportionate fault are binding on anyone other than the non-settling defendant. We put that in there.

So this whole business about that case cited by *Dacotah* doesn't apply at all. And the Court in *Dacotah* said the case was collusive because the Court wasn't told about the facts involving the negotiation. The Court here knows more about the facts involving this negotiation than 99 out of a hundred courts ever would. So even a collusive settlement in that case would have been okay if the parties had told the Court about it. By collusive, I mean a friendly suit in that context, using a friendly suit.

My brother wants the Court to adjudicate whether our measure of damages is the cost of purchasing annuities. We claim that it is. We in the complaint make that claim. Do we have to adjudicate that for purposes of the Court approving the settlement with respect to a contention that the Court isn't itself endorsing?

My brother talks about their rights of indemnity. He says they're contractual. It doesn't matter if there's a contract or not. If the plaintiffs

prove that St. Joseph's and Prospect were involved in a fraud on the Plan, they are in pari delicto. There will be no indemnity under in pari delicto allowed for Prospect against St. Joseph's.

Moreover, his contractual right of setoff expressly allows him to set off the 15 percent interest. So he already has set up a mechanism for payment. We'll fight that tooth and nail, but that's what he's got. So his speculative rights to contractual indemnity that are subject to a defense of in pari delicto are going to prevent a settlement between the plaintiffs and the Heritage Hospitals?

The one point, your Honor, you were asking me about, and that is the effect of the settlement statute on the directors. And if I misspoke earlier, I believe your Honor asked whether the settlement statute would bar contribution claims against the former directors and Mr. Reilly.

THE COURT: Yes. I think I misspoke. But you go ahead.

MR. SHEEHAN: And that -- we believe it would not. We do believe, however, and it's the law, that the settlement statute would bar claims for contribution against the two directors who are released, Mr. Hirsch and I don't remember the name of

the other one. So it would have that effect.

But that's what settlement -- that's what the law of contribution is. That's what the statute provides. Prejudice has to be unlawful prejudice, your Honor, not the lawful operation of a statute. And the fact that through settlements a statute is implicated that has the effect of damaging their rights doesn't make it unlawful. That is what the law is. Unless your Honor has any other questions.

THE COURT: No. Well, just some practical questions.

So let's assume that I approve the settlement. Then I imagine the non-settling defendants may want to seek an appeal on that and so do we end up with a motion to, in effect, because it would be interlocutory, there's not a final judgment here, but there is a right I think under -- there may be a right under 23(f), I'm not sure, that's on the certification of the class.

MR. SHEEHAN: That's right.

THE COURT: But not on the approval of the settlement itself. So I would have to certify an interlocutory appeal.

MR. SHEEHAN: Right.

THE COURT: And I have no idea if that is what

they would do.

MR. SHEEHAN: Right.

THE COURT: So do you want to say anything about that?

MR. SHEEHAN: Sure. Your Honor, we would oppose certification. We don't believe that there's a reason to make an exception from the final judgment rule. We believe that it's entirely speculative these rights that they are asserting with respect to the settlement funds, and it wouldn't justify an interlocutory appeal.

If there were an interlocutory appeal allowed, we would very much ask the Court to impose a bond on my brothers in the full amount of the settlement because in between the resolution of that appeal and the present, St. Joseph's money may go south so let them be the guarantors of the full amount of the settlement. I mean, a supersedeas bond is standard even if they had a right of final -- I mean, an absolute right of appeal. Certainly in an interlocutory appeal where it's going to prejudice us.

Let them impose, you know, a bond, let's say, $25 million. We have the 11.15 that's going to be paid in cash. We have the 15 percent interest in CharterCARE which was valued at $15 million. That's over 25 million right there. Let them put up that

bond. But we would oppose the granting of an interlocutory appeal in any event, your Honor.

I agree with your Honor that 23(f) is class certification. And there's been no objection by them to class certification. So I don't think that they would have grounds to appeal it not having objected to the Court on that issue.

THE COURT: So then my other question is then let's say I approve the settlement. Then where does the case go from there?

MR. SHEEHAN: This case, the monies paid, et cetera, the settling defendants are going to commence liquidation proceedings which are going to be in state court which aren't going to affect your Honor. This lawsuit will continue against the remaining defendants.

There was an issue with respect to Settlement B which is different, which is that in Settlement B because it's charitable money, Judge Stern had to subsequently rule, but that's not present here.

THE COURT: Right.

MR. SHEEHAN: So this is going to be -- they're out of the case.

THE COURT: The settling defendants are. You still have your whole complaint against --

MR. SHEEHAN: Oh, yeah. And the damages we've

gotten are by no means a considerable amount of the total damages we expect to receive.

THE COURT: So that's why I'm asking. So then you need to -- you haven't done anything really. We're still in a motion-to-dismiss phase which we're going to hear argument on this afternoon, and I'll have to deal with those issues. So that's, I guess, step one is to deal with the motion to dismiss.

So let's just assume that the complaint survives the motion to dismiss, then you're off and running on discovery, right?

MR. SHEEHAN: Right. And your Honor, your Honor previously suggested mediation. We went to mediation. The recommendation of the mediator was get through the motions to dismiss. Who knows, your Honor, whether there is a possibility of discussion at that point, who knows.

THE COURT: Okay. All right. Very good. Thank you.

MR. SHEEHAN: Thank you.

THE COURT: Does anybody have anything else? Mr. Halperin?

MR. HALPERIN: Brief. I'll be brief.

THE COURT: Brief.

MR. HALPERIN: Your Honor, if the Court

determines that what we've put forward by way of evidence of collusion is not sufficient for the Court to, essentially, not approve the settlement at all, which is really what we're suggesting, there's two issues. One is the statute, and the other one is the settlement in general.

If the settlement is collusive, the Court may decide not to approve it at all. But if the Court is trying to solve the problems of the various sections that we object to for other reasons and let the settlement go forward, perhaps another option would be to allow the non-settling defendants to reserve any claims for fraudulent transfer in the event it is determined that there is no liability and there's no recourse and it's a church plan.

And they obviously haven't proven anything at that point. The recourse could be to go back against the Plan assets where all these monies would at that point reside. So perhaps there's an option there to leave that open until there's some determination at least as to church-plan status.

And I don't believe I was suggesting earlier that the Court had to adjudicate every issue in the case. We were talking about the limited question of the timing of when it became a church plan. And sure,

there are a lot of other allegations being made, but allegations are not the same when it comes to determining whether a party is or is not a creditor.

And that's really the issue here. I brought up the issue because my brother started his presentation by saying there's nothing wrong with favoring one creditor over another. And I'm saying they're not a creditor until there is something determined that makes them a creditor, and they're certainly not a creditor based upon an obligation that wouldn't exist if it's a church plan. It's limited.

THE COURT: But Mr. Sheehan points out, and I think it's a good point, that the state law claims would at least be enough to provide a reason for the settlement that is something other than a collusive or a fraudulent type of transfer.

MR. HALPERIN: So he brought up the foundation. And he compares that. Let's look at that just for a second. The Foundation filed all kind of papers in the state court defending against the claim. They ended up settling for 50 percent. There appeared from the outside to be a hard-fought negotiation, 50 percent. They kept 50, they gave up 50.

This isn't that case. This is an eight-week nothing filed that was substantively no argument, no

battle, here it is, take it all. And their position has always been that it's not a creditor obligation. So I come back to where I ended, which is they can make all the allegations they want, but if they did this outside of this proceeding, we would be free to allege that that was a fraudulent transfer and we wouldn't lose those rights.

We're going to lose those rights merely because a complaint was filed. And that I think is the purpose of this complaint and the reason why they waited to file it before they settled.

THE COURT: So again, what is a fraudulent transfer? We're kind of going in circles here a little bit. So if it's a church plan and if there's a claim for breach of contract, breach of fiduciary duty, whatever the fraud which they have made in their complaint, and then there's a settlement, how could that be a fraudulent transfer?

MR. HALPERIN: If you assume that anything in their complaint is true, then they're settling a good-faith claim. But here the evidence is that no one really fought; they just are turning it over. And that goes back to the question of collusion. It's really no different than the *Spencer-Parker* case. Here's the judgment for three-and-a-half million dollars. Give us

our release; we're all set now. And that's exactly what happened here.

THE COURT: Well, I think it's a little bit different than that. I think it is that -- you know, if there was some reason to believe that there just was never an obligation to fund this plan, there was no legitimate claim of breach of contract, there's no legitimate claim of fraud, and that in spite of all of that and assuming that it's not an ERISA plan, they still decided to turn over all of the assets and you could point to something that suggested that that was a -- there was some other reason for that benefiting somebody for personal reasons or something like that, then there would be maybe something to look at.

But it seems to me like there's at least a colorable accusation that somebody had an obligation to fund this plan. So if it wasn't an obligation that was under ERISA, then it's not crazy to say there was an obligation under state law. There was a plan. There was an employer. There are plan documents.

I mean, it's not crazy to suggest that there are obligations that run here, either contractual obligations or fiduciary obligations, and that somebody decided not to do that and transfer the assets without doing that, you know.

MR. HALPERIN: The ERISA attorneys can speak to this much more eloquently than I can, but I've been told that there are plans all over this country that are severely underfunded, both ERISA and non-ERISA, especially church plans. There are not necessarily causes of action resulting from that. So it's a leap to say there was an obligation to fund the Plan just because the Plan was underfunded. That's not determined at all.

One more point I would like to make and I'm happy to sit down, your Honor, is that the Prospect entities have been effectively enjoined by the state court from taking any action to protect their rights with respect to their indemnification claims. In fact, they nearly were in contempt for acting too quickly. The state court has decided that this is an asset of the receivership and was stayed and whatever exists in that settlement agreement and the Prospect entities have not had the opportunity to pursue those rights which is what's giving the advantage to the plaintiff to get to those monies first.

So here you've got a party who has been forced to the sideline and now will have potentially no recourse even if they are found to have absolutely no liability at the end of this case. Their contractual

rights have been eviscerated by the state court injunction as well as this Court's stamp of approval. And that's going to be the result if this goes forward the way it's heading.

THE COURT: Okay. Thank you.

MR. SHEEHAN: Your Honor, may I make one point with respect to that last issue?

THE COURT: Okay. Make it quick.

MR. SHEEHAN: Your Honor, I'm sure Mr. Halperin misspoke, but the state court hasn't entered an injunction. My brother, Mr. Halperin, signed a stipulation in April of 2019 saying that in December he can bring his suit in Delaware if he wants. But that's a stipulation that became a consent order of the court.

And if my brother at this moment is going to bring in all of the significance of the court proceedings on this settlement approval, I think this is rather late.

THE COURT: Okay.

MR. HALPERIN: Your Honor, the state court did, in fact, issue a decision that the original stay order when the receivership entered barred us from taking any action against an asset of the receivership was stayed which included the rights under the settlement. The subsequent stipulation came long after that.

THE COURT: Okay. All right. Well, thank you. And I appreciate all of the arguments and all the effort you all have put into this. And I also appreciate Mr. Halperin's comments at the outset of his presentation. I was disturbed a little bit about some of the language and the invective that I was reading in some of the papers back and forth. And I'm glad you kind of cleared the air on that because I've worked with all of you for many years, and I think all the attorneys in this case are of the highest caliber and integrity.

I'm disturbed a little bit that the kinds of shots were being taken around this case. I think Mr. Halperin did a good job of kind of putting some of that to rest so I do appreciate that.

I'm going to take this under advisement. I'll issue an order as quickly as I can. I have some thoughts about it, but it's a little too complicated I think to do from the bench. I'm well aware of all of the passion that is involved demonstrated by all the folks who are here to observe, and we're going to give all of the attention that I can to this so that I can get you a decision as quickly as I can on the motion to approve the settlement. So hopefully that will not take too long.

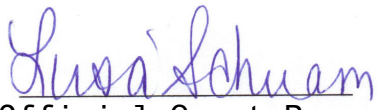
All right. We'll be in recess. Then we'll convene at 2 o'clock to hear the arguments on the motion to dismiss. Okay. We'll be in recess.

COURTROOM DEPUTY: All rise.

(Time noted: 12:20 p.m.)

CERTIFICATION

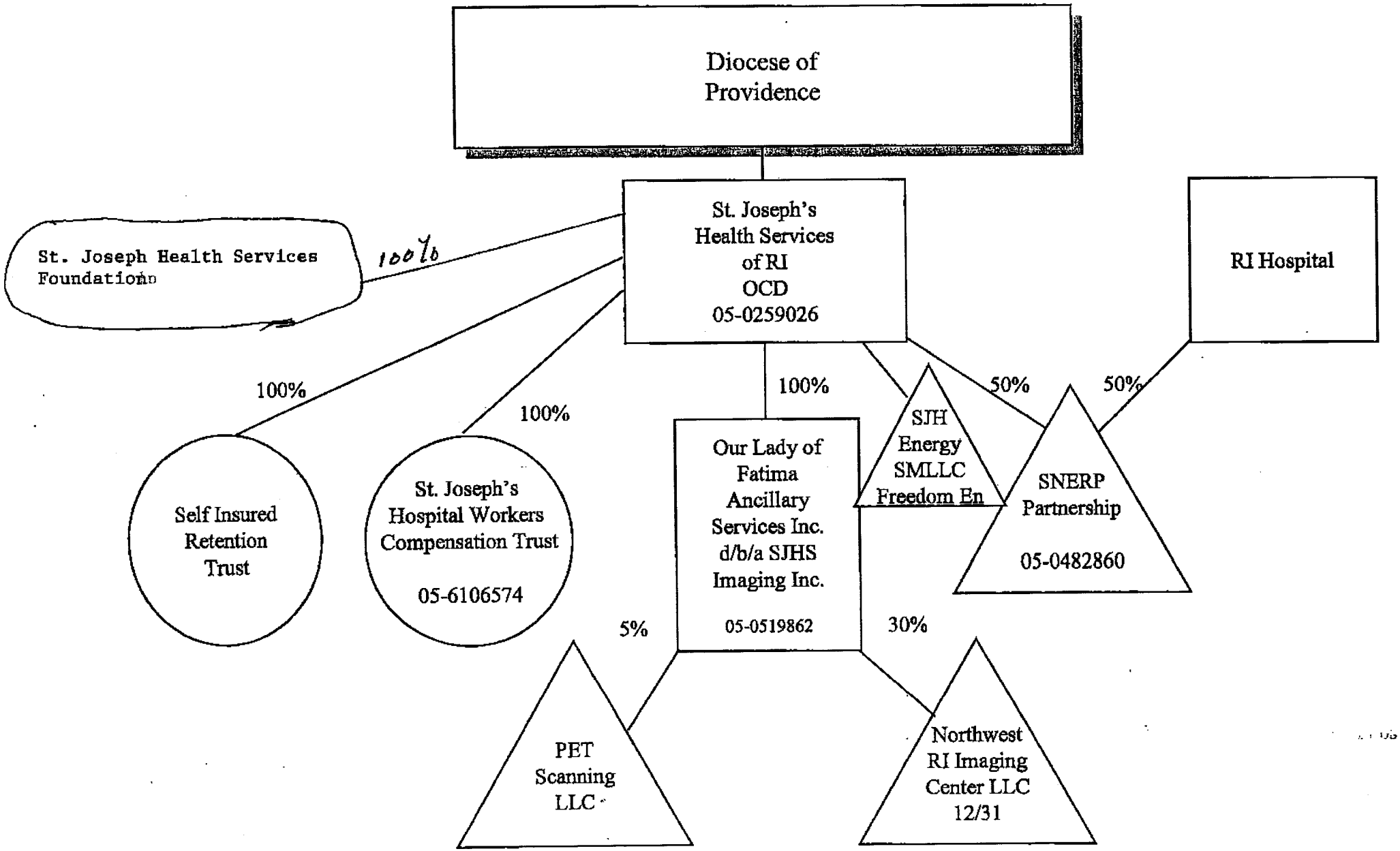
I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.



Official Court Reporter October 16, 2019

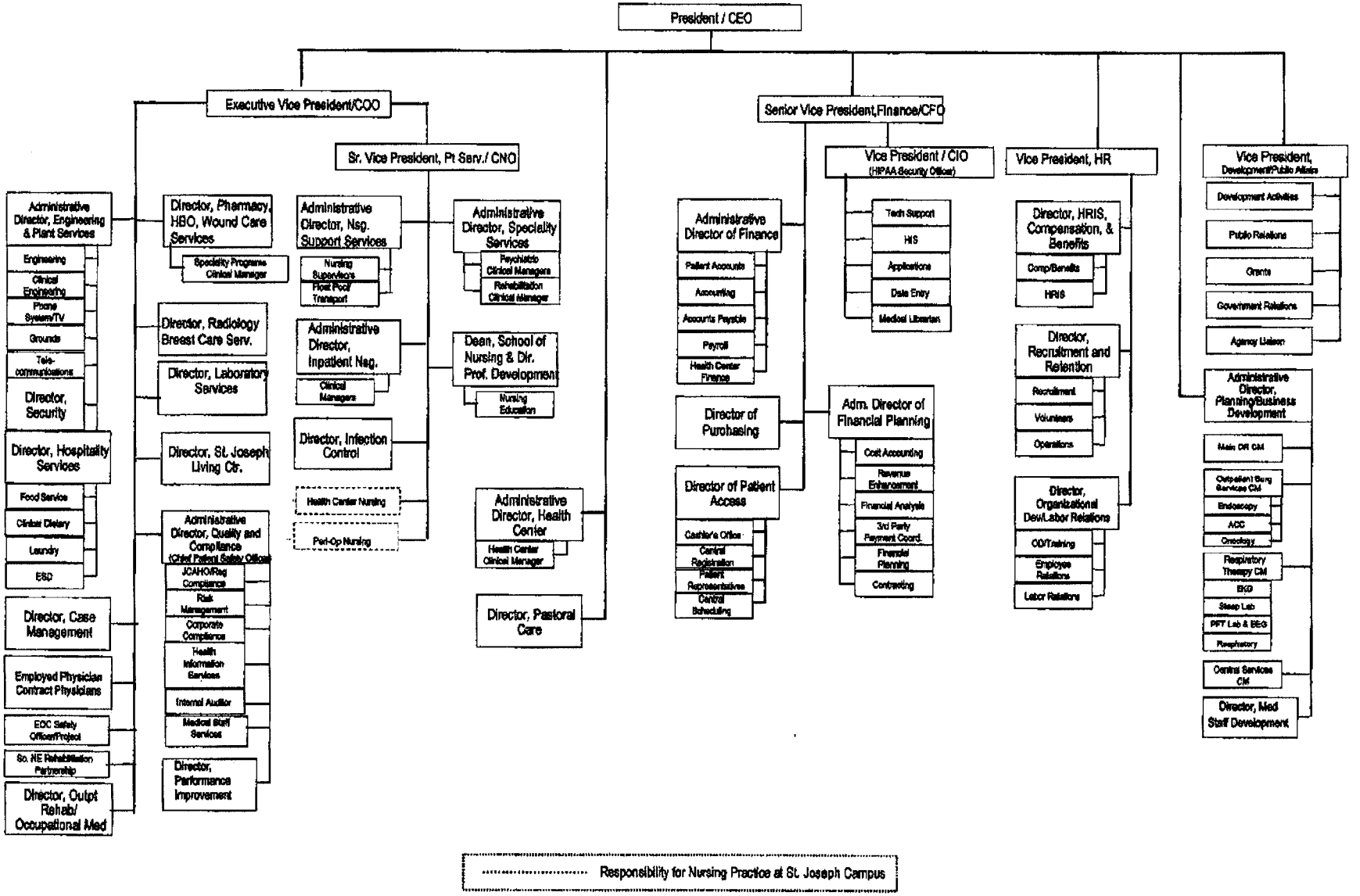
Exhibit 2

St. Joseph's Health Service of Rhode Island
Organization Chart



SJHSRI Organizational Chart

Revised: 05/20/08



St. Joseph Health Services of Rhode Island

Roger Williams Medical Center

SJHSRI & RWMC Affiliation
Corporate Organizational Structure

CharterCare Health Partners
- 15 Member Board -
(Parent w/ Reserved Powers)

Bishop/Diocese
(Reserved Powers on Catholicity)

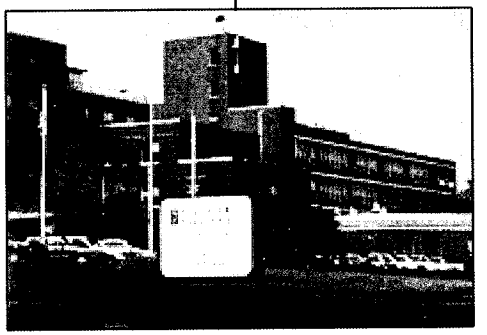
"Class B" Corporate Member

"Class A" Corporate Member

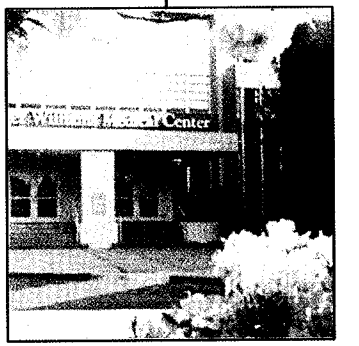
Sole Corporate Member

SJHSRI BOARD

RWMC BOARD



St. Joseph Health Services of Rhode Island



Roger Williams Medical Center

Exhibit 3

File

HOSPITAL CONVERSION APPLICATION

February 4, 2009

Please provide the following information (please copy the chart as needed):

Name Transacting Party:	**St. Joseph Health Services of Rhode Island**
Date Application Submitted:	February 4, 2009
Date of Agreement Execution with the Director for the Payment of Costs *	
Date of Agreement Execution with the Attorney General for the Payment of Costs *	
Date of Approval by Transacting Parties' and existing hospitals' parent corporation, council, or religious organization, including the Diocese, Council, and the Vatican * (if applicable)	January 15, 2009 Vatican Approval: August 29, 2008

* Please provide copies of the responsive documents.

Please provide the attestation/verification for each of the Transacting Parties and licensed hospital affiliates. (Please copy the chart as needed):

"I hereby certify that the information contained in this application submitted by St. Joseph Health Services of Rhode Island is complete, accurate and true."

1/29/09

Signed and dated by the President or Chief Executive Officer

St. Joseph Health Services of Rhode Island

Subscribed and sworn to before me this 29th day of January, 2009.

Notary Public

My Commission Expires: 01/28/09