UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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

THE DIOCESAN DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO WITHDRAW MOTION FOR PARTIAL SUMMARY JUDGMENT

PRELIMINARY STATEMENT

"Thus, the determination of whether and when the Plan ceased to qualify as a Church Plan is essential to determining the rights of the parties herein."

Pls.' First Am. Compl. ("FAC"), ECF No. 60, ¶ 66.

When Plaintiffs began this litigation in June 2018, they averred that establishing whether and when the St. Joseph Health Services of Rhode Island Retirement Plan (the "Plan") ceased to qualify as a church plan and became subject to ERISA was "**essential to determining the rights of the parties**."[1] The Diocesan Defendants[2] have also consistently stated that this determination is essential: "The Diocesan Defendants strongly believe that a prompt resolution

[1] Compl., ECF No. 1, ¶ 68 (emphasis added).
[2] Defendants Roman Catholic Bishop of Providence, a corporation sole ("RCB"), Diocesan Administration Corporation ("DAC"), and Diocesan Service Corporation ("DSC").

of this legal question will benefit the Court and the Parties."[3] So did the Court.[4] Accordingly, at the outset of the case and in lieu of deciding the then-pending motions to dismiss, the parties proffered a stipulation to the Court that established a timeline and process to resolve this critical issue. The Court entered that stipulation as an order (the "Stipulated Order").[5]

Pursuant to the Stipulated Order, Plaintiffs filed a motion for summary judgment on December 17, 2019.[6] Their Motion asserted that the Court should find that the Plan became subject to ERISA no later than April 29, 2013.[7] The Diocesan Defendants did not and do not object to the proffered relief. In fact, the Diocesan Defendants have assented to the relief requested by Plaintiffs.[8] One would think that the agreed resolution of an issue "**essential to determining the rights of the parties herein**" would be met with great enthusiasm – especially by the party that proffered the agreed-to resolution and after two years of discovery and briefing.[9] The Stipulated Order worked! The remaining parties and the Court can now move on to determining and clarifying the rights of the parties. Separation of the meat from the potatoes can begin, as the Court hoped for at the start of this process.[10]

But wait. Instead of seizing this moment and working to clarify what should – and should not – remain of this case, Plaintiffs astonishingly ask the Court to turn away from the

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[3] Diocesan Defs.' Resp. & Reservation of Rights concerning Pls.' Mot. for Summ. J., ECF No. 189, at 1; *see also* Diocesan Defs.' Resp. to Prospect's Mot. for Summ. J. ("Diocesan Defs.' Resp. to Prospect's MSJ"), ECF No. 200, at 3 ("This Court should resolve the Church Plan vs. ERISA Plan status of the Plan now so that further progress might be made in resolving the myriad of other issues in this case.").

[4] In response to a proposal that the Court address the question of whether and when the Plan became an ERISA plan the Court replied: "And maybe that is exactly what should happen. *Maybe discovery should go forward on that point alone, and we should decide that question and then see what's left of the case*. That's a helpful discussion." Tr. of Sept. 10, 2019 Hr'g on Mot. to Dismiss, ECF No. 222-1, 40:1-12 (emphasis added).

[5] Stipulation & Proposed Order concerning Limited Disc. & Related Summ. J. Mots., ECF No. 170 ("Stipulated Order") (entered as an order of the Court on October 29, 2019).

[6] Pls.' Mot. for Summ. J. on Count IV, ECF No. 173 ("Pls.' MSJ").

[7] *Id.* at 4.

[8] Diocesan Defs.' Notice of Assent, ECF No. 221.

[9] FAC, ECF No. 60, ¶ 66 (emphasis added).

[10] Tr. of Sept. 10, 2019 Hr'g on Mot. to Dismiss, ECF No. 222-1, 39:4-5 ("And I think everybody's interests are served better if we figure out, you know, where is the meat here and not the potatoes. Let's get to the meat.").

essential determination they, themselves, proffered.[11] Why?

To be very clear, Plaintiffs do not contend that their motion for summary judgment asserted against all defendants was brought improvidently. They do not contend that they overlooked a genuine issue of material fact or discovered controlling law that now precludes their proffered resolution. They point to no manifest injustice that would befall them if the Court was to follow through on the process set forth in the Stipulated Order. Finally, they do not argue that they were mistaken in their earlier averment and have now concluded that this issue is not essential to determining the rights of the parties. They do not argue that the Court need not decide this issue because it will never come up again. Rather, they ask the Court to simply abandon any resolution of this "essential" issue.[12]

The Diocesan Defendants must remind the Court of the conversation that resulted in the Stipulated Order. That conversation took place two years ago, in September 2019, at the hearing on the then-pending motions to dismiss. The Court asked Plaintiffs' counsel about "a way to get this case narrowed down in some reasonable fashion" and about resolving the question of if and when the Plan became an ERISA Plan:

> THE COURT: If I understand what you're doing and what the possibilities are at a very high level, it seems like it's this: Either the Plan is a church plan and continued to be a church plan up until the election in 2017, in which case, some of your ERISA causes of action fall by the wayside; or the Plan was an ERISA plan all along and some of your state law causes of action then fall by the wayside.
>
> MR. SHEEHAN: Some.
>
> THE COURT: Or the Plan was a church plan up to a certain point in time and then it became an ERISA plan. So you have causes of action that relate to the time

[11] Pls.' Mot. to Withdraw Mot. for Summ. J., ECF No. 226 ("Mot. to Withdraw" or "Motion to Withdraw"). Although they try to suggest otherwise, Plaintiffs unilaterally declared mediation over by filing the Motion to Withdraw. At the time the motion was filed on October 13, the Diocesan Defendants were under the impression that talks were still ongoing, with Chief Justice Williams meeting one on one with counsel and their clients. Counsel for the Diocesan Defendants had been scheduled to meet with the mediator in early November, a meeting that the mediator canceled after Plaintiffs filed the Motion to Withdraw.

[12] FAC, ECF No. 60, ¶ 66.

> period when it was a church plan, and you have causes of action that relate to when it became an ERISA plan. And there might be a period of time when it's really unclear what it was, but it has to be one or the other; it can't be anything else. So maybe there's a little bit of overlap.
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> So that's basically it, right?
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> MR. SHEEHAN: Right.
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> THE COURT: Wouldn't it make sense to get a decision on that question?[13]

Two years ago, Plaintiffs argued – as they do now – that the Court should decide nothing.[14] Two years ago, the Court rejected that argument and correctly determined that resolving if and when this Plan became subject to ERISA would assist in the orderly and manageable resolution of the myriad of issues raised by Plaintiffs' complaint and by the pending motions to dismiss. It is telling that the Plaintiffs are again before the Court pressing the very same argument – resolve nothing. Plaintiffs do not want the Court to make a finding that *they declare and concede* is essential to determining the parties' rights, even when that determination is the one that they themselves proffered. Why? Because, then as now, they do not want the rights of the parties scrutinized and determined. Especially regarding these defendants, Plaintiffs do not want an orderly or more focused assessment of the viability of their pending claims under applicable law. They want to leverage the costs and pressure of continued litigation.

The Court should stick to the process it adopted two years ago. The Court's questions quoted above that prompted the adoption of the Stipulated Order were valid then and are valid now. Promptly and efficiently resolving issues that are essential to a determination of the rights of the parties is a good and worthy goal. ***It is what the Court and the parties should***

[13] Tr. of Sept. 10, 2019 Hr'g on Mot. to Dismiss, ECF No. 222-1, 59:20-21, 69:14–70:10.
[14] *See, e.g.*, *id.* 61:8-9 ("[M]y suggestion to your Honor is that your Honor not even decide the motions to dismiss"); *id.* 70:11–73:11 (further resisting the Court's efforts to simplify case and ready matters for decision).

strive to accomplish. It is, in fact, what Rule 1 of the Federal Rules of Civil Procedure exhorts courts and parties to do – secure a just, speedy, and inexpensive determination of every action.

What is more, following through on the plan adopted two years ago will help resolution of this case now. This case is very different from the case that confronted the Court in 2019. Then, a mass of parties and motions confronted the Court. Now, only the Diocesan Defendants remain – but they are still confronted with a vague and meandering 165-page, 23-count complaint – a complaint that these defendants argue is legally deficient in many critical ways.[15] The Diocesan Defendants' motions challenging Plaintiffs' myriad and wholly implausible claims have never been assessed on the merits. Plaintiffs' complaint has never been tested or scrutinized at all by the Court. This is the moment to define the law on this "essential" issue, to exercise some control and review of this case, to step away from the noise and step towards meaningful resolution of the claims against *these* remaining defendants.[16]

The first step is easy. The Court can and should adopt the resolution of the "essential" issue of "whether and when the Plan ceased to qualify as a Church Plan" in the manner proposed by Plaintiffs themselves.[17] The Court can do so under any of three rubrics:

> (1) Deny the Motion to Withdraw and decide Plaintiffs' motion for summary judgment. Courts deny motions to withdraw in circumstances where such withdrawal would thwart court orders or result in inefficiency or wasted effort. The cases Plaintiffs cite involve unopposed motions to withdraw or do not involve scheduling orders like the one involved here;
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> (2) Enter summary judgment under Rule 56(f), which expressly authorizes courts to consider summary judgment on their own after identifying material facts not in dispute – the precise scenario before the Court now; or

[15] Diocesan Defs.' Mem. of Law in Supp. of Mot. to Dismiss, ECF No. 67-1.
[16] FAC, ECF No. 60, ¶ 66.
[17] *Id.*

> (3) Permit the Diocesan Defendants to file a motion for summary judgment seeking the same relief that Plaintiffs requested against the Diocesan Defendants. This would be the most inefficient manner to proceed, and the prior two options render it unnecessary. However, such a motion could be filed in a matter of days if the Court so desired.[18]

ARGUMENT

I. The Court Should Not Abandon the Agreed-to Plan to Resolve the Church Plan/ERISA Issue and Thereafter Determine the Rights of the Parties

The Motion to Withdraw offers no legitimate reason why the Court should abandon the process set out in the parties' Stipulated Order. *Direct Lineal Descendants of Jack v. Sec'y of the Interior*, No. 3:13-cv-00657-RCJ-WGC, 2014 WL 5439781, at *1 (D. Nev. Oct. 24, 2014) ("It is a well-established principle that once a stipulation is signed and submitted to the court, it acts as a binding contract between the parties."). "Once entered, parties are 'not generally free to extricate themselves [from the stipulation]. . . [unless] 'it becomes apparent that it may inflict a manifest injustice upon one of the contracting parties.'" *Chao v. Hotel Oasis, Inc.*, 493 F.3d 26, 32 (1st Cir. 2007) (ellipsis and second brackets in original).

The Stipulated Order provided: "The Parties agree to discovery as set forth below, limited to Count IV of the Plaintiffs' First Amended Complaint . . . with the expectation that Plaintiffs and/or Non-Settling Defendants will file motions for summary judgment as further described below, limited to that issue." Stipulated Order, ECF No. 170, ¶ 2. The Stipulated Order, moreover, contemplated that Count IV would be decided before the parties moved on to other matters, with the benefit of this central question resolved:

> "***Upon resolution of Count IV***, the Court will hold a status conference to discuss next steps (for example, and without any implied admission by any party that such step may be appropriate or necessary, mediation, answer deadlines, deadlines to replead, dispositive motions on ERISA preemption grounds, retention of

[18] There would be no prejudice or harm to Plaintiffs from the third approach, as the Diocesan Defendants would be, in relevant part, essentially filing Plaintiffs' own motion and supporting papers. There would be no surprises or need for discovery on the grounds for summary judgment. And Plaintiffs' odd estoppel arguments are flawed and could be dispatched as a matter of law. *Infra* Part IV (pages 18-20).

> supplemental jurisdiction, potential cross-claims and third-party practice, and discovery on a going-forward basis)."

Id. ¶ 4 (emphasis added).

The approach agreed to by the parties and the Court on this issue comes straight from the textbook and embraces modern case management. The Manual for Complex Litigation makes clear that the path set forth in the Stipulated Order is the correct one:

> The *sine qua non* of managing complex litigation is defining the issues in the litigation. The materiality of facts and the scope of discovery (and the trial) cannot be determined without identification and definition of the controverted issues. The pleadings, however, will often fail to define the issues clearly, and the parties may lack sufficient information at the outset of the case to arrive at definitions with certainty. Probably the judge's most important function in the early stages of litigation management is to press the parties to identify, define, and narrow the issues.

Manual for Complex Litigation (Fourth) § 11.31 (2004). The Stipulated Order identified and defined a question the resolution of which would help narrow the issues in the case and determine the rights of the parties. The process adopted for resolution was completed. The resolution proposed by Plaintiffs is supported by uncontested facts and current law. The very resolution Plaintiffs requested and briefed is ready to be adopted and has been assented to by the only remaining defendants.

The Court should not let Plaintiffs walk away from the process that the parties negotiated and agreed to and the Court approved, which called for decision on the ERISA/church plan issue. Stipulated Order, ECF No. 170, ¶¶ 2, 4. The Stipulated Order has not been vacated and Plaintiffs have made no showing that "manifest injustice" would result to them from the Stipulated Order's enforcement. *Chao*, 493 F.3d at 32-33 (explaining that party must demonstrate "manifest injustice" or a "clear mistake" to avoid enforcement of factual stipulation and denying relief); *see Waldorf v. Shuta*, 142 F.3d 601, 614-19 (3d Cir. 1998) (affirming denial

of motion to withdraw from stipulation to liability, where movant could not show manifest injustice from enforcement of stipulation, because movant's stipulation was "a tactical decision," and not caused by a "mistake of law," and the court and opposing party had expended substantial resources in reliance on the stipulation). The Court should hold Plaintiffs to their agreement, deny the Motion to Withdraw, and decide their summary judgment motion. *Direct Lineal Descendants*, 2014 WL 5439781, at *2 ("If the Court had approved a withdrawal of the parties' stipulation under these conditions, it would have been tantamount to allowing Defendants [the party trying to withdraw] to claim that they had their collective 'fingers crossed' when counsel signed the stipulation.").

Such approach is especially appropriate where, after more than two years, Plaintiffs only substantive argument for undoing the Stipulated Order is that pleading state and federal claims in the alternative allows them to avoid taking a position on if and when the Plan became subject to ERISA all the way to trial. Pls.' Withdrawal Mem., ECF No. 226-1 at 5-8. There is a material difference between electing a remedy and having to reveal your position on a mixed question of fact and law that is a threshold issue to adjudicating your various claims on the merits. *Witt v. Corelogic Saferent, LLC*, No. 3:15-cv-386, 2016 WL 4424955, at *11 n.1 (E.D. Va. Aug. 18, 2016).[19] This Court recognized as much when it observed that Plaintiffs

[19] As the *Witt* Court observed:

> The Court recognizes the right to plead alternative legal theories, but is aware of no authority that allows the pleading of alternative facts where one set of which is entirely opposite the other. Thus, the Court apprehends that Defendants' divergent views ("for employment purposes" or "not for employment purposes") is a violation of the rule that one may not approbate and reprobate at the same time. The expedited discovery will flush out the truth.

2016 WL 4424955, at *11 n.11. The *Witt* court had ordered discovery limited to this issue ("for employment purposes" or "not for employment purposes") as its resolution was "important to the future course of this case." *See id.* This Court did the same thing with respect to the ERISA/church plan issue and for the same reasons. To that end, Plaintiffs have decided whether they would "approbate" or "reprobate." *See id.* The Court should hold them to their decision and the Stipulated Order.

"[c]an't stay on the fence all the way to trial" on the ERISA/church plan issue back in February 2019. *See* Tr. of Feb. 12, 2019 H'rg, ECF No. 118, 39:4–40:5.

The cases that Plaintiffs cite on alternative pleading do not compel a different conclusion. This is not a case of a negligent entrustment theory of liability versus a respondeat superior theory, *Breeding v. Massey*, 378 F.2d 171, 177-78 (8th Cir. 1967), or breach of contract versus quantum meruit, *Wynfield Inns v. Edward Leroux Grp.*, 896 F.2d 483, 487-89 (11th Cir. 1990), or breach of contract versus breach of express guarantee, *Indus. Hard Chrome, Ltd v. Hetran, Inc.*, 64 F. Supp. 2d 741, 747 (N.D. Ill. 1999), or 29 U.S.C. § 1132(a)(1)(B) versus § 1132(a)(3), *Silva v. Metro. Life Ins. Co.*, 762 F.3d 711, 727-28 (8th Cir. 2014); *Donaldson v. Pharmacia Pension Plan*, 435 F. Supp. 2d 853, 869 n.5 (S.D. Ill. 2006), or offset versus contribution versus indemnity, *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), or return of property versus damages, *Galima v. Ass'n of Apartment Owners of Palm Court*, CIV. NO. 16-00023LEK-RT, 2019 WL 1982514, at *7-9 (D. Haw. May 3, 2019). The Motion to Withdraw should be denied.

II. Plaintiffs Offer No Legitimate Grounds for Withdrawal of Their Motion for Summary Judgment

Plaintiffs' Motion for Summary Judgment averred that there were no genuine issues of material fact and that Plaintiffs were entitled to judgment as a matter of law on Count IV declaring that the Plan became subject to ERISA no later than April 29, 2013. Pls.' MSJ, ECF No. 173, at 4, 27. They now seek to withdraw that motion, after two years of discovery and briefing and without identifying any intervening change in the law or misconceived or new facts that render summary judgment inappropriate. None have occurred.

To be sure, the Diocesan Defendants found no cases where a moving party seeks to withdraw a motion for summary judgment pursuant to a negotiated and approved scheduling order for no reason other than their desire to leave an essential issue unresolved for tactical reasons. Nor did Plaintiffs. In far less egregious circumstances, however, courts deny motions to withdraw summary judgment motions. *In re Smith*, 302 B.R. 870, 872 (Bankr. C.D. Ill. 2003) (denying motion to withdraw motion for summary judgment where the motion to withdraw was "not based on the discovery of genuine issues of material fact"); *Disability Law Ctr., Inc. v. Riel*, 130 F. Supp. 2d 294, 295 & n.2 (D. Mass. 2001) (denying plaintiff's motion to withdraw its motion for summary judgment and granting the motion for summary judgment, "because the affidavit of Steven R. Hennigan does not create disputed issues of material fact and because it [the motion to withdraw] is tardy").

In this district, Magistrate Judge Sullivan denied a motion to withdraw a motion to disqualify after the parties and the Court had expended time and resources on the issue. *Boudreau v. Petit*, No. 17-301WES, 2019 WL 6117723, at *3 (D.R.I. Nov. 18, 2019) (denying motion where defendant "has incurred the expense of responding to the motion to disqualify and the Court has expended its resources on considering it."); *see Simon Prop. Grp. L.P. v. mySimon, Inc.*, 104 F. Supp. 2d 1033, 1052 (S.D. Ind. 2000) ("SPG's motion to withdraw its motion [in limine] is hereby denied. SPG has forced mySimon and the court to deal twice with its proposed motion. MySimon is entitled to a ruling on those issues.").

Here, the parties and the Court have expended considerable time and resources in charting this case to the brink of decision on Count IV. As part of that process, the Diocesan Defendants participated in discovery related to Count IV (including answering Plaintiffs' discovery requests and attending depositions). The Diocesan Defendants also submitted a

response to Plaintiffs' motion for summary judgment and an extensive opposition to Prospect's cross-motion for summary judgment, including an 88-page response to Prospect's Statement of Undisputed Facts.[20] In those filings, the Diocesan Defendants did not waver from their position that the Court needed to decide whether and when the Plan became subject to ERISA.[21] The Court should deny the Motion to Withdraw and rule on Plaintiffs' motion for summary judgment to ensure the parties and the Court's efforts over these past two years are not for naught. *See Boudreau*, 2019 WL 6117723, at *3.

Where motions to withdraw motions are allowed, they are typically (1) unopposed and/or (2) prompted by the movant's realization that the initial motion was brought on an improper legal or factual foundation.[22] Neither condition is present here. Plaintiffs only cite four cases that even reference the withdrawal of a motion and they all hew to this paradigm. *Remley v. Lockheed Martin Corp.*, No. C00-2495CRB, 2001 WL 681257, at *1 (N.D. Cal. June 4, 2001), involved the defendant's withdrawal of a motion to dismiss by stipulation with the plaintiff, which occurred before plaintiff had filed an opposition. *Kelly v. Herrell*, 20-cv-805-bbc, 2021 WL 2806211, at *3 (W.D. Wis. Jul. 6, 2021), featured the withdrawal of a motion to

[20] Diocesan Defs.' Resp. & Reservation of Rights concerning Pls.' Mot. for Summ. J., ECF No. 189; Diocesan Defs.' Statement of Disputed Facts in Resp. to Prospect's Statement of Undisputed Facts, ECF No. 199; Diocesan Defs.' Resp. to Prospect's MSJ, ECF No. 200.

[21] *Supra* note 3.

[22] *See, e.g.*, *Script Sec. Sols. LLC v. Amazon.com Inc.*, No. 2:15-CV-1030, 2016 WL 5917548, at *1 (E.D. Tex. Oct. 11, 2016) (granting unopposed motion to withdraw motion for summary judgment); *Lashley v. Pfizer, Inc.*, Civil No. 1:09CV749-HSO-JMR, 2011 WL 13079282, at *1 (S.D. Miss. Mar. 23, 2011) (motion to withdraw motion granted where pending U.S. Supreme Court decision might dispose of issue for which summary judgment was sought); *Famous v. Pollard*, No. 07-C-847, 2010 WL 1904676, at *1 (E.D. Wis. May 11, 2010) (motion to withdraw granted where movant conceded "that disputed issues of material fact likely preclude summary judgment on exhaustion grounds."); *Bandsuch v. Werner Enters., Inc.*, 2:05-cv-305-FtM-34SPC, 2008 WL 11409456, at *1 (M.D. Fla. Jun. 23, 2008) (assented-to motion to withdraw granted where plaintiff acknowledged defendants' amendment to affirmative defenses mooted plaintiffs' motion for summary judgment); *Marchand v. Grant Cty.*, No. CV-06-0152-MWL, 2007 WL 295544, at *1 (E.D. Wash. Jan. 29, 2007) (motion to withdraw motion for summary judgment granted where movant conceded that there was "at least a question of fact, on whether the statute of limitations was tolled"); *Nw. Aluminum Co. v. Hydro Aluminium Deutschland GmbH*, No. Civ. 02-398-MO, 2004 WL 1149366, at *1 (D. Or. 2004) ("Hydro Aluminium's unopposed motion to withdraw its motion for summary judgment is GRANTED").

abandon property, where the consummation of a sale of the property addressed the concerns driving the motion to abandon. *Caldwell-Baker Co. v. Southern Illinois Railcar Co.*, 225 F. Supp. 2d 1243, 1258-1259 (D. Kan. 2002), is even further afield, discussing the impact of an uncontested withdrawal of a motion for more definite statement on waivable Rule 12 defenses. Likewise, in *Bayley Construction v. Wausau Business Insurance Co.*, No. C12-1176-RSM, 2012 WL 12874163, at *2 (W.D. Wash. Dec. 19, 2012), the withdrawal was not contested at the time of withdrawal. None of Plaintiffs' cases, moreover, involved a motion to withdraw a motion for summary judgment aimed at frustrating the fruition of a stipulated scheduling order and designed to avoid resolving an issue that the movant had pled was "essential to determining the rights of the parties." FAC, ECF No. 60, ¶ 66.

Finally, the above, as well as the following discussion respecting rule 56(f), *infra* Part III, demonstrate that Plaintiffs' argument that they are not "judicially estopped" from withdrawing their motion for summary judgment is a red-herring. Pls.' Withdrawal Mem., ECF No. 226-1, at 3-5. To be clear, the Diocesan Defendants have never argued that Plaintiffs were "judicially estopped." Judicial estoppel is not even the proper standard here; whether there is a genuine issue of material fact, an improper legal or factual foundation for the motion for summary judgment, or manifest injustice to Plaintiffs from enforcement of the Stipulated Order is the proper rubric. Some of the cases Plaintiffs cited to support their contention that they are not judicially estopped are dealt with above. But beyond the reasons those cases are distinguishable, nothing in those cases: (1) bars a court from enforcing a scheduling order and denying withdrawal of a motion where that withdrawal would prejudice other parties or frustrate the purpose of the scheduling order; or (2) prevent a court from entering judgment where

undisputed facts and existing law compel judgment on an issue. The Motion to Withdraw should be denied.

III. Independently, the Court Can and Should Exercise its Authority under Rule 56(f) to Grant Summary Judgment on Count IV

The Rules of Civil Procedure empower and direct the Court to construe them "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. To that end, the Court sought and then approved the Stipulated Order which set out a process that culminated in Plaintiffs' motion for summary judgment on Count IV. Plaintiffs now seek to frustrate that process. At this point, however, the Court can grant the relief requested in Plaintiffs' motion for summary judgment because the record before the Court is clear that undisputed facts support resolution of the issue.

Fed. R. Civ. P. 56(f) provides:

> **Judgment Independent of the Motion.** After giving notice and a reasonable time to respond, the court may: (1) grant summary judgment for a nonmovant; (2) grant the motion on grounds not raised by a party; or (3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely disputed.

(Bold in original). Plaintiffs themselves have already identified a set of undisputed material facts that they deemed sufficient for entry of judgment on Count IV. Pls.' Statement of Undisputed Facts, ECF No. 174. The Diocesan Defendants did not file an opposition to this statement of facts (as they did Prospect's).[23] On this record, summary judgment on Count IV is proper.

Even before the Rules of Civil Procedure were amended to add Rule 56(f), the Court's power to enter summary judgment on undisputed facts was clear: "To conclude otherwise would result in unnecessary trials and would be inconsistent with the objective of Rule 56 of expediting the disposition of cases." 10A Charles Alan Wright et al., *Federal Practice and*

[23] Diocesan Defs.' Statement of Disputed Facts in Resp. to Prospect's Statement of Undisputed Facts, ECF No. 199.

Procedure § 2720.1 (4th ed. 2021); *see P.R. Elec. Power Auth. (PREPA) v. Action Refund*, 515 F.3d 57, 64-66 (1st Cir. 2008) (holding *sua sponte* entry of summary judgment appropriate).[24] Rule 56(f) just makes it explicit.

If Plaintiffs now disown their request for a declaration that the Plan became subject to ERISA no later than April 29, 2013, then the Court can (and should) assess the facts and the law and approve the same declaration without the need for the Diocesan Defendants to file a formal motion requesting that relief. Fed. R. Civ. P. 1. "[T]he weight of authority is that summary judgment may be rendered in favor of the opposing party even though the opponent has made no formal cross-motion under Rule 56." 10A Wright, *supra*, § 2720.1. "The practice of allowing summary judgment to be entered for the nonmoving party in the absence of a formal cross-motion is appropriate. It is in keeping with the objective of Rule 56 to expedite the disposition of cases." *Id.*

Courts, moreover, regularly exercise their authority under Rule 56(f) to accomplish this goal. *See, e.g.*, *Wisehart v. Wisehart*, 850 F. App'x 649, 651 (10th Cir. 2021) (affirming summary judgment, where "[t]he court invoked Rule 56(f)(3) and informed AMW that judgment would enter against him unless he "come[s] forward with evidence sufficient to establish a *prima facie* case for [his RICO] claims." (brackets and italics in original)); *Yi v. BMW of No. Am., LLC*, 805 F. App'x 459, 461 (9th Cir. 2020) (holding that the "court did not violate Yi's procedural due process rights by entering summary judgment on the statute of limitations issue even though no motion was pending. The court may consider summary judgment on its own so long as it first gives notice and a reasonable time to respond"); *Maier v. Green Eyes USA,*

[24] In *Portugues-Santana v. Rekomdiv Int'l*, 657 F.3d 56, 60-61 (1st Cir. 2011), the First Circuit recognized that *Action Refund*'s construction of dolo claims under Puerto Rican law had been abrogated by the Puerto Rico Supreme Court. With respect to *sua sponte* awards of summary judgment, *Action Refund* remains good law.

Inc., No. CV409-172, 2012 WL 12920547, at *1 (S.D. Ga. Aug. 3, 2012) ("providing **NOTICE** to all parties of its [the court's] intent to consider the entry of summary judgment sua sponte in favor of Defendant KV" because "the Court cannot foresee any genuine issue of material fact involving the alleged negligence of Defendant KV that could proximately cause an increased the [sic] risk of harm" (bold in original)).

Here, the Court has a full summary judgment record on Count IV. That includes a statement of undisputed facts that Plaintiffs claimed warranted summary judgment on Count IV against all defendants and entry of a declaration that the Plan became subject to ERISA no later than April 29, 2013.[25] The only defendants remaining in this case did not oppose the statement of facts and have assented to the relief requested. Diocesan Defs.' Notice of Assent, ECF No. 221. Rule 56(f) gives the Court all the authority it needs to move this case forward and enter the relief Plaintiffs themselves suggested. *See Toland v. Phoenix Ins. Co.*, 855 F. App'x 474, 481, (11th Cir. 2021) (when "a legal issue has been fully developed[ ] and the evidentiary record is complete, summary judgment is entirely appropriate *even if no formal notice has been provided*." (brackets and emphasis in original)); *see also* Fed. R. Civ. P. 56(e) advisory committee's note to 2010 amendment ("Once the court has determined the set of facts—both those it has chosen to consider undisputed for want of a proper response or reply and any that cannot be genuinely disputed despite a procedurally proper response or reply—it must determine the legal consequences of these facts and permissible inferences from them.").

[25] The Court also has the completed opposition of Prospect, as well as Plaintiffs' and the Diocesan Defendants' responses to Prospect's opposition and cross-motion for summary judgment. *See* Prospect Defs.' Mem. of Law in Supp. of Opp'n to Pls.' Mot. for Summ. J. and Cross Mot. for Summ. J., ECF No. 190-1; Prospect Defs.' Resp. to Pls.' Statement of Undisputed Facts, ECF No. 190-4; Pls.' Response to Prospect Defs.' Statement of Undisputed Material Facts, ECF No. 196; Pls.' Reply to Prospect Defs.' Mem. of Law in Opp'n to Pls.' Mot. for Summ. J., ECF No. 197; Diocesan Defs.' Statement of Disputed Facts in Resp. to Prospect's Statement of Undisputed Facts, ECF No. 199; Diocesan Defs.' Resp. to Prospect's Cross-Mot. for Summ. J., ECF No. 200; Pls.' Mem. of Law in Opp'n to Prospect Entities' Mot. for Summ. J., ECF No. 202.

IV. Plaintiffs' Argument that the Diocesan Defendants are Estopped is without Merit

After pointing out that their estoppel arguments against the Diocesan Defendants are not germane to the Motion to Withdraw, Plaintiffs devote more than half of their Memorandum (fourteen of twenty-three pages) to previewing an argument that they *might* make at some point in the future. Pls.' Withdrawal Mem., ECF No. 226-1, at 9-23 ("Plaintiffs anticipate that they will contend that the Diocesan Defendants themselves are both equitably estopped and judicially estopped" from seeking the same declaration Plaintiffs sought).

The Diocesan Defendants are at something of a loss as to how to respond to this fourteen-page argument "preview." The first response is obvious. The estoppel arguments that Plaintiffs preview are not germane to this motion. *Id.* at 9 (indicating that Plaintiffs' will raise estoppel arguments in the event the Diocesan Defendants move for the same declaration that Plaintiffs did). The standards to be applied to this motion are discussed *supra* at Parts I-III. The Court has sufficient authority to enforce and carry through on the Stipulated Order it issued two years ago. It has authority pursuant to Rule 56(f) to enter judgment on its own based upon the record of undisputed facts before it in order to resolve issues of law presented to it and to which there is no opposition. To ignore the Stipulated Order and the policies behind Rule 56(f) (not to mention Rule 1) based upon "previewed" arguments that have no applicability and need never be addressed would turn the Stipulated Order and the Rules on their head. Add to that the other obvious response that nowhere in the fourteen pages devoted to previewing this red herring do Plaintiffs cite to a case where a party is estopped under the circumstances here. Quite simply, neither the Court nor the Diocesan Defendants can or should be estopped from seeking entry of judgment that the Plaintiffs requested – pursuant to the Stipulated Order – ***against*** the Diocesan Defendants. Pls.' MSJ, ECF No. 173, at 4, 27; FAC, ECF No. 60, ¶¶ 473-76 (Count IV).

Beyond that, while the Diocesan Defendants are reticent to respond to argument previews, they also do not want to leave the impression that Plaintiffs' estoppel argument has any merit. We provide this brief "counter-argument preview," reserving the right to supplement this "preview" should this issue ever actually need resolution. (We urge Plaintiffs to leave any "preview-reply" on the cutting room floor.)

First, it is improper to argue that the Diocesan Defendants can be estopped based on statements about the Plan's legal status as a church plan or ERISA plan in 2013/2014, when Plaintiffs contend, ***to this very day***, that the law and facts are such that they (like Prospect before them) can argue both or either side of that position in this proceeding consistent with Rule 11:

> The fact that Plaintiffs filed their motion [for summary judgment] in good faith and consistent with Rule 11 does not mean they would be unable to take the contrary position in good faith and consistent with Rule 11. The best illustration of that is that counsel for the Prospect Defendants in good faith and consistent with Rule 11 objected to Plaintiffs' motion and filed the cross-motion that asserted a position completely at odds with Plaintiffs' position.

Pls.' Mootness Reply, ECF No. 224, 17-18; *see Folio v. City of Clarksburg*, 134 F.3d 1211, 1218 & n.3 (4th Cir. 1998) (rejecting plaintiff-appellants' request for judicial estoppel and noting the irony of such a request, given the contradictory positions that appellants had taken between the state court and federal court and between the district court and on appeal: "appellants ask us to prohibit the City from doing precisely what they do so freely. We decline.").

Second, the Motion to Withdraw "twists equitable estoppel doctrine into a shape that the law does not recognize." *Plumley v. So. Container, Inc.*, 303 F.3d 364, 374 (1st Cir. 2002) (denying equitable estoppel claim, yet cited in support of Plaintiffs' estoppel argument, Pls.' Withdrawal Mem., ECF No. 226-1, at 15). Plaintiffs ***do not*** argue that they can use estoppel to preclude the Diocesan Defendants from arguing that the Plan is an ERISA plan so that both parties and the Court can proceed under the facts as allegedly represented to Plaintiffs –

i.e., the Plan was a church plan. To the contrary, Plaintiffs argue that they would still be able to obtain a declaration that the Plan is an ERISA plan somewhere down the road and, at the very same time, estop the Diocesan Defendants from arguing that ERISA limits Plaintiffs' recovery or ability to bring claims under state law. *Id.* at 13-14, 17. A true "heads I win, tails you lose" result that they cite no legal authority to support.[26] Instead, their cases caution that estoppel is "extraordinary relief," that it is "not a favored doctrine," and should be "applied carefully and sparingly and only from necessity." *Faella v. Chiodo*, 111 A.3d 351, 357 (R.I. 2015); *see Southex Exhibitions, Inc. v. R.I. Builders Ass'n, Inc.*, 279 F.3d 94, 104 (1st Cir. 2002) (estoppel not warranted).

Third, as Plaintiffs did not file a motion to estop anything specifically, although one could be forgiven for thinking that they did, there is no need for the Diocesan Defendants to engage in a point-by-point rebuttal of Plaintiffs' completely inaccurate factual claims regarding estoppel. To be clear, however, the Diocesan Defendants vigorously dispute Plaintiffs' factual recitation, including whether any of the statements cited by Plaintiffs are properly attributable to these defendants, or were made to, relied upon, or a subject of decision by regulators.[27]

Fourth, and wholly independent of all that has been said above, no estoppel can rest upon alleged statements (regardless of who may or may not have made such statements) about the Plan's qualification for the church plan exemption ***in 2013.*** This is particularly true as

[26] Plaintiffs cite three ERISA cases, two of which do not hold a party estopped. *Guerra-Delgado v. Popular, Inc.*, 774 F.3d 776, 783 (1st Cir. 2014) (estoppel not warranted); *Russo v. Valmet, Inc.*, No. 19-CV-324-DBH, 2020 WL 476670, at *3 (requiring a full factual record before considering validity of equitable estoppel claim). The third, *Cigna Corp. v. Amara*, 563 U.S. 423, 440-43 (2011), involved relief that might arguably be categorized as estoppel, but is the sort of remedy that is only permissible against an ERISA plan trustee/fiduciary, which the Diocesan Defendants were not, and have not been pled to be. Such remedy also bears no resemblance to a version of estoppel that bars arguments regarding ERISA preemption and the scope of "appropriate equitable relief" under 29 U.S.C. § 1132(a)(3).

[27] As one example, Plaintiffs point to no statements made by DAC, DSC, or RCB, let alone a statement by any of them that the Plan satisfied all of the elements for qualification as a church plan.

regards the Plan's non-compliance with the "principal purpose organization" requirement, which was the sole basis for Plaintiffs' motion for summary judgment. It is well-settled that estoppel is not applicable where a party takes inconsistent positions based upon a change in the law. *See, e.g.*, *Longaberger Co. v. Kolt*, 586 F.3d 459, 471 (6th Cir. 2009), abrogated on other grounds by *Montanile v. Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan*, 577 U.S. 136, 146-51 (2016) ("We therefore adopt the position of our sister circuits and hold that judicial estoppel is not applicable where a party argues an inconsistent position based on a change in controlling law."); *Perryman v. Motorist Mut. Ins. Co.*, 846 N.E.2d 683, 690-91 (Ind. App. Ct. 2006) (Liability insurer that denied claim based on pollution exclusion two years before state supreme court decision that pollution exclusion was unenforceable did not fraudulently conceal change in the law and was not equitably estopped from asserting the statute of limitations in insured's suit); *see also Chavariat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1427-1428 (7th Cir. 1993) (cited at Pls.' Withdrawal Mem., ECF No. 226-1, at 10) (holding judicial estoppel "unwarranted" where change in position was based on discovery of new information).

Although Plaintiffs paint the concept of a "principal purpose organization" as simple, defined, and well understood, it was anything but. As late as 2019, the U.S. Court of Appeals for the Seventh Circuit declared that the proper construction of the principal purpose organization requirement—what matters in assessing the principal purpose organization, what can/must it do, how frequent/long should it meet, how much of its authority can it delegate, are corporate formalities enough, etc.—presented "genuine issues of material *law*." *Smith v. OSF HealthCare Sys.,* 933 F.3d 859, 868-70 (7th Cir. 2019) (emphasis in original). Prior to the seminal U.S. Supreme Court case of *Advocate Health Care Network v. Stapleton*, 137 U.S. 1652 (2017), decisions from courts across the country (including district courts in the First Circuit),

held that church affiliated entities (like hospitals) could have church plans without a principal purpose organization. *See, e.g.*, *Torres v. Bella Vista Hosp., Inc*., CIVIL 06-2158 (JAG), 2009 WL 10717769, at *4-5 (D.P.R. Apr. 13, 2009), adopting recommendation, 639 F. Supp. 2d 188, 193 (D.P.R. 2009); *Catholic Charities of Me., Inc. v. City of Portland*, 304 F. Supp. 2d 77, 84-86 & n.4 (D. Me. 2004).

The facts will ultimately show – not surprisingly – that the Diocesan Defendants had no understanding of the nuances or applicability of whether or when the ***hospital's*** Plan failed to meet this arcane, changing and confusing ERISA concept, let alone made a representation to regulators on that issue. Regardless of what the facts show, however, basing a claim of estoppel on this concept is legally unsustainable.

CONCLUSION

For the foregoing reasons, the Court should adhere to the process the parties' agreed to and the Court approved, deny the Motion to Withdraw, and (1) hold Plaintiffs to their motion for summary judgment and decide it or (2) exercise the Court's authority under Rule 56(f) to enter summary judgment for the same relief.

Respectfully Submitted,

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

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of November, 2021, the foregoing document has been filed electronically through the Rhode Island ECF system, is available for viewing and downloading, and will be sent electronically to the counsel who are registered participants identified on the Notice of Electronic Filing.

/s/ Howard Merten

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