UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO WITHDRAW MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs,
By their attorneys,

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INTRODUCTION

Plaintiffs Stephen Del Sesto (as Receiver and Administrator of the St. Joseph Health Services of Rhode Island Retirement Plan) (the "Plan Receiver"), and Gail J. Major, Nancy Zompa, Ralph Bryden, Dorothy Willner, Caroll Short, Donna Boutelle, and Eugenia Levesque, individually as named plaintiffs (the "Individual Named Plaintiffs") (the Plan Receiver and the Individual Named Plaintiffs being collectively the "Plaintiffs") file this memorandum in reply to the memorandum filed by the Diocesan Defendants in response to Plaintiffs' motion to withdraw their Motion for Partial Summary Judgment (ECF # 228) (the "Diocesan Defendants' Memo.").

Plaintiffs hereby address the Diocesan Defendants' central arguments, without rehashing collateral disagreements.[1]

ARGUMENT

I. Plaintiffs' motion for summary judgment was expressly directed to Plaintiffs' claims against Prospect and did not address Plaintiffs' claims against the Diocesan Defendants

The Diocesan Defendants fail to acknowledge, much less address, the fact that, through their own choice, the summary judgment record is devoid of information concerning what effect Plaintiffs' motion for summary judgment would have on Plaintiffs' claims against the Diocesan Defendants, contrary to one of the essential requirements

[1] Plaintiffs cannot completely ignore one collateral issue, which is the Diocesan Defendants' disagreement with Plaintiffs' assertion that the mediation process was unsuccessful. ECF # 228 (Diocesan Defendants' Memo.) at 3 n.11. They claim that Plaintiffs unilaterally terminated the mediation. However, they cannot and do not dispute Plaintiffs' assertion (ECF # 226-1 at 3) that three days were set aside for mediation, and the mediator terminated the proceedings after one day. It is not appropriate to further discuss mediation proceedings, which are supposed to be both confidential and inadmissible.

of a motion for declaratory relief, *viz.*, that the court be informed of the relevance of the request for declaratory relief to the claims in the case, "so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them.'" In re Fin. Oversight & Mgmt. Bd. for Puerto Rico, 919 F.3d 638, 645–46 (1st Cir. 2019) (quoting Pub. Serv. Comm'n of Utah v. Wycoff Co., 344 U.S. 237, 243-44 (1952)).

Plaintiffs' Motion for Partial Summary Judgment sought "an order declaring that by April 29, 2013 at the latest, the Plan was not a Church Plan within the meaning of 29 U.S.C. § 1002(33) and, therefore, was subject to ERISA."[2] However, Plaintiffs' Motion for Partial Summary Judgment expressly explained the purpose of the motion, i.e., to advance Plaintiffs' claims against the Prospect Defendants for successor liability.[3] Neither Plaintiffs nor any of the Defendants addressed the effect, if any, of the applicability of that judgment on Plaintiffs' other claims against the Prospect Defendants, *or any of Plaintiffs' claims against any of the other defendants.* Consistent with the focus having been solely on Plaintiffs' claims against the Prospect Defendants, the Diocesan Defendants expressly and repeatedly abjured any position, pro or con, on the declaratory judgment sought by Plaintiffs.[4] The Diocesan Defendants also chose

[2] ECF # 173 (Plaintiffs' Motion for Partial Summary Judgment) at 27.

[3] See, e.g., ECF # 197 (Plaintiffs' Reply Memorandum) at 4 & 4 n.7 ("Plaintiffs' claim that Prospect has successor liability for the Plan under ERISA is based upon Plaintiffs' claim that the Plan was already subject to ERISA when Prospect took over Fatima Hospital on June 20, 2014, thus, it does not matter whether church plan status was lost on July 1, 2011 or April 29, 2013, since even the latter date was over a year before Prospect took over Fatima Hospital. Plaintiffs contend that under the doctrine of successor liability applicable to ERISA plans, Prospect is liable for its failure to fund the Plan from that day forward.").

[4] See, e.g., ECF # 200 (Diocesan Defendants' Response to Prospect's Cross-Motion for Summary Judgment) ("The Diocesan Defendants take no position on whether St. Joseph Health Services of Rhode

not to file their own motion for summary judgment, or to take any position, pro or con, on the Prospect Defendants' cross-motion for summary judgment that the Plan was *not* subject to ERISA before December 15, 2014 at the earliest. Thus, the summary judgment record is also devoid of any information concerning the effect that the declaratory judgment sought by Prospect would have on Plaintiffs' claims against the Diocesan Defendants.

Then Plaintiffs and the Prospect Defendants settled their dispute, prior to any hearing on either Plaintiffs' motion or the Prospect Defendants' cross motion.

Only after that settlement was finally approved by the Court did the Diocesan Defendants choose to take a position one way or the other. By then, however, the battle they had expressly declined to join was over. A final peace agreement between Plaintiffs and the Prospect Defendants had been approved by the Superior Court and this Court. One is reminded of Judge Coffin's comments in his "Address to a Luncheon for Newer Judges":

> Appellate judges… those are the chaps who ride down from the hills after the battle is over and shoot the wounded.

Daniel Wathen and Barbara Riegelhaupt, The Speeches of Frank M. Coffin: A Sideline to Judging, 63 Me. L. Rev. 467, 504 (2011).

Island, Inc. [sic] ('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).").

Plaintiffs argue that this settlement mooted their motion for partial summary judgment.[5] Although the Diocesan Defendants disagree concerning mootness, even they must acknowledge that, at least until the Diocesan Defendants filed their memorandum concerning mootness (ECF # 222) on August 31, 2021 (long after the settlement between Plaintiffs and Prospect had been agreed upon and a month after it was finally approved), the Court has been left completely in the dark concerning the effect which either the declaratory judgment sought by Plaintiffs or the summary judgment sought by Prospect would have on Plaintiffs' claims against the Diocesan Defendants.

It is, therefore, indisputable that the Court *cannot*, from the summary judgment record, "see what legal issues it is deciding, **what effect its decision will have on the adversaries**, and some useful purpose to be achieved in deciding them'" as required by the First Circuit in In re Financial Oversight and Management Board for Puerto Rico, *supra*, 919 F.3d at 645-46 (quoting Pub. Serv. Comm'n of Utah v. Wycoff Co., 344 U.S. 237, 243-44 (1952)) (emphasis added). In their memorandum filed on August 31, 2021, the Diocesan Defendants purported to state four "implications" that deciding Plaintiffs' motion would have on Plaintiffs' claims against the Diocesan Defendants, but Plaintiffs have already addressed why those alleged "implications" are irrelevant, are inaccurate, raise extraneous issues, and are offered too late for orderly consideration in connection with the pending motion for summary judgment. See ECF # 224 (Plaintiffs' Reply Concerning Mootness of Pending Motions for Summary Judgment) at 6-13.

[5] Plaintiffs' arguments are fully set forth in ECF # 223 (Plaintiffs' Memorandum Concerning Mootness of Pending Motions for Summary Judgment) and ECF # 224 (Plaintiffs' Reply Memorandum Concerning Mootness of Pending Motions for Summary Judgment).

Declaratory relief is discretionary. DeNovellis v. Shalala, 124 F.3d 298, 313 (1st Cir.1997) ("The Declaratory Judgment Act is 'an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant;' courts have broad discretion to decline to enter a declaratory judgment.") (quoting Wilton v. Seven Falls Co., 515 U.S. 277, 287 (1995)); El Dia, Inc. v. Hernandez Colon, 963 F.2d 488, 493 (1st Cir.1992) ("[D]eclaratory relief, both by its very nature and under the plain language of 28 U.S.C. § 2201, is discretionary.").

The exercise of such discretion would be unjustified in the unusual circumstances of this case, in which the prior settlement between Plaintiffs and Prospect mooted Plaintiffs' motion and Plaintiffs have formally moved for leave to withdraw their motion. Moreover, in the First Circuit, a trial court's decision to exercise its discretion to grant declaratory relief *by motion for summary judgment* is subject on appeal to "a particularly stringent version of independent review…" El Dia, Inc., *supra*, 963 F.2d at 493 ("Clearly, the case for [appellate] deference is at its lowest ebb in a situation like this one, where the district court was powerless either to make credibility determinations or to resolve factual conflicts. We must, therefore, afford a particularly stringent version of independent review to the judgment below.") (applying *de novo* review and reversing trial court's grant of declaratory relief through summary judgment). In particular, courts should "refrain from giving a declaration unless there is a full-bodied record developed through adequate adversary proceedings with all interested parties before the court." Nautilus Ins. Co. v. 8160 South Memorial Drive, LLC, 436 F.3d 1197, 1200 (10th Cir. 2006) (quoting 10B Fed. Prac. & Proc. Civ. § 2759 (3d ed. 1998)).

On the other hand, if the Court were inclined to proceed with the pending motions for summary judgment,[6] Plaintiffs would certainly be entitled to supplement the record to address the effect of ERISA on their claims against the Diocesan Defendants, who are the only defendants against whom Plaintiffs still have an adversary claim. Obviously, behind the Diocesan Defendants' belated "assent" lies their conviction that such a declaration would assist their defense. Before that unspecified benefit accrues to them, however, Plaintiffs are entitled to be heard why the Diocesan Defendants are estopped, and the Court should be informed on this issue before exercising discretion to grant summary judgment. Plaintiffs should be allowed at least to provide the Court with the relevant facts and legal arguments supporting their claim that the Diocesan Defendants are both equitably estopped and judicially estopped from asserting that ERISA applied to the Plan at any time up to and including the sale of SJHSRI's assets (including Fatima Hospital) to Prospect. Only then will there be "a full-bodied record developed through adequate adversary proceedings with all interested parties before the court." 10B Fed. Prac. & Proc. Civ. § 2759 (3d ed. 1998), *supra*.

II. There is no logical or legal inconsistency in Plaintiffs' claim that ERISA applied to Plaintiffs' claims against Prospect but the Diocesan Defendants are estopped from relying on ERISA

The Diocesan Defendants assert that their belated "assent" to Plaintiffs' motion for partial summary judgment establishes that Plaintiffs' claims against the Diocesan Defendants must be decided on the basis "that by April 29, 2013 at the latest, the Plan was not a Church Plan within the meaning of 29 U.S.C. § 1002(33) and, therefore, was

[6] That neither the movants (Plaintiffs) nor cross-movants (Prospect) are pressing.

subject to ERISA." However, to make that declaration without addressing the effect of estoppel is not in the interest of judicial economy. The effect of ERISA and the effect of estoppel are linked in this case. There would be no obstacle to the Court's making that precise declaration and, either at the same time or later in the case, accepting Plaintiffs' arguments that the Diocesan Defendants are also judicially estoppel and/or equitably estopped from relying on that declaration. In other words, that declaration may be "true" as a matter of law and fact, while at the same time the Diocesan Defendants are estopped to deny and, therefore, are bound by, their earlier assertions that the Plan was a "church plan" exempt from ERISA at all relevant times, including through the closing of the asset sale on June 20, 2014.

That is because, by definition, both equitable estoppel and judicial estoppel involve a court's holding that claims against a party will be determined based upon previously asserted (even if incorrect) factual statements and conclusions concerning mixed issues of law and fact. Under the doctrine of equitable estoppel, a party may be precluded from enforcing **an otherwise legally enforceable right** because of the previous actions of that party." Sturbridge Home Builders, Inc. v. Downing Seaport, Inc., 890 A.2d 58, 67 (R.I. 2005) (emphasis supplied). "Equitable estoppel is a judicially-devised doctrine which precludes a party to a lawsuit, because of some improper conduct on that party's part, from asserting a claim or a defense, **regardless of its substantive validity**." Phelps v. Fed. Emergency Mgmt. Agency, 785 F.2d 13, 16 (1st Cir. 1986) (emphasis supplied). "A person is estopped to set up the truth in contradiction to his conduct, **so as to make the truth an instrument of fraud**." East Greenwich Inst. for Savings v. Kenyon, 37 A. 632, 633 (R.I. 1897) (emphasis supplied).

In other words, the Diocesan Defendants are equitably estopped from asserting the "truth" (if any) of the applicability of ERISA to the Plan as of April 23, 2013, because to do so would allow them to use the truth as an instrument of fraud.

Judicial estoppel also precludes a party from relying on *true* statements of fact or conclusions of law where the party has previously argued to the contrary and a court or *administrative agency acting in any quasi-judicial proceeding*[7] accepted the incorrect statement of fact or conclusion of law. "The principle [of judicial estoppel] is that if you prevail in Suit # 1 by representing that A is true, you are stuck with A in all later litigation." Astor Chauffeured Limousine Co. v. Runnefeldt Inv. Corp., 910 F.2d 1540, 1547 (7th Cir. 1990). Indeed, prior to 2001, the Tenth Circuit took the minority position and rejected the doctrine of judicial estoppel entirely, in cases based on federal law, precisely because it tends to "discourage the determination of cases on the basis of the true facts as they might be established ultimately." Parkinson v. California Co., 233 F.2d 432, 438 (10th Cir. 1956). That minority position was abrogated by the Supreme Court's holding in New Hampshire v. Maine, 532 U.S. 742, 750 (2001) that judicial estoppel applies under federal law. See Johnson v. Lindon City Corp., 405 F.3d 1065, 1068-69 (10th Cir. 2005) ("Although this circuit has repeatedly refused to apply this principle [of judicial estoppel], the Supreme Court's intervening decision in *New Hampshire* has altered the legal landscape. Accordingly, we must follow the guidance of the Court's binding precedent.") (other citations omitted) (applying judicial estoppel).

[7] "Reliance by an administrative agency on a prior inconsistent position has supported judicial estoppel in later court proceedings." 18B Fed. Prac. & Proc. Juris. § 4477.2 (2d ed.).

The fact that ERISA is a federal statute does not make estoppel inapplicable, because estoppel is a remedy available under ERISA. See CIGNA Corp. v. Amara, 563 U.S. 421, 441 (2011) (approving of equitable estoppel as "other appropriate equitable relief" to redress violations of ERISA); Montrose Medical Group Participating Savings Plan v. Bulger, 243 F.3d 773, 780-82 (3d Cir. 2001) (holding that a hospital's assertion of contrary positions in separate proceedings, concerning whether or not a benefits plan was governed by ERISA, satisfied the inconsistency element of judicial estoppel, but judicial estoppel did not apply "when the initial claim was never accepted or adopted by a court or agency").

Because the applicability of equitable estoppel and judicial estoppel depend upon the conduct of a particular defendant, there is no reason why, in a case involving multiple defendants, a plaintiff's claim against one defendant cannot be determined based upon the true facts or legal principles while, in the same case, the plaintiff's case against another defendant who is judicially or equitably estopped cannot be determined based upon incorrect facts or legal principles previously asserted by that defendant. See generally Sunbeam Corp. v. Liberty Mut. Ins. Co., 781 A.2d 1189, 1192 (Pa. 2001) ("Unlike collateral estoppel or res judicata, it [judicial estoppel] does not depend on relationships between parties, but rather on the relationship of one party to one or more tribunals."); Whitacre P'ship v. Biosignia, Inc., 591 S.E.2d 870, 881 (N.C. 2004) ("judicial estoppel has no mutuality requirement because the doctrine 'has nothing to do with other parties to the suit'").

In such a case, it might be necessary to sever the cases against the different defendants for trial, so as to avoid confusing a jury. However, that procedural

complexity is not present here. Plaintiffs' settlement with Prospect has eliminated Prospect from the case, leaving only Plaintiff's claims (which are properly pleaded in the alternative) against the Diocesan Defendants. Thus, the summary judgment motion practice has already achieved the salutary purpose of simplifying the case.

Here, Plaintiffs asserted the applicability of ERISA against Prospect because ERISA would not prejudice Plaintiffs' claims against Prospect. To the contrary, ERISA would have enhanced the likelihood of recovery against Prospect based upon the fairly liberal principles of the federal common law of successor liability, the elements of which are proven against Prospect based upon the indisputable fact that Prospect acquired Fatima Hospital with knowledge of SJHSRI's obligations under the Plan.[8] However, applicability of ERISA to Plaintiffs' claims against the Diocesan Defendants would prejudice Plaintiffs. Successor liability may not apply to non-acquiring third parties such as the Diocesan Defendants, and other remedies under ERISA are arguably considerably less favorable to Plaintiffs than the remedies afforded under state law.

The Diocesan Defendants seek to use ERISA as a sword against Plaintiffs (notwithstanding that Plaintiffs include over 2,700 pension plan participants for whom ERISA is remedial legislation) after joining with others in successfully convincing the Rhode Island Department of Health and Rhode Island Attorney General to approve the asset sale in 2014 based upon representations that the Plan was a "church plan"

[8] See Einhorn v. M.L. Ruberton Const. Co., 632 F.3d 89, 99 (3d Cir. 2001) ("In sum, we hold that a purchaser of assets may be liable for a seller's delinquent ERISA fund contributions to vindicate important federal statutory policy where the buyer had notice of the liability prior to the sale and there exists sufficient evidence of continuity of operations between the buyer and seller."); Pension Benefit Guaranty Corporation v. Findlay Industries, Inc., 902 F.3d 597, 611-12 (6th Cir. 2018) (applying federal common law of successor liability under ERISA for a single employer defined benefit plan).

exempt from ERISA. Plaintiffs contend that, having prevailed before these agencies based upon the representation that the Plan was exempt from ERISA, the Diocesan Defendants are "stuck with" that conclusion in this litigation. See Astor Chauffeured Limousine Co. v. Runnefeldt Inv. Corp., *supra*, 910 F.2d at 1547 ("The principle is that if you prevail in Suit # 1 by representing that A is true, you are stuck with A in all later litigation."). The Diocesan Defendants seek some advantage against Plaintiffs through an adjudication by the Court that the Plan was governed by ERISA as of at least April 23, 2013. On that very date of April 23, 2013, the Bishop issued a resolution[9] directly to the contrary. While "a showing of unfair advantage" is not a prerequisite to applying judicial estoppel, see Guay v. Burack, 677 F.3d 10, 16–17 (1st Cir. 2012), "it is a powerful factor in favor of applying the doctrine." Id.

It should be abundantly clear that, even if the Diocesan Defendants could establish that ERISA would otherwise apply to this case, Plaintiffs must be given an opportunity by the Court to show that these defendants must be barred by their prior conduct from applying ERISA to their potential advantage. Plaintiffs are entitled to show that such prior conduct is the basis for equitable estoppel and judicial estoppel. The estoppel issues are intimately connected with the allegations of fraud that Plaintiffs have asserted against the Diocesan Defendants. As the Court knows, Plaintiffs have had no discovery whatsoever in this case relating to those issues.[10]

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[9] ECF # 226-12 ("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.").

[10] However, the Plan Receiver's pre-suit investigation unearthed substantial evidence of the Diocesan Defendants' fraud which is set forth with great detail in their complaint, including specific allegations

The Diocesan Defendants complain of the extensive discussion by Plaintiffs in their memorandum concerning the Diocesan Defendants' conduct which Plaintiffs contend give rise to the estoppels. The reason for Plaintiffs' including this material is not to ask the Court to decide the issue of estoppel, *vel non*, based upon the current (undeveloped) summary judgment record. That issue need not and cannot be decided on the existing summary judgment record. Rather, the purpose is to demonstrate to the Court that Plaintiffs have a legitimate basis to make these claims, that these claims are not some phantasmagorical creation, and the Plaintiffs are entitled to the opportunity to fully develop these claims. The Diocesan Defendants claim that Plaintiffs' assertions are "wholly implausible." ECF # 228 (Diocesan Defendants' Memo.) at 5. However, they make no effort to explain why. Are the Diocesan Defendants to be considered incapable of committing misdeeds, incapable of acting in other than in an open and transparent manner, and incapable of trying to cover up for prior misdeeds?

It is respectfully suggested that if the Diocesan Defendants wish to obtain a decision on the applicability of (or exemption from) ERISA, they should file their own motion for summary judgment.

III. The Diocesan Defendants can file their own motion for summary judgment, at the appropriate time

The Diocesan Defendants acknowledge that their desire to have the Court decide "whether and when the Plan ceased to qualify as a Church Plan" can be addressed by their filing their own motion for summary judgment "seeking the same

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concerning the "who, what, when, and where" of the Diocesan Defendants' efforts in combination with the other Defendants to shift the assets of SJHSRI beyond the reach of the Plan participants while leaving the liability for the Plan with SJHSRI.

relief that Plaintiffs' requested…" ECF # 228 (Diocesan Defendants' Memo.) at 6. Plaintiffs do not agree, however, with the Diocesan Defendants assertion that, in connection with such a motion, Plaintiffs' "estoppel arguments are flawed and could be dispatched as a matter of law." ECF # 228 (Diocesan Defendants' Memo.) at 6 n.6.[11] Although that issue need not and cannot be decided at this time, the looming presence of that issue further supports requiring the Diocesan Defendants to file their own motion for summary judgment so that the issue can be addressed properly.

IV. Parties are entitled to plead both facts and law in the alternative

Citing one case from the U.S. District Court for the District of Eastern Virginia, the Diocesan Defendants incorrectly contend that the Federal Rules of Civil Procedure do not permit a party to allege mutually exclusive facts in the alternative. See Diocesan Defendants' Memo. at 8-9 (citing Witt v. Corelogic Saferent, LLC, No. 3:15-cv-386, 2016 WL 4424955, at *11 n.1 (E.D. Va. Aug. 18, 2016)). That court stated in the cited footnote:

> The [District] 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.

[11] Questions of intent (including inadvertence or mistake) and bad faith are involved in both judicial estoppel and equitable estoppel and are for the jury to decide. 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"); 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").

Witt, 2016 WL 4424955, at *11 n.1. With all due respect to this one decision from the Eastern District of Virginia, its conclusion is inexplicable. There are numerous authorities (including from the First Circuit) expressly recognizing *the pleading of alternative facts where one set of which is entirely opposite the other*.

The First Circuit has expressly held:

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

Aetna Cas. Sur. Co. v. P & B Autobody, 43 F.3d 1546, 1555 (1st Cir. 1994).

That First Circuit authority, which (needless to say) is binding on this Court, is also consistent with authority in other circuits. See Henry v. Daytop Vill., Inc., 42 F.3d 89, 95 (2d Cir. 1994) ("Under Rule 8(e)(2)[12] of the Federal Rules of Civil Procedure, a plaintiff may plead two or more statements of a claim, even within the same count, regardless of consistency. The inconsistency may lie either in the statement of the facts or in the legal theories adopted.") (citations omitted); Guy James Const. Co. v. Trinity Indus., Inc., 644 F.2d 525, 530 (5th Cir.), modified, 650 F.2d 93 (5th Cir. 1981) ("A party may plead alternative and inconsistent facts or remedies against several parties without being barred."); Indep. Enterprises Inc. v. Pittsburgh Water & Sewer Auth., 103 F.3d

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

1165, 1175 (3d Cir. 1997) (Fed. R. Civ. P. 8 "permits inconsistency in both legal and factual allegations"); Wright & Miller, 5 Fed. Prac. & Proc. Civ. § 1283 (4th ed.) ("Under Federal Rule 8(d)(2) a party may include inconsistent allegations in a pleading's statement of facts.").

Thus, for example, a Section 1983 plaintiff alleging a wrongful search and seizure in violation of the Fourth Amendment is permitted to allege both that a drug-sniffing dog *alerted* to his vehicle *and did not alert* to the vehicle, notwithstanding that the two factual allegations are obviously mutually incompatible:

> The Motion is limited to a relatively narrow argument. Defendants only argue that the portion of the claim concerning the search of the Vehicle should be dismissed, and that it should be dismissed because "it is undisputed that the police dog alerted to the presence of drugs in the vehicle," which provided "probable cause to search the entire vehicle," thus resulting in a "constitutionally permissible" search of the Vehicle. Therefore, according to Defendants, "[w]hile the other claims against Trooper Pohlabel may go forward, the unconstitutional search claim ... should be dismissed" because it fails to state a claim upon which relief may be granted.
>
> However, the Court disagrees with the argument because it is entirely based on a faulty premise: that Mr. Collik "concedes that the police dog alerted to the presence of drugs when it sniffed his car." Looking at the Complaint, it alleges that the Defendants searched Mr. Collik's vehicle without a warrant. Allegations also indicate (or at least allow the reasonable inference) that there was no applicable exception to the general rule that warrantless searches of vehicles are per se unreasonable. This includes that the Complaint pleads a set of facts that the drug-sniffing dog did not alert, contrary to the foundational assertion in the Motion that "it is undisputed that the police dog alerted to the presence of drugs in the vehicle."
>
> **Mr. Collik pleads alternative facts in the Complaint: the drug-sniffing dog did not alert or the drug-sniffing dog alerted towards the passenger compartment of the Vehicle. This type of pleading is permissible.** Fed. R. Civ. P. 8(d)(2); *Indep. Enters. Inc. v. Pittsburgh*

> *Water and Sewer Auth.*, 103 F.3d 1165, 1175 (3d Cir. 1997) (the rules "permit[ ] inconsistency in both legal and factual allegations"); 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1283 (3d ed.) ("[u]nder Federal Rule 8(d)(2) a party may include inconsistent allegations in a pleading's statement of facts"). The pleading rules specify that, "[i]f a party makes alternative statements, the pleading is sufficient if any one of them is sufficient." Fed. R. Civ. P. 8(d)(2); *see also Johnson v. City of Hammond*, No. 2:14 CV 281, 2016 U.S. Dist. LEXIS 41840, at *6-7, 2016 WL 1244016, at *3 (N.D. Ind. Mar. 29, 2016) ("[p]leading alternative statements of fact does not make any of them less plausible, and if one is sufficient, then the pleading is sufficient").
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> [Emphasis supplied]

Collik v. Pohlabel, No. 3:20-CV-307, 2020 WL 7075632, at *3 (S.D. Ohio Dec. 3, 2020) (record citations omitted).

V. The stipulations effectuating the Court's direction that the Parties file motions for summary judgment are irrelevant to Plaintiffs' motion for leave to withdraw their motion for partial summary judgment

The Diocesan Defendants contend that the stipulations that effectuated the Court's direction that the parties file motions for summary judgment constituted a binding agreement, one precluding Plaintiffs from withdrawing their motion for partial summary judgment. ECF # 228 (Diocesan Defendants' Memo.) at 8 ("The Court should hold Plaintiffs to their agreement, deny the Motion to Withdraw, and decide their summary judgment motion."). There are at least four reasons why this argument must fail.

First, the record is clear that Plaintiffs agreed to the procedure for submission of summary judgment motions only after the Court, over Plaintiffs' objection, ruled that such motions would be required. Plaintiffs objected to depositions limited to the applicability of ERISA and summary judgment motions on that issue:

> 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 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. So that's basically it, right?
>
> MR. SHEEHAN: Right.
>
> THE COURT: Wouldn't it make sense to get a decision on that question?
>
> 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, your Honor, and leave the parties to our own devices, your Honor. It's not going to be an imposition on the Court. I'm suggesting the Court not even decide the motions to dismiss. Let the parties litigate.
>
> THE COURT: Well, maybe that's an alternative approach that could work, but there's going to be a lot of complaints from the other side about -- you heard what Mr. Merten said, you know, we're going to be doing depositions about what was said to the Plan members in 1973 and 1975. Well, you know, I think that's a legitimate complaint.

ECF # 222-1 (Sept. 10, 2019 afternoon hearing transcript) at 69-71. The record is also clear that the Court rejected Plaintiffs' request to "let the parties litigate" in favor of allowing limited discovery and then motions for summary judgment:

> THE COURT: All right. Here's what we're going to do: I'm going to give you some time to meet and confer on a discovery plan that will allow for some type of phase or reasonably organized discovery that would allow

> the claims to move forward and discovery to get started without my having to go through and try to parse this complaint down at this point in response to all these motions. I want to get a proposal from you about how that's going to be done. If you're unable to come up with a joint proposal on how to do it, then you can submit your respective proposals on how to do it. And I'll consider those proposals, and then I'll decide how we're going to go forward.

ECF # 222-1 (Sept. 10, 2019 afternoon hearing transcript) at 74. The Court then ended the hearing. Id. at 75. It was only then that Plaintiffs agreed to the stipulations providing the procedure pursuant to which Plaintiffs' and Prospect's motions for summary judgment were filed.

Second, the stipulations as agreed to and entered by the Court themselves make no provision for how summary judgment motions should be handled in the event 1) the Diocesan Defendants chose not to file a summary judgment or take any position on the motions that were filed, 2) there was a settlement between the only parties submitting or objecting to the motions; or 3) any party sought to withdraw a motion.

Third, no stipulation or prior order is effective to obligate or even allow the Court to decide a motion for summary judgment for declaratory relief that, in the present posture of this case, would not be a sound exercise of discretion.

Fourth, no stipulation or prior order however categorical (unlike the one referred to in this case) is effective to obligate or even allow the Court to decide a motion for summary judgment that has become moot as the result of a settlement or for any other reason. As discussed in Plaintiffs' prior memoranda (ECF ## 223 & 226-1) the Court has no jurisdiction to decide moot issues. "Federal courts cannot decide moot issues that the parties seek to have resolved." Northern Alaska Environmental Center v. Hodel, 803 F.2d 466, 469 n.3 (9th Cir. 1986). "Mootness is a jurisdictional issue, and

the agreement of the parties does not bind us." United States v. Johnson, 801 F.2d 597, 600-01 (2d Cir. 1986). "The parties cannot avoid the effect of a mootness determination simply by attempting to stipulate that the court has jurisdiction." Olin Water Services v. Midland Research Laboratories, Inc., 774 F.2d 303, 306 (8th Cir. 1985).

CONCLUSION

For the foregoing reasons, the Court should deem Plaintiffs' Motion for Partial Summary Judgment (ECF # 173) withdrawn.

Respectfully submitted,
Plaintiffs,
By their Attorneys,

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