STATE OF NEW YORK SUPREME COURT
COUNTY OF SCHENECTADY

MARY HARTSHORNE, *et al*., Plaintiffs, v. THE ROMAN CATHOLIC DIOCESE OF ALBANY, NEW YORK, *et al.*, Defendants.	**INDEX NO: 2019-1989**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS THE ROMAN CATHOLIC DIOCESE OF ALBANY, BISHOP EDWARD B. SCHARFENBERGER, AND BISHOP HOWARD HUBBARD'S MOTION TO DISMISS

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

CODES

NEW YORK LABOR LAW

NEW YORK CIVIL PRACTICE LAW AND RULES

MISCELLANEOUS

Plaintiffs submit this Memorandum of Law in support of their Opposition to the Motion to Dismiss Complaint, filed by the Roman Catholic Diocese of Albany, New York ("Diocese"), Bishop Edward B. Scharfenberger, and Bishop Howard Hubbard (together "Defendants") pursuant to Civil Practice Law and Rules CPLR §§ 3211(a)(1) and (a)(7). Plaintiffs request that the Court deny Defendants' motion.

PRELIMINARY STATEMENT

Plaintiffs seek to recover the pension benefits Defendants promised them in exchange for their years of work for St. Clare's Hospital ("Hospital"). Plaintiffs were the lifeblood that all of the Hospital's operations depended upon: nurses, orderlies, laboratory technicians, clerical and housekeeping staff, and others. Plaintiffs accepted relatively low wages in exchange for compensation in the form of pension payments when they retired. They trusted the Hospital, and the Church that built it, to deliver on that promise. In October 2018, Plaintiffs learned, to their dismay, that their pensions would soon be reduced or eliminated. Plaintiffs filed this lawsuit as a last hope to hold accountable the entities and individuals responsible for breaking that promise. The Diocese and the Bishops cannot escape that responsibility.

First, Plaintiffs successfully allege that the Diocese and St. Clare's Corporation are alter egos and therefore the Diocese is liable for breach of contract. The First Amended Complaint ("FAC") [1] demonstrates the Diocese's high level of control over the Corporation, specifically with respect to management of Plaintiffs' pensions. It goes on to describe a scheme whereby Defendants took advantage of the corporate form, dwindled Plan assets to almost nothing, and then attempted to dissolve the Corporation it controlled to the absolute detriment of Plaintiffs. None of the documents Defendants attach to their Motion undercut these allegations.

[1] On January 9, 2020, Plaintiffs filed an amended complaint, to which this Opposition cites. The amended complaint contains additional plaintiffs and incorporates minor changes but does not materially change the factual allegations.

Second, Defendants ignore clear language in the CPLR that permits Plaintiffs to plead promissory estoppel claims in the alternative. Defendants cannot dispute their contractual obligations while simultaneously using them as a shield from liability for promissory estoppel claims.

Third, Plaintiffs' claims for breach of fiduciary duty are sufficiently detailed. The Complaint alleges that the Diocese (as the Corporation's alter ego) and Bishops (as members of the Corporation's Board of Directors) owe fiduciary duties to Plaintiffs as stated in the Plan documents. Moreover, the Complaint painstakingly details eighteen separate acts or omissions that tie back to the allegations in the body of the Complaint and amount to breaches of those duties. The Defendants are therefore on notice of the basic facts that establish the cause of action.

STATEMENT OF FACTS

The Complaint starts at the beginning, when the Diocese donated the land for St. Clare's Hospital ("Hospital" or "Corporation") and established the original corporate board. FAC ¶ 57. The Hospital was always considered "part of the Diocese" and was listed in the Catholic Directory. *Id.* ¶ 58. Not only did the Diocese retain "significant influence over the Corporation's Board of Directors through the Bishop's automatic appointment as director and his control over other directors' appointments," but the Hospital's Board of Trustees also reported directly and exclusively to the Diocese. *Id*. In 1959, the Diocese, through its agents, established the St. Clare's Hospital Retirement Income Plan ("Plan"). *Id.* ¶ 59. From that point on, Diocesan employees, including but not limited to the Bishop, made all major decisions affecting the rights and benefits of the Plan's participants. *Id.* ¶ 58.

This included the decision to secure a letter ruling from the Internal Revenue Service (IRS) that the Plan was a "church plan."[2] To obtain such a ruling, the Diocese and Hospital made representations pursuant to Internal Revenue Code § 414(e), and based on these representations, the IRS granted the Plan "church plan" status. FAC ¶ 62. Shortly after obtaining the IRS ruling in 1992, the Hospital attempted to claw back premiums it had paid to the Pension Benefit Guaranty Corporation (PBGC). Ultimately, the Hospital settled with PBGC for a refund of approximately $88,000. *Id.* ¶ 63. The parties determined that the Diocese was a necessary signatory, and Defendant Hubbard signed the settlement agreement as its representative. *Id.*

A few years later, Defendants stopped making meaningful contributions to the plan. FAC ¶ 64. Defendants then froze the plan in 2005 so that Plaintiffs would not accrue any additional years of service for benefit calculation purposes. *Id.* ¶ 65. However, Plaintiffs were reassured that "*as long as they were vested when they left the Hospital, they would receive their pension benefit.*" *Id.* Defendants gave Plaintiffs similar assurances repeatedly throughout the years, including after the Hospital closed. *See, e.g., id.* ¶¶ 68, 70-72, 78, 80-84. Defendants, including the Diocese and Bishops, knew the extent of the gross underfunding of the Plan when they made these statements. *Id.* ¶¶ 76-77.

The Diocese was also involved in the Hospital's closure in 2008. All of the Hospital's assets were transferred to Ellis Hospital. FAC ¶ 73. A condition precedent to the agreement included the Church's approval, and a foundation related to the hospital paid $41,000 for this "service." *Id.* ¶ 74. As part of transaction, the Hospital sought money from the New York State Department of Health to cover the Plan's funding shortfall. *Id.* ¶ 75. Plaintiffs, again trusting the

[2] From about 1974 until 1992, the Diocese and Hospital treated the Plan as subject to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001, *et seq.*, a federal statute that protects employee pensions. FAC ¶ 61. A ruling that a pension plan is a "church plan" exempts it from ERISA's minimum funding requirements and from the obligation to pay into the PBGC insurance program. Church plans remain subject to state law.

Diocese and Corporation, believed this would be enough to fully fund the plan. *Id.* Defendants – including the Diocese and Bishops – knew, however, that the $28.5 million ultimately transferred to the Plan was not enough. *Id.* ¶ 77. There has not been a credible account of the disposition of these funds. *Id.* ¶ 4.

Defendants abruptly terminated the plan in 2018. FAC ¶ 87. Just a few months later, Defendant Pofit and others filed for dissolution of the Corporation. *Id.* ¶¶ 5, 31. The dissolution petition avers that the Corporation has no assets and owes an estimated debt of $53 million to the Plan but has no prospects for obtaining those funds. *Id.* ¶ 32. Meanwhile, Plaintiffs are left with either significantly reduced monthly benefits at a time in their lives when they need those benefits most or the harsh reality that the pension they worked for has vanished. *Id.* ¶ 90.

LEGAL STANDARD

"When reviewing a defendant's motion to dismiss a complaint for failure to state a cause of action, a court must give the complaint a liberal construction, accept the allegations as true and provide plaintiffs with the benefit of every favorable inference." *Cortlandt St. Recovery Corp. v. Bonderman*, 31 N.Y.3d 30, 38 (2018) (citation omitted). The motion "must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Gizara v. New York Times Co.*, 80 A.D.3d 1026, 1027 (3d Dep't 2011). "Whether plaintiff can ultimately prove its allegations is not a consideration in determining a motion to dismiss." *Cortlandt St. Recovery Corp.*, 31 N.Y.3d at 46-47.

In addition, "a fact-laden claim to pierce the corporate veil is unsuited for resolution on a pre-answer, pre-discovery motion to dismiss." *Id.* (citing *Holme v. Global Minerals & Metals Corp.*, 880 N.Y.S.2d 873 (Sup. Ct. N.Y. Cty. 2009), *aff'd*, 63 A.D.3d 417 (1st Dep't 2009)). Indeed, "the question of domination is generally one of fact and is thus particularly

unsuited for resolution on summary judgment." *Goodspeed v. Hudson Sharp Mach. Co.*, 105 A.D.3d 1204, 1205-1206 (3d Dep't 2013) (affirming denial of Defendants' motion for summary judgment seeking dismissal on the grounds that Defendant was a "stand alone" company) (emphasis added). Therefore, courts must be "acutely aware of the potential to decide the matter prematurely on a motion to dismiss." *Cortlandt St. Recovery Corp.*, 31 N.Y.3d at 46-47.

ARGUMENT

I. The Complaint Sufficiently Alleges That The Corporation Is The Diocese's Alter Ego

The Diocese ignores the allegations in the Complaint that sufficiently plead liability for breach of contract, promissory estoppel, and breach of fiduciary duty on the theory that the Diocese and the Corporation are alter egos. "[C]ourts will disregard the corporate form, or . . . pierce the corporate veil, whenever necessary to prevent fraud or to achieve equity." *Morris v. New York State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 140 (1993) (internal quotations omitted). "[A] plaintiff seeking to pierce the corporate veil must show that (1) the owners exercised domination or control of the corporation in respect to the transaction attacked; and (2) such domination was used to commit a fraud or wrong against the plaintiff that resulted in plaintiff's injury." *Cortlandt St. Recovery Corp.*, 31 N.Y.3d at 47. "Because a decision whether to pierce the corporate veil in a given instance will necessarily depend on the attendant facts and equities, the New York cases may not be reduced to definitive rules governing the varying circumstances when the power may be exercised." *Morris*, 82 N.Y.2d at 141; *see also Baby Phat Holding Co., LLC v. Kellwood Co.*, 123 A.D.3d 405, 407 (1st Dep't 2014). The facts and circumstances alleged in the Complaint, taken together, successfully allege that the Corporation is the Diocese's alter ego. As a result, the Court should deny Defendants' motion.

A. The Diocese controlled the Corporation and the Plan

Plaintiffs' complaint alleges numerous facts that indicate the Diocese exercised control over the Corporation. First, there are the "four facts" that Defendants acknowledge are alleged in the Complaint: the Diocese and the Corporation share a common address (Mem. L. Supp. Mot. Dismiss of Defts. the Roman Catholic Diocese of Albany, New York, Bishop Edward B. Scharfenberger & Bishop Howard Hubbard ("Diocese Defs. Mem.") at 7; FAC ¶ 20); the Diocese and Corporation share officers, directors, and personnel (Diocese Defs. Mem. at 7; FAC ¶ 22); the Corporation's organizational chart shows a direct reporting line to the Diocese (Diocese Defs. Mem. at 7; FAC ¶ 24, Ex. A.); and the Corporation was listed in the Official Catholic Directory (Diocese Defs. Mem. at 7; FAC ¶ 25). Although Defendants attempt to minimize these facts, courts consider them significant in assessing whether to pierce the corporate veil. *See, e.g.*, *Fantazia Int'l Corp. v. CPL Furs New York, Inc.*, 67 A.D.3d 511, 512 (2009) (recognizing overlap in ownership, officers, directors and personnel as well as common office space or telephone numbers among the factors). Indeed, the Corporation's own organizational chart, which shows the Corporation's Board reporting directly and exclusively to the Diocese, speaks for itself in terms of the Diocese's control over the Board. FAC, Ex. A. Similarly, a listing in the official Catholic directory demonstrates, as Plaintiffs allege, that the Corporation was part of the Diocese. FAC ¶¶ 1, 25.

In addition to downplaying the significance of these "four facts," Defendants ignore the weighty balance of further allegations illustrating the Diocese's domination and control of the Corporation. Specifically, the Complaint alleges that the Diocese donated the land for the hospital (FAC ¶ 57); that all members of the original board were associated with or employees of the Diocese (*id.*); and that the Corporation has been part of the Diocese since its creation, *id.* ¶

58. The Complaint also alleges that the Diocese "has significant influence over the Corporation's Board of Directors through the Bishop's automatic appointment as director and his control over other directors' appointments." *Id.* This not only speaks in favor of finding domination and control, but also is precisely the type of information courts rely upon to establish that a church has control over an associated hospital in matters concerning employee pensions. For instance, in *Overall v. Ascension*, 23 F. Supp. 3d 816, 829-30 (E.D. Mich. 2014), the court explained that "both the IRS regulations and the courts have used the common sense definition of organizational control: the ability of church officials to appoint the majority of the trustees or directors of an organization." Consequently, the court held that "the control of the Roman Catholic Church flows downward through Ascension Health Ministries, an entity created within the Roman Catholic Church, to Ascension and its system entities, including [the defendant]." *Id; see also Catholic Charities of Maine, Inc. v. City of Portland*, 304 F. Supp. 2d 77, 85 (D. Maine 2004) (noting that "controlled by" is not defined by federal law for purposes of employee benefits law, but rather has been interpreted by courts as "referring to corporate control[.]").

In the Complaint, Plaintiffs have also identified a clear nexus between the domination and control alleged and the transactions attacked. *See Cortlandt St. Recovery Corp.*, 31 N.Y.3d at 47 (2018). In addition to establishing the plan, the Complaint alleges, "Diocesan employees, including but not limited to the Bishop[s], *made all major decisions* affecting the rights and benefits of the Plan's participants." FAC ¶¶ 58, 59 (emphasis added). To that end, "the Diocese caused the Hospital to secure a letter ruling from the Internal Revenue Service that the Plan was a 'church plan' and thus exempt from ERISA." *Id.* ¶ 62. Obtaining this ruling was not a simple matter: to secure it the United States Internal Revenue Service (IRS) requires representations that (1) the Plan was maintained by an organization (the Corporation) that was controlled by or

associated with a church; and (2) the Corporation's employees "are employees or deemed employees of the church . . . by virtue of the [Corporation's] affiliation with the church . . . ." Grenadier Aff., Ex. A (citing Internal Revenue Code § 414(e)). As described above, "control" in this context refers to corporate control. *Catholic Charities of Maine,* 304 F. Supp. 2d at 85.

The ruling letter itself refers to representations made under penalty of perjury that validate Plaintiffs' allegations concerning the Diocese's control over the Corporation, including:

> (1) all members of the board of trustees of the Corporation were either appointed by or subject to approval of the Bishop;
>
> (2) the hospital *fulfills the religious mission of the church* through nondiscriminatory care for the sick and injured, provision of pastoral care through a department staffed with five chaplains who are members of the church, and by holding services in the hospital's chapel;
>
> (3) under the Corporation's bylaws, upon dissolution of the Corporation, the Corporation's assets will *accrue to the Diocese*;
>
> (4) the Corporation's employees "are employees or deemed employees of the church… by virtue of the [Corporation's] affiliation with the church"; and
>
> (5) because the Plan Administrator's appointment must be approved by the Trustees of the Corporation (who were, in turn, all appointed by or subject to approval of the Bishop), and because the Plan Administrator could be removed with or without cause, there was control over the Corporation to assure "that the plan administrator shares common religious bonds and convictions" with the Roman Catholic Church.

Grenadier Aff., Ex. A.[3] In New York, estoppel principles forbid a party from receiving the benefits of a transaction or statute and then subsequently taking an inconsistent position to avoid the corresponding effects. *See Zemel v. Horowitz,* 11 Misc. 3d 1058(A) (Sup. Ct. N.Y. Cty. 2006) (holding plaintiffs estopped from "recasting a transaction in a manner that is inconsistent

[3] Although this private letter ruling is redacted, it matches the date that Defendants received such a ruling, the date St. Clare's was incorporated, and the date of the Plan's inception. The unredacted ruling letter in Defendants' possession is the proper subject of discovery.

with their tax returns") (collecting cases), *judgment entered*, (Sup. Ct. N.Y. Cty. 2007). Defendants' statements disavowing control over the Plan violate these principles.

The Diocese also had to approve any transfer of assets to or from the Corporation. After the ruling regarding the plan's status as a "church plan," the Corporation entered into a settlement with the Pension Benefit Guaranty Corporation. FAC ¶ 63. The Complaint alleges that Defendant Bishop Hubbard was a "*necessary signatory*" to that agreement. *Id.* (emphasis added). Similarly, when St. Clare's Hospital closed and transferred assets to Ellis Hospital, public documents show that a condition precedent to closing the agreement was that "[t]he Roman Catholic Authority shall have approved the transfer of the Transferred Assets from St. Clare's to Ellis as required hereunder and, as further applicable, shall approve all other actions and undertakings required hereunder." Grenadier Aff., Ex. B. St. Clare's Hospital Foundation, an entity related to both the Diocese and the Corporation, paid the Church a fee of $41,000 for that approval.[4] FAC ¶ 74. This kind of control, paired with the reasonable inference that transactions between the entities were not at arm's length (*see Fantazia Int'l Corp.*, 67 A.D.3d at 512), also weighs in favor of finding Plaintiffs have adequately alleged control over the Corporation. *See Overall v. Ascension*, 23 F. Supp. 3d at 831 (relying on factors including approval of acquisition of entities, sale or divestiture of assets, incurrence of debts, and approval of transfer of assets among factors to hold that the Roman Catholic Church maintained control over the hospital entity at issue).

[4] St. Clare's Hospital Foundation is not a named Defendant in this action, but this fact at a minimum raises questions regarding the Foundation's involvement in the transactions alleged in the Complaint that warrant further inquiry through discovery.

B. The Diocese, through control of the Corporation, wronged Plaintiffs

The Complaint also adequately alleges that Defendants exerted control over the Corporation to commit wrongs that harmed Plaintiffs. Significantly, "[w]rongdoing in this context does not necessarily require allegations of actual fraud. While fraud certainly satisfies the wrongdoing requirement, other claims of inequity or malfeasance will also suffice." *Baby Phat Holding Co.*, LLC, 123 A.D.3d at 407 (citing *TNS Holdings v. MKI Sec. Corp.*, 92 N.Y.2d 335, 339 (1998)). "Allegations that corporate funds were purposefully diverted to make it judgment proof or that a corporation was dissolved without making appropriate reserves for contingent liabilities are sufficient to satisfy the pleading requirement of wrongdoing which is necessary to pierce the corporate veil on an alter-ego theory." *Id.* at 407-08.

As described in the Complaint, the Diocese engaged in a series of actions designed to do exactly that: dissolve St. Clare's Corporation without providing reserves for its liability to Plaintiffs. First, the Diocese caused St. Clare's to obtain an IRS ruling that it was a "church plan." FAC ¶ 62. Then, it signed off on a settlement with the PBGC for a refund of pension insurance premiums and stopped paying for PBGC insurance. *Id.* ¶ 63. The Diocese made all major decisions regarding the rights and benefits of the Plan's participants, including those decisions that resulted in Plaintiffs' losing all or a significant portion of their accrued benefits. *Id.* ¶ 23. Over the years, the Diocese made decisions to contribute only nominal amounts or nothing at all to the Plan, then "froze" the plan before the Hospital closed. *Id.* ¶¶ 64, 65. When the Hospital did close, Defendants—including the Diocese, the Corporation, the Bishop and other Diocese employees who were Corporation Board members and became Trustees—knew that the $28.5 million the New York State Department of Health transferred to the Plan was not enough to pay the pensions. *Id.* ¶¶ 75-77. Despite this knowledge, a series of letters were sent to

Plaintiffs, each containing misrepresentations regarding their accrued and vested benefits. *Id.* ¶¶ 68-72, 78. Each of the decisions described in those letters—including the final letter notifying Plaintiffs that the Plan would be terminated November 1, 2018, and benefits would either be reduced or eliminated as of February 1, 2019—were decisions made by the Board, under the control of the Diocese, in contravention of their fiduciary and contractual duties to Plaintiffs. *Id.* ¶¶ 70-72, 79-88.

But Defendants didn't stop there. As described in the Complaint, shortly after they broke their promise to pay Plaintiffs their benefits, the Board of Directors of the Corporation filed a petition seeking the Corporation's dissolution. FAC ¶ 5. The filings in the dissolution proceeding—now before this Court—aver that St. Clare's Corporation (1) owes the Plan $53.5 million; and (2) has been completely drained of assets, with "no likelihood that the required financial resources can be obtained." *Id.* ¶ 32-33. The Complaint alleges that prior to terminating the plan and seeking dissolution, the Diocese-controlled Board passed a resolution to notify the IRS and PBGC of the Plan's election of ERISA coverage; but then one board member changed their vote, and neither ERISA coverage nor PBGC insurance were ever reinstated. *Id.* ¶¶ 39-41. Thus, at the culmination of this scheme, Plaintiffs were left with no pension or a significantly reduced pension, little if any relief to be gained from the Corporation itself, and no federal backstop. To dismiss the Diocese from this case would constitute the type of injustice that the alter ego theory was designed to avoid. *Baby Phat Holding Co.*, 123 A.D.3d at 407 (defendant's domination of a corporation, misrepresentation of assets, and actions causing the corporation to become judgement proof were "sufficient to support claims that defendant perpetrated a wrong or injustice against plaintiff, thus warranting intervention by a court of equity."); *29/35 Realty Assocs. v. 35th St. New York Yarn Ctr., Inc.*, 181 A.D.2d 540, 541 (1st Dep't 1992) (reinstating

cause of action for breach of contract against individual alleged to be alter ego of corporation to avoid the unjust and inequitable result of the individual escaping liability for rent owed to plaintiff).

In their memorandum, Defendants cite just two New York cases in support of their argument that Plaintiffs have not sufficiently alleged the second prong of the alter ego inquiry. Neither case provides authority for granting their motion. *See E. Hampton Union Free School Dist. v. Sandpebble Bldrs., Inc.*, 66 A.D.3d 122, 125-127 (2d Dep't 2009), *aff'd by* 16 N.Y.3d 775 (2011) (complaint contained entirely conclusory allegations concerning liability of construction contractor to school district); *Heim v. Tri-Lakes Ford Mercury , Inc.*, 25 A.D.3d 901 (3d Dep't 2006) (case concerning liability for injuries arising from airplane accident dismissed at summary judgment stage, following discovery).

Unable to find a New York Case on point, Defendants rely heavily on *Johnson v. Evangelical Lutheran Church in Am.*, 2011 WL 2970962 (D. Minn. July 22, 2011). While this case is also about another religiously affiliated retirement plan, the allegations in that case were threadbare. The court observed that in that case, there was "no allegation that ELCA had *any role* in the 2009 decision to reduce annuity payments" and that the plaintiffs in that case failed to allege that ELCA was "*responsible, or even had the authority, for the actions underlying the alleged breaches . . . .*" *Id.* at *3 (emphasis added). The Board responsible for administering the retirement plan in *Johnson* was "elected by the churchwide membership of ELCA," *id.* at *1, as opposed to this case, where the Corporation's board was selected by or subject to the approval of the Diocese. *Compare id. with* FAC at ¶ 22, 58. The key distinction is that, in contrast to detailed allegations of control in the FAC (s*ee, e.g.*, FAC at ¶¶ 22-26, 35, 57-59, 62-63), the complaint

in *Johnson* "[did] not allege that ELCA controls the board with regard to the decisions at issue in this litigation." *Johnson*, 2011 WL 2970962, at *5.

Furthermore, in relying on *Johnson*, Defendants conveniently ignore the contrary holding in *Thorkelson v. Publishing House of Evangelical Lutheran Church in Am.*, 764 F. Supp. 2d 1119 (D. Minn. 2011). In that case, also involving the Evangelical Lutheran Church in America ("ELCA") and its publishing house (referred to as "AFP") the plaintiffs alleged similar claims: that the church was the alter ego of the publishing house and should therefore be held responsible for the retirement benefits promised to plaintiffs. *See id.* (alleging state law claims for breach of contract, promissory estoppel, violations of the state consumer fraud statute). In *Thorkelson*, plaintiffs simply alleged that ELCA exercised "tight control" over AFP, that the misleading statements about plaintiffs' pensions made by AFP were known to ELCA, and that there was a transfer of one asset (a publication) to ELCA during the time period that AFP underfunded the pension plan. *Id.* at 1130. Although the complaint did not allege that the transfer was improper, the court found that plaintiffs had sufficiently alleged an alter ego theory because the complaint included "alleged facts that raise questions as to AFP's solvency at the time of the termination [of the plan] and as to corporate siphoning." *Id.* at 1130-31. The *Thorkelson* plaintiffs also alleged, as here, that they were misled into believing they would receive pensions because they were provided written statements over the years indicating they would receive benefits when they retired. *Id.* at 1131. Similarly, Plaintiffs' Complaint raises questions about the Corporation's solvency at the time of the termination of the plan, and alleges Plaintiffs were misled over the years through written statements that they would receive their vested and accrued benefits. FAC ¶¶ 72, 75, 78-81.

A New Jersey court recently denied a similar motion to dismiss. In that case, the plaintiffs are former employees of a hospital system operated by the Roman Catholic Archdiocese of Newark, suing to recover their pensions. The allegations that the Archdiocese controlled the hospital and the plan are based on representations that were made to obtain church plan status, including: (1) that the Archdiocese controlled and administered the hospitals; (2) that the Archdiocese controlled agents responsible for overseeing and controlling the hospitals by power of appointment and removal of officers; (3) that the Archdiocese exercised governance and control over the hospitals through appointment of management personnel and Board members; and (4) that the Archdiocese controlled the administration of the pension plan for people working in the hospital system. *See* Grenadier Aff., Ex. C. The defendants moved to dismiss, making arguments substantially the same as those advanced here: that the allegations were insufficient to state a cause of action against the Archdiocese because it is a separate legal entity. *See* Grenadier Aff., Ex. D. The court, ruling from the bench, denied the motion in its entirety.[5] Grenadier Aff., Ex. E; *see also id.*, Ex. F. The same result is warranted here.

Defendants also argue that Plaintiffs must separately allege "abuse of privilege of the corporate form." Diocese Defs. Mem. at 7-8. Case law does not uniformly indicate that this is actually a separate element rather than simply part of the inquiry under prongs one and two, but in any event, the allegations described herein sufficiently allege misconduct on the part of the Diocese that amounts to abuse of the corporate form.

C. Discovery is warranted

Given the fact-intensive nature of the issue whether to pierce the corporate veil, Plaintiffs at a minimum have established that further discovery into the relationship between the Diocese

[5] As of the date of filing of this Opposition, no transcript of the hearing is available.

and the Corporation is warranted. Indeed, an alter ego claim is often "not well suited for summary judgment resolution." *Damianos Realty Grp., LLC v. Fracchia*, 35 A.D.3d 344, 344 (2d Dep't 2006). "Before dismissal can be granted, a plaintiff is entitled to obtain necessary discovery to ascertain whether there are grounds to pierce the corporate veil." *Bd. of Managers of Arches at Cobble Hill Condo. v. Hicks & Warren, LLC*, 18 Misc.3d 1103(A)), *6 (Sup. Ct. Kings Cty. 2007); *see also Giarguaro S.p.A. v. Amko Int'l Trading, Inc.*, 300 A.D.2d 349, 350 (2d Dep't 2002) (denying summary judgment because "proposed amended complaint was not plainly devoid of merit" and allowing for additional discovery regarding alter ego/breach of contract claims).

D. Plaintiffs do not bring a section 198-c claim

Finally, Defendants argue that Plaintiffs have not established that the Diocese was their employer within the meaning of New York Labor Law section 190(3). (Diocese Defs. Mem. at 9-10.) This argument should be discarded for three reasons. First, as the Complaint alleges no private right of action under New York Labor Law section 198-c, Defendants' assertion is directed at a strawman. Second, by alleging that their employer, the Corporation, is an alter ego of the Diocese, Plaintiffs have sufficiently alleged that the Diocese was in fact their employer. Third and finally, the IRS's finding that the Corporation's employees "are employees or deemed employees of the church . . . by virtue of the [Corporation's] affiliation with the church…" directly contradicts this assertion. Private Letter Ruling 9217041 (Jan. 29, 1992). Taking the facts alleged in the complaint as true, the allegations are sufficient to conclude at this stage that the Diocese was Plaintiffs' employer.

II. The Documents Attached to Defendants' Motion Do Not Warrant Dismissal

"When the motion to dismiss is premised upon documentary evidence, such motion may be appropriately granted only where the documentary evidence utterly refutes [the] plaintiff's

allegations, conclusively establishing a defense as a matter of law." *SUS, Inc. v. St. Paul Travelers Grp.,* 75 A.D.3d 740, 741 (3d Dep't 2010). The Complaint alleges that the Diocese indeed controlled the corporation by virtue of its control over the "board of directors, officers, employees, and other delegates." FAC ¶¶ 23. Because the documents attached to Defendants' motion do not refute *any* of the allegations mentioned above, Defendants' motion should be denied.

Upon examination, at least one of the documents actually tends to *support* Plaintiffs' allegations concerning the level of control the Diocese has over the Corporation.[6] For example, the 2008 bylaws of the St. Clare's Corporation (Ex. D to Affirmation in Support of Defendants' Motion to Dismiss)[7] are consistent with the bylaws referenced in the IRS ruling letter, stating that the Corporation's mission is "consistent with the teachings and convictions of the Roman Catholic Church"; that the Bishop is an automatic member of the board and appoints four to six directors, who then elect the remaining directors; that "approval of the Bishop of the Roman Catholic Diocese of Albany shall be necessary" to amend many of the bylaws provisions; that any sale of real property or lease of property longer than a year must be approved by the Bishop; and, that upon dissolution of the Corporation, any remaining assets or property of the Corporation will accrue to nonprofit organization(s) that "in the discretion of the Board of Directors, best serve the mission of the Catholic Church . . . ."

This is an argument Defendants have made before. In *Talmadge v. Roman Catholic Diocese of Albany,* the plaintiff alleged that the Diocese was the agent and alter ego of St. Mary's Church of Oneonta, and the Diocese argued that documentary evidence provided a basis for dismissal. 167 A.D.3d 1361, 1362 (3d Dep't 2018). The Court held that the documents

[6] The remaining documents attached to Defendants' motion do not challenge the allegations directly.
[7] It is unclear whether this is the final version of this document. It contains redline markings and is not signed.

proffered by the Diocese in support of its motion to dismiss did not "conclusively refute" the alter ego allegations. *Id*. Instead, a certificate of liability insurance obtained named the Diocese as an additional insured, which the court found "suggested some degree of diocesan supervision and control over the parish." *Id.* The court went on to hold that the "Supreme Court was therefore correct to decline to dismiss the complaint against the diocese." *Id.* The result here should be the same.

III. Plaintiffs Can Plead Promissory Estoppel as an Alternative to Their Contract Claim

Under CPLR § 3014, "[c]auses of action or defenses may be stated alternatively or hypothetically." CPLR § 3014; *see also* Siegel & Connors, N.Y. Prac. § 214 (6th ed. 2018) (stating that "[a]lternative pleading is . . . recognized and invited by CPLR 3014."). In cases involving a contract, a plaintiff can proceed on both a contract claim and a promissory estoppel claim "where there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue…." *Joseph Sternberg, Inc. v. Walber 36th St. Assocs.*, 187 A.D.2d 225, 228 (1st Dep't 1993); *see also Man Advisors, Inc. v. Selkoe*, 174 A.D.3d 435 (1st Dep't 2019) (holding, at motion-to-dismiss stage, that "plaintiff should be permitted to plead in the alternative, and its claim for fraud, [sic] should not be dismissed as duplicative of the breach-of-contract cause of action") (internal quotations and citation omitted); *Auguston v. Spry*, 282 A.D.2d 489, 491 (2d Dep't 2001) (explaining that "causes of action alleging breach of contract and unjust enrichment may be pleaded alternatively" pursuant to CPLR § 3014); *Strauss v. DiCicco*, 64 A.D.2d 979, 979-80 (2d Dep't 1978) (same). The cases Defendants cite do not differ

on this point.[8] Plaintiffs are entitled under CPLR § 3014 to maintain their promissory estoppel claim as an alternative theory of recovery.[9]

IV. Plaintiffs' Fiduciary Duty Claims Are Sufficiently Specific

To establish a breach of fiduciary duty claim, plaintiffs must show that: (1) a special relationship of trust was established with the defendants for their benefit; (2) defendants breached a duty ensured by that trust; and (3) they sustained injury because of that breach. *N.E. Gen. Corp. v. Wellington Adv.*, 82 N.Y.2d 158, 160-62 (1993); *accord EBC I, Inc. v. Goldman, Sachs, & Co.*, 5 N.Y.3d 11, 19-22 (2005) (denying motion to dismiss breach of fiduciary duty claim based on allegation that underwriter had a fiduciary duty to investor and breached it by failing to disclose conflicts of interest). Pursuant to CPLR § 3016(b), Plaintiffs must plead these claims "in sufficient detail." *Chiu v. Man Choi Chiu*, 71 A.D.3d 621, 623 (2d Dep't 2010). However, the Court of Appeals has repeatedly emphasized that this standard merely requires Plaintiffs to "allege the basic facts to establish of the cause of action." *Pludeman v. N. Leasing Sys., Inc.*, 10 N.Y.3d 486, 492 (2008).

Plaintiffs satisfy this standard. First, they have alleged a fiduciary relationship between each Defendant and themselves, all arising from the Plan documents and the relationship of trust created by those documents. The Complaint alleges that (1) St. Clare's Corporation is a named fiduciary under the Plan (FAC ¶ 113; *see also* Aff. of Ali Naini Supp. Pls.' Opp. to Defs. St.

[8] *M/A-Com, Inc. v. State*, 78 A.D.3d 1293, 1294 (3d Dep't 2010) ("Here, there is no dispute that a contract exists"); *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 389 (1987) ("Here, it is undisputed that the relationship between the parties was defined by a written contract,"); *Plumitallo v. Hudson Atl. Land Co.*, 74 A.D.3d 1038, 1039 (3d Dep't 2010) ("Where, as here, there is a bona fide dispute as to the existence of a contract, or where the contract does not cover the dispute in issue, a plaintiff may proceed upon a theory of quasi-contract as well as breach of contract, and will not be required to elect his or her remedies").

[9] To the extent Defendants argue that Plaintiffs have not adequately pled a claim for promissory estoppel, Plaintiffs hereby incorporate by reference the additional arguments made in in Opposition to the Corporate Defendants' Motion to Dismiss.

Clare Corp., St. Clare's Retirement Income Plan, Robert Perry, & Joseph F. Pofit's Mot. Dismiss ("Naini Aff."), Ex. D, § 14.1 ("The Sponsor [St. Clare's Corporation] shall be a 'named fiduciary' as that term is defined in ERISA Section 402(a)"); (2) the Corporation is part—i.e., an alter ego of—the Roman Catholic Diocese of Albany (FAC ¶¶ 1, 58) making their duties coterminous; and (3) Bishops Hubbard and Scharfenberger, during their respective years, have been head and Automatic Directors of the Board of Directors that exerted significant control over the Corporation, the Plan, and all relevant decisions (FAC ¶¶ 15-17, 22-23). The Complaint specifies the duties the Defendants had as fiduciaries of the Plan and Trust, based on both the express language of the document and the common law relationship, and contains the language articulating the Defendants' duty to administer the Plan and its assets for employees and beneficiaries' exclusive benefit. FAC ¶ 52 (citing Trust Agreement § 2.2; Naini Aff., Ex. D at 5).

The Complaint goes on to explain, "In addition to the duties imposed by the Plan and Trust documents themselves, fiduciaries such as Defendants have the duty to act prudently, loyally, and honestly in the interests of the beneficiaries such as the plaintiffs." FAC ¶ 47 (citing Restatement [Second] of Trusts, § 2). Count III lists all duties inuring to all fiduciaries—including the duties of prudence, loyalty, and exclusivity, the duty to monitor performance and fiduciary conduct, and the duty of honest and accurate disclosure. *Id.* ¶ 114. It contains a nonexclusive list of eighteen separate, specific acts or omissions that Plaintiffs allege breached those duties. *Id.* ¶ 115-116. Each of these acts and omissions is in turn readily traceable to the detailed facts alleged in the body of the Complaint, which describe Defendant's mismanagement, disloyalty, dishonesty, and imprudent judgments. The result of these acts and omissions was Plaintiffs' devastating financial losses. *Id.* ¶ 117-18. Taken together, these readily

give Defendants notice of the relevant transactions or occurrences, the material elements at issue, and the "basic facts to establish the cause of action." *Pludeman*, 10 N.Y.3d at 492.

Nevertheless, Defendants take issue with the way Plaintiffs have "grouped" defendants together. Diocese Defs. Mem. at 11-12. The cases on which they rely, however, are entirely inapposite. Many of these cases address entirely conclusory allegations that do not even give reasonable notice of the relevant conduct—a deficiency not raised here. *See, e.g.*, *Carr v. Haas*, 163 A.D.3d 1212 (3d Dep't 2018); *Mid-Hudson Valley Fed. Credit Union v. Quartaro & Lois, PLLC*, 155 A.D.3d 1218 (3d Dep't 2017). The detailed, specific factual allegations described in the Complaint place it firmly outside that category of deficient pleadings.

This case is also readily distinguishable from the cases Defendants cite involving a failure to identify the source of the alleged fiduciary relationship between each defendant and the plaintiffs, thus failing to give notice of how each defendant breached a separate duty. *See, e.g.*, *Aetna Cas. & Sur. Co. v. Merchants Mut. Ins. Co.*, 84 A.D.2d 736, 736 (1st Dep't 1981) ("Aetna . . . has sued several defendants, including the primary insurer and its house counsel. Plaintiff alleges bad faith, breach of contract, investigative failures, malpractice and breach of duty arising out of said defendants' inadequacies in handling a third party claim against the insured."); *Loch Sheldrake Beach & Tennis, Inc. v. Akulich*, 141 A.D.3d 809 (3d Dep't 2016) (shareholder counterclaimed against landlord-corporation for "vindictive" action against her without identifying any actions taken outside the corporation's interests); *see also Abdale v. North Short-Long Is. Jewish Health Sys., Inc.*, 49 Misc. 3d 1027 (Sup. Ct. Queens Cty. 2015) (action for 11 counts of negligence and breach of fiduciary duty for stolen data against numerous entities under the same corporate umbrella, many of which had no alleged nexus to the to the data theft). Here, in contrast, Plaintiffs allege that all Defendants worked together as part of the

governing body of the Corporation and (other than the Bishops) of the Trust. Thus, they collectively had the same fiduciary duties to the same people emanating from the same documents and relationships. Most importantly, they took specifically identified actions and omissions *as a group*. Even if the Corporation's Board of Directors and the trustees of the Trust could otherwise be contemplated as having technically different duties, as described above, the relevant documents here assign the same duties to the same people and entities—and, as a factual matter, the directors and trustees *are the same people.*

Including separate allegations against each of them would simply be a matter of rote, repetitive recitation that would not aid Defendants or the Court in understanding the violations alleged. In any event, the Court of Appeals has explained that "although plaintiffs have not alleged specific details of each individual defendant's conduct, we have never required talismanic, unbending allegations. Simply put, sometimes such facts are unavailable prior to discovery." *Pludeman*,10 N.Y.3d at 493. To the extent the Court is persuaded that Plaintiffs' Complaint lacks some important knowable detail, the appropriate remedy is for Defendants to seek a Bill of Particulars or other discovery. *Serio v. Rhulen*, 24 A.D.3d 1092, 1094 (3d Dep't 2005).[10]

CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request that the Court deny Defendants' motion in its entirety. To the extent the Court is inclined to grant any portion of Defendants' motion, Plaintiffs ask that the Court do so without prejudice and grant leave to amend the complaint.

[10] At most, the appropriate remedy is not a dismissal with prejudice, but one with leave to replead. *Aetna Cas. & Sur. Co.*, 84 A.D.2d 734, 736.