

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

David O'Connell,) Civil Action
) No. 1:20-cv-01365-KBJ
Plaintiff,)
)
vs.) **Motion Hearing** (via Zoom)
)
United States Conference of)
Catholic Bishops,) Washington, D.C.
) January 28, 2021
Defendant.) Time: 1:30 p.m.

Transcript of **Motion Hearing** (via Zoom)
Held Before
The Honorable Ketanji Brown Jackson (via Zoom)
United States District Judge

A P P E A R A N C E S

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P R O C E E D I N G S

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2 (REPORTER'S NOTE: This hearing was held during the
3 COVID-19 pandemic restrictions and is subject to the
4 limitations of technology associated with the use of
5 technology, including but not limited to telephone and video
6 signal interference, static, signal interruptions, and other
7 restrictions and limitations associated with remote court
8 reporting via telephone, speakerphone, and/or
9 videoconferencing.)

10 THE COURTROOM DEPUTY: Your Honor, we are here for
11 Civil Action 20-1365, David O'Connell v. United States
12 Conference of Catholic Bishops. I'm going to ask that counsel
13 please state their appearance for the record and introduce any
14 co-counsels that might be present.

15 MR. STANLEY: Good afternoon, Your Honor. I'm
16 Marc Stanley and my co-counsel is Martin Woodward. We
17 represent Mr. O'Connell and the putative class.

18 THE COURT: Good afternoon.

19 MR. STANLEY: Nice to meet you.

20 MR. FLOOD: And good afternoon, Your Honor. My name
21 is Emmet Flood. I'm here along with my Williams & Connolly
22 colleagues Kevin Baine and Richard Cleary, and we represent the
23 sole defendant, U.S. Conference of Catholic Bishops.

24 THE COURT: Good afternoon to you as well.

25 MR. FLOOD: Thank you, Your Honor.

THE COURT: This is a hearing regarding the
defendant's motion to dismiss the plaintiff's putative class
action complaint. The plaintiff's complaint alleges that --

1 and I guess I'll call it USCCB, although I'll do my best to
2 keep the acronyms straight. The plaintiff alleges that the
3 defendant is liable for fraud, unjust enrichment, and breach of
4 fiduciary duty based on the USCCB's alleged misrepresentations
5 with respect to how funds that are collected from parishioners
6 pursuant to the Peter's Pence collection are being spent.

7 In its motion, USCCB contends that this Court lacks
8 subject-matter jurisdiction over O'Connell's claims, which, I
9 believe, is a threshold consideration, even though it does not
10 come first in the motion to dismiss. The motion also maintains
11 that the plaintiff has failed to plead fraud with particularity
12 as required by Rule 9(b) and that the defendant is entitled to
13 judgment on the pleadings under Rule 12(c) or, in the
14 alternative, entitled to summary judgment.

15 I have reviewed your briefs. I am familiar with your
16 arguments. So I hope that we can just have a discussion that
17 illuminates the various legal issues. Let me start by
18 acknowledging that my hopes of how we will be able to proceed
19 are somewhat limited due to the circumstances, the constraints
20 that we face, in having to conduct this hearing virtually. We
21 are proceeding by videoconference due to the court's closure as
22 a result of the pandemic, and I found that these circumstances
23 are not exactly ideal for having the kinds of discussions that
24 I ordinarily have with parties that appear before me.

25 So we'll do our best, but I may have to scale back in

1 terms of my ordinary level of engagement. I will be asking you
2 questions, but probably fewer than I ordinarily would. We
3 won't impose any time limits. I find them distracting, and I'm
4 just trying to get to the heart of the matter. So let's just
5 do that.

6 And I'm going to alter my typical format just a bit to
7 expedite things in this way. I typically -- even though it is
8 a motion to dismiss, I ask the plaintiffs to start to set the
9 sort of framework of the complaint before we turn to the
10 arguments and dismissal. I think the general complaint is
11 straightforward. So I actually want to start with defense
12 counsel -- it is defense -- the defendant's motion -- and focus
13 in initially on the concerns about jurisdiction. We'll do a
14 round that focuses only on that threshold issue, and the
15 plaintiff can respond, and we'll have any replies.

16 And then we'll move to what I consider sort of a
17 two-part second set of questions, which is, one, the procedural
18 question of whether the defendant is able to make the arguments
19 that it seeks to advance here about particularity and failing
20 to state a claim as a Rule 12(c), motion and then also the
21 second part of this is the merits of the defendant's argument
22 about why this matter should not be allowed to proceed, whether
23 on particularity grounds or failure to state a claim or
24 otherwise.

25 One thing that occurred to me as I reviewed this -- and

1 it could be something of a function of the way in which this
2 Court has organized its practices. It occurred to me that the
3 parties haven't really focused on the difference between the
4 plaintiff's individual claim and the class claims with respect
5 to the arguments that they're making about particularity,
6 et cetera. And I'm starting to wonder whether some of the
7 disputes about the complaint and its sufficiency would be
8 resolved by addressing class certification first.

9 I know that I -- you know, as part of my routine, I
10 say the class action allegations, and sometimes that works,
11 but perhaps in this case we might need to do the class
12 discussion first, but obviously not in this context, since we
13 haven't prepared for it, but I think we should keep that in
14 mind as we figure out how we're going to deal with this
15 particular motion.

16 So let me start with defense counsel, Mr. Flood, and
17 have you address jurisdiction.

18 MR. FLOOD: Thank you, Your Honor.

19 If I might -- first of all, let me say that the -- the
20 bishops conference -- and I may just call it the Conference,
21 which might be simpler than the long acronym.

22 THE COURT: Perfect.

23 MR. FLOOD: The Conference -- our position is we
24 agree with the Court's initial statement that it is a threshold
25 matter. And we also, as Your Honor noted, argued it last in

1 the sequence. And I'd like to begin by giving the Court an
2 idea of why we did that.

3 It seems to -- to us that there are two principles of
4 very broad application that have indisputable bearing on the
5 case. One is the principle we argue for here that there are
6 situations in which a civil court should not insert itself into
7 what are internal questions of church governance. That
8 principle is not limited merely to a church administration or
9 property disputes or doctrine, but it also covers, in our view,
10 matters like internal governance, which includes spending
11 decisions. We think this case is covered by that principle and
12 have so argued.

13 But there's another principle of quite general
14 application that we think is here, and I hope, Your Honor, this
15 explains why we approached the matter the way we did. Churches
16 and, you know, ministers, you know, representatives of
17 religious orders acting, you know, in their official capacity
18 do not have some immunity from fraud claims. That's just a
19 fact. No one can cloak him- or herself in vestments or under a
20 church's rubric or aegis and say you may not approach me in a
21 civil court. That's not just the law.

22 And so our -- our -- our approach here was undertaken on
23 the following thought; that if we in our briefing discussed
24 something of the particulars of what is asserted here, we --
25 that could we use that as an opportunity because we believe it

1 would generally shed light on the problem of the degree of
2 difficulty, entanglement, intrusiveness and show just what it
3 is that plaintiff seeks to have the Court do here. And
4 that's -- so those are the two sort of background thoughts that
5 explain the sequencing we adopted.

6 THE COURT: All right. I mean, that's totally
7 logical, but I do think that if the Court does not have
8 jurisdiction, as you claim, with respect to the first principle
9 that you articulated, then my view of whether and to what
10 extent the plaintiffs have sufficiently alleged fraud given the
11 allegations of the complaint is not on the table. So as a
12 threshold matter, I think, it's important for me to evaluate
13 your ecclesiastical abstention contentions. So can we start
14 there?

15 MR. FLOOD: So --

16 THE COURT: Yes.

17 MR. FLOOD: Of course, Your Honor.

18 The -- what the -- what the plaintiff seeks here, in a
19 nutshell, is a ruling from a civil court that will provide some
20 kind of scheme or schedule or internal rule of a decision for a
21 Court to adopt in which it asks the Court to impose that rule
22 on a religious organization. So the gravamen of plaintiff's
23 complaint is that he was under the impression that the donation
24 he gave would be used immediately and exclusively for some
25 purpose.

1 And his view of the matter is that a civil court based
2 on what we regard as very thin allegations here -- but save
3 that for letter -- later -- should be able to tell a religious
4 institution how it should spend its money; right? When you
5 say -- this is not -- it's not alleged and not brought as a
6 simple case of somebody lied to me and here's the lie and I
7 would like to vindicate the lie.

8 THE COURT: Let me -- let me ask you why you say
9 that, Mr. Flood, because I marked in the complaint, for
10 example, paragraph 32, which is pretty clear with respect to
11 the -- what I thought was the essence of the alleged fraud,
12 which is that there is a great disparity between how this
13 Peter's Pence fund collection is being marketed and what the
14 vast majority of the collection is actually used for. And if
15 that is the statement, isn't that a classic fraud kind of
16 dynamic?

17 In other words, he's not saying you can't use the money
18 for these other means because it violates the guidelines -- I
19 know that's in there, but I feel like that's a red herring --
20 you know, because the -- the church is supposed to be using
21 this money in a certain way. I think the essence of the fraud
22 claim is here's all the marketing material that tells people
23 what you are using it for and, lo and behold, according to the
24 plaintiff, it's not being used for those purposes.

25 MR. FLOOD: Your Honor, I think the first point to

1 make in response is that if we want to call statements on the
2 website marketing material about Vatican use, that should be
3 fairly read side by side with the Vatican's own website about
4 how it's used. And we've quoted from the website in our
5 opposing papers. And it's very clear on the Vatican website
6 that what appears in plaintiff's complaint is only some of the
7 available uses, and the Vatican website makes no secret that it
8 is also used generally for the needs of the Holy Father. And
9 so that's -- that -- and I think that there's no getting around
10 plaintiff's intention to ask this Court to sort out which uses
11 are immediate enough and which uses are exclusive enough.

12 And --

13 THE COURT: Except -- except, Mr. Flood, the problem,
14 I think, with that argument is that that's the kind of thing
15 that you would argue to the jury as to why it is that you --
16 your client was not fraudulent. It's not an argument that
17 accepts the allegations in the complaint as true, which one
18 does on a 12, at least, (b) (6) kind of theory. And we'll talk
19 about whether or not you're even able to bring that kind of
20 argument at this point in the case. But assuming you are,
21 don't I have to accept what the plaintiff says about the
22 allegations -- excuse me -- about the, you know, marketing of
23 this, notwithstanding the fact that there may be some other
24 evidence that the plaintiff is mischaracterizing what's
25 actually going on?

1 MR. FLOOD: Your Honor, I don't think you have to
2 accept it for this purpose, and I think the reason is that,
3 to use Your Honor's terms, we're talking about marketing
4 here, and this plaintiff has not alleged that he was the
5 recipient of marketing in this form. It's very clear from his
6 complaint that he doesn't seem ever to have seen the USCCB
7 website.

8 THE COURT: But you're shifting, Mr. Flood. You're
9 not talking about this plaintiff and his standing and his
10 ability to raise these allegations; right? I want to isolate
11 the allegations in the complaint and determine whether or not,
12 if true, they state a claim for fraud.

13 And -- and I understood you to be saying that, well,
14 what's really being stated here is not a fraud claim. It is a
15 claim that the church should be spending the money in certain
16 ways and that's the kind of thing that courts can't get
17 involved in. All that might be true, but I'm finding
18 allegations in this complaint that appear to be stating a claim
19 of fraud in the traditional sense. Here's what you're saying,
20 Conference, and here's what you're actually doing, and that's a
21 fraud.

22 Now, whether or not Mr. O'Connell actually saw it, all
23 of those are other questions as to why there might be defects.
24 I just want to know whether you're right that the essence of
25 the claim is something that this Court cannot consider because

1 it goes to church policy and doctrine in the way that you
2 suggest.

3 MR. FLOOD: Your Honor, I think it goes directly to
4 church policy, church use of funds, church governance and
5 administration. And the reason I say that is the -- the
6 plaintiff, Mr. O'Connell's own opposition in response to this
7 motion, says that he wants to take discovery on how funds
8 travel from -- from the -- from the collection plate all the
9 way to what he calls Swiss hedge funds. He's asking the Court
10 to sort out which modes of internal transmission in a religious
11 body may or may not be fraudulent.

12 What he does not do, we submit, is ever allege that the
13 Conference had knowledge of any purported fraud. And the
14 Conference is the sole defendant here. And so he -- he only
15 brings the case against one defendant, and then he wants to use
16 that to expand, if we take his pleadings and his submissions at
17 face value, into the universal church. And that -- and once
18 you expand it to universal church and it becomes questions of
19 allocation and promptness of distribution, you're into the core
20 of church governance, and he doesn't make any secret that
21 that's what he wants to do in the case. And this appears at
22 page 22 of his opposition. At page -- you know, throughout
23 his opposition, he makes clear that this Court is going to
24 have to decide whether there is fraud on not only the USCCB
25 website but on the Vatican website. He's asking you to make

1 that call.

2 THE COURT: But I thought you said at the
3 beginning -- I thought you said at the beginning that churches
4 are not immune by their nature to claims of fraud. And so to
5 the extent that he is seeking to trace the money and figure out
6 whether or not the contributions that are being made by
7 parishioners are actually going to charitable works or going to
8 Hollywood, that that's just a means of proving his case that
9 there's a fraudulent expenditure going on in light of what
10 you -- the Conference has said about what happens to these
11 funds.

12 I don't necessarily see it as the Court deciding whether
13 or not the expenditures, the investments, the real estate
14 purchases and whatnot, are lawful or are consistent with church
15 doctrine or anything else. I mean, I understand the nature of
16 what you're saying, that he's seeking discovery into actually
17 how the money moves, but everything about discovery is relative
18 to a purpose. And it sounds to me from the complaint and from
19 what he's argued that the purpose of doing that is just to show
20 that the statements that are being made about what's happening
21 to this money are not true, which is the essence of a classic
22 fraud claim.

23 MR. FLOOD: Well, Your Honor, first of all, no one is
24 immune, per se, from a claim of fraud. I think that's well
25 established. You can't be a church and maintain that position.

1 With that said, however, the degree of intrusiveness
2 necessary to establish a purported fraud does implicate
3 Article III in subject-matter jurisdiction. There's just no
4 question about it.

5 That's why the Supreme Court and various, you know,
6 lower courts have said that presumptively the default position
7 is that civil courts should not get involved in -- you know, in
8 entanglement questions. In terms of the *Bible Way* case from
9 the D.C. Court of Appeals, questions of how money was spent,
10 where it flowed, what was the accounting, you don't get
11 involved. But the Court -- the cases also say that if there is
12 a case of fraud that can be brought and can be decided purely
13 on the basis of neutral principles, then we have a different
14 kettle of fish.

15 This case cannot be decided, it's our submission, on the
16 basis of neutral principles. We'll have to get involved in how
17 much is too much, and I think this is on the face of the
18 complaint. If you say exclusively, then is any deviation from
19 exclusive? And -- and as an aside, nothing says exclusive in
20 our materials, but --

21 THE COURT: Well, that's the answer, Mr. Flood.
22 That's why I wouldn't have to get involved; right? Isn't --
23 isn't the degree of intrusiveness or entanglement that you're
24 highlighting here relative to the statements that the church
25 made; so that if the Conference says this money is exclusively

1 being diverted to charitable -- or, you know, purpose for --
2 given to charitable works, that's the statement on the table,
3 then evidence concerning the money going somewhere else is
4 relevant under the rules of evidence. And through neutral
5 principles, the Court and a jury could decide whether or not
6 there was fraud. I don't know what you mean that it's not to
7 be evaluated via neutral principles or that the Court is going
8 to have to decide how much is too much.

9 MR. FLOOD: Your Honor, I think to take the last
10 point first, I think the "how much is too much" question is
11 certainly implicated by the claim that the money was not
12 distributed immediately. I think immediate and immediacy is a
13 question of degree. I think it's not possible to lay down a
14 single universal principle that separates the satisfactorily
15 and immediate from the unlawfully delayed.

16 As to exclusive, Your Honor, if we had a very different
17 case than this one in which someone stood up and spoke to this
18 defendant and said you're going to give a hundred dollars and
19 every penny is going to go to this specific purpose, we'd have
20 a different case; but we don't have that here. The -- the
21 client -- or I'm sorry. The plaintiff has pled the case in a
22 way that ineluctably invites the Court into the question of how
23 much is too much on the -- what he calls the exclusivity
24 question. There is no --

25 THE COURT: All right. Well, let me ask Mr. Stanley.

1 I mean, do you have anything more to say on jurisdiction
2 before I ask him respond to your well-taken point?

3 MR. FLOOD: I don't think so, Your Honor, except if
4 there's anything I could assist the Court in understanding why
5 we put the jurisdictional point last. I think I've said my
6 piece, but I realize it's a little bit unorthodox given
7 Your Honor's statement, but we thought some education on the --
8 inform the Court on -- on the fraud and other claims would help
9 to assist in understanding the degree of entanglement and
10 intrusiveness. That's all.

11 THE COURT: That's very helpful. Thank you.

12 So, Mr. Stanley, you have been listening to this
13 dialogue, and Mr. Flood makes the important and interesting
14 argument that -- that this Court would necessarily have to
15 evaluate how much is too much in the context of analyzing your
16 fraud claim given the allegations that you've made. Why is he
17 wrong about that?

18 MR. STANLEY: Okay. I'd like to come back to that in
19 one second, if I may.

20 THE COURT: Sure.

21 MR. STANLEY: I'd like to just set the stage. And,
22 that is, we absolutely agree that the ecclesiastical abstention
23 applies if a Court is required to interpret religious doctrine
24 or practice in order to resolve claims against a religious
25 organization. If the claims can be resolved, like Mr. Flood

1 said, in a neutral and generally applicable principles of law,
2 you have subject-matter jurisdiction.

3 So we offer an example in our -- in our response about a
4 defrocking of a Serbian Orthodox priest that goes too far. And
5 the Court should abstain on a lawsuit about that. That's
6 church doctrine.

7 In this case, what we're talking about is not the
8 actions of the Vatican. We're talking about the actions of
9 the Conference, not how the Vatican did it, but what the
10 Conference represented to the parishioners. We did not -- we
11 cannot, have not yet sued the Holy See. Whether that happens
12 in the future, that's another issue, but that's not up for
13 debate today.

14 In my case, we just settled a class action -- we had a
15 class certified against an organization called Gospel for Asia.
16 In that case what was happening was they were soliciting
17 donors. There were 179 categories you could make a
18 contribution for: water buffalos, bicycles, motorcycles,
19 lamps, heating lamps, stuff that would go to southeast Asia.
20 And they promised a hundred percent of it would be spent there
21 on those items. In fact, it's our position that none of it was
22 spent on that. Yet, they were a religious organization, and
23 they tried to say the same thing.

24 The class was eventually certified, and the Eighth
25 Circuit said no. I mean, this is a proper class certification.

1 You represented these people. You sought -- the representation
2 was made, the class members donated to it, and you didn't spend
3 the money as you promised.

4 THE COURT: Can I just ask you because --

5 MR. STANLEY: Please.

6 THE COURT: -- I think Mr. Holm -- Mr. Flood has
7 isolated a little bit of daylight between the positions that
8 you're talking about with respect to total abstention and --
9 and the ability to be able to proceed. And by that I mean, you
10 suggested in the Eighth Circuit case that you just mentioned
11 that the representations that were being challenged were
12 that a hundred percent of the money was going to some
13 organization.

14 My question -- and I think Mr. Flood's argument -- is
15 whether if the representation is not that definitive, if it's
16 just we're going to be giving this money to charity, would
17 evaluating whether or not that is a fraudulent statement in
18 light of where the money actually goes open the door to the
19 kinds of entanglement that courts have been worried about in
20 this abstention context?

21 MR. STANLEY: Not at all. And, in fact -- well, I
22 need to break it into two ways. One, we're not suing the
23 Holy See for how they spent the money. We're suing the
24 Conference for representing to us -- and if you actually look
25 at their representations, look at what they actually said --

1 and I'll come back to that. I'll find that in a second. In
2 the -- in the -- from the pulpit the week before it was read,
3 the week after, what people were told, and by their own
4 guidelines, that their job is to ensure that the money was
5 spent as represented.

6 In this case, just so you know, the Vatican is actually
7 engaged in lawsuits right now against the Swiss investment
8 funds involving Peter's Pence. They just got letters rogatory
9 in the last month in Switzerland to obtain documents on the
10 fraud that was made by certain cardinals and monsignors in how
11 they were investing this money. So they're upset about it too.
12 It's not just the donors that are upset.

13 But regardless of that, let's go back and look at
14 what was actually said. And I need to pull up that document
15 and -- you're right. It's difficult in doing it this way.
16 We attached the flyer they put out, and I'll make it bigger
17 so I can read it. Footnote 7, there's an attachment that
18 said --

19 THE COURT: Is this your complaint, because that's
20 what I'm sort of focused on.

21 MR. STANLEY: Yes, in the complaint, footnote 7. And
22 I can actually -- may I share my screen? Is that easier?

23 THE COURT: No, I have it. I have it. Thank you.

24 MR. STANLEY: The week before the collection, "Next
25 week, we will take up the Peter's Pence Collection, which

1 provides Pope Francis with the funds he needs to carry out his
2 charitable works around the world." The benefits proceed our
3 brothers -- "The proceeds benefit our brothers and sisters on
4 the margins of society, including the victims of war,
5 oppression, and natural disasters. Please be generous."

6 Okay. They say it's going there. Just like my Gospel
7 for Asia case, it's going somewhere, not to posh condo projects
8 in London, not to Swiss investment funds -- where they lost a
9 lot of money -- not to movies.

10 All right. This week, same thing, almost the same
11 statement. And then nothing about, hey, we're going to invest
12 this. It -- it -- if, by the way, Your Honor, they said: Hey,
13 we're going to invest this and grow it so when there are
14 emergencies the Pope can use that -- if they said in there,
15 by the way, the Pope might use this to satisfy deficits in
16 the Vatican budget, if they said they put -- might use it
17 for anything like that and people were told that, that's fine.

18 Then they say: Thank you for your generous
19 contribution. You're helping people around the world. Our
20 point is it didn't go to that. Ten percent went to that,
21 maybe, and the discovery is going to show that. But what the
22 discovery is also going to show is they promised every year
23 that they would ensure that the money went exactly as promised.
24 And from 2011, when they came out with that promise, to the
25 present, they never did anything to show that the money was

1 actually being spent for poor people. They never did
2 anything -- year after year -- this 2019 thing and 2020, even
3 this year, they came out with the same representations without
4 telling people, hey, there's a controversy here on how the
5 money is being spent.

6 THE COURT: All right. But is the essence of your
7 claim that you have a problem with how they're spending the
8 money, whether they're spending it for poor people or not, or
9 are you focused in on the statements that have been made?

10 MR. STANLEY: I guess I have to dummy down for
11 myself. The dummy down for myself is what did you promise the
12 class? We promised the class -- what did you solicit the class
13 for? We solicited the class exclusively -- nothing else. We,
14 the Conference of Bishops, told our dioceses, who were required
15 to report to us, and the churches, who were required to report
16 to us -- we supervise them. We told them to say to our
17 parishioners we need money for poor people in immediate need.
18 We need it now. Please give generously. Whether we need it or
19 not, we need it for poor people. Help your brothers and
20 sisters on the margins of society, including victims of war,
21 oppression, and natural disasters.

22 Not -- not \$170 million going to profit to the guy that
23 started the apartment -- the condo project in London. He made
24 \$170 million off of Peter's Pence. Not to the guy in
25 Switzerland who made a lot of money. It's going to our

1 brothers and sisters on the margins of society, including
2 victims of wars, oppression, and natural disaster. It didn't
3 go to them, hasn't gone to them, 2011 to present.

4 I think what the jury will find is 10 to 20 percent went
5 to them and the rest simply did not. And year after year, even
6 though they promised they would ensure donor intent is
7 fulfilled -- and that's really important. They promised donor
8 intent would be fulfilled. It is not being fulfilled. That's
9 fraud. There's nothing religious about this. If I --

10 Judge, I do a lot of fundraising. If I raise money for
11 a building, which I just did, and I take the money instead for
12 a religious organization -- I did it for a religious group,
13 Jewish senior housing -- and we take the money instead and we
14 put the money for salaries, because that's what we decided to
15 do, that's fraud.

16 I'm not asking you to decide anything religious about
17 abortion, about whether -- same sex marriage, about whether
18 priests can marry, about -- in my religion whether something is
19 kosher or not. We're not going that far. We're simply saying
20 to the Conference, you represented the money is going here,
21 didn't go there. You've had -- year after year, you're making
22 the same representation. You're promising you're going to
23 follow up and make sure the money was spent as promised. Did
24 you do what you promised? And it's fraud if not. There's no
25 religious encroachment whatsoever.

1 THE COURT: All right. Mr. Flood.

2 MR. FLOOD: Thank you, Your Honor.

3 Picking up the last point and also something Your Honor
4 said about paragraph 32. I don't think we actually have here
5 fairly read a specific allegation that these funds have been
6 diverted to noncharitable uses. What we have is an allegation
7 that there are some newspaper reports that say that the Peter's
8 Pence funds were invested and invested in some, you know,
9 different modalities that some persons might find unusual or
10 worse. But I think it's very important that the record not be
11 without more from the plaintiff that they are actually
12 asserting through specific allegations that these have, in
13 fact, been diverted to noncharitable uses.

14 THE COURT: Let me -- let me explore that a little
15 bit, because I'm trying to understand what you mean. At the
16 pleading stage, people plead upon information and belief all
17 the time, and their source could be a newspaper article. I
18 mean, I don't take you to suggest that plaintiffs should have
19 already done all of the discovery that's necessary to figure
20 out where this money is going.

21 MR. FLOOD: I -- I totally agree, Your Honor, but
22 I -- if I'm reading the complaint correctly and fairly -- and
23 I've also looked at the newspaper reports -- I don't view the
24 newspaper reports as saying this money has been diverted in the
25 way that I think a reasonable person would agree that, you

1 know, using the money to go to Las Vegas and gamble or using
2 the money to buy, you know, some -- a minister's brother-in-law
3 a condo or something is diversion.

4 The reports are about investments. The investments have
5 caused some people to question the character or quality of
6 them. That's not the same thing. I think it's important as
7 saying the money isn't stolen.

8 THE COURT: But why is that not a jury argument,
9 Mr. Flood? Why isn't this a jury argument? You're just saying
10 there's no fraud here, and that's not really the province of
11 these early-pleadings-stage kinds of motions. You're saying
12 they're wrong; you know, to the extent that the plaintiff is
13 alleging that we are -- we've acted inappropriately or
14 improperly or we've not done what we said we were going to do,
15 he's wrong. And that's -- that's -- that is what the jury is
16 supposed to decide at the end of day or what you would be
17 entitled to summary judgment regarding after all the facts come
18 out and the Court assesses it.

19 MR. FLOOD: Your Honor, I don't disagree as to the
20 great run of cases, but Article III jurisprudence here cautions
21 courts at the threshold to look hard so that we don't wind up
22 in an entanglement situation. And our position is that if, as
23 I believe counsel is asking, the Court is going to have to
24 insert itself into questions of how much is too much, where is
25 the money going; if this is an investment, is it an improper

1 investment. That is the kind of thing forbidden by
2 Article III. And it's forbidden both to -- to a Court, we
3 submit, but also to a jury.

4 I mean, that's why these motions get made at the
5 threshold. Because if a juror -- 12, you know, of our fellow
6 citizens are going to sit in Your Honor's court and decide the
7 question of, well, you know, I didn't like the Elton John movie
8 or, you know, nobody said anything about, you know, high-end
9 London condos or whatever the newspaper accounts say, that
10 itself on the assumption that these are actually investments,
11 for which there's no contrary allegation, is itself
12 exceptionally intrusive. And it would open up --

13 THE COURT: And absolutely the defendant would have
14 the opportunity to make that argument at summary judgment
15 before the jurors would be engaged, but on the basis of the
16 allegations, I'm just not so sure, especially when we have
17 cases like *Ambellu*, RICO fraud claims, not barred, you know, on
18 this basis.

19 So it's clear, as you conceded, that churches can be
20 subject to fraud claims, and any fraud claim is going to
21 require the Court and ultimately a jury to evaluate the truth
22 of the matter being asserted. And that -- you know, the
23 question, I guess, is whether or not that amounts to the kinds
24 of entanglements that you are asserting.

25 And I'll have to look at the cases. I think I

1 understand that issue. Unless you want to say something more
2 about jurisdiction -- you said something about paragraph 32
3 that I mentioned?

4 MR. FLOOD: Yes, Your Honor. It's -- I -- I think I
5 folded my point into my response to Mr. Stanley, which is that
6 the great disparity between marketing and use at this stage,
7 there is no allegation of unlawful use. There is an allegation
8 that newspapers reported certain investments. And that's the
9 only point I wanted to make.

10 THE COURT: Right. And let me just underscore that
11 the Court does not understand Mr. Stanley to be making an
12 argument about unlawful use, and that that may well be where,
13 you know, we're sort of blurring the lines between entanglement
14 or not concerning the -- the money at issue. So I think I
15 understand your argument.

16 Did you want to move to your sort of -- what you
17 consider to be the key here, the first set of principles, the
18 arguments about -- about the failure to state a claim, I guess
19 and Rule 9(b)?

20 MR. FLOOD: I will, Your Honor. If I might be
21 allowed 30 seconds on the prior points.

22 THE COURT: Sure.

23 MR. FLOOD: Just by way of
24 supplementation/clarification, it's not our position that
25 churches are generally subject to all kinds of fraud claims,

1 but, rather, that an appropriately pled case, in which there is
2 no intrusion and in which the case can either be resolved
3 entirely by neutral civil law principles, there is an opening
4 there. We don't think this case meets that, but it's -- but I
5 wanted to make sure I wasn't on the record as having conceded
6 that there is a general openness to this under Article III.

7 THE COURT: Understood.

8 MR. FLOOD: Thank you, Your Honor.

9 On our point about -- about the rules. Your Honor, you
10 broke this into two parts. So I will take Part 1 first from
11 the question whether the -- whether the kinds of arguments
12 we -- we made are cognizable by a district court for there
13 having been made under Rule 12(c). The short answer, it will
14 not surprise the Court, is that we believe that they can be.
15 And we think that there's several reasons for this. Perhaps
16 the most noteworthy -- or the first in order, I think, derives
17 from the language of the federal rules themselves.

18 We have brought a 12(b)(6)-type -- 12(b)(6)-type motion
19 pursuant to 12(c), and we've done that because we believe --
20 procedural point, Your Honor. The case was brought in
21 Rhode Island federal court. Predecessor counsel for the
22 Conference moves on, as I remember it, only venue grounds.
23 Maybe it was personal jurisdiction as well. In any event, they
24 succeeded. Their argument was so persuasive that even
25 Mr. O'Connell's counsel agreed and sought a transfer.

1 All right. The -- they did not file on every
2 conceivable available ground. I have not asked for
3 predecessor's counsel opinion on why. I think it's a fair
4 presumption, because it is well settled in the rules
5 themselves, that a person is not -- a defendant is not
6 obligated to bring a 12(b)(6)-type motion at the beginning
7 because the opportunity to do that is preserved by Rules 12(g)
8 and 12(h)(2)(B). And so we -- we are proceeding on that basis.
9 We think that the 12 -- that the Rule 12(b)(6) grounds are
10 perfectly appropriate at this stage, even under Rule 12(c).

11 THE COURT: All right. Let me just -- I -- I did
12 write about this in *Murphy*, and Mr. Stanley points that out in
13 his opposition. And I -- I'm still very, very perplexed by the
14 confusion that appears to have arisen about these different
15 rules.

16 You suggest that Rule 12(b)(6) and Rule 12(c) motions
17 are of the same type. But, in fact, as I said in -- in *Murphy*,
18 they're actually two different types of motions. They both can
19 relate to whether or not the plaintiff states a claim upon
20 which relief can be granted. That argument can be the same,
21 but the motions are different. And they have different bases,
22 and they have different results.

23 So let me ask you this: If you're bringing a Rule 12(c)
24 motion, which you are saying you're trying to do here, are you
25 seeking judgment on the pleadings as a result of that motion or

1 what -- what is it that you're asking the Court to do if I
2 grant your 12(c) motion?

3 MR. FLOOD: Your Honor, we're asking you to -- to
4 grant the motion for all the reasons set forth in *Iqbal* and
5 *Twombly* and by the D.C. Circuit in the *Rollins* case.

6 THE COURT: But that's a -- that's dismissal. So
7 there are two different things that a court can do in a
8 situation like this, and they, in fact, track the differences
9 between 12(b) and 12(c).

10 I understood 12(c) to be a motion for judgment on the
11 pleadings. A motion for judgment says I win judgment
12 preclusively. Not dismiss the plaintiff's case or dismiss his
13 claims. That's Rule 12(b).

14 So I'm asking you are you seeking judgment as a result
15 of the Court's -- let's say I agree with you concerning their
16 failure to state a claim. Are you asking me for judgment?

17 MR. FLOOD: Your Honor, we're asking for the full
18 panoply of relief that may be available under 12(c). If that's
19 just judgment -- and I think there would be problems at this
20 stage if judgment were granted -- that's agreeable to us, but I
21 also think that the *Rollins* case makes very clear that the
22 12(b)(6)-type grounds are available for vindication on a 12(c)
23 motion.

24 THE COURT: All right. Let me explain to you. I
25 haven't read the *Rollins* case, but I'll explain my

1 understanding, and then we can move to the -- to the merits of
2 this; all right?

3 MR. FLOOD: Sure.

4 THE COURT: 12(c) is a motion for judgment on the
5 pleadings. And I appreciate that Rule 12(h)(2) says that you
6 can -- you can make the argument that a plaintiff has failed to
7 state a claim upon which relief can be granted by a motion
8 under Rule 12(c).

9 But when you are doing that, I say in *Murphy* -- and --
10 and this is my view of the rules -- you're actually making a
11 different kind of argument about their failure to state a claim
12 than you are in the Rule 12(b) scenario in the following sense.
13 As a Rule 12(b) motion, you are saying, Your Honor, I would
14 like to test the allegations of the complaint. I want you to
15 assume for the purpose of this motion that the facts that are
16 being alleged in the complaint are true. And I say looking
17 only at those allegedly true facts, you can say this person has
18 failed to state a claim and you dismiss their complaint as a
19 result.

20 Alternatively, under Rule 12(c), when you're asking for
21 a judgment on the pleadings, you have answered, and when the
22 Court looks at both the complaint and the answer, it
23 appreciates that there's no material dispute of fact regarding
24 the allegations of the complaint. So a Rule 12(c) motion in
25 that context says, Your Honor, we agree as a matter of fact

1 with the allegations in the complaint. There's no need to go
2 to trial. There's no need to go to discovery. Everybody's in
3 agreement about the basic facts here. And appreciating that,
4 understanding that, we win, says the defendant.

5 Now, plaintiff can also bring a motion for judgment on
6 the pleadings under Rule 12(c) to say we win. The defendant
7 has agreed to all of the material facts, and given those facts,
8 when you look at the legal standards, we win.

9 That is why, even though they both are failure to state
10 a claim arguments, one is assuming the facts are true,
11 testing the allegations of the complaint, they fail to state a
12 claim. The other is there is no dispute of fact. Everything
13 they say is true, and yet they still don't win and, therefore,
14 judgment comes to us. It's almost like we're at the end of the
15 case, as though we've done everything we need to do, we get
16 judgment.

17 The second scenario is also a failure to state a claim
18 because relief cannot be granted to the plaintiff given those
19 true facts; all right?

20 I said this in *Murphy*. That's my view. And as a
21 result, I look at your -- your answer, and I don't see the
22 kinds of concessions that are necessary with respect to the
23 material facts to tee up procedurally a Rule 12(c)-type motion.
24 And I think you, therefore, have waived your ability to make
25 the kind of Rule 12(b)-type argument, because you had to make

1 that before you answered.

2 The outstanding question -- and I'm going to ask this of
3 both of you -- is whether you can make a Rule 12(b) kind of
4 argument post-answer, and I'm not sure.

5 Mr. Flood, why don't you tell me a little bit about
6 that.

7 MR. FLOOD: Well, Your Honor, I begin by saying I
8 very much hope you can because the kind -- I hope we can,
9 rather, because the kind of argument that we've made is a
10 12(b)(6)-type argument. We don't think it's waived, and not
11 only -- and we don't think that for a couple of reasons.

12 First, I think that were it to be determined that we've
13 waived it, I think there would be an element of unfairness in
14 that. You know, the initial motions made in Rhode Island
15 federal court were made against the backdrop of a set of
16 federal rules that preserves the ability to make those kinds of
17 arguments later, which is to say that no party is obligated to
18 make every available 12(b)(6) -- 12(b), rather, grounds for
19 dismissal in a first motion or they are forever waived. That's
20 not -- that's not the -- the text and purpose of the rules.

21 And so the idea we -- that we may have waived by reason
22 of the procedural sequence in this case, especially when we're
23 here in front of Your Honor because plaintiff successfully
24 moved the case, having essentially agreed with -- with us
25 about -- about the jurisdictional flaw -- venue flaw. So I

1 just think there's an element on fairness, and I think if you
2 look at Rule 1 --

3 THE COURT: I'm sorry. Can I just ask you because --
4 I must not understand the procedural history enough to be able
5 to evaluate what you're saying. Was there something about the
6 circumstances in Rhode Island that made it necessary for the
7 defendant to answer?

8 MR. FLOOD: I don't think so, Your Honor. I mean, I
9 think the circumstances were such that there clearly was not
10 proper venue, and I think that the plaintiffs, once they saw
11 the motion on that basis, understood that.

12 THE COURT: Right. So the unfairness would only
13 arise if there was something that made the defendant answer
14 such that they then lost their ability to make these kinds of
15 arguments. The defendant presumably could have brought their
16 motion for transfer, had the case transferred, the answer is
17 still outstanding, and brought their 12(b)(6) motion to
18 dismiss; right?

19 MR. FLOOD: Well, Your Honor, I'm not sure that
20 the -- that the cases permit the sequential motions of that
21 sort; right? And for the extended matters to Your Honor, the
22 possibility of doing that was proposed to Mr. Stanley by my
23 partner, who said he was not agreeable to that. And given the
24 very short timetable because -- as Rule 12 provides, once that
25 first decision is entered on the venue question, there's a very

1 brief time to make the -- file an answer.

2 And so we did it on that abbreviated time and then very
3 promptly by -- consistently, as we believe, with the text of
4 the rules -- brought the 12(b)(6)-type motion under 12(c). And
5 I just think the idea that it's forever waived if you don't
6 bring it in a very first motion --

7 THE COURT: Well, Mr. Flood, I mean, I get your point
8 in general. I don't understand it to be unfair because the
9 rules are what they are, but I get your point that, you know,
10 it seems like, wow, this is forever waived. But the question
11 is: What is the "it"?

12 The only argument that is waived in this sense is the
13 mere testing of the allegations of the complaint, and there are
14 many, many defendants who don't even bother with the motion to
15 dismiss, especially in a fraud-type case where they understand
16 that there are genuine issues of material fact as to what is
17 going on, and they answer. And then they answer, and they move
18 for a very rapid discovery schedule or, you know, early motion
19 for summary judgment because they say we win on -- you know, we
20 know that this isn't true and so they just move the case that
21 way.

22 So it's not as though you don't get to litigate this
23 matter, like you're waiving something substantial. The only
24 thing you're waiving is the ability to make an argument that,
25 based purely and solely on the allegations of the complaint

1 taken as true, the plaintiffs cannot proceed, and it sounds to
2 me like you have many other arguments for why you think they
3 can't.

4 MR. FLOOD: Your Honor, I'm -- I'm compelled to
5 disagree with the Court on the question of whether we're
6 waiving something, whether we just haven't waived something
7 substantial. It seems to me that the -- that the right
8 afforded by the rules and preserved by Rules 12(g) and 12(h) to
9 bring *Iqbal*- and *Twombly*-type arguments under 12(c) is
10 something very substantial. It would be substantial for any
11 defendant, but it's particularly substantial for a church
12 defendant that enjoys a degree of protection or immunity or
13 ecclesiastical abstention.

14 At the end of the day, Your Honor, a similar question
15 was presented -- and I -- refer the Court to a decision by
16 Judge Cooper of this Court on a question like this, and the
17 answer he provided, drawing, I think, in part on Your Honor's
18 own jurisprudence in this area was -- was this: Can a
19 12(b)(6)-type argument -- can -- can this motion to dismiss
20 type Rule 12 arguments be brought under Rule 12(c). And his
21 answer was sometimes they can and sometimes they can't. And
22 when he was -- and this case is called *Jimenez* against
23 *McAleenan*, who was the Secretary of HHS, I think, a couple
24 years ago.

25 And -- and in deciding that a 12(b)(6)-type motion could

1 be brought, Judge Cooper quoted, actually, from the *Rollins*
2 case that I mentioned. And the *Rollins* case says, very
3 expressly, other circuits have held that *Iqbal* and *Twombly*
4 apply to 12(c) motions -- and it gives some citations -- and we
5 do likewise.

6 Now, I -- I had not read Your Honor's jurisprudence in
7 this area in the *Murphy* case and *Alliance of Artists* and some
8 of your other opinions in this to extend across any and every
9 conceivable Rule 12(c) case. I did not find -- I confess,
10 Your Honor, I did not read the briefs in all those cases, but I
11 did not find in any of the Court's opinions a situation in
12 which the defendant posing the 12(b)(6)-type argument in a
13 12(c) posture had made the rule-based arguments under Rules
14 12(g) and 12(h)(B)(2) [sic]. I just didn't see that there.
15 And so perhaps Your Honor's jurisprudence does extend across
16 every possibility, but it seemed to me --

17 THE COURT: I mean, I just don't understand how it
18 can't. Because I don't know what it means to have Rule 12(c)
19 and Rule 12(b)(6) mean the same thing. I don't understand what
20 it means to say we'd like to bring a Rule 12(b)(6) argument as
21 a Rule 12(c) motion when those are different things; when one
22 is asking for judgment versus asking for dismissal when
23 Rule 12(b) says a motion asserting any of these defenses must
24 be made before pleading if a responsive pleading is required.

25 I don't know what it means to suggest that we don't have

1 to worry about that part and we can just say the same thing in
2 the context of a Rule 12(c) motion. And so my attempt in
3 *Murphy* and looking at Wright and Miller and working through it
4 is to explain why it is that there's language in (h) (2), for
5 example, that makes it seem as though you might be able to do
6 that, but, in fact, it's really not opening the door to
7 repeating a Rule 12(b) (6) kind of analysis after the answer.

8 So let me have Mr. Stanley respond, he wants to. I
9 think it's unlikely that I'm going to change my view of what's
10 happening with the rules. So the question, I think, that is
11 most productive at this point, Mr. Flood, is whether Rule 9,
12 your arguments about particularity, are actually also
13 encompassed by this waiver of process or prospect or whether
14 Rule 9 is something else entirely that really doesn't have to
15 do with the timing of an answer.

16 MR. FLOOD: Your Honor, I think that --

17 MR. STANLEY: May I respond on Rule --

18 MR. FLOOD: Oh, I'm sorry.

19 THE COURT: Yes. Go ahead, Mr. Stanley. Just -- you
20 can respond on this point that we've been making and then go to
21 Rule 9.

22 MR. STANLEY: Yeah, I'm not going to belabor it. I
23 do want to correct the record, though. Mr. Flood, I guess,
24 wasn't involved in this at the time, but if you look at
25 Document 14, we agreed to a consent motion for extension of

1 time to answer the complaint. There wasn't a rush to answer.
2 We gave them plenty of time to answer it. That was their
3 choice.

4 The truth is that the table's already set for counsel,
5 for Mr. Flood and Mr. Baine, by the Rhode Island counsel.
6 There were two different sets of lawyers, and they could have,
7 as the judge said, simply done a motion to transfer. And they
8 didn't go that way. They went with a 12 -- Rule 12(b) motion,
9 which required the Court's consideration, would have required
10 us to -- to resolve it. So the fairness is we've been through
11 that process once. It wasn't extraordinarily heavy on us, but
12 we did do it. And --

13 THE COURT: Mr. Stanley, let me just be clear. You
14 said -- so you say in responding to your complaint, they filed
15 the Rule 12 motion and it included a transfer component; is
16 that what it was?

17 MR. STANLEY: That's what it was, yes, ma'am. Let me
18 find it exactly, and I'll tell you the -- it was -- I'm
19 going -- there it is. Motion to dismiss. It's Document No. 7
20 in this case and a brief, and it was under Rule 12 to dismiss
21 it, Rule 12(b).

22 And so the Court eventually found that as moot, but that
23 was their -- their -- their response. I actually expected
24 them -- when they got the case to D.C., I expected them to say,
25 hey, we didn't really take a stab at some of the 12(b)(6)

1 stuff, are you okay with us taking another bite at the apple
2 before we answer.

3 THE COURT: Yes. Can I pause?

4 Mr. Flood, why didn't you do that; right? Isn't that
5 your unfairness issue? In other words, you appreciated that
6 there was some limitation with respect to 12(b)(6) because when
7 you came to D.C., you sought to move under 12(c).

8 MR. FLOOD: That's correct, Your Honor.

9 THE COURT: So why didn't you try to reopen the 12(b)
10 motion that you had previously -- that had you previously
11 issued or -- you know, the motion that you had before in
12 Rhode Island?

13 MR. FLOOD: The short answer, Your Honor, is that I
14 was not quarterbacking the case at that point. My partner
15 Mr. Baine is -- is muted on the line, and my understanding is
16 he did reach out to counsel and suggest to him that we would
17 like to file a motion of that sort, and -- and now I will read
18 you counsel's response to that, Your Honor.

19 Actually, I'll begin with Mr. Baine. This is May 26th
20 of last year.

21 THE COURT: I'm sorry. When did the answer come in?
22 Was it prior to the filing of the original motion to
23 transfer/dismiss?

24 MR. FLOOD: No, Your Honor. On that subject, I don't
25 believe my client through predecessor counsel actually moved

1 for a transfer. I think that the motion was made by
2 Mr. Stanley on behalf of the plaintiff, and I'm advised that
3 we, in fact, did not move for a transfer.

4 THE COURT: Okay.

5 MR. FLOOD: The transfer motion was made solely by
6 the plaintiff --

7 THE COURT: Okay.

8 MR. FLOOD: -- and was granted by the Court. So I'm
9 happy to have the opportunity to clear that up.

10 Given the timing until the transfer was made -- I have a
11 chronology here somewhere, Your Honor -- around the third week,
12 I believe, of May in 2020. The transfer order was issued on
13 May 21 by a Rhode Island federal court denying the motion as
14 moot and granting plaintiff's motion, which it calls a
15 cross-motion in its minute order, to transfer. And so that's
16 the 21st.

17 I think under the rules there's only -- there are only
18 three weeks then to answer that absent an extension of time,
19 and, of course, if it were possible to actually file another
20 12(b) motion before the answer, it would make sense, of course,
21 to extend that time to permit a full motion.

22 I now come to the record in -- in the matter -- or to --
23 to the back and forth. On May 26th, my -- my partner
24 Mr. Baine, you know, asked for an extension of time. He
25 believed -- he -- he worded the request as a 30-day extension

1 for time to respond. He did not use the word "answer" or the
2 word "move." He used the more general term.

3 In response, same day, Mr. Stanley wrote back and said
4 nice to meet you, et cetera, and said we agree to --

5 MR. STANLEY: That's actually not true. Can I -- I
6 have the email up. He did talk about a motion in his initial
7 letter.

8 MR. FLOOD: Well --

9 MR. STANLEY: Can we -- can we at least make the
10 record correct? He says: I understand our response by way of
11 answer or motion is now due on June 4th. So he was
12 contemplating a motion when he did that.

13 MR. FLOOD: Answer -- answer or motion is, of course,
14 generic for all possibilities.

15 MR. STANLEY: Right.

16 MR. FLOOD: And I'll gladly provide this exchange to
17 the Court.

18 THE COURT: All right.

19 MR. FLOOD: But if I --

20 THE COURT: Keep going, Mr. Flood.

21 MR. FLOOD: If I may finish just one sentence,
22 Your Honor. The response says: We agree to a July 6th answer
23 date, but we do not agree that a section -- second motion to
24 dismiss would be proper. And in those circumstances,
25 Your Honor would have -- motion being -- with an opposition to

1 any effort to bring a motion having been clearly stated. What
2 we adopted is rather than make an emergen- -- rush motion and
3 burden the Court with that, to answer and then promptly move
4 under 12(c).

5 THE COURT: Not getting into your litigation
6 strategy, you could have also disputed that; right? I mean,
7 the Court does have process for these for adjudicating early
8 stage disputes between the parties regarding what is the
9 appropriate course of action. And it may well be that the
10 initial Court's determination that your -- that your motion to
11 dismiss was moot was actually not correct, such that you were
12 entitled to renew your motion to dismiss and should have never
13 been adjudicated on the merits in the previous forum.

14 Mr. Stanley.

15 MR. STANLEY: Yes. That's exactly right. And that
16 was our position. And he responded by saying: Thank you for
17 agreeing to the 30-day extension. And that's not a rush.
18 That's several weeks plus 30 days. I understand your position.
19 It is not our intention to file another preanswer motion. The
20 motion for judgment on the pleadings or motion for summary
21 judgment would not be precluded upon providing an answer. That
22 was their choice to go this way. And then he -- I complimented
23 him on working with Thurgood Marshall. And he compli- -- he
24 talked about that, and we talked about that for a moment. But
25 that was it.

1 And then he agreed to prepare a stipulation. We agreed
2 to sign it. I liked our position. So I definitely was taking
3 that position. I did not -- I wasn't sure I was going to win
4 if it actually went that way, but they chose to go a different
5 route, and that was evident in their response.

6 THE COURT: Well, that -- that was actually helpful
7 just to understand fully why Mr. Flood is suggesting that there
8 might be a fairness issue.

9 To the extent that they did previously bring a motion to
10 dismiss under 12(b)(6) timely and prior to the answer and it
11 was never ruled upon, I do now understand at least your
12 suggestion, Mr. Flood, that it would be fair to allow you to
13 make those same arguments in this context.

14 Now, on the other hand, as Mr. Stanley is suggesting and
15 given the Court's own evaluation of the rules, that may well
16 have been, you know, your choice; that -- that your -- and I
17 see that Mr. Baine has popped up. Maybe he'd like to say
18 something, but let me just finish putting on the table my
19 thought that perhaps, you know, the -- the parties proceed at
20 their own peril to the extent that they are making an
21 evaluation of what they believe the rules require or allow, and
22 if the thought was, well, we'll do this as a 12(c) motion
23 because it's our understanding that the rules allow it, if the
24 Court disagrees, then you would necessarily be precluded.

25 Mr. Baine.

1 MR. BAINÉ: Your Honor, thank you. I'm not dressed
2 for court because I took at face value the Court's request that
3 only people who are speaking appear.

4 THE COURT: That's quite all right.

5 MR. BAINÉ: But since people have tried to
6 characterize why I made decisions, I'd like the opportunity to
7 explain it, if I may.

8 THE COURT: You may.

9 MR. BAINÉ: And it's simply this: That I thought
10 that Mr. Stanley was correct when he said that the rules don't
11 allow a second motion pursuant to Rule 12(b)(6) to dismiss the
12 complaint because the rules say that failure to state a claim
13 can't be raised on a second motion solely under 12(b)(6). It
14 says if you want to do that, if you've made any motion under
15 Rule 12(b) that's denied, you have to answer.

16 THE COURT: But the motion wasn't denied, Mr. Baine.
17 The mistake may have been that what happened was that the
18 original motion really doesn't count as a motion because the
19 Court just --

20 MR. BAINÉ: That's what I wanted to get to. That's
21 what I wanted to get to. The rules say you can't make a second
22 12(b) motion, but -- so you have to -- so normally you have to
23 answer and then make the failure-to-state-a-claim argument
24 under 12(c), which is expressly allowed by the rules.

25 Now, my point about the unfairness here is simply

1 this -- and, quite frankly, if the Court thinks that the motion
2 should be brought under 12(b)(6) and not under 12(c), we would
3 respectfully ask to amend the motion to make it under 12(b)(6).
4 But the reason why we thought we had to make it under 12(c) was
5 because ordinarily when you -- when you made one 12(b)(6), the
6 rules say, well, you can't make a second one.

7 Normally what would have happened after the 12(b)(1)
8 motion in Rhode Island, which the defendant concedes was
9 proper, was correct, the Court would have dismissed the case.
10 The complaint would have been refiled in D.C. We would have
11 filed a motion under Rule 12(b)(6) to dismiss the new
12 complaint. But the defendants persuaded the judge to transfer
13 the case rather than dismiss it. And so we thought well, we
14 can't make a second motion and label it 12(b). We have to
15 label it 12(c).

16 THE COURT: I understand your point.

17 (Indiscernible simultaneous cross-talk.)

18 MR. BAINÉ: -- wrong about that, we hereby move to
19 amend it to make it under 12(b).

20 THE COURT: All right.

21 MR. BAINÉ: But it shouldn't be a game of gotcha. It
22 shouldn't be a game. It should be -- we should look at the
23 rules and try to -- try to follow a procedure that's -- that's
24 just and fair to us. If I made the mistake of putting the
25 wrong letter after 12 in the motion, my mistake.

1 THE COURT: Well, I -- I totally understand your
2 point, and we'll sort it all out.

3 I just want, you know, everyone who comes before me to
4 at least appreciate that there is actually a distinction
5 between 12(b) and 12(c) with respect to what the Court is
6 supposed to be doing, what the parties are supposed to be
7 arguing. And I know that many, many courts have said, oh,
8 these are basically the same thing. And in my view, they're
9 not.

10 MR. BAINE: And all I --

11 THE COURT: It matters.

12 MR. BAINE: All I can say, Your Honor, is you're
13 correct. That at this stage, because we've answered it, you
14 may also look at the answer as well as the complaint. Then you
15 have to ask the same question: Now that I see the answer and
16 now I see the complaint, has the plaintiff alleged facts which
17 would entitle the plaintiff to relief? And we don't think it
18 has. We don't think they have.

19 THE COURT: But -- but in that view of the world,
20 Mr. Baine, the answer does no work. In other words, just
21 looking at the answer doesn't matter if I'm asking the same
22 questions.

23 My view is that 12(c) actually requires an answer for a
24 reason and that you're doing something when you issue judgment
25 on the pleadings on the basis of both the complaint and the

1 answer. Not just I look at the answer and I put it down and I
2 go back to the 12(b) world.

3 But all that said, I mean, we've sort of, you know, been
4 around this corner. All I'm suggesting is that it is possible
5 that in -- and I do understand with all of the machinations
6 moving around, I consistently and typically transfer cases with
7 pending motions, with the motion still pending, because I never
8 want to do anything to the parties' rights concerning pleadings
9 that they have made or motions they have made if it's not my
10 case. So I figure the judge who gets it can decide what to do
11 with this motion.

12 It appears in this situation that the motion was somehow
13 mooted before the case was transferred, which led to confusion
14 about whether it had been handled and, therefore, if you make
15 it again in this context, is it a second motion that violates
16 the rules or whatever? And it seems to me that in that
17 circumstance, the -- the defendant has a good argument that it
18 isn't a second motion; that it doesn't transgress the rules in
19 that way because we were never -- you know, we never got any
20 answer or relief with respect to our first motion under these
21 circumstances, especially since the plaintiff was the one who
22 requested the transfer.

23 So all that said, you know, I'll have to go back and see
24 whether -- you know, what I think about that, and maybe they'll
25 be -- you know, give you an opportunity to evaluate in writing

1 as to whether or not the Court should construe the motion
2 that exists as one under 12(b)(6). But I think if it sticks
3 as a 12(c) based on my view, you lose because 12(c) is not
4 doing what it is that you're requesting me to do in this
5 context.

6 Mr. Stanley.

7 MR. STANLEY: I just want to say two things. One,
8 that was the route they chose, and the rules are very clear; a
9 motion asserting any of the 12(b) defenses must be made before
10 a pleading -- before pleading if a responsive pleading is
11 allowed. They went and chose to do the responsive pleading.
12 So it's now too late. That's the path they chose.

13 In terms of fairness, we're now a year down after we
14 filed the suit, and we're -- we're out of the starting gate, in
15 our view, and ready to get discovery.

16 THE COURT: But there's no prejudice to you,
17 Mr. Stanley, if they were allowed to make these motions. I
18 mean, I understand the rules preclude it, but if they -- if the
19 Court were to somehow construe this as a 12(b)(6) that was
20 properly filed in light of the unique circumstances of this
21 case, you're not necessarily prejudiced by that, are you?

22 MR. STANLEY: I think so. I -- we could have at
23 least argued -- we could have argued beforehand that it wasn't
24 inappropriate, but the real point is I think it sets a bad
25 precedent. The rules clearly state that once you file an

1 answer, it's too late to do it. And I think that sets a bad
2 precedent. I think you talked in the *Tapp* case that you can't
3 convert a 12(c) into 12(b) motion. And I just don't think it's
4 proper.

5 THE COURT: All right. I understand this. I think
6 it was very helpful. And, Mr. Baine, thank you for coming on
7 and explaining your perspective, and the procedural history was
8 helpful.

9 Let's talk about -- let's assume for a second that we
10 are moving forward with the arguments that are being made.
11 What -- what about this particularity, Mr. Flood? And let
12 me -- let me just home in, in the interest of time, on my
13 concern. It's something that I articulated at the beginning,
14 which is: As I read your motion, it seems to be making
15 particularity arguments only with respect to the plaintiff's
16 individual claim, but the complaint is a class -- a putative
17 class action complaint.

18 So even if I agree with you, that he hasn't said who,
19 what, where, when with respect to the, you know, summer of 2018
20 in his own circumstance, are you making the argument that the
21 complaint in general fails on Rule 9(b) grounds?

22 MR. FLOOD: Your Honor, I think the only succinct way
23 I can say it is we're making the argument that this complaint
24 alleging these facts fails on Rule 9(b) grounds. We're not in
25 a position to move on any complaint other than the one brought,

1 and the complaint brought alleges facts relating to
2 Mr. O'Connell, and, in our view, those do not survive the 9(b)
3 rigors.

4 THE COURT: Let me put it this way. Let's say I
5 cross out the paragraphs that relate to Mr. O'Connell -- and
6 there's only a couple -- and I left in everything elsewhere
7 where he says here are all the statements that the Conference
8 has made, he quotes at length, he says where they come from,
9 you know, this is in the bulletin announcement, this is
10 provided to all the churches to be read from the pulpit, this
11 is on the website, all that remains, and the only thing that I
12 cross out, pursuant to your argument, is the section starting
13 on page 14, paragraphs 34 through 36; all right?

14 Are you suggesting that what remains is not particular
15 enough under Rule 9(b)?

16 MR. FLOOD: Your Honor, there's a couple -- I need to
17 take this from a couple of different angles. First of all,
18 without an individual plaintiff -- you know, some plaintiffs --
19 some groups -- some- -- someone other than Mr. O'Connell
20 whom -- who does not actually allege that he heard this,
21 there's no hearer, there's no receiver. And so all the
22 elements -- for example, the reliance element is missing. If
23 that's all -- if this is all we have are these three
24 paragraphs, some of the other elements that are, you know --
25 that are fundamental components of -- of a fraud claim are just

1 not there.

2 THE COURT: And so you think it's not enough that it
3 alleges that these statements were made and that millions of
4 dollars come in from parishioners around the world, or at least
5 around the country, as a result?

6 MR. FLOOD: Your Honor, I think it is nowhere near
7 enough, and there are any number of reasons why. First of all,
8 this plaintiff doesn't allege that he read or saw or heard
9 those statements before he acted.

10 THE COURT: No, I'm not talking about him. I'm
11 talking about the class allegation claims. An individual
12 plaintiff can say this sort of thing happened to me but
13 describe the scheme more broadly. And I'm trying to understand
14 whether you are suggesting that the -- that the individual
15 plaintiff, all of the particulars of his own potential
16 individual claims have to be in there. And if they're not, why
17 doesn't that just eliminate the ability for the individual
18 claim to advance but not the class claim?

19 MR. FLOOD: Your Honor, the -- the plaintiff and
20 plaintiff's counsel are the masters of this complaint. One
21 would think that if one were intent on -- on seeking the kind
22 of remedy sought and on, you know, surviving the preliminary
23 motions and pursuing this through the normal process, there
24 would be a plaintiff who could actually say here's what I
25 heard and here's what I relied on and here's how I was wronged.

1 You're putting me, candidly, Judge, in an impossible
2 position to say what somebody else might say if they had heard
3 it. Let me point out that the statements referred to on the
4 website are -- are statements that -- they're on the website,
5 just as the Vatican statements, which complement them, are on
6 a website. And -- but I don't know how the case will go
7 forward as a class other than on an analogy to what we know
8 now. I would be speculating if I did otherwise. And on
9 analogy --

10 THE COURT: So shouldn't we -- shouldn't we do the
11 class part first then? I mean, this was my -- my point in
12 raising this is shouldn't we sort out the class allegations
13 under these circumstances? Where you're saying these are
14 website statements, we don't know who saw, we don't know who
15 heard, we don't understand the reliance -- not from a Rule 9(b)
16 standpoint necessarily, because I think you understand what it
17 is he's talking about, but just in terms of can this go forward
18 as a class action, shouldn't we sort that out? And then in the
19 context of that, we will know whether Mr. O'Connell is typical,
20 whether he's an adequate representative based on what he says
21 happened to him?

22 MR. FLOOD: Well, Your Honor, in -- in all candor,
23 this is a little bit outside my lane and my zone of preparation
24 today.

25 THE COURT: Okay.

1 MR. FLOOD: If -- if we could give you an informed
2 opinion on that, you know, by written submission, obviously
3 we'd be glad and -- and promptly prepared to do just that.

4 But it seems to me, Your Honor, that if -- if a
5 complaint is brought and it's brought as a putative class
6 action -- and there are roughly 50 million Catholics in the
7 United States and on any given Sunday, you know, I surmise
8 maybe half of them are in the pews. And if the plaintiff comes
9 forward with -- if counsel comes forward with this sole
10 plaintiff and he turns out to be a person who didn't hear any
11 of this and, if in addition to that -- and here I'd like to
12 supplement something Your Honor said. Excuse me.

13 I don't believe there is an allegation that my client,
14 the Conference, automatically provides or imposes or gives the
15 scripted material, from which he's asking you to draw this
16 inference, to the diocese. That's an assumption that -- that I
17 have not been allowed to test yet. And it is a multi-step
18 inference for which there is no predicate.

19 THE COURT: But wait. I'm sorry, Mr. Flood. Again,
20 I'm just -- I'm getting confused because many of your
21 arguments, in my view, start getting into summary judgment
22 territory as opposed to the allegations in the complaint.

23 So I see on paragraph 24 the allegation that the
24 Conference also furnishes specific instructions for
25 Peter's Pence appeals to be read from the pulpit at church

1 services. And then he quotes something that says, in parens,
2 "*Please read this text from the pulpit, or include it as part*
3 *of your weekly announcements.*" So there is an allegation in
4 the complaint that the Conference is providing specific
5 instructions to the parishes to make these statements, and we
6 have to accept that as true at this stage; right? That's what
7 *Iqbal* and *Twombly* tell us; right?

8 MR. FLOOD: Your Honor, we have to -- you have to --
9 our submission is you have to take the complaint in its
10 totality. And if something in the allegations, his intention
11 or -- contradicts something else or something on the website,
12 which plaintiff is relying on, you should look to that.

13 The Conference's website, you know, fairly read makes it
14 pretty clear, I think, that this is -- although this -- he has
15 read the text correctly, it is not, by any means, obligatory.
16 He has not alleged as a fact that the Conference has actually
17 provided to his diocese and from there to his parish and from
18 there to the pulpit in his case. And there are a couple of
19 places on the site, which it's clear, and it says, you know, I
20 mean, how to give for Peter's Pence: If your diocese --
21 archdiocese does not participate, if you want further
22 information for resources. Now, I didn't want to introduce a
23 body of factual information in response to an opening -- or as
24 supplement to a motion of this sort.

25 But if he's going to say that the instructions were

1 provided, then he's got to take into account that the website
2 and nothing else that he's pointed to actually supports that.
3 It's a bare allegation in -- in tension and contradiction, I
4 submit, with the website itself.

5 THE COURT: All right. Mr. Stanley.

6 MR. FLOOD: That's our claim.

7 THE COURT: Mr. Stanley.

8 MR. STANLEY: Thank you.

9 First of all, I want to remind everybody that the
10 Conference said in their -- in their motion -- I mean in their
11 reply -- for the purpose of this motion we are ". . . not
12 disputing any of Plaintiff's allegations, such as they are."
13 And if you look at the allegations themselves, it's different
14 than what Mr. Flood said.

15 If you look at paragraph 48 under fraud, it says that
16 they -- the Conference consistently, routinely, and uniformly
17 solicited donations for the collection. By doing this, they
18 ". . . communicated to Plaintiff and to each Class member
19 that" -- they communicated to us -- that the money would be --
20 ". . . they donated to Peter's Pence would be used exclusively
21 for these purposes." And if you go down -- it says material
22 representation.

23 Then we go to paragraph 50, and it says, ". . .
24 Plaintiff and Class members decided to donate to Peter's Pence
25 based in part on the representations communicated to them by"

1 the Conference. It does say that the plaintiff did rely on it.

2 And then on the next paragraph, it says the same thing.
3 But for it, he wouldn't have given. He had damages. And so we
4 did say that O'Connell did, in fact, rely on the Conference's
5 representations to them as flooded down to the church.

6 THE COURT: And, Mr. Flood, if that turns out to be
7 not true, which I assume will be the Conference's position,
8 isn't that the work of discovery and summary judgment and, if I
9 can't figure it out based on the evidence, eventually trial.
10 That's the essence of the -- the claim to be evaluated going
11 forward, isn't it, Mr. Flood?

12 MR. FLOOD: Your Honor, I think that -- that the
13 Court ought to evaluate that claim in the context of the other
14 claims. And the other claim -- one of the other claims is he
15 heard something from the pulpit, but he does not give it any
16 content. To get from a script that is available to dioceses on
17 the -- on the Conference's website to an actual hearing by a
18 plaintiff and actual reliance requires multiple factual steps.
19 And the burden is on the plaintiff to make -- allege at least
20 enough --

21 THE COURT: But only isn't that in the context of
22 helping the defendant to understand the nature of the fraud? I
23 mean, I -- I sometimes think defendants make too much of
24 Rule 9(b) and its assertion that you have to plead fraud with
25 particularity when the cases indicate that really its function

1 is just to make sure that we don't have such vague allegations
2 concerning fraud that a defendant doesn't have any idea what
3 really to defend itself against.

4 Here we have particular statements. We have an
5 allegation of reliance on such statements by the plaintiff and
6 other class members. We have an allegation that those
7 statements mattered because at least the plaintiff -- and he
8 alleges also class members -- gave the money because they heard
9 these solicitations and they believed the representations that
10 were being made and an allegation that, in fact, those
11 statements were not true, because at the end of the day, the
12 money was not being used for what was being represented.

13 I -- I'm just struggling to understand why that's
14 unclear from a Rule 9(b) standpoint and why you suggest that
15 that's not sufficient to at least get us past -- at least on
16 the class-wide claims to get us past this very initial early
17 hurdle that the rules require.

18 MR. FLOOD: Your Honor, the short of it is that
19 Mr. O'Connell is -- wants to pursue a fraud claim. Fraud
20 requires a specific false representation. The thing that he
21 says is false he never alleges that he heard, and the thing he
22 says he heard he can't particularize enough to know whether
23 it's even false.

24 The whole approach to -- plaintiff's whole approach to
25 the complaint is like one of these little paper toys that

1 adults would make for me when I was a boy. And on one side was
2 a blue coloring, and on the other side was yellow. And they
3 could spin it like a top, and it looked like it was green.
4 But I -- it wasn't green. There was a blue side and a yellow
5 side. And if plaintiff wants to be green, he should say that
6 he heard a thing that misled him personally; and he never does
7 that.

8 He says in his opposition on page 16, in the --
9 footnote 17, he says his ". . . fraud allegations are based on
10 USCCB's affirmative representations." But USCCB, he doesn't
11 allege, actually ever made any representations at all to him.
12 Because he doesn't have that, he asks you to draw an inference.
13 And he asks you to draw it as, I presume, one of those fair
14 inferences as permissible from a complaint when a reviewing
15 court at this stage looks at the facts alleged.

16 But he does not allege any connecting inferences between
17 what is on one version of a script and what he heard. He
18 doesn't do it because he can't tell you what he heard, and he
19 doesn't do it because he doesn't allege the connecting joints.
20 He wants a three- or four-stage inference, and we submit that's
21 too much to ask at this stage of the case.

22 THE COURT: Mr. Stanley.

23 MR. STANLEY: Again, paragraph 48 says just the
24 opposite of what Mr. Flood is saying. You can't recast
25 this. By doing these communications -- by doing the

1 representations or what they set out, they -- the Conference
2 ". . . communicated to Plaintiff and to each Class member that
3 any money he donated to Peter's Pence would be used exclusively
4 for these purposes." He said he received a communication from
5 them.

6 THE COURT: All right.

7 MR. FLOOD: But, of course, Your Honor, it doesn't
8 say he received that communication, and I think that's the key.

9 THE COURT: And I also think that that -- you -- you
10 are not suggesting, Mr. Flood, that you wouldn't be able to
11 make that kind of argument in the summary judgment context
12 after, of course, you depose plaintiff and have gotten the full
13 statement as to what he heard or what he saw? You'd make this
14 same argument to me at summary judgment, wouldn't you?

15 MR. FLOOD: Your Honor, I think we will make any
16 argument that Your Honor will permit at that stage, if we find
17 ourselves at that stage.

18 My only point is that these burdens in a fraud claim,
19 you know, rest in the first instance with the plaintiff.
20 Plaintiff has to come forward with particulars of this sort.
21 We submit he hasn't done it as to the content of the statement.
22 We submit also that he certainly hasn't done it as to
23 allegations, you know, that -- that my client, the Conference,
24 made false statements, that they knew they were false and in
25 making them they intended to deceive somebody. He hasn't even

1 responded --

2 THE COURT: How can you ever say more about
3 knowledge? Isn't in the complaint enough to say that the
4 Conference, you know, makes these statements and the record
5 demonstrates that the -- the newspaper says the money is not
6 going and I allege, upon information and belief, that the
7 Conference knew the money wasn't going at the time they made
8 the statement? How can you say more than that from a
9 particularity standpoint?

10 MR. FLOOD: Well, it seems to me, Your Honor, that --
11 that if the -- if the gist of the complaint, as -- as I -- I
12 believe it's fair to say, is that the money was not spent
13 exclusively and immediately, then plaintiff ought to say
14 something about how the -- the defendant -- here the only
15 defendant -- knew that and, nevertheless, made the statements
16 knowing and understanding that they were false. And he doesn't
17 do anything of the kind. I mean, I understand --

18 THE COURT: It's not enough, in your view, for him
19 to say that the Conference is responsible for collecting
20 these solicitations, that the Conference is responsible for --
21 he makes some statements about what the Conference does;
22 right?

23 MR. FLOOD: He does, Your Honor. And -- and, again,
24 you know, I think there just comes a point, I think, where the
25 Court -- we -- we, you know, respectfully ask the Court to look

1 at the website.

2 There is nothing in the record and there's -- the record
3 is the wrong term, and I withdraw that term, Your Honor.
4 There's nothing in the complaint and there's nothing on the
5 website -- and much to the contrary -- to suggest or -- or show
6 that the Conference oversees this; that it actually does the
7 solicitations, that it collects the money, that it's
8 responsible for conveying it. All of that is just unfounded
9 and that a lack of basis is set forth on the very website they
10 invoke for other purposes.

11 THE COURT: So you believe that I can go to the
12 website in order to test the proposition at paragraph 3 that
13 the Conference has solicited and collected hundreds of millions
14 of dollars in donations from parishioners, you think that at
15 this stage of the case the Court is to go to the website and
16 try to determine whether it provides evidence that supports or
17 rebukes this statement?

18 MR. FLOOD: Your Honor, I don't think you need to --
19 it's a question of -- of having the Court find evidence, at
20 least not at this stage. But if plaintiff can use the website
21 as a sword, we ought to be able to use at this stage the same
22 website as a shield to this -- the assertions made there. And
23 if you go there, you will find -- at least in two different
24 places -- number one, that -- that the -- the Conference does
25 not collect this money and, number two, that the money is not

1 to be sent to the Conference. It's to be sent to the
2 nunciature.

3 THE COURT: I just -- I guess I don't understand your
4 view that a shield is supposed to be what's happening at the
5 motion to dismiss stage. I'm just confused by that, because
6 the motion to dismiss stage, a defendant is not shielding him-
7 or herself. The defendant is, in fact, accepting for the
8 purpose of the motion what plaintiff says. That's what I
9 thought those motions do. Now, maybe I'm wrong about that. I
10 don't think so. And if that's the case, my looking at the
11 website is not helpful from the defendant's perspective because
12 I'm just testing the allegations of the complaint.

13 MR. FLOOD: I don't disagree with -- with
14 Your Honor's description of the Court's role here, but it
15 seems to me -- and while I'm not familiar with any cases
16 from -- from the district courts in this circuit, there's good
17 case law in -- in other -- in other circuits to the effect that
18 if a plaintiff makes an assertion and -- and includes a website
19 as part of the complaint and if in the other parts of the
20 website that assertion is flatly contradicted, then the Court
21 adopts the view of the website in contradiction to it. I
22 mean --

23 THE COURT: So is there a part of the website that
24 says, quote, the Conference does not solicit or collect money
25 from parishioners for the Peter's Pence collection?

1 MR. FLOOD: Your Honor, there's certainly a part that
2 says send your money directly to -- to the nunciature and
3 don't send it to us. And -- and there is nothing else on the
4 website, I'm confident, that says the diocese -- that the
5 Conference, rather, oversees the collection or does the
6 collecting or retains the collection or anything of that sort.

7 THE COURT: So the absence of a statement by the
8 Conference indicating that it does this, you think, is
9 sufficient contradiction that I at the motion to dismiss stage
10 can take that to undermine what the plaintiff has said here?

11 MR. FLOOD: Your Honor, I think the absence of that,
12 combined with the affirmative statements that the money is
13 supposed to go directly to the nunciature are more than
14 adequate in the absence of, you know, greater detail by the
15 plaintiff.

16 THE COURT: All right. Mr. Stanley.

17 MR. STANLEY: I don't think that they're bank
18 robbers, but if a boss tells someone like me -- my boss tells
19 me I want you to plan a bank robbery, I want you to hire -- go
20 get the bank robbers, tell them how they're going to do it,
21 give them all the plans, tell them exactly what they're going
22 to do, have them rob the bank on this day, then have them send
23 the money straight to me, you won't touch it, you can say I'm
24 out -- I'm out of -- I'm out of trouble. Certainly in RICO and
25 other cases -- we haven't alleged RICO yet -- but the issue

1 here is really the false representation that they made. They
2 represented -- and if you look at -- at their One Church One
3 Mission, they say very clearly that we and you, the churches --
4 the dioceses and the churches, are going to follow this set of
5 rules ". . . to adhere to the fundamental principle of 'donor
6 intent.' Donors should be informed about the intended uses of
7 donated resources. Donors must be assured that the gifts will
8 be used for the purposes in which they were given."

9 Recognition, handle with confidentiality, et cetera. Then they
10 go back and forth --

11 THE COURT: I understand, Mr. Stanley. Help me to
12 understand that set of allegations. Because the thing that
13 worries me a little bit about your reliance on that is the
14 conversation that we had at the beginning about entanglement.

15 So to the extent that you're suggesting that what is
16 wrong here is that the plaintiff -- excuse me -- that the
17 Conference and the Vatican are not actually following its own
18 guideline, then doesn't Mr. Flood have a point; and is that the
19 function of your pointing to these other statements about
20 ensuring that donors' monies goes to their intended uses?

21 MR. STANLEY: First of all, are we still talking
22 about 9(b), or have we gone back to the motion to dismiss or
23 something else?

24 THE COURT: We're sort of talking about both at the
25 same time, 9(b) and motion to dismiss, but I wanted to make

1 sure that I understood -- you -- you at various points said
2 it's critical, Your Honor, that you understand that the
3 Conference at times has guidelines and statements and rules
4 about ensuring that donors' money goes to where it's intended.

5 And I'm just trying to flesh out whether any part of
6 your claim is about the failure to do what they said they were
7 going to do with the money.

8 MR. STANLEY: Well, no. The failure to understand
9 what was being done with the money, not what -- not promising
10 what they're going to do. We all encounter people who make
11 representations to us in general things, whether they have a
12 right to or not, that sometimes they just don't check. They
13 don't know what they're talking about.

14 They continued year after year with a very specifically
15 worded solicitation that they promised that -- me, as -- I
16 wouldn't know any better if I'm in a church and they say, hey,
17 do something right. There's this special collection going to
18 people with special needs, they're suffering from poverty,
19 they're -- they're on the edges of society. Please give this
20 money now.

21 They don't know -- have a clue one way or the other --
22 we're going to find through our discovery they never checked to
23 see if that was true or not, year after year after year. Yet
24 they promised to. Not only did they promise to -- to
25 themselves, but they promised to the churches, to the dioceses,

1 and the churches and the parishioners, the rules of the game
2 for these special collections are that we're going to know what
3 we're talking about. We're going to make sure that when you
4 give money that you're giving to something real, and that's --
5 that's the neglect I was talking about before.

6 THE COURT: Mr. Stanley, but you're not bringing -- I
7 didn't understand you to be bringing or making some kind of a
8 negligence claim; right? What you've just articulated is a
9 whole other set of duties that, I guess, one could make a claim
10 about, that's separate and apart from the fraud.

11 MR. STANLEY: It's not just negligence. If you know
12 something not to be true and there was no -- from the last --
13 from 2015 on, they knew it wasn't true, and they kept doing it
14 over and over again. So there will be a time period from 2011
15 to 2015 where they actually knew. And discovery is going to
16 let us get into these documents and see what they knew and
17 didn't know about Peter's Pence. But if they knew that it
18 wasn't going there, but yet every year they repeated the same
19 thing, that's fraud. It's a --

20 THE COURT: Obviously. So you're using -- so you're
21 using this notion of a duty to ensure that the money is going
22 to where it's supposed to go to fulfill the element of
23 knowledge in the context of the fraud; that -- that you're
24 saying because there's this requirement that they have adopted
25 to ensure the donor funds are used for precise purposes, one

1 could infer that they knew when they made the representations
2 that it was going to X place that it really wasn't?

3 MR. STANLEY: Right.

4 THE COURT: Okay.

5 MR. STANLEY: Yes.

6 THE COURT: I mean, I think I understand it. You
7 said that there's overlap between that and the totally separate
8 kind of claim about negligence with respect to their following
9 their own guidelines and that that claim might well raise the
10 kinds of concerns that Mr. Flood is talking about with respect
11 to entanglement, et cetera.

12 MR. STANLEY: We think they knew for most of these
13 years it wasn't going as they were doing [sic], and that's
14 fraud. There may be a line, and we may lose on 2011 to 2012,
15 2013, 2014. I haven't seen the documents yet. They may have
16 known. They may not have known. I don't know the answer.

17 But I believe that -- and that when we go for class
18 certification we'll add some documents to let us know exactly
19 what we're going for on that, if they did know or should have
20 known. We'll look at that and make those arguments to the
21 Court then.

22 But for 9(b), again, we say that he heard the
23 representations. We'll make -- they can take the -- the
24 deposition of the -- the reverend who made the representations.
25 They can take the deposition of the bishop who sent it down

1 there and find out what was said and not said. And we have
2 tons of other people in the wings who have contacted us after
3 this lawsuit was filed that say I'm angry about this. This is
4 exactly what I thought I was giving a lot of money to, and I'm
5 really not happy with it, and they also want to join in as
6 members of the class or class representatives, if we need to
7 substitute or add somebody. But there is a large outcry of
8 this. I'm not picking on the church because it's a church.
9 It's the fraud of it, the fact of what happened here.

10 THE COURT: All right. I think I understand. Let me
11 give Mr. Flood a chance, and then I'll come back to you
12 finally, Mr. Stanley. I'm -- I'm mindful of the time.

13 Mr. Flood.

14 MR. FLOOD: Your Honor, to -- to Mr. Stanley's last
15 observations, as a matter of survival on adequacy of the motion
16 at this point, it's not enough that he believes that my client,
17 the bishops' conference, knew about its uses or, you know,
18 diversions or allocations that his client doesn't approve of.
19 He has to allege that, and he hasn't alleged that. There was
20 no specific allegation with any semantic content that doesn't
21 fail under Your Honor's analysis at the front of the *Tran* case
22 to show that.

23 It's not enough to say they knew. It's not enough to
24 say, you know, they knew or should have know known. If you
25 look at the complaint, it says in paragraph 15 they ". . . knew

1 or should have known" that Peter's Pence contributions were
2 diverted. That's boilerplate. At 49 --

3 THE COURT: So -- sorry. What, Mr. Flood, are they
4 supposed to say? What would they need to have said in order to
5 satisfy Rule 9 for this purpose?

6 MR. FLOOD: Respectfully, Your Honor, at a minimum, I
7 should think they ought to say something about why it is
8 that -- you know, something factual, not by way of an
9 explanation, but allege some facts that show that the
10 Conference, which has a coordinating role in the promotion for
11 those dioceses to then elect to follow through and actually
12 have the -- have the campaign, that why it is in doing that
13 there's any reason, in fact, to think that they knew how the
14 Vatican, which handles contributions from six continents, was
15 actually allocating its funds, and they don't do that.

16 It's a -- it's -- I think there's a tendency with
17 churches -- and I suppose not only the churches -- to think of
18 it as a single monochromatic, monolithic organization in which
19 everyone knows what everybody else is doing, but the conference
20 is -- is an independent entity. It's a nonprofit. It's based
21 in D.C. It's not in Rome. And I just don't think it's enough
22 at the threshold to say, these guys, if they didn't know how
23 the Vatican was spending this money, by golly, they should have
24 and that's fraud. I just respectfully submit something more
25 than that is required to satisfy --

1 THE COURT: At the allegation stage. Not at the -- I
2 mean, you are probably correct if the facts don't bear out that
3 they actually knew, but I just am worried about the suggestion
4 that prediscovery a plaintiff in a fraud case has to have
5 specific facts concerning information that really is only in
6 the purview of the defendant, which is what they knew at any
7 particular time. The plaintiff can allege that, and then we go
8 to discovery. And when it's clear that they didn't actually
9 know, you win.

10 MR. FLOOD: With -- Your Honor, I don't disagree with
11 the rule as you formulate it with the following qualification:
12 If in addition to the arch- -- to the Conference -- I keep
13 saying the archdiocese. I apologize. If in addition to the
14 Conference, they had also alleged that my son's swim team was a
15 participant in this and they had some role, one would expect
16 there to be allegations about why it is that they had the kind
17 of knowledge that would obligate them to go forward in a case
18 like this.

19 THE COURT: Only insofar as your son's swim team has
20 nothing to do with this. He says in his complaint that this
21 very institution, the Conference, is the one that's collecting
22 the money. And he says that the Conference, through these
23 other guidelines, indicates that donor money is supposed to go
24 to where it's supposed to go. So it's not as though they're
25 your son's swim team or somebody who has nothing to do with the

1 allegations at issue here. And the question is just whether
2 it's enough having made those allegations at the very beginning
3 of the case to get past this initial hurdle.

4 MR. FLOOD: I agree, Your Honor. I don't want to
5 overparse your language, but it's not enough, I submit, to
6 say they had something to do with it. I think much more
7 is required is -- because it's fraud. It has been
8 particularized.

9 Now, this is not something -- I'm not suggesting that
10 there's some insanely draconian legal gloss that attaches to
11 Rule 9(b). We all know it's actually to the contrary. But if
12 you sue a single defendant and you sue them in fraud, it's not
13 enough to say, as plaintiff says four, five, six times, they
14 knew or should have known. Knew or should have known is the
15 language of negligence.

16 THE COURT: But, Mr. Flood, these -- he's also
17 alleging that these are the very defendants who are making the
18 statement that he says is fraudulent; right? I take your point
19 in the world in which the person -- the party at issue is
20 someone who doesn't have any connection to the allegedly
21 fraudulent statement or to the underlying facts that would
22 indicate that this is fraud.

23 But he says these are the people who are making the
24 statements, see the website, see the brochures and materials.
25 These are the people who, he alleges, are collecting the

1 money; right? So they're not just random people. They're --
2 they're the statement makers and the money collectors. And so
3 the question is saying they knew at the time they made the
4 statement, is that sufficient or do they have to have -- or
5 does he have to have more in terms of how they might know
6 or what is the org chart between the Conference and the
7 Vatican?

8 And I'm just not sure -- given the allegations that
9 place the Conference at the center of this with respect to the
10 alleged misrepresentations, I'm not sure he needs to say more
11 than when they made the statement, they knew.

12 MR. FLOOD: Well, and our response to that,
13 Your Honor, I think is, number one, when they made the
14 statement, they need to make it to him.

15 Number two, the statement that he points to, which is in
16 the script, it does not say what he interpreted it to mean and
17 cannot be fairly read to say immediate and exclusive.

18 Number three, if you're going to identify a defendant as
19 a fraudster in a complaint, you ought to come forward with
20 facts, you know, specific enough to show why they had the
21 improper mental state and -- and knowledge and also an attempt
22 to deceive.

23 There's -- there's really nothing in the complaint
24 that's not the kind of boilerplate ruled out by -- by the rule
25 and the case laws about -- about this knowledge element and

1 this intent element. They're asking you to assume that because
2 they managed to cobble together, you know, pieces of the
3 website that nobody has ever alleged to have seen.

4 THE COURT: All right. Any final thoughts on this,
5 Mr. Flood? I'm going to give Mr. Stanley the last word, but
6 I'm happy to entertain any other arguments that we haven't
7 touched on here.

8 MR. FLOOD: With Your Honor's leave, I know we
9 touched on this, but if I could say one last thing about the
10 jurisdictional argument. The basis -- the centerpiece of the
11 complaint is that Mr. O'Connell gave money but he didn't -- but
12 his gift was not used, exclusively and immediately solely for
13 the poor.

14 THE COURT: I'm sorry. I didn't hear you. Solely
15 for --

16 MR. FLOOD: For the poor or the displaced.

17 THE COURT: Thank you.

18 MR. FLOOD: I'm sorry. This necessarily, unavoidably
19 invokes questions of church governance and how money is spent.
20 You cannot claim that the fraud consists in imperfect immediacy
21 or fatal lack of -- of directness and at the same time say this
22 can be decided on neutral principles. Inevitably, unavoidably
23 the Court or a jury will be put in a position ultimately of
24 saying how much is too much, how soon is too soon. And the
25 same thing goes with exclusivity.

1 THE COURT: Can I ask you how much is too much but
2 not relative to the canons or to the Bible; right? I mean,
3 it's not asking whether this is true or untrue as it relates to
4 religious teachings, is it?

5 MR. FLOOD: No, not at all, Your Honor. This is not
6 a doctrine case, you know, or -- you know, like the defrocking
7 case that -- that my counterpart mentions. This is about the
8 use of church funds for the church's charitable purposes.

9 THE COURT: Can I -- if the Court's ultimate
10 ruling -- and I'm -- I don't know how we get here, but I'm just
11 trying to play out what you're suggesting about entanglement.
12 What if the answer is the defendants just have to say exactly
13 what is happening to the money? They don't have to change
14 their practice. They don't have to give more to the poor
15 versus, you know, not. And so it's not really about are you
16 breaking some sort of rule or law or principle based on how you
17 allocate money, but the answer is just you have to tell people
18 this is what we do with the money. Why isn't that a neutral
19 principle kind of analysis?

20 MR. FLOOD: Well, I think, Your Honor, because in --
21 in the real world, in the world of hierarchal church with
22 worldwide jurisdiction and a bishops' conference located in one
23 country, to avoid, you know, the -- the very rigorous -- to
24 survive a motion to dismiss, the only possibility in the world
25 in which Your Honor's suggestion becomes law is to have a kind

1 of disclosure that is so detailed, so ramified it would be like
2 one of those -- you know, all the disclaimers on those -- on
3 those medication commercials for people my age that I see. You
4 have to say it's going here and there's not going to be any of
5 this and you don't have to worry about that and the other
6 thing.

7 The bishops' conference in one country, I submit,
8 doesn't know what the Vatican does. I'm not offering that as a
9 proposition of fact to create a factual issue. I'm just saying
10 that in the natural scheme of things, given the nature of the
11 church and where the -- the Conference fits, they're just not,
12 by reason of structure, in a position to have that knowledge.

13 THE COURT: And so isn't Mr. O'Connell's claim that
14 they shouldn't be telling people where it goes? So fine. They
15 don't know what the Vatican does with the money. The essence
16 of the fraud claim is here are all these statements where
17 they're telling people it goes to the poor. And so isn't the
18 answer don't say where it goes. Don't solicit; right? It's
19 not -- that's not complicated.

20 Don't solicit money telling people this goes to the poor
21 if you either don't know where it goes or if it's going to all
22 of these investments and whatever before it gets to the poor,
23 such that people are confused or people feel as though they
24 haven't been leveled with in terms of how this money is being
25 allocated.

1 MR. FLOOD: With respect to Your Honor, I don't think
2 that could be the answer. And I don't think it could be the
3 answer because the -- the -- the alternative you've given is --
4 and I don't mean to mischaracterize it. Sounds like you've
5 either got to tell them everything or you've just got to be
6 quiet about it. And I think both are -- I think that the "be
7 quiet about it" is just utterly impracticable. I don't think
8 you can ask parishioners in the pews to give money without
9 giving them some sense of where it might go. This is kind of a
10 rhetorical point about how appeals work.

11 On the other side -- on the other part of the
12 disjunction, I don't think you can itemize every conceivable
13 use because I don't think, in a local church, meaning the
14 church in this or that country, is going to have that
15 information and I also --

16 THE COURT: But can I ask you --

17 MR. FLOOD: Could I have one last point, Your Honor?

18 THE COURT: Yeah.

19 MR. FLOOD: Just one.

20 And I also think to insist on that as a rule of law for
21 churches that raise money going forward is to impose an
22 exceptionally intrusive and burdensome standard on something
23 that at least before this case I'm not aware any Court has ever
24 contemplated.

25 THE COURT: Can I -- can I ask you a hypothetical?

1 And then I'll move to Mr. Stanley.

2 MR. FLOOD: Of course, Your Honor.

3 THE COURT: This is not this case because you are
4 alleging that -- or maybe -- I don't know. We haven't really
5 seen your side of the case yet, but I can imagine you would
6 argue that, you know, as the Pope apparently did in some of the
7 responses to the articles, that he's making investments and
8 some percentage of it is going to the poor.

9 But in a world in which -- let's say a hundred percent
10 of the money was going to, you know, Vatican operations and
11 none of it was going to the poor and yet we had the same facts
12 concerning solicitations being made with the statement this is
13 going to the poor, is that a viable basis for a fraud claim or
14 would that still be subject to the entanglement concerns that
15 you're talking about?

16 MR. FLOOD: The short answer, Your Honor, is I don't
17 know. It's a whole lot closer to actionable fraud than what we
18 have here, because I think that a 100-percent erroneous
19 assertion, it would be highly problematic from a deception
20 standpoint. Now that, I think, alone doesn't give a
21 plaintiff -- in Your Honor's hypo, I don't think that is enough
22 alone to deliver all elements of the fraud. But I think, you
23 know, it does sound to me like it's a false statement and on
24 Your Honor's hypo, it's an in- -- inarguably false statement
25 that can't be qualified away, not what we have here.

1 THE COURT: And -- and no defense, I'm a church, this
2 would have you looking at my uses of the money, wouldn't be --
3 would you or would not be able to make the kind of
4 jurisdictional claim that you're making here?

5 MR. FLOOD: Your Honor, I'd want to know a whole lot
6 more about the factual context, but I think the best I can say
7 on -- on your hypo is it would be a much more difficult case
8 than what we have here. Because the idea of the -- of, you
9 know, faithful discretion, the idea, you know -- the things
10 that are said on the Vatican website, that's all taken out of
11 play. If everybody is lying about this, then I think, you
12 know, a church member -- I think -- let me put my point
13 differently and then I'll -- and then I'll shut up.

14 I think Your Honor's hypothetical becomes very close to
15 those very rare -- I can only find two of them -- cases in
16 which a church says -- in which the Court has said, you know,
17 somebody who raises money in a subscription, where there's a
18 specific purpose, clearly identified commitment forms are
19 filled out -- for example, to building a building, and then
20 they don't build the building and just keep it in the church
21 treasury -- courts have allowed those kinds of cases to go
22 forward, and I think Your Honor's hypothetical, if not on all
23 fours, is much, much closer to that.

24 THE COURT: All right. Thank you.

25 MR. FLOOD: Thank you, Your Honor.

1 THE COURT: Mr. Stanley, I'll give you the final
2 word.

3 MR. STANLEY: Thank you very much.

4 Again, none of that happened here. The representations,
5 it's not very complex. They give a very small paragraph of
6 what they passed down, what they're going to do with the money.
7 It didn't say, hey, we're going to build a rainy day fund,
8 we're going to invest in apartments and condos in London or
9 Swiss funds or movies, and then if it spins off profit, we'll
10 have a bigger one or we will lose money. It didn't say one day
11 we might use it for church deficits.

12 This was the rule of the game. Give money for this.
13 And our client will testify that he did not give money to the
14 church. He gave money as a pass-through. He was giving money
15 to poor people. His goal was not to give any money to the
16 church. His goal was to give money to people who were on the
17 edges. And --

18 THE COURT: But I guess Mr. Flood's point is, all
19 right. So fine. Even if the allegations in the complaint are
20 true, that only 10 percent of this money actually ends up going
21 to poor people, does the Court really have the authority to
22 evaluate that in -- in order to assess whether or not there's
23 fraud?

24 MR. STANLEY: Yes. Because our position will be --
25 and, again, the discovery will allow us to show behind there

1 that a hundred percent was supposed to go to the poor people,
2 not 10 percent. And that when it turns out, the facts that
3 come out, that the money went to Cardinal Becciu's relatives
4 instead of poor people -- and they aren't poor -- they went to
5 investment fund managers in Switzerland, they went to --
6 170 million went to this profit, went to this developer in
7 London, who was very suspicious, that the multi-fund -- it went
8 wrong. This was run amuck. This was a fund that nobody -- who
9 was watching whatever. It wasn't done right.

10 Again, our client's testimony will be he expected a
11 hundred percent of it to go to the poor, not to be gone this
12 way, and it was very poorly done.

13 THE COURT: Is that an expectation that just comes
14 from him, or are you saying that's what they said?

15 MR. STANLEY: That's what they said to him. It was
16 going to go to the poor and people in the margin. And, again,
17 discovery will show this, and we'll get this out, but that's
18 our position.

19 As to the bottom line, we're happy with our complaint.
20 It's -- as you said in the *Tapp* case, "It is . . . axiomatic
21 that for the purpose of the court's consideration of the
22 Rule 12(c) motion, all of the well-pleaded factual allegations
23 in the adversary's pleadings are assumed to be true and all
24 contravening assertions in the movant's pleadings are taken to
25 be false."

1 And any contravening assertions they simply denied, but
2 this other stuff about what's on the Pope's website, that's in
3 their -- in their motions. But our pleadings, the well-pleaded
4 factual allegations, are assumed to be true, which is also what
5 they said in their reply. For the purpose of this motion,
6 the Conference is not disputing any of the plaintiff's
7 allegations.

8 So we're resting on our pleading, we're happy with our
9 pleading, and we think the Rule 12(c) should be denied, and we
10 think denying (b) allegations, we think there's -- we told --
11 we told them what he relied on and we gave it out very clearly.

12 THE COURT: But you don't say on June 12th, 2018,
13 while in this particular church service, Pastor So-and-So said
14 X; right?

15 MR. STANLEY: We did -- you have to -- maybe -- maybe
16 not clearly on that day, and you talked about that in your
17 *Tran* case. You said you don't have to give every -- it's just
18 give them fair notice of what's going. But what we do say is
19 that this is a once-a-year solicitation, a special collection
20 once a year. What we do say is that O'Connell heard that and
21 he relied on it and he donated money. So, yeah, we do say it.

22 And, again, they can take the deposition of the pastor,
23 see what he -- the Father to see what -- what he said and what
24 was instructed to him to say. We can get all that there, but
25 O'Connell is going to say that's exactly what he heard. And

1 that's what he said here. And if you look, it's very clear --
2 paragraphs 48 to 51 are very clear on that.

3 THE COURT: All right. Thank you very much. I will
4 take the motion under advisement and issue a written ruling.

5 MR. STANLEY: Thank you for your patience.

6 THE COURT: Thank you.

7 MR. FLOOD: Thank you, Your Honor.

8 THE COURT: Have a good day.

9 (The proceedings concluded at 3:34 p.m.)
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CERTIFICATE OF OFFICIAL COURT REPORTER

I, Nancy J. Meyer, Registered Diplomate Reporter,
Certified Realtime Reporter, do hereby certify that the above
and foregoing constitutes a true and accurate transcript of my
stenograph notes and is a full, true, and complete transcript
of the proceedings to the best of my ability.

Dated this 1st day of February, 2021.

/s/ Nancy J. Meyer

Nancy J. Meyer

Official Court Reporter

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