UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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

THE DIOCESAN DEFENDANTS' OPPOSITION TO FINAL APPROVAL AND COMPANION MOTION FOR ATTORNEYS' FEES CONCERNING SETTLEMENT WITH ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND, INC., ROGER WILLIAMS HOSPITAL, AND CHARTERCARE COMMUNITY BOARD

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Defendants Roman Catholic Bishop of Providence, a corporation sole, Diocesan Administration Corporation and Diocesan Service Corporation (collectively, the "Diocesan Defendants") submit this opposition to final approval of the settlement between Plaintiffs and Defendants St. Joseph Health Services of Rhode Island, Inc. ("SJHSRI"), Roger Williams Hospital ("RWH"), and CharterCARE Community Board ("CCCB") ("Settlement A"), ECF No. 63, and Class Counsel's motion for attorneys' fees in connection with Settlement A, ECF No. 64.

PRELIMINARY STATEMENT

As they explained last December, the Diocesan Defendants have no objection to millions of dollars of liquid assets from SJHSRI, RWH, and CCCB (collectively, the "Settling Defendants") pouring into the SJHSRI Retirement Plan (the "Plan"). Settlement A, however, extends far beyond a transfer of assets. It presents a slew of obstacles to final approval and unreasonably enriches Class Counsel at the expense of the Plan Participants. Many of these issues have been thoroughly briefed and can be addressed by reference to earlier filings. Others warrant more detailed discussion on account of information newly provided by Plaintiffs or Class Counsel or unearthed in limited discovery.

The Court should not approve Settlement A under Rule 23 of the Federal Rules of Civil Procedure or R.I. Gen. Laws § 23-17.14-35, nor should it allow Class Counsel's companion motion for attorneys' fees for four reasons. *First*, the Pension Benefit Guaranty Corporation ("PBGC") has an essential role to play in these proceedings that precludes approval of motions related to Settlement A. *Second*, a "good faith" finding under § 23-17.14-35 is inappropriate because the statute not only is preempted by ERISA but also is unconstitutional under the federal and state constitutions. *Third*, Settlement A is not a "good faith" settlement under § 23-17.14-35, but rather—as explained by

Prospect[1]—an improper preferential transfer. *Fourth*, Class Counsel's fee application in connection with Settlement A is not reasonable. The Court, therefore, should decline to approve Settlement A and the fee application.

ARGUMENT

I. The Essential Role of the PBGC

As the Prospect Entities have previously explained, the Court should deny final approval of Settlement A and the related fee motion on account of Plaintiffs' failure to join the PBGC to these proceedings. In the alternative, the Court should defer resolution of the motions until the PBGC has been joined or has otherwise officially weighed in on the settlement. ECF No. 75-1 at 10-12.

II. ERISA Preemption and Constitutional Defects are Threshold Obstacles to a Renewed Request for a Good Faith Finding Under § 23-17.14-35

Approval of Settlement A under § 23-17.14-35 should be denied because ERISA preempts the state statute. ECF No. 73 at 4-5. Additionally, the Court should decline to approve the settlement under § 23-17.14-35 because the statute also violates the Equal Protection and Due Process Clauses of the United States and Rhode Island Constitutions. *Id.* at 5-13. The Court, further, should resolve these ERISA and constitutional challenges prior to making any good faith finding under § 23-17.14-35. To do otherwise would prejudice the non-settling defendants' defense of this litigation by leaving their contribution rights and the applicable judgment credit regime unclear. ECF No. 115 at 2-3; *see Denney v. Deutsche Bank AG*, 443 F.3d 253, 272-76 (2d Cir. 2006); *In re Jiffy Lube Secs. Litig.*, 927 F.2d 155, 160-62 (4th Cir. 1991).

[1] "Prospect" refers collectively to Defendants Prospect Medical Holdings, Inc., Prospect East Holdings, Inc., Prospect Chartercare, LLC, Prospect Chartercare SJHSRI, LLC, and Prospect Chartercare RWMC, LLC.

III. The Court Should Deny a Renewed Request for a "Good Faith" Finding Under § 23-17.14-35 Because Settlement A Is Not a "Good Faith" Settlement

The Diocesan Defendants join the argument of the Prospect Entities as it concerns the good faith approval of Settlement A under § 23-17.14-35. The Court cannot deem Settlement A a "good faith" settlement because the settlement is actually an improper preferential transfer masquerading as a compromise. *See* Prospect's August 27, 2019 Objection to Final Settlement Approval.

The Diocesan Defendants also refer the Court to their prior arguments concerning the facially and contextually collusive components of Settlement A. ECF No. 73 at 13-23. These include statements in the agreement concerning liability, damages, and proportionate fault, the clear-sailing provision on attorneys' fees, the questionable scope of the releases, the timing of the settlement, and the fact that a significant (albeit presently undefined) portion of the initial lump sum payment component of the settlement appears as if it would have poured into the Plan without litigation.[2] *Id.*

The remainder of this brief will focus on issues concerning Class Counsel's motion for attorneys' fees in connection with Settlement A, ECF No. 64. In doing so, the Diocesan Defendants reiterate that matters concerning attorneys' fees also go to the good faith and fairness of the settlement. *See* Fed. R. Civ. P. 23(e)(2) advisory committee note to 2018 amendments ("Particular attention [in the fairness inquiry] might focus on the treatment of any award of attorney's fees, with

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[2] Plaintiffs suggest that the non-settling defendants do not have standing to oppose a "good faith" finding under § 23-17.14-35 in their filings concerning the settlement with CharterCARE Foundation. ECF No. 139 at 40-41. To the extent they have done so, Plaintiffs would be wrong as to that settlement *and* Settlement A. Non-settling defendants have standing to challenge a class action settlement if it impairs their substantive rights, including rights to contribution. *See, e.g.*, *In re Masters Mates & Pilots Pension Plan & IRAP Litig.*, 957 F.2d 1020, 1026 (2d Cir. 1992) ("In other words, where the rights of one who is not a party to a settlement are at stake, the fairness of the settlement to the settling parties is not enough to earn the judicial stamp of approval."). Plaintiffs conceded this fact in prior briefing. ECF No. 63-1 at 46 ("Accordingly, the Prospect Entities, CCF, and the other non-settling Defendants have standing to be heard in connection with the Court's determination whether the Proposed Settlement is a good faith settlement under the recently enacted Rhode Island statute, R.I. Gen. Laws § 23-17.14-35 . . . ."). Plaintiffs were right the first time. Because a "good faith" finding will effect a contribution bar under Rhode Island law, the non-settling defendants have standing to challenge it.

respect to both the manner of negotiating the fee award and its terms."); *id.* ("Examination of the attorney-fee provisions may also be valuable in assessing the fairness of the proposed settlement.").

IV. **The Fee Application for Settlement A Is Not Reasonable**

In prior briefing, the Diocesan Defendants raised questions regarding Class Counsel's motion for attorneys' fees in connection with Settlement A. ECF No. 73 at 23-29. These concerns arose from a lack of information regarding Class Counsel's attempts to reach a pre-litigation settlement, the absence of discussion concerning time devoted to procuring Settlement A, the fact that a substantial (albeit undefined) portion of the Settling Defendants' liquid assets were earmarked for the Plan, and substantial inconsistencies between the lodestar and the percentage of the fund requested. *Id.* In some respects, limited discovery and recent filings have clarified or resolved these issues. In others, they have raised more questions. This is especially so as it concerns Class Counsel's efforts to reach a pre-litigation settlement and their attempts to calculate a lodestar.

A. *Issues Concerning Class Counsel's Pre-Suit Settlement Efforts*

1. Class Counsel's Failure to Engage the Settling Defendants in Pre-Suit Settlement Talks or Even Send Them a Pre-Suit Demand Renders the Fee Request Unreasonable

Class Counsel's fee arrangement with Plaintiff Stephen Del Sesto (the "Receiver") and the putative class representatives provides that counsel will receive 10% of any recovery obtained prior to the filing of a complaint and 23 1/3% of any recovery obtained after a complaint has been filed. ECF No. 64-1, at 2-3. Class Counsel was paid $375.00 an hour for work conducted prior to initiating this lawsuit (and ultimately compensated in excess of half a million dollars for those efforts). *Id.* at 5. Because Plaintiffs reached an agreement with the Settling Defendants after a complaint was filed, Class Counsel has requested 23 1/3% of the prospective recovery (minus a $552,281.25 credit against the Settling Defendants' proposed lump sum payment of $11.15 million, for fees paid during the investigative phase). *Id.* at 18.

Class Counsel has submitted multiple declarations in support of their fee request. *See* ECF No. 65; ECF No. 145. Those declarations do not detail what settlement efforts Class Counsel directed at the Settling Defendants prior to filing this lawsuit. This silence is not an accident. Discovery has confirmed that Class Counsel made no pre-suit settlement efforts as it concerns the Settling Defendants: not even a demand letter. That is especially noteworthy here, given that the Settling Defendants were willing to admit liability and were in financial circumstances suggesting that they had no incentive to litigate.[3] The Settling Defendants, moreover, had expressed a willingness to fund receivership expenses for some period of time, ECF No. 65-1 ¶ 22, and believed that pursuant to the 2015 *cy pres* order that assets remaining after wind-down would become available to the Plan.[4] *See* Ex. A (Excerpted Land Dep.) 23:11-24:2[5]; Ex. B (Excerpted Del Sesto Dep.) 17:12-23.[6] And,

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[3] Plaintiffs themselves acknowledge that the Settling Defendants are corporations in effective long-term wind-down, with limited assets that are insufficient to satisfy Plaintiffs' claims. ECF No. 60 ¶ 55(d)(iv) (alleging that SJHSRI was stripped of "virtually all value"); *id.* ¶ 521 ("Defendants SJHSRI, RWH, and CCCB have ceased ordinary business and dissolved and/or have become in essence empty shells."); *see also* ECF No. 63-1 at 40 ("Settling Defendants' admit . . . that Plaintiffs' damages greatly exceed Settling Defendants' collective assets[.]").

[4] The Receiver shared that interpretation at one time. *See* ECF No. 73 at 28 & n.24 (quoting Receiver's statement at a December 4, 2017 town hall with plan participants that his fees and Class Counsel's fees were being paid from the non-Plan assets of the Settling Defendants that would have ultimately flowed into the Plan pursuant to a *cy pres* order). He has since changed his mind. Ex. B (Excerpted Del Sesto Dep.) 17:24-18:6. Regardless, the Settling Defendants stated understanding that their remaining assets upon completion of wind-down would be available to the Plan spoke in favor of greater pre-suit settlement efforts (*e.g.*, a demand that the Settling Defendants not wait to wind-down and proffer all their assets at once) than the Receiver and his counsel made.

[5] Q. [Mr. Halperin] Was it -- did you have an understanding over the last four years as to whether there was an obligation on the part of the Oldco entities [the Settling Defendants] to provide any kind of funding to the plan?

A. [Mr. Land] So again, just to be precise, I understood that St. Joseph's Health Services of Rhode Island, having satisfied all of its other liabilities, would then use whatever funds were available to it for the pension plan. That was my understanding. Whether that's right or wrong, that was my understanding. With respect to the other Oldco entities, I don't recall, frankly, CharterCARE -- anything specific relating to CharterCARE. And with respect to Roger Williams, I think -- I believe there was potentially a partial waterfall. In looking at this document [the 2015 *cy pres* petition] I believe it relates to the charitable assets with waterfall. Potentially."

Ex. A (Excerpted Land Dep.) 23:11-24:2.

[6] Q. [Mr. Halperin] Did it come to your attention that the monies that Oldco and CCCB had were going to ultimately pay -- be paid to the plan?

Mr. SHEEHAN: Objection to the form.

A. [Mr. Del Sesto] It was my -- Attorney Land represented to me that he believed -- in the beginning of the case he represented to me that he believed that the Cy Pres order functioned as -- I don't know if he called it this, I'm going to characterize it as a waterfall. That ultimately the monies would ultimately fall into the plan. That's what he represented to me as far as his understanding of the Cy Pres.

Ex. B (Excerpted Del Sesto Dep.) 17:12-23.

unsurprisingly given all this, after the case was filed, the Settling Defendants settled early and before engaging in any meaningful litigation or, it turns out, much negotiation. *See* Prospect's August 27, 2019 Objection to Final Settlement Approval.

Based on this record, it remains unclear why initiation of this lawsuit was required to procure Settlement A. The Receiver's deposition testimony offered no answers on this score. When faced with the Settling Defendants' expressed willingness to settle before a lawsuit was brought, the Receiver and his counsel made no follow-up and did not even provide the Settling Defendants with a demand. ECF No. 144 ¶¶ 13-16; *see also* Ex. B (Excerpted Del Sesto Dep.) 93:21-25 ("A. I can only speak to what happened with me [the Receiver] between then, and the answer to that is nothing. I was not provided -- I was not presented with or had any discussion regarding anything of substance beyond is there a way we can resolve this."). Instead, the Receiver and his counsel placed the burden on the Settling Defendants and any other litigation target to guess what might satisfy the Receiver. *See* Ex. B (Excerpted Del Sesto Dep.) 94:12-22.[7] The Court should not reward this lack of follow-through by enriching Class Counsel at the expense of the Plan.

2. The Receiver's Declaration Does Not Excuse Class Counsel from Their Failure to Attempt to Reach a Pre-Litigation Settlement with the Settling Defendants

In his declaration, the Receiver offers another reason—not mentioned in his deposition—for his counsel's lack of follow-up on the Settling Defendants' purported willingness to engage in pre-suit settlement talks. The Receiver declares that, as of June 2018, he believed "that there would have been no meaningful settlement discussions until after suit had been brought" and

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[7] Q. To your knowledge did Special Counsel follow up on Mr. Land's expression of willingness to settle prior to filing suit?

A. I do not know. I actually, if anything, would have directed Attorney Land to follow up with my Special Counsel, not the other way around.

Q. Did you do that?

A. I don't recall. I said it would have been to either say contact Special Counsel, and if you got something talk to them. I've had those same discussions with other defendants in this case.

that he "did not instruct WSL [Class Counsel] to share the draft complaint with any potential defendants prior to filing, because [he] believed that would have no benefit and would actually weaken Plaintiffs' position . . . ." ECF No. 144 ¶ 16.

The Diocesan Defendants will refrain from second-guessing the Receiver's strategic decision-making as it concerns sharing drafts of the complaint. The failure of the Receiver and Class Counsel, however, to serve a simple pre-suit demand on their litigation targets—especially when the Settling Defendants had expressed interest in settling—seems in conflict with the financial interest of the class (and the Plan). Class Counsel do not indicate whether they confirmed that the putative class representatives agreed with the Receiver's apparent conclusion that a pre-suit demand on the Settling Defendants would be fruitless. Such demands are commonplace and the absence of one here is particularly puzzling given the financial swing from retirement benefits to attorneys' fees that hinged on whether a settlement was reached pre- or post-complaint.[8] It would have taken minimal effort on the part of the Receiver and his counsel to serve such a demand. That they did not send such a letter to the Settling Defendants before filing suit should weigh in the Court's assessment of the reasonableness of the fee application and warrants a reduced award.

B. *Class Counsel Still Have Not Broken Down the Hours Attributable to Settlement A and Their Effort to Use All Hours Worked to Support a Lodestar Calculation Is Not Reasonable*

In connection with Settlement A and the settlement with CharterCARE Foundation ("Settlement B"), Class Counsel seek a combined attorneys' fee of $3,098,863.80 ($2,049,013.80 (Settlement A) + $1,049,850 (Settlement B) = $3,098,863.80).[9] ECF No. 80 at 3-4. In a recent filing

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Ex. B (Excerpted Del Sesto Dep.) 94:12-22.

[8] A pre-litigation settlement under the same terms would have resulted in a reduced fee award on the lump sum component of Settlement A of $562,718.75 (assuming Class Counsel's continued willingness to extend the same generous credit to the class for fees paid for investigative work). 10% of $11,150,000 = $1,115,000, minus $552,281.25 = $562,718.75.

[9] Class Counsel's most recent fee related filing references a total combined fee of $3,093,031.30, consisting of a $2,043,181.13 component for Settlement A and a $1,049,850 component for Settlement B. ECF No. 140 at 36 n.49. Class Counsel's initial fee motion sought $2,049,013.80 of the initial lump sum payment of Settlement A. ECF No. 64-1 at 18

concerning their fee application for Settlement B, Class Counsel respond to the Diocesan Defendants' questions about how the fee applications for Settlement B and Settlement A square against a lodestar crosscheck. ECF No. 140 at 32-39. Class Counsel assert that the proper hourly rate to calculate the lodestar is at least $600.00, multiplied by all 4,072 hours that Class Counsel has devoted to this case (and not just the 2,600 hours they have expended since filing this lawsuit or the unknown, and presumably, lesser amount of time associated with procuring Settlement A). *Id.* at 9, 36.

Problematically, Class Counsel still do not break down the hours devoted to litigating with the Settling Defendants or obtaining Settlement A nor do they provide the Court with documentation to allow the Court to do so. *See Heien v. Archstone*, 837 F.3d 97, 99 (1st Cir. 2016) (involving fee application where class counsel sought percentage of fund, but still provided billing records to permit the court to calculate an accurate lodestar); *In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 307 (1st Cir. 1995) (noting that "even under the POF [percentage of fund] method, time records tend to illuminate the attorneys' role in the creation of the fund, and, thus, inform the court's inquiry into the reasonableness of a particular percentage"); *Walsh v. Popular, Inc.*, 839 F. Supp. 2d 478, 482-83, 485-87 (D.P.R. 2012) (granting less than the requested percentage of fund and noting that the court had rejected a generalized time description and required counsel to produce itemized time records which were used in connection with "a rough lodestar" cross-check).

Class Counsel's 4,072 hour figure, moreover, not only includes time unrelated to Settlement A and investigative work for which Class Counsel have already been paid, but presumably also reaches time devoted to good-faith discovery concerning Settlement A. The former two are

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n.44. The Diocesan Defendants are not sure of the reason for this change. For the sake of maintaining mathematical consistency throughout their briefing, the Diocesan Defendants will continue to use the figure from the initial fee motion.

inappropriate as they risk double compensation and/or are irrelevant to the procurement of the settlement. The latter is improper, as such discovery was totally avoidable and the result of the Receiver and Class Counsel's negotiation of a settlement raising questions of collusion. *See* ECF No. 73 at 13-20. As such, the record still is not sufficient to enable the Court to conclude that the fee application is reasonable. *See Walsh*, 839 F. Supp. 2d at 482-83.

C. *The Court Should Apply a Lodestar to the Fee Application As It Concerns the Initial Lump Sum Payment Component of Settlement A*

The Court should use the lodestar method as it concerns the lump sum payment piece of Settlement A. The First Circuit has indicated that, "in a common fund case the district court, in the exercise of its informed discretion, may calculate counsel fees either on a percentage of the fund basis or by fashioning a lodestar." *Heien*, 837 F.3d at 100 (quoting *Thirteen Appeals*, 56 F.3d at 307). Although the percentage of fund method has advantages over the lodestar in some circumstances, they are not controlling. *See id.* In fact, "the percentage-of-fund approach may result in the overcompensation of lawyers in situations where actions are resolved before counsel has invested significant time or resources." *See id.* (internal quotation marks and citation omitted). In these types of cases, the district court can and should fashion a reasonable fee from the lodestar. *See id.* at 101-02.

This is such a matter. Plaintiffs reached a settlement with the Settling Defendants on August 31, 2018, a little more than two months after this litigation commenced. *Compare* ECF No. 63-2 at 1 ("This settlement agreement is entered into as of August 31, 2018") *with* ECF No. 1 (Original complaint, filed June 18, 2018). In doing so, the Settling Defendants admitted liability. ECF No. 63-2 ¶ 28. The Settling Defendants also believed that their assets would go to the Plan after they completed winding down (a view that the Receiver shared at one time). *Supra* at Part IV.A.1 & note 4. On these facts alone, it would not be unfair for the Court to conclude that a settlement

including the lion's share of the Settling Defendants' assets was a foregone economic reality and that the case against the Settling Defendants was basically "won" before it started—certainly by the end of the investigatory stage for which Class Counsel have already been compensated. Plaintiffs barely litigated against the Settling Defendants after the complaint was filed. Instead, Plaintiffs have been allied with the Settling Defendants, and were so allied before any of the non-settling defendants filed their first motions to dismiss. *See* ECF No. 49 (first motion to dismiss, filed on September 14, 2018).

The circumstances, here then, are similar to those in *Heien*. In that case, the First Circuit upheld a district court's application of the lodestar to award a more modest fee, instead of plaintiffs' attorneys' request for a much larger percent of the fund. *See Heien*, 837 F.3d at 98-100. The district court considered that liability had already been decided against the defendant in an earlier related litigation (for which plaintiffs' attorneys were compensated), no discovery or significant motion practice had occurred in *Heien*, and *Heien* had settled "promptly." *See id.* at 101-02. In affirming, the First Circuit referenced the prior fee award in the earlier matter and agreed with the district court's reasoning that *Heien* "had required little, if any, legal work." *See id.*

Here, as in *Heien*, the parties reached a settlement "promptly," without any significant motion practice or litigation between Plaintiffs and the Settling Defendants. *See id.* Class Counsel, likewise, were compensated in an earlier related proceeding for their discovery efforts as it concerns the Settling Defendants (and others). *See id.* In some respects, the facts here are even more extreme than in *Heien*, as the Settling Defendants also admitted liability, whereas the attorneys in *Heien* had to establish liability by way of a motion for summary judgment in earlier litigation. *See id.* at 98-99, 101-02; *see also Baptista v. Mut. of Omaha Ins. Co.*, 859 F. Supp. 2d 236, 242-44 (D.R.I. 2012) (choosing lodestar over percentage-of-fund method in ERISA class action and declining to award a lodestar multiplier, where "the case settled within weeks, without any significant discovery").

Assuming the Court approves Settlement A at all—and it should not—the unique, *Heien*-esque, circumstances of this case weigh in favor of applying a creative lodestar approach to the lump sum component of Settlement A, instead of a simple application of a 23 1/3% fee to all aspects of the settlement. One reasonable approach would be an award of $330,918.75, plus added hourly compensation at Class Counsel's blended $600.00 non-contingent case rate for time expended negotiating and documenting Settlement A and seeking its judicial approval. $330,918.75 is the difference between what Class Counsel were paid for work during the investigatory phase ($552,281.25), and what they would have been paid under their standard blended rate for the claimed 1,472 hours of investigatory work (1,472 x $600.00 = $883,200). This makes Class Counsel whole for the discount they gave the Receiver during the investigative phase. Hourly compensation specific to work on Settlement A, moreover, will fairly compensate Class Counsel for post-complaint effort in connection with the quick resolution of their case with the Settling Defendants, without reaching matters unrelated to Settlement A or risking double compensation for those matters.[10] This novel lodestar approach allows for more reasonable compensation as it concerns the lump sum portion of Settlement A and permits significantly more funds to be delivered to the Plan and its participants—as was originally contemplated in the *cy pres* petition. *See Baptista*, 859 F. Supp. 2d at 242-44; ECF No. 73 at 26-29 (discussing *cy pres* petition); ECF No. 115 at 7-8 (same).

As it concerns the remaining components of Settlement A (*e.g.*, proceeds from the exercise of the put option; rights to the RWH escrow account; proceeds from subsequent liquidation proceedings), the Diocesan Defendants have no objection to Class Counsel's requested 23 1/3% fee.

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[10] Assuming Class Counsel kept records of their time, it should not be difficult for them to identify the time devoted to negotiating, documenting, and seeking approval of Settlement A. *See Thirteen Appeals*, 56 F.3d at 307 ("[B]ecause the district court in any given case may eschew the POF [percentage of fund] method in favor of the lodestar method, we urge attorneys to keep detailed, contemporaneous time records in common fund cases").

D. *The Diocesan Defendants Have Standing to Question the Fee Applications and, in Any Event, Are Providing Valuable Adversarial Presentation to Assist the Court in Its Independent Review of the Applications*

1. Standing

Class Counsel question the Diocesan Defendants' standing to contest the fee applications and their motive for doing so. As the Diocesan Defendants have explained throughout the briefing on this issue, they do have standing here. ECF No. 73 at 17-18, 24 n.20. The Amended Complaint asks the Court to order the Diocesan Defendants (among others) to "fund the Plan in accordance with ERISA's funding requirements." *See* ECF No. 60, ¶ 472(C). In other words, pay a sufficient, but presently undefined, amount of money into the Plan until some unknown date in the future when all beneficiaries' claims have been satisfied. As more settlement funds flow to Class Counsel therefore, fewer will go to shore up the Plan, meaning greater outlays would be required from the non-settling defendants if Plaintiffs obtain this relief. Due to the *sui generis* nature of this matter, the Diocesan Defendants have yet to find a case addressing a standing challenge on these facts.[11] But there is certainly a threat of monetary harm to the Diocesan Defendants from the fee application based on the relief that Plaintiffs are seeking.

[11] The cases that Class Counsel cite in connection with their standing challenge do not either. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 482 & n.7 (1980) (rejecting effort by defendant against whom judgment was rendered to recover leftover funds in judgment fund over the claims of class counsel, and reasoning that defendant could have raised the challenge had it appealed the judgment); *Thirteen Appeals*, 56 F.3d at 305 (reviewing dispute among plaintiffs' lawyers over allocation of common fund and not considering questions of standing); *Uselton v. Comm. Lovelace Motor Freight, Inc.*, 9 F.3d 849, 854-55 (10th Cir. 1993) (concerning class counsel's objection to fee award from common fund to objector's counsel and not considering argument for standing of the type raised by the Diocesan Defendants); *Abselet v. Levene Neale Bender Yoo & Brill L.L.P.*, CV 16-6263-JFW (JEMx), 2017 WL 8236272, at *4 & n.8 (C.D. Cal. Nov. 17, 2017) (not considering argument for standing of the type raised here); *Roberts v. Heim*, Nos. C 84-8069 TEH, C 87-6174 TEH, C 88-3373 TEH, 1991 WL 427888, at *2, *6 (N.D. Cal. Aug. 28, 1991) (dealing with untimely objection from non-settling defendants concerning sufficiency of class notice and not considering grounds for standing akin to those raised by the Diocesan Defendants).

2. Adversarial Presentation

And, even assuming a lack of standing (which is denied), the Court would still be free to consider the questions that the Diocesan Defendants have raised as part of the Court's independent analysis of the fee application. *See In re Cabletron Sys., Inc. Secs. Litig.*, 239 F.R.D. 30, 38 (D.N.H. 2006) (Smith, J., by assignment) (referencing the "district court's obligation to carefully examine the fee request for reasonableness"); *Mokover v. Neco Enters., Inc*., 785 F. Supp. 1083, 1086 (D.R.I. 1992) ("[T]his Court has a fiduciary duty to review the requested counsel fees . . . and to use its best judgment to determine what is a reasonable fee . . . ."). Courts in this district (and elsewhere), moreover, have routinely lamented the lack of adversarial presentation on fee applications in class actions. *See, e.g.*, *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 52 (2d Cir. 2000) ("We appreciate that fixing a reasonable fee becomes even more difficult because the adversary system is typically diluted—indeed, suspended—during fee proceedings."); *Baptista*, 859 F. Supp. 2d at 243 ("[I]t is appropriate for the Court to consider counsel fees in class action settlements with particular care, since the request for settlement fees is not contested by the Defendants"); *In re Fleet/Norstar Secs. Litig.*, 974 F. Supp. 155, 158 (D.R.I. 1997) ("Given that the defendants generally have no interest in this issue, in that they have already paid out the amount of the settlement and have no concern with how the fund is distributed, the court is left without the benefit of adversarial presentation of the issues of fees and expenses."). The Diocesan Defendants have stepped in to fill the adversarial void and assist the Court's independent review of the fee motions.

Class Counsel has no one to blame but themselves for the questions that have been raised about the fee applications. Most, if not all, of the concerns that the Diocesan Defendants have brought to the Court's attention (*e.g.*, the lack of pre-suit settlement efforts, discrepancies between the lodestar and fees sought) result from Class Counsel's incomplete presentation of information in their

initial fee motions. It bears noting, moreover, that Class Counsel's fees are under scrutiny only because they saw a strategic advantage to bringing this matter as a class action. As Class Counsel told the Court previously, they believed that the Receiver had "standing to bring all necessary claims to protect participants and participants' beneficiaries." ECF No. 64-1 at 29. Thus, at least according to Class Counsel, this matter did not have to be brought as a class action. The great offense that they have taken to questions being raised about their fee requests, therefore, rings hollow. Their frustrations are of their own making.[12]

In the event that the Court approves Settlement A, the Court should consider the issues that the Diocesan Defendants have raised and either deny the fee application or award an appropriately reduced fee.

CONCLUSION

For the foregoing reasons, the Court should decline to approve Settlement A in general and under R.I. Gen. Laws § 23-17.14-35 and either deny the request for attorneys' fees or issue a reduced award.

[12] The same can be said for Class Counsel's handwringing over the purported "structural unfairness" of this litigation.

Respectfully Submitted,

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Date: August 27, 2019

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of August 2019, the foregoing document has been filed electronically through the Rhode Island ECF system, is available for viewing and downloading, and will be sent electronically to the counsel who are registered participants identified on the Notice of Electronic Filing.

/s/ Howard Merten

EXHIBIT A

In The Matter Of:

Stephen Del Sesto, et al v.

Prospect CharterCARE, LLC, et al

Richard Land

July 24, 2019

401-352-6869 / www.premierlegalsupport.com

Original File 07-24-19-Richard Land.txt

Min-U-Script® with Word Index

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

STEPHEN DEL SESTO, AS RECEIVER AND ADMINISTRATOR OF THE ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND RETIREMENT PLAN, et al	:	
vs.	:	C.A. No.: 1:18-cv-00328-WES-LDA
PROSPECT CHARTERCARE, LLC, et al	:	

DEPOSITION OF RICHARD LAND

(Taken on behalf of Defendant
Prospect Medical Holdings, Inc. and
Prospect East Holdings, Inc.)

Wednesday, July 24, 2019
10:00 a.m.
SHECHTMAN HALPERIN SAVAGE, LLP
1080 Main Street
Pawtucket, Rhode Island 02860

- - -

Lori P. Hamel
Certified Court Reporter
Premier Legal Support, Inc.

reference to the St. Joseph's retirement plan that's the subject of this litigation, or is that referring to some other pension?

A. I believe it's referring to the St. Joseph's Health Services pension plan.

Q. So that parenthetical is a parenthetical that comes after post-closing liabilities in the document, correct?

MR. SHEEHAN: Objection.

A. Correct.

Q. Was it -- did you have an understanding over the last four years as to whether there was an obligation on the part of the Oldco entities to provide any kind of funding to the plan?

A. So again, just to be precise, I understood that St. Joseph's Health Services of Rhode Island, having satisfied all of its other liabilities, would then use whatever funds were available to it for the pension plan. That was my understanding. Whether that's right or wrong, that was my understanding. With respect to the other Oldco entities, I don't recall, frankly, CharterCARE -- anything specific relating to CharterCARE. And with respect to Roger Williams, I think -- I believe there was potentially a partial waterfall. In looking at this document I believe it

relates to the charitable assets with waterfall. Potentially.

Q. Let me refer you to paragraph 17 as well and I'll ask you some more questions.

On page 7, I'll ask you to look at the last sentence in paragraph 17 of Exhibit 3.

"It is anticipated" is the beginning of that sentence. The final sentence in paragraph 17.

A. The final sentence in paragraph 17 says --

Q. Oh, I'm sorry, the second to last sentence.

A. I'm just going to read the whole paragraph.

Q. Go right ahead.

(Witness reading)

A. Okay, I've read it.

Q. The last sentence of paragraph 17 says: "The SJHSRI pension funding obligation will continue after the wind-down period concludes."

Is that the understanding you had during the last several years, that once the wind-down period concluded, the pension would be funded in some way?

MR. SHEEHAN: Objection to the form.

A. Yes, but not -- not an automatic funding. But yes.

Q. What did CCCB contemplate would happen with respect to the money under its control after the wind-down period concluded?

C E R T I F I C A T E

I, Lori P. Hamel, a Notary Public in and for the State of Rhode Island, do hereby certify that I am expressly approved as a person qualified and authorized to take depositions pursuant to Rules of Civil Procedure of the Superior Court, especially but without restriction thereto, under Rule 30(e) of said Rules; that the deponent was first sworn by me; that this deposition was stenographically reported by me and later reduced to print through Computer-Aided transcription; that the foregoing is a full and true record of the proceedings; and that a review of the transcript by the deponent was not requested.

IN WITNESS WHEREOF, I have hereunto set my hand this 12th day of August, 2019.

Lori P. Hamel
Certified Court Reporter
Notary Public

My Commission Expires 6/24/21

EXHIBIT B

In The Matter Of:

Stephen DelSesto, et al v.
Prospect CharterCare, LLC, et al

Stephen DelSesto
July 31, 2019

401-352-6869 / www.premierlegalsupport.com

Original File 07-31-19-stephen DelSesto.txt
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

STEPHEN DEL SESTO, AS RECEIVER AND ADMINISTRATOR OF THE ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND RETIREMENT PLAN, et al	:	
vs.	:	C.A. No.: 1:18-cv-00328-WES-LDA
PROSPECT CHARTERCARE, LLC, et al	:	

DEPOSITION OF STEPHEN DEL SESTO

(Taken on behalf of Defendant
Prospect Medical Holdings, Inc. and
Prospect East Holdings, Inc.)

Wednesday, July 31, 2019
10:00 a.m.
SHECHTMAN HALPERIN SAVAGE, LLP
1080 Main Street
Pawtucket, Rhode Island 02860

- - -

Lori P. Hamel
Certified Court Reporter
Premier Legal Support, Inc.

the subject, is there any way we can resolve this thing and get it dealt with. And I -- I probably said either I'll talk to my attorney or call my attorney.

Q. And that was before suit was filed?

A. That was -- right, March/April of '18, and the suit was filed in June of '18.

Q. Did it come to your attention at any point in time that the funds that were in the possession of Rick Land's clients were intended to be paid into the plan at any point in the future?

A. Could you repeat that question.

Q. Did it come to your attention that the monies that Oldco and CCCB had were going to ultimately pay -- be paid to the plan?

MR. SHEEHAN: Objection to the form.

A. It was my -- Attorney Land represented to me that he believed -- in the beginning of the case he represented to me that he believed that the Cy Pres order functioned as -- I don't know if he called it this, I'm going to characterize it as a waterfall. That ultimately the monies would ultimately fall into the plan. That's what he represented to me as far as his understanding of the Cy Pres.

Q. Did you come to your own understanding of how those monies were intended to flow by reviewing the Cy Pres

order yourself?

A. Later on, myself and my counsel reviewed the Cy Pres order, and I guess I'll just characterize it as I did not agree with Attorney Land's initial representations to me in September/October of 2017, maybe November of 2017.

Q. So having reviewed the Cy Pres order, you were not able to conclude that at some point in time the moneys that Oldco had were going to be paid into the plan; is that correct?

A. Correct. To the contrary, I did not believe that the Cy Pres actually did function that way. Which is why we intervened.

Q. Do you recall when you first saw that Cy Pres order?

A. It had to be right around that same time frame, maybe in October/November, when Attorney Land raised the issue to me. At that point in time it was early on in the case and I wasn't even aware that there was the Cy Pres order because that was connected to the 2014 transaction. So it was probably somewhere shortly after that conversation. But I can't say exactly when.

MR. HALPERIN: Let's mark as Exhibit 3 this document.

(Exhibit No. 3 marked).

Q. Can you identify Exhibit No. 3, please?

Q. Okay. And an offer had been made at that time?
A. That was -- it was -- if it was a month into the receivership, then that's being generous. It was sometime around the 15th of September. It was a meeting with Angel in their counsel room, and they made what I would consider to be the most substantive offer that was made to me prior to the filing of the complaint.
Q. And prior to that meeting, had a claim been asserted against Angel?
A. I had been in the case for, at best, 30 days. There had been nothing, but I would imagine that maybe Angel was concerned that a claim was going to be brought against them, otherwise they wouldn't have asked for the settlement.
Q. So following the discussion that you had with Mr. Land in March or April where he expressed a willingness on the part of his clients to settle, what, if anything, happened between then and the filing of the complaint in June 18?
A. I can only speak to what happened with me between then, and the answer to that is nothing. I was not provided -- I was not presented with or had any discussion regarding anything of substance beyond is there a way we can resolve this.

Q. Well, as Receiver, when you're approached by counsel for any prospective defendant who asks for -- or expresses a willingness to settle, why is it that nothing was done prior to filing suit?
A. You'd have to ask Attorney Land why. I didn't have anything to entertain. He just, he made that expression and I -- I probably would have directed -- I'm represented by counsel, I had the court approve Special Counsel, so Special Counsel was handling that piece of the receivership, the investigation of potential claims.
Q. To your knowledge did Special Counsel follow up on Mr. Land's expression of willingness to settle prior to filing suit?
A. I do not know. I actually, if anything, would have directed Attorney Land to follow up with my Special Counsel, not the other way around.
Q. Did you do that?
A. I don't recall. I said it would have been to either say contact Special Counsel, and if you got something talk to them. I've had those same discussions with other defendants in this case.
Q. Earlier this morning you testified as to a meeting that occurred on or about June 29, 2018 at Special Counsel's office?

C E R T I F I C A T E

I, Lori P. Hamel, a Notary Public in and for the State of Rhode Island, do hereby certify that I am expressly approved as a person qualified and authorized to take depositions pursuant to Rules of Civil Procedure of the Superior Court, especially but without restriction thereto, under Rule 30(e) of said Rules; that the deponent was first sworn by me; that this deposition was stenographically reported by me and later reduced to print through Computer-Aided transcription; that the foregoing is a full and true record of the proceedings; and that a review of the transcript by the deponent was not requested.

IN WITNESS WHEREOF, I have hereunto set my hand this 15th day of August, 2019.

Lori P. Hamel

Lori P. Hamel
Certified Court Reporter
Notary Public

My Commission Expires 6/24/21