UNITED STATES DISTRICT COURT
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*.	CA No.: 1:18-cv-00328-WES-LDA

CHARTERCARE COMMUNITY BOARD, ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND, AND ROGER WILLIAMS HOSPITAL'S RESPONSE TO THE PROSPECT ENTITIES' OBJECTION TO FINAL SETTLEMENT APPROVAL

St. Joseph Health Services of Rhode Island, Chartercare Community Board and Roger Williams Hospital (collectively the "Settling Defendants") hereby respond to the Prospect Entities' Objection to Final Settlement Approval (Doc. 147)(hereinafter "Objection" and the Prospect Entities referred to as "Prospect Entities" or "Objectors") as follows:

I. INTRODUCTION

The willingness of the Objectors to commit almost 12 pages, without a single legal citation or sincere application of the law to the issue before the Court,[1] assailing the character of Stephen Del Sesto (with his agents and counsel the "Receiver") and Richard Land (with his counsel "Attorney Land") is a shining example of not only their desperation to obstruct, but also their

[1] Pages 10-22 of the Objection are completely void of any real application of the law to facts. Rather, the Objectors offer personal attack, embellishment and misdirection in an attempt to persuade the Court of their position. Just because they cry collusion, does not make it so.

continued effort to harass, slander and frustrate the efforts of those who worked to resolve a dire problem (which was allegedly caused at least in part by the Objectors) rather than genuinely attempt to demonstrate to the Court that the settlement should not be approved. The Court should completely disregard the smear campaign orchestrated by the Objectors and the Diocese (which conveniently ignores critical facts) and perhaps question whether the representations and argumentation were intended to mislead the Court.[2]

The Settling defendants, posit the Objectors, must pay all their debts, contingent, unasserted or otherwise, before they can settle litigation with anyone. The false assertion that the proposed settlement leaves the Objectors without recourse for their unliquidated contingent claim is not only misleading but speaks to their bad faith and lack of candor to this tribunal. What makes the Objectors' position preposterous is that the Objectors asserted a contractual indemnification demand by letter dated June 27, 2019, identifying assets to satisfy or contribute to indemnification (if proven by the Prospect Entities). Furthermore, the Objectors' position that the Settling Defendants cannot use cash on hand to resolve costly litigation against them is strange—payments by the Settling Defendants reduce the Objectors' exposure on a dollar for dollar basis.

The Settling Parties submit that the settlement was made in good faith, not collusive, and that nothing in the Objection demonstrates any collusion whatsoever. For the reasons set forth herein, the Court should overrule the Objection and enter an order approving the Settlement Agreement.

[2] This is not the first time that the Objectors or the Diocese have made assumptions and material misrepresentations to the Court regarding the Settling Defendants and Attorney Land. The Settling Defendants, Attorney Land, and their counsel contest each and every criticism, accusation, insinuation and the like anywhere in the Objectors' papers and contend that such material is completely without merit. It is unfortunate that the Objectors have taken a mud-slinging approach rather than identifying actual facts that might challenge the presumption of good faith.

II. ARGUMENT

A. THE PROSPECT ENTITIES' OBJECTION MUST BE OVERRULED BECAUSE THEY FAILED TO CARRY THEIR EVIDENTIARY BURDEN

The Court should summarily overrule the Prospect Entities' Objection for failing to carry their evidentiary burden. There is no evidence whatsoever of collusion – no document, note, communication, e-mail, testimony or exhibit. All they have offered is personal attacks and misguided re-characterizations of the terms of the Settlement Agreement. The Objection falls far short of the clear and convincing evidence required.[3]

It is well established that "there is a presumption that the settlement has been made in good faith, and the burden is on the challenging party to show that the settlement is infected with collusion or other tortious or wrongful conduct." Gray v. Derderian, 2009 WL 2997063, *4 (D.R.I. August 14, 2009); see also Rhode Island Economic Development Corp. v Wells Fargo Securities LLC, 2014 WL 3709683, *2, n. 3 (R.I. Super. Ct, July 22, 2014). R.I. Gen. Laws § 23-17.14-35 provides: "a good-faith settlement is one that does not exhibit collusion, fraud, dishonesty, or other wrongful or tortious conduct intended to prejudice the non-settling tortfeasor(s), irrespective of the settling or non-settling tortfeasors' proportionate share of liability." (hereinafter the "Settlement Statute"). Accordingly, the Objectors must show that the "release is given with the tortious purpose of intentionally injuring the interests of nonsettling parties, rather than as the product of arm's length bargaining based on the facts of the case and the merits of the claim." Dacotah Marketing and Research, L.L.C. v. Versatility, Inc., 21 F.Supp.2d 570, 578 (E.D. Va. 1998)(addressing similar settlement statute).[4] The Court should be mindful that "[a]ny negotiated settlement involves

[3] Virtually all of the "evidence" presented in the Objection is argument of counsel, which does not qualify as evidence. See e.g. Icon Health & Fitness, Inc. v. Strava, Inc., 849 F.3d 1034, 1043 (Fed. Cir. 2017) ("Attorney argument is not evidence").

[4] The Dacotah court applied a clear and convincing standard. 21 F.Supp. 2d at 578, n. 21.

cooperation, but not necessarily collusion." Fairfax Radiological Consultants, P.A. v. My Q. Bui, 2002 WL 34463989, *3 (Va. Cir. Ct. 2002). It only becomes collusive when it "is aimed to injure the interests of an absent tortfeasor." Id. [5]

The Prospect Entities' Objection fails to proffer any evidence of "intentionally injuring the interests of" the Objectors. See Dacotah Marketing and Research, L.L.C. v. Versatility, Inc., 21 F.Supp.2d at 578. Once stripped of the unwarranted aspersions and negative depictions, the Objection can be distilled to the following arguments: (1) the Settlement Agreement transfers assets in exchange for releases, (2) the Settlement Agreement purportedly cuts off indemnification rights,[6] (3) the Settling Defendants did not negotiate to the Objectors' satisfaction, (4) the Settlement Agreement includes an admission of liability, and (5) the Settling Defendants "contend" that their proportionate fault is less than the non-settling defendants. As will be demonstrated, none of these arguments, alone or in the aggregate, support a conclusion of collusion.

As this Court recognized of the settlement agreement in Gray v. Derderian, the Settlement Agreement here was made at arms-length, all parties were represented by counsel, due consideration was given to arguments raised by the parties, the costs of litigation, the risks of trial,

[5] Courts have even recognized that "a settlement motivated by tactical gain is not necessarily one in bad faith." Dacotah Marketing and Research, L.L.C. v. Versatility, Inc., 21 F.Supp.2d at 578 Smith v. Monongahela Power Co., 429 S.E.2d 643 (W. Va. 1993); Ponirakis v. Choi, 2003 WL 21661895, *1 (Va. Cir. Ct. 2003).

[6] The Settling Defendants question whether the Prospect Entities' unliquidated, contingent, indemnification claim is an "interest" within the boundaries of good faith consideration under the Settlement Statute. Taken to its illogical extreme, no settlement would be possible if parties were compelled to consider every potential impact upon their respective non-litigation creditors. The Objectors have not asserted that the Settlement Agreement impairs their rights in this litigation, rather that it possibly impairs their unliquidated, contingent, indemnification right in a future judicial dissolution or litigation against the Settling Defendants. Prospect's indemnification claim is outside the scope of the litigation brought by the Plaintiffs.

and the financial resources of the parties. 2009 WL 2997063, at *5.

i. The Objectors' Position That Collusion Is Demonstrated By An Exchange Of Assets For Releases Is A Non-Sequitur

The Objectors' position vis-à-vis exchanging assets for releases is almost laughable. Doc. 147, p. 9-10. They complain that a quid-pro-quo (the very essence of a compromise) is somehow evidence of collusion. Id. at 10. An exchange of money for a release is the customary structure of a settlement, it does not evidence collusion or the absence of good faith. It aligns with the norm.[7] This is not a case where the Settling Defendants obtained a release for one dollar. See e.g. Dacotah Marketing and Research, L.L.C. v. Versatility, Inc., 21 F.Supp.2d at 579.[8] To the contrary, the Settling Defendants are giving substantial consideration. If the Court were to accept the Objectors' proposition that an exchange of assets for releases demonstrates collusion, virtually no litigation would ever settle. As a policy matter, that would directly contravene the purpose of statutes such as the Settlement Statute. See Id. at 575 (purpose of statute is to foster settlements in multiple tortfeasor context); Greater New York Mutual Insurance Company v. Lavelle Industries, Inc., 2016 WL 7785455, *5 (D. Mass. 2016) ("The statute is designed to encourage settlements in multiple party tort actions").

ii. To Assert That Their Rights Are "Cut Off", The Objectors Ignore Two Avenues Of Potential Recovery For Their Contingent Indemnification Claim

In Section A of the Objection, the Objectors assert that their indemnification claim is

[7] The Settling Defendants would be curious of the answer if the Court inquired whether counsel for the Prospect Entities would ever advise a client to fund a settlement without obtaining a release.
[8] The amount of the settlement, by itself, cannot demonstrate lack of good faith. Noyes v. Raymond, 548 N.E.2d 196, 199 (Mass. App. Ct. 1990); Chapman v. Bernard's Inc., 198 F.R.D. 575, 578 (D. Mass. 2001)("The amount of a settlement has no bearing on the good faith question.").

completely cut-off. See Doc. 147, p. 10-11. In doing so, they omit crucial facts in an effort to misdirect the Court to an improper conclusion. Specifically, the Objectors leave out that they have a potential source of recovery in the form of set-off against the Settling Defendants' 15% interest in Prospect Chartercare, LLC, and in fact made demand for indemnification by letter dated June 27, 2019 ("Demand"). [9] Notwithstanding their prior assertion of the set-off right, the Objectors aver:

> "While Prospect and the other creditors can participate in a judicial liquidation, **only $600,000 has been reserved for distribution among all creditors**, and even here, the Settlement Agreement impermissibly favors the Receiver, arbitrarily assigning to him a $125 million claim that shoves Prospect and the remaining creditors to the back of the line. As a result, **the Settlement Agreement completely cuts off Prospect's contractual right to indemnification from the Oldco Entities**, pursuant to the APA."

Doc. 147, p. 10-11 (emphasis added). Several months after the Demand, and having specifically identified the substantial asset against which the Objectors could assert indemnification rights, the Objectors tell this Court that "the Settlement Agreement completely cuts off Prospect's contractual right to indemnification." Doc. 147, p. 11. To say that their position is inaccurate would be gracious—it is plainly wrong and contradicts the Objectors' indemnification demand and the contract from which the Objectors derive their claim. See **Exhibit 1** and **Exhibit 2**.

To better appreciate the length to which the Objectors are willing to go to deceive, this Court should consider the following undisputable facts:

1. The Objectors had not asserted any claims against the Settling Defendants, let alone

[9] A copy of the Demand is attached as **Exhibit 1**. A copy of Sec. 17.2(a) of the Amended & Restated Operating Agreement of Prospect Chartercare, LLC is attached as **Exhibit 2**.

their contingent indemnification claim, at the time the settlement was negotiated.[10]

2. Not until June 27, 2019 (more than 8 months after the Settlement Agreement was submitted) did the Objectors make the Demand.

3. The Demand specifically states that Prospect intends to set-off its indemnification rights against the 15% interest in Prospect Chartercare, LLC held by CCCB. See **Exhibit 1**.

It is inconceivable that the Objectors innocently omitted the Demand from their argument, and when viewing this omission in the context of the Objection as a whole, it demonstrates that the Objectors intended to lead the Court astray. Notwithstanding the Objectors' dubious position, their contingent and unliquidated indemnification claim is not cut-off by the Settlement Agreement.

iii. The Admission Of Liability Is Not Relevant To The Prospect Entities' Contingent Indemnification Claim, Does Not Give The Receiver Priority And, Furthermore, Is Not Binding On The Prospect Entities

Beginning on page 13 of the Objection, the Objectors argue that the Oldco Entities' admission of liability is somehow evidence of collusion because it impairs their interests. Doc.

[10] Notwithstanding the late demand, any indemnification obligation of the Settling Defendants remains contingent on a finding of liability against the Prospect Entities within the indemnified liabilities set out in the Amended & Restated Operating Agreement. See **Exhibit 2**. It is troubling that the Objectors accuse the Settling Defendants and others of making false statements when the Objectors themselves fall victim to their own criticism. For example, the Objectors represent to this Court that "Land, on behalf of the Oldco Entities, agreed to this structure despite knowing that at the time of the Settlement Agreement, Prospect had a pending contractual indemnification claim against the Oldco Entities relative to the Plan, pursuant to the 2014 Asset Purchase Agreement." Doc. 147, p. 14. There is no dispute that the Settlement Agreement is dated as of August 30, 2018 and the Prospect Entities did not make an indemnification demand until June 27, 2019. See **Exhibit 1**. How could Land know of a pending claim that was not yet made? It is doubtful that the Prospect Entities used the word "pending" to convey that Attorney Land was aware of the Amended & Restated Operating Agreement and its terms. See Doc. 147, p. 14. It is more likely that the Objectors used the word "pending" to induce the belief that their claim had been asserted prior to the Settlement Agreement being negotiated. They again used the word "pending" to assert that "Land not only knew that Prospect had pending claims against the Oldco Entities, but also that other creditors—who are wholly unaware of the Settlement Agreement and payment to the Receiver—had asserted claims, some of which were not covered by insurance. Doc. 147, p. 14. Perhaps, in the Objectors' view, "pending" means unasserted, unliquidated and contingent.

147, p. 13-14. Again, the Objectors have glossed over key facts in their attempt to persuade the Court.

First, the admission is limited to one defendant and contractual liability only. Settlement Agreement, ¶ 28. To be clear, the Settling Defendants "acknowledge[d] that SJHSRI, as former employer of the Plan participants, is liable to the [plan participants] for breach of contract…". Id. The Objectors, however, fail to articulate that they cannot be liable for SJHSRI's breach of an agreement with individual employees to fund a pension plan. Thus, the admission of SJHSRI's contractual liability to former employees is not relevant to the Prospect Entities' contingent indemnification claim.

Second, the admission of contractual liability of SJHSRI is not binding on the Prospect Entities. The Objectors and the other non-settling defendants remain free to challenge the Receiver's claims, including before a court of equity in a judicial liquidation, regardless of the statement that SJHSRI is liable in contract. Third, even assuming the validity of the Receiver's and the Prospect Entities' claims, they would each receive pro-rata distributions as general unsecured creditors of the debtor.

In sum, the Objectors arguments surrounding SJHSRI's admission of contractual liability do not evidence collusion.

iv. The Settling Defendants Are Not Required To Negotiate To The Prospect Entities' Satisfaction And Nothing The Prospect Entities Raise In Their Objection Demonstrates A Lack Of Good Faith By Clear And Convincing Evidence

The Objectors' displeasure with the bargain struck with the Settling Defendants is by no means evidence of collusion, and the impression that the Settling Defendants should have negotiated to the satisfaction of the Objectors is absurd. The Court should recognize that there is nothing in the Objection that can sustain the Objectors' burden of proof. Certainly the Objectors'

quibbling over the timeframe, fictional lack of redlined drafts, and inability of witnesses to recall precise details do not demonstrate collusion by clear and convincing evidence. See Dacotah, 21 F.Supp. 2d at 578, n. 21 (challenger must prove by clear and convincing evidence).

The Objectors' caviling over the statement that the Settlement Agreement was the result of "lengthy and intensive arms-length negotiations" is feeble. The Objectors assert that a two month time period is insufficient for settlement negotiations. It is unclear to the Settling Defendants, and perhaps to the Court, what precisely the Objectors consider acceptable. Is four months enough but two months is not? Given the magnitude of the disputes in this case, the efficient negotiation should be applauded as it preserves funds for the settlement class rather than waste them on years of litigation. It appears, without explanation, that the Objectors want to parse the concept of "lengthy" in a manner intended to misdirect the Court. The evidence produced demonstrates that the Settling Defendant's original proposal was rejected, the Receiver's counterproposals were negotiated, and ultimately the Settlement Agreement incorporated compromises by the Settling Defendants and the Receiver.

The Settling Defendants are confused by the Objectors' claim that no red-lined drafts were produced. Doc. 147, p. 16. The Settling Defendants produced redlined versions of the Settlement Agreement. See CRF00508-545. Additionally, the Settling Defendants produced documents showing that (i) Attorney Sheehan sent redlined versions of the settlement documents to Attorney Land and Attorney Fine on August 30, 2018, and (ii) redlined documents were referred to in e-mails from Attorney Land to Attorney Fine. See CRF0079 and CRF0085. Not only is the Objectors' position false, there is no particular format of bargaining required. Setting aside the veracity of the Objectors' statements to the Court, the negotiations took place among experienced counsel through redlined documents, telephone conversations, and during in-person meetings.

The Objectors offer no evidence (only criticism) to suggest there was no bargaining. Their lack of evidence is fatal and does not contradict the good faith settlement.

v. The Settling Defendants' Contention Regarding Proportionate Fault Does Not Impair The Prospect Entities' Rights

The Objectors harp on the contention in paragraph 30 of the Settlement Agreement that the Settling Defendants' proportionate liability in tort is less than the non-settling defendants. But the Settling Defendants' contention does not bind the Objectors or the Court and has no impact on their contingent indemnification rights.[11] There is nothing precluding the Prospect Entities, or any other Non-Settling Defendant, to challenge the comparative liability of the defendants in this matter, regardless of the statement in the Settlement Agreement.

The Court should not be surprised that the Settling Defendants contend that their liability is less than the other defendants—that is the *modus operandi* of essentially every defendant in multi-party litigation. The Objectors certainly contend they have no tort liability; does that demonstrate they are colluding with the Receiver against the other non-settling defendants? The fallacy of the Objectors' position is obvious and the Court should easily dismiss their arguments on this issue.

B. THE PROSPECT ENTITIES' ACCUSATIONS THAT SETTLEMENT AGREEMENT PARAGRAPHS 28 AND 30 ARE FALSE ARE UNFOUNDED AND SHOW A COMPLETE LACK OF JUDGMENT

The Objectors claim that paragraph 28 is a dishonest admission because the Settling Defendants' contended that the Oldco Entities had no legal obligation to fund the plan. Doc 147,

[11] The precise statement provides that "[t]he Settling Defendants contend that their proportionate fault in tort, if any, in causing said damages is small compared to the proportionate fault of the other defendants…" Settlement Agreement, ¶ 30.

p. 19-20.[12] The Objectors completely ignore that the statements regarding the lack of obligation to fund the plan were made in connection with the receivership petition, several months prior to the special counsel's investigation, and prior to the Settling Defendants being presented with the Complaint and other evidence of contractual liability—the litigation of which would have further diminished funds available for any creditors, including the Objectors' contingent claim. Merely because the Settling Defendants agreed to a resolution that differed from their original contention does not demonstrate collusion.

The Objectors complain of paragraph 30 and overemphasize the $125 million figure set out in the Settlement Agreement. That amount was already set out in the receivership petition in August 2017. The figure was taken directly from the actuary's calculation of the unfunded pension. In an event, merely because there is a particular admission of liability and a dollar amount set out in the Settlement Agreement, it does not preclude the Objectors or any other creditor from challenging those issues in a liquidation proceeding.

III. CONCLUSION

The Objectors' general proposition – that the Settlement Agreement is collusive because it is too good for the Receiver – absolutely does not meet the Objectors' burden of proving the settlement was not made in good faith and nothing raised by in the Objection demonstrates any "collusion, fraud, dishonesty, or other wrongful or tortious conduct intended to prejudice" the Objectors. See R.I. Gen. Laws § 23-17.14-35; Fed. R. Civ. P. 23.

For the reasons set forth herein, the Court should overrule the Objection and enter an order

[12] Furthermore, to correct one of the many misstatements by the Objectors, the Oldco Entities did not admit that "they" were liable in breach of contract. Doc. 147, p. 17. Rather, the Oldco Entities admitted that SJHSRI was liable to the plan participants in breach of contract. See Settlement Agreement, ¶ 28.

approving the Settlement Agreement.

Chartercare Community Board, St. Joseph Health Services of Rhode Island, and Roger Williams Hospital,

By their attorneys,

/s/ Robert D. Fine

_____

Robert D. Fine (2447)
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Dated: September 3, 2019

CERTIFICATION

I hereby certify that on September 3, 2019, I have caused the within document to be filed with the Court via the ECF filing system. As such, this document will be electronically sent to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants.

/s/ Robert D. Fine

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A Limited Liability Partnership

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June 27, 2019

REGISTERED MAIL
RETURN RECEIPT REQUESTED
(9590926699042145734985-Land)
(9590926699042145734992-Hirsch)

CharterCARE Community Board
c/o Richard L. Land, Esq.
One Park Row, Suite 300
Providence, RI 02903

David Hirsch, President
CharterCARE Community Board
50 South Main Street
Providence, RI 02903

Re: Demand for Indemnification

Dear Mr. Hirsch:

This firm represents Prospect Medical Holdings, LLC ("Prospect") and Prospect East Holdings, Inc. (the "Prospect Member") in connection with the Amended & Restated Limited Liability Company Agreement of Prospect Chartercare, LLC, as amended (the "LLC Agreement") and the Asset Purchase Agreement among Chartercare Health Partners, et al and Prospect, the Prospect Member, et al, dated as of September 24, 2013 (the "APA").

We are writing pursuant to Section 17.2 (a) the LLC Agreement to demand that you comply with the indemnification provisions of the APA by making payment to Prospect and the Prospect Member for Damages (as that term is defined in Section 14.2 of the APA) arising from or in connection with the St. Joseph Health Services of Rhode Island Retirement Plan (the "Retirement Plan") which is one of the "Excluded Liabilities" under the APA. You are further notified that Prospect and the Prospect Member are entitled to indemnification pursuant to Sections 14.2(d) and 14.5 of the APA based upon Damages incurred in connection with the civil actions entitled, *St. Joseph Health Services of Rhode Island, Inc. v. St. Josephs Health Services of Rhode Island Retirement Plan*, C.A. No. PC-2017-3856, Providence Superior Court and *Stephen DelSesto, as Receiver and Administrator of the St. Joseph Health Services of Rhode*

Island Retirement Plan v. Prospect Chartercare, LLC, et al, Case No. 1:18-cv-00328-WES-LDA, United States District Court, District of Rhode Island.

To date, Prospect and the Prospect Member have sustained Damages in the amount of at least $2,018,597.35 as a result of their costs of investigation and defense and reasonable attorneys' fees and expenses relating to claims against them arising out of the Retirement Plan. Because these actions are ongoing, Prospect and the Prospect Member anticipate that they will incur substantial additional Damages. Pursuant to Section 17.2 (a) of the LLC Agreement, Prospect and the Prospect Member reserve all rights and remedies, including, without limitation those set forth in the aforesaid Section 17.2 (a) should you fail to pay all of such amount within thirty (30) days from your receipt of this demand.

Very truly yours,

Preston Halperin

Preston W. Halperin

Cc: Prospect East Holdings, LLC
Prospect Medical Holdings, LLC

(a) The members of the Board of Directors, the Members and the Manager (the "Representatives") shall not be liable, responsible or accountable in damages to any Member or the Company for any act or omission on behalf of the Company performed or omitted by them in good faith and in a manner they reasonably believed to be in the best interests of the Company and, in the case of a criminal proceeding, if they had no reasonable cause to believe that the conduct was unlawful.

(b) To the fullest extent permitted by the Act, the Company shall indemnify each Representative against reasonable expenses (including reasonable attorneys' fees), judgments, taxes, penalties, fines (including any excise tax assessed with respect to an employee benefit plan) and amounts paid in settlement (collectively "Liability"), incurred by the Representative in connection with defending any threatened, pending or completed action, suit or proceeding (whether civil, criminal, administrative or investigative, and whether formal or informal) to which the Representative is, or is threatened to be made, a party because they are or were a Representative, provided that (i) the Representative acted in good faith and in a manner reasonably believed by the Representative to be in the best interest of the Company; (ii) in the case of a criminal proceeding, the Representative had no reasonable cause to believe the conduct was unlawful; (iii) in connection with a proceeding brought by or in the right of the Company, the Representative was not adjudged liable to the Company; and (iv) the Representative was not adjudged liable in a proceeding charging improper personal benefit.

(c) To the fullest extent authorized or permitted by the Act, the Company shall pay or reimburse reasonable expenses (including reasonable attorneys' fees) incurred by a Representative who is a party to a proceeding in advance of final disposition of such proceeding if (i) the Representative furnishes the Company a written affirmation of its, his or her good faith belief that it, he or she has met the standard of conduct described in Section 17.1(b) hereof; (ii) the Representative furnishes the Company a written undertaking, executed personally or on the Representatives behalf, to repay the advance if it is ultimately determined that the Representative did not meet the standard of conduct and the Board reasonably believes such Representative would have the ability to repay such advance; and (iii) a determination is made that the facts then known to those making the determination would not preclude indemnification under the provisions of Section 17.1(b) hereof.

(d) The indemnification against Liability and advancement of expenses provided by, or granted pursuant to, this Section 17.1 shall not be deemed exclusive of any other rights to which these seeking indemnification or advancement may be entitled under any agreement, action of Members or otherwise, both as to action in their official capacity and as to action in another capacity while holding such office of the Company, shall continue as to an entity or person who has ceased to be a Representative, and shall inure to the benefit of the successors, assigns, heirs, executors and administrators of such an entity or person.

(e) Any repeal or modification of this Section 17.1 by the Members shall not adversely affect any right or protection of the Representatives under this Section 17.1 with respect to any act or omission occurring prior to the time of such repeal or modification.

17.2 Purchase Agreement Indemnification Obligations.

(a) In the event that CCHP is required to pay the Company or Prospect an amount pursuant to the indemnification provisions of the Purchase Agreement (an "Unpaid Indemnification Amount"), and fails to pay all of such amount within thirty (30) days, then Prospect may, in its sole and absolute discretion, recoup or offset, as applicable, on a dollar-for-dollar basis, all or a portion of the Unpaid Indemnification Amount in the following order of priority to the extent amounts are available in each such category: (x) by receiving distributions from the Company otherwise due to CCHP in respect of its Units (pursuant to the provisions of Section 17.2(b) below), (y) by reducing the Long-Term Capital Commitment, or (z) by treating such amount as an additional capital contribution by Prospect to the Company and adjusting the Prospect Member's and the Seller Members' respective Sharing Percentages (pursuant to the provisions of Section 17.2(c) below), or any combination of the foregoing, all pursuant to the terms of the Amended and Restated Agreement.

(b) If and to the extent Prospect elects to receive distributions in respect of an Unpaid Indemnification Amount as provided for in clause (x) of Section 17.2(a) above, if the Unpaid Indemnification Amount is due to Prospect, the Company shall pay to Prospect all distributions due hereunder to CCHP until the Unpaid Indemnification Amount due to Prospect from CCHP has been fully satisfied; and (ii) if the Unpaid Indemnification Amount is due to the Company, the Company shall offset all distributions due hereunder to CCHP until the Unpaid Indemnification Amount due to the Company has been fully satisfied, and shall make a special distribution to Prospect equal to the Unpaid Indemnification Amount. In such an event, the distributions which would have otherwise been made to CCHP shall be treated as if they were actually made to CCHP and then paid by CCHP to Prospect or to the Company, as applicable.

(c) If and to the extent Prospect elects to receive distributions in respect of an Unpaid Indemnification Amount as provided for in clause (z) of Section 17.2(a) above, the Unpaid Indemnification Amount (including interest thereon) shall be treated as an Additional Capital Contribution by Prospect to the Company pursuant to Section 4.2(e) above, and CCHP's and the Prospect Member's Sharing Percentage (and Units) shall be adjusted as per such provision, as if CCHP were a Non-Contributing Member (provided, however, that this provision shall not cause CCHP's Sharing Percentage to fall below 5%).

17.3 Notices. All notices given pursuant to this Agreement shall be in writing and shall be deemed effective when personally delivered or when placed in the United States mail, registered or certified with return receipt requested, when sent by nationally recognized overnight courier service, or when sent by prepaid telegram or facsimile followed by confirmatory letter. For purposes of notice, the addresses of the Members shall be as stated under their names on the attached Exhibit B; notices to the Company shall be sent to 825 Chalkstone Avenue, Providence, RI 02908, to the attention of the Chief Executive Officer, with a copy to the Prospect Member. Notwithstanding the foregoing, each Member shall have the right to change its address for notice hereunder to any other location by the giving of thirty (30) days' notice to the Manager in the manner set forth above.

17.4 Choice of Law and Dispute Resolution.

(a) Choice of Law. The parties agree that this Agreement shall be governed by and construed in accordance with the Laws of the State of Rhode Island, without giving effect