UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION PARTIAL SETTLEMENT AMONG PLAINTIFFS AND ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND, ROGER WILLIAMS HOSPITAL, AND CHARTERCARE COMMUNITY BOARD

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Plaintiffs Stephen Del Sesto (as Receiver and Administrator of the St. Joseph Health Services of Rhode Island Retirement Plan) (the "Receiver"), and Gail J. Major, Nancy Zompa, Ralph Bryden, Dorothy Willner, Caroll Short, Donna Boutelle, and Eugenia Levesque, individually as named plaintiffs ("Named Plaintiffs") and on behalf of all class members[1] as defined herein (the Receiver and the Named Plaintiffs are referred to collectively as "Plaintiffs"), submit this memorandum in support of their motion for final certification of a settlement class and final approval of the settlement among Plaintiffs and CharterCARE Community Board ("CCCB"), St. Joseph Health Services of Rhode Island ("SJHSRI"), and Roger Williams Hospital ("RWH") (collectively the "Heritage Hospitals") (this settlement hereinafter being "Settlement A").

OVERVIEW OF SETTLEMENT A

Settlement A is the first of two settlements in this case but is the second to reach a hearing for final approval. The other settlement ("Settlement B")[2] received a hearing on final approval on August 29, 2019. (While no written Decision or Order has yet been entered as of this moment, the Court approved Settlement B.[3]) The Settlement Agreement for Settlement A is signed by representatives of Plaintiffs and Defendants SJHSRI, CCCB, and RWH.

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[1] Contingent upon the Court certifying the Class and appointing them Class Representatives. They were preliminarily appointed Class Representatives by this Court's Memorandum and Order of June 6, 2019. See Dkt #124 (Memorandum and Order) at 12.

[2] Settlement B is a settlement among the Plaintiffs and CharterCARE Foundation, together with CCCB, SJHSRI, and RWH (which are participating in order to give certain releases to CharterCARE Foundation as well as to Defendant The Rhode Island Community Foundation).

[3] See Minute Entry for proceedings held before Chief Judge William E. Smith (August 29, 2019) ("Court approves Settlement Agreement. Order to issue.").

As previously discussed in connection with its preliminary approval, if it receives final approval, Settlement A entails:

1. an initial lump sum (the "Initial Lump Sum") of not less than $11,150,000 in value, constituting more than 95% of the Settling Defendants' current operating funds;

2. the assignment of Settling Defendant RWH's interests in an escrow account required by the Rhode Island Department of Labor and Training (the "DLT Escrow") with a current balance of $750,000;

3. certain rights that the Settling Defendants have in Defendant CharterCARE Foundation ("CCF")[4] and Defendant Prospect Chartercare, LLC ("Prospect Chartercare"); and

4. the proceeds to be awarded the Plaintiffs from the remaining assets of the Settling Defendants pursuant to judicial liquidations of the Settling Defendants that will take place in Rhode Island Superior Court in the near future.

As Judge Stern found:

> The PSA [Proposed Settlement Agreement] presents the rare settlement agreement where the terms are so favorable to the Plan's estate that the Receiver is unlikely to recover a higher sum by proceeding to, and prevailing at, trial. Pursuant to the PSA, the Settling Defendants have agreed to pay to the Receiver 95% of the Settling Defendants' liquid assets in exchange for a release. Further, the PSA obligates the Settling Defendants to seek judicial liquidation with the hope that the remaining, non-liquid assets can be distributed in the Plan's favor. Hence, even assuming this Court was to conclude the Receiver had a 100% chance of prevailing in his claims against the Settling Defendants, in all likelihood, the Receiver could not net a higher sum by proceeding to judgment at trial. The probability factor weighs in favor of approving the PSA.

St. Joseph Health Services of Rhode Island, Inc. v. St. Josephs Health Services of Rhode Island Retirement Plan, No. PC-2017-3856, 2018 WL 5792151, at *12 (R.I. Super. Oct. 29, 2018).

[4] However, Settlement B includes the Receiver's re-transferring to Defendant CCF any such rights the Receiver receives from Defendant CCCB (if Settlement A is approved).

PROCEDURAL TRAVEL

On August 18, 2017, Defendant SJHSRI petitioned the Superior Court to place the Plan into Receivership.[5] Although SJHSRI was the only named petitioner, prior to filing the Receivership petition, counsel for SJHSRI consulted with counsel for the Prospect Entities about the petition, provided them with a copy of the petition, and had multiple phone calls concerning it.[6] In a nutshell, the Receivership petition stated that the Plan was woefully underfunded, and SJHSRI proposed to have the Superior Court cut beneficiaries' benefits by 40%, so that the reduced benefits could be paid from Plan assets without additional contributions from SJHSRI or anyone else.

Following his appointment as temporary Receiver,[7] the Receiver obtained permission from the Superior Court on October 17, 2017 to engage Plaintiffs' counsel Wistow, Sheehan & Loveley, P.C. ("WSL") as special counsel to conduct an investigation of possible claims and "to make claims against persons and/or entities who its investigation indicates may be liable for damages or to assume responsibility for the Plan."[8]

Beginning on October 19, 2017, Plaintiffs' counsel began serving subpoenas *duces tecum* on various persons and entities, including the present Defendants or their associated entities. On October 18, 2017 and December 1, 2017, Plaintiffs' counsel

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[5] Dkt #65-1 (Petition for the Appointment of a Receiver).

[6] July 24, 2019 Deposition of Richard Land ("Land depo.") at 144:20-146:23. Pertinent excerpts of this deposition are submitted herewith as Exhibit 1 hereto.

[7] Dkt #65 (Wistow Dec.) ¶ 4. The Receiver was later appointed Permanent Receiver on October 27, 2017. Dkt #65 (Wistow Dec.) ¶ 10.

[8] Dkt #65-3 (Emergency Petition to Engage Special Legal Counsel) at 5 (Engagement and Fee Agreement); Dkt #65-12 at 15 (executed Engagement and Fee Agreement).

served two subpoenas *duces tecum* on SJHSRI. On January 10, 2018, Plaintiffs' counsel served a subpoena *duces tecum* on CharterCARE Community Board.

Obtaining documents from the Heritage Hospitals, however, required considerable motion practice in the Receivership proceeding.

Plaintiffs' counsel ultimately obtained over 325,000 pages of documents from the Heritage Hospitals and over 1,000,000 pages of documents from all subpoenaed persons or entities.[9]

On June 18, 2018, Plaintiffs filed their Complaint.[10] Plaintiffs and the Heritage Hospitals subsequently negotiated and executed Settlement A with the Heritage Hospitals, dated as of August 31, 2018 and subject to Court approval. The facts concerning those negotiations are discussed *infra* at 8-22.

On September 4, 2018, the Receiver petitioned the Superior Court for permission to present Settlement A to this Court for its approval. On October 29, 2018 the Superior Court issued thirty-one (31) page decision approving Settlement A.[11] On November 16, 2019 the Superior Court issued its Order approving Settlement A with conditions. Thereafter on November 21, 2018, Plaintiffs and the Heritage Hospitals filed their Joint Motion for Settlement Class Certification, Appointment of Class Counsel, and Preliminary Settlement Approval (Dkt #63). In support thereof the Settling Parties filed

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[9] Dkt #145 (Second Supplemental Declaration of Max Wistow in Support of Approval of Settlements A and B and WSL's Fee Applications in Connection Therewith) ("Wistow Second Supp. Dec.") dated August 15, 2019, at ¶ 3.

[10] Dkt #1. Plaintiffs later filed their operative First Amended Complaint (Dkt #60) on October 5, 2018.

[11] St. Joseph Health Services of Rhode Island, Inc. v. St. Josephs Health Services of Rhode Island Retirement Plan, No. PC-2017-3856, 2018 WL 5792151 (R.I. Super. Oct. 29, 2018).

the Declaration of Max Wistow dated November 21, 2018 (Dkt #65). At the same time WSL filed their motion for attorneys' fees (Dkt #64).

Non-Settling Defendants filed objections to Settlement A. See Dkt #73 (Diocesan Defendants' objection); Dkt #75 (the Prospect Entities' objection). Plaintiffs filed replies to those objections. See Dkt #82 (Plaintiffs' reply to the Prospect Entities and the Diocesan Defendants); Dkt #83 (Plaintiffs' reply to the Prospect Entities). The Settling Defendants joined in Plaintiffs' replies. See Dkt #84 (Settling Defendants' Joinder in Plaintiffs' reply to the Diocesan Defendants); Dkt #85 (Settling Defendants' Joinder in Plaintiffs' reply to the Prospect Entities). On February 5, 2019, the Prospect Entities filed their sur-reply (Dkt #101). The Settling Parties motions and the Non-Settling Defendants objections thereto were heard on February 12, 2019. On February 18, 2019, the Prospect Entities filed a motion seeking limited discovery of the settlement negotiations in connection with Settlement A, to which Plaintiffs objected. See Dkt #103 (Prospect Entities' motion for limited discovery); Dkt #110 (Plaintiffs' objection to such discovery).

On February 26, 2019 Plaintiffs and the Settling Defendants filed their joint post-hearing memorandum. See Dkt #109. On March 12, 2019, the Non-Settling Defendants filed their post-hearing memoranda. See Dkt #115 (Diocesan Defendants' Post-Hearing Memorandum); Dkt #116 (the Prospect Entities' Post-Hearing Memorandum); Dkt #117 (Angell's Post-Hearing Statement). On March 26, 2019, Plaintiffs filed their replies to the Diocesan Defendants' and the Prospect Entities Post-Hearing Memoranda. See Dkt #120 (Plaintiffs' reply to the Diocesan Defendants' Post-Hearing Memorandum); Dkt #121 (Plaintiffs' reply to the Prospect Entities' Post-Hearing

Memorandum). The Settling Defendants either filed their own replies of joined in Plaintiffs' replies. See Dkt #119 (Settling Defendants' reply to the Diocesan Defendants' Post-Hearing Memorandum); Dkt #122 (Settling Defendants' Joinder in Plaintiffs' reply to the Prospect Entities' Post-Hearing Memorandum).

Following an unsuccessful mediation, the Court on June 6, 2019 issued its Memorandum and Order (Dkt #124) granting the joint motion, preliminarily approving the settlement, preliminarily certifying the settlement class, preliminarily appointing Plaintiffs' counsel as class counsel, and setting the settlement down for a final approval hearing on September 10, 2019. The Court also granted the Prospect Entities' motion for limited discovery, and ordered that such discovery be completed by August 5, 2019. On July 25, 2019, the Non-Settling Defendants took the deposition of Richard Land, Esq. On July 31, 2019, the Non-Settling Defendants took the deposition of the Receiver, Stephen Del Sesto, Esq.

On August 27, 2019 the Prospect Entities (Dkt #147) and the Diocesan Defendants (Dkt #146) filed memoranda in support of their objections to final settlement approval and WSL's fee application. This is Plaintiffs' reply to those memoranda insofar as they concern final settlement approval.[12]

There has been compliance with all deadlines set forth in the Court's Memorandum and Order preliminarily granting preliminary certification of the settlement class and preliminary approval to the settlement. In particular:

[12] Plaintiffs separately file a memorandum responding to the Prospect Entities' and Diocesan Defendants' arguments concerning the fee application.

- Prior to July 1, 2019, the Receiver completed all aspects of the notice plan, including serving the Class Notice by first class mail on all class members and posting the Class Notice on the Receivership website;[13]
- On July 2, 2019, the Settling Defendants filed proof that all appropriate notice was provided to the appropriate state and federal officials pursuant to the Class Action Fairness Act, including copies of the Class Notice.[14]

No preliminarily certified settlement class member has filed an objection to final approval of Settlement A. Nearly 1,000 class members have affirmatively expressed their support through the sworn declarations of their counsel. See Dkt #141 (Declaration of Christopher Callaci dated August 12, 2019); Dkt #142 (Affidavit of Arlene Violet dated August 9, 2019); Dkt #143 (Declaration of Jeffrey Kasle dated August 13, 2019).

FURTHER PROCEEDINGS FOLLOWING FINAL APPROVAL

As the Class Notice states, if the Court grants final approval to Settlement A, then the Heritage Hospitals will petition themselves into judicial liquidation, where the Receiver and other creditors of the Heritage Hospitals will pursue claims against any assets of the Heritage Hospitals that (at that time) have not been transferred to the Plan.

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[13] Dkt #144 (Declaration of Stephen Del Sesto dated August 14, 2019) ("Del Sesto Dec.") ¶¶ 19-20.

[14] Dkt #129 (Declaration of Robert D. Fine, Esq. Regarding Notice of Proposed Settlement Pursuant to 28 U.S.C. § 1715 on Behalf of CharterCARE Community Board); Dkt #129-1 (Declaration of Robert D. Fine, Esq. Regarding Notice of Proposed Settlement Pursuant to 28 U.S.C. § 1715 on Behalf of Roger Williams Hospital); Dkt #129-2 (Declaration of Robert D. Fine, Esq. Regarding Notice of Proposed Settlement Pursuant to 28 U.S.C. § 1715 on Behalf of St. Joseph Health Services of Rhode Island).

FACTS CONCERNING LIABILITY AND DAMAGES

The allegations concerning the merits of the claims of the Plaintiffs involving the Heritage Hospitals' conduct are set forth in the First Amended Complaint filed in this action and the State Court Complaint.[15] Those complaints are lengthy and detailed. However, Plaintiffs' claims are summarized in the subparagraphs of paragraph 55 of the First Amended Complaint (Dkt #60).

FACTS CONCERNING NEGOTIATION OF THE SETTLEMENT

I. The Heritage Hospitals' maneuvering immediately pre-commencement of suit concerning their obligation to fund the Plan

Prior to the Receiver's appointment on August 18, 2017, he had conversations with counsel for the Heritage Hospitals who informed him that the Plan was underfunded.[16] Indeed, at his deposition Attorney Land confirmed that it was his understanding before the Petition for Appointment of Temporary Receiver ("Petition for Receivership") was filed by SJHSRI as Petitioner, that SJHSRI had no obligation to fund

[15] Dkt #65 (Wistow Dec.), Exhibit 7 (Plaintiffs' Complaint in the State Court Action). Plaintiffs' Complaint in the State Court Action states: "This state court proceeding is brought solely for the purposes of protecting Plaintiffs from the possible expiration of any time limitations during the pendency of the proceedings in the Federal Action, should the Federal Court for any reason decline to exercise supplemental jurisdiction over those state law claims. Plaintiffs intend to ask that this state court proceeding be stayed pending the resolution of the proceeding in the Federal Action." Id. ¶ 51.

[16] July 31, 2019 Deposition of Stephen Del Sesto ("Del Sesto depo.") at 10:22-11:5 ("Q. Did you discuss with Mr. Land at any point in time prior to actually being appointed the possibility of any claims that might exist? A. Prior to my appointment. Q. Yes. A. About claims that might exist. I don't recall if there were discussions about claims that might exist. There was a discussion about the shortfall, but that's about it. And that was stated in the petition."). Pertinent excerpts of this deposition are submitted herewith as Exhibit 2 hereto.

the Plan.[17] Absent approval of the settlement, the Heritage Hospitals will deny all liability.[18]

Moreover, in the Petition for Receivership, SJHSRI stated as follows:

> As a result of the "church plan" exemption, Petitioner was not required to make annual minimum contributions to the Plan, or make pension insurance payments to the Pension Benefit Guaranty Corporation ("PBGC").

Petition for Receivership ¶ 6. The Petition further stated "that the Plan will lose 'church plan' status on or before December 31, 2018" (Petition for Receivership ¶ 7), in which event "Petitioner would be required to make minimum annual contributions and annual payments to PBGC, and would otherwise be required to comply with ERISA. Petitioner does not have the financial resources to make such payments, or to comply with the other financial and regulatory requirements of ERISA." Petition for Receivership ¶ 8.

The Petition also stated that "the Plan is severely underfunded and requires additional capital of over $48,000,000 to reach a 100% funding level" and, to support that conclusion, provided an actuarial analysis that had been prepared by Defendant The Angell Pension Group, Inc. ("Angell"). Petition for Receivership ¶ 10. To address that underfunding, SJHSRI also provided a "Benefit Adjustment Analysis" (also prepared by Angell), which purported to demonstrate the effect of a reduction in benefits. Petition for Receivership ¶¶ 13-14. Based upon that analysis, SJHSRI asked

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[17] Land depo. at 86:19-24 ("Did you understand at any time before the Receivership was filed that SJHSRI had an obligation to the plan? A. My understanding was that as a church plan, that there wasn't a formal -- there was not a formal obligation to fund the plan.").

[18] See Dkt #109-2 (Affidavit of Richard J. Land) ¶ 7 ("If the Settlement Agreement is not approved, the Heritage Hospitals would be compelled to litigate all claims, including denying liability on [t]he basis that the governing Plan documents limit recovery for the plan participants (including plaintiffs) to the Plan assets.").

the Superior Court to appoint a temporary Receiver and authorize the Receiver to order an immediate, across the board cut in benefits to which Plan participants were entitled, by 40%. Petition for Receivership¶ 15.

Although not expressly stated in the Petition for Receivership, the calculations submitted therewith demonstrate that after a 40% reduction in benefits, the existing Plan assets would be sufficient to pay all benefits, assuming a conservative[19] (6.66%) rate of return. Thus, although not stated in the Petition for Receivership, the effect would be to protect the assets of SJHSRI and the other Heritage Hospitals from the claims of Plan participants, because there no longer would be any underfunding.

The Petition for Receivership also made the following statement with respect to the assets of the Heritage Hospitals:

> Petitioner, and, Petitioner's affiliates, Roger Williams Hospital and CCCB, are winding down their respective affairs. Upon conclusion of such wind down efforts, the net assets of Petitioner, RWH and CCCB **may** become available to assist with the Plan. While the availability of additional funds is **uncertain** at this time, such additional funds **could** be used to support the Plan for long-term pay-outs to beneficiaries or provide supplemental distributions to beneficiaries whose benefit payments might be reduced as part of the Plan's Wind-down process. The potential for additional Plan funds is not contemplated by the Benefit Adjustment Analysis.

Petition for Receivership ¶ 16 (emphasis supplied). The Non-Settling Defendants argue that this statement demonstrates SJHSRI's assets were predestined to "pour[] into the

[19] Petition for Receivership Exhibit 4 (Angell's "Benefit Adjustment Analysis") at 1 ("Minimum Rate of Return on Investments to Avoid Insolvency [bases on existing Plan assets]: 6.66%"). Indeed, the assumed rate of return used by Angell in its most current actuarial analysis of the Plan (as of August 31, 2016) was 7.75%. Petition Exhibit 2 (Angell Actuarial Valuation as of July 1, 2016) at 11 (listing assumption of "Pre-Retirement Investment Return: 7.75% per annum" and "Post-Retirement Investment Return: 7.75% per annum").

Plan without any litigation at all."[20] But this is not so. Not only does this statement fail to make a binding commitment to apply the Heritage Hospitals' funds to the Plan ("may," "could" and "uncertain" are not the same as "shall," "would," or "definite"), in fact there likely would be no need for the Heritage Hospitals' assets after the 40% cut in benefits (if the proposed reduction had the desired effect, i.e. continuing payments at only 60% of prior levels).

Moreover, any payment to the Plan from surplus assets in dissolution was prohibited by the Articles of Incorporation of CCCB and RWH that stipulate that any excess assets left after dissolution of those entities must be paid to an entity that qualified as tax exempt under IRC § 501(c)(3),[21] which the Plan was not and could not be.[22] Consistent with that restriction, in April of 2015 SJHSRI, RWH, and CCCB sought court approval to transfer approximately $8,200,000 of their assets to a 501(c)(3) entity they controlled, CharterCARE Foundation.[23] Settlement B relates to these assets and requires CharterCARE Foundation to pay $4,500,000 to the Plan.

During the period from WSL's initial involvement on behalf of the Receiver in early September 2017, through the filing of suit herein on June 18, 2018, WSL performed an exhaustive investigation of the facts, aided by subpoenas issued in the Receivership Proceedings. WSL encountered considerable resistance from some of the individuals and entities from whom documents were sought. The intense activity reflected in the docket in that case includes scores of filings relative to subpoenas and

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[20] Dkt #73 (Diocesan Defendants' memorandum in opposition to approval of Settlement A) at 26.

[21] Land depo. at 120:2-122:11.

[22] The instant settlement provides for a judicial liquidation, not dissolution. Moreover, there will be no excess assets requiring transfer to a 501(c)(3) entity.

[23] FAC ¶ 55(d)(iii).

motions for compliance—many against the Settling Defendants in this proposed Settlement A.

During this same period, pursuant to their own statement in the Petition for Receivership that they would "fund the fees and expenses of the Receiver from time to time" until further notice, Petition for Receivership ¶ 22, the Heritage Hospitals advanced such funds to pay Receivership expenses.[24]

In April or May of 2018, the Receiver himself was asked by counsel for the Heritage Hospitals whether any claims the Receiver may have could be settled prior to filing suit, and the Receiver's response was that counsel for the Heritage Hospitals should make a specific proposal to Special Counsel.[25] It was the Receiver's standard practice to respond to such inquiries from debtors by directing the debtors to make a concrete proposal, either to the Receiver directly, or, if the Receiver was represented by counsel, to the Receiver's counsel.[26] However, at no time during the period from WSL's initial involvement on behalf of the Receiver in early September 2017, through the filing of suit herein on June 18, 2018, was WSL approached by counsel for the Heritage Hospitals to discuss settlement. Under these circumstances, the Receiver himself

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[24] The Prospect Entities mischaracterize this advancing of funds as tied to the Heritage Hospitals' willingness to settle claims that would be asserted by the Receiver. See Dkt #147 (Prospect's Memo.) at 12. There is no basis for that assertion in the deposition testimony that Prospect Entities cite. See Del Sesto depo. at 15:13-16-7 ("Q. And why did you request funds? A. I requested funds because based on the petition, there was an indication in the petition that was filed that they would fund the expenses of the Receivership until they wouldn't anymore. So that the funds did not have to come out of the plan itself, and so I made the request so that I could have funds in the estate account to pay reasonable fees, costs and expenses that were approved by the court or that were within my authority to pay. Q. And were those funds characterized in any way as the loan or as just a payment? Did you have some understanding as to what the arrangement was with respect to those funds? A. No, I requested them, Attorney Land indicated that he had to talk to the board, they had to approve it, and then came back to me and said that the board approved it and that they were sending the money over. I don't know in -- I don't know how it was characterized. For me it was just to fund the estate.").

[25] Dkt #144 (Del Sesto Declaration) ¶ 13.

[26] Dkt #144 (Del Sesto Declaration) ¶ 13.

concluded that no meaningful settlement discussions would occur until WSL filed its complaint detailing the Receiver's claims against the Heritage Hospitals and the other Defendants.[27] Accordingly, he instructed WSL to file suit, on June 18, 2018. Counsel complied with the Receiver's express instruction.[28]

II. Post-filing settlement negotiations

The Complaint that WSL filed revealed in great detail all of the Heritage Hospitals' wrongdoings and machinations which theretofore had been completely concealed, and pulled no punches. To the contrary, it set forth the Receiver and other Plaintiffs' claims against the Heritage Hospitals in great detail, and sought recovery for, *inter alia*, fraudulent scheme,[29] fraudulent misrepresentations,[30] and damages under R.I. Gen. Laws § 9-1-2 for the Heritage Hospitals' (and other Defendants') commission of various crimes, including several felonies concerning misleading state regulatory officials in connection with the 2014 Asset Sale.[31]

Shortly after the complaint was filed, counsel for the Heritage Hospitals contacted WSL and suggested a meeting to discuss settlement.[32] That meeting took place on June 29, 2018, but no specifics of potential settlement terms were discussed.[33] WSL

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[27] Dkt #144 (Del Sesto Declaration) ¶ 16. The draft Complaint was not shared with potential Defendants, because the Receiver "believed that would have no benefit and would actually weaken Plaintiffs' position by suggesting we were reluctant to file suit." Id.

[28] Dkt #144 (Del Sesto Declaration) ¶ 16.

[29] FAC Count VIII.

[30] FAC Count VII

[31] FAC Counts XVI – XIX.

[32] Land depo. at 59:22-24 ("I believe my initial offer references a June 29 meeting, and I think that that's the inception of the discussions. . . .").

[33] Land depo. at 73:3-5 ("I don't believe there was a significant conversation about specific terms that would be in a settlement agreement.") (referring to the June 29, 2018 meeting).

asked for a written settlement proposal to assess the viability of settlement at that time.[34] On July 9, 2018 counsel for the Heritage Hospitals sent WSL a letter detailing the terms under which his clients would consider settlement.[35]

The Heritage Hospitals' proposal was that Plaintiffs give the Heritage Hospitals a general release up front.[36] Counsel for the Heritage Hospitals also insisted that the release run to *all* of the Heritage Hospitals present *and former* officers, directors and agents.[37]

In return, the Heritage Hospitals' only undertaking was to be that they would undergo a judicial liquidation, in which the Plaintiffs would have to prove their creditor status just like any other creditor, with the Heritage Hospitals' retaining the right to dispute liability, and to contest the existence and amount of Plaintiffs' damages. Moreover, under that proposal, even if Plaintiffs proved their claims, they would only recover after all other creditors were paid.[38] The Plan would be last in line. The Heritage Hospitals' proposal also required the Receiver to pay independent counsel to

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[34] Land depo. at 72:3-4 ("Frankly, not a lot other than what came out of it was [the] suggestion that we make a proposal to settle.") (referring to the June 29, 2018 meeting).

[35] Dkt #146-2 (Land depo. Exhibit 5).

[36] Land depo. at 139:9-18 ("Q. And so what you were requiring was that before a judicial liquidation would be commenced, the plaintiffs would have to execute and deliver a full general release. A. Yes. Q. And if at the end of the day the liquidation resulted in the plaintiffs getting zero, it was your expectation that that full general release would nevertheless be binding. A. Yes.").

[37] Land depo. Exhibit 5 at 2; Land depo. at 95:12-17 ("And my proposal was a broad release, which I believe is commonplace. And everyone at this table here negotiating or at least would probably want a release of any and all. And that's what we were seeking. That's not what ultimately ended up happening.").

[38] Del Sesto depo. at 32:10-17 ("Q. And the second part of paragraph one includes the language that all assets of the Oldco Entities will be paid to the pension after resolution of creditor claims. Do you see that? A. I do. Q. How did you -- did you -- how did you understand that would work having read that? What did you think that meant? A. Simply stated, I stood last in line. So if I prove my claim, then great. And then after all other creditor claims are paid, then I would get money.").

represent the Heritage Hospitals in the liquidation proceedings,[39] and to agree to indemnify the Heritage Hospitals from any liability to third parties,[40] as well as other expenses.[41]

Pursuant to the July 9th proposal, the Heritage Hospitals would be released from liability and indemnified, even if Plaintiffs failed to prove their claim in the liquidation proceedings or there were insufficient funds after payment of other creditors to pay any amount towards Plaintiffs' damages.[42] Thus, under that proposal, Plaintiffs could have actually ended up with no recovery, and, indeed, have a substantial loss from having to pay the expenses of the liquidation and to indemnify the Heritage Hospitals for their liabilities to the other defendants or to third parties.

WSL on behalf of the Receiver rejected that proposal categorically, labelling it "insulting."[43]

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[39] Land depo. at 137:20-23 ("Q. Now, in paragraph 5, you're proposing that the Receiver pay all costs and expenses incurred by your clients in connection with the wind-down. Correct? A. Correct."); Land depo. at 138:14-18 ("Q. Okay. And then the next paragraph, 6, you here as a condition of your proposal require the engagement of independent counsel to represent those entities, the Oldco entities and their directors. A. Yes.").

[40] Land depo. at 138:19-139:2 ("Q. And you state -- as we go on, it says: 'In the event claims are made in such proceeding against any of the foregoing parties, and will indemnify such parties against any losses suffered as a result of such claims.' Do you see that? A. I do. Q. And that was if the Receiver was going to be obligated to indemnify those entities, right? A. Yes."); Del Sesto depo. at 31:3-11 ("The other issue here that was also a non-starter was there was an indemnity provision in here. I believe paragraph 6. That -- that that also was a non-starter. So I can get involved in a process where I may get absolutely nothing and then I have to indemnify the Oldco entities, their directors, trustees, blah blah blah, in the judicial dissolution proceeding in the event claims are made in such proceeding against those parties.").

[41] Land depo. at 137:20-23 ("Q. Now, in paragraph 5, you're proposing that the Receiver pay all costs and expenses incurred by your clients in connection with the wind-down. Correct? A. Correct.") (referring to the July 9, 2018 letter).

[42] Land depo. at 139:9-18 ("Q. And so what you were requiring was that before a judicial liquidation would be commenced, the plaintiffs would have to execute and deliver a full general release. A. Yes. Q. And if at the end of the day the liquidation resulted in the plaintiffs getting zero, it was your expectation that that full general release would nevertheless be binding. A. Yes.").

[43] Land depo. at 84:11-13 ("The one thing that stands out in my mind is Mr. Wistow telling me that he was insulted that I would send him that proposal.").

That rejection was followed by several weeks of negotiations, which included detailed written disclosure to WSL of all of the Heritage Hospital's assets and liabilities.[44] What followed was that WSL then made a written counter-proposal, which formed the basis for what eventually became the Settlement Agreement.[45] That counter-proposal is completely different from the proposal that counsel for the Heritage Hospitals made on July 9, 2018.[46] Notably, the counter-proposal obligated the Heritage Hospitals to warrant that their asset disclosure was accurate and complete,[47] pay Plaintiffs a minimum of $11,125,000,[48] transfer to the Receiver their rights to a Rhode Island Department of Labor escrow account of $750,000[49] and their rights against CharterCARE Foundation,[50] and to transfer to the Receiver the beneficial interest of CCCB's minority interest of at least 15% in Prospect Chartercare.[51] After those transfers, the Heritage Hospitals were obligated to submit to judicial liquidations in

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[44] Del Sesto depo. at 46:22-47:1 ("Q. So is it your recollection consistent with Exhibit 9 that on or about this July 19 date, information was coming from Mr. Land's office to the Receiver relating to assets and liabilities? A. Yes"); Del Sesto depo. at 49:8-12 ("Q. And the July 25 letter that we've marked as Exhibit 11 is further information being supplied by Mr. Land's office relative to assets and liabilities; is that correct? A. That's what it appears to be, yes."); Del Sesto depo. at 50:8-13 ("Q. And would you agree in -- after reviewing Exhibit No. 12, that this again is more information being supplied with respect to assets and liabilities of the Oldco entities? A. I do, and in anticipation of a meeting scheduled for the very next day.").

[45] Land depo. at 36:9-12 ("Q. Do you know who prepared the first draft of the settlement agreement? A. The Receiver or the Receiver's counsel prepared the first draft of this settlement agreement, yes.").

[46] Land depo. at 49:3-12 ("Q. Tell me what you think one of the significant differences are between what you proposed and what you ultimately agreed to. A. Oh, between what we ultimately -- what we originally proposed? Q. Mm-hmm. A. Well, this -- the biggest difference is this compels and requires an immediate payment of a substantial sum of money to the Receiver on how [sic] to settle, whereas our original proposal did not contemplate that.").

[47] Dkt #63-2 (Settlement Agreement) ¶¶ 22-23.

[48] Dkt #63-2 (Settlement Agreement) ¶¶ 1(q) & 10.

[49] Dkt #63-2 (Settlement Agreement) ¶¶ 1(l) & 15.

[50] Dkt #63-2 (Settlement Agreement) ¶¶ 1(c) & 13.

[51] Dkt #63-2 (Settlement Agreement) ¶¶ 1(d) & 17-19. Prospect Chartercare is the sole member of two subsidiaries that own the hospital assets that were transferred in connection with the 2014 Asset Sale.

which Plaintiffs could seek to recover their remaining damages from the Heritage Hospitals' assets in liquidation alongside other creditors.[52]

The Settlement Agreement obligated the Heritage Hospitals to admit liability for breach of contract and that the amount sum needed to fund the shortfall in addition to existing Plan assets was at least $125,000,000.[53] Specifically, the Settlement Agreement states as follows:

> The Settling Defendants acknowledge that SJHSRI, as the former employer of the Plan participants, is liable to the Plaintiffs for breach of contract, and, arguably, on at least some of the other claims Plaintiffs have asserted against the Settling Defendants in the Federal Court Action and the State Court Action, and that Plaintiffs' damages resulting from such liability include the sum that (in addition to the remaining assets of the Plan) would be sufficient to purchase annuities from one or more insurance companies to fund all of the benefits to which the Plan participants are entitled under the Plan, and that, according to the analysis obtained by the Settling Defendants in connection with the filing of the Petition for Receivership, that sum (in addition to the remaining assets of the Plan as represented to Counsel for the Settling Defendants by the Receiver within ten (10) days prior to the execution of this Settlement Agreement) would be at least $125,000,000. The Settling Defendants RWH and CCCB agree that they are liable along with SJHSRI, jointly and severally, for breach of contract to the Plaintiffs and, arguably, on at least some of the other claims Plaintiffs have asserted against the Settling Defendants in the Federal Court Action and the State Court Action, in the amount of damages of at least $125,000,000, and all of the Settling Defendants agree that such sum less the Gross Settlement Amount Prior to Distribution in the Liquidation Proceedings shall be amount of the Plaintiffs' claims as creditors of the Settling Defendants in the Liquidation Proceedings.

Indeed, Exhibit 2(B) to the Petition for Receivership is the analysis of Angell concerning the sum need to terminate the Plan and fund all benefits through annuities, reduced by

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[52] Dkt #63-2 (Settlement Agreement) ¶ 21.

[53] Dkt #63-2 (Settlement Agreement) ¶ 28.

the value of existing Plan assets. Angell determined that the total amount needed was $210,476,318; that the value of existing assets was $84,291,881; and, therefore, the sum needed in addition to existing assets was $126,184,437. Thus, the damages figure of at least $125,000,000 was based on specific data.

On August 30, 2018, "[p]ursuant to and in compliance with" paragraph 28 of the Settlement Agreement, the Receiver notified the Settling Defendants that "as of July 31, 2018 (the most current statement valuation date), the total value of the remaining assets of the Plan are $81,967,437.97".[54] Accordingly, the amount of the Plaintiffs' damages using that valuation had increased to $128,508,880.03 (i.e. $210,476,318 minus $81,967,437.97).

The admission of liability was required because Plaintiffs wanted to avoid the very scenario they had rejected in the July 9, 2018 proposal, under which the Heritage Hospitals in liquidation proceedings would retain the right to dispute liability and damages.[55] In addition, such admission in writing that the Heritage Hospitals were

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[54] Exhibit 3 (August 30, 2018 email from Stephen Del Sesto to Richard Land and Robert Fine).

[55] Land depo. at 135:14-25 ("In the first numbered paragraphs it states: 'The Oldco Entities will stipulate that, if proven, the claims asserted by the plaintiff would exceed the value of the assets held by the Oldco Entities,' etc. Have I read that portion correctly? A. Yes. Q. Now, what you're saying there is that the liability of your client would be determined in liquidation proceedings, but you are acknowledging that if your client was found liable, the amount of the underfunding was such that your client would be rendered insolvent? A. I think that's a fair characterization."); Del Sesto depo. at 31:22-33:5 ("Q. Did you understand that that sentence meant that in a judicial proceeding, liquidation proceeding, the Oldco Entities -- I'm sorry, that the plaintiffs would have to establish, prove their claim in that proceeding? A. Absolutely -- if proven. So that means I file a claim, then I've got to prove my claim, and if I do, then I might get something. But I -- but it's not a – there is no claim until it's submitted and then defended, proven. Q. So your understanding was that they weren't agreeing to anything, it was nothing more than an opportunity to participate in a judicial liquidation proceeding? A. That's correct, that's how I read that."); Del Sesto depo. at 68:2-11 ("Q. Can you explain why you thought it was important to have that acknowledgment of the settlement agreement? A. In Attorney Land's initial proposal, which I said was unacceptable and paragraph one was a non-starter, that was I would have to prove the claim, if proven. This allowed there to be a representation affirmatively by Attorney Land's clients that my claim is $125 million. I would not have to prove that claim if there was a judicial dissolution. Now I had the number actually locked in in terms of what the liability was.").

liable to Plaintiffs would entitle Plaintiffs to petition the Heritage Hospitals into liquidation in the event the Heritage Hospitals themselves failed to do so, in breach of the Settlement Agreement.[56] The Heritage Hospitals had preferred not to admit to liability,[57] but Plaintiffs made that a condition of the Settlement, and, in order to secure the settlement, the Heritage Hospitals agreed.[58]

The Settlement Agreement also stated 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 in the Federal Court Action and the State Court Action, but acknowledge that, under the law governing joint and several liability, the Settling Defendants could be required to pay the full amount of Plaintiffs' damages regardless of the proportionate fault of the other defendants."[59] Plaintiffs recognized that this statement would not be binding on anyone other than the Heritage Hospitals, but nevertheless required that provision for several reasons.

First, Plaintiffs believed that the Heritage Hospitals in filing the Petition sought in bad faith to protect both themselves and the Prospect Entities (with whom they had consulted about the Petition) from any liability, as demonstrated by SJHSRI's including statements that exculpated Prospect that WSL had learned during WSL's investigation were factually false.[60] That gave Plaintiffs legitimate concern that after the Heritage

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[56] See R.I. Gen. Laws § 7-6-60(a)(2)(ii).

[57] Land depo. at 55:2-4 ("Q. Do you recall that your original proposal did not include an admission of liability? A. Yes.").

[58] Id.

[59] Dkt #63-2 (Settlement Agreement) ¶ 30.

[60] See, e.g., Receivership Petition at 2 n.4 (falsely stating that "Prospect had no role in the evaluation of the Plan or its funding level.").

Hospitals were released from liability, they might try to help the Prospect Entities avoid any liability by claiming that the Heritage Hospitals were 100% at fault.[61] To mitigate that risk, Plaintiffs required the Heritage Hospitals to go on record 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…."[62]

Second, Plaintiffs expected that the Non-Settling Defendants would contend that the Settlement Statute was preempted by ERISA and/or unconstitutional.[63] Plaintiffs disputed and continue to dispute those claims, but sought to limit their risk if the Non-Settling Defendants were correct.[64] Specifically, Plaintiffs were concerned that if the Settlement Statute were preempted by ERISA and/or unconstitutional, the Non-Settling Defendants would assert contribution claims against the Heritage Hospitals in the liquidation proceedings, which the Heritage Hospitals might choose not to oppose, which could potentially reduce the assets available in the liquidation proceedings to pay Plaintiffs' claims.[65]

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[61] Id.

[62] Id.; Dkt #63-2 (Settlement Agreement) ¶ 30.

[63] Del Sesto depo. at 106:11-1 ("The other thing related to the legislation, and contribution from the other defendants. If the legislation had passed, then I would be less concerned so long as Attorney Land didn't go in and say that the Oldco entities were a hundred percent at fault. Because the legislation would have given me protection if there was at least one percent for anybody else. However, if the legislation were deemed to be unconstitutional, that would create – his representation as to fault would potentially create a problem for my recovery against other defendants. So this was a way to, I guess, put the settling defendants' feet to the fire to fight as aggressively as they could as to their potential fault. They were now on the record saying that they believed that their potential fault was smaller as compared to the rest."); Del Sesto depo. at 122:25-123:7 ("I did not know at that time what the relationship was between Prospect and the Oldco entities, and I didn't know what the basis for the statements in the petition were, and I needed to make sure that I had the ability to pursue from everybody and that not somebody came in as the sacrificial lamb to say we were a hundred percent at fault.").

[64] Id.

[65] Del Sesto depo. at 114:25-115:24 ("You said that if the statute is declared unconstitutional, you wanted them to fight hard that they had a small proportionate fault because otherwise there would be contribution issues in the judicial liquidation? A. That's correct. . . . Q. So there would be judicial liquidation with a

Contribution is based upon proportionate fault.[66] Accordingly, Plaintiffs had a contingent financial interest in limiting the Heritage Hospitals' proportionate fault *vis-a-vis* the Non-Settling Defendants, since if the Heritage Hospitals' relative proportionate fault was small, then the Heritage Hospitals' assets in liquidation would be less likely to be reduced by the Non-Settling Defendants claims for contribution.[67] The means adopted was to lock the Heritage Hospitals into the Heritage Hospitals' own litigation position: that *if* any of the defendants were liable *in tort*, it should be the other defendants. In other words, Plaintiffs sought to protect themselves from the risk of the Settling Defendants' again allying with Prospect after the settlement. The contractual language was consistent with Mr. Land's expressed belief, given under oath, that "if there was going to be any liability, our relative liability in tort was less – was considerably less."[68]

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certain amount of assets in there? A. Correct. Q. And how would that -- how would the Receiver's rights to those assets be affected by this issue? A. How the Receiver's rights would be affected by the – I would -- I would be fighting with the other defendants in terms of access to those funds. Q. Prospect asserting -- A. Prospect, yeah, correct. I would be trying to -- I'd be battling with them as to whether or not that money came to me or them.").

[66] R.I. Gen. Laws § 10-6-3 ("The right of contribution exists among joint tortfeasors; provided however, that when there is a disproportion of fault among joint tortfeasors, the relative degree of fault of the joint tortfeasors shall be considered in determining their pro rata shares.").

[67] *Supra* at 20 n.65.

[68] Land depo. at 54:5-15 ("Q. Which of the non settling defendants do you contend had greater responsibility than the settling defendants in tort? MR. SHEEHAN: Objection. A. I -- there's language in here that says 'if any.' So I'm not prepared now, nor was I then, to evaluate whether any of the defendants had liability in tort to the plaintiff. It's a relative statement. But if there was going to be liability, our relative liability in tort was less -- was considerably less. If there was any liability.")

The Heritage Hospitals' directors also engaged independent counsel (Edward Feldstein, Esq.) to evaluate the final Settlement Agreement before the Heritage Hospitals agreed to it.[69]

The vast gulf between what the Heritage Hospitals were initially offering and what the Plaintiffs ultimately obtained through negotiation evidences that Plaintiffs drove a hard bargain. The Heritage Hospitals' initial offer on July 9, 2018 completely belies the Prospect Entities' contention that the Heritage Hospitals had an "utter lack of resistance to the Receiver's demands". Dkt #147 (Prospect's Memo.) at 15.

ARGUMENT

I. The Court has jurisdiction over the dispute

For the reasons Plaintiffs previously briefed in connection with Settlement B and discussed at the August 29, 2019 hearing, the Court has jurisdiction to approve both settlements. See Dkt #139 (Plaintiffs' memorandum concerning Settlement B) at 9-26.

II. No class members have objected to Settlement A, and it has the affirmative and enthusiastic support of nearly 1,000 class members

The Court's Memorandum and Order of June 6, 2019 set a deadline of August 30, 2019 for settlement class members to file written objections. See Dkt #124 at 16. No class member has done so.

In addition, as previously noted in connection with Settlement B, approval of

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[69] See Dkt #119 (Heritage Hospitals' Reply to the Diocesan Defendants' post-hearing memorandum) at 3 ("First, the Diocesan Defendants in footnote 4 condemn Attorney Land for the board's lack of separate counsel. See Doc. 115, p. 6, fn. 4. The directors did in fact engage separate counsel, Edward Feldstein, Esq., for the purpose of evaluating the terms of the settlement agreement. The Diocesan Defendants should be more careful in casting aspersions against the Settling Defendants counsel, or better yet, they could have asked Attorney Land who would have corrected their misstatement before it was made.").

Settlement A is enthusiastically supported by nearly 1,000 class members who are separately represented by counsel.[70]

III. The Non-Settling Defendants' objections should be overruled

A. Plaintiffs' Counsel were entitled (indeed, obligated) to secure every possible lawful advantage for their clients and the prospective class members, regardless of whether counsel for plaintiffs in other settlements may not be so assertive and demanding

Plaintiffs' Counsel (as do all attorneys) owe certain duties to their clients, both the Receiver and the putative class. Those duties include the obligation to "act with all reasonable diligence." R.I. Rules of Professional Conduct 1.3. That imposes the obligation on Plaintiffs' Counsel to "take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." Id., Commentary [1]. The same requirement obligates Plaintiff's Counsel "to act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." Id.

In performing their obligations, Plaintiffs' Counsel are not required to limit the advantages they can obtain for their clients to what other counsel might accept in similar circumstances, or to accept particular forms of releases or settlement agreements. On behalf of their clients, Plaintiffs' Counsel are permitted (nay, required) to "drive hard bargains," and insist on leaving nothing on the table that might benefit their clients when the settlement is concluded.

Plaintiffs' Counsel are also entitled to apply whatever lawful pressure is at their disposal. With the consent of their clients, that lawful pressure includes refusing an

[70] See Dkt #141 (Declaration of Christopher Callaci dated August 12, 2019); Dkt #142 (Affidavit of Arlene Violet dated August 9, 2019); Dkt #143 (Declaration of Jeffrey Kasle dated August 13, 2019).

unfavorable settlement and demanding terms to which the defendant is reluctant to agree, even when another attorney might not be so demanding. The Settling Defendants "have no right to have neutral and unbiased opponents in the settlement negotiations because negotiation, as part of litigation, is also part of our adversarial system . . . ." Marino v. United States Dep't of the Interior, No. CIV 06-506 JH/RHS, 2009 WL 10708171, at *2 (D.N.M. June 30, 2009). Similarly, Plaintiffs' Counsel in negotiating a settlement must not favor or even consider protecting the interests of non-settling parties at the expense of their own clients' interests.

Plaintiffs' Counsel performed these obligations and exercised these rights to obtain a very favorable settlement. The Non-Settling Defendants do not like it.[71]

B. Non-Settling Defendants' objections are the first step toward seeking to disqualify Plaintiffs' counsel and the Receiver and upending this entire litigation

The Non-Settling Defendants baldly accuse both Plaintiffs' counsel and the Receiver of conducting this litigation through acts of wrongful and tortious collusion, to the detriment of both the Non-Settling Defendants and class members. These accusations are utterly groundless for the reasons discussed *infra*, but at the outset, it is important to recognize their full significance.

If the Non-Settling Defendants' allegations are credited, then that would not simply be grounds for disapproving the pending settlement. Of course, disapproving the settlement would cause significant harms and disruption on its own, depriving the Plan

[71] See, e.g., Patrons Oxford Ins. Co. v. Harris, 905 A.2d 819, 828 (Me. 2006) ("Although the insurer may be opposed to the insured entering into the settlement, such conduct on the part of the insured does not necessarily rise to the level of collusion.") (citing Black's Law Dictionary's definition of "collusion" as "an agreement to defraud another or to obtain something forbidden by law.").

and the class members of Settlement A's extraordinarily favorable benefits while requiring the Heritage Hospitals to resume defending this action, at enormous expense and with no better outcome conceivably in sight for either side.

Moreover, if the Non-Settling Defendants' allegations are credited, then the Non-Settling Defendants will certainly argue that both the Receiver and Plaintiffs' counsel have no business even being in this case. If the Court finds that the Receiver and Plaintiffs' counsel are guilty of the alleged misconduct, then the next step would be Non-Settling Defendants' immediate filing of motions to disqualify both, and throw this case into utter chaos and ultimately into the dustbin.

C. There is no evidence of collusion or bad faith

1. "Collusion" means unlawful or tortious conduct, which is intended to wrongfully or tortiously prejudice the non-settling defendants

Plaintiffs have already fully set forth all of the reasons why "collusion" in connection with settlement approval under Rule 23(e) must refer to tortious or wrongful conduct, and, in connection with the Settlement Statute,[72] it must also refer to "wrongful or tortious conduct intended to prejudice the non-settling tortfeasor(s), irrespective of the settling or non-settling tortfeasors' proportionate share of liability."[73]

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[72] See R.I. Gen. Laws § 23-17.14-35(3) ("For purposes of this section, 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.") (emphasis supplied).

[73] See Dkt #82 (Plaintiffs' Reply to the Diocesan Defendants' Opposition to the Motions for Settlement Class Certification, Appointment of Class Counsel, and Preliminary Settlement Approval and for Award of Attorneys' Fees, filed on January 21, 2019) at 27-33; Dkt #83 (Plaintiffs' Reply to the Prospect Entities' Opposition to the Motions for Settlement Class Certification, Appointment of Class Counsel, and Preliminary Settlement Approval and for Award of Attorneys' Fees, filed on January 21, 2019) at 80.

Indeed, Black's Law Dictionary defines "collusion" as "[a]n agreement to defraud another or to do or obtain something forbidden by law." *COLLUSION*, Black's Law Dictionary (11th ed. 2019).

None of the Non-Settling Defendants have directly disputed this standard, although they have had ample opportunity to do so, both at the hearing the Court held on February 12, 2019 and in their written submissions filed after Plaintiffs set forth this argument.[74] That is dispositive, because all of the Non-Settling Defendants' allegations of "collusion" refer to terms, conduct, or facts that are not wrongful or tortious.

Instead, without acknowledging, much less rebutting Plaintiffs' arguments, the Non-Settling Defendants create and rely upon their own soft and amorphous standard of what constitutes collusion. For example, a settlement term that is unusual is therefore collusive; or the fact that Plaintiffs are getting paid ahead of other creditors is perceived as unfair to the Prospect Entities or the Diocesan Defendants, and, therefore, is collusive; or the fact that the settlement was negotiated in eight to ten weeks is somehow suspicious, and, therefore, collusive. However, "unusual," "unfair," and "suspicious" are not synonyms for collusion. Conduct or settlement terms may be unusual, perceived as unfair, or suspicious, but unless they are unlawful ("wrongful or tortious"), they are not collusive.

Indeed, the Non-Settling Defendants through their use of the term "collusion" are attempting to erect a barrier to class action settlements that goes beyond the law of

[74] See Dkt #101 (Prospect's Surreply to Dkt #83); Dkt #103 (Prospect's motion to conduct settlement discovery); Dkt #115 (Diocesan Defendants' post-hearing memorandum); Dkt #116 (Prospect Entities' post-hearing memorandum); Dkt #146 (Diocesan Defendants' opposition to final approval of Settlement A); Dkt #147 (Prospect Entities' opposition to final approval of Settlement A).

fraudulent transfers, voidable preferences, and Rhode Island's common law. There is no such standard and no such barrier.

Moreover, as discussed below, there are countervailing considerations which dictate that "collusion" be cabined to unlawful, wrongful, dishonest, or tortious conduct. Construing "collusion" to require a "tortious or unlawful purpose" enables courts in determining what is collusive to apply defined standards as to what constitutes a tort and what is unlawful. However, if "collusion" includes lawful agreements, courts would be left to probe the motives of parties to lawful agreements with no established criteria. Courts normally do not interfere with lawful agreements or lawful conduct.

Perhaps more importantly, class counsel have the right (and ethically are obligated) to negotiate for every possible lawful advantage for their clients, within the limits of their professional ethics and their duty to refrain from unlawful conduct. That right and obligation will be severely chilled if settlements are disapproved because lawful advantages are construed to be "collusive." The result will be that settlement classes are deprived of the zealous representation that other litigants receive.

2. Every allegedly objectionable term in the Settlement Agreement is lawful, and not dishonest, wrongful, or tortious

a. The Heritage Hospitals' obligation to pay Plaintiffs ahead of other possible creditors is not unlawful, dishonest, wrongful, or tortious

The Non-Settling Defendants claim that it was structurally improper for the Heritage Hospitals to agree to a settlement with Plaintiffs under which virtually all of the Heritage Hospitals' assets would go to Plaintiffs, and contend that is unfair because it would deprive the Heritage Hospitals of assets potentially needed to satisfy the

Prospect Entities' purported (and unlitigated) contractual claims for indemnification under the Asset Purchase Agreement, particularly the claim for indemnity arising out of Plan.[75] That argument, however, ignores that the Prospect Entities' claims for indemnification are factually disputed and legally unenforceable.[76]

Moreover, Prospect's argument is based on the false assumption that a debtor is not entitled to prefer one creditor over another. To the contrary, under black-letter Rhode Island law, in the absence of statutory avoidance proceedings, a debtor has "the right to prefer one creditor over another." Faiella v. Tortolani, 72 A.2d 434, 438 (R.I. 1950). That is:

> At common law it is no fraud for a debtor to pay in full any debt which he owes, out of any property which he has, whether attachable or not, though the result, and even the purposed result, of the payment may be that other debts will have to go unpaid.

Elliott v. Benedict, 13 R.I. 463, 466 (R.I. 1881). See Colt v. Sears Commercial Co., 37 A. 311, 314 (R.I. 1897) ("A preference of one creditor over another is not fraudulent, and can only be set aside by a proceeding instituted under the statute [governing preferences in insolvency]."); Coates v. Wilson, 37 A. 537, 537 (R.I. 1897) ("Except for

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[75] The Diocesan Defendants assert that Settlement A "is an improper preferential transfer," Dkt #146 at 3, but do not make that assertion with reference to any claims of their own against the Heritage Hospitals. Although the Diocesan Defendants cite the Prospect Entities' memorandum for the proposition that the settlement is a "preferential transfer," id., the Prospect Entities do not use that nomenclature, which is a term of art under bankruptcy law, here inapplicable.

[76] Plaintiffs dispute the validity of those claims. Moreover, even if those claims were valid contractually, they are nevertheless unenforceable, because the Heritage Hospitals and the Prospect Entities are *in pari delicto* with respect to liabilities arising out of the Plan. See, e.g., Alabama Great S. R. Co. v. Chicago & N. W. Ry. Co., 493 F.2d 979, 985 (8th Cir. 1974) (discussing "the general rule that joint tortfeasors in pari delicto, where each are guilty of acts or omissions which could have proximately caused the underlying injury, are not entitled to indemnity from each other"); Borg Warner Corp. v. White Motor Co., 344 F.2d 412, 413 (5th Cir. 1965) ("the right to indemnity as between joint tortfeasors exists only where the tortfeasors are not in pari delicto"). See generally Nisselson v. Lernout, 469 F.3d 143, 151 (1st Cir. 2006) ("In pari delicto is both an affirmative defense and an equitable defense. Broadly speaking, the defense prohibits plaintiffs from recovering damages resulting from their own wrongdoing.").

such [insolvency] proceedings, a transfer of property which operates as a preference is good."); Perkins v. Hutchinson, 22 A. 1111, 1111 (R.I. 1891) ("[I]t is well settled in this state that an assignment which operated merely as a preference of certain creditors over others is not fraudulent."). See also 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 61 ("In the absence of statutory regulation, and subject to certain exceptions, an individual debtor, in applying his or her assets to the discharge or securing of the debtor's obligations, may lawfully prefer one or more creditors to others. The transfer is not rendered illegal or fraudulent merely because the transferor was insolvent at the time, the transfer contributed to his or her insolvency, or the conveyance exhausted his or her assets.") (citations omitted).

The Prospect Entities have not commenced insolvency proceedings against the Heritage Hospitals, because they cannot. A creditor cannot initiate a liquidating Receivership proceeding against a Rhode Island nonprofit corporation, unless "the claim of the creditor has been reduced to judgment and an execution on it has been returned unsatisfied," or "the corporation has admitted in writing that the claim of the creditor is due and owing." See R.I. Gen. Laws § 7-6-60(a)(2). The Prospect Entities cannot satisfy either of those prongs. Moreover, involuntary bankruptcy proceedings cannot be commenced against nonprofit corporations. See 11 U.S.C. § 303 ("An involuntary case may be commenced . . . against a person, except a . . . corporation that is not a moneyed, business, or commercial corporation. . . ."); In re Capitol Hill Healthcare Grp., 242 B.R. 199, 203 (Bankr. D.D.C. 1999) (nonprofit hospital corporation was not a "moneyed, business, or commercial corporation" eligible to be an involuntary bankruptcy debtor). It should be observed that certain preferences can be avoided in

bankruptcy proceedings not because they are wrongful or tortious, but, rather, because the Bankruptcy Act gives the trustee the avoidance power by statute.

The Prospect Entities also do not assert any claims that final consummation of Settlement A would effectuate an avoidable transfer under Rhode Island's Uniform Voidable Transactions Act,[77] R.I. Gen. Laws § 6-16-1 *et seq.*, because it obviously would not. For purposes of that statute, "[v]alue is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied," R.I. Gen. Laws § 6-16-3, and "'debt' means liability on a claim." R.I. Gen. Laws § 6-16-1(5). Settlement A is a compromise of Plaintiffs' claims that they are pressing in this very action, *i.e.* payment of an antecedent debt.

The only purported legal support the Prospect Entities offer for their contention that it is somehow impermissible for Plaintiffs' claims to be paid first, ahead of those of other potential creditors of the Heritage Hospitals, is a single footnote with a single citation to R.I. Gen. Laws § 7-6-51(1), which they utterly mischaracterize. See Dkt #147 at 14 n.12. That statute provides:

> The assets of a corporation in the process of dissolution[78] shall be applied and distributed as follows:
>
> (1) All liabilities and obligations of the corporation shall be paid and discharged, or adequate provision shall be made for their payment and discharge;

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[77] Since the Heritage Hospitals' transfers to the Plaintiffs, if Settlement A receives final approval, will occur after July 2, 2018, they are subject to Rhode Island's Uniform Voidable Transactions Act instead of Rhode Island's Uniform Fraudulent Transfer Act, which governs many of Plaintiffs' claims in this action. See 2018 Rhode Island Laws Ch. 18-236 (18-S 2288) § 4.

[78] Prospect also mischaracterizes the statute as applying to corporations in "wind down" rather than dissolution. See Dkt #147 at 14 n.12. In fact, the dissolution statute requires the corporation in dissolution to give notice of dissolution to all known creditors, which SJHSRI, RWH, and CCCB even to this day have not done.

> (2) Assets held by the corporation upon condition requiring return, transfer, or conveyance, which condition occurs by reason of the dissolution, shall be returned, transferred, or conveyed in accordance with the requirements;
>
> (3) Assets received and held by the corporation subject to limitations permitting their use only for charitable, religious, eleemosynary, benevolent, educational, or similar purposes, but not held upon a condition requiring return, transfer, or conveyance by reason of the dissolution, shall be transferred or conveyed to one or more domestic or foreign corporations, societies, or organizations engaged in activities substantially similar to those of the dissolving corporation, pursuant to a plan of distribution adopted as provided in this chapter or as otherwise provided in its articles of incorporation or bylaws;
>
> (4) Any other assets shall be distributed in accordance with the provisions of the articles of incorporation or the bylaws to the extent that the articles of incorporation or bylaws determine the distributive rights of members, or any class or classes of members, or provide for distribution to others;
>
> (5) Any remaining assets may be distributed to any persons, societies, organizations, or domestic or foreign corporations, whether for profit or nonprofit, that may be specified in a plan of distribution adopted as provided in this chapter.

R.I. Gen. Laws § 7-6-51. The statute requires a dissolving nonprofit corporation to pay their creditors ahead of charities or other potential recipients. Crucially, however, the statute says absolutely nothing about any priority of payment *among creditors inter se*.

Not only were the Heritage Hospitals lawfully permitted to favor Plaintiffs over their other creditors, that issue was discussed between the Settling Parties in connection with the negotiation of the Settlement Agreement.[79] Indeed, Plaintiffs' Counsel provided counsel for the Settling Defendants with citations to Rhode Island

[79] Second Declaration of Stephen Del Sesto in Support of Approval of Settlement A ¶ 1.

confirming that point.[80] Thus, both Plaintiffs' Counsel and counsel for the Settling Defendants were very careful to ensure the lawfulness of the Heritage Hospitals' payments to the Plan even if it meant preferring Plaintiffs over other creditors.[81]

Just as the Heritage Hospitals were entitled to prefer one creditor over another, so too any creditor is legally entitled to seek payment from the debtor, regardless of whether the debtor has other creditors, and even if the debtor is insolvent.

Indeed, if seeking payment first was somehow wrongful or tortious, there could be no settlements under which a plaintiff receives a payment from a defendant that has other creditors. At the very least, every such settlement would necessitate a *pro rata* allocation of the defendant's assets among all of the defendant's creditors.

b. The Heritage Hospitals' admission of liability for breach of contract is not unlawful, dishonest, wrongful, or tortious

As previously briefed at length, Paragraph 28 of the Settlement Agreement contains an admission by the Heritage Hospitals that they are liable to Plaintiffs for breach of contract. Plaintiffs' counsel negotiated to obtain this admission after rejecting the Heritage Hospitals' initial offer only to provide another forum (liquidation proceedings) for Plaintiffs to prove their claims. As the Receiver testified:

> Q. Can you explain why you thought it was important to have that acknowledgment of the settlement agreement?
>
> A. In Attorney Land's initial proposal, which I said was unacceptable and paragraph one was a non-starter, that was I would have to prove the

[80] Second Declaration of Stephen Del Sesto in Support of Approval of Settlement A ¶ 1.

[81] Second Declaration of Stephen Del Sesto in Support of Approval of Settlement A ¶ 2.

> claim, if proven. This allowed there to be a representation affirmatively by Attorney Land's clients that my claim is $125 million. I would not have to prove that claim if there was a judicial dissolution. Now I had the number actually locked in in terms of what the liability was.

Del Sesto depo. at 68:2-11.

In addition, Heritage Hospitals' admission in writing that they are liable to Plaintiffs entitles Plaintiffs to petition the Heritage Hospitals into liquidation in the event they themselves fail to do so, in breach of the Settlement Agreement. See R.I. Gen. Laws § 7-6-60(a)(2)(ii) ("(a) The superior court has full power to liquidate the assets and affairs of a corporation: . . . (2) In an action by a creditor: . . . (ii) When the corporation has admitted in writing that the claim of the creditor is due and owing and it is established that the corporation is insolvent").

The Non-Settling Defendants object to the admission of liability on the grounds that it is unusual, in that defendants typically deny liability.[82] However, "unusual" does not equate to "collusive." There is no requirement that the Settling Parties conform to usual custom (if indeed any such "custom" exists) in drafting their Settlement Agreement. Moreover, in the usual case, plaintiffs are indifferent to whether a defendant denies liability in the release that accompanies the agreed-upon settlement payment, because the defendant's liability has ceased to matter. That is not the case here.

Moreover, although it has come to be expected, a defendant's denial of liability in the release is usually somewhat disingenuous, since the defendant's willingness to pay over large sums in settlement is more consistent with the defendant's anticipating it will

[82] Dkt #73 (Diocesan Defendants' Response in Opposition to the Joint Motion for Settlement Class Certification) at 15.

be found liable at trial than anticipating a defense verdict. That does not make a plaintiff's willingness to accept such denials in the release collusive.

The Prospect Entities contend that the admission of liability and damages in paragraph 28 is "dishonest" insofar as it contradicted Mr. Land's "understanding" of his client's liabilities reflected in his initial July 9, 2018 offer letter, which included no admission of liability. See Dkt #147 (Prospect's Memo.) at 17-18. This argument mischaracterizes Mr. Land's testimony and misconceives the very nature of litigation compromise. Most tellingly, it is impossible to square with the Prospect Entities' prior arguments that *the Heritage Hospitals are so obviously liable to fund the Plan that this settlement itself is superfluous* (an argument used to try to reduce WSL's claim for attorneys' fees).

First, there is nothing sacrosanct about Mr. Land's personal past understandings or misunderstandings concerning his clients' liabilities over the years, before he had the benefit of Plaintiffs' laying out their claims in the Complaint—or even after. In the absence of a negotiated compromise, Plaintiffs would continue to press their claims, and the Heritage Hospitals would seek to interpose defenses to those claims.[83]

Second, the Prospect Entities complain that the Petition for Receivership contains statements inconsistent with SJHSRI's admission that it is liable in breach of contract. See Dkt #147 at 19 n.13. So what? That Petition contains many statements

[83] See Dkt #109-2 (Affidavit of Richard J. Land) ¶ 7 ("If the Settlement Agreement is not approved, the Heritage Hospitals would be compelled to litigate all claims, including denying liability on [t]he basis that the governing Plan documents limit recovery for the plan participants (including plaintiffs) to the Plan assets.").

that Plaintiffs contend are self-serving or erroneous.[84] In addition, Mr. Land testified that he consulted with the Prospect Entities about the contents of that Petition before filing it.[85] That fact standing alone justified Plaintiffs and their counsel in trying to protect their interests in the forthcoming liquidation.

c. The admission to damages of at least $125 million is not unlawful, dishonest, wrongful, or tortious

The Prospect Entities also insinuate that the $125 million damages number was dishonestly agreed to because it is (they contend) arbitrary. See Dkt #147 (Prospect's Memo.) at 18. In fact, as Mr. Land testified, this number was based on an analysis of the cost of purchasing private annuities to fund the underfunded pension liabilities, prepared by Defendant The Angell Group, Inc. and attached to the Receivership Petition.[86] Indeed the Settlement Agreement itself recites that this was the basis for the number.[87]

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[84] See, e.g., Receivership Petition at 2 n.4 (falsely stating that "Prospect had no role in the evaluation of the Plan or its funding level.").

[85] See Land depo. at 144:20-146:2 ("Q. Now, prior to filing the petition for Receivership, you consulted with individuals at Prospect about the petition. Correct? MR. HALPERIN: Objection. A. Yes, that's correct. Q. You spoke to [Prospect's attorney] Moshe Berman specifically about the petition? MR. HALPERIN: Objection. A. Yes. Q. And you undertook to provide Prospect with a copy of the petition before it was filed. MR. HALPERIN: Objection. A. Correct. Q. And you did that. A. I did that. . . . Q. You had several phone conversations with Mr. Berman about the petition; is that right? MR. HALPERIN: Objection. A. I recall speaking with him about it, yes.").

[86] See Land depo. at 97:25-98:10 ("[Q.] Is it your understanding that with respect to the amount sufficient to purchase the annuity referenced in paragraph 28 of Exhibit 8, that that number came from Angel[l]? A. I believe that number came from the report prepared by Angel[l] that we submitted in connection with the petition to appoint the Receiver. And in that report, there were several different numbers used for different iterations of underfunding. And I believe that that was the one associated with the private pension, acquiring private pensions for the pension holders. Q. Were there -- A. Private annuities, I'm sorry.").

[87] See Settlement Agreement ¶ 28 ("Plaintiffs' damages resulting from such liability include the sum that (in addition to the remaining assets of the Plan) would be sufficient **to purchase annuities from one or more insurance companies to fund all of the benefits** to which the Plan participants are entitled under the Plan, and that, **according to the analysis obtained by the Settling Defendants in connection with the filing of the Petition for Receivership**, that sum (in addition to the remaining assets of the Plan as

Thus, not only was the $125 million number not arbitrary, it was derived from an analysis that SJHSRI felt was sufficiently reliable to attach to the Petition for Receivership and to seek relief based upon it from the court in the Receivership Proceeding.[88]

The admission to damages of at least $125 million also will not tortiously or wrongfully injure the non-settling defendants. They will not be bound in this proceeding by the Heritage Hospitals' admission that Plaintiffs' damages are at least $125 million.

d. The Heritage Hospitals' contention that their proportion of fault in tort "if any" is less than the Non-Settling Defendants is not unlawful, dishonest, wrongful, or tortious

The Non-Settling Defendants continue to misread paragraph 30 of the Settlement Agreement, which states:

> 30. The 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 in the Federal Court Action and the State Court Action, but acknowledge that, under the law governing joint and several liability, the Settling Defendants could be required to pay the full amount of Plaintiffs' damages regardless of the proportionate fault of the other defendants.

Settlement Agreement ¶ 30 (emphasis supplied). As Mr. Land[89] testified, the caveat "if any" was significant to the Heritage Hospitals, who continue to contend that they have

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represented to Counsel for the Settling Defendants by the Receiver within ten (10) days prior to the execution of this Settlement Agreement) would be at least $125,000,000.") (emphasis supplied).

[88] See *supra* at 17-18.

[89] Plaintiffs reiterate that there is nothing magical about Mr. Land's personal understanding of these issues.

no liability *in tort*, but if they did, their relative liability was "considerably less" than the other defendants':

> Q. Which of the non settling defendants do you contend had greater responsibility than the settling defendants in tort?
>
> MR. SHEEHAN: Objection.
>
> A. I -- there's language in here that says "if any." So I'm not prepared now, nor was I then, to evaluate whether any of the defendants had liability in tort to the plaintiff. It's a relative statement. **But if there was going to be liability, our relative liability in tort was less -- was considerably less. If there was any liability.**

Land depo. at 54:5-18 (emphasis supplied).

This provision serves several legitimate purposes. As the Receiver testified:

> Q. And why did you need that concept?
>
> A. I needed that concept for a couple of reasons. One, I needed that concept because of the inception of the Receivership. I had -- it was my understanding that the Oldco entities [i.e. the Heritage Hospitals] and Prospect were aligned in terms of wanting the Receivership. And I felt that some of the representations in the petition were in Prospect's favor. So I did not know if Attorney Land had a relationship with Prospect that would lead for them to, for lack of a better way to put it, take the blame for what had happened. So there was one protection there. The other thing related to the legislation, and contribution from the other defendants. If the legislation had passed, then I would be less concerned so long as Attorney Land didn't go in and say that the Oldco entities were a hundred percent at fault. Because the legislation would have given me protection if there was at least one percent for anybody else. However, if the legislation were deemed to be unconstitutional, that would create – his representation as to fault would potentially create a problem for my recovery against other defendants. So this was a way to, I guess, put the settling defendants' feet to the fire to fight as aggressively as they could as to their potential fault. They were now on the record saying that they believed that their potential fault was smaller as compared to the rest.

Del Sesto depo. at 105:25-107:1.

The Prospect Entities contend baldly that the Heritage Hospitals' contention that "if" they have tort liability, it is less than the non-Settling Defendants' tort liability, is simply false. See Dkt #147 at 20. The Heritage Hospitals contend it is true. The Receiver agrees that the Settling Defendants' make that contention, but takes no position on whether the contention is accurate.[90] In fact, the statement is nothing more than a prediction of what a jury would conclude at trial, and, thus, it is neither true nor false. We may never know which prediction is more accurate.

e. The releases being given to directors who voted to authorize the settlement are not unlawful, dishonest, wrongful, or tortious

The Heritage Hospitals sought broad releases from Plaintiffs, covering all former and current officers, directors, and agents, but Plaintiffs refused. See *supra* at 17; Land depo. at 95:11-17 ("I think everybody at the table knows, these releases are narrowly drafted. And my proposal was a broad release, which I believe is commonplace. And everyone at this table here negotiating or at least would probably want a release of any and all. And that's what we were seeking. That's not what ultimately ended up happening.").

However, the Heritage Hospitals' then-current voting directors insisted on releases for themselves, in order to ensure that the directors' indemnification rights would not be obliterated by the settlement:

> Q. And do you understand why those directors required the releases that they did in exchange for the payment of the vast majority of the assets of the Heritage Hospitals to the plan?

[90] Del Sesto depo. at 70:23-25 ("Q. So you're not agreeing that their fault is small by comparison necessarily? A. I'm not stating that one way or the other.").

> A. I think I understand why they did.
>
> Q. Can you tell me your understanding.
>
> A. If the settlement were to go through, and there were no releases of the directors, and then they were sued by these same plaintiffs, the indemnification rights that they had as against the Heritage Hospitals as in their roles as officers or directors would be worthless, because there would be no -- essentially no assets to defend against the same claims that the -- those very claims that the Receiver would bring.
>
> * * *
>
> Q. You testified that their indemnification rights would be worthless if the vast majority of the assets of Heritage Hospitals was relayed to the plan; is that correct?
>
> A. That's true.
>
> Q. And they conditioned their vote in favor of the settlement on obtaining releases; is that correct?
>
> A. A condition of a settlement agreement was releases of officers and directors. It's a -- that is a common provision in the context of settling any lawsuit. This particular release just happens to be much more narrow than that. But they were concerned about their indemnification rights in particular, because this settlement agreement essentially deprived them of any right to seek indemnification against the hospitals.

Land depo. at 107:25-109:10. The Non-Settling Defendants suggest there was something wrong in the current directors' requiring this protection, but they cite no authority for that proposition. The Non-Settling Defendants initially criticized Attorney Land for not having the proposed settlement vetted by an attorney who had no prior involvement with the Heritage Hospitals,[91] but when they learned that in fact Attorney

[91] Dkt #115 (Diocesan Defendants' Post-Hearing Brief) at 6 n.4.

Land had submitted the proposed settlement to Edward Feldstein, Esq. for approval,[92] the Non-Settling Defendants had no response.[93]

The Non-Settling Defendants speculate that Plaintiffs should have obtained contributions from the Heritage Hospitals D & O carriers. However, the carriers that insured the Heritage Hospitals' directors, officers and agents had denied coverage for Plaintiffs' claims. See Land depo. at 115:23-24 ("Q. Do you know specifically whether they denied coverage? A. I believe they denied coverage."). That denial seems justified, since the applicable Directors & Officers liability insurance policies excluded coverage for claims of breach of contract, claims of fraud, and ERISA claims:

> Q. Now, you mentioned this issue of D&O coverage. You understand that directors and officers coverage does not apply to claims for breach of contract?
>
> A. I do understand that.
>
> Q. And you also understand that there's no coverage for tort liability based on fraud with respect to --
>
> A. Generally I understand that to be the case.
>
> Q. Okay. And did you know -- do you agree that the D&O policies that your client had excluded liability for directors and officers under ERISA?
>
> A. I believe that's the case, yes.

Land depo. at 140:17-141:2.

In any event, the releases being given to the Heritage Hospitals and certain of their current directors, officers, and agents are not unlawful, dishonest, wrongful, or tortious. Indeed, the Non-Settling Defendants do not even argue that they were in any

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[92] Dkt #119 (Heritage Hospitals' Reply to the Diocesan Defendants' post-Hearing Brief) at 3.

[93] See Dkt #146 (Diocesan Defendants' Opposition to Final Approval of Settlement A).

way prejudiced by those releases, much less that such prejudice was wrongful or tortious.

3. The conduct of the Settling Parties was not unlawful, dishonest, wrongful, or tortious

In addition to objecting to certain terms in the Settlement Agreement, the Non-Settling Defendants point to certain conduct and facts as demonstrating collusion. Here again they improperly use a soft and amorphous standard to define "collusion." However, there is not a scintilla of evidence that any of the conduct of the Settling Parties was unlawful, dishonest, wrongful, or tortious.

a. The length of the settlement negotiations was not unlawful, dishonest, wrongful or tortious

The Prospect Entities contend without any basis that because Settlement A was negotiated in the approximately two and a half months between when the Complaint was filed (on June 18, 2018) and when Settlement A was executed (as of August 31, 2018), it was not "the result of 'lengthy and intensive arm's-length negotiations.'" Dkt #147 at 16 (quoting the Settlement Agreement). Two and a half months is plenty of time, and here the proof is in the pudding. There is nothing unlawful, dishonest, wrongful, or tortious in agreeing to a settlement in ten weeks.

b. The Prospect Entities' assertion that no red-lined drafts of the Settlement Agreement were produced in discovery is false and, in any event, would not be unlawful, dishonest, wrongful, or tortious

The Prospect Entities misinform the Court that "no red-lined drafts of the Settlement Agreement were produced" in discovery. Dkt #147 (Prospect's Memo.) at

16. That assertion is false. See, e.g., PLAINTIFF00001348-1385 and CRF00508-545.[94] In any event, it should go without saying that the absence of red-lined drafts would not be unlawful, dishonest, wrongful, or tortious. However, the Non-Settling Defendants' argument that it would constitute collusion illustrates how far afield they would have the Court go to consider conduct as "collusive."

c. Although negotiations need not be "contentious" to be arm's length, there is ample evidence that the negotiations were indeed contentious, and even if they were amicable, that would not be unlawful, dishonest, wrongful, or tortious

Despite being granted the extraordinary opportunity to conduct discovery into the settlement negotiations between the Plaintiffs and the Heritage Hospitals, the Non-Settling Defendants have offered no actual evidence of collusion during the settlement negotiations.

Instead, the Prospect Entities contend: "Land's assertion that the Settlement Agreement was the result of 'contested and often-times heated negotiations' is not reflected in a single draft, e-mail, letter or other document produced by the parties." Dkt #147 (Prospect's Memo.") at 16. That is obviously wrong, since Mr. Land's initial offer letter of July 9, 2018 itself (rejected by Plaintiffs' counsel as "insulting"), as compared with the final Settlement Agreement, demonstrates that the negotiations were sharply contested. There is no requirement that negotiations be conducted by e-mail or any

[94] Because these redlined Settlement Agreement drafts have been marked confidential pursuant to the parties' Confidentiality and Nondisclosure Agreement of June 19, 2019, Plaintiffs appropriately do not attach copies herewith.

other writing, as opposed to using old-fashioned in-person meetings involving face-to-face negotiations.[95]

The Prospect Entities selectively quote from deposition testimony for their unsupported factual contention that "both Land and the Receiver were unable to recall any particular issues that were difficult to resolve or otherwise contentious." Dkt #147 (Prospect's Memo.) at 16. In fact, both Mr. Land[96] and the Receiver[97] did testify about such contentious issues. In addition, the Receiver testified that he left "the detail of the negotiations" to Plaintiffs' counsel, whom the Non-Settling Defendants chose not to seek to depose. See Del Sesto depo. at 63:25-64:9 ("I was leaving the -- I guess the detail of the negotiations to my counsel, and then my counsel would come back to me and we would talk about those discussions. And then so the discussion -- I was not involved in the back and forth other than to review changes and give my opinion on certain changes on what I might be willing to agree to and what I would not be willing to agree to. And those discussions were with my counsel exclusively.").

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[95] The existence of such meetings is reflected in deposition testimony as well as e-mails and other documents produced in discovery, which Plaintiffs will not burden the record by producing herewith.

[96] See, e.g., Land depo. at 95:22-96:8 ("Q. Well, let's start with paragraph 28. A. Okay. I think I already testified to this paragraph. Q. Would this paragraph be one that you would have viewed as subject of contentious discussions? A. There were certainly discussions regarding this paragraph. It's a bit unusual to admit to liability, and so I believe we did have some debate over this paragraph and what we were willing to do and what we weren't willing to do. Q. And what do you recall about that? A. I recall it ended up in what we have in the settlement agreement."); Land depo. at 102:25-103:12 ("Q. And Father Reilly is not included in the proposed release, correct? A. Father Reilly is excluded from the proposed release. Q. And who insisted on that as part of the settlement? A. The Receiver insisted that Father Reilly be excluded from the release. Q. Okay. Was the proposed exclusion of Father Reilly a matter which generated contentious discussions between the Oldcos and the Receiver and his counsel? A. We certainly had discussions with the Receiver and the Receiver's counsel on that specific issue. I can tell you that -- I can testify that the Receiver insisted -- Receiver's counsel insisted on that.").

[97] See, e.g., Del Sesto depo. at 82:23-83:7 ("Q. How would you characterize the tenor of the negotiations on the substantive terms of the settlement that took place between July 9 and August 30? A. I think I already testified that there was -- and I -- at points I'm being kind by calling it tense or frustrating. I can tell you that I had – between October of 2017 and August, I can tell you that Attorney Land called me many times asking me to ask my counsel to back off a little bit. Not be so aggressive.").

d. The timing of the Settlement is not unlawful, dishonest, wrongful, or tortious

The Non-Settling Defendants speculate that the timing the settlement shortly after Plaintiffs' Complaint was filed suggests that the Heritage Hospitals were already prepared to pay their assets into the Plan, but that WSL preferred that the settlement take place after suit was brought, so that WSL could be due a higher attorneys' fee under the Retainer Agreement, which provided for a 10% fee for pre-litigation settlements, and a 23.33% fee for settlements after litigation was commenced. The Diocesan Defendants even perniciously speculate, on the basis of nothing, that Plaintiffs' counsel breached their fiduciary duties to the individual named Plaintiffs in order to accomplish this scheme.[98]

There are (at least) three problems with this argument.

First, that scenario is fabricated out of whole cloth. As the Receiver stated in his Declaration:

> In June of 2018 I instructed WSL to file suit on my behalf, and granted permission for them to also bring the case as a class action. At the time I instructed WSL to file suit, I was well aware of WSL's right to a higher contingent fee if cases were settled after commencement of suit rather than before. By that time I believed, and I continue to believe today, that there would have been no meaningful settlement discussions until after suit had been brought.

Dkt #144 (Del Sesto Declaration) ¶ 16. Plaintiffs' counsel was not entitled to disregard this client instruction even if (*arguendo*) WSL disagreed (which it did not).

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[98] See Dkt #146 (Diocesan Defendants' Memo.) at 9 ("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.").

Second, in WSL's memorandum in support of its fee application in connection with Settlement A, WSL discusses in detail why the suggestion that the Heritage Hospitals would have paid their assets to the plan without litigation not only is baseless conjecture, but, in fact, is contradicted by the Heritage Hospital's history of dealings with the Plan and Plaintiffs' allegations in the First Amended Complaint regarding transfers of assets to defraud, hinder, and delay the Plan participants. WSL also addresses the Non-Settling Defendants' obvious motive for making such false claims, to undermine WSL's fee application and disincentivize WSL from vigorously pursuing Plaintiffs' claims against them. Moreover, as previously discussed, these allegations are intended to set in motion the process of disqualifying Plaintiffs' Counsel and the Receiver, in order to cripple or even kill this lawsuit.

Third, such hypothetical conduct would be addressed by the Court in connection with the fee application, and, in any event, would not prejudice the Non-Settling Defendants. The Non-Settling Defendants certainly had no right to expect that Plaintiffs and the Settling Defendants would reach a settlement sooner.

4. Labelling the settlement collusive based on lawful advantages Plaintiffs' Counsel secured for their clients would be contrary to public policy and have a chilling effect on the adequacy of representation received by settlement classes in class actions

The Court may consider the public policy consequences of disapproving a settlement because class counsel was unusually effective or drove an unusually hard bargain. See Sharnese v. California, 547 Fed. App'x. 820, 824 (9th Cir. 2013) ("[C]ourts must.be sensitive to the dangers of chilling vigorous advocacy.") (citation omitted) (considering effect of imposition of Rule 11 sanctions on class counsel); In re Initial

Public Offering Securities Litigation, 671 F. Supp. 2d 467, 513-514 (S.D.N.Y. 2009) ("[F]orcing this case to go to trial will not benefit anyone—not plaintiffs' counsel, not the defendants, not this Court, and certainly not class members who have been waiting nearly a decade for some recovery and resolution of this litigation. Indeed, disapproving this settlement would have a significant chilling effect on future class actions—a bad result at a time when serious questions have been raised over the conduct of many banks during the recent financial crisis.").

One of the core criteria for approval of a class settlement is whether "the class representatives and class counsel have adequately represented the class". Fed. R. Civ. P. 23(e)(2)(A). Such adequacy of representation, by its nature, includes whether "[c]lass counsel had vigorously advocated" on behalf of the class. Williams v. Rohm & Haas Pension Plan, 658 F.3d 629, 635 (7th Cir. 2011). Indeed, courts' scrutiny of class action "reverse-auctions," where defendants engage in settlement negotiations with multiple potential class representatives in order to have them bid down the settlement value to which the defendants ultimately agree, is rooted in the obvious importance of maximizing class counsel's zeal in advocating for the interests of the class. See, e.g., Ryan Kathleen Roth, Mass Tort Malignancy: In the Search for A Cure, Courts Should Continue to Certify Mandatory, Settlement Only Class Actions, 79 B.U. L. Rev. 577, 609 (1999) ("Ideally, the class's counsel acts as the zealous advocate who tirelessly champions the interests of thousands, if not millions, of clients.").

The Non-Settling Defendants improperly turn that public policy on its head. Instead of maximizing the financial benefit to the Receiver and the class, they argue, Plaintiffs' counsel should have left more money on the table *for the Non-Settling*

Defendants. Driving the hardest bargain for the Receiver and the Plan, the Non-Settling Defendants contend, is somehow unusual, unseemly, or inherently improper. Their contention makes a mockery of the fiduciary duties attorneys owe to their own clients (not to their adversaries) to do everything within the law and within the ethics rules to obtain the best outcome for their clients.

D. PBGC is not a necessary party, especially at the partial-settlement approval stage of these proceedings

Both the Prospect Defendants and the Diocesan Defendants have contended PBGC is a necessary party and must be joined prior to the approval of this settlement.

PBGC is not a necessary party, for the reasons addressed at length in Plaintiffs' prior memoranda. See Dkt #100 (Plaintiffs' Omnibus Memorandum in Support of Their Objection to Defendants' Motions to Dismiss) at 99-123, 125-45. PBGC does not meet the Fed. R. Civ. P. 19(a) standard for compulsory joinder, because PBGC does not claim an interest in the action, and complete relief can be accorded among the existing parties in PBGC's absence. PBGC also cannot even be joined as a Defendant until a claimant has been "adversely affected by any action of [PBGC]," 29 U.S.C. § 1303(h), and PBGC has not yet taken any action with respect to the Plan.

As previously discussed, PBGC is entirely aware of this litigation, including all the settlement-related filings, and has informed the Receiver that he is responsible for this litigation unless and until PBGC steps in and terminates the Plan. See Dkt #127-4 (May 15, 2019 letter from PBGC Deputy General Counsel Charles L. Finke to the Receiver).[99] There is no reason to delay either of the partial settlements while awaiting a PBGC

[99] Mr. Finke's letter was in response to the Receiver's letter to him of May 14, 2019. See Dkt #131-1.

intervention that may never arrive and which would not materially affect the claims being settled against the settling Defendants. Moreover, further delay may substantially prejudice the Plan and the Settlement Class by subjecting them to a host of unknowable risks (not the least of which is market risk affecting the Heritage Hospitals' investments) potentially affecting the Settling Defendants' ability to make good on the settlement, and depriving the Plan of the time value of the settlement funds.

E. The Prospect Entities' reference to the I.R.C. § 4971 excise tax is a red herring

Prospect says the Receiver should "scuttle the pending settlement, and with it the many releases that have been promised to each of the Settling Defendants and their current and former directors and officers, and simply demand that they jointly and severally honor their contribution obligations to the Plan for the plan years ending June 30, 2018 and June 30, 2019."[100] In other words, the Receiver should walk away from a binding settlement and an immediate infusion of millions of dollars and instead, simply demand that the Settling Defendants make contributions to fund the Plan (as Plaintiffs have been doing all along). Prospect says Receiver would have a great deal of leverage, by reporting the "settling defendants" to the IRS, who would impose debilitating excise taxes on them if they failed to comply.[101]

There are several major problems with this argument.

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[100] Dkt #138 at 5. Although this argument was framed in opposition to Settlement B, it applies with equally nonexistent force to Settlement A.

[101] Dkt #138 at 5.

First, the Receiver could not "scuttle the settlement" even if he wanted to. The Settlement Agreement is just as binding on him (subject to Court approval) as it is on the Settling Defendants.

Second, even if the Receiver could walk away from the settlement, the Receiver prefers that bird in the hand to any other scenario which is inevitably speculative and doomed to recover less than is being given now.[102]

Third, even if the excise tax were imposed in this case, that tax (like any other tax) is assessed and collected by the government. It does not go into the Plan; rather, it goes into the U.S. Treasury. Therefore, Prospect's assertion that the excise tax would somehow benefit the Receiver and the Plan's participants is just plain wrong.

F. The Receiver's ERISA election did not retroactively strip him of authority to enter into settlements

Prospect also argues that the Election stripped the Receiver of authority to enter into the settlement. But as noted, the same letter from PBGC that Prospect quotes from makes clear that the Plan Administrator continues to be responsible for collecting amounts due to the Plan at all times prior to its termination.[103] The duty is to maximize the Plan's recovery, not to maximize the size of an uncollectible judgment. The Receiver is confident that his decision to enter into the settlement, including providing

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[102] See St. Joseph Health Services of Rhode Island, Inc. v. St. Josephs Health Services of Rhode Island Retirement Plan, No. PC-2017-3856, 2018 WL 5792151, at *12 (R.I. Super. Oct. 29, 2018) ("Hence, even assuming this Court was to conclude the Receiver had a 100% chance of prevailing in his claims against the Settling Defendants, in all likelihood, the Receiver could not net a higher sum by proceeding to judgment at trial.").

[103] See Dkt #127-4 (May 15, 2019 letter from PBGC Deputy General Counsel Charles L. Finke to the Receiver).

the releases, was a prudent exercise of his discretion, and will result in the best recovery possible from the Settling Defendants.

In any event, any questions concerning the Receiver's authority go to the merits of Plaintiffs' claims, not the Court's jurisdiction to approve the settlement. Indeed, if (*arguendo*) there were a significant issue concerning the Receiver's authority, that would be further reason to approve the settlement and insure the benefit to the settlement class before the Receiver's authority is ripe for determination.

G. There is no need to reach the issues of whether Rhode Island's Settlement Statute is constitutional or preempted

Both the Diocesan Defendants and the Prospect Defendants contend that R.I. Gen. Laws § 23-17.14-35[104] is unconstitutional and preempted by ERISA. Accordingly, both sets of Non-Settling Defendants contend the Court should refrain from making a finding under that statute that the settlement is "a good-faith settlement." This contention is utterly illogical. If (*arguendo*) the statute is a legal nullity (which here need

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[104] R.I. Gen. Laws § 23-17.14-35 provides:

> The following provisions apply solely and exclusively to judicially approved good-faith settlements of claims relating to the St. Joseph Health Services of Rhode Island retirement plan, also sometimes known as the St. Joseph Health Services of Rhode Island pension plan:
>
> (1) A release by a claimant of one joint tortfeasor, whether before or after judgment, does not discharge the other joint tortfeasors unless the release so provides, but the release shall reduce the claim against the other joint tortfeasors in the amount of the consideration paid for the release.
>
> (2) A release by a claimant of one joint tortfeasor relieves them from liability to make contribution to another joint tortfeasor.
>
> (3) For purposes of this section, 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.

R.I. Gen. Laws § 23-17.14-35.

not be determined), then the non-Settling Defendants can suffer no cognizable injury from any findings relating to it.

These Defendants' contentions are also substantively incorrect for the reasons discussed in Plaintiffs' prior memoranda in connection with the other pending settlement. See Dkt #82 (Plaintiffs' Reply to the Diocesan Defendants) at 2-27; Dkt #83 (Plaintiffs' Reply to the Prospect Defendants) at 49-54. In any event, approval of the settlement does not require these substantive issues of constitutionality or preemption to be decided at this time. The Court is simply being asked to make a factual finding of good faith.

In the Memorandum and Order preliminarily approving this settlement, the Court acknowledged these objections and appropriately declined to rule on them at that time. See Dkt #124 at 13-14. The Court should do so again in connection with final approval. Settlement A only requires that the Court make the factual finding of good faith referred to under the Settlement Statute, not that the Court adjudicate the legal issues of whether the Settlement Statute is constitutional or preempted by ERISA. Those latter issues, therefore, need not and should not be addressed in connection with Settlement A. "A settlement court reviewing the fairness of a compromise does not 'decide the merits of the case or resolve unsettled legal questions.'" In re Lupron Mktg. & Sales Practices Litig., 228 F.R.D. 75, 97 (D. Mass. 2005) (quoting Carson v. Am. Brands, Inc., 450 U.S. 79, 88 n.14 (1981)). See Fraley v. Batman, 638 F. App'x 594, 597 (9th Cir. 2016) ("When approving a settlement, a district court should avoid reaching the merits of the underlying dispute. As a result, a district court abuses its discretion in approving a

settlement only if the agreement sanctions 'clearly illegal' conduct.") (quoting Robertson v. Nat'l Basketball Ass'n, 556 F.2d 682, 686 (2d Cir. 1977)).

IV. The Settlement meets the standards for final approval

A. The settlement class should receive final certification

Plaintiffs previously set forth the standard for class certification in connection with the Joint Motion for Settlement Class Certification, Appointment of Class Counsel, and Preliminary Settlement Approval. See Dkt #63-1 at 54-66. The Court has granted preliminary certification of the class for settlement purposes only, concluding that the four requirements of Fed. R. Civ. P. 23(a) are met and at least one of the three categories in Fed. R. Civ. P. 23(b) is met. See Dkt #124 (Memorandum and Order) at 9-12.

Specifically, the Court found that joinder of all class members (i.e. all 2,729 Plan participants) as plaintiffs is impracticable; that Plaintiffs' claims present issues of law and fact common to the class; that the Named Plaintiffs' claims arise from the same set of events and allegations as those of the other proposed class members; that the Named Plaintiffs' interests are aligned with the class members' interests; and that Plaintiffs' claims satisfy the criteria for certification as a "limited-fund" class action under Fed. R. Civ. P. 23(b)(1)(B), especially inasmuch as they include ERISA claims but also with respect to Plaintiffs' state law claims "even if Plan was not governed by ERISA during the relevant period." See Dkt #124 (Memorandum and Order) at 9-12. The Court also concluded that Plaintiffs' counsel are highly qualified and capable of carrying out their duties as class counsel. See id. at 12.

None of the class members has objected to certification of the class. Likewise, none of the Non-Settling Defendants' objections relate to "satisfy[ing] the Rule 23 criteria." Dkt #124 (Memorandum and Order) at 5 n.6. Accordingly the Court should grant final certification of the class for settlement purposes only.

B. The Rule 23(e) standard for final class settlement approval is met

Since its 2018 amendment, Fed. R. Civ. P. 23(e)(2) codifies four criteria to be weighed by the Court in determining whether a class settlement should receive final approval as "fair, reasonable, and adequate." Rule 23(e)(2) states:

> (2) Approval of the Proposal. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:
>
> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> (i) the costs, risks, and delay of trial and appeal;
>
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>
> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

Here, all four criteria weigh in favor of approval, and none weigh against.

1. The class representatives and class counsel have adequately represented the class

Whether "the class representatives and class counsel have adequately represented the class" is "redundant of the requirements of Rule 23(a)(4) and Rule 23(g), respectively." Newberg on Class Actions § 13:49 (5th ed.). The Court has already made findings in connection with the preliminary approval of the settlement that these requirements are satisfied. See Dkt #124 (Memorandum and Order) at 9-11 (applying Rule 23(a)(1)-(4)); id. at 11 ("The Court thus concludes that the proposed representatives will fairly and adequately protect the interests of the class."); id. at 12 ("Lastly, the Court recognizes that the proposed class counsel are highly qualified and able to carry out their corresponding duties. Among other things, counsel are experienced in complex litigation, appear to have engaged in significant pre-suit investigation, and presented the proposed settlement to the Rhode Island Superior Court in related Receivership proceedings to obtain that court's required approval.").

No class members have objected. In addition, nearly 1,000 class members have expressed enthusiastic support for the settlement, through their counsel.[105] This overwhelming support demonstrates that the class representatives and class counsel have adequately represented the class.

2. The proposal was negotiated at arm's length

The second Rule 23(e)(2) factor is whether "the proposal was negotiated at arm's length." Fed. R. Civ. P. 23(e)(2)(B). By definition, a settlement that was negotiated at

[105] See Dkt #141 (Declaration of Christopher Callaci dated August 12, 2019); Dkt #142 (Affidavit of Arlene Violet dated August 9, 2019); Dkt #143 (Declaration of Jeffrey Kasle dated August 13, 2019).

arm's length is not collusive. See Saccoccio v. JP Morgan Chase Bank, N.A., 297 F.R.D. 683, 692 (S.D. Fla. 2014) ("Where the parties have negotiated at arm's length, the Court should find that the settlement is not the product of collusion."); Cohen v. J.P. Morgan Chase & Co., 262 F.R.D. 153, 157 (E.D.N.Y. 2009) ("Preliminary approval of a proposed settlement is appropriate where it is the result of serious, informed, non-collusive ("arm's length") negotiations. . . ."); In re Cardizem CD Antitrust Litigation, 218 F.R.D. 508, 522 (E.D. Mich. 2003) ("Relevant factors considered by the Court include…whether the settlement is the product of arm's length negotiations as opposed to collusive bargaining. . . .") (citations omitted). See In re Domestic Air Transp. Antitrust Litig., 144 F.R.D. 421, 424 (N.D. Ga. 1992) ("Objectors have neither alleged nor submitted evidence of collusion in the settlement negotiating process and all indications to the Court thus far indicate that the settlement process was an arm's length dealing between all parties.").[106]

Although the Non-Settling Defendants (except Defendant The Angell Pension Group, Inc.) have alleged that Settlement A is collusive, they have failed to substantiate those allegations with valid evidence despite being granted an extraordinary opportunity to conduct discovery. See *supra* at 25-41.

3. The relief provided for the class is adequate

The third Rule 23(e)(2) criterion is whether:

(C) the relief provided for the class is adequate, taking into account:

[106] It should be noted that criteria of arm's length (non-collusive) negotiation overlaps substantially (if not completely) with the criteria for settlement approval under the Settlement Statute. See R.I. Gen. Laws § 23-17.14-35(3) ("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").

> (i) the costs, risks, and delay of trial and appeal;
>
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>
> (iv) any agreement required to be identified under Rule 23(e)(3);

Fed. R. Civ. P. 23(c)(2)(C).

Two of these sub-criteria can be quickly disposed of: there is no agreement other than the Settlement Agreement itself required to be identified under Rule 23(e)(3), and the deposit of net settlement proceeds into the Plan itself for the benefit of all Plan beneficiaries is an obviously effective method of distributing relief to the class, requiring no additional method of processing class members' claims.

The third sub-criterion, i.e. the terms of the proposed award of attorneys' fees, Fed. R. Civ. P. 23(e)(2)(C)(iii), is discussed at length in Plaintiffs' Counsel's separate fee application. The terms of Plaintiffs' counsel's engagement were previously approved by the Superior Court and are substantively fair.

The fourth sub-criterion entails examination of "the costs, risks, and delay of trial and appeal". Fed. R. Civ. P. 23(e)(2)(C)(i). The issues concerning costs, risks, and delay are discussed in the Settling Parties' prior Memorandum in Support of Joint Motion for Settlement Class Certification, Appointment of Class Counsel, and Preliminary Settlement Approval. See Dkt #63-1 at 31-32. As Judge Stern found:

> The PSA [Proposed Settlement Agreement] presents the rare settlement agreement where the terms are so favorable to the Plan's estate that the Receiver is unlikely to recover a higher sum by proceeding to, and prevailing at, trial. Pursuant to the PSA, the Settling Defendants have agreed to pay to the Receiver 95% of the Settling Defendants' liquid

> assets in exchange for a release. Further, the PSA obligates the Settling Defendants to seek judicial liquidation with the hope that the remaining, non-liquid assets can be distributed in the Plan's favor. Hence, even assuming this Court was to conclude the Receiver had a 100% chance of prevailing in his claims against the Settling Defendants, in all likelihood, the Receiver could not net a higher sum by proceeding to judgment at trial. The probability factor weighs in favor of approving the PSA.

St. Joseph Health Services of Rhode Island, Inc. v. St. Josephs Health Services of Rhode Island Retirement Plan, No. PC-2017-3856, 2018 WL 5792151, at *12 (R.I. Super. Oct. 29, 2018).

Moreover, the effect of the Settlement Statute on the Prospect Entities' rights of contribution does not give them the requisite Article III standing to object to the settlements.

"The burden is on the party asserting standing to establish it." In re Kristan, No. BAP EP 08-041, 2008 WL 8664765, at *3 (B.A.P. 1st Cir. Dec. 15, 2008). Article III standing requires three things. First, it requires that the party claiming standing show an "injury in fact," which means the "invasion of a legally protected interest." Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville, Fla., 508 U.S. 656, 663 (1993). Moreover, that "invasion" must be "'a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.'" Id. (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)). Second, the party claiming standing must show "a causal relationship between the injury and the challenged conduct…" Id. Third, the party claiming standing must demonstrate "a likelihood that the injury will be redressed by a favorable decision, i.e., that "the 'prospect of obtaining relief from the injury as a result of a favorable ruling' is not 'too speculative.'" Id.

The only circumstance under which a non-settling defendant may have standing to object to a settlement is if he or she can meet "the burden of demonstrating that [he or] she will suffer 'plain legal prejudice' through effectuation of the settlement," and that standard is "narrowly construed and occurs only when a partial settlement deprives a non-settling party of a substantive right." 4 Newberg on Class Actions § 13:24 (5th ed.) (citations omitted).

By definition, the Court's determination of facts (i.e., whether Settlement A was made in good faith) in connection with approving Settlement A does not constitute an "invasion of a legally protected interest" of the Non-Settling Defendants. 4 Newberg on Class Actions § 14:12 (5th ed.) ("Plain legal prejudice requires a showing that the settlement would disadvantage the [non-settling defendant] legally, **not just factually** or tactically, in future litigation.") (citations omitted and emphasis supplied).

The exception to the rule that Non-Settling Defendants lack standing to object to a settlement is commonly invoked to entitle Non-Settling Defendants to object to settlements which are conditioned upon the court issuing bar orders, which deprive Non-Settling Defendants to rights of contribution that would otherwise exist under prevailing law.[107] However, *Settlement A is not conditioned upon the Court's issuing a bar order*. The Court is not even being asked to determine the legal effect of the settlement on the Non-Settling Defendants' rights of contribution (which, incidentally, also would not constitute "plain legal prejudice" to the Non-Settling Defendants or

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[107] See, e.g., In re Rite Aid Corp. Sec. Litig., 146 F. Supp. 2d 706, 716 n.12 (E.D. Pa. 2001) (noting the consensus that a non-settling defendant has "standing to object to a partial settlement which purports to strip it of a legal claim or cause of action, an action for indemnity or contribution for example, or to invalidate its contract rights" but doubting that such non-settling defendant had standing "to object to the settlement as having been obtained by unfair conduct" or "to object to the assignment of claims as champertous".).

deprive them of any "substantive right"). Instead, the effect of Settlement A on the Non-Settling Defendants' rights of contribution will be determined at a later date under the prevailing law—the Settlement Statute if it is constitutional, or Rhode Island's version of the Uniform Contribution Among Tortfeasors Act if it is not. Again, by definition, the determination of rights under the prevailing law does not constitute "plain legal prejudice" or deprive them of any "substantive right." The Non-Settling Defendants will be free to argue that their rights of contribution are preserved, and there is no bar order to prevent such claims.

4. The proposal treats class members equitably relative to each other

The final Rule 23(e)(2) factor examines whether "the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D). Here, all class members are being treated equally: as previously[108] noted, the net proceeds are being deposited into the Plan for distribution to Plan Beneficiaries under the terms of the Plan. No incentive payments are to be paid to any of the class representatives.[109]

C. Other factors not enumerated in Fed. R. Civ. P. 23(e) are also satisfied

The advisory committee notes to the 2018 amendment to Fed. R. Civ. P. 23(e)(2) "explain that the enumerated, specific factors added to Rule 23(e)(2) are not intended to 'displace' any factors currently used by the courts, but instead aim to focus the court

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[108] See Dkt #63-1 (Plaintiffs' Memorandum in Support of Joint Motion for Settlement Class Certification) at 1-2.

[109] Cf. Vassalle v. Midland Funding LLC, 708 F.3d 747, 755 (6th Cir. 2013) ("[W]e have also looked to whether the settlement 'gives preferential treatment to the named plaintiffs while only perfunctory relief to unnamed class members.' We have held that such inequities in treatment make a settlement unfair.").

and attorneys on 'the core concerns of procedure and substance that should guide the decision whether to approve the proposal.'" In re Extreme Networks, Inc. Sec. Litig., No. 15-CV-04883-BLF, 2019 WL 3290770, at *6 (N.D. Cal. July 22, 2019).

Since "[t]here is no single test in the First Circuit for determining the fairness, reasonableness and adequacy of a proposed class action settlement," district courts in this circuit have discretion to consider additional factors.[110] In re Tyco Int'l, Ltd. Multidistrict Litig., 535 F. Supp. 2d 249, 259 (D.N.H. 2007). Such factors have included:

> (1) risk, complexity, expense and duration of the case; (2) comparison of the proposed settlement with the likely result of continued litigation; (3) reaction of the class to the settlement; (4) stage of the litigation and the amount of discovery completed; and (5) quality of counsel and conduct during litigation and settlement negotiations.

In re Tyco Int'l, Ltd. Multidistrict Litig., 535 F. Supp. 2d at 259-60.

1. The risk, complexity, expense and duration of the case

As demonstrated by the breadth and detail of the First Amended Complaint and the scope of the motion practice on the motions to dismiss, encompassing numerous issues of first impression not only in the First Circuit but throughout the country, this is a very complex case. While this case has been pending in the U.S. District Court for approximately fourteen months, it is the outgrowth of a Superior Court action that has been pending for over two years, and the 2015 *Cy Pres* Proceeding that has been pending for over four years. The risks of continued litigation against the Heritage

[110] "The First Circuit has not established a fixed test for evaluating the fairness of a settlement" in connection with a motion for final approval. Gulbankian v. MW Mfrs., Inc., No. CIV.A. 10-10392-RWZ, 2014 WL 7384075, at *1 (D. Mass. Dec. 29, 2014) (citing New England Carpenters Health Benefits Fund v. First Databank, Inc., 602 F. Supp. 2d 277, 280 (D. Mass. 2009)). "There is no single litmus test for a settlement's approval; it is instead examined as a gestalt to determine its reasonableness in light of the uncertainty of litigation." Id. (citing Bussie v. Allmerica Fin. Corp., 50 F. Supp. 2d 59, 72 (D. Mass. 1999)). Nor has the First Circuit construed the 2018 amendment to Fed. R. Civ. P. 23(e)(2).

Hospitals are potentially substantial, not least because such litigation would deplete assets of the Heritage Hospitals that Plaintiffs would presently receive under Settlement A.

2. Comparison of the proposed settlement with the likely result of continued litigation

Through this settlement, Plaintiffs are obtaining substantially all of the Heritage Hospitals' assets in its possession now, and will continue to pursue their claims against the Heritage Hospitals' remaining assets in the subsequent liquidation proceedings.[111] It is a virtual certainty that continue litigation against the Heritage Hospitals would squander hundreds of thousands and possibly millions of dollars that would be transferred to Plaintiffs by this settlement, while resulting in no additional dollars' becoming available.

3. The reaction of class members to the proposed settlement

"If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement." Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 118 (2d Cir. 2005). Here, no class members have objected. In contrast, nearly 1,000 class members have expressed their enthusiastic support through the sworn declarations of their counsel. See Dkt #141 (Declaration of Christopher Callaci dated August 12, 2019); Dkt #142 (Affidavit of Arlene Violet dated August 9, 2019); Dkt #143 (Declaration of Jeffrey Kasle dated August 13, 2019). Thus this factor also weighs in favor of final approval.

[111] See Dkt #82 (Plaintiffs' Reply to the Diocesan Defendants' Opposition to the Motions for Settlement Class Certification) at 36 (Settlement A "not only shears the Settling Defendants of all their presently available assets but ships the Settling Defendants to the knackery for liquidation.").

4. The stage of the litigation and the amount of discovery completed

In preliminarily approving the settlement, the Court noted that class counsel "appear to have engaged in significant pre-suit investigation, and presented the proposed settlement [i.e. Settlement A] to the Rhode Island Superior Court in related Receivership proceedings to obtain that court's required approval." Dkt #124 (Memorandum and Order) at 12. Thus this factor also weighs in favor of final approval.

5. The quality of counsel and conduct during litigation and settlement negotiations

"The trial court is entitled to rely upon the judgment of experienced counsel for the parties." Jones v. Singing River Health Servs. Found., 865 F.3d 285, 300 (5th Cir. 2017). "The quality and experience of the lawyering is thus something of a proxy for both 'trustworthiness' and 'reasonableness'—that is, if experienced counsel reached this settlement, the court may trust that the terms are reasonable. . . ." Id.

The Court's order preliminarily approving the settlement included findings that class counsel "are highly qualified" and "experienced in complex litigation". Dkt #124 (Memorandum and Order) at 12. In addition, the Prospect Entities in their opposition memorandum have vouched for the experience of the Heritage Hospitals' counsel Richard Land, whom they call "an experienced insolvency attorney that regularly serves as a court-appointed Receiver, special master, and examiner." Dkt #147 (Prospect's memorandum) at 11. Accordingly this factor also weighs in favor of final approval.

V. Final approval should include a finding of "good faith" within the meaning of R.I. Gen. Laws § 23-17.14-35

As discussed *supra*, the Settlement satisfies the Fed. R. Civ. P. 23(e)(2)(B) factor that "the proposal was negotiated at arm's length." Accordingly, it likewise does not "exhibit collusion, fraud, dishonesty, or other wrongful or tortious conduct intended to prejudice the non-settling tortfeasor(s)". R.I. Gen. Laws § 23-17.14-35(3). Thus, in reliance on the finding that "the proposal was negotiated at arm's length," the Court should make an express finding that the Settlement is a "good faith" settlement under that Rhode Island statute.

There certainly is nothing inappropriate with the Court making the finding under R.I. Gen. Laws § 23-17.14-35 in connection with final approval of the class action settlement. Indeed, courts giving final approval to class action settlements regularly and appropriately include findings of "good faith" pursuant to state statutes that bar or limit contribution claims following judicial approval of good faith settlements. For example, the approval of the Station Nightclub Fire class action settlements by this Court (Lagueux, S.D.J.) expressly included such findings:

> Based upon the representations made by the Movants in their supporting memoranda and also in the affidavits filed in support of each Motion, I find that each settlement is a non-collusive agreement which has been negotiated, bargained for, and agreed to at arm's length and in good faith. Thus, each settlement satisfies the standard for "a judicially approved good-faith settlement" within the meaning of R.I. Gen. Laws §§ 10-6-7, 10-6-8.

Gray v. Derderian, No. 03-483L, 2009 WL 1575189, at *18 (D.R.I. June 4, 2009) (Lagueux, S.D.J., accepting Report and Recommendation of Martin, M.J.). Federal courts outside Rhode Island approving class action settlements also routinely include

findings of "good faith" with specific reference to state contribution-among-joint-tortfeasors statutes. See, e.g.:

- Vincent v. Reser, No. C 11-03572 CRB, 2013 WL 621865, at *6-7 (N.D. Cal. Feb. 19, 2013) (approving class action settlement and including a "good-faith" finding under California Code of Civil Procedure §§ 877 and 877.6, rejecting Non-Settling Defendants' "mere speculation on the Defendants' good faith without providing any factual support to indicate a lack thereof");

- In re Zurn Pex Plumbing Prod. Liab. Litig., No. 08-MDL-1958 ADM/AJB, 2013 WL 716088, at *11 (D. Minn. Feb. 27, 2013) (granting final approval to class action settlement, including finding that "in California, Hawaii, and states that have equivalent good faith settlement statues, the provisions of the Settlement Agreement constitute a good faith settlement and will be so construed under the good faith settlement statutes in those forums");

- Pichler v. UNITE, 775 F. Supp. 2d 754, 763 (E.D. Pa. 2011) ("The provisions of the Settlement Agreement and any claim thereunder constitute a good faith Settlement under California Code Civil Procedure §§ 877 and 877.6 and comparable laws in other states. . . .") (granting final class action settlement approval);

- In re Metro. Sec. Litig., No. CV-04-0025-FVS, 2010 WL 11474099, at *3 (E.D. Wash. Sept. 22, 2010) (granting final approval to class action settlement as "a reasonable and good faith settlement of all claims" for purposes of "Wash. Rev. Code § 4.22.060, Cal. Civ. Proc. §§ 877 and 877.6 and any comparable statute or common law of any other state"); In re Washington Pub. Power Supply Sys. Sec. Litig., 720 F. Supp. 1379, 1400 (D. Ariz. 1989) (granting final approval to class action settlement as a "good faith" settlement that was "reasonable under the circumstances and within the meaning of R.C.W. 4.22.060");

- In re Lawnmower Engine Horsepower Mktg. & Sales Practices Litig., 733 F. Supp. 2d 997, 1017 (E.D. Wis. 2010) (granting final approval to class action settlement and overruling objection to inclusion of language: "The Court finds that this Settlement was entered into in good faith based upon arms-length negotiation between the Settling Parties and their Counsel. The Settlement Agreement shall thus serve as a bar to all claims for contribution and indemnity as among or against the Releasing Parties and the Released Parties under the Illinois Joint Tortfeasor Contribution Act,

7740 ILCS 100/2, and other applicable joint tortfeasor statute, or common law principles, of other states.");[112]

- Gates v. Rohm And Haas Co., No. CIV.A.06-1743, 2008 WL 4078456, at *9 (E.D. Pa. Aug. 22, 2008) ("[T]he Court concludes that the Settlement was reached in good faith within the meaning of 740 ILCS 100/2 [the Illinois Contribution Act]. . . .") (class action settlement of claims under CERCLA and Illinois law).

Moreover, we have not found (and the Non-Settling Defendants fail to cite) any precedent questioning the right or propriety of the Court making such a finding in connection with approval of a class action settlement. Indeed, the Prospect Entities contend that it is appropriate that the Court make this determination in connection with its ruling on settlement approval. See Dkt #147 (Prospect's Objection) at 8 ("By its plain language, therefore, the Special Act broadens the Court's focus on collusion . . . .").

As also discussed *supra*, final approval should be without prejudice to the Non-Settling Defendants' contentions that R.I. Gen. Laws § 23-17.14-35 is preempted or unconstitutional. See Duhaime v. John Hancock Mut. Life Ins. Co., 183 F.3d 1, 4 (1st Cir. 1999) ("Rule 23(e) only requires court approval of the dismissal or compromise of 'the class action' itself; it in no way suggests that negotiated resolutions of disputes peripheral to the class action need be approved."). While the Settlement is conditioned on receiving judicial approval as a good-faith settlement, the Settlement is not conditioned in any way on the efficacy or enforceability (*vel non*) of that Rhode Island statute.

[112] This is an *a fortiori* case, inasmuch as the settling parties here are not asking the Court to adjudicate whether this settlement serves as a contribution bar (as stated, it is neither a contribution nor indemnity bar) but merely to make the finding that it was a "good faith" settlement.

CONCLUSION

The settlement class should receive final certification and the settlement should receive final approval.

Respectfully submitted,

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By their Attorney,

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Dated: September 3, 2019

CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the within document was electronically filed on the 15th day of August, 2019 using the Electronic Case Filing system of the United States District Court and is available for viewing and downloading from the Electronic Case Filing system. The Electronic Case Filing system will automatically generate and send a Notice of Electronic Filing to the following Filing Users or registered users of record:

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Exhibit 1

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

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A. I don't recall. This is the letter that came out of it, so I suspect -- and knowing that this was not a settlement that was acceptable, I don't believe there was a significant conversation about specific terms that would be in a settlement agreement.
Q. You mentioned knowing the settlement wouldn't be acceptable. When did you learn that?
A. After the fact. I already testified to that. That this was rejected by the Receiver.
Q. No, no, I understand that. My question is did you, when you were writing this, based on your communication with Mr. DelSesto or his counsel, have any either inkling or idea as to how they would react to any of the particular terms you offered based on your conversations you had with them on June 29?
A. So I'm going to answer that a little indirectly. First off, I tend not to waste my time, so if I thought that I was going to be completely rejected and the reaction that I would get was what I would get, I would never have wasted my time drafting this. Secondly, I don't speculate on how Mr. Wistow is going to respond to things, or Mr. Sheehan or Mr. Ledsham or Mr. DelSesto. And their reaction was what it was. It was a rejection of this. So when I was drafting this, I wasn't wasting my time and I

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wasn't speculating about their reaction.
Q. But, would it be fair to say then, though, that based on your meeting you certainly thought this initial offer wouldn't be a waste of time, right?
A. I think I've said, I did not think this was a waste of time.
Q. So you were speculating that, right?
MR. SHEEHAN: Objection.
A. Speculating on whether it was a waste of --
MR. FINE: Objection.
Q. How did you know -- how did you come to the belief it would not be a waste of time?
A. I'm not sure I understand what you're asking me.
Q. Okay, so you came to the belief that sending this letter would not be a waste of time, correct?
A. No. I wrote this letter. I don't do things knowing them to be a waste of time. I don't know that I did an evaluation of whether preparing a letter would be a waste of my time. But I just know how I function.
Q. Okay.
MR. WISTOW: Custom and practice.
Q. Custom and practice.
A. I would hope other people don't waste their time too.
Q. Is that a dig?
A. No. Not at all. I don't know you well enough to have

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a dig.
Q. That's fine.
MR. SHEEHAN: I thought it was directed at me, frankly.
(Laughter)
THE WITNESS: That's possible.
Q. All right. Are we on Exhibit 10?
A. Yes.
MR. KESSIMIAN: Mark this as Exhibit 10. I don't have enough copies but.
(Exhibit No. 10 marked)
Q. Mr. Land, have you had a chance to review Exhibit 10?
A. I reviewed page one. If you want me to review the whole thing I can.
Q. Sure.
(Witness perusing document)
A. Okay.
Q. Do you recognize Exhibit 10?
A. Well, Exhibit 10 appears to be a letter that I -- an e-mail chain that -- involving myself, Sean Fontes from the Rhode Island Department of Labor and Training, my associate at the time Jared Sugerman, and it relates to the Roger Williams Hospital, what I'll characterize as the DLT escrow. The Workers' Comp escrow.
Q. Does the -- does your request contained in this exhibit

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have anything to do with the settlement discussions that you were having with the Receiver or his counsel?
A. Yes.
Q. How?
A. So this Roger Williams Hospital Workers' Comp reserve was a reserve set up, you know, when the hospitals were operating. It was to cover a period of time when the hospitals were self-insured, as I understood it. And the Department of Labor and Training required a reserve to be set up, and when I -- I don't know how much detail you want, but when I first learned of this years ago, we made arrangements to remove what was a bonding requirement to avoid the additional cost to bond. We put the funds in escrow with Citizens Bank and the Department of Labor and Training. In order to get the funds out of the escrow, we would have had to obtain the Department of Labor and Training's consent, which would be an evaluation of what Workers' Comp claims for that period -- the relevant period of time remaining. When we engaged in negotiations with the Receiver, one of the issues was seeking to free up those funds from the -- from the escrow, and this letter, this e-mail chain is in furtherance of that effort.
Q. Okay. See if I can -- at some point I believe you testified earlier that at some point while you were

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letter; is it not?
A. Yes.
Q. Okay. And that certainly is a settlement proposal that you made, correct?
A. It is.
Q. Okay. Is Exhibit 5 -- does Exhibit 5 relate to the content of that sentence I just read in your affidavit?
MR. FINE: Objection. You can answer.
Q. To be more precise -- okay, so the affidavit talks about the Heritage Hospitals expressing a willingness to discuss settlement, at the time complaint was filed the Heritage Hospitals were only prepared to initiate judicial liquidation of entities. That's what it says, right?
A. Mm-hmm.
Q. This document does, does it not, offer the judicial liquidation of the entities?
A. This document being my July 9 --
Q. Yes.
A. Yes.
Q. Okay. And I'm just wondering, is there any -- sitting here, do you recall any other document or offer that concerns that second sentence in paragraph 2 other than Exhibit 5?
A. I don't.

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Q. Okay. Now, the next paragraph, Rick, in the affidavit. It says:
"The Heritage Hospitals' initial proposal to the Receiver and his Special Counsel after the complaint was filed was rejected, and the Receiver asserted that the proposed offer provided the Plan with no benefit."
Do you see that?
A. Mm-hmm.
Q. All right. Do you recall whether that rejection of the offer was in writing or was it verbal?
A. That was verbal.
Q. Okay. Do you remember when that was?
A. Well, it was certainly shortly after that July 9 letter. I believe -- I believe it was at a meeting in Mr. Wistow's office, but I don't recall precisely the date.
Q. Do you believe it was in the month of July?
A. Oh, it was definitely the month of July.
Q. Not the month of August?
A. Well, that would not be the month of July.
Q. Okay. Would your -- do you bill your time for the -- did you bill your time for the work you did with respect to the settlement negotiations here?
A. Mm-hmm.
Q. I'm sorry, yes?

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A. Yes.
Q. Okay. So there would be records that could be used to refresh your recollection as to when these meetings took place even if they were verbal, correct?
A. More likely than not I would have tracked the time and the date and put those -- yeah, made that part of my billing.
Q. And did you review any of these records to prepare for your testimony here today?
A. No.
Q. So this meeting that took place in July, that you recall it took place in July, do you know who was there?
A. I know certainly myself and Mr. Fine, Mr. Wistow, Mr. Sheehan, and Mr. Ledsham were there.
Q. At the time you had this meeting, had --
A. I don't know if anybody else was there.
MR. WISTOW: Give me just one minute. Just one minute. It won't take any longer.
MR. HALPERIN: Off the record.
MR. KESSIMIAN: We'll take a break. That's okay.
(Off the record, short recess taken)
BY MR. KESSIMIAN:
Q. Where was that meeting?

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A. That was at Wistow, Sheehan & Loveley.
Q. And how long did this meeting last?
A. Again, I don't recall but it might have been an hour. I just don't recall.
Q. Okay. At the time you had this meeting, had you received a written response to any settlement offer that you had made?
A. I don't believe so, no.
Q. To the best of your memory, what was said at this meeting?
A. The one thing that stands out in my mind is Mr. Wistow telling me that he was insulted that I would send him that proposal.
Q. Did he say why?
A. Um, that's the one thing I can recall. I mean, it was a very, um -- it was a very -- emotional is not the right word because I don't view Mr. Wistow to be an emotional guy. Sorry. Animated.
MR. WISTOW: I am sentimental.
A. Sentimental but not emotional. It was a very animated response, and essentially the offer was entirely unacceptable.
Q. Okay. Sorry, do you recall any reason he gave you as to why it was unacceptable?
A. As set forth in my affidavit, I mean, I think that's a

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fair assessment. That his view was it didn't provide him with anything.
Q. Did you agree with him?
A. No, but...
Q. But that's what you recall he said?
A. Yes.
Q. Anything else?
A. I don't recall any more details of that meeting.
Q. Have I exhausted your memory as to the details of that meeting?
A. Yeah, sure.
Q. All right. Could I turn your attention to paragraph 4?
A. Still on the affidavit, right?
Q. Yes, sir.
A. Exhibit 11, paragraph 4.
Q. It says:
"Based upon the Church Plan status of the St. Joseph Health Services of Rhode Island Pension Plan (the Plan) and the governing Plan documents, SJHSRI did not believe that it had an obligation to make a contribution to the Plan, nor did SJHSRI have available assets to fund the Plan."
Do you see that?
A. I see that.
Q. I'm going to focus on the last part, "nor did SJHSRI

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have available assets to fund the Plan."
What did you mean by that?
A. The plan, even in a best case scenario, needed millions and millions of dollars. Best case scenario. SJHSRI doesn't have anywhere near those kinds of funds to satisfy the needs of the plan.
Q. That's what I wanted to get at.
So, it certainly wouldn't be true to say that at the time you signed this affidavit, that SJHSRI had no funds that could be available to fund the plan, right?
(Long pause)
Q. I'm drawing a distinction between --
A. Yeah, yeah, yeah.
Q. -- fully funding the plan and funding the plan at all.
A. Yeah, SJHS had and has funds, and subject to the satisfaction of other liabilities potentially would have had money to put into the plan.
Q. And subject to -- strike that.
Did you understand at any time before the receivership was filed that SJHSRI had an obligation to the plan?
A. My understanding was that as a church plan, that there wasn't a formal -- there was not a formal obligation to fund the plan.
Q. Okay. So -- all right. So, would you agree that --

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would you characterize the pension plan before the receivership was filed as a liability of SJHSRI?
MR. SHEEHAN: Objection.
A. So, I'm not an accountant, so if you're asking me an accounting question of whether it would be booked as a liability on a balance sheet, I can't answer that question. From a practical perspective, I believe the view of HSRI was after this satisfaction of any and all of its other liabilities, the remaining funds would be paid over to them, to the pension.
Q. Okay. And what did you base that understanding on?
A. That there would be no other liabilities to satisfy so it would be -- call it excess funds.
Q. But the -- do you understand -- is that understanding based at all in part -- let me strike that.
Is that understanding based at all on the Cy Pres petition or order?
A. Relative to SJHSRI, no.
Q. Is that because it's -- regardless of the Cy Pres order, SJHSRI had an obligation with respect to the pension plan?
MR. SHEEHAN: Objection. He already said there was no obligation.
A. My understanding was -- my understanding is under applicable law relating to church plans, that there was

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no formal obligation of SJHSRI to contribute to the plan. Whether that -- that would mean it's not a liability. But if there's no other liabilities to be satisfied and there's money left, my client, SJHSRI, would use those funds to contribute to the plan.
Q. That's what I'm getting at. Why would it do that?
A. Because there -- all the other liabilities are satisfied and there were no other funds -- nobody else to pay.
Q. There would still be an obligation to pay the pension even under that circumstance, right?
MR. WISTOW: Objection.
A. I don't understand the --
Q. So, for example, if SJHSRI doesn't have any liability to Paul Kessimian, it doesn't matter if there's $200 million left over after you pay all the other claimants, the plan's not gonna pay -- Let me back up.
There has to be an obligation that SJHSRI has if, even after it pays all its other claimants, it would turn over its remaining assets to the plan, right?
MR. SHEEHAN: Objection.
A. I think the only answer I can say is no. I don't -- your --
Q. So it would be gratuitous.
A. Your question -- no.

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A. I have.
Q. And can you tell me what it is?
A. This -- well, Exhibit 12 is an e-mail from me to Steve DelSesto demonstrating that I sent an e-mail, or copying him on an e-mail I sent to Max, Steve Sheehan, and Mr. Ledsham.
Q. Okay. And is it fair to say that your e-mail to Max, Ben, and Stephen referenced at the bottom of Exhibit 12 references the Cy Pres?
A. It references Exhibit C to the Cy Pres.
Q. Precisely, thank you.
Just using this document, now that you've read it, does it refresh your recollection at all as to any communications you might have had with regard to the Cy Pres other than what you testified to already?
A. Clearly I was communicating relating to sources and uses of funds. This occurred at a time -- this was November 27, 2017. This was at a time when Mr. Wistow and his -- the other attorneys in his office and Mr. DelSesto were investigating. They were issuing subpoenas, there were a lot of heated debates going on amongst the parties, and I -- I believe this was delivered in that context of delivering documents and information to Mr. DelSesto -- excuse me, Mr. Wistow.
Q. And sitting here today, having reviewed Exhibit 12,

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does it refresh your recollection as to any conversations you might have had with respect to the Cy Pres, or specifically Exhibit C to the Cy Pres and the pension liability?
A. It does not rate -- it does not help me recall any other discussions regarding those matters.
Q. That's fair, thank you.
A. Are we done with 12?
Q. Yes. If we can go to -- I believe it's Exhibit 8, which is the settlement agreement.
Sitting here today, could you point me to any specific provisions in the settlement agreement that were contested or hotly negotiated between you and the Receiver or his counsel?
A. Well, I can --
Q. Actually, let me back up. I want to use precise language.
Okay, so, earlier, do you recall testifying about there were aspects of this negotiation that were hotly contested, or words to that effect?
A. Something to that effect.
Q. Okay. Could you, using the settlement agreement you have in front of you, Exhibit 8, identify particular provisions that you recall were hotly contested, or words to that effect?

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A. So I'm not going to characterize it as "hotly contested." I don't know that I used that language specifically or not, but I know that there was -- there were contentious discussions, and I believe that's how I characterized it. And that wouldn't necessarily be with respect to a specific provision, it might have been the overall relationship. But I can tell you that there were -- with respect to the releases, there was at least discussions. I probably -- I believe they were heated in the scope of the releases, because that's -- I think everybody at the table knows, these releases are narrowly drafted. And my proposal was a broad release, which I believe is commonplace. And everyone at this table here negotiating or at least would probably want a release of any and all. And that's what we were seeking. That's not what ultimately ended up happening. That's one. I don't know if there are others.
Q. Anything else?
A. I'd have to go through it paragraph by paragraph. If you want me to do that, I will.
Q. Well, let's start with paragraph 28.
A. Okay. I think I already testified to this paragraph.
Q. Would this paragraph be one that you would have viewed as subject of contentious discussions?

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A. There were certainly discussions regarding this paragraph. It's a bit unusual to admit to liability, and so I believe we did have some debate over this paragraph and what we were willing to do and what we weren't willing to do.
Q. And what do you recall about that?
A. I recall it ended up in what we have in the settlement agreement.
Q. Anything else?
A. Nothing specific.
Q. Okay. Do you recall -- do you recall -- strike that.
Paragraph 28 makes a reference to a $125 million figure, correct?
A. Yes.
Q. During the course of your discussions, had the -- that number changed at all?
A. I don't believe -- I know -- I understand what you're asking. I don't believe that number ever changed.
Q. If you go to Exhibit 6. Keep that there but Exhibit 6 might help. Really just curious now.
A. Killed the cat.
Q. You got it?
A. Okay.
Q. So, if you could turn to Exhibit 6 to the analogous provision, which I believe --

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A. It was 120. Paragraph 26.
Q. Paragraph 26, different number, right, correct. Just look at that for a second.
A. Mm-hmm.
Q. Okay. And do you see a reference there to $120 million?
A. I do.
Q. Okay. Does that refresh your recollection as to whether that number may have changed?
A. Clearly it changed from that draft to the other.
Q. Sitting here today, do you have any understanding as to why that number changed?
A. I think, what I testified to before and what my recollection is is that 125 was tied to the petition in the Angel analysis that we submitted, and I believe 125 is actually either the precise number or a more -- more precise estimate of the number.
Q. I know that paragraph 28 specifically states that that 125 number, right, comes from the amount sufficient to purchase an annuity. Is that right?
A. It does, yes.
Q. And is it -- to the best of your recollection, your understanding is that number sufficient to purchase -- I'll start over. Or I'll slow down.
Is it your understanding that with respect to the

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amount sufficient to purchase the annuity referenced in paragraph 28 of Exhibit 8, that that number came from Angel?
A. I believe that number came from the report prepared by Angel that we submitted in connection with the petition to appoint the Receiver. And in that report, there were several different numbers used for different iterations of underfunding. And I believe that that was the one associated with the private pension, acquiring private pensions for the pension holders.
Q. Were there --
A. Private annuities, I'm sorry.
Q. Were there any discussions about whether any of the other numbers you just referenced should appear in the settlement agreement as opposed to the cost of purchasing annuity?
A. I don't recall any discussions for over a different paradigm.
Q. So Exhibit 6 is the -- turning back to that.
A. Got it.
Q. That's dated August 10, correct?
A. Yes.
Q. And the final settlement was effective 8/31; is that right?
A. Yes.

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Q. Is it your understanding that by August 10, the parties had largely come to an agreement as to the material terms of their settlement?
MR. SHEEHAN: Objection.
A. I -- I think I would characterize it as we were all working toward the common goal and believed that we had a solid foundation and most of the terms of an agreement and were still working out some details.
Q. Okay. And I think you testified earlier that that -- the first, you know, draft version of the settlement agreement was prepared and sent to you by counsel for the Receiver, correct?
A. Well, it was sent to us by counsel for the Receiver, certainly.
Q. And do you know who -- I'm sorry, did you draft the first draft of the settlement agreement?
A. No. It came from the counsel to the Receiver.
Q. Okay. And did you -- okay, so the first time -- looking at Exhibit 6. Had you had discussions by August 10 that as part of the settlement, the Receiver or its counsel would want an admission as to liability from the settling defendants?
MR. SHEEHAN: If you remember.
A. Yeah, I don't recall.
Q. Okay. So sitting here today, you don't know whether

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you opened up your e-mail on August 10 and for the first time saw that the Receiver and his draft settlement was demanding an admission of liability?
A. I don't recall if that was the first time or not.
Q. Do you recall any reaction to that as reflected in the August 10 draft?
A. I don't recall the specific reaction.
Q. Okay. On paragraph 30, again now returning to the -- there's the statement there about proportionate fault that you went over earlier.
A. Yes.
Q. Okay. So, do you know at whose request language to this effect was included in the settlement agreement?
A. This language was proposed by the Receiver or the receiver's counsel.
Well, let me back up.
This section, this concept was proposed by the Receiver or the Receiver's counsel. There was some negotiation over this provision.
Q. So is it accurate to say that the -- that you or the Oldcos didn't request as part of the settlement the language contained in paragraph 30?
A. So, I -- it was a subject of conversation and negotiation. I don't -- it was in the draft. I don't know whether -- you know, I think it's fair to say we

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didn't request it, but I'm not sure that that's the same as saying we wrote a different part of the agreement.
Q. And, now a part of the settlement agreement does include a release of directors and agents and attorneys of the Oldco entities, correct?
A. Correct.
Q. Okay. And turning to your affidavit, which is -- I believe that's Exhibit 11.
A. Yep.
Q. Paragraph 9 says that: "Those directors of the Heritage Hospitals, who were required to approve the Settlement Agreement and who voted, insisted that the releases contained in the Settlement Agreement were a required component as the payment of the vast majority of the assets of the Heritage Hospitals, absent such releases, would expose the directors and others to potential liability for which they would seek indemnification from the Heritage Hospitals."
Did I read that correctly?
A. Yep.
Q. Okay. Who of the directors were requiring that any settlement agreement -- strike that.
Who of the directors insisted that the releases contained in the settlement agreement were a required

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component of the settlement?
MR. FINE: I just want to put on the record that there is a stipulation regarding non-waiver of attorney-client privilege in answers to these questions as to other matters. So I just want to reassert that we believe the attorney-client privilege is still in effect, although we can answer this question.
A. The two directors who participated in the settlement negotiations were David Hirsch and Polly Wall. Well, Mary Wall. She goes by Polly.
Q. Did you talk about the proposed release with Father Reilly?
A. I did not.
Q. Why not?
A. So, Father Reilly recused himself from anything to do with the settlement agreement. He did so -- I early on suggested that he speak with his own counsel to determine whether or not he had a conflict and whether he should recuse himself. I did not tell him he should or shouldn't, I just suggested that he do so. He thereafter sent a letter to David Hirsch recusing himself from any and all negotiations in connection with the settlement agreement. Hence, I did not speak to him about it.
Q. And Father Reilly is not included in the proposed

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release, correct?
A. Father Reilly is excluded from the proposed release.
Q. And who insisted on that as part of the settlement?
A. The Receiver insisted that Father Reilly be excluded from the release.
Q. Okay. Was the proposed exclusion of Father Reilly a matter which generated contentious discussions between the Oldcos and the Receiver and his counsel?
A. We certainly had discussions with the Receiver and the Receiver's counsel on that specific issue. I can tell you that -- I can testify that the Receiver insisted -- Receiver's counsel insisted on that. And the reason for that had to do with his interpretation of what he viewed as applicable law and the potential implication of a release in favor of Father Reilly on his claims against the Diocese.
Q. You had mentioned earlier that given the amount claimed owed to the plan, it dwarfed the amount of assets available to the Oldco entities, correct?
MR. SHEEHAN: Objection. There is no testimony that anything's owed.
Q. Okay. Do you recall testifying earlier about the amount of the claim with respect to the pension and the assets available to the Oldco entities?
MR. WISTOW: Your voice died down, what was

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the last few.
MR. KESSIMIAN: Did you get that?
(The record was read by the court reporter, as requested)
A. I believe what I testified to was the amount of money St. Joseph's Health Services of Rhode Island had. I don't know that I -- I may have but I don't recall specifically testifying about the Oldco entities as entirely having assets available for the pension plan.
Q. Did you ever conclude that they did?
A. Well, the settlement agreement contemplates that the funds are going to be paid over to the pension plan. Absent this settlement agreement, I would more likely than not revert to a liquidation process pursuant -- you know, all other things being equal and this litigation not going on. But the analysis that Angel pension prepared that we used as the basis for the appointment of the Receiver demonstrates unequivocally that the 14 or 15 or 16 or 20 million dollars that we have is less than -- even in the aggregate, assuming all assets can go to the pension, is considerably less than what the minimum liability is at the time of the filing of the receivership. Which I believe is the reference.
Q. So did you consult or reach out to any creditors about

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this potential settlement?
A. So, I believe in the context of discussions with DLT we disclosed to them that this settlement was pending. Whether you characterize the DLT as a potential creditor or not, I don't know but they were concerned about potential liability, that's why they required that reserve. I don't recall reaching out to any other creditors to discuss the settlement.
Q. Why not?
MR. SHEEHAN: Objection.
A. I don't think it would be necessary to speak to other parties about a settlement.
Q. Did you conclude it was necessary to speak to DLT though?
A. The discussion with DLT revolved around seeking to release funds. It's possible that we mentioned to them that this was in context of a settlement to fund a pension plan.
Q. Anything else that you recall about that?
A. About the conversation with DLT?
Q. Right.
A. Nothing I can specifically recall.
Q. Did you ever communicate with Receiver or counsel for Receiver that it was D&O insurance for the members of the board of directors of any of the Oldco entities?

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MR. FINE: Objection. You can answer.
A. I believe that was provided to the Receiver's counsel in connection with the subpoenas.
Q. Did the issue of the board of directors insurance ever come up in your discussions about potential settlement in this matter?
A. I don't specifically recall.
Q. Do you recall there being any e-mail or written communications other than the drafts of the settlement agreement that would concern the exclusion of Father Reilly from the settlement agreement or the release?
A. The only thing I can recall is I believe Mr. Wistow provided us with a case, or the case reference that he was focused on. But I believe that's part of the -- if it was in an e-mail communication, it would have been turned over in connection with the discovery and the subpoena.
Q. What do you mean by case reference?
A. There was a specific case, and it gives a -- I think it was a Rhode Island Supreme Court case, that implicated releases of officers and directors and their -- its effect on claims against the principal.
Q. Sitting here today do you recall the name of the case?
A. I do not.
MR. KESSIMIAN: I'm going to take a break.

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(Recess taken)
MR. KESSIMIAN: I concluded my questioning. Thank you, Mr. Land.
THE WITNESS: Thank you.
EXAMINATION BY MR. BOYAJIAN
Q. Mr. Land, I'm Steve Boyajian, I represent Angel Pension Group. I'm just going to have a few questions for you today.
A. Great.
Q. Could I ask you to look at your affidavit, which I believe is marked as Exhibit 11.
A. I got it.
Q. Turn your attention to paragraph 9.
A. Yes.
Q. Paragraph 9 indicates that several directors who, quote, were required to approve the settlement agreement and who voted, insisted that the releases contained in the settlement agreement were a required component as the payment of the vast majority of the assets of the Heritage Hospitals, absent such releases, would expose the directors and others to potential liability for which they would seek indemnification from the Heritage Hospitals. Is that correct?
A. That's correct.
Q. And do you understand why those directors required the

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releases that they did in exchange for the payment of the vast majority of the assets of the Heritage Hospitals to the plan?
A. I think I understand why they did.
Q. Can you tell me your understanding.
A. If the settlement were to go through, and there were no releases of the directors, and then they were sued by these same plaintiffs, the indemnification rights that they had as against the Heritage Hospitals as in their roles as officers or directors would be worthless, because there would be no -- essentially no assets to defend against the same claims that the -- those very claims that the Receiver would bring.
Q. And so in other words, it is the personal interest of the directors who voted to approve the settlement agreement and maintain the value of their indemnification rights that drove their decision to approve the agreements?
MR. WISTOW: Objection.
A. No.
Q. You testified that their indemnification rights would be worthless if the vast majority of the assets of Heritage Hospitals was relayed to the plan; is that correct?
A. That's true.

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Q. And they conditioned their vote in favor of the settlement on obtaining releases; is that correct?
A. A condition of a settlement agreement was releases of officers and directors. It's a -- that is a common provision in the context of settling any lawsuit. This particular release just happens to be much more narrow than that. But they were concerned about their indemnification rights in particular, because this settlement agreement essentially deprived them of any right to seek indemnification against the hospitals.
Q. The directors and officers would be deprived of that right, correct?
A. Yes.
Q. Okay. Personally.
A. To the extent they have a personal claim for indemnification, I guess it would be personal but it would be as a result of their capacity as an officer or director of the entity.
Q. And how is their -- the value of their indemnification right different than the indemnification right of any other party holding indemnification right against the Heritage Hospitals?
MR. SHEEHAN: Objection.
A. I don't know the answer to that question.
Q. So, for example, indemnification rights of Angel and

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the Prospect entities would be rendered worthless by the settlement, correct?
A. Well, they have a right to participate in any judicial proceeding thereafter relating to the wind-down of the entity.
Q. But the directors and officers of the Heritage Hospitals would not have approved the settlement if their indemnification rights were rendered worthless, right?
A. I don't believe that they would have. The directors. When you say officers and directors, the directors made the determination to approve the settlement agreement. They made it a condition of the settlement. They insisted upon a release.
MR. BOYAJIAN: Could we mark this as 13.
(Exhibit No. 13 marked)
Q. Mr. Land, I'm showing you what's been marked as Exhibit 13. Do you recognize this document at all?
A. I don't.
Q. In the bottom right-hand corner, it bears a Bates stamp indicating it was produced by the plaintiff in this matter. Do you see that there?
A. I do see that.
Q. Do you know how the plaintiff would have come into possession of this?

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A. I don't. It's conceivable it came from us but I don't recall seeing it.
Q. Is it -- my characterization but tell me if you think it's fair. Is this a history of claims made against certain insurance policies issued to the Heritage Hospitals?
A. Well, it's captioned as a loss run, so I believe that a loss run is a history of claims made against particular policy.
Q. Okay. And can I turn your attention to the bottom half of the page. There is a summary of a claim where it says Date Reported January 9, 2018. Do you see that there?
A. I do see that, yes.
Q. Okay. And the summary indicates, quote, on January 2, 2018, RIC received notice from the law firm Chace Ruttenberg & Freedman, LLP. The firm indicated their representation of the following: Charter Care Community Board, formerly known as Charter Care Health Partners, St. Joseph's Health Services of Rhode Island and Roger Williams Hospital, formerly known as Roger Williams Medical Center. The matter apparently involves potential issues relating to SJSHRI's handling of the SJHSRI Retirement Plan.
Did I read that correctly?

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A. You did.
Q. Did you submit that claim?
A. I believe we did submit the claim sometime -- well, it says it was reported January 9, 2018.
Q. Okay. Did you personally submit that claim?
A. I don't think I did. I probably asked Mr. Fine to do that.
Q. Okay. And do you know whether that claim was made in writing or telephone call or any other means?
A. I don't recall specifically.
Q. Above that claim there is a different claim noted. Again dated -- this indicates Date of Loss, January 2, 2018, the Date Reported, January 30, 2018. Do you see that?
A. I do.
Q. And the description -- Loss Description there says: Potential issues related to SJHSRI's handling of the SJHSRI Retirement Plan.
A. Mm-hmm.
Q. Do you understand that to be St. Joseph's Health Services?
A. I think that's the acronym for St. Joseph's Health Services of Rhode Island.
Q. No, that's not actually the acronym for St. Joseph's Health Services of Rhode Island.

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A. SJHSRI. Okay.
MR. WISTOW: There is no acronym, it's an abbreviation.
A. Abbreviation, thank you. Thank you for clarifying.
Q. All right. And do you know who submitted that claim?
A. It would likely have been our office as well.
Q. Do you know why there was a claim submitted, according to these records January 9, and then a different one on January 30?
A. I do not recall anything about these, why it was -- why they were filed multiple times.
Q. Do you know whether you or St. Joseph's Health Services or any of the other Heritage Hospitals received responses to these claims?
A. I do -- well, these claims? I don't recall.
Q. So you don't know whether they were denied?
A. I have a vague recollection that they were acknowledged, but these weren't -- these were more like notices of potential claims. It wasn't -- I don't recall whether there was a formal denial letter.
Q. Have any of the Heritage Hospital's insurers funded defense counsel in this litigation?
A. No.
Q. Have you ever sought to have them reimbursed?
A. No.

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Q. Have you had any discussion with the Receiver or his counsel about these insurance claims that were made?
A. No.
Q. Have you had any discussion with the insurers here regarding the terms of the proposed settlement?
A. No.
Q. Has anyone from your office?
A. It's possible that Mr. Fine has. I don't -- I don't know.
Q. Are the Heritage Hospitals aware of the status of these claims right now?
MR. SHEEHAN: Heritage Hospital --
A. My clients?
Q. Right, the settling clients.
A. My clients are aware that we submitted notices and the complaint to the insurance carrier.
Q. So the complaint was submitted to the insurance carrier?
A. Yeah.
Q. But the claim here indicates that it was submitted prior to the date the complaint was filed.
A. As I noted earlier, there was significant back and forth with the subpoenas that had been issued by the Receiver, and there were suggestions in some of the subpoenas and some of the pleadings in this case that

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gave rise to concerns, and that's why we put the insurance carrier on notice early rather than wait until something was actually filed.
Q. But subsequent to the date the claims were filed then, the complaint in this litigation was provided to the insurers, is that your testimony?
A. Yes.
Q. Has there been -- well, how would you describe the volume of correspondence with the insurers regarding these claims?
A. Not significant.
Q. What else besides the complaint was sent to them?
A. I don't -- I don't know. I believe the complaint was sent.
Q. And did they respond at all to the complaint after it was sent to them?
A. I do recall that there was a responsive letter.
Q. Do you know what that said?
A. I believe it -- I believe they indicated that they did not believe that there was coverage. But I don't recall specifically. I guess I should say I don't recall specifically.
Q. Do you know specifically whether they denied coverage?
A. I believe they denied coverage.
Q. Did they deny a defense?

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A. Don't recall.
Q. Do you recall whether they reserved their rights?
A. I don't recall specifically.
MR. BOYAJIAN: I don't have any further questions.
MR. DENNINGTON: No questions.
MR. SHEEHAN: I have a few.
EXAMINATION BY MR. SHEEHAN
Q. I'd like to go as fast as we can, and with apologies I'm paraphrasing.
I believe you testified that in the initial settlement proposal that you made on July 9, you contemplated that the -- a judicial liquidation process would be the forum in which St. Joseph's liability to pay on the plan be determined.
A. I believe that's true.
Q. Now, and you also when you made that proposal anticipated that the liquidation proceeding would be the forum in which it would be determined how St. Joseph's assets should be distributed.
A. That's true.
Q. That's a basic part of the liquidation proceeding.
A. That's a basic -- yeah, basic aspect of a liquidation proceeding.
Q. Now, the statute on judicial liquidations sets forth

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exactly how assets of an entity in liquidation have to be distributed. Correct?
A. That's correct.
Q. At the time that you filed the petition for receivership, it was your client's position that your client, meaning St. Joseph's, had no legal obligation to contribute to the plan, therefore no liability to the plan participants.
MR. KESSIMIAN: Objection.
Q. Right?
A. That's correct.
Q. And that continued to be your client's position as of the date of your letter July 9, 2018, absent a settlement.
MR. KESSIMIAN: Objection.
A. That's correct.
Q. Now, if it were determined that St. Joseph's had no liability to the plan, the result would be that St. Joseph's might have a surplus in connection with any liquidation, right?
A. That's certain -- definitely possible, yes.
Q. And certainly -- it had been alleged in the lawsuit that CharterCARE Community Board and Roger Williams Hospital were also liable with St. Joseph's on the plan, you're aware of that?

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A. Yes.
Q. And if that liability was determined in liquidation proceeding not to exist, then both those entities likely would have a surplus in liquidation proceedings, right?
A. Yes.
Q. And the liquidation statute sets forth what you have to do with the surplus, doesn't it? After all creditors are paid, the statute specifies how the surplus is to be handled, doesn't it?
A. Yes.
Q. And it gives the -- I'll show it to you, see if it refreshes your recollection.
MR. SHEEHAN: I don't have more than two copies of this. It's a statute. I'll pass it around after the witness testifies if people want to look at it.
Could I have this marked as plaintiff's first exhibit, we'll make it Exhibit A.
(Exhibit A marked)
Q. It's Rhode Island General Law Section 7-6. Actually hyphen 61. So that's the procedure for liquidation but the distribution -- yeah, that's the statute. And it sets forth a hierarchy, doesn't it, under subsection B -- I'm sorry, subsection C.

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A. Yes, it does.
Q. And subsection (c)(1) deals with liabilities of the corporation?
A. Yes.
Q. And if it were determined in the liquidation that the entities in liquidation had no legal liability to the plan, they -- then the plan would not receive payment under subsection 1. Correct?
A. That's correct.
Q. And subsection 2 has to do with returning charitable assets?
A. Yes.
Q. And then if after creditors are paid and charitable assets are received, we have subsection 3 which talks about conveyance of assets in the Cy Pres type of proceeding?
A. Yes.
Q. And if there's still assets left after that, they're to be distributed in accordance with the provisions of the articles of incorporation or the bylaws.
A. That's correct.
Q. And that's to the extent that they determine that the distributive rights of members, or any class or classes of members, or provide for distribution to others, right?

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A. Right.
Q. And the articles of incorporation for CharterCARE Community Board stipulate that assets must be distributed to a charitable corporation. Are you aware of that?
MR. HALPERIN: Objection.
A. I just don't specifically recall, it's been a long time since I looked at them.
(Exhibit B marked)
Q. Exhibit B. And what it is is a copy of CharterCARE Health Partners Articles of Incorporation. And you understand that CharterCARE Health Partners went through a name change in connection with the asset transfer, right?
A. Yes.
Q. And became CharterCARE Community Board?
A. Yes.
Q. Now, if we turn to the third page of this document, there's a paragraph that, in the middle of the page it starts "No part of the assets." Do you see that?
A. I got that, yup.
Q. And if you go down to the bottom of the paragraph, there's the statement, and I'm going to read into the record and ask if I read it correctly.
"Upon the liquidation or dissolution of the

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Corporation, after payment of all of the liabilities of the Corporation or due provision therefore, all of the assets of the Corporation shall be distributed by the directors as set forth in the Bylaws, subject and pursuant to the Rhode Island Non-profit Corporations Act, provided that no amounts shall be distributed to any entity that is not then in existence and exempt from tax under Section 501(c)(3) of the Code."
Do you see that?
A. I see that.
Q. Now, was the St. Joseph's retirement plan a Section 501(c)(3) entity?
A. No.
Q. I'm going to show you the Articles of Amendment to Roger Williams Hospital's Articles of Incorporation. Focus on the same issue.
This would be Exhibit C.
(Exhibit C marked)
Q. And I'd like to draw your attention to the page that is second from last. It has the number 2 at the bottom.
A. I got it.
Q. And the paragraph number 4, I'm just going to read into the record and ask you if I read it correctly.
"Subject to the Rhode Island Non-profit Corporation Act, upon the liquidation or dissolution of the

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Corporation, after payment of all the liabilities of the Corporation or due provision therefor, all of the assets of the Corporation shall be disposed to one or more organizations exempt from federal income tax under Section 501(c)(3) of the code as shall be approved by the Member."
Have I read that correctly?
A. You read that correctly.
Q. Now, the member for Roger Williams Hospital was CharterCARE Community Board. Right?
A. That's correct.
Q. At the time you made the settlement offer that was dated July 9th of 2018, you had had the benefit of reading the complaint in the federal court proceeding, correct?
A. Yes.
Q. And you were aware that one of the plaintiff's allegations in the case was that your three clients, meaning St. Joseph's, CharterCARE Community Board, and Roger Williams Hospital, together were conspiring to put assets beyond the reach of the plan participants by transferring assets to CharterCARE Foundation?
A. I'm aware that that was alleged in the complaint.
Q. Now, according to -- you knew that -- you understood that CharterCARE Foundation was a 501(c)(3)

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corporation, correct?
A. That was my understanding, certainly.
Q. And there would be nothing unlawful under the provisions that you've just read from the Articles of Roger Williams Hospital and CharterCARE Community Board for the surplus after payment of the three categories we discussed to be transferred to CharterCARE Community -- CharterCARE Foundation, do you agree with that?
A. I -- I agree with that.
MR. DENNINGTON: Objection.
Q. You were also aware that plaintiffs in the lawsuit alleged that in fact $8.2 million was transferred to CharterCARE Foundation unlawfully?
A. I understand --
MR. DENNINGTON: Objection.
A. -- that that allegation was made in the complaint.
Q. Now, you talked at one point about your client's obligations under the plan, or specifically St. Joseph's obligations under the plan as a moral obligation. Do you recall that?
A. I do recall that.
Q. Well, you understood when you made a settlement proposal to the plaintiffs that the plaintiffs' attorneys would have to get approval from their

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clients?
A. I did understand that, yes.
Q. And you understood that an attorney in obtaining approval from its client is obliged to make a disclosure to the client of the risks involved in the settlement?
A. As a general rule, yes, I do understand that to be the case.
Q. Okay. And you would have understood, therefore, that one of the risks that would have had to have been disclosed to the plaintiffs in connection with your settlement proposal is that at the end of the judicial liquidation proceedings for your clients, your clients would choose to transfer the funds to CharterCARE Foundation as they were lawfully entitled to do so, rather than follow their moral obligation to the plan?
MR. HALPERIN: Objection.
MR. DENNINGTON: Objection.
MR. KESSIMIAN: Objection.
Q. That would have to be disclosed, because that would be your right.
MR. HALPERIN: Objection.
Q. Let me back up a bit.
If the provisions I've read to you concerning the distribution of a surplus and liquidation are correct,

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for the defendant.
Q. You have Exhibit 5 in front of you?
A. I do.
Q. Now, in the first paragraph, there's a reference -- and I'm going to -- it's in the middle of the sentence but I'm just going to read this phrase because it starts, quote, as demonstrated by the release sought in the Cy Pres Petition and the resulting Order that any remaining funds be paid into the St. Joseph's Health Services of Rhode Island Pension Plan, closed quote. Do you see that phrase?
A. I do.
Q. Now, at the time you wrote that, you understood that it was the plaintiff's contention that the references in the Cy Pres petition to the pension plan were intended to lull the court into believing that there was sufficient money to pay the plan.
A. I do understand that that was the plaintiff's position.
Q. And you understand that the Order that the court entered did not -- let me back up a bit.
The Order that the court entered allowed certain funds that Roger Williams had to be used to pay liabilities of St. Joseph's. Correct?
A. Correct.
Q. It did not, however, order that those funds be used to

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pay St. Joseph's liabilities. Correct? It gave permission.
A. That's how I understand it, yes.
Q. And you understood that in connection with the 2000 -- well, let me back up a bit.
You came onto the scene after the asset sale had gone through, right?
A. Quite a bit of time, yes.
Q. Are you aware today that at one point the Board of Directors of Roger Williams Hospital had a resolution that authorized a certain sum to be used to pay St. Joseph's liabilities, including pension obligations?
A. I understand there was a resolution for $14 million to go into the pension. I'm not sure if that's what you're referring to.
Q. That's the 14 million that went as part of the sale proceeds, right?
A. Right.
Q. You're talking probably about something else.
MR. SHEEHAN: Mark this as the next plaintiff's exhibit. Is it E?
THE WITNESS: No, it's F.
(Exhibit F marked)
Q. Have you ever seen this resolution before that you can

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recall, Mr. Land?
A. I'm just going to read it.
Q. Sure. I'm going to be focusing on the very last part of it.
(Witness perusing document)
A. I vaguely recall seeing this, I don't specifically recall.
Q. Do you know any reason why the board of directors could not issue a resolution countermanding this resolution after the fact?
A. No.
Q. We have this Exhibit 5. Sorry to be jumping around but I want to go back to that.
In the first numbered paragraphs it states: "The Oldco Entities will stipulate that, if proven, the claims asserted by the plaintiff would exceed the value of the assets held by the Oldco Entities," etc. Have I read that portion correctly?
A. Yes.
Q. Now, what you're saying there is that the liability of your client would be determined in liquidation proceedings, but you are acknowledging that if your client was found liable, the amount of the underfunding was such that your client would be rendered insolvent?
A. I think that's a fair characterization.

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Q. Okay. Now, in paragraph number 3 on page 2, you're proposing that the Receiver administer your client's assets, correct?
A. I'm reading it, just a minute.
(Witness reading document)
A. Yes.
Q. And that would involve managing the claims process and resolving disputed claims.
A. Yes.
Q. And you mentioned the appointment of independent counsel. Do you see that?
A. Yeah, that's below. Paragraph 6, right?
Q. It's also paragraph 3.
A. Oh, yes. Yes.
Q. And your proposal was that -- well, let me withdraw that.
The next paragraph, number 4, has to do with the procedure typically in a judicial liquidation, which is you have to notify all known creditors and publish notice to unknown creditors that you instituted judicial liquidation.
A. Yes.
Q. And that is to permit those creditors and unknown creditors to come into the proceeding.
A. Yes.

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Q. And to assert their own claims. Correct?
A. Yes.
Q. And also to object, if they wish to, to any claims asserted by another creditor.
A. That would be part of the process, yes.
Q. And certainly the entity in liquidation, your clients, would have the right to oppose claims that were asserted by a creditor if your entity felt that those claims were invalid?
A. Yes.
Q. And under this proposal that you made on July 9, your clients were reserving the right in liquidation to argue that in fact your clients had no obligation to fund the plan. Right?
A. Well, I believe the Receiver would have been the -- I think that right exists. To answer your question, that right exists.
Q. It did not in this proposal waive that right.
A. That's correct.
Q. Now, in paragraph 5, you're proposing that the Receiver pay all costs and expenses incurred by your clients in connection with the wind-down. Correct?
A. Correct.
Q. And that would include your own expenses as counsel for those entities, if you remained in that capacity?

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A. If -- if that were contemplated by the Receiver.
Q. Yes.
A. Yes.
Q. Now, in addition, the Receiver would be obligated to defend any claims brought against the Oldco entities, including the directors, trustees, officers, employees, agents and attorneys. Right?
A. Yes.
Q. So, the Receiver, who was asserting a claim against the Oldco entities, would also be obligated to defend them against claims brought against them and their representatives.
A. Yes.
Q. Okay. And then the next paragraph, 6, you here as a condition of your proposal require the engagement of independent counsel to represent those entities, the Oldco entities and their directors.
A. Yes.
Q. And you state -- as we go on, it says: "In the event claims are made in such proceeding against any of the foregoing parties, and will indemnify such parties against any losses suffered as a result of such claims." Do you see that?
A. I do.
Q. And that was if the Receiver was going to be obligated

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to indemnify those entities, right?
A. Yes.
Q. Now, if we go to the full paragraph at the bottom of the page, not numbered, it stipulates that, "in consideration of moving forward in this manner, the plaintiffs would execute and deliver a full general release."
A. Mm-hmm, yes, I see that.
Q. And so what you were requiring was that before a judicial liquidation would be commenced, the plaintiffs would have to execute and deliver a full general release.
A. Yes.
Q. And if at the end of the day the liquidation resulted in the plaintiffs getting zero, it was your expectation that that full general release would nevertheless be binding.
A. Yes.
Q. And then as we go down further, you say: "Of course the release and court approvals must be sufficient to withstand any collateral attack by third parties, including but not limited to the existing defendants in litigation." Do you see that?
A. I see that. I do.
Q. Now, one form of collateral attack that you were

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referring to there is the possibility that a remaining defendant might seek contribution.
A. Yes.
Q. And you understood at the time that the statute had been passed by the Rhode Island legislature to attempt to address that issue.
A. At the time of this letter I did understand that to be the case.
Q. And you also understood that that -- the constitutionality of that statute had not been adjudicated.
A. That's correct.
Q. So what you were requiring here is there had to be an undertaking by the Receiver that in fact these releases would protect your clients from contribution.
A. Yes.
Q. Now, you mentioned this issue of D&O coverage. You understand that directors and officers coverage does not apply to claims for breach of contract?
A. I do understand that.
Q. And you also understand that there's no coverage for tort liability based on fraud with respect to --
A. Generally I understand that to be the case.
Q. Okay. And did you know -- do you agree that the D&O policies that your client had excluded liability for

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directors and officers under ERISA?
A. I believe that's the case, yes.
Q. Turn to Exhibit 7. If you could just put that in front of you.
A. Go ahead.
Q. What I'm asking you refers to on the first typed page, second to the bottom. I believe Mr. Halperin asked you to address this section involving indemnity for Prospect?
A. Yes.
Q. Now, at the time that this schedule was drafted, Prospect had been operating the hospitals for a couple of years. Actually for four years.
A. Four years.
Q. And there were certain indemnities that arose out of that operation of the hospital, were there not?
A. Yes.
Q. Could you explain for me what those indemnities were, or give me an example of one.
A. Again, time references may not be precise but there were -- there were and are environmental indemnification claims that had been asserted against the Prospect entities on account of events that occurred prior to the transaction. They've asserted indemnification rights relative to those environmental

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claims, and at least in one case we made a payment outright that satisfied the environmental liability. In another case we have an ongoing environmental investigation. Although not couched as indemnification there were some situations where there were payments made by -- or payments withheld from Prospect by Medicare and Medicaid on account of pre-sale services. And so there were payments reimbursed. So while not defined specifically as indemnification you might conclude that they're similar.
Q. Those are the cases where Prospect's rights of recovery for Medicare were affected by a setoff based on St. Joseph's liabilities that arose prior to the sale of the hospital, right?
MR. HALPERIN: Objection.
A. Yes. And/or Roger Williams.
Q. All right. Now, at the time that you entered into this -- your clients entered into this settlement, you believe that at least certain of these indemnity claims that you just described had possible merit.
MR. HALPERIN: Objection.
A. I actually thought that they might be asserted. Whether they had merit or not, I hadn't evaluated, but I thought they would potentially be asserted.
Q. At the time that you prepared this schedule, no claim

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for indemnity had been asserted against your client by Prospect arising out of the federal litigation.
MR. HALPERIN: Objection.
Q. Correct?
A. That's correct.
Q. And you obviously when you prepared this schedule could not have been intending to reference that claim for indemnity which had not even been made.
MR. HALPERIN: Objection.
Q. Right?
A. There was no specific reference to any specific indemnification claim.
Q. Okay. Were you aware at the time that -- well, I'll withdraw that.
You testified that your client recently has received a demand for indemnification for Prospect, correct?
A. That's correct.
Q. Your client's position is that Prospect is not entitled to that indemnity, correct?
MR. HALPERIN: Objection.
A. I don't know that there's been a determination that they're not entitled to it.
Q. Do you understand the concept of in pari delicto?
A. I do.

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Q. Do you understand that when two parties or two entities are involved in a fraud and one seeks indemnity from the other, the court generally will not grant such indemnity based on the doctrine of in pari delicto?
A. I do understand the doctrine, yes.
MR. SHEEHAN: I'm just going to take a minute.
(Recess taken)
BY MR. SHEEHAN:
Q. Just a few questions.
Mr. Land, you -- rather through your counsel, Mr. Fine, were joint moving on the petition for settlement approval before Judge Stern and Judge Smith, correct?
A. Correct.
Q. And you would not have done that unless you believed that the settlement was entered into in good faith and entitled to judicial approval.
A. Correct.
Q. Now, prior to filing the petition for receivership, you consulted with individuals at Prospect about the petition. Correct?
MR. HALPERIN: Objection.
A. Yes, that's correct.
Q. You spoke to Moshe Berman specifically about the

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petition?
MR. HALPERIN: Objection.
A. Yes.
Q. And you undertook to provide Prospect with a copy of the petition before it was filed.
MR. HALPERIN: Objection.
A. Correct.
Q. And you did that.
A. I did that.
Q. And one of the undertakings, assurances that you gave to Prospect in connection with those discussions before the petition was filed was that the petition would state that Prospect had no liability under the plan, right?
MR. HALPERIN: Objection.
A. I don't recall that I gave them that assurance. I know that the petition states that but I don't recall an assurance in that regard.
Q. Okay, you understand it states that because Prospect wanted that in the petition.
MR. HALPERIN: Objection.
A. I just really don't recall. It's possible but I just don't recall specifically.
Q. You had several phone conversations with Mr. Berman about the petition; is that right?

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MR. HALPERIN: Objection.
A. I recall speaking with him about it, yes.
Q. And if there was an internal e-mail by Prospect following discussions with you in which it was stated that you assured them that the petition would state that Prospect has no liability on the plan, would that cause you to -- let me rephrase.
You don't recall one way or the other whether there was this assurance requested from you containing a provision in the petition that Prospect had no liability on the plan.
MR. HALPERIN: Objection.
A. I just don't recall that that was -- that request was made of me specifically.
Q. Okay. Is it your testimony under oath that that request was not made?
A. No, no. I'm not saying it wasn't made but I just don't recall specifically the circumstance.
MR. SHEEHAN: Has the petition itself been marked? I know it has.
THE WITNESS: I don't think so. No.
MR. HALPERIN: No.
(Exhibit G marked)
Q. Up to G?
A. We are.

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Q. What's been marked as Exhibit G is a copy of the Petition for Appointment of Receiver that you filed. The exhibits are not attached. For purposes of my questions now I don't need to get into the exhibits.
On page 2, at the bottom of paragraph number 4, there's a sentence: "Neither Prospect nor the Hospital Purchaser assumed the Plan or any liability with respect thereto as clearly stated in the asset purchase agreement among the parties," closed quote.
Do you see that?
A. I do see that, yes.
Q. Now, you are not testifying one way or the other as to whether that was something that Prospect wanted in the petition, correct?
A. I just don't recall one way or the other.
Q. All right. Now, there's a footnote that follows that sentence that says Prospect had no role in the evaluation of the plan or its funding levels, do you see that?
A. I do see that.
Q. Now, you were not involved in the asset purchase transaction, correct?
A. That's correct.
Q. You had no personal knowledge as to whether Prospect did or did not have any role in evaluation of the plan

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or its funding level in connection with that agreement.
MR. HALPERIN: Objection. That's correct.
Q. And as you sit here today, you cannot say one way or the other whether this footnote was something Prospect asked you to put into the agreement.
A. That's correct.
Q. Now, there was a meeting with the Department of Labor concerning the escrow in connection with the proposed settlement. Do you recall that?
A. I do recall that.
Q. And at the time was it your understanding that even if the settlement did not go forward, that your clients would benefit if the amount of the escrow was reduced?
A. Yes.
Q. So, one way or the other it was an outcome that your clients desired?
A. Yes.
Q. So, the fact that Mr. Wistow and you met with the Department of Labor, does that mean at that time that a -- the material terms of the settlement had already been agreed?
MR. HALPERIN: Objection.
Q. Let me rephrase that.
You would have met with the Department of Labor to discuss reducing the escrow with Mr. Wistow even if the

Exhibit 2

In The Matter Of:

Stephen DelSesto, et al v.

Prospect CharterCare, LLC, et al

Stephen DelSesto

July 31, 2019

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Q. So the information that's in Exhibit 1 would be accurate as of November 10, the day you signed it, correct?
A. I believe so.
Q. And in paragraph 1 it indicates that you were appointed as Temporary Receiver on August 18.
A. Yes, it does.
Q. Now, early on in the receivership, which we'll characterize as from August 18 when you were appointed, to November 10 when you filed this first interim report, which was the first few months of the receivership, you performed a number of functions in your role as Receiver, correct?
A. Yes.
Q. And one of the things you did is you had a status conference on September 8, which is within a few weeks of having been appointed. And I'll refer you to paragraph 10 of your Exhibit No. 1.
A. That's what it states, yes.
Q. And you advised the court at that point in time that you had already begun discussions about possibly engaging the law firm of Wistow, Sheehan & Loveley; is that correct?
A. That's what it states, yes.
Q. Now, had you -- well, strike that.

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In addition to the thinking about engaging Mr. Wistow's firm, you also were thinking about the possibility of claims that might exist and could bring money into the receivership estate. Is that correct?
A. That's the first thing a Receiver does, yes.
Q. Was there anything that caused you to believe that there were potential claims that needed to be investigated that came to you as a result of conversations with Richard Land?
MR. SHEEHAN: I'm going to just put an objection on the record here that court order has called for narrowly limited discovery, and, you know, I'm not going to instruct the witness not to answer, but the time will come if we go further afield that I'll have to do that.
(Arrival of Mark Russo to deposition)
MR. SHEEHAN: But you may continue.
A. Could you repeat the question.
MR. HALPERIN: Could you read that back, please -- well, I'm going to repeat it -- ask a different question.
Q. Did you discuss with Mr. Land at any point in time prior to actually being appointed the possibility of any claims that might exist?
A. Prior to my appointment.

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Q. Yes.
A. About claims that might exist. I don't recall if there were discussions about claims that might exist. There was a discussion about the shortfall, but that's about it. And that was stated in the petition.
Q. But at some point you decided that there might be claims and it was necessary or appropriate to engage outside counsel?
A. I don't know if I decided that there might be claims so much as just the shortfall itself seemed to infer that there was somebody who might have been responsible to avoid that shortfall.
Q. And at that point you didn't know who it might be but you just decided to launch an investigation; is that correct?
A. At -- on -- I don't know the time frame what you're asking.
Q. As of November 10th when you filed your first interim report.
A. At that point in time, that I did not know who, I didn't know if anybody was in fact responsible at that point but I felt that a investigation was prudent and part of my obligations as Receiver.
Q. At what point in time did you begin meeting with Rhode Island state legislature -- legislators to consider

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requesting a special act?
A. Um, the session doesn't begin until January, so it had to be after January 18. When exactly I met, I cannot exactly recall the exact time frame. It was certainly after January 1, 2018, and before I sent the letter on June 5, I believe it was.
Q. So the letter you're referring to that you sent on June 5 is a letter that you sent to the Speaker, the Senate president, and the Senate Majority Leader; is that correct?
A. That's correct.
Q. And do you recall in that letter mentioning the fact that there already were parties who expressed a willingness to settle?
MR. WISTOW: Should we mark this as an exhibit?
MR. HALPERIN: I may get to that, Max.
A. I do recall a statement about that particular letter.
Q. And who were the parties who had expressed a willingness to settle as of June 5, 2018?
A. There were three. I had had a discussion with Angel, early on in the case in September, in which they actually -- I considered it to be an offer to resolve with them. I had -- maybe in March or April, Attorney Land had approached me and indicated a willingness to

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settle. And I believe actually you and I maybe had a conversation similar to Land's of is there any way we can resolve this, and I believe I was told by my counsel that there were discussions with either you or another counsel for Prospect about that. The only one, however, that had any -- what I call even the remotest substance was the one from Angel in September.

MR. HALPERIN: Let's mark as Exhibit 2 your June 5 letter to the Rhode Island legislators.

(Exhibit 2 marked)

Q. With respect -- with respect to Mr. Land and the clients that he was representing, did you understand him to be representing the Oldco entities, the Roger Williams Hospital, the St. Joe's, Rhode Island entity, as well as CCCB?

A. Yes. I did. Clearly I understood him to represent the petitioner in the case, which is St. Joseph Health Services of Rhode Island, Inc. And then I later found out that in addition, Roger Williams and CCCB, or Chartercare Community Board, was also part of his client group.

Q. And at that time you were discussing the case with Mr. Land, did you also know that he was acting as an agent for one or more of those entities separate and apart from his role as counsel?

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A. I'm not sure the time frame you're talking about or what you mean by that.

Q. At some point in time did you learn that Mr. Land had two roles, attorney and agent?

MR. SHEEHAN: Objection.

A. I knew he was an attorney for those groups. I did see documents that he signed on behalf of those groups that were pre -- call it pre-receivership, pre-August 17, 18 that he signed which seemed to indicate that he was acting in a capacity other than attorney. But I don't know for sure if I knew if he was acting in that capacity or if he was signing as an attorney for them.

Q. Was it Mr. Land that initially contacted you about the possibility of serving in the capacity as Receiver?

A. Um, actually, no. It was not Attorney Land.

Q. Who was it?

A. William Dolan. Bill Dolan. Who at the time was my partner.

Q. Do you know whether or not Mr. Land had contacted Mr. Dolan?

A. I believe -- I believe he did, which is why Bill came to speak to me about being involved in the case with him, not as necessarily the Receiver at that point.

Q. I'm going to refer you to the last page of Exhibit No. 1 which is the transaction detail that you

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submitted to the court.

The first line item is a $400,000 amount. That's an amount that was provided to you as Receiver by the Oldco entities and Mr. Land; is that correct?

A. That's correct.

Q. And what was the purpose for which those funds were provided to the receivership estate?

A. I think it -- well, the purpose I asked for them or what was the purpose for him providing it?

Q. Well, that -- I'll back up and ask you, are you the one that requested funds?

A. Yes, I did.

Q. And why did you request funds?

A. I requested funds because based on the petition, there was an indication in the petition that was filed that they would fund the expenses of the receivership until they wouldn't anymore. So that the funds did not have to come out of the plan itself, and so I made the request so that I could have funds in the estate account to pay reasonable fees, costs and expenses that were approved by the court or that were within my authority to pay.

Q. And were those funds characterized in any way as the loan or as just a payment? Did you have some understanding as to what the arrangement was with

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respect to those funds?

A. No, I requested them, Attorney Land indicated that he had to talk to the board, they had to approve it, and then came back to me and said that the board approved it and that they were sending the money over. I don't know in -- I don't know how it was characterized. For me it was just to fund the estate.

Q. But you had no expectation that those monies would ever have to be repaid, did you?

A. No, I did not.

Q. At some point in time did you begin having a substantive discussion with Mr. Land regarding settlement?

A. It was after the lawsuit was filed was what I would consider to be the first time we had substantive discussions about settlement.

Q. Prior to the time the lawsuit was filed, did Mr. Land indicate to you that he had a desire to settle the case?

A. Like I had stated, in about March/April, that's my best recollection of the time frame, we had what I would consider to be a very quick and it was not a conversation that was focused on St. Joe's, I think I actually bumped into him in court on another matter that we were working on, and then he said can I change

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things to determine exactly what the status of the assets were.
Q. Was there any discussion about who might be released as part of the settlement at that initial meeting?
A. I don't recall that being a part of that discussion.
Q. What's the next thing that you can recall happening with respect to possible settlement with the Oldco entities?
A. I think it was the letter that I received from Attorney Land following that. I don't know if my counsel had engaged in discussions with him but for me it was that letter.
MR. HALPERIN: Mark this.
(Exhibit No. 5 marked)
(Witness perusing document)
Q. You've reviewed Exhibit No. 5, correct?
A. That's correct.
Q. And that's a July 9, 2018 letter that your counsel, Mr. -- I'm sorry, that's the letter that was sent to Mr. Wistow by Mr. Land; is that correct?
A. That's what it appears to be, yes.
Q. Is that something you -- the letter you were referring to in your testimony a minute ago?
A. Yes, it is.
Q. This proposal was not acceptable to the Receiver, was

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it?
A. No, it was not.
Q. Can you tell me what the Receiver found to be objectionable about this? Give us the highlights if you would.
A. Yeah, I will give you kind of the -- first of all, paragraph one for me was a non-starter. It says that the Oldco Entities will stipulate, if proven, the claims asserted by the plaintiffs would exceed the value of the assets held by Oldco Entities, and that accordingly all assets of Oldco Entities would be paid over to the pension after resolution of all creditor claims or as otherwise ordered by the court.
In paragraph two I kind of put together with that is the plan will include a claims filing procedure, claims bar date, and a process.
So basically that paragraph one says we're going to liquidate the Oldco entities through judicial proceeding, you can file a claim, we will review the claim. Maybe your claim is going to have something, maybe it isn't, so maybe you'll get money, maybe you won't, but it's going to be subject to a claim procedure. And depending on how that fleshes out you may get nothing or you may get something, but we have no idea. So as far as I was concerned I had to look at

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the worst case scenario with regard to the estate and that was potentially giving me absolutely nothing.
The other issue here that was also a non-starter was there was an indemnity provision in here. I believe paragraph 6. That -- that that also was a non-starter. So I can get involved in a process where I may get absolutely nothing and then I have to indemnify the Oldco entities, their directors, trustees, blah blah blah, in the judicial dissolution proceeding in the event claims are made in such proceeding against those parties.
So those two things in and of themselves, I mean there were other problems with this but those were -- that's paragraph one and it was a non-starter for me.
Q. Okay. With respect to paragraph one, the sentence indicates that the Oldco Entities will stipulate that, if proven, the claims asserted by plaintiffs would exceed the value of the assets held by the Oldco Entities. That's the beginning of paragraph 1, correct?
A. That's correct.
Q. Did you understand that that sentence meant that in a judicial proceeding, liquidation proceeding, the Oldco Entities -- I'm sorry, that the plaintiffs would have to establish, prove their claim in that proceeding?

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A. Absolutely -- if proven. So that means I file a claim, then I've got to prove my claim, and if I do, then I might get something. But I -- but it's not a -- there is no claim until it's submitted and then defended, proven.
Q. So your understanding was that they weren't agreeing to anything, it was nothing more than an opportunity to participate in a judicial liquidation proceeding?
A. That's correct, that's how I read that.
Q. And the second part of paragraph one includes the language that all assets of the Oldco Entities will be paid to the pension after resolution of creditor claims. Do you see that?
A. I do.
Q. How did you -- did you -- how did you understand that would work having read that? What did you think that meant?
A. Simply stated, I stood last in line. So if I prove my claim, then great. And then after all other creditor claims are paid, then I would get money. So I stood last. I was, in essence, as a receivership priority, we're all typically -- the average one is I'm an equity holder. I don't get anything until everybody in front of me has been paid.
Q. So it was unacceptable to the Receiver, to you as

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Q. Does this -- is this consistent with your recollection as to the time frame that this was taking place based on the July 17, 2018 date on the first page of Exhibit 8?
A. Yes, it is.
Q. So this was something else that took place between July 9 and July 19; is that correct?
A. That's -- it appears to be. Seventeen falls there.
Q. Do you recall that other information was being requested and going back and forth between the Receiver and Mr. Land during this same time period for any financial information, flash drives or anything else?
A. Prior to July 19?
Q. Yes.
A. I'm going to -- based on the fact that the letter was sent on the 19th, I'm going to assume that that happened because I don't think that Attorney Fine would have sent the letter and a flash drive if there hadn't been a discussion or a request.
MR. HALPERIN: Mark that, please.
(Exhibit No. 9 marked)
(Witness perusing document)
MR. SHEEHAN: I just want to put something on the record here, and that is that there's been a confidentiality agreement entered into by all of the

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parties that these communications that involve liabilities of the settling parties as to third parties, or even claims of the settling parties, settling defendants as to third parties are confidential. And I just want to put that on the record to remind everyone that that agreement extends to the transcript of this deposition. If anyone has an objection with that, I'd like to hear it now since if that's the case we'll have to address it.
Q. Can you identify Exhibit No. 9, please?
A. Sure. Exhibit No. 9 is -- top of the page it says Confidential, and it appears to be actually two e-mails. One from Attorney Robert Fine dated July 19 to Attorney Wistow, myself, and Attorney Land. And then there's another e-mail, four page -- on the fifth page, that is also marked Confidential from Attorney Fine dated the same date, July 19, but only in that instance sent to Attorney Sheehan.
Q. Do you know whose handwriting appears on the last few pages of Exhibit 9?
A. I do not.
Q. So is it your recollection consistent with Exhibit 9 that on or about this July 19 date, information was coming from Mr. Land's office to the Receiver relating to assets and liabilities?

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A. Yes, both because of this e-mail as well as the July 19 letter.
Q. Are you aware of any other communications in writing that took place between the 9th and the 19th other than those that I have shown you here today?
A. I don't recall any. There may have been some, I just don't recall.
MR. HALPERIN: Mark that, please.
(Exhibit No. 10 marked)
(Witness perusing document)
Q. Ask you to identify Exhibit No. 10, please.
A. Sure, this appears to be a letter dated July 23, 2018 addressed to Attorney Robert Fine and it is signed by Max Wistow.
Q. Would you agree that Exhibit No. 10 includes information and questions relating to assets and liabilities of the Oldco entities?
A. I would agree with that.
Q. Do you see anything in Exhibit 10 that you would consider to be a substantive discussion of the settlement terms?
MR. SHEEHAN: Objection.
A. I think discussion of assets and liabilities with the party you're settling is substantive discussions on settlement. It's difficult to settle if you don't know

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what you're gonna get.
Q. So this is information that was desired in order to reach a settlement but you don't see a discussion in here on a particular term that would go into a settlement agreement, do you?
A. I don't -- in my quick review of it, I do not see anything that relates to a specific term of any settlement.
(Exhibit No. 11 marked)
(Witness perusing document)
Q. Mr. DelSesto, can you identify Exhibit No. 11 please.
A. Sure. It appears to be a letter dated July 25, 2018 addressed to Attorney Max Wistow and was sent by Attorney Robert Fine.
Q. And this letter from Mr. Fine is a response to Mr. Wistow's letter July 23 that we've marked as the previous exhibit; is that correct?
A. That's what it says in the first sentence, yes.
Q. Do you recall seeing Exhibit 11 before today?
A. Yes, I do.
Q. Do you see that information was being supplied on the flash drive according to paragraph 1?
A. Yes, I do.
Q. Do you know if you obtained that information yourself on that flash drive?

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A. I did not obtain the flash drive.
Q. Do you know what was on it?
A. Um, I would -- I may have seen it at some point but from the letter I would imagine that it includes further information related to all of the number and lettered paragraphs that Attorney Fine indicates in the July 25 letter.
Q. And the July 25 letter that we've marked as Exhibit 11 is further information being supplied by Mr. Land's office relative to assets and liabilities; is that correct?
A. That's what it appears to be, yes.
Q. And do you agree with me that there's nothing in Exhibit No. 11 that would be considered a discussion of the term of the settlement agreement itself?
A. Like I stated before, a term of the settlement agreement would be what is getting paid over, so this is a discussion as to what liabilities are there and what assets are there, so it is substance to the financial terms of the settlement.
Q. There's nothing in here that would be a negotiation of any specific provision that found its way into the final document, is there?
A. No, it appears to be information.
Q. Okay.

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(Exhibit No. 12 marked)
(Witness perusing document)
Q. Mr. DelSesto, Exhibit No. 12 is a July 30, 2018 letter sent by Mr. Wistow to Mr. Fine in response to Mr. Fine's July 25 letter that we just marked as Exhibit 11. Is that correct?
A. It appears to be.
Q. And would you agree in -- after reviewing Exhibit No. 12, that this again is more information being supplied with respect to assets and liabilities of the Oldco entities?
A. I do, and in anticipation of a meeting scheduled for the very next day.
Q. And again, at least according to this July 30 letter, there's nothing in here that could be considered a negotiation of any provision of the actual settlement agreement itself, is there?
A. Other than as I've stated twice before, no.
Q. Do you recall the meeting actually taking place the very next day, July 31, 2018?
A. Until I saw this letter I could not have told you that it was July 31, but I'm assuming that the meeting actually went forward on the 31st but I -- I remember a meeting, I just don't remember if it actually happened on the 31st.

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Q. A meeting that you're remembering, where did it take place?
A. I believe similar to the earlier meeting, that it took place at the offices of my counsel.
Q. And who was present at that meeting?
A. If my recollection serves me correct, the same parties. Attorney Land, Attorney Fine, Attorneys Wistow, Sheehan, and Ledsham, and myself.
Q. And what can you recall having been said at that meeting?
A. Not much. I don't have a recollection of what was discussed specifically at the meeting other than further discussion of settlement.
Q. Do you remember it including a discussion of the actual settlement document?
A. I don't know if the document had been drafted at that point.
Q. Do you recall a discussion of provisions that might ultimately be in a settlement agreement?
A. Do I -- could you repeat that question.
Q. Do you recall a discussion of any provision that might ultimately be in a settlement agreement?
A. I don't -- I don't recall a discussion of a provision. I do recall discussion of further -- further diving into this information, and discussion as to how it

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would be reflected in a settlement but not a specific provision.
Q. By this information you're referring to all the information that has been included in the correspondence that we've looked at relating to assets and liabilities?
A. That's correct.
Q. So you remember that having been part of the discussion at that meeting?
A. Yes, I do.
Q. But are you unable to recall as you sit here today any other specific discussion that took place other than that relating to assets and liabilities?
A. No, there was other discussion, I just don't remember exactly what pieces were discussed of a settlement in terms of a liquidation of the Oldco entities or any procedure of getting money over, anything like that. There was definitely discussion regarding settlement, which was related to this. Like I said earlier, that this is assets and liabilities and this goes to what the ultimate settlement might be financially for the pension plan. And I do know that there was a discussion as to how we get from this information to a settlement.
Q. Do you remember anything specifically that your counsel

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internal copies to Mr. Sheehan's partners. Have you seen this before?
A. I have not seen this e-mail before, no.
Q. Do you see on the third paragraph of this document indicates that you had signed off?
A. Yes, I do.
Q. Do you know what that's in reference to?
A. I can't speak to the reason or -- actually, I can't speak to signed off. My opinion would be is that Attorney Sheehan was reflecting to Attorney Land and Fine that I had reviewed and I was okay with the most recent version of the settlement agreement.
Q. Okay. As of August 30 the settlement agreement, from your perspective, appears to have been in final form; is that fair?
A. I think that's fair.
(Exhibit No. 15 marked)
Q. Can you identify Exhibit 15?
A. It appears to be an e-mail that was sent on Friday, August 10, 2018. It says that it is from an unspecified sender, there's nobody identified on the To line, and it appears to be a forward of Attorney Sheehan's e-mail of that same date by Attorney Land, but it's unclear as to who he sent it to.
Q. So the e-mail on the lower portion of Exhibit No. 15

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from Mr. Sheehan to Mr. Fine and Land is a cover e-mail enclosing the draft settlement agreement along with certain exhibits; is that correct?
A. Correct. I believe it's -- it's the e-mail that is Exhibit 14.
Q. I asked you earlier, I think your testimony was you really don't know whether this is the first draft of the settlement agreement; is that correct?
A. That's correct.
Q. So looking at it doesn't refresh your memory in any way, shape or form, does it?
A. No, it does not.
Q. So we've previously marked the final settlement agreement as Exhibit No. 6. I'm going to ask you if you can recall, without studying the documents, how the settlement agreement changed in substance from the early draft to the final draft?
A. I -- I cannot recall as I sit here now.
Q. Do you recall any specific terms of the settlement agreement that were the substance of a negotiation that you are aware of?
A. Well, there were a lot of terms that were the substance of a negotiation. Whether or not they resulted in a change from the initial draft is different than whether or not they were subjects of a discussion.

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Q. So we had the original proposal that came in on July 9 --
A. Mm-hmm.
Q. -- from Mr. Land in the form of a letter, correct?
A. Mm-hmm.
Q. And then we have the first draft that came from your counsel on August 10. Is that correct?
A. That's correct.
MR. SHEEHAN: Objection. It's already been testified, how many times, he doesn't know whether it's the first or not.
A. Or I -- that's correct. What I was going to say is that the difference between what Attorney Land provided on whatever that date was, the 29th or --
MR. SHEEHAN: Ninth.
A. Ninth. And the version that was sent, or that this exhibit, I guess it's Exhibit 15, is vastly different.
Q. And what I'm trying to find out if you recall is any specific conversation that you became aware of where a provision of the settlement agreement was negotiated between your side and the Oldco side?
A. Could you repeat the question.
(The record was read by the court reporter, as requested)
A. I'm not aware of any specific conversation because I

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was leaving the -- I guess the detail of the negotiations to my counsel, and then my counsel would come back to me and we would talk about those discussions. And then so the discussion -- I was not involved in the back and forth other than to review changes and give my opinion on certain changes on what I might be willing to agree to and what I would not be willing to agree to. And those discussions were with my counsel exclusively.
Q. Can you look at Exhibit No. 6, the settlement agreement. I'm going to refer you to page 19. You might want to start on page 18 because I'm going to ask you questions about paragraph 28 and paragraph 30.
MR. SHEEHAN: You said from 18 to 30?
THE WITNESS: Eighteen to 19, paragraph 28 to paragraph 30 is what he's going to ask me about.
(Witness perusing document)
Q. Ready?
A. Yes, I am.
Q. You see paragraph 28, the first sentence includes the words, "The settling defendants acknowledge that SJHSRI, as the former employer of the plan participants, is liable to the plaintiffs for breach of contract," and the sentence goes on from there.
A. Yes, I do.

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Q. What contract, if you know, was breached?
A. In my opinion the obligation to fund the pension plan.
Q. So is that the -- would the contract be the plan or is there a different -- is it a verbal contract or a written contract?
A. I don't know if there is a written contract specifically other than the plan document which I believe is a contract between the employer and their employees.
Q. So having reviewed the plan, did you reach the conclusion that there was a contractual obligation on the part of the Oldco entities to fund the plan?
MR. SHEEHAN: Objection. You're asking the witness to give an opinion on a legal issue that's being litigated in this lawsuit.
MR. GODOFSKY: It's a relevant question.
MR. SHEEHAN: No, it isn't relevant. It isn't relevant to the settlement.
MR. GODOFSKY: It's relevant.
MR. HALPERIN: I think we should hold this for the court. Let's let the witness answer and you've preserved your objection.
A. Could you repeat the question.
(The record was read by the court reporter, as requested)

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A. I believe in the litigation there was a count for breach of contract. So that's the conclusion that the defendants breached a contract that were part of that count.
Q. The question that I asked you was whether or not based on your review of the plan you concluded that there was a funding obligation on the part of the Oldco entities?
A. I believe that the plan was a contract.
Q. Again, that wasn't the question. The question was whether you reached the conclusion that there was a funding obligation having reviewed the plan.
A. I believe the fact that the plan was orphaned and underfunded by 125 million indicates that somebody had an obligation and breached that obligation. I sued approximately 14 different parties for that, and so there was a conclusion that the fund -- the plan needed $125 million, give or take. Somebody did not put that money in, and left it for dead.
Q. I appreciate when you provide all this information but I'm trying to stay with the question and answer format. And so I asked you whether or not having reviewed the plan you reached the conclusion that the Oldco entities had a funding obligation.
A. I believe the Oldco entities -- at least the Oldco entities had a funding obligation. There were other

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parties as well.
Q. I understand that. Thank you.
On page 19 of Exhibit No. 6, it's a part of paragraph 28, there is a reference to a damage amount of $125 million. Do you see that?
A. Yes, I do.
Q. And do you know how that amount was calculated?
A. I believe it was Angel Pension who provided that amount. I believe that amount was in the petition which led to my appointment.
Q. So do you have an understanding of whether that $125 million figure was an amount needed to fully fund the plan or was it an amount needed to purchase an annuity? Do you have any recollection as to what that number represents?
A. I believe the settlement agreement speaks to it, and I believe it -- I believe that amount would really kind of cover both things you just stated.
Q. Do you know why it was included in the settlement agreement that there be an acknowledgment by the defendants that they're liable?
A. Absolutely.
Q. Why?
A. The -- paragraph one of Attorney Land's letter to me was the, the main reason why I needed that number in

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there.
Q. Can you explain why you thought it was important to have that acknowledgment of the settlement agreement?
A. In Attorney Land's initial proposal, which I said was unacceptable and paragraph one was a non-starter, that was I would have to prove the claim, if proven. This allowed there to be a representation affirmatively by Attorney Land's clients that my claim is $125 million. I would not have to prove that claim if there was a judicial dissolution. Now I had the number actually locked in in terms of what the liability was.
Q. Is it your understanding based on the settlement agreement that was entered into that as part of the settlement, in addition to receiving all of the funds that are provided for, that you would also be seeking additional funds in a dissolution proceeding relative to that $600,000 amount or whatever that amount ended up being?
MR. SHEEHAN: Objection. You mean liquidation proceeding?
MR. HALPERIN: Yes, sorry.
A. In the liquidation proceeding that might have occurred with the Oldco entities?
Q. That's -- that may still occur.
A. Yes. Yes, that I would have the ability to file a

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claim.
Q. Okay. So this isn't the end of your recourse, this settlement agreement. You get the money that comes from this settlement, there's approximately $600,000 left to the Oldco entities, you still would have the right to pursue additional money in additional liquidation?
MR. SHEEHAN: Objection to the form.
Q. That's your understanding?
A. My understanding is that I would still have the ability to file a claim in any judicial liquidation proceeding.
Q. And is that where it would be important to you to have the $125 million figure acknowledged?
A. That was one -- one instance where it would be important. That's the amount of money that Angel had indicated to Attorney Land and then later indicated to me that this plan needed to survive.
Q. Paragraph 30 on page 19 of Exhibit 6 addresses the proportionate fault in tort of the various defendants. Do you see that?
A. Yes, I do.
Q. Do you know who drafted that provision initially?
A. I don't know who drafted it, no.
Q. Did you yourself do any sort of analysis to reach the conclusion that's stated in paragraph 30?

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A. Did I do an analysis? I'm not sure if I understand the question.
Q. Did you reach that conclusion stated -- as stated in paragraph 30?
MR. SHEEHAN: The statement is the settling defendants contend. You're asking if he reached the conclusion that the settling defendants contend?
Q. I'll ask it again.
Did you reach the conclusion that the amount of fault that the settling defendants had was small in proportion to other defendants?
A. I guess I'll answer that by saying I agree with the statement in paragraph 30.
Q. You do?
A. Yes.
Q. And what is the basis for that agreement?
A. Because they contend it.
Q. That wasn't the question. I asked you whether you yourself, not what they contended, the last question that I believe you answered is that you agreed with the statement. Are you simply agreeing that they contend?
A. Yes.
Q. So you're not agreeing that their fault is small by comparison necessarily?
A. I'm not stating that one way or the other.

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Q. All right, so you're not -- you don't have a view on that specifically?
MR. SHEEHAN: Objection.
A. No.
Q. Okay. Mr. DelSesto, I don't think there was an answer to that last question. You don't have an answer on that specifically?
A. Oh, I thought I said no.
Q. Okay, I didn't know she got it. Thanks.
(Exhibit No. 16 marked)
Q. Mr. DelSesto, Exhibit 16 includes Exhibits 16 and 17 from the settlement agreement. Is that correct?
A. It does, it has two separate 17s.
Q. We'll leave it that way since it's already been marked. It's a duplicate.
A. Okay.
Q. With respect to Exhibit No. 16, do you see all of the claims that are identified in the fourth column as indemnification claims?
A. Yes, I do.
Q. Do you know what the nature of those claims are?
A. As I sit here right now, other than that they are in the nature of indemnification, no.
Q. Do you have an understanding that these are claims that either exist or might potentially exist on the part of

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the creditor identified in the first column and they're included in the settlement agreement as liabilities?
A. That's -- yes.
Q. And you see the reference in the first column at the bottom, the box that's second to the bottom on the left side, to the September 24, 2013 agreement?
A. Oh, yes, any and all other Company/Prospect indemnified persons, as such term is defined in that certain Asset Purchase Agreement, dated September 30 -- I'm sorry, dated September 24, 2013. Yes.
Q. Do you understand that to be a reference to the agreement pursuant to which the Prospect entities acquired the assets of the Oldco hospitals?
A. I understand it to be that certain asset purchase agreement dated September 24, 2013.
Q. Do you know why it was necessary or important to list liabilities of the entities in your settlement agreement?
A. Why it was important?
Q. Yeah, why is it in the agreement?
A. To identify the liabilities of CCCB, one of the settling defendants.
Q. Does the agreement indicate how these liabilities would be treated?
MR. SHEEHAN: Objection. The agreement

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realize they vend out.
Q. Do you know if creditors of any of the Oldco entities have been notified that this settlement is being considered by the courts?
A. I know that there have been notice, I just don't know specifically every single party that's been given notice.
Q. Would -- would you have provided notice to the Oldco creditors of the settlement?
A. I don't -- I don't know why I would give notice to Oldco creditors.
Q. So you did not provide notice to the Oldco creditors?
A. I did not. You asked if I know if anybody had been -- if anybody had notified Oldco creditors. I did not. I can't speak to whether or not anybody else had.
Q. So to your knowledge Oldco creditors have not been formally notified of the settlement?
MR. SHEEHAN: Objection.
A. I do not know.
Q. I'm going to bring you back one more time to the timeline between July 9 and August 30, and my question is, was there a point in time that a settlement in principle was reached, if you know?
A. August 30.
Q. So that would have been the final settlement?

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A. That's when the settlement was reached.
Q. That's the final settlement, but was there a point in time between July 9 and August 30 that the essential terms were agreed upon subject to being documented?
A. There was probably a time a few days before that if I recall Attorney Sheehan's e-mail, with the August 30 one, is that there were some typos, which I would not consider those to be substantive and things like that. So I imagine that the final settlement agreement happened a few days before that.
MR. SHEEHAN: Please don't speculate. "I would imagine."
Q. Have you seen Mr. Land's affidavit where he describes the negotiations as heated, contentious, or something along those lines?
A. I'm sorry, I didn't --
Q. Have you seen Mr. Land's affidavit in which he characterized the negotiations as heated or contentious?
A. I believe I saw the affidavit but I don't recall specific -- the specific language in it as we're sitting here right now.
Q. How would you characterize the tenor of the negotiations on the substantive terms of the settlement that took place between July 9 and August 30?

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A. I think I already testified that there was -- and I -- at points I'm being kind by calling it tense or frustrating. I can tell you that I had -- between October of 2017 and August, I can tell you that Attorney Land called me many times asking me to ask my counsel to back off a little bit. Not be so aggressive.
MR. HALPERIN: I'm probably done, I'd like to take just a two-minute break and come back.
(Recess taken)
BY MR. HALPERIN:
Q. Mr. DelSesto, assuming all the funds that would transfer over to the Receiver from the Oldco entities actually go into the Plan, in the event that other creditors of Oldco were not able to be satisfied from whatever funds Oldco had at the time they were pursuing their claims, is it your understanding -- do you have an understanding as to whether or not those creditors could reach into the plan to attempt to recover money?
A. I don't have any understanding as to...
Q. Do you know how the six hundred thousand dollar figure was arrived at that is in the settlement agreement?
A. As I sit here right now, I don't recall exactly how that came about twelve months ago.
Q. Do you know if it was intended to be an amount

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sufficient to cover creditor claims?
A. I -- I don't recall.
Q. Are you aware that some of the other non-settling defendants besides Prospect might have indemnification rights or claims against the Oldco Entities?
A. Am I aware other than Prospect?
Q. Yes.
A. I'm not aware.
Q. We talked a while ago about the funding obligation that exists, at least regarding that topic. My question is do you know if an obligation to fund the plan exists in the written plan document itself?
MR. SHEEHAN: Objection. The document speaks for itself.
A. I'll say the plan is extensive. The -- I guess I'll say the old plan.
MR. WISTOW: Could you keep your voice up a little bit, I'm having trouble hearing.
A. Sure. The old plan is extensive, and as I sit here today it's -- it's maybe a hundred pages long, I can't speak to whether or not there's anything in there or not. I don't -- I don't have that recollection right now, I'd have to review it.
Q. And do you know if there's any other written contract that would obligate the Oldco entities to fund the plan

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fault of the other defendants in the Federal Court Action and State Court action, and it goes on. But that was language that the Receiver proposed to include in the agreement, correct?

MR. FINE: Objection.

A. I -- I don't recall who proposed that. It's in the draft of August 10 but I don't -- I don't remember who proposed it.

Q. Well, last week Mr. Land testified -- I'll represent to you because you probably weren't here, that Mr. Land testified that in fact that came from the Receiver side and not from him.

MR. FINE: Objection.

Q. Do you have any reason to dispute that?

MR. SHEEHAN: We're talking about the specific language or the concept?

Q. Well, we can talk about the concept.

A. I don't have any reason to doubt it. I don't have that recollection. I don't have any recollection.

MR. SHEEHAN: Concept. As to why this is here.

A. Oh, as to the -- as to the concept.

Q. Yes.

A. That was a concept that I needed.

Q. And why did you need that concept?

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A. I needed that concept for a couple of reasons. One, I needed that concept because of the inception of the receivership. I had -- it was my understanding that the Oldco entities and Prospect were aligned in terms of wanting the receivership. And I felt that some of the representations in the petition were in Prospect's favor. So I did not know if Attorney Land had a relationship with Prospect that would lead for them to, for lack of a better way to put it, take the blame for what had happened. So there was one protection there. The other thing related to the legislation, and contribution from the other defendants. If the legislation had passed, then I would be less concerned so long as Attorney Land didn't go in and say that the Oldco entities were a hundred percent at fault. Because the legislation would have given me protection if there was at least one percent for anybody else. However, if the legislation were deemed to be unconstitutional, that would create -- his representation as to fault would potentially create a problem for my recovery against other defendants. So this was a way to, I guess, put the settling defendants' feet to the fire to fight as aggressively as they could as to their potential fault. They were now on the record saying that they believed that their

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potential fault was smaller as compared to the rest.

Q. Now, there were a number of exhibits to the settlement agreement that I don't believe were -- let me mark this.

(Exhibit No. 17 marked)

Q. Exhibit 17 is the settlement agreement, which is about two-thirds of the way into Exhibit 17.

A. Do you know what the Bates stamp number is?

Q. Yeah, the -- well, I can give you the document. The page, it begins on page 117.

A. Okay, I have Exhibit 11.

Q. And page 2 of this exhibit, so it's on page 118 of the document that's filed.

A. Mm-hmm.

Q. Near the -- three lines up from the bottom on the second page.

Monsignor Timothy Reilly was specifically excluded. Do you see that?

A. I do.

Q. And what was the reason for that, to your knowledge?

A. I don't recall the exact reason for that. I know that Monsignor Reilly was -- I think he was a director for some time whereas the directors that existed when I was appointed were very very -- one I think had only been a director for a month, the other had been a director for

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a year or less. But Monsignor Reilly bridged all of those boards. I guess he was the -- he was a constant member of the board prior to the 2014 transaction, and after. And I also believe he had taken some -- taken some positions -- like had not participated in certain votes, things of that nature.

Q. He recused himself from certain votes.

A. I don't know exactly the -- I just know that he did not participate, I don't know exactly the basis for it.

Q. So I want to make sure I understand this.

Your testimony is that the reason Monsignor Reilly was excluded from the settlement, unlike the other directors of St. Joseph Health Services of Rhode Island, was because he had been a director longer?

A. No. That's not what I said. I said I don't remember why he was excluded. What I --

MR. WISTOW: Then you can go on to speculate, but go ahead.

A. I don't remember why he was excluded.

MR. SNOW: Thank you for the coaching, Mr. Wistow.

MR. WISTOW: It's not coaching. He said, I don't remember why but listen to what I'm going to say.

Q. The -- he was --

MR. WISTOW: I want to put on the record that

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A. No.
Q. Was there anything that the settling parties did or propose that you believed intended to prejudice the non-settling defendants?
A. No.
Q. And does the same answer hold true for the actual settlement agreement?
A. Yes, it does.
MR. FINE: Thank you, no further questions.
MR. SHEEHAN: I've got a few.
EXAMINATION BY MR. SHEEHAN
Q. Mr. DelSesto, you recall that a special statute was passed regarding contribution rights in this case?
A. Yes, it was.
Q. And that if a settlement is approved under that statute, the effect is that the settling defendants will have no liability in contribution?
A. That's correct.
Q. Now, you earlier were asked about the concept behind the paragraph dealing with the small proportionate fault of the settling defendants?
A. Yes.
Q. And you -- would you put -- take your time and explain why it was that that concept was a requirement of the Receiver in connection with the settlement?

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A. Sure, I think I stated first of all it was my uncertainty, and I guess concern regarding the relationship between the Oldco entities and Prospect in terms of putting this matter into a receivership proceeding. That was one. And two, it was, as I stated, if the statute that you just referenced was found to be valid, constitutional, then I did not want Attorney Land, if there was a relationship with Prospect, I did not want Attorney Land coming and saying that the Oldco entities were responsible a hundred percent. Because that would hurt my ability to -- preclude my ability to recover for any of the other defendants. And if the statute was deemed to be unconstitutional, it was challenged to be unconstitutional, I wanted Attorney Land to fight hard to stick to the statement made in the settlement as to the small amount of proportionate fault, because I would have had to have been dealing with at that point in time contribution issues, both in either judicial dissolution or in this lawsuit. And by making that statement, it would have required the Oldco entities and their counsel to argue in a way that would support that statement.
Q. All right, I'd like to start with the last one. You said that if the statute is declared

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unconstitutional, you wanted them to fight hard that they had a small proportionate fault because otherwise there would be contribution issues in the judicial liquidation?
A. That's correct.
Q. Can you explain now what that would be? Who would be asserting claims of contribution against whom?
A. The other defendants would be asserting that Prospect, and that would potentially -- without the special legislation, that would reduce my ability to collect against them depending on what the Oldco's proportionate fault would be.
Q. So there would be judicial liquidation with a certain amount of assets in there?
A. Correct.
Q. And how would that -- how would the Receiver's rights to those assets be affected by this issue?
A. How the Receiver's rights would be affected by the -- I would -- I would be fighting with the other defendants in terms of access to those funds.
Q. Prospect asserting --
A. Prospect, yeah, correct. I would be trying to -- I'd be battling with them as to whether or not that money came to me or them.
Q. Now, you were asked about your -- as Receiver through

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your counsel filed a motion to intervene in the Cy Pres case.
A. Yes.
Q. And you understood that was a motion for intervene -- for leave to file a complaint in the Cy Pres case?
A. I believe so. To vacate the order and file a complaint.
Q. Right. Now, in your experience is there a distinction between a party being granted leave to intervene to file a complaint and a party being granted the substantive relief called for in the complaint?
A. Yes.
Q. Was there any -- ever any agreement with any of the settling defendants that they would agree to the substantive relief that the Receiver was asking for in that complaint of intervention?
A. No.
MR. SHEEHAN: I don't have anything further.
FURTHER EXAMINATION BY MR. HALPERIN
Q. Would you look at Exhibit No. 6, the final settlement agreement, paragraph 32.
A. I've got two versions. With exhibits and without. I've got 17 and 6 which are both the final. One has exhibits.
Q. Either one. Either one will work.

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A. I was just going to say --
MR. WISTOW: The language says adjudication in the federal court and the state court. This is ridiculous.
MR. HALPERIN: I'll ask you, if you'd like, Max.
MR. WISTOW: You want to ask me, I'll tell you exactly what it says.
MR. HALPERIN: We'll take your deposition next. But at the moment I'm simply asking him whether this is in fact part of the relief that would be sought in the Cy Pres. It's a real simple question.
MR. WISTOW: And the answer is yes obviously.
MR. HALPERIN: Thank you.
Q. Now you say yes.
A. Yes.
MR. HALPERIN: We're done.
MR. SNOW: I have some follow-up.
EXAMINATION BY MR. SNOW
Q. The special legislation which ultimately became Rhode Island General Law's 23-17.14-35, that was legislation that was pursued by the Receiver, correct?
A. Yes. Proposed.
Q. Proposed.
A. Yes.

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Q. What discussions, if any, were there between the Receiver or counsel of the receiver and settling defendants about the special legislation?
A. I don't recall any discussions with the settling defendants.
Q. Referring you back to Exhibit 2, your letter to the leadership in General Assembly.
A. I have it.
Q. On page 2, second full paragraph, it says -- second full sentence, reads, and I quote, "Without this legislation the ability for me as Receiver to reach a reasonable settlement to expeditiously and efficiently obtain funds to supplement the assets of this plan is substantially compromised, if not fully eliminated." Closed quote.
If you hadn't had discussions with any defendants, what was the basis for your conclusion that -- that I just read?
A. The current state of Rhode Island law without the special legislation, if one party walks in and says we are a hundred percent at fault, I don't have any contribution claims from any of the other defendants, and the petition seemed to indicate that St. Joe's, the entity St. Joe's and the Oldcos, I would say, at the same time, were claiming that they had liability. I did not know at that time what the relationship was between Prospect and the Oldco entities, and I didn't know what the basis for the statements in the petition were, and I needed to make sure that I had the ability to pursue from everybody and that not somebody came in as the sacrificial lamb to say we were a hundred percent at fault.
MR. SNOW: No further questions.
MR. SHEEHAN: I have one.
FURTHER EXAMINATION BY MR. SHEEHAN
Q. Under the existing law, if a -- the rights of a settling tort feasor are -- rather the exposure of a settling defendant to contribution is going to be eliminated, that settling defendant -- rather the plaintiff has to agree that the non-settling defendant will get the greater of the settling defendant's proportionate fault with the amount paid in settlement, are you aware of that?
A. Yes, I am.
MR. HALPERIN: Objection.
Q. And what risk does that pose for the receivership entering into a settlement with one defendant?
A. It would -- it could potentially eliminate the contribution from any other. I wouldn't be able to collect any money from any other defendant.

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MR. SHEEHAN: All right, thank you.
MR. HALPERIN: I think we are concluding your deposition.
THE WITNESS: Thank you.

(Whereupon the deposition was adjourned at 1:37 a.m.)

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Exhibit 3

From: Stephen Del Sesto
To: Richard Land; Robert Fine
Cc: Max Wistow; Benjamin Ledsham; carmaxabbey@aol.com; Stephen P. Sheehan; Julie Zaccagnini
Subject: Current Plan Asset Balance - per paragraph 28 of Settlement Agreement
Date: Thursday, August 30, 2018 11:38:16 AM

Dear Rick and Bob:

As you are aware, paragraph 28 of the final draft of the Settlement Agreement between the "Plainitffs" and the "Settling Defendants" (as such terms are defined in the final draft Settlement Agreement) requires me, as Receiver, to provide you with the value of the remaining assets in the Plan ten (10) days prior to the execution of the Settlement. Pursuant to and in compliance with that paragraph 28, please be advised that as of July 31, 2018 (the most current statement valuation date), the total value of the remaining assets of the Plan are $81,967,437.97.

Thank you.

Sincerely,
Stephen F. Del Sesto, Esq.
As and only as Receiver for the Plan

Stephen DelSesto
PIERCE ATWOOD LLP **PH** 401.490.3415