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' COUNSEL'S FINAL APPROVAL MEMORANDUM IN SUPPORT OF MOTION FOR AWARD OF ATTORNEYS' FEES IN CONNECTION WITH "SETTLEMENT A"

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The law firm of Wistow, Sheehan & Loveley, P.C. ("Plaintiffs' Counsel"[1] or "WSL") submits this memorandum in support of its motion for an award of attorneys' fees for their representation of the Receiver, the putative class representatives, and the putative class members in connection with 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") (Plaintiffs and the Heritage Hospitals being referred to collectively as the "Settling Parties").[2]

PROCEDURAL BACKGROUND AND OVERLAP CONCERNING SETTLEMENTS A & B

On June 6, 2019 the Court issued a Memorandum and Order ("Settlement A Memorandum and Order") (Dkt #124) which *inter alia* scheduled a final approval hearing on Settlement A for September 10, 2019. The Settlement A Memorandum and Order granted the Non-Settling Defendants' motion for discovery involving that settlement.[3] Specifically, the Court allowed discovery "concerning whether Settlement A was executed in good faith and is not collusive in accordance with Rule 23 of the Federal Rules of Civil Procedure and R.I. Gen. Laws § 23-17.14-35."[4]

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[1] On June 6, 2019, the Court preliminarily appointed WSL as class counsel on behalf of the preliminarily certified class. See Dkt #124 (Memorandum and Order) at 12.

[2] Defendants SJHSRI, RWH, and CCCB are also parties to the proposed settlement between Plaintiffs and Defendant CharterCARE Foundation ("CCF") ("Settlement B"). However, SJHSRI, RWH, and CCCB are not making any monetary contribution to *that* settlement, participating solely for the purposes of releasing Defendant CCF from any liability and disclaiming any rights they may have in Defendant CCF.

[3] All discovery is otherwise in abeyance under Fed. R. Civ. P. 26(d) & (f).

[4] See Dkt #103 (Prospect Entities' Motion for Leave to Propound Limited Discovery Relating to Settlement Between Plaintiffs and CharterCARE Community Board); Dkt #124 (Memorandum and Order) (granting Dkt #103).

This is the first proposed partial settlement in this matter but the second to be scheduled for final Court approval. Separately, on May 17, 2019 the Court issued a Memorandum and Order ("Settlement B Memorandum and Order") (Dkt #123) which *inter alia* (and preliminarily) certified a settlement class, appointed Plaintiffs' Counsel as settlement class counsel, and approved Settlement B. The Court conducted a final approval hearing on Settlement B for August 29, 2019, to address both the merits of the settlement and WSL's application for attorneys' fees. Although no order has yet entered, the Court approved Settlement B on August 29, 2019.[5]

There is a great deal of overlap in the issues involved in WSL's application for attorneys' fees in connection with Settlement B and WSL's application for attorneys' fees in connection with Settlement A. On August 15, 2019, WSL submitted its memorandum in support of its application for attorneys' fees in connection with Settlement B (Dkt #140) (hereinafter "WSL's Final Memo re: Settlement B"). Rather than burden the Court with unnecessary repetition concerning those overlapping issues, WSL hereby incorporates WSL's Final Memo re: Settlement B by reference, and limits this memorandum to issues that are unique to WSL's application for attorneys' fees in connection with Settlement A and/or are not already addressed in WSL's Final Memo re: Settlement B.

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[5] See Docket entry at 2:19 p.m. on August 29, 2019 ("Minute Entry for proceedings held before Chief Judge William E. Smith: Fairness Hearing held on 8/29/2019. S. Sheehan, Esq. and M. Wistow, Esq. for Mr. Del Sesto; R. Conn for CharterCare Foundation; P. Halperin, Esq. for the Prospect Defendants; H. Merten, Esq. for the Diocesan Defendants. Statements regarding Settlement heard from Plaintiffs, Defendants and Objectors. The Court intends to appoint D. Sherman as Special Master. Order to issue. **Court approves Settlement Agreement**. Order to issue…") (emphasis supplied).

FACTUAL BACKGROUND

The factual background of Plaintiffs' claims against the Heritage Hospitals and the genesis of Settlement A is outlined in Plaintiffs' Final Approval Memorandum that is served and filed herewith, and is not repeated here.

WSL'S PROPOSED FEE AWARD

I. Proposed Fee Award

In connection with Settlement A, Plaintiffs' Counsel are seeking an award of attorneys' fees of 23.33% of all sums obtained pursuant to Settlement A, including the minimum gross settlement payment of $11,125,000. This percentage is based upon the Retainer Agreement between Plaintiffs' Counsel and the Receiver that was approved by the Rhode Island Superior Court in the Receivership Proceeding prior to the commencement of this lawsuit, which provides *inter alia* that Plaintiffs' Counsel shall be entitled to a contingent fee of 23.33% of the gross settlement amount obtained by settlement after the commencement of litigation.[6] In the retainer agreements between Plaintiffs' Counsel and the class representatives, the same percentage sets the ceiling for WSL's fees for that representation.

It should be noted that in WSL's initial memorandum in support of its fee application for Settlement A filed on November 21, 2018 (Dkt #64), and notwithstanding that WSL had no obligation to do so,[7] Plaintiffs' Counsel on their own volition agreed to

[6] Dkt #65-3 ("If suit is brought, the Receiver agrees to pay as legal fees twenty-three and one-third percent (23 1/3 %) of the gross of any amount thereafter recovered by way of suit, compromise, settlement or otherwise.").

[7] See Declaration of Stephen Del Sesto dated August 14, 2019 ("Del Sesto Dec.") ¶ 17 ("…I consider their [WSL's] offer to credit the hourly fees they received against their contingent fee to be a

reduce that fee application by $552,281.25, the amount that was paid to Plaintiffs' Counsel by the Receiver during the investigative phase:

> Notwithstanding that the Retainer Agreement does not envision any reduction of Plaintiffs' Counsel's contingent fee for fees received in connection with the Investigative Phase, Plaintiffs' Counsel on their own volition agree to such a reduction, to be applied to the first recoveries on the Proposed Settlement. As noted, those fees total $552,281.25. That credit would reduce Plaintiffs' Counsel's fee on the minimum Initial Lump Sum of $11,150,000 from 23.33% to approximately 18.4%.

Dkt #64-1 at 20.

At that time it was anticipated that Plaintiffs' Counsel's fee application in connection with Settlement A would be heard and decided before Plaintiffs' Counsel's fee application in connection with Settlement B would be heard and decided. Instead, the final approval hearing for Settlement B ultimately preceded the final approval hearing for Settlement A. Given that sequence, and if the Court prefers, Plaintiffs' Counsel have no objection to that reduction instead being applied to their fee application in connection with Settlement B, rather than to their fee application in connection with Settlement A.

II. Objections to Proposed Fee Award

All members of the settlement class have been timely sent the Class Notice which *inter alia* describes WSL's fee application and establishes a procedure for class members to object thereto. Out of over 2,700 putative class members, none has objected to either Settlement A or WSL's fee application.

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commendable and entirely voluntary contribution not required by the Retainer Agreement, but, rather, made out of concern for the Plan participants.").

The Diocesan Defendants have objected to WSL's fee application in connection with Settlement A, and the Prospect Entities have joined in that objection to a limited extent. As discussed below, none of the Non-Settling Defendants have standing to object to the fee application, they all have a vested interest in disincentivizing WSL from vigorously pursuing Plaintiffs' claims against them, and their objections are substantively without merit. The Diocesan Defendants openly and perniciously accuse WSL (and the Receiver), on the basis of nothing, of breaching WSL's fiduciary duties to its clients. These sham accusations are being pressed not only to deprive WSL of a fee and not only to scuttle Settlement A, but also to lay the groundwork for disqualifying the Receiver and WSL from prosecuting this action altogether.

III. Attorney Time

This subject is addressed in WSL's Final Memo re: Settlement B.

ARGUMENT

I. This action is not brought solely as a class action, but is also brought by the Receiver on behalf of the Plan, and the recovery to the Plan is in performance of a judicially approved fee agreement entered into by the Receiver on behalf of the Plan

This action has been brought not solely as a class action on behalf of the Plan's beneficiaries. It is also being prosecuted by the Receiver on behalf of the Plan which is in Receivership.[8] While Plan beneficiaries are certainly benefiting from the proposed settlements, their benefit is indirect, inasmuch as the net settlement proceeds are to be

[8] See Dkt #60 (First Amended Complaint) ("FAC") ¶¶ 1-10.

deposited into the Plan and will ultimately be distributed to Plan beneficiaries in the form of Plan benefits.

Thus, while the settlements can be understood as creating common funds on behalf of the settlement classes, they are better understood as recoveries on behalf of the Plan, through WSL's performance of the terms of a contractual fee agreement that the Receiver entered into on behalf of the Plan, with the approval of the Superior Court. In this respect, the posture of this fee application is very different from other more typical class action contexts (for which the instant fee application, in any event, would still be appropriately granted). In other words, the recovery to the Plan should be governed by the fee agreement previously approved by the Superior Court.

II. The preferred method for determining the amount of attorneys' fees is the percentage of fund approach, with a benchmark of 25% of the gross recovery

This subject is addressed in WSL's Final Memo re: Settlement B, which is equally applicable to WSL's fee application in connection with Settlement A. For both settlements, Plaintiffs' Counsel has negotiated a proposed settlement that at a minimum establishes a common fund to benefit all members of the Settlement Class.[9] The percentage of fund ("POF") method is preferred in common fund cases, for its numerous advantages over the lodestar method. See WSL's Final Memo re: Settlement B at 9-13 (citing cases). The benchmark percentage considered reasonable in the First Circuit is 25%. See WSL's Final Memo re: Settlement B at 11 (cases cited). Fee awards to class action plaintiffs' attorneys are essential to ensure access to the courts for large numbers

[9] If one were to disregard the fact that the settlement is simply a recovery to the Plan itself.

of individuals who have suffered significant injuries that do not justify the great expense of litigation. See WSL's Final Memo re: Settlement B at 11-12 (case cited). Moreover, the determination of what constitutes a fair and reasonable attorneys' fee should take into account the public policy in favor of incentivizing plaintiffs' counsel. WSL's Final Memo re: Settlement B at 12-13 (citing 5 Newberg on Class Actions § 15:73 (5th ed.).

III. Plaintiffs' Counsel's fee application is fair and reasonable under the individual facts of this case

In the First Circuit, what constitutes a reasonable fee is determined on an individualized basis, case by case. See WSL's Final Memo re: Settlement B at 13 (citing case and treatise). In connection with Settlement B, WSL has addressed the reasons why WSL's fee application is reasonable under the specific facts of this case. See WSL's Final Memo re: Settlement B at 13-20. All of those reasons apply in *pari materia* to WSL's fee application in connection with Settlement A, and are not repeated here. Moreover, as discussed above, these settlements are better understood as recoveries on behalf of the Plan, through WSL's performance of the terms of a contractual fee agreement that the Receiver entered into on behalf of the Plan, with the approval of the Superior Court. WSL's fee application is fair and reasonable under that fact as well.

IV. WSL's fee application is also fair and reasonable under the *ex ante* method, the market-mimicking approach, and the multifactor test

As noted, in the First Circuit the determination of whether a proposed fee is fair and reasonable is made on an individualized, case-by-case basis, without the requirement that any particular set of factors be considered. As previously discussed,

WSL's fee application is fair and reasonable under that approach, based upon the specific facts of this case. WSL's fee application is also fair and reasonable applying the other standards courts have utilized to make that determination, specifically the *ex ante* approach, the market-mimicking approach, and the multifactor test. See WSL's Final Memo re: Settlement B at 21-29.

As noted in connection with Settlement B, there is no need or reason to apply a lodestar cross-check to WSL's fee application in the circumstances of this case. See WSL's Final Memo re: Settlement B at 33-34. Nevertheless, in connection with Settlement B, WSL has provided the information necessary to perform the lodestar cross-check based on WSL's fee applications in both Settlement A and Settlement B. See WSL's Final Memo re: Settlement B at 35-36.

V. The objections of the Non-Settling Defendants should be rejected

A. The Non-Settling Defendants lack standing to challenge WSL's fee application

The Non-Settling Defendants lack Article III standing to object to the fee application, since they are neither paying nor receiving these fees. See WSL's Final Memo re: Settlement B at 29-30; Fed. R. Civ. P. 23(h)(2), advisory committee's note to 2003 amendment ("A class member and any party from whom payment is sought may object to the fee motion. Other parties--for example, nonsettling defendants--may not object because they lack a sufficient interest in the amount the court awards."). Nor are the Non-Settling Defendants somehow either directly or indirectly injured by those fees, since they will be given a credit against their liability in the gross amount of the settlement, regardless of the amount of WSL's fees. See WSL's Final Memo re:

Settlement B at 30-31. Their only interest in WSL's fees is an illegitimate interest in making this case as uneconomical as possible for WSL, in order to put WSL in the unenviable position of proceeding with representation on terms that are not only financially onerous, but also are contrary to WSL's agreement. More importantly, the effect could be detrimental to the interests of the Plan participants going forward. See WSL's Final Memo re: Settlement B at 31.

The Diocesan Defendants acknowledge that there is no legal support for their contention that they have standing to object to the fee application. See Dkt #146 at 12 ("Due to the *sui generis* nature of this matter, the Diocesan Defendants have yet to find a case addressing a standing challenge on these facts."). Indeed, as noted, the comments to Rule 23 plainly state that non-settling defendants who are not paying fees lack standing to object to fee applications.

B. The Non-Settling Defendants' objections are meritless

In addition to the Non-Settling Defendants' lacking standing to object to WSL's fee application, their objections are substantively without merit.

1. The claim that the Heritage Hospitals would have contributed to the plan without this litigation is baseless speculation and contrary to the history of the Heritage Hospital's actions prior to litigation

The Non-Settling Defendants oppose WSL's fee application because, they contend, "a significant (albeit presently undefined) portion of the initial lump sum payment component of the settlement appears as if it would have poured into the Plan

without litigation."[10] However, the Non-Settling Defendants have no personal knowledge, and were neither making the payment nor asserting claims against the Heritage Hospitals. Consequently, their assertion of what would have happened "if no litigation had been brought" is rank counter-factual speculation and conjecture that the Court should not entertain. See Perry v. Judd, 471 Fed. App'x. 219, 225 (4th Cir. 2012) ("[C]ounterfactual speculation is not the office of the federal judiciary."); Farland v. T & T Fishing Corp., 682 F. Supp. 700 (D.R.I. 1988) ("Counterfactual speculation exceeds the limits of judicial competence.").

What we do know is that counsel for the Heritage Hospitals has stated categorically and under oath, and without contradiction, that "[i]f that Settlement Agreement is not approved, the Heritage Hospitals will 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."[11]

In any event, the Non- Settling Defendants' speculation of what would have happened if this litigation had not been brought is contradicted by the history of the Heritage Hospitals' actions prior to litigation, expressly detailed in the Complaint, which makes it extremely unlikely (to say the least) that the Heritage Hospitals would have paid any sums into the Plan absent this litigation.

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[10] Dkt #146 (Diocesan Defendants' Opposition to Final Approval and Companion Motion for Attorneys' Fees) at 3. The Diocesan Defendants' qualification of this assertion with the phrase "appears as if it would" marks a retreat from their prior categorical contention that "a significant (albeit presently undefined) portion of the initial lump sum payment would have poured into the Plan without any litigation at all." Dkt #73 (Diocesan Defendants' Response in Opposition to the Joint Motion for Settlement Class Certification) at 26. Whether caveated or categorical, the statement is false.

[11] Dkt #109-2 (Affidavit of Richard J. Land) ¶ 7.

First, and notwithstanding SJHSRI's obligation to make necessary contributions every year, no contributions whatsoever "poured into the Plan" from 2008 until this litigation was commenced, with the exception of the single $14 million payment from the 2014 Asset Sale proceeds which was made to secure regulatory approval for the transaction and was misrepresented to be sufficient to fund the Plan.[12] No payments were made from 2009-2013, and none were made from 2015 to the present.

Second, it has been Plaintiffs' position that not only were the necessary contributions not made, in fact the Heritage Hospitals wrongfully transferred assets away from SJHSRI (beyond the reach of SJHSRI's creditors) during that period, including the 15% interest in Prospect Chartercare that should have been paid to SJHSRI and not SJHSRI's controlling member CCCB, and the approximately $8,200,000 that was transferred to a foundation (CCF) which CCCB controlled. Both CCCB and CCF were intended to continue after SJHSRI was dissolved. These transfers were fraudulent transfers involving both actual intent to defraud, and constructive fraud; actual intent to defraud because they were intended to defraud, hinder and delay the Plan participants, who were SJHSRI's creditors, and, therefore, violated R.I. Gen. Laws § 6-16-4(a)(1);[13] and constructive fraud regardless of SJHSRI's actual intent, because they were made without receiving reasonably equivalent value at a time when SJHSRI was insolvent due to its liabilities to the Plan, and, therefore, violated R.I. Gen. Laws §§ 6-16-4(a)(2) and/or 6-16-5(a)).[14]

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[12] FAC ¶¶ 324-46.

[13] FAC ¶¶ 477-85 (Count V).

[14] FAC ¶¶ 486-93 (Count VI).

Third, the Petition that initiated the Receivership Proceeding itself clearly evidences the fact that SJHSRI had no intention to voluntarily make any payments into the Plan. Although SJHSRI in the Petition stated that its goal was "achieving an equitable resolution for all beneficiaries,"[15] the means SJHSRI chose actually sought to protect SJHSRI, at the expense of the Plan participants.

In the Petition, SJHSRI sought an immediate 40% reduction in Plan benefits which (according to Defendant The Angell Pension Group, Inc.'s calculations) the existing Plan assets would be sufficient to pay, assuming a (conservative[16]) 6.66% rate of return on existing Plan assets. Since the Plan was adequately funded to pay those reduced benefits, the effect of the 40% reduction would be to relieve SJHSRI of its obligation to fund the Plan. Thus, notwithstanding its professed concern for the Plan participants, SJHSRI sought through the Receivership Proceeding to have its obligations under the Plan hacked down to a size that the existing Plan assets would be sufficient to satisfy, thereby freeing SJHSRI's assets either to be retained by SJHSRI, or, if SJHSRI dissolved, to be transferred either to CharterCARE Foundation or to CCCB.

The Petition also notes that if SJHSRI was not able to put the Plan into receivership, SJHSRI would have immediately terminated the Plan. Petition ¶ 20 ("Absent judicial intervention, Petitioner anticipates that the Plan will be terminated…"). However, the Plan assets were sufficient in termination only to fund 60% of the benefits

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[15] Receivership Petition ¶ 15.

[16] 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").

to which those Plan participants were entitled, with nothing whatsoever left over for Plan participants who were not yet receiving benefits. Petition ¶ 12 ("The Initial Termination Analysis demonstrated that upon an immediate termination of the Plan, beneficiaries currently receiving benefits would receive a payout of approximately 60% of their accrued benefits and all other beneficiaries would receive no distributions whatsoever."). Instead of SJHSRI's contributing its own assets to the Plan to increase the funds available to fund the Plan, and thereby either increase the benefits for those Plan participants who were already receiving benefits or to provide some benefit to the Plan participants who were not yet receiving benefits, SJHSRI's intention was to terminate the Plan as is:

> Absent judicial intervention, Petitioner anticipates that the Plan will be terminated and its funds distributed in a manner that Will result in current Plan beneficiaries receiving approximately 60% of their accrued benefits and all others receiving nothing.

Petition ¶ 20. At the time the Petition was filed, 1,382 Plan participants were receiving benefits, and 1,342 Plan participants were not yet receiving benefits. Petition Exhibit 3 at 4. Thus, SJHSRI's intention if the Court did not approve an across-the-board benefit cut of 40% was that 1,382 Plan participants would receive 60% of their benefits and 1,342 Plan participants would receive nothing. Thus, SJHSRI had no intention of voluntarily paying its own assets into the Plan.

Moreover, it is equally clear from the face of the Petition that what drove the timing of the filing for the Receivership was the Heritage Hospitals' professed belief that

the Plan was about to lose "church plan" status,[17] ERISA would consequently apply, and SJHSRI would be obligated under ERISA both to correct the underfunding and to pay premiums to PBGC:

> 7. Petitioner is advised and believes that the Plan will lose "church plan" status on or before December 31, 2018.
>
> 8. If the Plan loses its status as a "church plan," 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 ¶¶ 7 & 8. However, if the 40% rate cut SJHSRI was seeking was effectuated before the Plan became subject to ERISA, that would relieve SJHSRI of any obligation under ERISA to make contributions, because ERISA does not determine the amount of benefits that an employer must offer, only that the employer do what he promised. See Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 511 (1981) ("That the private parties, not the Government, control the level of benefits is clear from the statutory language defining nonforfeitable rights as well as from other portions of ERISA."). SJHSRI's plan to either terminate the Plan or to obtain a 40% across the board cut in benefits before SJHSRI became legally obligated to fund the Plan is certainly inconsistent with an intention of paying all (or any) of its assets into the Plan voluntarily.

Fourth, the fact that the Heritage Hospitals were allegedly in dissolution gave no assurance that the Plan would receive any of their assets as a voluntary contribution after all creditors were paid. Indeed, the Articles of Incorporation of CCCB and RWH

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[17] It is, of course, one of Plaintiffs' alternative claims in this case that the Plan was not entitled to church plan status at the time of the Receivership Petition, and had not been so entitled for years. See FAC ¶ 68 *et seq.*

expressly required that any surplus in dissolution be distributed only to an entity that was qualified under I.R.C. § 501(c)(3).[18] The Plan was not and could not be qualified under I.R.C. § 501(c)(3).[19] Accordingly, any voluntary payment to the Plan in connection with dissolution was expressly prohibited. However, both CCCB, and the foundation which CCCB controlled as sole member, CharterCARE Foundation, were and are qualified under I.R.C. § 501(c)(3).[20] Thus, the Heritage Hospitals would have been entitled to transfer any surplus to CCCB and/or CCF, which was their goal all along.

These facts are the reality, and they evidence SJHSRI's intention to never fund the Plan.

To attempt to prove that SJHSRI intended to eventually pay its assets into the Plan without this litigation, the Non-Settling Defendants point to SJHSRI's statements in the petition that commenced the 2015 *Cy Pres* Proceeding and in the Receivership Petition. However, as already discussed, the 2015 *Cy Pres* Proceeding was intended to and did transfer SJHSRI's assets to other entities, beyond the reach of both SJHSRI and the Plan participants, which would effectively preclude SJHSRI from paying those assets into the Plan even if SJHSRI wanted to, whereas the purpose of the

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[18] See July 24, 2019 Deposition of Richard Land ("Land depo.") at 120:9-122:8. Pertinent excerpts of this deposition are submitted as Exhibit 1 to 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 Charter Care Community Board, which is filed concurrently herewith.

[19] Land depo. at 121:11-13 ("Q. Now, was the St. Joseph's retirement plan a Section 501(c)(3) entity? A. No.").

[20] Land depo. at 122:24-123:10 ("Q. Now, according to -- you knew that -- you understood that CharterCARE Foundation was a 501(c)(3) 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.").

Receivership Petition was to reduce SJHSRI's obligations under the Plan to a sum that existing Plan assets were sufficient to pay. As such, those statements were part of what Plaintiffs allege to be a sleight of hand.

The statements in the 2015 *Cy Pres* Petition upon which the Non-Settling Defendants rely are analyzed below, but prior to that it must be noted that the consummate irony of the Non-Settling Defendants' reliance on those statements is that Plaintiffs expressly allege in the Complaint[21] that the very same statements were intended to give the court in the 2015 *Cy Pres* Proceeding false assurance that the Plan was fully funded, to deceive the court into allowing $8,200,000 to be transferred to CharterCARE Foundation which should have been paid to the Plan.

Moreover, the literal meaning of those statements is very much in dispute, even among the Defendants in this case. For example, in support of their claim that SJHSRI would have paid its assets to the Plan without this litigation, the Diocesan Defendants claim that "[t]he 2015 *Cy Pres* Petition confirms . . . that additional assets [from the Heritage Hospitals] were destined for the Plan,"[22] and base that conclusion on their exegesis of statements in the 2015 *Cy Pres* Petition concerning use of the Heritage Hospital's assets to pay "Outstanding Pre and Post Closing Liabilities," which the Diocesan Defendants now argue constitute representations that SJHSRI's pension liability would be paid.[23]

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[21] See, e.g., FAC ¶ 401 ("Defendants SJHSRI, RWH, and CC Foundation intentionally frustrated enforcement of the statutory payment priorities by repeatedly misrepresenting, first to the Attorney General, and then to the court in the 2015 Cy Pres Proceeding, that all of their liabilities, including their pension liabilities, would be "satisfied" and "paid" from other assets.")

[22] See Dkt #73 at 27.

[23] See Dkt #73 at 27-28.

However, in opposing the Plaintiffs' motion for leave to intervene in the 2015 *Cy Pres* Proceeding, CharterCARE Foundation set forth its own exegesis of the same statements and reached the diametrically opposite conclusion, contending that "it is misleading… to suggest that the [2015 *Cy Pres*] Petition unconditionally included pension liabilities as among the 'Outstanding and Post Closing Liabilities' that would be 'paid' or 'satisfied' during a wind-down period."[24]

The Diocesan Defendants' reliance on statements in the Receivership Petition to evidence SJHSRI's intent to pay assets into the plan is even more unfounded. They argue that the following statement in the Receivership Petition demonstrates that "a significant (albeit presently undefined) portion of the initial lump sum payment would have poured into the Plan without any litigation at all":

> Petitioner [SJHSRI], 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 payouts to beneficiaries or provide supplemental distributions to beneficiaries whose benefit payments might be reduced as part of the Plan's wind-down process.

Dkt #146 (Diocesan Defendants' memorandum) at 4 (incorporating Dkt #73 at 26 by reference). There are three aspects of this statement that render it illusory.

First, it makes no actual commitment whatsoever to do anything. "May become available" is not the same as "shall become available", and the *possibility* that "such

[24] See Dkt #65-9 (Opposition of Petitioner Chartercare Foundation f/k/a Chartercare Health Partners Foundation to Motion to Intervene) at 14.

additional funds could be used to support the Plan" is not the same as the statement that they "would" be so utilized.

Second, it is not part of the relief SJHSRI was seeking. In other words, SJHSRI was not asking the Receivership Court to order a 40% cut in benefits *and* that SJHSRI's surplus assets be paid into the Plan.

Third, if the court in the Receivership Proceeding approved the 40% cut in benefits that SJHSRI was seeking, then the existing Plan assets would be sufficient to pay all benefits that were due, and there would be no need for SJHSRI's assets "to assist with the Plan."

In short, nothing SJHSRI did or said before this litigation was brought even tends to prove that SJHSRI would have paid its assets into the Plan even if this litigation had not been brought, and a great deal of what SJHSRI did and said before this litigation was brought tends to prove the opposite. What blew up SJHSRI's scheme to shield its assets from the Plan was the Receiver's appointment, and the investigation by WSL, as Special Counsel to the Receiver, culminating in the 139 page complaint that commenced this action and which for the first time disclosed (and detailed) SJHSRI's fraudulent scheme.

2. Plaintiffs' counsel did not inappropriately "fail" to engage the Heritage Hospitals in pre-suit talks

First, there is no basis in Rule 23 for the Diocesan Defendants' contention that any particular amount of pre-suit settlement negotiations should have occurred.

Second, there is no factual basis in the record for the Diocesan Defendants' contention. The Court granted the Diocesan Defendants (along with the other Non-

Settling Defendants) an extraordinary opportunity to conduct discovery into the settlement negotiations between Plaintiffs and the Heritage Hospitals. The Diocesan Defendants ignore that factual discovery, except to quote portions of deposition testimony out of context in purported support of other subsidiary arguments the Diocesan Defendants make about the Heritage Hospitals' liabilities. The Diocesan Defendants also mischaracterize the testimony contained in the declarations that have been filed with the Court.[25] And not content to remain even superficially moored to any semblance of facts in the record, the Diocesan Defendants openly and perniciously speculate that Plaintiffs' counsel breached their fiduciary duties to their clients.[26]

The actual facts regarding pre-suit and post-suit settlement negotiations are discussed at length in Plaintiffs' separate memorandum concerning final approval of Settlement A. Those facts demonstrate that notwithstanding the Heritage Hospitals' vague expressions of desire for settlement, they never made any meaningful or substantive offer of settlement until after the Complaint was filed. And when, after the Complaint was filed, they finally made an actual settlement offer on July 9, 2018, that offer was simply insulting. Thus, even *after* the Complaint had been filed, the Heritage

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[25] For example, the Diocesan Defendants cite paragraphs 13-16 of the Receiver's Declaration (Dkt #144) in purported support of the following statement: "When faced with the Settling Defendants' expressed willingness to settle before a lawsuit was brought, the Receiver and his counsel made no follow-up and did not even provide the Settling Defendants with a demand." Dkt #146 (Diocesan Defendants' Memo.) at 6. In fact, paragraph 13 of the Receiver's Declaration states that when he spoke to counsel for the Prospect Entities, Diocesan Defendants, and Heritage Hospitals "concerning the possibility of settlement" he "informed them that if they were interested they should contact WSL and make an offer" and that no subsequent offers were forthcoming. See Dkt #146 (Del Sesto Declaration) ¶ 13. The remaining paragraphs the Diocesan Defendants cite address other issues, such as the urging of Plan participants at town-hall meetings to take action against culpable parties, including the Diocesan Defendants. See id. ¶¶ 14, 15-16.

[26] 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.").

Hospitals were *still* unwilling to commit pay any amounts whatsoever to the Plaintiffs, to say nothing of the Heritage Hospitals' "offer" to have *Plaintiffs indemnify the Heritage Hospitals against other creditors' claims* and have Plaintiffs pay the expenses of the Heritage Hospitals' liquidation.

There is no evidence that the very favorable terms that Plaintiffs' Counsel ultimately was able to extract from the Heritage Hospitals on behalf of the settlement class were available pre-suit, and all the available evidence demonstrates the opposite. Plaintiffs were entitled to heed Plan participants' imploring to cut to the chase and bring suit against the Defendants.[27]

3. The record is sufficient to perform a lodestar cross-check if the Court determines one is necessary

The Diocesan Defendants contend it is inappropriate to perform any lodestar cross-check using Plaintiffs' Counsel's total hours summarized in Wistow's Declaration and Supplemental Declarations. See Dkt #146 (Diocesan Defendants' Memo.) at 7-8. Plaintiffs have previously briefed why that is the correct approach to performing any cross-check. The cases the Diocesan Defendants cite in opposition do not actually support their position.

The Diocesan Defendants mischaracterize Heien v. Archstone, 837 F.3d 97, 99 (1st Cir. 2016) as "involving [a] fee application where class counsel sought [a] percentage of [the] fund, but still provided billing records to permit the court to calculate an accurate lodestar." Dkt #146 (Diocesan Defendants' Memo.) at 8. In fact, Heien

[27] See Dkt #144 (Del Sesto Declaration) ¶ 14 ("Following my appointment as Receiver I held regular open meetings with Plan participants to keep them informed. . . . Understandably as the months of investigation wore on, they were imploring me to take action against culpable parties.").

involved a pure lodestar fee awardable under Mass. G.L. c. 93A, in a follow-up companion case to an earlier c. 93A suit[28] prosecuted by the same counsel, where POF fee awards were held inappropriate under c. 93A. See Hermida v. Archstone, 950 F. Supp. 2d 298, 308 n.2 (D. Mass. 2013) ("The First Circuit, however, has disfavored the creation of a common settlement fund from which members of the certified class can be paid in Chapter 93A claims.") (rejecting the defendant's argument that plaintiffs' attorneys should be paid out of the recovery instead of obtaining a statutory award of fees in addition to the recovery). See *infra* at 24-25 (further discussing Heien). The fact that Heien was a statutory fee case involving an attorneys' fees award to the prevailing party makes it completely inapplicable to the case *sub judice*, which is a common fund case. See Brown v. Rita's Water Ice Franchise Company LLC, 242 F. Supp. 3d 356, 368 (E.D. Pa. 2017) ("In determining the reasonableness of the time spent in a lodestar cross-check, a summary of hours, rather than the detail required to calculate the lodestar for a prevailing party award, normally suffices.").

In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig., 56 F.3d 295 (1st Cir. 1995) actually stands for the opposite of the Diocesan Defendants' contention that the Court should be scrutinizing individual time records. See Dkt #145 (Diocesan Defendants' Memo.) at 8. The entire paragraph, from which the Diocesan Defendants have excised a phrase of dicta, states:

> In complex litigation—and common fund cases, by and large, tend to be complex—the POF approach is often less burdensome to administer than the lodestar method. See Swedish Hosp., 1 F.3d at 1269 (finding POF

[28] In the earlier suit, class counsel had obtained summary judgment against the same defendants on liability. Accordingly the follow-up suit, involving the same legal theories against the same defendants on behalf of a different set of plaintiffs, involved little additional work.

> approach "less demanding of scarce judicial resources"). Rather than forcing the judge to review the time records of a multitude of attorneys in order to determine the necessity and reasonableness of every hour expended, the POF method permits the judge to focus on "a showing that the fund conferring a benefit on the class resulted from" the lawyers' efforts. Camden I, 946 F.2d at 774. While the time logged is still relevant to the court's inquiry—even under the POF method, time records tend to illuminate the attorneys' role in the creation of the fund, and, thus, inform the court's inquiry into the reasonableness of a particular percentage—the shift in focus lessens the possibility of collateral disputes that might transform the fee proceeding into a second major litigation.

In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig., 56 F.3d 295, 307 (1st Cir. 1995).

Finally, the Diocesan Defendants characterize Walsh v. Popular, Inc., 839 F. Supp. 2d 478, 482-83, 485-87 (D.P.R. 2012) as "granting less than the requested percentage of fund and noting that the court had rejected a generalized time description and required counsel to produce itemized time records which were used in connection with 'a rough lodestar' cross-check." See Dkt #147 (Diocesan Defendants' Memo.) at 19. What the Diocesan Defendants do not inform the Court is that in Walsh, the class counsel sought 33 1/3% of the common fund, and that the Court requested additional details about time expenditures in order to cross-check that unusually high percentage, which was "the ceiling on typical percentage of the fund awards in the First Circuit." See Walsh, 839 F. Supp. 2d at 485. The court ultimately reduced the fee award to 23% of the fund, id., *i.e.* approximately the same percentage Plaintiffs' Counsel in the instant litigation have been seeking all along.[29]

[29] The percentage Plaintiffs' Counsel actually seek is even lower than 23% after accounting for their voluntary reduction of fees to account for the amounts received in connection with the pre-suit investigation.

The Diocesan Defendants contend that a lodestar cross-check should not include pre-suit investigative hours and hours expended litigating the fairness of the settlement (including those occasioned by Non-Settling Defendants' discovery fishing expedition), because "they risk double compensation and/or are irrelevant to the procurement of the settlement," and "such discovery was totally avoidable." Dkt #146 (Diocesan Defendants' Memo.) at 8-9. These contentions are illogical.

First there is no risk of double compensation, because Plaintiffs' Counsel have voluntarily credited the pre-suit investigation fees (themselves at reduced rates) against their request for fees.

Second, the Diocesan Defendants' grumbles about the "avoidab[ility]" of the discovery that the Settling Defendants insisted upon obtaining (over Plaintiffs' objection) is simply more hypocritical victim-blaming. The Non-Settling Defendants sought (and still seek) to block judicial approval of the settlement. They insisted on conducting an inquisition into imaginary collusion. Tearing down the roadblocks the Diocesan Defendants have interposed between the settlement class and the settlement fund is a necessary prerequisite to obtaining that fund for the class.

4. The Court should reject the Diocesan Defendants' "novel" and punitive lodestar approach, which they invent out of whole cloth

The Diocesan Defendants contend that the Court should abandon the POF approach altogether and simply fashion a lodestar here. See Dkt #146 (Diocesan Defendants' Memo.) at 9. For the reasons previously briefed, the POF approach is the appropriate approach to calculating fees under the circumstances of this case.

The Diocesan Defendants do not actually grapple with Plaintiffs' prior arguments, and so Plaintiffs will spare the Court a repetition of them. Instead, the Diocesan Defendants fall back on their unsupported and ridiculous factual contentions that the settlement provides no benefit to the settlement class. See Dkt #146 (Diocesan Defendants' Memo.) at 9.

The Diocesan Defendants also draw a further inapposite analogy to Heien v. Archstone, 837 F.3d 97 (1st Cir. 2016) (discussed *supra* at 20-21) in order to pretend Plaintiffs' Counsel accomplished nothing. See Dkt #146 (Diocesan Defendants' Memo.) at 10. As noted, Heien was a follow-up companion case, asserting the same claims against the same defendants (on behalf of a broader class of similarly situated plaintiffs), as those in an earlier case in which summary judgment had already been obtained on those claims against those defendants in favor of individual plaintiffs. See Heien v. Archstone, 837 F.3d 97, 98–99 (1st Cir. 2016) (discussing the interrelation of Heien v. Archstone and Hermida v. Archstone).[30]

The Diocesan Defendants incorrectly state: "the facts here are even more extreme than in *Heien*, as the Settling Defendants also admitted liability, whereas the attorneys in *Heien* had to establish liability by way of a motion for summary judgment in earlier litigation." Dkt # 146 (Diocesan Defendants' Memo.) at 10. In fact, the only admission of liability here is the admission contained in the settlement agreement that

[30] As noted *supra*, because Heien was a Mass. G.L. c. 93A case, fees were awarded to the prevailing party in addition to (and not taken out of) the common fund.

Plaintiffs' Counsel obtained and which the Diocesan Defendants seek to scuttle. Absent approval of the settlement, the Heritage Hospitals will deny all liability.[31]

Finally, the Diocesan Defendants lay out what they call "a novel lodestar approach" under which Plaintiffs' Counsel would receive $600/hour for "time devoted to negotiating, documenting, and seeking approval of Settlement A"[32] and no recovery whatsoever for their other (more than 2,000) hours expended in litigating this action, plus $225/hour multiplied by the pre-suit investigative hours only, an amount they arbitrarily select as the difference between Plaintiffs' Counsel's blended rate of $600/hour in hourly cases[33] and reduced rate of $375/hour. See Dkt #146 (Diocesan Defendants' Memo.) at 11. The Diocesan Defendants cite absolutely no authority in support of applying this (admittedly) "novel" approach, except a mis-citation to Baptista v. Mut. of Omaha Ins. Co., 859 F. Supp. 2d 236, 242–44 (D.R.I. 2012) which does not support the proposition.[34]

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[31] 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.").

[32] Dkt #146 (Diocesan Defendants' Memo.) at 11 n.10.

[33] Which is much less that WSL's recovery in successful contingent fee cases.

[34] In Baptista, the court (Lisi, J.) rejected the POF approach because "there is nothing particularly complex about this case" (which entailed "essentially unopposed proceedings") and accepted counsel's time charges, but denied the request for an additional enhancement multiplier of that lodestar fee. See Baptista, 859 F. Supp. 2d at 244 ("For those reasons, the Court sees no compelling reason to multiply the lodestar figures with a 1.55 factor. Therefore, approval of attorneys' fees is limited to the compensation for the actual work performed in this litigation."). In contrast, the instant case is extraordinarily complex, and Plaintiffs have been opposed every step of the way, both here and in the Superior Court, especially by the Non-Settling Defendants.

C. The Non-Settling Defendants' objection to WSL's fee application involves structural unfairness in that counsel for the Non-Settling Defendants already have been paid many millions of dollars in attorneys' fees for defending against Plaintiffs' claims, and reasonably can expect to be paid many millions more as this lawsuit continues, but they contend WSL should be paid much less if ever

As discussed in WSL's Final Memo re: Settlement B, the Non-Settling Defendants have retained experienced and highly skilled attorneys who are being paid millions of dollars in fees, win or lose. However, they seek to limit the options for the Plaintiffs to attorneys who will work for less than the sums paid to defense counsel, and will only be paid out of recoveries, if any. That is anything but a level playing field, and would be grossly unfair and unjust to WSL, the Receiver, and the Settlement Class.

VI. Plaintiffs' Counsel no longer seek an award of costs and expenses

As discussed in the prior submission in connection with Settlement B, the Receiver, with the approval of the Superior Court, has reimbursed WSL's out-of-pocket expenses.

CONCLUSION

WSL's fee application should be approved.

Respectfully submitted,

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By their Attorney,

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CERTIFICATE OF SERVICE

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