UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

STEPHEN DEL SESTO, AS RECEIVER AND ADMINISTRATOR OF THE ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND RETIREMENT PLAN et al.	:	
Plaintiffs	:	
v.	:	C.A. NO.: 1:18-cv-00328
PROSPECT CHARTERCARE, LLC, et al.;	:	
Defendants.	:	

DEFENDANT CHARTERCARE FOUNDATION'S MEMORANDUM OF LAW IN FURTHER SUPPORT OF FINAL SETTLEMENT APPROVAL

INTRODUCTION

In its May 17, 2019 Memorandum and Order granting preliminary approval of the CharterCARE Foundation Settlement ("Settlement B"),[1] this Court (a) permitted CharterCARE Foundation ("CCF") until August 15, 2019 to file papers in support of final settlement approval and (b) denied without prejudice the Settling Parties' request for a good faith finding under R.I. Gen. Laws § 23-17.14-35 (hereinafter, the "Settlement Statute"), but stated that this request "may be renewed in connection with any final fairness determination." (ECF No. 123 at 5, 12). In advance of the final fairness hearing scheduled for August 29, 2019, CCF now submits this

[1] As used herein, the term "Settlement B" refers to the Settlement Agreement dated November 21, 2018 between and among Plaintiffs, CharterCARE Foundation, St. Joseph Health Services of Rhode Island ("SJHSRI"), Roger Williams Hospital ("RWH"), and CharterCARE Community Board ("CCCB") (collectively, the "Settling Parties"). (ECF No. 77-2). SJHSRI, RWH, and CCCB collectively are referred to herein as the "Heritage Hospital Defendants." "Settlement A" is the earlier settlement agreement dated August 31, 2018 that previously was executed between Plaintiffs and the Heritage Hospital Defendants. (ECF No. 63-2).

brief for the limited purpose of renewing its request that this Court include a factual finding of good faith under the Settlement Statute as part of any order of final approval.[2]

ARGUMENT

The Settlement Statute is directly relevant here because Plaintiffs' primary claims against CCF are Rhode Island state law tort claims.[3] Counts V and VI of Plaintiffs' First Amended Complaint ("FAC") allege that CCF violated the Rhode Island Fraudulent Transfer Act, R.I. Gen. Laws § 6-16-4 and -5, when it received approximately $8.2 million in restricted charitable assets from SJHSRI and RWH pursuant to a *cy pres* order issued by the Rhode Island Superior Court on April 20, 2015. (FAC, ¶¶ 479, 481, 489) (ECF No. 60). The FAC also pleads other tort claims against CCF, such as "fraudulent scheme" (Count VIII), conspiracy (Count IX), and aiding and abetting breaches of fiduciary duty (Count XXII). (Id. ¶¶ 499, 504, 555).[4]

With respect to tortfeasor liability under Rhode Island state law, the Settlement Statute provides as follows.

> 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:

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[2] In support of its request for final approval under Fed. R. Civ. P. 23(e), CCF relies upon the arguments in the Settling Parties' January 4, 2019 brief in support of their joint motion for preliminary approval (ECF No. 77-1) and CCF's January 25, 2019 reply brief in further support of that joint motion (ECF No. 86).

[3] Plaintiffs also pleaded an ERISA claim against CCF at Count I. (FAC, ¶ 460) (alleging that CCF "is . . . jointly and severally liable for SJHSRI's failure to make . . . minimum contributions . . . because it is a member of the same control group pursuant to 29 U.S.C. § 1082(b)(2)"). Because Plaintiffs' state law claims against CCF are part of the same case or controversy as their ERISA claim against CCF, this Court has supplemental jurisdiction over those state law claims pursuant to 28 U.S.C. § 1367(a). As Plaintiffs previously have argued, this Court maintains subject matter jurisdiction over the Settling Parties' pending motions for settlement approval notwithstanding the contemporaneous pendency of the Non-Settling Defendants' motions to dismiss. (See ECF No. 83 at 18-21).

[4] The remaining claims against CCF are: Alter Ego (Count XII); Successor Liability (Count XV); Civil Liability Under R.I. Gen. Laws § 9-1-2 for Violations of Rhode Island Hospital Conversions Act (Count XVI); Civil Liability Under R.I. Gen. Laws § 9-1-2 for Violations of R.I. Gen. Laws § 11-18-1 (Count XVIII); and Civil Liability Under R.I. Gen. Laws § 9-1-2 for Violations of R.I. Gen. Laws § 7-6-60 & -61 (Count XIX).

> (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 (emphasis added).

Applying those bolded definitions here, this Court should have little difficulty concluding that Settlement B is indeed a "good-faith settlement." "[T]here is a presumption that the settlement has been made in good faith, and the burden is on the challenging party to show that the settlement is infected with collusion or other tortious or wrongful conduct." Gray v. Derderian, 2009 WL 1575189, at *5 (D.R.I. 2009). None of the objecting parties has presented any evidence of "collusion, fraud, dishonesty, or other wrongful or tortious conduct" with respect to Settlement B. Nor could they since Settlement B is a paradigmatic example of a good faith settlement that followed arm's length bargaining between experienced counsel familiar with the strengths and weaknesses of their clients' respective claims and defenses.

This Court has, however, expressed some concern as to whether it should be the court to make the good faith finding under the Settlement Statute, or whether that finding can or should be left for another court and another day. For at least three reasons, CCF respectfully submits that it is appropriate for this Court to make the factual finding of good faith under the Settlement Statute at the August 29, 2019 final approval hearing.

First, the Court would undermine the legislative intent behind the Settlement Statute if it were to forestall ruling on this issue. As Plaintiffs detailed in a recent filing, the Settlement Statute is the latest in a series of similar statutes that the Rhode Island State Assembly recently has enacted to encourage and facilitate early settlements in complex multi-party litigation. (See ECF No. 63-1 at 24-27). These statutes are "designed to encourage settlements" by providing settling defendants "a **measure of finality** in return for their willingness to settle." See United Technologies Corp. v. Browning-Ferris Industries, Inc., 33 F.3d 96, 102-03 (1st Cir. 1994) (emphasis added).[5] That measure of finality is an assurance that a settlor will not be exposed to contribution claims by non-settling parties. This measure of finality is particularly important for those defendants insured under so-called "cannibalizing" insurance policies in which ongoing defense costs erode the limits of coverage. See R.I. Econ. Dev. Corp. v Wells Fargo Securities LLC, No. PB 12-5616, 2014 WL 3709683, *5 (R.I. Super. Ct.) (Silverstein, J.) (quoting R.I. Depositors Econ. Prot. Corp. v. Brown, 659 A.2d 95, 101 (R.I. 1995) ("our Supreme Court has already recognized that encouraging settlement, particularly in the face of 'cannibalizing' insurance policies, 'is certainly a legitimate legislative objective'")).

Here, the Settlement Statute's promise of finality was one of the factors in CCF's decision to settle when it did. CCF is insured under a $1MM "defense-within-limits" liability policy, which rapidly was eroding as the litigation progressed. As a term of its settlement, CCF's liability insurer (RSUI) has agreed to pay the $600,000 balance remaining on its $1MM insurance policy with CCF. That payment – and indeed all of Settlement B – is conditioned

[5] United Technologies Corp. is significant because it concerned special contribution provisions of the Comprehensive Environmental Response Compensation & Liability Act ("CERCLA"), 42 U.S.C. § 9613(f), which later became the model for Rhode Island's "Depco Act", R.I. Gen. Laws § 19-11-9 (the "Depco Act"). Ernst & Young v. Depositors Econ. Prot. Corp., 45 F.3d 530, 532 fn.3 (1st Cir. 1995). In turn, the Depco Act became a model for similar amendments to joint tortfeasor liability applicable to settlements in the Station nightclub fire cases and the 38 Studios case. The Settlement Statute governing the St. Joseph's pension case is the progeny of those predecessor statutes. This history is succinctly summarized in Plaintiffs' reply brief responding to the Prospect Entities' opposition to the joint motion for preliminary approval of Settlement A. (ECF No. 63-1 at 24-27).

upon this Court's determination that Settlement B is a "good-faith settlement" under the Settlement Statute. Specifically, Settlement B provides as follows.

> If the Federal Court Order Granting Final Settlement Approval or the *Cy Pres* Final Judgment is not entered for any reason, then this Settlement B Agreement will be null and void and the Settlement B Settling Parties will return to their respective positions as if this Settlement B Agreement had never been negotiated, drafted, or executed.

(ECF No. 77-2 at 26, ¶ 8). "Federal Court Order Granting Final Settlement Approval" is a defined term meaning "the order approving Settlement B 1) as fair, reasonable, and adequate, 2) **as a good faith settlement under R.I. Gen. Laws § 23-17.14-35**, 3) awarding attorneys' fees to Plaintiffs' Counsel, and 4) such other and further relief as the Federal Court may direct." (Id. at 10, ¶ 20) (emphasis added).

Any refusal by this Court to make the "good faith" finding that is a condition of Settlement B would undermine the legislative objective of the Settlement Statute (encouraging settlement) and frustrate the Settling Parties' legitimate expectations that such a determination would be made. After all, Plaintiffs' claims against CCF largely are Rhode Island state law tort claims, whose settlement indeed was negotiated in good faith against the backdrop of the Settlement Statute. Refusing to make, or deferring, such a finding also would have a chilling effect on the Non-Settling Defendants' calculus as to whether or not they too should settle with the Receiver in the future.

Second, the interests of judicial economy are best served by this Court making a factual determination of "good faith" under the Settlement Statute at the same time that it determines whether the same settlement is "fair, reasonable, and adequate" under Fed. R. Civ. P. 23(e). These two standards are exceedingly similar. For example, a touchstone of the "good faith" determination under the Settlement Statute is whether the settlement was "the result of arm's length bargaining." Gray, 2009 WL 1575189 at *16. That exact same determination is one of

the expressly enumerated factors in assessing whether the same settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2)(B). It does not make sense for a later court to make such a similar factual determination at a different point in time. A later court would not have the same familiarity with Settlement B as this Court does. This Court already is well familiar with the terms and context of Settlement B having issued a detailed preliminary approval order under Fed. R. Civ. P. 23(e). Indeed, it seems fairly clear from the Settlement Statute that the Rhode Island State Assembly intended the required "judicial[] approv[al]" to come at the time of the settlement, not years later in response to a contribution claim or the like.

Third and finally, this Court can make a factual finding that Settlement B is good faith under the Settlement Statute without infringing upon the Non-Settling Defendants' future ability to assert that the Settlement Statute is unconstitutional or preempted by ERISA. Those inchoate legal challenges to the statute's applicability only would present themselves if, after this Court decided the pending motions to dismiss, one or more of the Non-Settling Defendants then sought to assert cross-claims or third-party claims for contribution against CCF. If that occurred, then those Non-Settling Defendants would have the opportunity to argue that, notwithstanding that this Court previously had made a *factual finding* that the CCF Settlement qualified as a "good-faith settlement" under Section 3 of the Settlement Statute, *as a matter of law*, the settlement bar at Section 2 of Settlement Statute does not extinguish their contribution claims because the statute is unconstitutional or preempted by ERISA. While CCF does not believe that either challenge – constitutionality or preemption – has merit, the Non-Settling Defendants would have an opportunity to raise such challenges at the appropriate future time.

CONCLUSION

CCF among all defendants is in a unique position in this massive and potentially never-ending litigation. It is a small non-profit foundation with limited charitable assets, even more so after the settlement, operated by a volunteer board that simply must put this litigation behind it to survive. As noted, Settlement B will exhaust the limits of CCF's liability policy. In short, the measure of finality afforded by a good faith finding under the Settlement Statute is crucial to CCF's ability to move forward and away from the darkening shadow of this suit.

In view of the foregoing, CCF requests that this Court approve Settlement B as fair, reasonable, and adequate under Fed. R. Civ. P. 23(e) and as a "good-faith settlement" under the Settlement Statute.

CHARTERCARE FOUNDATION,

By its counsel,

/s/ Russell F. Conn

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Dated: August 15, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of August, 2019, I filed and served this document through the ECF filing system. This document is available for viewing and downloading from the ECF system, and the ECF system will automatically generate and send a Notice of Electronic Filing to the following Users of Record:

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