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,	:	C. A. No. 1:18-cv-00328-WES-LDA
v.	:	
PROSPECT CHARTERCARE, LLC, *et al*. Defendants.	:	

<u>JOINT OPPOSITION OF DEFENDANTS PROSPECT MEDICAL HOLDINGS, INC., PROSPECT EAST HOLDINGS, INC., PROSPECT CHARTERCARE, LLC, PROSPECT CHARTERCARE SJHSRI, LLC, AND PROSPECT CHARTERCARE RWMC, LLC TO FINAL APPROVAL OF PLAINTIFFS' JOINT MOTION FOR SETTLEMENT AND CLASS CERTIFICATION (ECF NO. 77)</u>

NOW COME Prospect Medical Holdings, Inc., Prospect East Holdings, Inc., Prospect Chartercare, LLC, Prospect Chartercare SJHSRI, LLC, and Prospect Chartercare RWMC, LLC (collectively, the "Prospect Entities"), by and through their attorneys, and hereby submit this further Objection to the Joint Motion for Settlement and Class Certification filed in the captioned case by Plaintiffs and by Defendants Chartercare Foundation ("CCF"), St. Joseph Health Services of Rhode Island ("SJHSRI"), Roger Williams Hospital ("RWH") and Chartercare Community Board ("CCCB," together with CCF, SJHSRI and RWH, the "Settling Defendants") (ECF No. 77, the "Settlement Motion").

<u>FACTS</u>

The Rhode Island Superior Court ("Superior Court") appointed Stephen Del Sesto as permanent receiver ("Receiver") of the St. Joseph Health Services Retirement Plan (the "Plan"). Subsequently, the Receiver, through his special counsel and invoking his title as the Plan's

"Administrator" to provide him with the requisite statutory standing,[1] filed a lawsuit in this Court ("Federal Court Litigation") against a plethora of parties, including the Prospect Entities and the Settling Defendants. While the Federal Court Litigation was pending, though, the Receiver invoked the powers conferred upon him by the Superior Court to negotiate a settlement of the claims that he asserted against the Settling Defendants. The centerpiece of the settlement agreement (ECF No. 77-2, "Settlement Agreement") between the Receiver and the Settling Defendants is monetary: it calls for CCF to transfer $4.5 million to the Receiver "for deposit into the Plan assets." ECF No. 123 at 3. In exchange, the Receiver, SJHSRI, CCCB, and RWH are to "release CCF and the Rhode Island Foundation from liability." *Id.* at 4. Additionally, the Receiver is to transfer to CCF any rights that he holds in CCF. *Id.* However, after executing the Settlement Agreement and while seeking state and federal court approval of its terms, the Receiver, on April 15, 2019, made and filed an election causing the Plan to be subject to the funding, fiduciary duty, and other provisions of both Title I and Title IV of ERISA, effective July 1, 2017. That election casts the Receiver's settlement negotiations with the Settling Defendants in an entirely different light.

On May 17, 2019, the Court issued an order granting preliminary approval of the Settlement Agreement without prejudice to several defendants' objections (the "Decision"). *See* ECF No. 123. In the Decision, the Court ordered that a hearing on final approval of the Settlement

[1] As a state court-appointed receiver, the Receiver lacked the legal standing needed to commence the Federal Court Litigation, because under Section 502(a) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), such lawsuits can only be brought by participants, beneficiaries, and plan fiduciaries. *See* 29 U.S.C. § 1132(a). However, because the Receiver had been appointed by the Superior Court to serve as the Plan's "Administrator"—one of the Plan's named fiduciaries—that appointment provided him with the needed statutory authority to do so.

Agreement be held on August 29, 2019, and has allowed non-settling defendants to submit objections to final approval of the Settlement Agreement.

ARGUMENT

For purposes of efficiency, the Prospect Entities will not rehash or reiterate their prior objections to the Settlement Motion, which they filed with the Court on January 18, 2019 (ECF No. 81).[2] The Court already has been made aware of the Prospect Entities' many concerns, including the obviously collusive nature of the pending settlement and the foreseeably prejudicial effect that the pending settlement will have on the Prospect Entities. The Prospect Entities instead draw to this Court's attention the significant impact that the Receiver's April 15, 2019 "ERISA election" has had, and will continue to have, on the Plan, the Settling Defendants, and the Settlement Agreement.

Simply, by irrevocably subjecting the Plan to ERISA's funding and fiduciary duty requirements as of July 1, 2017, the Receiver not only put to rest all possible legal question(s) regarding ERISA's application to the Plan from that date forward, but he *also* subjected each of the Settling Defendants to ERISA's minimum funding requirements, including the potentially

[2] The Prospect Entities initially objected to preliminary approval of the settlement agreement between the Receiver, CCCB, and RWH ("Settlement A"). *See* ECF Nos. 75, 75-1. The Prospect Entities then incorporated their objections to Settlement A into their objection to the Settlement Agreement between the Receiver, CCF, CCCB, SJHSRI, and RWH ("Settlement B"). *See* ECF No. 81. The Prospect Entities now re-incorporate by reference their objections to Settlement A and Settlement B herein. In sum, those objections are that the Settlement Agreement should be denied because (1) the Plan is a retirement plan subject to ERISA; therefore no settlement can be effectuated without the Pension Benefit Guaranty Corporation ("PBGC"), a necessary party to the Federal Court Litigation, and no settlement of any Plan-held claims should be effectuated without the PBGC; (2) federal courts have exclusive jurisdiction over ERISA plan fiduciaries' activities and over the interpretation and enforcement of ERISA's provisions; and (3) any actions the Receiver takes to compromise and settle the Plan's ERISA-based claims against the Settling Defendants (e.g., failure to fund the Plan in accordance with ERISA's requirements, etc.) are governed by ERISA, not state law, causing his attempt to settle those claims under state law to be wholly preempted and superseded—and therefore, contrary to federal law.

debilitating penalty tax provisions found in Section 4971 of the Internal Revenue Code of 1986 ("IRC") from that date forward, because each of the Settling Defendants is, or at least was, either a sponsor of the Plan or a contributing employer to the Plan during that period.

That puts the Receiver in a position to demand and collect minimum required contributions from the Settling Defendants on a joint and several liability basis—contributions that, according to the Receiver, currently total $20,169,983 for that period. *See* Exhibit A.[3] This was recently brought to the Court and the Receiver's attention in the Joint Supplemental Memorandum filed with the Court on June 14, 2019. *See* ECF No. 127, at § III.A (explaining ERISA's minimum required contribution obligation, and how IRC § 4971's penalty provisions act as a significant motivator to prompt sponsors and contributing employers to honor their funding obligations).[4]

In the context of the pending $4.5 million settlement, what it means is this: the Receiver did not need to engage in long, drawn-out settlement negotiations in state court with each of the Settling Defendants, nor did he have to incur millions of dollars in legal fees or—perhaps most notably—promise to release from liability each of the Settling Defendants and their countless current and former directors and officers (some of whom no doubt could still be pursued as Plan fiduciaries), in order to obtain all the Settling Defendants' assets. All the Receiver had to do is

---

[3] This is the amount that the Receiver now is trying to elicit from the Prospect Entities (and likely, the other non-settling defendants), even though—as the relevant federal statutes make abundantly clear—the Receiver has no statutory or other legal basis for doing so because none of the Prospect Entities have ever been a sponsor of the Plan or a contributing employer to the Plan. The Prospect Entities' response to the letter attached as Exhibit A is attached as Exhibit B.

[4] The penalty tax imposed under IRC § 4971 begins at 10% of the minimum required contributions that fail to get made, *see* IRC § 4971(a) (the "initial tax"), and continue each year that failure persists. *Id*. at § 4971(a)(1). If non-payment persists, though, the penalty tax shifts to a virtually confiscatory 100% tax, *see* IRC § 4971(b) (the "additional tax"), thus incentivizing a plan sponsor or contributing employer to comply. IRC § 4971(e) makes plain that the liability is imposed on the plan sponsor and/or employer responsible for making the required contributions, and any and all other organizations which are members of its controlled group.

what he now, finally, has done: he has elected to subject the Plan to ERISA and its minimum funding and fiduciary duty rules, and put ERISA's provisions, and related federal tax provisions, to work for him and for the Plan's participants and beneficiaries.

Now that the Plan is subject to ERISA, 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. And to help each of the Settling Defendants with their decision(s), he can bring to the attention of the Internal Revenue Service the fact that each is subject to the assessment of debilitating federal excise taxes so long as they continue to resist or delay. All without releasing anyone from liability. In this way, the Court's denial of the Settlement Agreement would actually assist the Receiver.

Moreover, by pressing forward and seeking final approval for the pending settlement while acting as the Plan's Administrator and named fiduciary, the Receiver places himself at some personal peril for having needlessly released the Plan's sponsors and contributing employers from all liability, along with other potential defendants. It bears remembering that in the May 15, 2019 letter that the PBGC sent to the Receiver when responding to his request for guidance as the Plan's Administrator (ECF No. 117, Ex. 4), the PBGC made clear that if and when (we submit, when) the PBGC steps in to take over the Plan in termination, the PBGC takes over the right to assert all of the Plan's claims and causes of action:

> For your information, when PBGC does become trustee of a terminated plan, it succeeds to a plan's claims and causes of action, including any ongoing litigation. And PBGC may bring litigation on behalf of a terminated plan for at least three years after the date PBGC becomes trustee.

ECF No. 117, Ex. 4.

That could include asserting breach-of-fiduciary duty claims against prior Plan fiduciaries found to have carelessly misplayed or squandered the Plan's rights. The Court can assist the Receiver by denying the Settlement Motion and putting him in a position to more easily and efficiently empty the Settling Defendants' coffers using ERISA's minimum funding rules (and related federal tax rules).

Lastly, and perhaps most important, the Receiver asks the Court to approve a settlement that he entered into without proper authority. The irrevocable election that the Receiver made and filed on April 15, 2019, which retroactively subjected the Plan to all of ERISA's provisions as of July 1, 2017, strips the Receiver of the authority under which he purported to act. Because ERISA irrefutably began to apply to the Plan as of July 1, 2017, all of the Receiver's fiduciary activities after July 1, 2017, need to be wholly consistent with ERISA, including the discretion—and discretionary authority—the Receiver clearly exercised when he unilaterally decided to settle and compromise the Plan's ERISA-based claims against the Settling Defendants. Review and approval of that decision, what motivated it, and whether it constitutes the prudent and diligent exercise by the Receiver of his fiduciary responsibilities under ERISA, should have come exclusively from a federal court, as ERISA § 502(e)(1) makes plain. *See* 29 U.S.C. § 1132(e)(1). Because that did not occur here, the Settlement Motion should be denied.

CONCLUSION

For the foregoing reasons, the Settlement Motion should be denied.

Respectfully submitted,

PROSPECT MEDICAL HOLDINGS, INC. and
PROSPECT EAST HOLDINGS, INC.

By their attorneys,
/s/ Ekwan E. Rhow, Esq.
/s/ Thomas V. Reichert, Esq.
Ekwan E. Rhow, Esq., *Pro Hac Vice*
Thomas V. Reichert, Esq., *Pro Hac Vice*
BIRD, MARELLA, BOXER, WOLPERT, NESSIM
DROOKS, LINCENBERG & RHOW, P.C.
1875 Century Park East, 23rd Floor
Los Angeles, California 90067-2561
T: 310-201-2100
erhow@birdmarella.com

/s/ Preston W. Halperin, Esq.
Preston W. Halperin, Esq. (#5555)
Dean J. Wagner, Esq. (#5426)
Christopher J. Fragomeni, Esq. (#9476)
SHECHTMAN HALPERIN SAVAGE, LLP
1080 Main Street
Pawtucket, RI 02860
T: 401-272-1400
phalperin@shslawfirm.com

/s/ John J. McGowan, Esq.
John J. McGowan, Esq., *Pro Hac Vice*
BAKER & HOSTETLER LLP
Key Tower
127 Public Square, Suite 2000
Cleveland, OH 44114
T: 216-861-7475
jmcgowan@bakerlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of August 2019, the foregoing document has been filed electronically through the Rhode Island ECF system, is available for viewing and downloading, and will be sent electronically to the counsel who are registered participants identified on the Notice of Electronic Filing.

/s/ Preston Halperin, Esq.

Exhibit A

PIERCE ATWOOD LLP

Stephen Del Sesto

One Financial Plaza
26th Floor
Providence, RI 02903

P 401.490.3415
F 401.588.5166
sdelsesto@pierceatwood.com
pierceatwood.com

Admitted in: RI, MA

July 22, 2019

Via certified mail, return receipt requested and
First class mail, postage pre-paid

Prospect CharterCare, LLC *et. al.*
c/o Preston Halperin, Esq.
Shechtman Halperin Savage, LLP
1080 Main Street
Pawtucket, Rhode Island 02860

Re: Demand for Payment of Minimum Required Contribution by the Prospect Entities to the St. Joseph Health Services of Rhode Island Retirement Plan

Dear Madam, Sir and Attorney Halperin:

As you know, I am the Court-appointed Receiver and Administrator (the "Administrator") of the St. Joseph Health Services of Rhode Island Retirement Plan (the "Plan"). Prospect Chartercare, LLC, Prospect Chartercare SJHSRI, LLC, Prospect Chartercare RWMC, LLC, Prospect Medical Holdings, Inc., and Prospect East Holdings, Inc. (collectively, the "Prospect Entities") are liable to the Plan to make minimum required contributions ("MRC") due to the Plan, pursuant to Section 302 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and Section 430 of the Internal Revenue Code of 1986, as amended (the "Code").

The Court-approved Plan actuary has calculated the MRC due to the Plan as follows:

2017-2018 Plan Year:	$10,367,603
2018-2019 Plan Year:	

Q1: (due 10/15/18)	$2,450,595
Q2: (due 1/15/19)	$2,450,595
Q3: (due 4/15/19)	$2,450,595
Q4: (due 7/15/19)	$2,450,595
"Catch-up payment" (due 3/15/20)	$4,143,961

In my capacity as Administrator, I hereby demand that the Prospect Entities make payment to the Plan in the amount of $20,169,983, representing the value of the total MRC due for the plan year that ended on June 30, 2018 and for the quarterly payments due for the plan year that ended June 30, 2019. The Prospect Entities shall remit that amount no later than August 6, 2019. This payment is in addition to the Prospect Entities' other ongoing or future obligations to the Plan.

Sincerely,

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

cc: Jeffrey Cohen, Esq. (via electronic mail only)
Max Wistow, Esq. (via electronic mail only)
Stephen Sheehan, Esq. (via electronic mail only)
Benjamin Ledsham, Esq. (via electronic mail only)

SHECHTMAN HALPERIN SAVAGE, LLP
ATTORNEYS AT LAW

Attorneys At Law
A Limited Liability Partnership

Preston W. Halperin, Esq.
phalperin@shslawfirm.com

August 9, 2019

Via Certified Mail & Electronic Mail
sdelsesto@pierceatwood.com

Certified Article Number
9414 7266 9904 2145 7355 52
SENDER'S RECORD

Stephen F. Del Sesto
Receiver and Administrator for the
St. Joseph Health Services of Rhode Island Retirement Plan
One Financial Plaza, 26th Floor
Providence, RI 02903

RE: Your Letter Dated July 22, 2019, Demanding Payment of Certain Minimum Required Contributions on behalf of the St. Joseph Health Services of Rhode Island Retirement Plan (the "Plan")

Dear Mr. Del Sesto:

The captioned letter, which you directed at Prospect CharterCare LLC, Prospect CharterCare SJHSRI, LLC. Prospect Chartercare RWMC, LLC, Prospect Medical Holdings, Inc., and Prospect East Holdings. Inc. (alternatively, the "Prospect Companies" or "Prospect"), in your capacity as the Administrator of the captioned Plan, has been referred to me for an appropriate response.

Prospect rejects your demand, which you make without statutory or regulatory support and in the face of contrary facts, together with your assertion that the Prospect Companies (or any of them) are liable under Section 302 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and/or under Section 430 of the Internal Revenue Code of 1986, as amended (the "Code") to make minimum required contributions ("MRC") to the Plan – either for the Plan's 2017-2018 fiscal year or for the Plan's 2018-2019 fiscal year.

Strangers to the Plan

Prospect's reasons for doing so are simple and straightforward. First, none of the Prospect Companies has, or ever has had, any sort of relationship with the Plan. None of the Prospect Companies has ever sponsored the Plan; or contributed to the Plan (or made any commitment to contribute to the Plan); or directly or indirectly administered the Plan; or directly or indirectly set the Plan's terms; or directly or indirectly appointed the Plan's fiduciaries; or caused the Plan to recognize the employment service provided to any of the Prospect Companies by their respective employees. Indeed, as the Prospect Companies all along have maintained and as you well know, each of the Prospect Companies is a complete stranger to the Plan.

Second, the three entities that actually do have such a relationship with the Plan are well-known to you; those entities served continuously as the Plan's sponsor, or as a contributing employer whose employees were accruing benefits under the Plan, long before Prospect purchased business assets from them in 2014 and for several years afterwards: the CharterCare Community Board ("CCCB"). St. Joseph Health Services of Rhode Island, Inc. ("SJHSRI"), and Roger Williams Hospital ("RWH"). As the Plan's independent auditors recently described the relevant events:

> Between 2009-2014, [St. Joseph Health Services of Rhode Island] engaged in a series of corporate transactions transferring ownership of the hospitals. **SJHSRI continued to operate the Plan following the closing of each transaction.** During 2017, SJHSRI initiated a proceeding in the Rhode Island Superior Court requesting the appointment of a Receiver to manage the Plan [ ] .

Notes to Plan's Audited Financial Statements, Note 1, p. 2, appended to 2017 Form 5500 filed April 15, 2019 (emphasis mine).

ERISA Points at CCCB, SJHSRI and RWH

The fact that these funding obligations only arise now, years after the Prospect Companies completed their business dealings with CCCB, SJHSRI and RWH, simply underscores the broader point being made: you plainly are casting about for other pockets to pick, now that you appear to have successfully claimed all of the assets the Plan's actual sponsor(s) and contributing employer(s) had left. Moreover, it seems clear that funding for the Plan is readily available to you, at least for now, from CCCB. CCCB has already paid you $400,000 to fund the receivership, and has agreed to turn over millions of dollars to you, which you could use to fund the Plan.

As Plan Administrator, you know (or should know) that ERISA Title I imposes the obligation to fund a defined benefit pension plan like the Plan on the "employer responsible for making [such] contributions." ERISA §302(b)(1), part of ERISA Title I and codified at 29 U.S.C. §1082(a)(1), makes this clear:

> **(b)(1) In general**
>
> Except as provided in paragraph (2) [pertaining to such an employer's controlled group, if any], the amount of any contribution required by this section (including any required installments under paragraphs (3) and (4) of section 1083(j) of this title or under section 1085a(f) of this title) **shall be paid by the employer responsible for making contributions** to or under the plan.

ERISA §3(5), in turn, defines an "employer" for ERISA Title I purposes as any person acting directly as an employer, or indirectly in the interest of an employer, in relation to a plan:

> **(5)** The term "employer" means **any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan**; and includes a group or association of employers acting for an employer in such capacity.

29 U.S.C. §1002(5) (emphasis added). As the operative statute and the statutory definition make plain particularly when read together, the obligation falls squarely – and solely – on the person(s) "acting directly as the employer", or "indirectly in the interest of the employer in relation to" the plan in question. Here, none of the Prospect Companies has ever acted at all when it came to how CCCB, SJHSRI and RWH neglected their funding obligations towards the Plan in 2014, and from 2015 through 2018, even as they allowed the Plan to be run into the ground.

The Code Points Nowhere At All

We only briefly respond to your contention that the Prospect Companies have an obligation to fund the Plan under Code §430, simply because the Code does not explicitly or even implicitly confer a private right of action upon anyone – not even an ERISA plan fiduciary -- to sue a private party. E.g., *Rosenberg v. Blue Cross Blue Shield of Fla, Inc.*, 2019 U.S. Dist. LEXIS 15461 (MD FL; Jan. 31) (holding no private right of action exists; explaining the standard for determining under *Cort v. Ash*, 422 U.S. 66 (1975) whether a private right of action can be implied); *also*, *Reynolds v. de Silva*, 2010 U.S. Dist. LEXIS 18040 (SDNY; Feb. 24) (same conclusion; collecting cases).

Congress' decision to enact a parallel provision (ERISA §302) capable of being enforced against certain specified parties, such as a plan's contributing employers or the plan fiduciaries that looked the other way while the contributing employers failed to make contributions as and when due, linked that requirement to ERISA's remedial provisions (found at §§502(a)(2) and 502(a)(3)) strongly reinforces this conclusion.

As Plan Administrator, rather than casting around for inventive ways to bring claims against third parties that border on the specious while wasting Plan assets in the process, you would be far better served by conserving the Plan's assets so they remain available for distribution to the Plan's participants and beneficiaries.

Sincerely,

Preston Halperin

Preston W. Halperin