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 DEFENDANTS CHARTERCARE FOUNDATION, 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 Foundation ("CCF"), CharterCARE Community Board ("CCCB"), St. Joseph Health Services of Rhode Island ("SJHSRI"), and Roger Williams Hospital ("RWH") (this settlement hereinafter being "Settlement B").

OVERVIEW OF SETTLEMENT B

Settlement B is the second of two settlements in this case but is the first to reach a hearing for final approval. The other settlement ("Settlement A")[2] is scheduled for a hearing on final approval for September 10, 2019. The Settlement Agreement for Settlement B is signed by representatives of Plaintiffs and Defendants CCF, SJHSRI, CCCB, and RWH.[3]

Settlement A was fairly complex, and included various transfers, including the transfer to the Receiver of certain rights that Defendant CCCB had in CCF. Settlement

[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 May 17, 2019. See Dkt #123 (Memorandum and Order) at 9.

[2] Settlement A is a settlement among the Plaintiffs, CharterCARE Community Board, St. Joseph Health Services of Rhode Island, and Roger Williams Hospital.

[3] Although Defendant The Rhode Island Community Foundation is not a signatory to the Settlement Agreement, Settlement B obligates Plaintiffs and Defendants SJHSRI, RWH, and CCCB to release Defendant The Rhode Island Community Foundation from liability, since The Rhode Island Community Foundation's sole role in this case is as a custodian for Defendant CCF's investment assets.

B includes the Receiver re-transferring to Defendant CCF any such rights the Receiver receives from Defendant CCCB in connection with Settlement A. However, Settlement B is *not* conditioned upon Settlement A being approved. In other words, if approved, Settlement B will take effect regardless of whether the Settlement A is approved.

As previously discussed in connection with its preliminary approval, if it receives final approval, Settlement B entails the transfer to the Receiver of $4,500,000 for deposit into the Plan assets pursuant to the orders of the Rhode Island Superior Court in the 2015 *Cy Pres* Action and the Receivership Proceedings, after payment of attorneys' fees. In return the Plaintiffs and Defendants SJHSRI, CCCB, and RWH will release CCF and The Rhode Island Community Foundation[4] from liability. In addition, the Receiver will transfer to CCF any rights in CCF which the Receiver has in CCF. The Plaintiffs will continue to pursue their claims against the remaining Defendants.

PROCEDURAL TRAVEL

On August 18, 2017, Defendant St. Joseph Health Services of Rhode Island petitioned the Superior Court to place the St. Joseph Health Services of Rhode Island Retirement Plan into receivership.[5] Following his appointment as temporary receiver,[6] the Receiver obtained permission from the Superior Court on October 17, 2017 to engage Plaintiffs' counsel Wistow, Sheehan & Loveley, P.C. as special counsel to conduct an investigation of possible claims.

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[4] Id.

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

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

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.[7] On January 25, 2018, Plaintiffs' counsel issued a subpoena *duces tecum* on CCF, which produced documents in rolling productions between February and May, 2018. Plaintiffs' counsel obtained over 31,000 pages of documents from CCF, in addition to over 1,000,000 pages of documents from other subpoenaed persons or entities.[8]

In April and May of 2018, after their document productions were substantially complete, CCF's counsel and Plaintiffs' counsel had discussions and correspondence concerning settlement, but those communications were unproductive.[9]

On June 18, 2018, the Receiver and the other Plaintiffs filed the Complaint in this action, together with a companion Superior Court complaint asserting only state-law claims and a Motion for Leave to Intervene in another Superior Court action, In re: CharterCARE Health Partners Foundation[10], Roger Williams Hospital and St. Joseph Health Services of Rhode Island, Inc., KM-2015-0035 (the "2015 Cy Pres Action"). This intervention was sought to attack prior transfers of approximately $8,200,000 by RWH and SJHSRI to CCF pursuant to an April 20, 2015 order they had obtained from the

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[7] Dkt #65 (Wistow Dec.) ¶ 11.

[8] 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.

[9] See Wistow Second Supp. Dec. ¶ 4 ("In April and May of 2018, I had a series of discussions and correspondence with Attorney Russell Conn, counsel for CCF, in which Mr. Conn contended that his client had no liability to Plaintiffs, and sought the outright non-assertion of Plaintiffs' claims against his client. That was certainly not acceptable to Plaintiffs. Accordingly, on June 18, 2018 Plaintiffs commenced this action against various defendants, including CCF.").

[10] CharterCARE Health Partners Foundation was the former name of CharterCARE Foundation. See Plaintiffs' First Amended Complaint ("FAC") ¶ 24.

Superior Court following the 2014 hospital asset transfers, as discussed in detail in the Amended Complaint.

CCF objected to Plaintiffs' intervention, which they litigated over the ensuing months. On September 17, 2018, the Superior Court (Stern, J.) issued a bench decision granting Plaintiffs' intervention.[11] Following that decision, Plaintiffs' counsel and CCF's counsel began settlement discussions, ultimately culminating in the execution of Settlement B, subject to judicial approvals.[12]

On November 28, 2018, the Receiver petitioned the Superior Court for permission to present Settlement B to this Court for its approval. That petition was granted on December 27, 2018. Thereafter on January 4, 2019, Plaintiffs and CCF[13] filed their Joint Motion for Settlement Class Certification, Appointment of Class Counsel, and Preliminary Settlement Approval (Dkt #77).

Non-Settling Defendants filed objections to Settlement B. See Dkt #80 (Diocesan Defendants' objection); Dkt #81 (the Prospect Entities' objection). Plaintiffs and CCF filed replies to those objections. See Dkt #86 (CCF's reply to both the Prospect Entities and the Diocesan Defendants); Dkt #88 (Plaintiffs' reply to the Prospect Entities); Dkt #89 (Plaintiffs' reply to the Diocesan Defendants). Although the Non-Settling Defendants sought and recently obtained limited discovery of the

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[11] Dkt #79 (Wistow Supp. Dec.) ¶¶ 3-4.

[12] Wistow Second Supp. Dec. ¶ 5 ("Following the issuance of the Superior Court's September 17, 2018 bench decision granting Plaintiffs' motion to intervene in *In re: Chartercare Health Partners Foundation, Roger Williams Hospital, and St. Joseph Health Services of Rhode Island*, KM-2015-0035 (R.I. Super.), settlement discussions began between Plaintiffs and CCF, which culminated in the settlement agreement.").

[13] Together with CCCB, RWH, and SJHSRI, which are participating in Settlement B in order to give releases to CCF and The Rhode Island Community Foundation, which is the custodian of CCF's funds.

settlement negotiations in connection with Settlement A, they did not seek such discovery in connection with Settlement B.

Following an unsuccessful mediation, the Court on May 17, 2019 issued its Memorandum and Order (Dkt #123) granting the joint motion, preliminarily approving the settlement, preliminarily certifying the settlement class, appointing Plaintiffs' counsel as class counsel, and setting the settlement down for a final approval hearing on August 29, 2019.

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:

- Prior to May 31, 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;[14]
- On August 14, 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.[15]

Only one preliminarily certified settlement class member has filed an objection to final approval. See Dkt #128 (Lydia Corvese's Objection). That objecting class

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

[15] Dkt #135 (Declaration of Andrew R. Dennington, Esq. Regarding Notice of Proposed Settlement Pursuant to 28 U.S.C. § 1715 on Behalf of CharterCARE Foundation, CharterCARE Community Board, Roger Williams Hospital, and St. Joseph Health Services of Rhode Island).

member has not sought discovery into the merits of the settlement or concerning its negotiation.

FURTHER PROCEEDINGS FOLLOWING FINAL APPROVAL

As the Class Notice states, if the Court grants final approval to Settlement B, then the Settling Parties will return to the Superior Court to seek its approval of an amended *cy pres* petition to authorize the transfer of the settlement payment from CCF's charitable funds to the Receiver:

> This Partial Settlement is contingent upon: (1) final approval by the United Street District Court for the District of Rhode Island in this Action; and (2) the Rhode Island Superior Court's entry of a final judgment approving an amended *cy pres* petition authorizing CCF [CharterCARE Foundation] to transfer $3,900,000 from charitable funds currently held at RIF [The Rhode Island Community Foundation] to the Receiver.
>
> If this Partial Settlement receives final approval by the United Street District Court for the District of Rhode Island in this Action, then the Settling Parties will cooperate in filing and seeking approval of an amended *cy pres* petition in the 2015 *Cy Pres* Proceeding in the Rhode Island Superior Court. That amended *cy pres* petition will request that the Rhode Island Superior Court approve CCF's transfer to the Receiver of $3,900,000 of charitable funds that it received in 2015 from SJHSRI and RWH and now holds at RIF. If the Rhode Island Superior Court enters a final judgment approving that amended *cy pres* petition, then CCF will complete the Settlement Payment to the Receiver by paying the $3,900,000 of charitable funds that CCF holds at RIF, plus the $600,000 from the RSUI insurance policy.

Del Sesto Dec., Exhibit 2. This requirement for an amended *cy pres* petition is expressly included in the Settlement Agreement,[16] which Judge Stern approved on

[16] See Dkt #77-2 (Settlement Agreement) § II ("As set forth below, Settlement B is further contingent upon obtaining (a) approval thereof in the Receivership Proceedings, (b) the Federal Court Order Granting Final Settlement Approval, and (c) approval of an Amended Cy Pres Petition and entry of the Amended Cy Pres Order and Cy Pres Final Judgment in the 2015 Cy Pres Proceeding.").

December 17, 2018 and authorized the Receiver to file with this Court.

FACTS CONCERNING LIABILITY AND DAMAGES

The allegations concerning the merits of the claims of the Plaintiffs involving CCF's conduct[17] are set forth in the First Amended Complaint filed in this action, the State Court Complaint,[18] and Plaintiffs' memorandum in support of their motion to intervene in the 2015 *Cy Pres* Proceeding,[19] and are only summarized herein.

CCF is a Rhode Island non-profit corporation. The Receiver's and the Named Plaintiffs' claims against CCF arise principally from a 2015 transaction in which SJHSRI and RWH transferred approximately $8,200,000 of their assets to CCF (the "*Cy Pres* Transfer"). In this Action and a related action pending in the Rhode Island Superior Court known as In re: CharterCARE Health Partners Foundation et al., C.A. No. KM-2015-0035 (hereinafter referred to as the "2015 *Cy Pres* Proceeding"), the Receiver and the Named Plaintiffs allege that the *Cy Pres* Transfer was a fraudulent transfer in violation of R.I. Gen. Laws §§ 6-16-4(a)(1), 6-16-4(a)(2) and/or 6-16-5(a). Plaintiffs also allege that, because the *Cy Pres* Transfer took place in connection with the anticipated dissolution of Defendants SJHSRI and RWH, the provisions of R.I. Gen. Laws §§ 7-6-51 & 7-6-61(c)(1) entitled creditors such as Plaintiffs to be paid before any funds could be transferred pursuant to the doctrine of *cy pres*. CCF denies all of those allegations.

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[17] However, Plaintiffs have also asserted conspiracy claims against CCF and the other Defendants. Under the law of conspiracy, each member of the conspiracy is liable for the wrongful acts of other members of the conspiracy in furtherance of the conspiracy, even if they were unaware of or actually opposed those acts. See Plaintiffs' Memorandum in Support for Their Objection to the Prospect Entities' Motion to Dismiss (Dkt #99-1) at 85-87.

[18] Dkt #65 (Wistow Dec.), Exhibit 7 (Plaintiffs' Complaint in the State Court Action).

[19] See Dkt #65 (Wistow Dec.), Exhibits 8-10 (Proposed Intervenors' memorandum in support of their motion to intervene in the 2015 *Cy Pres* Proceeding, CCF's memorandum in opposition thereto, and Proposed Intervenors' reply memorandum).

In addition, in the event the other pending settlement, Settlement A, between Plaintiffs and SJHSRI, RWH, and CCCB, is approved prior to this Settlement B, Plaintiffs will have additional claims to assert against Defendant CCF based upon certain rights that Defendant CCCB claims in Defendant CCF that are being transferred to Plaintiffs in connection with Settlement A.

CCF denies liability to Plaintiffs. Indeed, CCF filed a motion to dismiss Plaintiffs' initial Complaint, with an extensive supporting memorandum detailing the grounds upon which CCF claimed that Plaintiffs' claims should be dismissed. When Plaintiffs filed their First Amended Complaint on October 5, 2018, productive settlement negotiations between Plaintiffs and CCF were well underway, such that CCF did not file a motion to dismiss Plaintiffs First Amended Complaint at that time. However, CCF has informed the Court that if this Settlement B between Plaintiffs and CCF is not approved, CCF intends to file a motion to dismiss Plaintiffs First Amended Complaint.[20]

Moreover, if CCF's motion to dismiss is not fully successful, CCF can be expected to vigorously defend this case on the merits. Notably, there is no precedent in Rhode Island directly addressing Plaintiffs' claim that the provisions of R.I. Gen. Laws §§ 7-6-51 & 7-6-61(c)(1) entitled creditors such as Plaintiffs to be paid before any funds could be transferred pursuant to the doctrine of *cy pres*. Plaintiffs rely upon precedents from other jurisdictions, but CCF can be expected to protest the applicability of those precedents and to offer other precedents in support of its position that charitable funds cannot be used to pay creditors. In addition, CCF can be expected to argue that

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[20] See Dkt #66 (Joint Motion by Plaintiffs and Defendant CharterCARE Foundation to Stay CharterCARE Foundation's Deadline to Answer or Otherwise Respond to Amended Complaint, Pending Judicial Approval of Proposed Settlement [i.e. Settlement B]).

Plaintiffs are not *bona fide* creditors of SJHSRI and RWH. It would not be prudent to contend that there is no risk to Plaintiffs of these defenses prevailing. For example, although Plaintiffs contend that such provisions are unenforceable, the Plan documents contain provisions that perhaps may tend to exculpate SJHSRI and RWH from, *inter alia*, any obligation to fund the Plan.[21]

Defendant CCF also disputes the contention that Defendant CCCB has any rights in Defendant CCF, and contends that, assuming *arguendo* that Defendant CCCB has any such rights, those rights cannot be transferred to the Plaintiffs in connection with Settlement A. The resolution of these issues also would likely involve factual disputes that may necessitate trial.

ARGUMENT

I. The Court has jurisdiction over the dispute

The dispute concerning the Court's jurisdiction to approve Settlement B arises from the Non-Settling Defendants' contention that Plaintiffs lack statutory (ERISA) and constitutional (Article III) standing, and the Non-Settling Defendants' contention that the Court lacks federal question jurisdiction until the applicability of ERISA to the Plan is actually determined. Plaintiffs' statutory (ERISA) and constitutional (Article III) standing is discussed in Plaintiffs' Memorandum in Reply to the Prospect Entities' Objection to Settlement A. Dkt #83 at 18-40.[22] Since the Court in the telephone status conference on August 5, 2019 specifically directed Plaintiffs to address in this memorandum the

[21] See FAC ¶¶ 218-23.

[22] Plaintiffs' constitutional (Article III) standing is also discussed at length in objection to the Non-Settling Defendants' motions to dismiss. See Dkt #100 (Plaintiffs' Omnibus Memorandum in Support of Their Objection to Defendants' Motions to Dismiss) at 7-11 (discussing the facts) and 79-123 (applying the law of standing to those facts, disposing of the Non-Settling Defendants' arguments).

Court's jurisdiction to approve Settlement B, we repeat some of, and amplify upon, that discussion. In addition, we provide additional case citations holding that proof that a Plan is covered by ERISA is not a jurisdictional predicate for the Court to approve this settlement involving ERISA claims; rather, the Court has federal question subject matter jurisdiction to approve this settlement because Plaintiffs' Complaint purports to assert a claim under ERISA, regardless of the merits of that claim and even if (*arguendo*) the Complaint fails to state a claim under Rule 12(b)(6) based on ERISA.

This case is still in the pleadings stage. Indeed, motions to dismiss based upon the pleadings are pending. The standard applicable when issues of statutory and/or constitutional standing are raised in connection with a proposed class action settlement while the case is still in the pleadings stage is that the plaintiffs' allegations are accepted as true. In re Deepwater Horizon, 739 F.3d 790, 821 (5th Cir. 2014) (approving class action settlement at pleadings stage, based *inter alia* on the fact that the allegations in plaintiffs complaint adequately alleged Article III standing) ("As we wrote in *Cole*, 'it is sufficient for standing purposes that the plaintiffs seek recovery for an economic harm that they **allege** they have suffered,' because we 'assume *arguendo* the merits' of their claims at the Rule 23 stage.") (emphasis in original) (quoting Cole v. General Motors Corp., 484 F.3d 717, 723 (5th Cir. 2007)).

This is consistent with the general principle that although the elements of Article III standing are constant throughout litigation, the standard used to establish these elements is not constant but becomes gradually stricter as the parties proceed through the stages of the litigation. See In re Deepwater Horizon, *supra*, 739 F.3d at 800 ("[T]the elements of Article III standing are constant throughout litigation: injury in

fact, the injury's traceability to the defendant's conduct, and the potential for the injury to be redressed by the relief requested. As *Lujan* emphasized, however, the standard used to establish these three elements is not constant but becomes gradually stricter as the parties proceed through 'the successive stages of the litigation.'") (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)).

In Lewis v. Casey, 518 U.S. 343 (1996), the Supreme Court reaffirmed this formulation:

> Since they are not mere pleading requirements, but rather an indispensable part of the plaintiffs case, each element of standing must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim. In response to a summary judgment motion, however, the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be supported adequately by the evidence adduced at trial.

Lewis v. Casey, *supra*, 518 U.S. at 358.

Indeed, in many judicially approved class action settlements, the possibility that the plaintiffs may be determined to lack Article III standing at a later stage of the litigation, or on appeal, is a risk of litigation that tends to justify judicial approval of the class action settlement. See, e.g., Zink v. First Niagara Bank, N.A., 206 F. Supp. 3d 810, 817-18 (W.D.N.Y. 2016) (approving class action settlement) ("In my view, under the present state of the law the scales tip slightly (but only slightly) in favor of finding that plaintiff has Article III standing to pursue claims on behalf of himself and the class.

However, the substantial possibility that a higher court might eventually rule otherwise, particularly when coupled with the other defenses potentially available to First Niagara, warrants the settlement agreement's significant reduction from full value of the class members' claims."); Edwards v. First Am. Corp., No. CV0703796SJOFFMX, 2016 WL 8999934, at *6 (C.D. Cal. Oct. 4, 2016) (approving class action settlement of claims for violations of the anti-kickback provisions of the federal Real Estate Settlement Procedures Act which caused no harm to plaintiffs) (citing as a substantial litigation risk that favored settlement that "the U.S. Supreme Court has not resolved the issue of whether a plaintiff has Article III standing based on a violation of a federal statute absent financial harm"); Esomonu v. Omnicare, Inc., No. 15-CV-02003-HSG, 2018 WL 3995854, at *6 (N.D. Cal. Aug. 21, 2018) ("Defendant asserts, for example, that Plaintiff and the class members would face risks in proving Article III standing. . . . The Court finds that the settlement amount, given these risks, weighs in favor of granting preliminary approval."). Thus, any question concerning whether Plaintiffs will be able to prove standing beyond the pleadings stage actually mitigates in favor of settlement approval now, because it increases the risk that the litigation would result in no recovery for the class.

There can be no real dispute that the *Receiver* has both statutory and constitutional (Article III) standing, and, therefore, the Court has federal question and Article III jurisdiction to approve the settlement. As noted, federal question jurisdiction is based upon the Complaint. See Rivet v. Regions Bank of Louisiana, 522 U.S. 470, 475 (1998) ("We have long held that the presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction

exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint.").[23] The Complaint alleges that the Receiver is the Plan Administrator.[24] As Plan Administrator, the Receiver has statutory standing as an ERISA fiduciary to prosecute claims on behalf of the Plan under 29 U.S.C. § 1132(a)(2) & (3).

The Receiver also has Article III standing, since by alleging injuries to the Plan itself, the Receiver meets the requirement for injury in fact. In Nationwide Life Ins. Co. v. Haddock, 460 F. App'x 26, 28 (2d Cir. 2012) (summary order), the Second Circuit held that trustees of an employees' benefit plan covered by ERISA had standing to sue plan fiduciaries (Nationwide) for disgorgement of hidden commissions, notwithstanding that plan participants may not have standing, stating as follows:

> As a preliminary matter, Nationwide argues that plaintiffs lack constitutional standing to seek disgorgement, citing decisions by this Court holding "that an ERISA Plan participant or beneficiary must plead a direct injury in order to assert claims [for monetary relief] on behalf of a

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[23] The court has federal question jurisdiction if the complaint alleges a federal cause of action, regardless even of whether those allegations are sufficient to state a claim. As stated in Carlson v. Principal Fin. Group, 320 F.3d 301 (2d Cir. 2003):

> [T]he question of whether a federal statute supplies a basis for subject matter jurisdiction is separate from, and should be answered prior to, the question of whether the plaintiff can state a claim for relief under that statute. The jurisdictional inquiry is rather straightforward and depends entirely upon the allegations in the complaint: "where the complaint ... is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions later noted, must entertain the suit." The two exceptions occur "where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." Thus, in order to sustain federal jurisdiction, the complaint must allege a claim that arises under the Constitution or laws of the United States and that is neither made solely for the purpose of obtaining jurisdiction nor wholly insubstantial and frivolous."

Carlson, 320 F.3d at 306 (quoting Bell v. Hood, 327 U.S. 678, 681-83 (1946)). There is absolutely no basis for even suggesting that Plaintiffs' allegations of ERISA violations were made "solely for the purpose of obtaining jurisdiction" or are "wholly insubstantial and frivolous." Accordingly, those allegations are controlling for purposes of jurisdiction at this stage of the litigation.

[24] FAC ¶ 2 ("[The Receiver] brings this action on behalf of the Plan and all of the Plan participants, in his capacity as Receiver for and Administrator of the Plan.").

> Plan." *See, e.g.*, *Central States Se. & Sw. Areas Health & Welfare Fund v. Merck–Medco Managed Care, L.L.C.,* 433 F.3d 181, 200 (2d Cir. 2005). Nationwide misreads that line of authority. Plaintiffs are ERISA Plan trustees, *not* "Plan participant[s] or beneficiar[ies]." *Id.* Thus, their allegations of injuries to plans resulting from Nationwide's alleged breaches of fiduciary duties are in no sense indirect, and we have no difficulty concluding that plaintiffs have properly pleaded the required injury in fact.

Nationwide, 460 F. App'x at 28. See also Central States Southeast and Southwest Areas Health and Welfare Fund v. Merck-Medco Managed Care, L.L.C., 504 F.3d 229, 243 (2d Cir. 2007) (finding that trustee as fiduciary of employee benefit plan had constitutional standing to sue based on injuries to the plan); Allen v. Bank of Am. Corp., No. 15 CIV. 4285 (LGS), 2016 WL 4446373, at *3-5 (S.D.N.Y. Aug. 23, 2016) (plan trustees have constitutional standing based upon injury to the plan) (citing Nationwide Life Ins. Co. v. Haddock, 460 F. App'x at 28).

There also can be no real dispute that the Receiver's co-plaintiffs, the *Plan participants*, also have both statutory and constitutional (Article III) standing, and the Court has federal question and Article III jurisdiction based on such standing.

As Plan participants, the individual Named Plaintiffs and the Settlement Class have the express statutory right to assert claims under 29 U.S.C. §§ 1132(a)(2) & (3), as they have in the Complaint.[25]

They also have Article III standing. The test for participants in a defined benefit plan to have Article III standing is that they must allege that the defendants' misconduct "creates or enhances the risk of default by the entire plan." LaRue v. DeWolff, Boberg & Associates, Inc., 552 U.S. 248, 255 (2008). See also Spokeo, Inc. v. Robins, 136 S. Ct.

[25] See FAC ¶¶ 452-76.

1540, 1549 (May 24, 2016) (the requirement of demonstrating a concrete injury "does not mean, however, that the **risk of real harm** cannot satisfy the requirement of concreteness.") (citation omitted and emphasis supplied).

The lower federal courts have embraced the Supreme Court's statement in LaRue v. DeWolff, Boberg & Assocs. as the standard for determining whether participants in defined benefit pension plans have individualized harm sufficient to confer constitutional standing for violations of ERISA. The following cases involving claims by participants in defined benefit plans all rely on and/or quote this statement from LaRue v. DeWolff, Boberg & Assocs. as the test for Article III standing in such cases:

- Rollins v. Dignity Health, 338 F. Supp. 3d 1025, 1040 (N.D. Cal. 2018) ("'[A] trustee's misconduct will give rise to Article III standing where the [m]isconduct ... creates or enhances the risk of default by the entire plan.'") (quoting Slack v. Int'l Union of Operating Eng'rs, No. C-13-5001 EMC, 2014 WL 4090383, at *14 (N.D. Cal. Aug. 19, 2014);

- Adedipe v. U.S. Bank, Nat. Ass'n, 62 F. Supp. 3d 879, 891 (D. Minn. 2014) ("In a standing analysis, the import of this alleged increased risk of default can only lie in the concomitant increase in the risk that the participants will not receive the level of benefits they have been promised due to the Plan being inadequately funded at termination.");

- Fox v. McCormick, 20 F. Supp. 3d 133, 141 (D.D.C. 2013) ("[A] a participant in a defined benefit plan can sue trustees for their failure to collect contributions when the participant faces a risk of non-payment of his pension—such as when trustees' dereliction threatens the financial stability of a plan—or when the participant specifically retains a reversionary interest in excess contributions if monies remain after all benefits are paid.");

- Perelman v. Perelman, 919 F. Supp. 2d 512, 518 (E.D. Pa. 2013) ("However, the [third amended complaint]'s claims for monetary relief under § 502(a)(2) require that Jeffrey allege an injury in fact. As a beneficiary to a defined benefit pension plan, he cannot establish standing to sue on behalf of the Plan absent a plausible

allegation that the breach of fiduciary duty created or enhanced a risk of default by the entire plan."), aff'd, 793 F.3d at 374 ("By contrast, there is some support for the notion that a participant or beneficiary in a defined benefit plan has suffered an injury sufficient to pursue a claim for 'make-whole' equitable monetary relief under § 502(a) where the fiduciary's alleged misconduct "creates or enhances the risk of default by the entire plan.") (quoting LaRue v. DeWolff, Boberg & Assocs., Inc.);

- Lee v. Verizon Communications Inc., 954 F. Supp. 2d 486, 497 (N.D. Tex. 2013) ("For defined benefit plans such as the Plan, a decrease in the value of plan assets does not necessarily result in an injury in fact because the benefit amount is fixed regardless of the value of assets in the Plan. '[T]he employer typically bears the entire investment risk and—short of the consequences of plan termination—must cover any underfunding as the result of a shortfall that may occur from the plan's investments.' *Hughes Aircraft*, 525 U.S. at 439, 119 S.Ct. 755. Therefore, a decrease in the amount of plan assets "will not affect an individual's entitlement to a defined benefit unless it creates or enhances the risk of default by the entire plan.") (quoting LaRue v. DeWolff, Boberg & Assocs., Inc., 552 U.S. 248, 255 (2008)).

In short, Article III standing (and the Court's Article III jurisdiction) for a participant in a defined benefit pension plan governed by ERISA depends upon whether the alleged violations of ERISA resulted in the plan being underfunded. See Adedipe v. U.S. Bank, Nat. Ass'n, *supra*, 62 F. Supp. 3d at 902 n.8 ("The Court recognizes, as has the Eighth Circuit, that one implication of the standing analysis outlined in *Harley* is that a private cause of action to remedy a fiduciary breach will be available to a participant when a plan is underfunded, but the same participant will have no recourse for the very same misconduct when the plan is overfunded.") (finding plan participant standing because alleged ERISA violations resulted in substantial underfunding) (citing Harley v. Zoesch, 413 F.3d 866, 871, 908 n.5 (8th Cir. 2005)).

The Plan participants satisfy Article III for purposes of the Court's approval of Settlement B, because the Complaint pervasively alleges that Defendants' misconduct created and/or enhanced the risk of default of the entire Plan.[26]

Indeed, even if, following approval of Settlements A and B, the Court were to grant Defendants' motions to dismiss all of Plaintiffs' federal-law claims for failure to state a claim, that would not deprive the Court of subject matter jurisdiction going forward with respect to the remaining Defendants. Rodriguez v. Doral Mortg. Corp., 57 F.3d 1168, 1177 (1st Cir. 1995) ("In an appropriate situation, a federal court may retain jurisdiction over state-law claims notwithstanding the early demise of all foundational federal claims."). See Lawless v. Steward Health Care System, LLC, 894 F.3d 9, 19 (1st Cir. 2018) (fact that pretrial discovery established absence of federal claim did not deprive court of federal question jurisdiction to hear remaining state claim). As the First Circuit stated in Lawless:

> After all, it is common ground that when a federal court may validly exercise federal-question jurisdiction over at least one claim, it may also exercise supplemental jurisdiction over pendent state-law claims. **And once such supplemental jurisdiction has attached, the mere fact that the anchoring federal claim subsequently goes up in smoke does not, without more, doom all pendent state-law claims**.

Id. (citation omitted) (emphasis supplied). The issue then would be whether or not the Court exercises its discretion to decline to hear such state law claims, in accordance with the factors set forth in 28 U.S.C. § 1367 (Supplemental Jurisdiction).

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[26] See, e.g., FAC ¶ 458 ("As a result of SJHSRI's failure to fund the Plan in accordance with ERISA's minimum funding standards, Plaintiffs' pensions will be lost or at least severely reduced.") and ¶¶ 459-61 (explaining why co-defendants RWH, CCCB, CCF, Prospect Chartercare, Prospect East, Prospect Medical Holdings, Prospect Chartercare St. Joseph, and Prospect Chartercare Roger Williams have liability under ERISA for SJHSRI's failure to make contributions).

Thus, there is a fundamental distinction between whether the complaint provides federal question jurisdiction and whether the complaint ultimately states a claim for relief under federal law:

> The distinction between lack of jurisdiction and failure to state a claim upon which relief can be granted, is an important one: "[T]he court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy. Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover...."

Do-Well Machine Shop, Inc. v. United States, 870 F.2d 637, 639-40 (Fed. Cir. 1989), (quoting Bell v. Hood, 327 U.S. 678, 682 (1946)).

Thus, the issue of whether ERISA applies to the Plan goes to the merits of Plaintiffs' claims, and does not impact the Court's federal-question subject-matter jurisdiction based on ERISA. See Smith v. Reg'l Transit Auth., 756 F.3d 340, 344 (5th Cir. 2014) (whether plan is exempt from ERISA as a governmental plan is an issue on the merits, not jurisdictional) (noting "that whether a party has a valid claim does not implicate subject matter jurisdiction.") (citation omitted). See also Dahl v. Charles F. Dahl, M.D., P.C. Defined Ben. Pension Trust, 744 F.3d 623, 629 (10th Cir. 2014) ("[R]ecent Supreme Court decisions compel the conclusion that the existence of a benefit plan subject to ERISA is not a jurisdictional requirement but an element of a claim under ERISA."); Leeson v. Transamerica Disability Income Plan, 671 F.3d 969, 979 (9th Cir. 2012) ("[I]ntervening Supreme Court precedent compels us to conclude that participant status is an element of an ERISA claim, not a jurisdictional limitation.... By asserting a colorable claim that he is a plan participant, [the plaintiff] has satisfied the

threshold for establishing federal court subject matter jurisdiction. The issue of participant status goes to the merits of his claim and not to the subject matter jurisdiction of the district court."); Daft v. Advest, Inc., 658 F.3d 583, 590-91 (6th Cir. 2011) ("Therefore, in light of *Arbaugh* and its progeny, the existence of an ERISA plan must be considered an element of a plaintiff's claim . . . not a prerequisite for federal jurisdiction.") (referring to Arbaugh v. Y & H Corp., 546 U.S. 500 (2006) and related cases); NewPage Wisc. Sys. Inc. v. USW, 651 F.3d 775, 777 (7th Cir. 2011) ("Whether a claim is good differs from the question whether a district court possesses jurisdiction, a matter of adjudicatory competence. A federal district court is the right forum for a dispute about the meaning of ERISA [.]" (citation omitted)); Carlson v. Principal Fin. Grp., 320 F.3d 301, 307 (2d Cir. 2003) (holding that the question of whether a plan qualifies as an employee benefit plan under ERISA goes to the issue of whether a plan participant is able to assert a valid claim under the statute and "is irrelevant to the question of whether the District Court has subject matter jurisdiction over her complaint.").

Accordingly, the ultimate issue of whether the Plan may be a church plan, and, therefore, exempt from ERISA, does not affect the Court's subject matter jurisdiction, because Plaintiffs' complaint asserts claims under ERISA. Stapleton v. Advocate Health Care Network, 76 F. Supp. 3d 796, 798 (N.D. Ill. 2014) (whether plan is a church plan, and, therefore, exempt from ERISA, is not jurisdictional) ("To ask whether a federal law like ERISA reaches a certain actor or conduct in the first place is itself a merits question, not a jurisdictional one.") (citing Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 254 (2010) and Arbaugh v. Y&H Corp., 546 U.S. 500, 516 (2006)), aff'd,

Stapleton v. Advocate Health Care Network, 817 F.3d 517, n.4 (7th Cir. 2017) ("Although Advocate premised its motion to dismiss on both a failure to state a claim under Rule 12(b)(6) and a lack of subject matter jurisdiction under 12(b)(1), the district court made short order of the claim under 12(b)(1) noting that '[t]o ask whether a federal law like ERISA reaches a certain actor or conduct in the first place is itself a merits question, not a jurisdictional one.' "), rev'd on other grounds, Advocate Health Care Network v. Stapleton, 137 S. Ct. 1652 (2017).

A series of District Court and Fifth Circuit decisions in Smith v. Reg'l Transit Auth. illustrates how the issue of whether a plan is exempt from ERISA should (and should not) be addressed. That case involved the plaintiff's claim that the Regional Transit Authority ("RTA") and its subsidiary Transit Management of Southeast Louisiana, Inc. ("TMSEL") administered an employee benefit program in violation of ERISA, but RTA and TMSEL contended the plan was exempt from ERISA because it was a governmental plan.[27] In the first case in the series, the District Court granted RTA and TMSEL's motion to dismiss on the grounds of lack of subject matter jurisdiction, pursuant to F. Civ. P. 12(b)(1). Smith v. Reg'l Transit Auth., 944 F. Supp. 2d 515, 528 (E.D. La. 2013) ("[T]he Court finds that TMSEL is an agency or instrumentality of RTA and, consequently, that the TMSEL welfare benefit plan is a governmental plan and is excepted from the ERISA framework. Thus, this Court lacks subject matter jurisdiction over this case.").

[27] That exemption is similar to the exemption for church plans. Compare 29 U.S.C. § 1002(32) (governmental plans) with 29 U.S.C. § 1002(33) (church plans). See 29 U.S.C. § 1003(b)(1) & (2) (exemptions).

The Fifth Circuit reversed, holding that "a federal district court has jurisdiction to decide whether or not a plan is an ERISA plan as claimed by the plaintiff in the complaint..." Smith v. Reg'l Transit Auth., *supra*, 756 F.3d 340, 346 (5th Cir. 2014). The Fifth Circuit quoted its prior decision in ACS Recovery Services, Inc. v. Griffin, which stated:

> "Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is so insubstantial, implausible, foreclosed by prior decisions [of the Supreme Court], or otherwise completely devoid of merit as not to involve a federal controversy."

Smith v. Reg'l Transit Auth., *supra*, 756 F.3d at 346 (quoting ACS Recovery Servs, Inc. v. Griffin, 723 F.3d 518, 522-23 (5th Cir. 2013) (en banc), cert denied, 571 U.S. 1010 (2013)) (brackets in original, citation and internal quotation marks omitted).

The Fifth Circuit held that "the proper procedural vehicle to raise the question of whether a purported ERISA plan is a 'governmental plan' is either Rule 12(b)(6) [failure to state a claim] or, if factual information outside the pleadings is needed, Rule 56 (if factual issues cannot be resolved then, of course, a trial may be needed)." Smith v. Reg'l Transit Auth., *supra*, 756 F.3d at 347. The Fifth Circuit then addressed whether the outcome would be different if the motion were considered under Rule 12(b)(6), rather than Rule 12(b)(1), and concluded that it would:

> The question then becomes whether this procedural distinction makes a difference here. We conclude that it does.
>
> . . . [U]nder Rule 12(b)(1), the district court can resolve disputed issues of fact to the extent necessary to determine jurisdiction; by contrast, disputed questions of fact are anathema to Rule 12(b)(6) jurisprudence, unless those disputed facts are immaterial to the outcome… In light of the complexity of the facts here involved, this case cannot be resolved without some resort to "the facts." As such, because the procedural mechanism

> employed could very well affect the outcome, the matter should be directed to the district court in the first instance.

Smith v. Reg'l Transit Auth., *supra*, 756 F.3d at 347 (citations omitted).

On remand, RTA and TMSEL wisely (because that inquiry would involve facts beyond the pleadings) chose not to seek dismissal under Rule 12(b)(6) on the grounds that the plan was exempt from ERISA, but instead sought summary judgment on those grounds, and the District Court allowed discovery on the relevant facts. Smith v. Reg'l Transit Auth., No. CIV.A. 12-3059, 2015 WL 6442337, at *1 (E.D. La. Oct. 23, 2015) ("At Plaintiffs' request, the parties were granted time to conduct discovery necessary to clarify the ownership, funding, and management of TMSEL."). The District Court then granted summary judgment:

> Considering the undisputed facts regarding the RTA and TMSEL set forth in the record and cited in the parties' briefs, the Court concludes that when Plaintiffs' causes of action arose in March 2006, the RTA was a political subdivision of Louisiana and TMSEL was an agency or instrumentality of the RTA. TMSEL maintained the Plan for its employees. Therefore, the Plan was maintained by an agency or instrumentality of a political subdivision. For this reason, the Plan was a governmental plan excluded from ERISA's coverage in March 2006, and it remains a governmental plan now. Accordingly, Defendants are entitled to summary judgment in their favor on all of Plaintiffs' ERISA claims.

Smith v. Reg'l Transit Auth., *supra*, 2015 WL 6442337, at *12 (footnote omitted).

The Fifth Circuit agreed and affirmed. Smith v. Regional Transit Authority, 827 F.3d 412, 420 (5th Cir. 2016) ("For these reasons, we hold that the Plan was a governmental plan and thus exempt from ERISA. Accordingly, the district court did not err by granting summary judgment in favor of Defendants on Plaintiffs' ERISA claims."). Notably, the court had jurisdiction to enter summary judgment, notwithstanding that the court concluded that Plaintiffs had no claim under ERISA because the plan was an exempt

governmental plan. In other words, the fact that the court ultimately determined that plaintiffs had no claim under ERISA did not deprive the court of federal question subject matter jurisdiction based on ERISA.

In the case *sub judice*, the issue of whether and when the Plan ceased to qualify as a church plan also involves complex facts, such that it cannot be addressed on Defendants' motions to dismiss under Rule 12(b)(6). However, that issue is not before the Court in connection with the motions for settlement approval. Regardless of how the Court decides the motions to dismiss under Rule 12(b)(6), it is absolutely clear that this issue does not affect the jurisdiction of the Court, because Plaintiffs' ERISA claims are not "'so insubstantial, implausible, foreclosed by prior decisions [of the Supreme Court], or otherwise completely devoid of merit as not to involve a federal controversy.'" Smith v. Regional Transit Authority, *supra*, 756 F.3d at 346 (quoting ACS Recovery Servs, Inc. v. Griffin, *supra*, 723 F.3d at 523). In other words, the Court "has jurisdiction to decide whether or not a plan is an ERISA plan as claimed by the plaintiff in the complaint...." Smith v. Reg'l Transit Auth., *supra*, 756 F.3d at 346.

The conclusion illustrated and supported by this series of cases from the Fifth Circuit is that the Court has jurisdiction to approve Settlement B, and can and should do so without first deciding whether the Plan is governed by ERISA, either in connection with Defendants' pending motions to dismiss under Rule 12(b)(6) or some other procedural vehicle such as on a motion for summary judgment or at trial. Moreover, if (*arguendo*) the Court were to decide the motions to dismiss first, and the Court (*arguendo*) concluded that Plaintiffs have failed to state a claim under ERISA, the Court could and should retain jurisdiction under 28 U.S.C. § 1367 to adjudicate Plaintiffs' state

law claims, and to approve Settlement B. Indeed, the dismissal of Plaintiffs' ERISA claims would be an additional reason to do so, since such dismissal would increase the risk that the settlement class would have no recovery.

In arguing that the determination of whether or when the Plan became governed by ERISA must precede settlement approval, the Non-Settling Defendants ignore this settled law. They also ignore the many class action settlements that have been approved by federal courts in "church plan" cases, in which the parties disputed whether ERISA applied to the plan (and, therefore, whether plaintiffs had a claim under federal law). Many such settlements have been approved by a United States District Court prior to any determination whether or not the plan was a "church plan" and, therefore, prior to any determination whether or not the Plan was governed by ERISA, in which the defendants agreed to pay significant amounts in settlement.[28] None of these

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[28] See, e.g., Hodges v. Bon Secour Health System, Inc., United States District Court, D. Maryland, Civil Action Nos. RDB-16-1079, RDB-16-1150, Dkt 90 (Motion for Settlement attaching settlement agreement providing for payment of $98,000,000, filed before any ruling on whether alleged "church plan" was in fact governed by ERISA), Dkt. 117 (Order and Final Judgment approving settlement); Lisser v. Saint Francis Hospital and Medical Center, United States District Court, D. Conn., Civil Action No. 3:15-cv-01113, Dkt 46 (Declaration of Robert Izard in Support of Plaintiffs' Unopposed Motion for Preliminary Settlement Approval of Class Action Settlement, attaching settlement agreement providing for payment of $107,000,000, reached while motions to dismiss on church plan issue were pending); Dkt. 61 (Final Judgment Approving Settlement) ("Defendants previously filed a motion to dismiss, arguing that ERISA's statutory text, case law, and administrative agency interpretations all support the conclusion that the Plan is church plan that is exempt from ERISA's requirements… Nonetheless, before the motion to dismiss was fully briefed, the parties agreed to mediation…Following the second meeting on February 18, 2016, the parties successfully reached an agreement-in-principle to settle the case and, at the conclusion of the meeting, signed a term sheet reflecting the material terms of the agreement… The Settlement Agreement provides, in part, that SFH shall contribute a total of $107 million (the "Settlement Amount" or "Settlement Fund") to the Plan over a period of ten years… the Court finds that Settlement B is fair, adequate and reasonable."); Nicholson v. Franciscan Missionaries of Our Lady Health System, United States District Court, M.D. La., Civil Action No.: 3:16-cv-00258-SDD-EWD, Dkt 69-2 (Plaintiffs' Memorandum of Law in Support of Preliminary Approval of Class Action Settlement) ("While the Motions to Dismiss were pending, the Parties recognized that it might be possible to resolve the case… The Settlement provides that the Operating Entities will aggregately contribute $125 million to the Plans over the next 5 years.") (emphasis added), Dkt. 99 (Final Judgment Approving Settlement) ("The Court finds after a hearing and based upon all submissions of the Parties and interested persons that the Parties' Settlement B is fair, reasonable, and adequate."); Griffith v. Providence Health and Services, United States District Court, W.D. Wash., Case No. C14-1720-JCC, Dkt 50 (Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement

settlements would or even could have been approved if there was a requirement that the trial court first determine whether or not the plan in question was a church plan exempt from ERISA.

Moreover, the Court has jurisdiction to approve Settlement B "so long as there is at least one named plaintiff with standing to sue as to every claim alleged."" In re Crocs, Inc. Sec. Litig., 306 F.R.D. 672, 685 n.17 (D. Colo. 2014) ("[D]istrict courts allow putative class suits to proceed so long as there is at least one named plaintiff with standing to sue as to every claim alleged.") (granting final approval to class action partial settlement). See also Price v. Pierce, 823 F.2d 1114, 1118 (7th Cir. 1987) ("If at least one plaintiff had standing when the suit was brought and certified as a class action, and if continuously after that there was a live controversy between at least one defendant and one member of the class (not necessarily a named plaintiff), there is federal jurisdiction."); Precision Assocs., Inc. v. Panalpina World Transp., (Holding) Ltd., No. CV-08-42 JG VVP, 2013 WL 6481195, at *10 (E.D.N.Y. Sept. 20, 2013) ("'In a class action suit with multiple claims,' the only requirement as to each claim is that 'at least one named class representative must have standing with respect to each claim.'") (quoting 1 Newberg on Class Actions § 2:5 (5th ed.)).

Here, the litigation has been prosecuted both by the Receiver, who is the Plan Administrator, and by the individual named Plaintiffs, each of whom is a Plan beneficiary

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Agreement) ("The monetary consideration provided under this Settlement is substantial, totaling $351.9 million.") (emphasis added), Dkt 69 (Final Judgment Approving Settlement) ("Having considered the Settlement, the objections thereto, the parties' briefing, and the relevant record, the Court concludes that the Settlement is fair, reasonable, and adequate.").

of the Plan. As discussed,[29] there is no real dispute that the Receiver has both statutory and Article III standing. Thus, the Court would have jurisdiction to approve Settlement B even assuming (*arguendo*), that the Plan participants lack Article III standing because they have no suffered a concrete injury (which they do not lack).

On the other hand, if (*arguendo*) Defendants' spurious[30] claim that the Rhode Island Superior Court had no authority to appoint the Receiver is somehow construed as a claim that the Receiver lacks either statutory or constitutional standing (which he does not lack), and even if that argument had merit, that would not deprive the Court of jurisdiction to approve the settlement, because the Plan participants (including the individual Named Plaintiffs) have both statutory and constitutional standing. Accordingly the Court has jurisdiction to certify the settlement class and approve the settlement because at least one of the Plaintiffs has both constitutional and statutory standing.

II. The objections to the settlement should be overruled

A. The sole objection filed by a class member should be overruled

The Court's Memorandum and Order of May 17, 2019 set a deadline of July 30, 2019 for settlement class members to file written objections. See Dkt #123 at 13. Only one class member has done so. See Dkt #128 (Objection of Lydia Corvese). That objection states in its entirety:

> Your Honor,

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[29] See *supra* at 12-14.

[30] See Dkt #83 (Plaintiffs' Memorandum in Reply to [the Prospect Entities' objections to preliminary approval of Settlement A]) at 11-18; Dkt #109 (Plaintiffs' and Defendants CharterCARE Community Board, St. Joseph Health Services of Rhode Island, and Roger Williams Hospital's Post-Hearing Memorandum) at 16-21); Dkt #121 (Plaintiffs' Reply Memorandum to the Prospect Entities' Post-Hearing Memorandum in Opposition to Settlement Motion) at 9-11.

> I am objecting to the settlement. The settlement is for half of the money that should have gone into the Plan. The lawyers will be taking a good share and that leaves very little to go back into the Plan. It seems to me there will always be an ongoing threat to the Plan, because no one is taking responsibility for funding the Plan.
>
> I was promised a Pension for the rest of my life.
>
> This is an action of fraud and should be treated as such.
>
> Who allowed the sale of St Joseph without first dealing with the Pension. Doesn't the State of RI advocate for us? Or can a company just stop funding a pension if they feel like it. I depend on this Pension. I gave them years of loyalty. When a company is sold with an ongoing Pension, the Pension goes with the sale. This is fraud. Deal with it as it should be.
>
> Sincerely,
>
> Lydia A Corvese

Dkt #128 (handwritten Objection of Lydia Corvese).

While Plaintiffs share Ms. Corvese's frustration with the treatment of the Plan by Defendants, her objection does not set forth any basis for declining to approve the pending settlement concerning CCF. Of the approximately $8,200,000 which Plaintiffs allege was wrongfully transferred to CCF, Plaintiffs are receiving $4,500,000. Plaintiffs have appropriately discounted their potential recovery at trial to reflect the obvious risks of litigation. Plaintiffs continue to press their claims, including claims sounding in fraud, against the Non-Settling Defendants.

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

1. 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).[31] There is no reason to delay either of the partial settlements while awaiting a PBGC 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 Settlement Class by subjecting them to a host of unknowable risks (not the least of which is market risk affecting CCF's investments) potentially affecting the Settling Defendant's ability to make good on the settlement, and depriving the Plan of the time value of the settlement funds.

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

2. There is no need to reach the issues of whether Rhode Island's settlement statute is constitutional or preempted

The Diocesan Defendants and the Prospect Defendants contend that R.I. Gen. Laws § 23-17.14-35[32] 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."

These Defendants' contentions are 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 #123 at 10-11. The Court should do so again in connection with final approval.

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[32] 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.

Settlement B 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 B. "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)).

3. The Prospect Defendants failed to make a motion for discovery of the settlement amount's fairness

In their objection to the settlement, the Prospect Entities questioned whether the settlement amount was fair inasmuch as CCF is paying a settlement amount that is approximately half of its assets instead of turning over 100% of its assets. See Dkt #81 (Prospect Entities' Objection) at 2. The Prospect Entities went on to suggest that "confirmatory discovery" was required "to evaluate the fairness of Settlement B." Id. But, unlike with the other pending settlement, the Prospect Entities never made a motion for discovery. Moreover, they never raised any question whatsoever concerning the issue of whether Settlement B was entered into in good faith. Thus, they cannot complain that it is unfair for the Court to make the factual determinations that Settlement

B is fair and reasonable and made in good faith without their having had the benefit of discovery.

In any event, the Non-Settling Defendants certainly failed to make a preliminary showing which would entitle them to discovery in connection with this settlement. In determining whether to approve a class action settlement, "[a] court should not allow discovery into the settlement-negotiation process unless the objector[33] makes a preliminary showing of collusion or other improper behavior." Manual Complex Lit. § 21.643 (4th ed.) (citing Bowling v. Pfizer, 143 F.R.D. 141, 153, 153 n.10 (S.D. Ohio 1992)). This preliminary showing requires the movants to "furnish additional independent evidence of collusion" before they can obtain leave to rifle through their opponents files. See Bowling, 143 F.R.D. at 146:

> Objectors may discover the details of a class counsel's negotiations with the defendants only where the objectors lay a foundation **by adducing from independent sources** of evidence that the settlement may be collusive. *Mars Steel Corp. v. Continental Ill. Nat'l Bank and Trust*, 834 F.2d 677, 684 (7th Cir. 1987). . . . **Therefore, the Objectors must furnish additional independent evidence of collusion** before it is reasonable for this Court to compel the proponents of the settlement to furnish discovery material concerning the negotiations of the settlement.
>
> . . . .We conclude that the Green firm has failed to provide any independent evidence of collusion.
>
> [Emphasis supplied]

Bowling v. Pfizer, Inc., 143 F.R.D. 141, 146 (S.D. Ohio 1992) (denying discovery).

Discovery into class action settlement negotiations is nearly always denied as "unusual" and improper:

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[33] The cases addressing the issue almost universally involve objecting class members, not non-settling defendants. As noted *supra*, the Non-Settling Defendants are mere interlopers.

> **Discovery of settlement negotiations in ongoing litigation is unusual because it would give a party information about an opponent's strategy**, and it was not required in the circumstances of this case. Suppose [rival plaintiffs' counsel] Joyce and Kubasiak[34], allowed to discover the details of Continental's negotiations with [settlement class counsel] Torshen, had found out that Continental had acknowledged certain weaknesses in its defense; Joyce and Kubasiak could have used that information to drive a harder bargain with Continental or, if settlement negotiations had broken down, to undermine Continental's defense at trial. **Such discovery is proper only where the party seeking it lays a foundation by adducing from other sources evidence indicating that the settlement may be collusive, as in the General Motors case, where negotiations with one class counsel were carried out in violation of the district court's order.** *See* 594 F.2d at 1126. There is no indication of such hanky-pank here. Nothing in the terms or timing or other circumstances of the Mars settlement-a settlement highly favorable to the class, as we have said-suggests that Torshen was selling out the class in an effort to beat Joyce and Kubasiak to the attorney's fee trough.
>
> [Emphasis supplied]

Mars Steel Corp. v. Cont'l Illinois Nat. Bank & Tr. Co. of Chicago, 834 F.2d 677, 684 (7th Cir. 1987). See White v. Nat'l Football League, 822 F. Supp. 1389, 1429 (D. Minn. 1993) ("Moreover, if there is no evidence of collusion in the negotiation process, objectors have no right to seek discovery concerning the negotiations of a class action settlement.").

> We conclude the district court did not abuse its discretion in denying this requested discovery. Settlement negotiations involve sensitive matters. *See Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.*, 834 F.2d 677, 684 (7th Cir. 1987). **We agree with the Seventh Circuit that "discovery [of settlement negotiations] is proper only where the party seeking it lays a foundation by adducing from other sources evidence indicating that the settlement may be collusive."** *Id.* [Objecting class member] Havird made no foundational showing of

[34] The law firm Joyce and Kubasiak had filed a dueling class action against the same defendant.

> collusion. Her requested discovery of the settlement negotiations, therefore, was properly denied.

Lobatz v. U.S. W. Cellular of California, Inc., 222 F.3d 1142, 1148 (9th Cir. 2000).

The Non-Settling Defendants have made no such showing. To the contrary, and for the reasons discussed in prior memoranda and again herein, it is clear that the settlement was the product of arm's length negotiations, and made in good faith, and that the settlement amount is fair and certainly within the range of reason, taking into account all of the uncertainties of litigation. Likewise, no class member has sought such discovery.

III. 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 #77-1 at 26-36. 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 #123 (Memorandum and Order) at 4-9.

Specifically, the Court found that joinder of all class members (i.e. all 2,729 Plan participants) as plaintiffs is impracticable; Plaintiffs' claims present issues of law and fact common to the class; the Named Plaintiffs' claims arise from the same set of events and allegations as those of the other proposed class members; 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 premised on trust principles. See Dkt #123 (Memorandum and Order) at 4-8. The Court also concluded that Plaintiffs' counsel are highly qualified and capable of carrying out their duties as class counsel. See id. at 8-9.

The same remains true at the final approval stage. As discussed *supra* at 26-27, only one class member has objected to settlement approval, and that objection does not assert any grounds for declining to certify the settlement class, or valid substantive reasons for not approving the settlement. Likewise, none of the Non-Settling Defendants' objections relate to "satisfy[ing] the Rule 23 criteria." Dkt #123 (Memorandum and Order) at 6 n.5. 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 #123 (Memorandum and Order) at 5-7 (applying Rule 23(a)(1)-(4)); id. at 7 ("The Court thus concludes that the proposed representatives will fairly and adequately protect the interests of the class."); id. at 8-9 ("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 Settlement B to the Rhode Island Superior Court in related receivership proceedings to obtain that court's required approval.").

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 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).

There is no suggestion—either by the sole objecting class member or by the Non-Settling Defendants—that this Settlement B was not negotiated at arm's length or is in any way collusive. Cf. 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."). The Court previously found in connection with preliminary approval that Settlement B "appears to have been negotiated at arm's length". Dkt #123 (Memorandum and Order) at 4. That remains true.

Indeed, the history of this and the related litigations demonstrates the adversity between Plaintiffs and CCF. Plaintiffs obtained tens of thousands of pages of discovery

from CCF through pre-suit subpoena practice in the Superior Court beginning in January 2018. Settlement discussions in April and May of 2018 were unproductive.[35] In September 2018, CCF also filed a lengthy motion to dismiss the Complaint.[36] Both Plaintiffs and CCF conducted months of contentious motion practice against each other concerning Plaintiffs' intervention into the Superior Court *cy pres* proceeding, with CCF filing a lengthy opposition to Plaintiffs' motion to intervene.[37] It was only after that motion to intervene was granted on September 17, 2018 that Plaintiffs and CCF renewed settlement discussions.[38]

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").

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:

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[35] Wistow Second Supp. Dec. ¶ 4.

[36] Dkt #53.

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

[38] Wistow Second Supp. Dec. ¶ 5 ("Following the issuance of the Superior Court's September 17, 2018 bench decision granting Plaintiffs' motion to intervene in *In re: Chartercare Health Partners Foundation, Roger Williams Hospital, and St. Joseph Health Services of Rhode Island*, KM-2015-0035 (R.I. Super.), settlement discussions resumed between Plaintiffs and CharterCARE Foundation, culminating in the settlement agreement.").

> (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 at length 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 #77-1 at 5-7, 16-19. They include all the uncertainties surrounding establishing liability and damages, as well as the fact that a portion of the settlement amount is being paid by an insurance carrier who is defending

CCF under a cannibalizing insurance policy whose limits would be depleted by further defense costs. Id.

The only objection concerning the adequacy of relief in this settlement was lodged by the Prospect Entities, discussed *supra* at 30. As noted, the Prospect Entities questioned whether the settlement amount was fair but abandoned any effort to obtain what they initially referred to as "confirmatory discovery". See id.

In any event, the Prospect Entities' concern was expressed not for the class members but for themselves, in that they claim to fear that the settlement will preclude them from suing CCF for indemnity:

> If the Court were to decide that Rhode Island law, rather than federal law, governs this settlement, the Prospect Entities may be precluded from seeking indemnity or contribution from CCF as a result. Accordingly, since CCF will, under the terms of the Settlement B, retain in excess of $4 million in assets, which would not be available to any of the non-settling defendants, the Prospect Entities request limited discovery to evaluate whether the settlement is fair.[39]

Dkt #81 (Prospect Entities' Joint Opposition) at 2. That argument suggests that a settlement that left CCF with approximately $4 million in assets after paying $4.5 million in settlement is somehow suspicious. However, as noted, Plaintiffs discounted their potential recovery going forward by the risks of litigation. This argument also misstates the law. Under Rhode Island law, the settlement will have no effect on the Prospect

[39] See Dkt #81 (Prospect Entities' Joint Opposition) at 2 ("If the Court were to decide that Rhode Island law, rather than federal law, governs this settlement, the Prospect Entities may be precluded from seeking indemnity or contribution from CCF as a result. Accordingly, since CCF will, under the terms of Settlement B, retain in excess of $4 million in assets, which would not be available to any of the non-settling defendants, the Prospect Entities request limited discovery to evaluate whether the settlement is fair.").

Entities' rights to indemnity.[40] Thus, the Prospect Entities can reach all of CCF's assets if they obtain a judgment on their indemnity claims.

Moreover, the effect of the Settlement Statute on the Prospect Entities' rights of contribution does not give them standing to object to the settlements. 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 B was made in good faith) does not constitute "plain legal prejudice" to the Non-Settling Defendants or deprive them of any "substantive right."

This 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.[41] However, *Settlement B is not conditioned upon the Court issuing a bar order*. The Court is not even being asked to determine the legal effect of the settlement on the

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[40] The Settlement Statute refers only to rights of contribution. See R.I. Gen. Laws § 23-17.14-35(2) ("A release by a claimant of one joint tortfeasor relieves them from liability to make contribution to another joint tortfeasor."). The general joint tortfeasor statute expressly preserves rights of indemnity. R.I. Gen. Laws § 10-6-9 ("This chapter does not impair any right of indemnity under existing law.").

[41] 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".).

Non-Settling Defendants' rights of contribution (which, incidentally, also would not constitute "plain legal prejudice" to the Non-Settling Defendants or deprive them of any "substantive right"). Instead, the effect of Settlement B 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 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.[42]

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

[42] 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.[43] 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 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

[43] "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).

pending for over four years. The risks of continued litigation against CCF are discussed *supra* at 7-9 and are potentially substantial.

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

Plaintiffs believe that the settlement payment of $4,500,000 is favorable in light of the risks and obstacles to be encountered going forward without settlement. Although Plaintiffs might succeed in obtaining a greater amount from CCF, they also might recover less or nothing. Plaintiffs accepted more than 50 cents on the dollar, which is appropriate under the circumstances.

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, only one class member has objected. In contrast, nearly 1,000 class members have expressed their support through the sworn declarations of their counsel filed herewith. See Affidavit of Arlene Violet dated August 9, 2019; Declaration of Christopher Callaci dated August 12, 2019; Declaration of Jeffrey Kasle dated August 13, 2019. Thus this factor also weighs in favor of final approval.

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 B] to the Rhode Island Superior Court in related

receivership proceedings to obtain that court's required approval." Dkt #123 (Memorandum and Order) at 8-9. 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 #123 (Memorandum and Order) at 8. Accordingly this factor also weighs in favor of final approval.

IV. 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(c). 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(3) 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.");[44]

    - 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.

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

[44] 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.

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.

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: August 15, 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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