

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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

**DEFENDANT CHARTERCARE FOUNDATION'S
MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS
PURSUANT TO FED. R. CIV. P. 12(b)(6) & (7)**

INTRODUCTION AND SUMMARY OF ARGUMENT

Defendant CharterCARE Foundation (“CCF”) f/k/a CharterCARE Health Partners Foundation respectfully submits this memorandum of law in support of its motion to dismiss all plaintiffs’ claims against CCF.

At its July 30, 2018 scheduling conference, this Court encouraged defense counsel to avoid unnecessarily repetitive briefing regarding Rule 12 defenses common to all fifteen (15) defendants. There are ERISA-based defenses to all plaintiffs’ claims against all defendants, as follows:

1. Plaintiffs’ ERISA claims (Counts I-IV) are barred on ripeness and standing grounds, and therefore should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).
2. Alternatively, if the ERISA claims are ripe, those claims still should be dismissed pursuant to Fed. R. Civ. P. 12(b)(7) because Plaintiffs failed to join the Pension Benefit Guaranty Corporation (“PBGC”) as an indispensable party. Alternatively, if the Court does not dismiss this action pursuant to Fed. R. Civ. P. 12(b)(7), then it should order joinder of the PBGC pursuant to Fed. R. Civ. P. 19(c).

3. All plaintiffs' state law claims (Count V-XXI) are preempted by ERISA, and therefore should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

CCF's co-defendants thoroughly have briefed these ERISA issues in their own separately filed motions to dismiss. Consistent with the Court's invitation to streamline briefing on the defense side, CCF will not repeat these ERISA arguments, but adopts them by reference herein. If the Court accepts its co-defendants' ERISA arguments, then the Court should dismiss all claims against all defendants, including CCF.

CCF now files this memorandum of law solely to highlight the following defenses that are unique to the state law claims against CCF, and supply further grounds for their dismissal.

First, as to the fraudulent conveyance claims pleaded against CCF in Counts V and VI, and the related declaratory judgment claim at Count XXI, the Rhode Island Attorney General ("Attorney General") is an indispensable party that must be joined under Rule 19. Those claims seek, by way of relief, an attachment against all of the assets transferred to CCF pursuant to the 2015 *Cy Pres* Proceeding. (Complaint, ¶¶ 458, 466, p. 133).¹ The assets in question consist of, *inter alia*, charitable donations previously donated in trust to St. Joseph's Health Services of Rhode Island ("SJHSRI") and Roger Williams Hospital ("RWH"). See (Complaint, ¶ 367). The Rhode Island Supreme Court's decision in Israel v. Nat'l Bd. of Young Men's Christian Ass'n recognizes that the Attorney General is a necessary party to an action such as this one.

[T]he attorney general is the representative of the interests of beneficiaries and the public under charitable trusts and bequests for charitable uses and . . . **he should be made a party in any suit in which . . . the administration of such a trust is involved.**

369 A.2d 646, 649 (R.I. 1977) (emphasis added). Without the joinder of the Attorney General, this Court cannot adjudicate plaintiffs' alleged entitlement to the charitable donations now held

¹ The term "2015 *Cy Pres* Proceeding" refers to the Rhode Island Superior Court action known as *In re: CharterCARE Health Partners Foundation et al.*, C.A. No. KM-2015-0035. (Complaint, ¶ 55).

by CCF. Accordingly, if this Court holds that ERISA does not preempt plaintiffs' fraudulent conveyance claims, then this Court either must dismiss Counts V, VI, and XII pursuant to Rule 12(b)(7) or order joinder of the Attorney General pursuant to Rule 19(a)(2).

Second, the Court should dismiss plaintiffs' claims for "Fraudulent Scheme" (Count VIII), "Conspiracy" (Count IX), and "Aiding and Abetting Breaches of Fiduciary Duty" (Count XX) because they are not pleaded with particularity as to CCF. The Complaint does not identify a single allegedly false or misleading statement made by an officer, director, or employee of CCF. It does, however, allege that other defendants, principally SJHSRI, made false or misleading statements to SJHSRI Retirement Plan (the "Plan") participants, state regulators, and a state court judge designed to conceal the underfunded status of the Plan. The Complaint does not, however, allege that CCF played any role whatsoever in administering or evaluating the Plan. Nor does it allege any facts shedding light on how, why, or when CCF would have learned of the Plan's financial condition. Because the Complaint does not allege that CCF knew of the Plan's financial condition, Plaintiffs cannot plausibly allege that CCF participated in a "fraudulent scheme" or conspiracy to conceal the allegedly underfunded status of the Plan from anyone. For largely the same reasons, this Court also must dismiss plaintiffs' related claims that CCF aided and abetted other defendants' breaches of fiduciary duties allegedly owed to Plan participants.

Third, this Court should dismiss the veil-piercing claims against CCF in Count XII ("Alter Ego") and Count XV ("Successor Liability"). To state a claim that CCF is liable as the "alter ego" of another defendant, the Complaint would need to allege facts suggesting that CCF and the other defendant(s) of which CCF allegedly is an "alter ego" share a unity of interest and ownership so strong that "their separate identifies and personalities no longer exist." See Nat'l

Hotel Assocs. v. O. Ahlborg & Sons, Inc., 827 A.2d 646, 652 (R.I. 2003). No such facts are alleged here. To state a claim that CCF has “successor liability” for SJHSRI’s pension liabilities, the Complaint would need to allege facts suggesting that CCF continued the hospital operations of SJHSRI, or took some action to assume SJHSRI’s pension liabilities. No such facts are alleged here.

CCF – a non-profit corporation that extends grants and scholarships to promote better health care in Rhode Island – is at least two steps removed from SJHSRI’s pension liabilities. At most, plaintiffs allege that defendant CharterCARE Community Board (“CCCB”) is the sole member of CCF, that CCCB became the sole member of SJHSRI in or about 2011, and that, thereafter, SJHSRI delegated administration of the Plan to CCCB. (Complaint, ¶¶ 25, 80-81, 89).² On these facts, there is no plausible claim for “double veil piercing” – i.e. holding CCCB responsible for the liabilities of its subsidiary (SJHSRI), then holding CCF liable for the liabilities of its alleged parent, CCCB.

Finally, the Court should dismiss Count XX, seeking to establish that CCF is liable under R.I. Gen. Laws § 9-1-2 for purported criminal violations of Rhode Island’s Hospital Conversions Act (“HCA”), R.I. Gen. Laws § 23-17.14-13. The Complaint does not allege that CCF was a party to the HCA approval applications submitted by other defendants. Nor does the Complaint allege that CCF made any misstatements to anyone in the course of the HCA approval proceeding.

For all these reasons, this Court should dismiss all plaintiffs’ claims against CCF.

² CCF maintains that it has operated independently of CCCB for the past four years, and that CCCB long ago waived or abandoned any purported right to control CCF’s activities as its sole member. Nonetheless, solely for the purposes of developing arguments in support of this motion to dismiss, CCF assumes the truth of plaintiffs’ allegation that CCCB still is CCF’s sole member.

ALLEGATIONS OF PLAINTIFF'S COMPLAINT³

This is a case about alleged underfunding of the Plan. The Complaint alleges “four separate but related factual scenarios and schemes” that caused the Plan to be underfunded. (Id. ¶ 57). The Complaint does not allege that CCF played any role in the first three of those schemes, which principally involved SJHSRI, RWH, CCCB, and the Diocesan Defendants.^{4 5}

Plaintiffs do, however, allege that CCF played some part in the fourth alleged scheme, which plaintiffs describe as follows.

Beginning in 2011, SJHSRI and other Defendants put into operation a scheme to transfer SJHSRI's operating assets, cash, and most of its expected future charitable income to entities controlled by SJHSRI's parent company, intending that such assets thereby would be out of reach of a suit by the Plan participants, and then terminate the Plan.

(Id. ¶ 57(d)). Plaintiffs allege that this fourth scheme, in turn, consisted of “four key stages.”

(Id.)

The first stage of this fourth scheme consisted of “fraudulent misstatements and material omissions concerning the Plan” that were made in the course of the 2013-14 administrative

³ As this Court is aware, under Rule 12(b)(6), the Court must accept all well-pleaded factual allegations in the complaint, and must draw all reasonable inferences in favor of the plaintiffs, but the complaint must nonetheless provide the grounds upon which plaintiffs' claim rests through factual allegations sufficient “to raise a right to relief above the speculative level.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). Rule 8 “demands more than an unadorned, the-defendant unlawfully-harmed-me accusation. A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” Ashcroft v. Iqbal, 556 U.S. 662, 677-78 (2009) (quoting Twombly, 550 U.S. at 555). “[C]onclusory statements are ‘not entitled to the assumption of truth.’” Maldonado v. Fontanes, 568 F.3d 263, 268 (1st Cir. 2009) (quoting Iqbal at 679). In other words, “a complaint must contain ‘enough facts to raise a reasonable expectation that discovery will reveal evidence’ supporting the claims.” Fantini v. Salem State College, 557 F.3d 22, 26 (1st Cir. 2009) (quoting Twombly, 550 U.S. at 544). A claim may be dismissed “if plaintiff's well-pleaded facts do not possess enough heft to show that plaintiff is entitled to relief.” Rhodes v. Owens Loan Servicing, LLC, 44 F.Supp.3d 137, 140 (D. Mass. 2014) (quoting Ruiz Rivera v. Pfizer Pharm., LLC, 521 F.3d 76, 84 (1st Cir.2008) (internal quotations omitted)).

⁴ The first three alleged schemes involved: (1) improper marketing of the Plan to SJHSRI employees and prospective employees; (2) failure to make contributions to the Plan, and misrepresentations to Plan participants allegedly designed to conceal its underfunded status; and (3) a secret plan to terminate the Plan. (Complaint, ¶¶ 57(a)-(c)).

⁵ The Complaint refers to CCF as “CC Foundation.” (Complaint, ¶ 25). The “Diocesan Defendants” are the Roman Catholic Bishop of Providence, Diocesan Administration Corporation, and the Diocesan Service Corporation.

proceeding that culminated in the approval by the Attorney General and the Rhode Island Department of Health (“DOH”) of the 2014 Asset Sale⁶ pursuant to the HCA. (Id. ¶ 57(d)(i)). Plaintiffs detail the factual basis for this allegation in a section of the Complaint titled “Fraudulent Misrepresentations and Omissions to State Regulators.” (Id. at p. 77). This section consists of fifty-two (52) paragraphs of factual allegations, but not one of them alleges a single act or omission by CCF. (Id. ¶¶ 308-59).⁷ CCF could not have participated in such conduct because it was not a party to the HCA approval applications, which instead were submitted by “SJHSRI, RWH, CCCB and the Prospect Entities. . . .” (Id. ¶ 308).⁸

The second stage of the fourth scheme consisted of an alleged conspiracy to “falsely claim that Plan continued to qualify as a ‘church plan’ . . .” (Id. ¶ 57(d)(ii)). Plaintiffs do not allege that CCF played any role in this part of the alleged conspiracy. There are 153 paragraphs of factual allegations describing this stage of the fraudulent scheme, but again, not one of them alleges a single act or omission by CCF. (Id. ¶¶ 60-212).⁹

The third stage of the fourth scheme consisted of the 2015 *Cy Pres* Proceeding. (Id. ¶¶ 57(d)(iii)). This is the one and only portion of the Complaint that comes anywhere close to alleging liability on the part of CCF. In that 2015 *Cy Pres* Proceeding, CCF, SJHSRI, and RWH

⁶ The term “2014 Asset Sale” refers to the sale, pursuant to an Asset Purchase Agreement, by SJHSRI, RWH, and CCCB of two health care facilities, Roger Williams Hospital and Our Lady of Fatima Hospital, to Prospect Chartercare, LLC. See (Complaint, ¶¶ 11, 142). Under the terms of that Asset Purchase Agreement, the Plan was an excluded liability that was retained by the seller, SJHSRI. See (id. ¶¶ 144, 426).

⁷ CCF is mentioned only once, in passing, in this section. (Id. ¶ 342). That passing mention does not describe anything that CCF did or did not do.

⁸ The “Prospect Entities” refers to: Prospect Chartercare, LLC; Prospect Chartercare SJHSRI, LLC; Prospect Chartercare RWH, LLC; Prospect East Holdings, Inc.; and Prospect Medical Holdings, Inc.

⁹ Paragraph 116 does allege that: “At all relevant times, SJHSRI, CCCB, RWH, *CC Foundation*, the Diocesan Defendants, the Prospect Entities, and Angell, knew that if the Plan ceased to qualify as a Church Plan, it would become subject to ERISA.” (Id. ¶ 116) (emphasis added). But that conclusory allegation is not supported by a single factual allegation as to who at CCF had such knowledge, how that person gained such knowledge, and when they gained such knowledge.

jointly filed a *cy pres* petition (the “2015 *Cy Pres* Petition”) requesting that the Rhode Island Superior Court approve the transfer of approximately \$8,200,000 of charitable assets from SJHSRI and RWH to CCF. (Id. ¶ 360). The Attorney General had required, as a condition of its approval of the 2014 Asset Sale, that such a *cy pres* petition be filed. (Id. ¶ 369).

At paragraph 379 of the Complaint, plaintiffs allege that SJHSRI, RWH, and CCF all “repeatedly misrepresent[ed] . . . to the court in the 2015 *Cy Pres* Proceeding, that all of *their* liabilities, including *their* pension liabilities, would be ‘satisfied’ and ‘paid’ from other assets [i.e. assets remaining with SJHSRI, RWH, and CCCB post-closing].” (Id. ¶ 379) (emphasis added). Although paragraph 379 uses the terms “*their* liabilities” and “*their* pension liabilities,” the Complaint does not identify any liabilities of CCF, much less pension liabilities of CCF. Clearly, the “pension liabilities” that allegedly were being misrepresented were those of SJHSRI.

The Complaint does not any allege any facts plausibly suggesting how or why, at the time of the 2015 *Cy Pres* Proceeding, CCF could have know the true financial condition of the Plan, or the magnitude of its alleged underfunding. Tellingly, the section of the Complaint titled “Defendants Knew The Plan Was Underfunded” does not allege any facts attributing such knowledge to CCF. (Id. ¶¶ 236-256). In fact, that section’s concluding paragraph attributes such knowledge to every defendant, except CCF: “Thus, prior to and at the time of the 2014 Asset Sale, CCCB, SJHSRI, RWH, the Prospect Entities, the Diocesan Defendants, and Angell all had actual knowledge of the full extent of the Plan’s unfunded liabilities.” (Id. ¶ 256).

Finally, the fourth stage of fourth scheme that allegedly injured the Plaintiffs was SJHSRI’s decision to place the Plan into receivership in 2017. (Id. ¶ 57(d)(iv)). There is no allegation that CCF played any role in that decision.

To summarize, plaintiffs allege that there were four distinct “schemes” though which various defendants underfunded the Plan, and then acted to conceal its underfunded status. CCF is not alleged to have administered the Plan at any time, nor is it alleged to have owned or controlled any of the several different defendants that, at one time or another, directly or indirectly owned or controlled the Plan administrator. Of all the defendants, CCF stands alone as having the most tangential relationship to the Plan.¹⁰

Further summarizing, Plaintiffs allege four separate schemes that caused them damage. Their Complaint connects CCF to only one of four separate stages comprising the fourth alleged scheme. Plaintiffs allege that, in a pleading filed in the 2015 *Cy Pres* Petition, CCF’s attorneys misrepresented the extent of another defendant (i.e. SJHSRI)’s pension liability to a state court judge. (Complaint, ¶¶ 371, 379-80). The Complaint, however, does not allege facts plausibly suggesting how or why CCF would have know the extent of SJHSRI’s pension liabilities as of the time of the alleged misrepresentation in 2015.

For the reasons set forth below, these factual allegations do not support any cognizable claims for relief against CCF.

ARGUMENT

I. THIS COURT CANNOT ADJUDICATE PLAINTIFF’S FRAUDULENT CONVEYANCE AND DECLARATORY JUDGMENT CLAIMS SEEKING TO UNDO THE 2015 CY PRES TRANSFER OF RESTRICTED CHARITABLE ASSETS TO CCF WITHOUT JOINDER OF THE ATTORNEY GENERAL PURSUANT TO RULE 19.

Counts V and VI allege two separate and distinct transactions that plaintiffs seek to avoid under Rhode Island’s Uniform Fraudulent Transfer Act (“UFTA”), R.I. Gen. Laws §§ 6-16-4 et seq. The first transaction is the 2014 Asset Sale itself. (Complaint, ¶¶ 456, 464). CCF was not a

¹⁰ This excepts the Rhode Island Foundation, which is included only in the declaratory judgment count at Count XXI, and is essentially named as a nominal defendant.

party to that transaction.¹¹ The second transaction was the transfer of approximately \$8,200,000 in charitable assets from SJHSRI and RWH to CCF. (*Id.*) That transaction is of great significance to CCF because it essentially “capitalized” CCF, and enabled it to fulfill its current charitable mission of extending grants and scholarships to promote better health care in Rhode Island. CCF would be put out of business if this Court ordered CCF to divest itself of those funds.

In Counts V and VI, and the related declaratory judgment claim at Count XXI, plaintiffs demand, *inter alia*, that this Court “order Defendant RI Foundation to turn over to plaintiffs all of the funds it received from [CCF]. . . .” (*Id.* at pp. 119, 121, 133). Such an order would effectively undo the *cy pres* transfer of charitable assets that was imposed as a condition of the Attorney General’s HCA approval of the 2014 Asset Sale, (*id.* ¶ 369), then supported by the Attorney General in a pleading that he filed in the 2015 *Cy Pres* Proceeding, (*Attorney General’s Response to the Petition for Disposition of Charitable Assets Including Application of Doctrine of Cy Pres*) (Apr. 6, 2015) (attached hereto at **Exhibit A**),¹² and finally ordered by a valid order issued by a Rhode Island Superior Court judge. (*Id.* ¶ 381).

More recently, the Attorney General stated as follows in a September 7, 2018 filing in the state court receivership action that gives rise to this federal court action.¹³

¹¹ Pursuant to Rule 12(b)(6), the Prospect Entities have moved to dismiss Plaintiffs’ claims that the 2014 Asset Sale – which received HCA approval by the Attorney General and DOH – was itself a fraudulent conveyance. If that Court accepts that argument, then the Court also must dismiss Plaintiffs’ claims that the 2015 *cy pres* transfer to CCF was a fraudulent conveyance claim because, as the Complaint acknowledges, that the 2015 *cy pres* transfer to CCF was a condition and requirement of the Attorney General’s HCA approval of the 2014 Asset Sale. (Complaint, ¶ 369).

¹² It is well established that the Court may consider matters of public record, including filings in prior state court adjudications, in deciding a Rule 12(b)(6) motion without converting it one for summary judgment. See Greene v. Rhode Island, 398 F.3d 45, 49 (1st Cir. 2005); Boateng v. InterAmerican Univ., Inc., 210 F.3d 56, 60 (1st Cir. 2000).

¹³ The receivership action is known as St. Joseph Health Svs. Of R.I. v. St. Joseph’s Health Svs. Of R.I. Retirement Plan, R.I. Superior Court, C.A. No. PC-2017-3856).

The Attorney General has the responsibility under the General Laws as well as at common law to ensure that charitable assets are being used in accordance with the terms of the trust. *See* R.I. Gen. Laws §§ 18-9-9 to 18-9-11; *see also, e.g., e.g., Israel v. Nat'l Bd. Of Young Men's Christian Ass'n*, 369 A.2d 646, 649 (R.I. 1977). The Attorney General's authority in this area is specifically recognized in HCA. *See* R.I. Gen. Laws § 23-17.14-21. Moreover, the HCA imbues the Attorney General with the power to enforce the conditions he previously imposed on the Prospect/CharterCARE transaction. *See* R.I. Gen. Laws § 23-17.14-30.

(Attorney General's Joinder to CharterCARE Foundation's Emergency Cross-Motion to Postpone Sept. 13, 2018 Hearing As It Relates To Proposed Settlement Terms at 2) (Sept. 7, 2018) (attached at **Exhibit B**). In that submission, the Attorney General expressed concerns regarding a proposed settlement among plaintiffs, SJHSRI, RWH, and CCCB in which CCCB would purport to exercise rights as CCF's sole member to "place the assets of [CCF] effectively under the Receiver's control." (*Id.* at 1). The Attorney General correctly noted that this proposed settlement term would "raise questions about compliance with charitable trust principles." (*Id.* at 1, 3).¹⁴ Those exact same questions and concerns are present here, because Counts V, VI, and XXI likewise seek to place CCF's charitable assets under the Receiver's control, and undo the 2015 *cy pres* transfer required by the Attorney General and ordered by the Rhode Island Superior Court.

Rule 19(a)(1)(B) requires joinder of a party where, as here:

that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

- (i) as a practical matter impair or impede the person's ability to protect the interest; or
- (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

¹⁴ This is the same settlement described in the *Joint Motion to Stay Deadline for Defendants St. Joseph Health Services of Rhode Island, Roger Williams Hospital and CharterCARE Community Board to Answer or Otherwise Respond to Complaint* filed by plaintiffs, SJHSRI, RWH, and CCCB on September 5, 2018. (Dkt. # 48).

Fed. R. Civ. P. 19(a)(1)(B). The Attorney General's most recent filing demonstrates that he does indeed claim an interest relating to the subject of the action – i.e. whether or not the charitable assets entrusted to CCF may lawfully be transferred to plaintiffs in order to fund the Plan.

(Exhibit B). As stated above, supra at 2, the Rhode Island Supreme Court has recognized that:

[T]he attorney general is the representative of the interests of beneficiaries and the public under charitable trusts and bequests for charitable uses and . . . **he should be made a party in any suit in which . . . the administration of such a trust is involved.**

Israel, 369 A.2d at 649 (emphasis added); see also Grace v. Carroll, 219 F. Supp. 270, 273 (S.D.N.Y. 1963) (requiring joinder because “[t]o leave the [New York] Attorney General stand on the sidelines would permit an adjudication of the interests of the charitable beneficiaries without providing an opportunity to have their interest represented”). Based upon the foregoing, it is clear that the Attorney General is a necessary party to this suit.

Therefore, if this Court declines to dismiss Counts V, VI, and XXI on the grounds that they are preempted by ERISA, then this Court either must dismiss those claims pursuant to Fed. R. Civ. P. 12(b)(7) due to plaintiffs' failure to join the Attorney General as a necessary party, or alternatively, order that the Attorney General be made a party pursuant to Rule 19(a)(2).

II. PLAINTIFFS' FAILURE TO ALLEGE THAT CCF HAD KNOWLEDGE OF THE UNDERFUNDED STATUS OF SJHSRI'S PENSION PLAN REQUIRES DISMISSAL OF PLAINTIFFS' CLAIMS FOR “FRAUDULENT SCHEME,” CONSPIRACY, AND AIDING AND ABETTING BREACH OF FIDUCIARY DUTY.

This Court should dismiss Count VII (“Fraudulent Scheme”), Count IX (Conspiracy), and Count XX (Rhode Island Law, Aiding and Abetting Breaches of Fiduciary Duty) for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). The common thread connecting these three claims is that, although plaintiffs do not name CCF as a defendant in Count VII (“Fraud Through

Intentional Misrepresentations and Omissions”), as a back-up, they are attempting to develop weak, vague claims of joint tort liability against CCF.

Beginning with Count VII, CCF notes that there is no Rhode Island decision recognizing a cause of action for “fraudulent scheme.” This is equivalent to a civil conspiracy claim predicated on fraud – i.e. a plan between multiple parties to defraud another. Therefore, Count VII’s claim for “fraudulent scheme” is subsumed within Count IX’s claim for conspiracy.

A claim for civil conspiracy is not an independent basis of liability. Read & Lundy, Inc. v. Washington Trust Co. of Westerly, 840 A.2d 1099, 1102-03 (R.I. 2004). Rather, civil conspiracy claims must be supported by allegations that the defendant – i.e. CCF – committed an underlying intentional tort in furtherance of an “unlawful enterprise.” Id. The plaintiff also must allege facts sufficient to show that defendant had a “specific intent to do something illegal or tortious.” Chain Store Maint, Inc. v. Nat’l Glass & Gate Serv., Inc., No. PB-01-3522, 2004 WL 877599, *11 (R.I. Super. Ct. Apr. 21, 2004) (Silverstein, J.) (quoting Guilbeault v. R.J. Reynolds Tobacco Co., 84 F.Supp.2d 263, 268 (D.R.I. 2000)).

The First Circuit has recognized that, where, as here, the plaintiff predicates a civil conspiracy claim upon allegations of fraud, the Complaint must plead that conspiracy claim with particularity pursuant to Fed. R. Civ. P. 9(b). Hayduk v. Lanna, 775 F.2d 441, 443-44 (1st Cir. 1985) (applying Rule 9(b) to conspiracy claim where plaintiffs alleged that defendants “conspired and developed a scheme” to defraud plaintiffs). As such, plaintiffs must allege “specifics about the time, place, and content” of CCF’s alleged fraudulent conduct. Woods v. Wells Fargo Bank, N.A., 733 F.3d 349, 358 (1st Cir. 2013). “Rule 9(b) requires not only specifying the false statements and by whom they were made but also identifying the basis for inferring scienter.” N. Am. Catholic Educ. Programming Found., Inc. v. Cardinale, 567 F.3d 8,

13, 15 (1st Cir. 2009) (applying Rule 9(b) to both fraud claims and also “associated claims where the core allegations effectively charge fraud”).

It is not enough for plaintiffs to point to allegations that *other defendants* engaged in fraudulent conduct.

As to multiple fraud defendants, a plaintiff “must provide each and every defendant with enough information to enable them ‘to know what misrepresentations are attributable to them and what fraudulent conduct they are charged with.’ ” *Pegasus Holdings v. Veterinary Centers of America, Inc.*, 38 F.Supp.2d 1158, 1163 (C.D.Ca.1998) (quoting *In re Worlds of Wonder Sec. Litig.*, 694 F.Supp. 1427, 1433 (N.D.Ca.1988)). “Rule 9(b) does not allow a complaint to merely lump multiple defendants together but ‘require[s] plaintiffs to differentiate their allegations when suing more than one defendant ... and inform each defendant separately of the allegations surrounding his alleged participation in the fraud.’ ” *Swartz v. KPMG LLP*, 476 F.3d 756, 764–765 (9th Cir.2007) (quoting *Haskin v. R.J. Reynolds Tobacco Co.*, 995 F.Supp. 1437, 1439 (M.D.Fla.1998)). “In the context of a fraud suit involving multiple defendants, a plaintiff must, at a minimum, ‘identif[y] the role of [each] defendant[] in the alleged fraudulent scheme.’ ” *Swartz*, 476 F.3d at 765 (quoting *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 541 (9th Cir.1989)).

Moreover, in a fraud action against a corporation, a plaintiff must “allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written.” *Tarmann v. State Farm Mut. Auto. Ins. Co.*, 2 Cal.App.4th 153, 157, 2 Cal.Rptr.2d 861 (1991).

Cisneros v. Instant Capital Funding Group, Inc., 263 F.R.D. 595, 606–07 (E.D. Cal. 2009).

Here, the Complaint does not allege that a single officer, director, or employee of CCF made a false or misleading statement to anyone, or took a false or misleading action in relation to anyone. The only factual allegation that comes close is paragraph 379. This paragraph alleges that SJHSRI, RWH, and CCF (through an attorney jointly retained to represent all three entities) all “repeatedly mispresent[ed] . . . to the court in the 2015 *Cy Pres* Proceeding, that all of *their* liabilities, including *their* pension liabilities, would be ‘satisfied’ and ‘paid’ from other assets

[i.e. assets remaining with SJHSRI, RWH, and CCCB post-closing].” (*Id.* ¶ 379) (emphasis added).

Critically, the Complaint does not allege any facts suggesting that, as of the time of the alleged misrepresentation in 2015, any officer, director, or employee of CCF had knowledge of the underfunded status of the Plan, or the extent thereof. (In fact, the Complaint does not even identify by name a single individual as being an officer, director, or employee of CCF.) And it is telling that the section of the Complaint titled “Defendants Knew The Plan Was Underfunded” does not allege any facts suggesting such knowledge on the part of CCF. (*Id.* ¶¶ 236-256).

In sum, CCF stands alone as the only defendant that is not alleged to have knowledge of the Plan’s financial condition. Because CCF never had any role in administering the Plan, it is not reasonable to infer that CCF somehow had knowledge of another defendant (SJHSRI)’s pension liabilities. Without such knowledge, plaintiffs cannot include CCF in the claims for “fraudulent scheme” and conspiracy to conceal the underfunded status of the Plan. See N. Am. Catholic Educ. Programming Found., Inc. v. Cardinale, 567 F.3d at 13. This Court therefore should dismiss Counts VII and IX for failure to state a claim pursuant to Fed. R. Civ. 12(b)(6).

For largely the same reasons, this Court should dismiss Count XX (Rhode Island Law, Aiding and Abetting Breaches of Fiduciary Duty). Rule 9(b)’s heightened pleading requirements apply to “aiding and abetting” claims “where the core allegations effectively charge fraud.” Hallal v. Vicis Capital Master Fund Ltd., 2013 WL 1192384, *15 (D. Mass. 2013) (Dein, M.J.) (quoting N. Am. Catholic Educ. Programming Found., Inc. v. Cardinale, 567 F.3d at 15). In conclusory fashion, plaintiffs’ Complaint alleges at paragraph 524 that CCF “knowingly aided, abetting, and participated in breaches of fiduciary duty by Defendants SJHSRI, CCCB, Angell, and the Diocesan Defendants.” (Complaint, ¶ 524). The Complaint does not allege how CCF

possibly could have aided or abetted breaches of fiduciary duty by Angell or the Diocesan Defendants. The focus therefore shifts to when and how CCF could have “knowingly” aided and abetted SJHSRI’s and/or CCCB’s breaches of fiduciary duties owed to Plan participants. (Complaint, ¶ 524). The only factual allegations that come close are those set forth at paragraph 379, alleging that SJHSRI, RWH, and CCF all “repeatedly mispresent[ed] . . . to the court in the 2015 *Cy Pres* Proceeding, that all of *their* liabilities, including *their* pension liabilities, would be ‘satisfied’ and ‘paid’ from other assets [i.e. assets remaining with SJHSRI, RWH, and CCCB post-closing].” (*Id.* ¶ 379) (emphasis added). As stated above, the Complaint alleges no facts plausibly suggesting how or why CCF would have had knowledge of the extent of SJHSRI’s pension liabilities. Without factual allegations plausibly suggesting scienter (i.e. CCF’s knowledge that certain statements about the Plan’s financial condition were false), plaintiffs fail to state an actionable claim that CCF “*knowingly* aided, abetted, and participated in” breaches of fiduciary duties owed to Plan participants concerning Plan funding. (*Id.* ¶ 524) (emphasis added). Accordingly, this Court should dismiss Count XX for failure to state a claim pursuant to Fed. R. Civ. 12(b)(6).

III. PLAINTIFFS’ VEIL-PIERCING CLAIMS IN COUNTS XII AND XV MUST BE DISMISSED BECAUSE CCF IS AT LEAST TWO STEPS REMOVED FROM SJHSRI, THE ENTITY THAT HAD THE PENSION LIABILITY TO PLAINTIFFS, AND THERE ARE NO FACTS SUGGESTING THAT CCF IS A MERE CONTINUATION OF SJHSRI OR ITS ALLEGED PARENT, CCCB.

Through Count XX, plaintiffs allege that CCF is in an “Alter Ego Group” that makes it “liable therefore as the alter ego[] for the Defendants directly liable to Plaintiff.” (Complaint, ¶ 495). An alter ego theory of liability is one in which the plaintiff alleges that one entity is so closely related to another that the entities should be considered one and the same for purposes of assessing liability. See Nat’l Hotel Assocs. v. O. Ahlborg & Sons, Inc., 827 A.2d 646, 652 (R.I. 2003). There must be “a unity of interest and ownership between the corporation and its owner

or parent corporation *such that their separate identities and personalities no longer exist. . .*”.

Id. (emphasis added).

Here, the Complaint vaguely alleges that CCF was an “alter ego” of another defendant, without specifying which defendant. The Complaint does, however, allege that CCCB is CCF’s sole member – i.e., its parent corporation. (Complaint, ¶ 25). (As stated above, CCF disputes that CCCB currently has any rights as CCF’s sole member, supra at fn. 2, but accepts this allegation as true solely for purposes of this motion to dismiss.)

Factors to consider in determining if CCF can be judged CCCB’s alter ego include “continuity of ownership, similarity of the two companies in relation to management, business purpose, operation, equipment, customers, [and] supervision” Groden v. N&D Transp. Co., Inc., 866 F.3d 22, 27-28 (1st Cir. 2017). Plaintiffs do allege the first factor – continuity of ownership. Plaintiffs, however, do not allege that any of the other six factors are present. Plaintiffs do not allege overlap in CCCB’s and CCF’s officers and directors. Plaintiffs do not allege that CCCB managed or supervised CCF in any way. There is no overlap in CCCB’s and CCF’s business purpose or operations. CCCB’s business is, and has been, assisting with the management of Fatima Hospital and Roger Williams Hospital, and the wind-down of their assets. See (Complaint, ¶¶ 81-82, 372). In contrast, CCF is a non-profit corporation charged with administering SJHSRI’s and RWH’s former charitable assets consistent with donors’ intent. There is no allegation that CCF ever operated a hospital. The missions of the two corporations are not similar, but dissimilar. On these facts, there is no plausible basis for holding that CCCB’s and CCF’s “separate identities and personalities no longer exist” so as to establish alter

ego liability. Nat'l Hotel Assocs., 827 A.2d at 652. Accordingly, this Court should dismiss Count XII for failure to state a claim pursuant to Fed. R. Civ. 12(b)(6).¹⁵

In any event, even if plaintiffs succeeded in establishing CCF as the “alter ego” of CCCB, that still would not get plaintiffs very far. To establish that CCF has “alter ego” liability for SJHSRI’s Plan funding obligations, plaintiffs would need to pierce the corporate veil twice – first establishing CCF as the “alter ego” of CCCB, and then establishing CCCB as the “alter ego” for SJHSRI. There is no factual basis for such a far-fetched, “double veil-piercing” claim in this case.

Count XV (“Successor Liability”) fares no better against CCF. The general rule in Rhode Island is that a successor-in-interest is not liable for the debts of its predecessor. H.J. Baker & Bro, Inc. v. Organics, Inc., 554 A.2d 196, 205 (R.I. 1989). The First Circuit, however, has recognized four exceptions under which successor liability may be imposed on an “acquiring corporation.” Ed Peters Jewelry Co., Inc. v. C&J Jewelry Co., Inc., 124 F. 3d 252, 266 (1st Cir. 1997).

CCF is not the “acquiring corporation” that is the target of Count XV. Rather, Count XV targets the Prospect entities as the “acquiring corporations” that have successor liability. In the 2014 Asset Sale, one or more Prospect entities acquired SJHSRI’s assets (other than the restricted charitable assets transferred to CCF pursuant to the 2015 *Cy Pres* Order). (Complaint, ¶ 11). The Complaint alleges that:

[E]ntities [i.e. Prospect] which purchase the assets of an ERISA plan sponsor [i.e. SJHSRI], and which continue to carry on essentially the same business at the same location and with the same employees, have liability for the plan under the

¹⁵ In the portion of their brief arguing for Rule 12(b)(6) dismissal of the “alter ego” claims against them, the Prospect Entities raise well-placed arguments that common ownership between two companies is insufficient to establish alter ego status. CCF joins in those arguments, which apply with equal force to any purported “alter ego” claim based solely on the fact that CCCB allegedly “owns” CCF as its sole member.

doctrine of successor liability, which cannot be avoided by the parties' express exclusion of the pension liability from the asset sale.

(Complaint, ¶ 62); see also (id. ¶ 130). Tellingly, the section of the Complaint titled "Facts Concerning Successor Liability" does not allege any pertinent facts against CCF, mentioning it only once in passing at paragraph 409(b). (Id. ¶¶ 388-410). This section concludes that, "Prospect East, Prospect Medical Holdings, and CCCB share the liabilities of Prospect Chartercare, and have successor liability for the Plan, both under ERISA and, if ERISA is not applicable, under state common law of successor liability and joint ventures." (Id. ¶ 410). Mention of CCF is noticeably absent from that allegation.

In sum, CCF was not the "acquiring corporation" of SJHSRI (or CCCB), and SJHSRI's *cy pres* transfer of charitable assets to CCF pursuant to the conditions of the AG's HCA approval and the Superior Court's April 20, 2015 *Cy Pres* Order is irrelevant to the "Successor Liability" claim concerning SJHSRI's pension liabilities. Accordingly, this Court should dismiss Count XV for failure to state a claim pursuant to Fed. R. Civ. 12(b)(6).

IV. PLAINTIFFS' CLAIMS AGAINST CCF FOR ALLEGED HCA VIOLATIONS MUST BE DISMISSED BECAUSE CCF WAS NOT EVEN A PARTY TO THE HCA APPROVAL PROCEEDING.

Count XVI seeks to hold CCF civilly liable under R.I. Gen. Laws § 9-1-2 for violations of the HCA, R.I. Gen. Laws § 23-17.14-30. Section 9-1-2 creates a private right of action for the recovery of economic damages caused by the commission of a criminal act. Cady v. IMC Mort. Co., 862 A.2d 202, 215 (R.I. 2004). In order to state a claim under the statute, plaintiffs must allege facts sufficient to prove (by preponderance of the evidence) that CCF committed the underlying criminal offense, and that plaintiffs suffered damages as a result. Mello v. DaLomba, 798 A.2d 405, 410-11 (R.I. 2002).

Here, plaintiffs predicate their § 9-1-2 claim upon an alleged violation of Section 23-17.14-30 of the HCA, which permits the Superior Court to impose criminal sanctions for violations of the HCA and for knowingly providing false or incorrect information during the HCA approval process. But the Complaint concedes that CCF was not even a party to the HCA approval applications submitted by other defendants. (Complaint, ¶ 308). As stated above, the section of the Complaint titled “Fraudulent Misrepresentations and Omissions to State Regulators” does not allege a single act or omission by CCF. (*Id.* ¶¶ 308-59).¹⁶ The Complaint does not allege that CCF provided any false or incorrect information to the Attorney General or DOH during the HCA approval process, much less specify how that caused damage to plaintiffs. Plaintiffs allege only that CCF was a signatory to the 2015 *Cy Pres* Petition, which was drafted, filed, and approved nearly a year after the Attorney General’s and DOH’s HCA approval. Simply put, there are no factual allegations that would support any claim that CCF violated the HCA.

CCF also joins in the Diocesan Defendants’ well-placed arguments that plaintiffs’ § 9-1-2 claim is an impermissible collateral attack on a state administrative decision (i.e. the Attorney General’s and DOH’s HCA approval of the 2014 Asset Sale), and an attempted end-run around the requirements of Rhode Island’s Administrative Procedures Act, R.I. Gen. Laws §§ 42-35-1.1.

Accordingly, this Court should dismiss Count XVI for failure to state a claim pursuant to Fed. R. Civ. 12(b)(6).¹⁷

¹⁶ CCF is mentioned only once, in passing, in the section of the Complaint titled “Fraudulent Misrepresentations and Omissions to State Regulators.” (*Id.* ¶ 342). That passing mention does not describe anything that CCF did or did not do.

¹⁷ CCF also joins in the Prospect Entities’ argument that plaintiffs’ state law claims in Count V-XX are not ripe, and therefore should be dismissed.

III. CONCLUSION

WHEREFORE, CCF respectfully requests that the Court **ALLOW** this motion and dismiss all plaintiffs' claims against CCF.

CHARTERCARE FOUNDATION,

By its counsel,

/s/ Russell F. Conn

Russell F. Conn, Esq. (admitted *pro hac vice*)
Andrew R. Dennington, Esq. (#7528)
Christopher K. Sweeney, Esq. (#9689)
CONN KAVANAUGH ROSENTHAL PEISCH & FORD,
LLP
One Federal Street, 15th Floor
Boston, MA 02110
(617) 482-8200
(617) 482-6444 (fax)
rconn@connkavanaugh.com
adennington@connkavanaugh.com
csweeney@connkavanaugh.com

Dated: September 17, 2018

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of September, 2018, I filed and served this document through the ECF filing system. This document is available for viewing and downloading from the ECF system, and the ECF system will automatically generate and send a Notice of Electronic Filing to the following Users of Record:

Stephen F. Del Sesto, Esq.
Pierce Atwood LLP
One Financial Plaza, 26th Floor
Providence, RI 02903

Richard J. Land, Esq.
Robert D. Fine, Esq.
Chace Ruttenberg & Freedman, LLP
One Park Row, Suite 300
Providence, RI 02903

Howard Merten, Esq.
Steven E. Snow, Esq.
Christopher M. Wildenhain, Esq.
Eugene G. Bernardo, Esq.
Paul M. Kessimian, Esq.
Partridge Snow & Hahn LLP
40 Westminster Street, Suite 1100
Providence, RI 02903

Joseph V. Cavanagh, III, Esq.
Blish & Cavanagh, LLP
30 Exchange Terrace
Providence, RI 02903

David A. Wollin, Esq.
Hinckley Allen & Snyder, LLP
100 Westminster Street, Suite 1500
Providence, RI 02903-2319

Max H. Wistow, Esq.
Stephen P. Sheehan, Esq.
Benjamin G. Ledsham, Esq.
Wistow Sheehan & Loveley, PC
61 Weybosset Street
Providence, RI 02903

Preston W. Halperin, Esq.
Dean J. Wagner, Esq.

Christopher J. Fragomeni, Esq.
Shechtman Halperin Savage, LLP
1080 Main Street
Pawtucket, RI 02860

Daniel F. Sullivan, Esq.
Steven J. Boyajian, Esq.
Robinson & Cole, LLP
One Financial Plaza, Suite 1430
Providence, RI 02903

David R. Godofsky, Esq.
Emily S. Costin, Esq.
Patrick C. DiCarlo, Esq.
Alton & Bird, LLP
950 F Street, NW
Washington, DC 20004

/s/ Christopher K. Sweeney

Christopher K. Sweeney

1920939.3 02611.000

HEARING DATE: April 6, 2015; 3:30PM

**STATE OF RHODE ISLAND
KENT, SC.**

SUPERIOR COURT

In re: CHARTERCARE HEALTH PARTNERS :
FOUNDATION, ROGER WILLIAMS : C.A. KM-2015-0035
HOSPITAL and ST. JOSEPH HEALTH :
SERVICES OF RHODE ISLAND :

**ATTORNEY GENERAL’S RESPONSE TO THE
PETITION FOR DISPOSITION OF CHARITABLE
ASSETS INCLUDING APPLICATION OF
DOCTRINE OF CY PRES**

Now comes Attorney General Peter F. Kilmartin (“Attorney General”) and hereby responds to the Petition for Disposition of Charitable Assets, Including Application of Doctrine of *Cy Pres* (the “Petition”) filed by CharterCARE Health Partners Foundation (the “CCHP Foundation” or “Petitioners”). This Response will address the Petitioners’ request for the use and disposition of two types of charitable assets: the institutional charitable assets¹ and the charitable trusts.² Additionally, this Response proposes reporting requirements in connection with the funds at issue. Petitioners have reviewed and agree to the reporting requested by the Attorney General.

I. Background

On June 20, 2014, a closing on the transaction approved by the Attorney General and the Department of Health³ occurred in which certain of the assets of CharterCARE Community

¹ These assets are referenced at Paragraphs 21-23 and 26 of the Petition.

² These assets are referenced at Paragraphs 27-30 of the Petition.

³ The transaction was approved by a Decision of the Attorney General on May 16, 2014 (“Attorney General’s Decision” or “HCA Decision”) and by the Department of Health on May 19, 2014. The approvals followed extensive reviews performed pursuant to the Hospital Conversions Act, R.I. Gen Laws §§ 23-17.14-1, et seq. (“HCA”).

Board, formerly known as CharterCARE Health Partners (“CCCB”), Roger Williams Hospital (“RWH”), formerly known as Roger Williams Medical Center, and St. Joseph Health Services of Rhode Island (“SJHSRI”) were transferred to the newly formed for-profit joint venture between CCCB and Prospect Medical Holdings, Inc. (“PMH”) known as Prospect CharterCARE, LLC, and its affiliates (the “Joint Venture”). In addition, the Joint Venture contemplated the transfer, subject to Court approval, of certain charitable assets to CCHP Foundation and the use of certain of the charitable assets during the wind down of RWH and SJHSRI to satisfy the Outstanding Pre and Post Closing Liabilities.

Prior to the Joint Venture, CCHP Foundation’s mission included raising funds for the benefit of CCCB, including Roger Williams Medical Center and SJHSRI. After the closing, the mission of the CCHP Foundation was changed because the charitable assets at issue in the Petition could no longer be used for the benefit of the for-profit entities that now comprise Prospect CharterCARE, LLC. The new mission reflects a community based benefit to provide responsive health care and health care related services. The current mission statement is as follows:

Such purposes shall include serving as a community resource to provide accessible, affordable, and responsive health care and health care related services including, without limitation, disease prevention, education and research grants, scholarship, clinics and activities within the communities previously served by St. Joseph Health Services of Rhode Island and Roger Williams Hospital in order to facilitate positive changes in the health care system. Petitioners’ Exhibit A.

II. Charitable Assets

A. Charitable Funds

The Petitioners have filed the instant Petition requesting that the Honorable Court allow CCHP Foundation to use charitable funds which can no longer be used in accordance with original donor intent, for the benefit of the new CCHP Foundation mission as outlined in Section I. The Attorney General agrees that because of the formation of the Joint Venture, the funds cannot be used for the benefit of the for-profit hospitals and therefore agrees to the *cy pres* of these funds. However, given the Attorney General's statutory and common law duties to protect charitable assets, the Attorney General has proposed, and CCHP Foundation has assented, to certain reporting requirements described in further detail below at Section III.

B. Charitable Trust and *Cy Pres*

Similarly, the Attorney General has no objection to the *cy pres* of charitable trusts assets as outlined in the Petition. Pursuant to the HCA Decision (pp 24-28), the Attorney General permitted pre and post-closing liabilities be paid with RIFEPA income from the trusts because the funds being used are income funds that are not restricted and therefore are usable for the general purposes of the operations of the hospitals. These charitable trusts are referenced by Petitioners in paragraphs 28 of the Petition (the Brown, Knight, Flint, Horton and Steinert Trusts) and at Paragraph 29 of the Petition (the Boyden Trust). Additionally, the use of these trust funds was permitted by the trustees as outlined in R.I. Gen. Laws § 18-4-2, "Powers of Trustees", which provides:

- (a) every trust, inter vivos or testamentary, previously or subsequently effective, in which no provision is made to the contrary, shall be deemed to give to the trustees or trustee under the trust for the time being, in addition to any other power they may lawfully have, full power in there, his, or her discretion, or if a corporation in the discretion of its duly authorized officer or committee:

- (a)(4) to participate in, assent to, or disapprove any plan for the reorganization, recapitalization, consolidation, merger, winding up, or readjustment of the

indebtedness of any corporation or association, and to take any and all action required by reason of participation in the plan;...."

While the Attorney General has agreed to the use of such charitable assets, the Attorney General requests, and CCHP Foundation has agreed, that the reporting requirements incorporated herein at Section III also be required if and when any assets of the charitable trusts are transferred to CCHP Foundation.

Additionally, it should be noted that Bank of America ("BOA"), trustees of the Perpetual Trusts identified in the Petition, have received notice of these proceedings and a copy of the Petition. BOA has provided a written response to this Court, stating that they have no objection to the requests made by Petitioners with respect to the Perpetual Trusts identified in Paragraphs 27-30 of the Petition.

III. Reporting Requirements

1. The CCHP Foundation shall submit a report to the Health Care Advocate at the Rhode Island Department of Attorney General of the expenditures of the funds transferred to the CCHP Foundation as set forth herein.
2. The report shall include the amount of funds expended, the purpose of the expenditure, the beneficiary of the funds, and the name and contact information for such beneficiary.
3. The report shall be submitted annually, with a copy of CCHP Foundation's IRS Form 990 ("990"), five business days after the date the 990 is filed with the IRS, commencing with the 990 filing for the fiscal year ending September 30, 2015.⁴ A

⁴ CCHP Foundation's fiscal year runs from October 1 – September 30. The 990 filing is due by the 15th day of the fifth month after the close of a charity's fiscal year (February 15) with an automatic three month extension (May 15) and a second discretionary three month extension (August 15).

report shall also be submitted if an expenditure of over \$200,000 occurs more than ninety (90) days after the reporting date, or more than ninety (90) days prior to the reporting date, whichever occurs first.

4. If, at any time, CCHP Foundation decides to relinquish custody and control and transfer the funds to another charitable institution, regardless of the amount, notice of said transfer shall be provided to the Health Care Advocate at the Rhode Island Department of Attorney General, within thirty (30) days prior to the transfer. Notice shall precede the transfer and contain the amount of funds transferred and the name of the institution receiving the funds, and the contact information for the person(s) managing the funds.

IV. Enforcement

Should the CCHP Foundation fail to comply, the Attorney General shall invoke its common law and statutory duty, including, but not limited to, the authority granted to the Attorney General pursuant to R.I. General Laws §§18-9-9, 18-9-10 and 18-9-11, to protect charitable assets within the State of Rhode Island.

V. Conclusion

The Attorney General has reviewed the Petition and the affected charitable assets. Based on that review, the Attorney General and the CCHP Foundation have agreed that CCHP Foundation shall report to the Attorney General regarding the expenditure of certain charitable assets. The Office of Attorney General seeks the following relief:

- (1) An order granting the Petition incorporating the reporting requirements requested herein and agreed to by the Parties; and
- (2) any additional relief that is equitable and just.

Respectfully submitted,

STATE OF RHODE ISLAND
BY ITS ATTORNEY,

PETER F. KILMARTIN
ATTORNEY GENERAL

/s/Kathryn R. Enright
/s/ Chrisanne Wyrzykowski
Kathryn R. Enright (#7208)
Special Assistant Attorney General
Genevieve Martin (#3918)
Assistant Attorney General
Chrisanne Wyrzykowski (#7565)
Special Assistant Attorney General
150 South Main Street
Providence, RI 02903
Tel.: (401) 274-4400
Fax: (401) 222-2995

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April, 2015 I filed and served this document through the electronic filing system and via e-mail on the following parties: The document electronically filed and served is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

Patricia K. Rocha, Esq.
Joseph Avanzato
Leslie D. Parker
Adler Pollock & Sheehan P.C.
One Citizens Plaza, 8th Floor
Providence, RI 02903
procha@apslaw.com

Paul A. Silver, Esq.
James Nagelberg, Esq.
Hinckley, Allen & Snyder LLP
50 Kennedy Plaza, #1500
Providence, RI 02903
psilver@hinckleyallen.com

Moshe Berman
CharterCARE Health Partners
825 Chalkstone Avenue
Providence, RI 02908
Moshe.berman@chartercare.org

/s/ Chrisanne Wyrzkowski

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

**ST. JOSEPH HEALTH SERVICES :
OF RHODE ISLAND :**

v. :

C.A. No. PC-2017-3856

**ST. JOSEPH HEALTH SERVICES :
OF RHODE ISLAND RETIREMENT :
PLAN, as amended :**

**ATTORNEY GENERAL’S JOINDER TO CHARTERCARE FOUNDATION’S
EMERGENCY CROSS-MOTION TO POSTPONE SEPTEMBER 13, 2018 HEARING AS
IT RELATES TO PROPOSED SETTLEMENT TERMS**

Now comes Attorney General Peter F. Kilmartin (“Attorney General”) and hereby joins CharterCARE Foundation’s Emergency Cross-Motion to Postpone the September 13, 2018 Hearing on the Receiver’s Petition for Settlement Instructions (“Petition”) in the above-captioned matter. For the reasons stated below, the Attorney General requests a reasonable amount of time to review the terms of the proposed settlement that it received less than 48 hours ago to ensure that those terms comply with both this Office’s 2014 Decision and Conditions in the Prospect/CharterCARE matter under the Hospital Conversions Act (“HCA”) (*see Exhibit A, Attorney General’s Decision of May 16, 2014 re Initial Hospital Conversion Application of Prospect Medical Holdings, Inc., et al*) and the charitable trust rules that this Office is statutorily required to enforce.

The Receiver has petitioned this Court to approve a proposed settlement agreement that would, if executed, place the assets of the CharterCARE Foundation (the “Foundation”) effectively under the Receiver’s control. *See Receiver’s Petition for Settlement Instructions*, at, *e.g.*, p. 6, at ¶ 14(c). The Receiver appears to promote vacation of this Court’s April 20, 2015 order in the

related *cy pres* proceeding (*In re CharterCARE Health Partners Foundation, et al.*, C.A. No. KM-2015-0035). *See Proposed Settlement Agreement*, at, *e.g.*, p. 2 (first “whereas” clause), and p. 20, at ¶ 32.

The Attorney General has the responsibility under the General Laws as well as at common law to ensure that charitable assets are being used in accordance with the terms of the trust. *See* R.I. Gen. Laws §§ 18-9-9 to 18-9-11; *see also, e.g., e.g., Israel v. Nat’l Bd. Of Young Men’s Christian Ass’n*, 369 A.2d 646, 649 (R.I. 1977). The Attorney General’s authority in this area is specifically recognized in HCA. *See* R.I. Gen. Laws § 23-17.14-21. Moreover, the HCA imbues the Attorney General with the power to enforce the conditions he previously imposed on the Prospect/CharterCARE transaction. *See* R.I. Gen. Laws § 23-17.14-30.

The Attorney General received only forty-eight hours’ notice of the proposed Settlement’s terms, and therefore has not had a reasonable opportunity to examine those terms in light of the Attorney General’s statutory responsibilities both under the HCA and laws governing charitable trust assets in this State. The Attorney General further notes that the record in the *cy pres* proceeding concerning charitable trust assets was voluminous. In the short time that this Office has had to review the Settlement, it appears at first blush that some of the terms of the proposed Settlement may potentially conflict with certain Conditions the Attorney General imposed on the hospital conversion transaction out of which the CharterCARE Foundation was created. *See, e.g., Exhibit A* at p. 51 (Condition Nos. 1 and 2, concerning board and officer overlap) and p. 52 (Condition No. 8, concerning scope of *cy pres* modifications). The terms of the Settlement as proposed in the Receiver’s Petition also raise questions about compliance with charitable trust

principles.¹ This Office requires more time to ensure that none of the proposed Settlement terms conflict with this Office's prior 2014 Decision and Conditions under the HCA or the laws governing charitable assets in the State of Rhode Island, which this Office is bound to enforce.²

Respectfully submitted,

**STATE OF RHODE ISLAND
DEPARTMENT OF ATTORNEY GENERAL**

By Its Attorney,

**PETER F. KILMARTIN
ATTORNEY GENERAL**

/s/ *Lauren S. Zurier*

/s/ *Maria R. Lenz*

Lauren S. Zurier (#4496)
Special Assistant Attorney General
Maria R. Lenz (#8558)
Special Assistant Attorney General
Department of Attorney General
150 South Main Street
Providence, RI 02903
lzurier@riag.ri.gov
marialenz@riag.ri.gov
(401) 274-4400 (phone)
(401) 222-3016 (fax)

Dated: September 7, 2018

¹ The concerns discussed herein regarding compliance with the charitable trust laws and the 2014 Conditions and Decision are not meant to provide an exhaustive recitation of the concerns the Office may have regarding the proposed Settlement. This Office does not waive its right to alert the Court in this or any future and/or pending proceedings of any other substantive concerns or issues not described herein that are discovered upon further review of all pertinent documents and law.

² The Attorney General is amenable to the schedule proposed by counsel for CharterCARE Foundation in its Objection to the Receiver's Petition.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 7th day of September 2018, I electronically filed and served this document through the electronic filing system to all on record. The document electronically filed is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

/s/ Karen M. Ragosta