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.

PROSPECT CHARTERCARE, LLC; ET AL.,

Defendants.

C.A. No. 1:18-CV-00328-S-LDA

THE DIOCESAN DEFENDANTS' POST-HEARING BRIEF ADDRESSING PROPOSED ORDERS ON PRELIMINARY SETTLEMENT APPROVAL AND QUESTION REGARDING FEDERAL RECEIVERSHIP

DATED: March 12, 2019

ROMAN CATHOLIC BISHOP OF PROVIDENCE, A CORPORATION SOLE, DIOCESAN ADMINISTRATION CORPORATION and DIOCESAN SERVICE CORPORATION

By Their Attorneys,

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Defendants Roman Catholic Bishop of Providence, a corporation sole ("RCB"), Diocesan Administration Corporation and Diocesan Service Corporation (collectively, the "Diocesan Defendants") respectfully submit this post-hearing brief following oral argument on February 12, 2019 on the Joint Motion of Plaintiffs and St. Joseph Health Services of Rhode Island, Inc. ("SJHSRI"), Chartercare Community Board ("CCCB"), and Roger Williams Hospital ("RWH" and collectively with Plaintiffs, SJHSRI, and CCCB, the "Settling Parties") for Preliminary Settlement Approval, ECF No. 63 (the "Joint Motion").

PRELIMINARY STATEMENT

At the conclusion of a three-plus hour hearing on the Joint Motion, the Court did not ask the parties to submit post-hearing briefs proffering new arguments or rearguing the issues discussed at that hearing or in the extensive briefing previously filed. Yet that is precisely what the Settling Parties have seen fit to do in their 28-page submission. Settling Parties' Post-Hearing Mem., ECF No. 109 ("Post-Hearing Brief" or "PH Brief"). More than half of their Post-Hearing Brief is devoted to repeating arguments already made or attempting to rebut arguments that the Settling Parties failed to address in their 72 page opening brief, their combined 150 pages of reply briefing, or at oral argument. The Court should not allow or consider these redundant and additional arguments.

The Court *did* request that the parties: (1) submit a proposed order concerning preliminary approval of the settlement among the Settling Parties and, if they could not agree on that order, submit a brief memorandum outlining their position on the points of conflict; and (2) advise as to their position on the Court establishing a federal receivership or a joint federal/state receivership for the St. Joseph Health Services of Rhode Island Retirement Plan (the "Plan").

Ex. A, Excerpts from Feb. 12, 2019 H'rg Tr. 108:7-109:21 ("Tr."). The Diocesan Defendants will adhere to the Court's request, while also briefly responding to new arguments.[1]

ARGUMENT

I. THE SETTLING PARTIES' PROPOSED ORDER FAILS TO SATISFY THE COURT'S REQUEST THAT ANY ORDER PRELIMINARILY APPROVING THE SETTLEMENT NOT PREJUDICE THE NON-SETTLING DEFENDANTS

The Court indicated that it was disinclined to enter an order that would prejudice the non-settling defendants' rights, particularly at this early stage in the proceedings where no rulings have been made that could substantially impact the rights at issue. *Id.* 110:8-21. At various points in the hearing, Plaintiffs represented that they did not intend any preliminary approval to prejudice any such rights. *Id.* 22:7-24:10. Towards the end of the hearing, they backtracked from that position. *Id.* 99:7-101:16. Thereafter, the Settling Parties submitted a proposed order that included a "good faith" finding pursuant to R.I. Gen. Laws § 23-17.14-35, which would cut off the non-settling defendants' rights to contribution, and approve release language that likewise cuts off contribution rights.

As the Diocesan Defendants advised the Court at oral argument, federal courts have declined to approve settlements where they leave the non-settling defendants' contribution and judgment reduction rights unclear:

> The second question I have, and this applies to the securities context, which is -- and I can cite the case, your Honor, *In re Jiffy Lube Securities Litigation*, 927 F.2d 155, where the Court suggests there that at the time of approving a settlement, that the non-settling defendants are entitled to know how their contribution rights will be affected and what the mechanism for setoff would be.

[1] To remove any doubt, the Diocesan Defendants oppose the Joint Motion and maintain that the Court should deny it. The Diocesan Defendants have not waived, and expressly reserve the right, to appeal any order approving the proposed settlement or granting the Joint Motion, and their compliance with the Court's request should not be interpreted as an abandonment of such rights.

Tr. 92:5-12. These courts reason that having to prepare for trial without knowing the judgment reduction regime that will apply prejudices the non-settling defendants' ability to plot their course in the litigation. *See, e.g.*, *In re Jiffy Lube Secs. Litig.*, 927 F.2d 155, 161 (4th Cir. 1991). In *Jiffy Lube*, the Fourth Circuit reversed a district court's decision to approve a contribution bar without simultaneously establishing a clear judgment credit regime because such lack of clarity prejudiced the non-settling defendants. *Id.* The court reasoned that "the choice of setoff method determines to a large extent the manner in which a defense should be made at trial" and held a non-settling defendant "is entitled to know what the law of the case is in advance of trial, not on the eve, after discovery is concluded and witnesses have been prepared." *Id.*

The only way for the Court to avert this prejudice to the non-settling defendants here is to adopt the non-settling defendants' proposed order, which preserves contribution rights, and refrain from issuing a good faith determination under R.I. Gen. Laws § 23-17.14-35 until at a minimum, it has determined whether the settlement statute is (1) preempted by ERISA and for what timeframes or (2) unconstitutional. Otherwise, the non-settling defendants are unduly harmed in their defense of this litigation. *See id.*

II. THE DIOCESAN DEFENDANTS STAND BY THEIR WRITTEN OPPOSITION TO PRELIMINARY APPROVAL OF A SETTLEMENT THAT PREJUDICES THE NON-SETTLING DEFENDANTS

The Diocesan Defendants stand by their written opposition,[2] and will refrain from responding to the substantial redundant content in the Settling Parties' Post-Hearing Brief and instead rely on the responses already set forth in their prior memorandum. They do respond to four new arguments.

[2] Diocesan Defs.' Response In Opp'n To The J. Mot. For Settlement Class Certification, Appointment Of Class Counsel, & Preliminary Settlement Approval & Mot. For Award Of Att'ys' Fees, ECF No. 73 ("Dioc. Opp'n").

A. Argument Concerning The Letter To Legislative Leaders

First, the contention that the Diocesan Defendants mischaracterized the Receiver's letter to Rhode Island legislative leaders ("Legislative Letter") does not withstand even a cursory review of what the Settling Parties believe to be the relevant language of that correspondence:

> Without this legislation, the ability for me, as Receiver, to reach a reasonable settlement to expeditiously and efficiently obtain funds to supplement the assets of this Plan is substantially compromised if not wholly eliminated. Conversely, this legislation will provide the opportunity for Special Counsel, the [Superior] Court and myself to negotiate and accept terms of settlement from some parties without compromising our claims and efforts with those unwilling to offer a reasonable settlement. You should know that we already have parties who have expressed a willingness to settle and avoid even the filing of a complaint **but we cannot entertain those discussions until this legislation is in place.**

PH Brief at 8 (bold emphasis and brackets in PH Brief, underlined emphasis added for clarity) (quoting Legislative Letter attached as Exhibit 1 to PH Brief). The Diocesan Defendants referenced the Legislative Letter as further evidence (and confirmation) that Plaintiffs had an opportunity to negotiate a settlement prior to filing this lawsuit, but offered no evidence that they made any attempt to do so, despite this letter's proof that parties were willing to enter that dialogue. The Post-Hearing Brief cannot change that reality. Nor does Mr. Land's newly-filed affidavit, as discussed below.

B. Argument Concerning The Affidavit

Second, the Affidavit of counsel for SJHSRI, CCCB, and RWH (attached as Exhibit 2 to the Post-Hearing Brief) does nothing to negate questions of collusion and prejudice for a number of reasons. Among them, nothing in that affidavit clarifies whether (and, if so, to what extent) Mr. Land's clients attempted to engage in settlement negotiations *pre-complaint*.

Were they, as the Legislative Letter indicates, one of the "parties who have expressed a willingness to settle and even avoid the filing of a complaint"? PH Brief, Ex. 1.

What the affidavit does say indicates that Mr. Land's clients actually were willing to engage in settlement discussions, but explains away the lack of pre-suit discussions because their initial offer was not what the Settling Parties wound up agreeing on. PH Brief, Ex. 2 ¶¶ 2-3. At the outset, this statement borders on the ridiculous. If the fact that one party's opening offer excused any purpose or value in further negotiations, settlement would cease to exist. The whole purpose and process of negotiations concerning litigation (whether pending or threatened) is a back-and-forth between the parties. Nothing in this affidavit excuses Plaintiffs from their failure to even begin negotiations prior to filing this lawsuit (especially when whether over a million dollars would go towards pension benefits or attorneys' fees turned on the timing of the settlement). Nor does the affidavit provide any kind of timeline or explanation as to why settlement negotiations only occurred after the filing of the complaint.

Although these issues certainly have relevance to the pending motions for attorneys' fees, the Diocesan Defendants reiterate that they also go to the good faith and fairness of the settlement to the class and the non-settling parties. Dioc. Opp'n 17, 19-21; *see* Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018 amendment ("Particular attention [in the fairness inquiry] might focus on the treatment of any award of attorney's fees, with respect to both the manner of negotiating the fee award and its terms."); *id.* ("Examination of the attorney-fee provisions may also be valuable in assessing the fairness of the proposed settlement.").

Further, the affidavit does not answer concerns about the collusive nature of this settlement and the inappropriateness of the proposed releases in particular. It heightens them. The affidavit concedes that SJHSRI did not "have available assets to fund the Plan," PH Brief,

Ex. 2 ¶ 4, yet goes on to declare that the directors who voted "insisted" on releases of any claims ***against them*** as a condition of the settlement. *Id.* ¶ 9. This is tantamount to an admission that actors with fiduciary and ethical obligations to SJHSRI, RWH, and CCCB—or more accurately, the creditors of SJHSRI, RWH, and CCCB given the insolvency of those entities—held up a settlement to further their own individual self-interest. *Nat'l Hotel Assocs. v. O. Ahlborg & Sons, Inc.*, 827 A.2d 646, 656 (R.I. 2003) ("When a corporation becomes insolvent and can no longer continue in business, the directors and other managing officers occupy a fiduciary relation towards creditors by reason of their position and their custody of the assets.") (internal quotation marks omitted)).

Here, the affidavit lays out that two of three directors[3] of SJHSRI, RWH, and CCCB agreed to hand over essentially all assets of the entities they served as fiduciaries to the Plan, but only if they themselves, and the agents advising them, were released from any potential liability. They did so, moreover, at the expense of other creditors.[4] These include the Plan participants, but also others—Prospect and Angell—who possess contractual indemnity rights against SJSHRI or CCCB and fellow director, Rev. Timothy Reilly, who has the same indemnity rights as the directors being released but was left out in the cold. *O. Ahlborg* speaks directly to these circumstances:

> "[I]t is inequitable to allow directors who control the affairs of the corporation . . . to place themselves in a favorable position by protecting their own interests to the detriment of the remaining creditors."

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[3] The third director, Rev. Timothy Reilly, did not participate in the vote and was inexplicably excluded from the scope of the release, even though the very justifications provided by the Settling Parties for the reasonableness of the voting directors' demand apply to him with equal force.

[4] While it is uncomfortable to make this point, the affiant also benefits from the release language in the proposed settlement agreement. *See* Proposed Settlement Agreement, ECF No. 63-2, Exs. 9-11 (proposed releases of CCCB, RWH, and SJHSRI). There is no reference in the affidavit or the supplemental memorandum to any consultation with separate legal counsel for the settling entities to analyze the scope of the release, or the reasonableness of the directors' supposed insistence for one in the context here.

Id. The Court should decline to find this settlement as one made in "good faith" under R.I. Gen. Laws § 23-17.14-35.

C. Argument Concerning The 2015 *Cy Pres* Petition

Third, the Settling Parties, for the first time in their Post-Hearing Brief, also attempt to address the Diocesan Defendants' argument that the settlement is collusive, in part, because a significant portion of the initial lump sum payment appears as if it would have poured into the Plan without any litigation at all. PH Brief at 11. The Diocesan Defendants premised this argument on SJHSRI and RWH's 2015 *cy pres* petition to use post-closing funds to pay certain "Outstanding Pre and Post Closing Liabilities" as more fully set forth in the Asset Purchase Agreement. Dioc. Opp'n at 20, 26-28. The Settling Parties contend that "[i]t is false to suggest that the Asset Purchase Agreement set forth anything of the sort" and argue that the Diocesan Defendants failed "to point to anything in the Asset Purchase Agreement actually saying so, because they cannot." PH Brief at 11. The Court should decline to consider this argument because it is not timely raised and beyond the scope of the Court's request for briefing. Tr. 108:7-109:21.

But even if it did, the Settling Parties are wrong. The 2015 *cy pres* petition provides:

> it was necessary for each of the Heritage Hospitals [i.e. SJHSRI and RWH] at the closing to discharge various pre-existing liabilities incurred during the period the Heritage Hospitals provided services to their patients prior to the closing and satisfy outstanding pre and post closing liabilities during their subsequent wind-down period (the "Outstanding Pre and Post Closing Liabilities") as is more fully set forth in the APA.

Dioc. Opp'n, Ex. 3 (2015 Cy Pres Petition) ¶ 12. "APA," of course, is shorthand for "Asset Purchase Agreement." *Id.*, Ex. 3 ¶ 10.

The Diocesan Defendants explained at footnote twenty-three of their opposition that: "The Asset Purchase Agreement specifically identified '[a]ll Liabilities related to the Retirement Plan' as one of the liabilities of SJHSRI and RWH that would remain with SJHSRI and RWH post-closing in Schedule 2.4 of that agreement." *Id.* at 27 n.23. Thus, the 2015 *cy pres* petition sought permission to use these funds to pay post-closing liabilities as defined by the Asset Purchase Agreement, including liabilities relating to the Plan. *Id.* at 26-28. The Superior Court granted that request. *Id.* at 28. The Settling Parties' argument is without merit.

Indeed, perhaps unintentionally, the affidavit submitted by the Settling Parties supports this argument. Paragraph 5 of the affidavit implicitly acknowledges that whatever assets of SJHSRI, RWH, or CCCB were left following the wind-down of those entities would be directed to the Plan. PH Brief, Ex. 2 ¶ 5 ("At the time of the filing of the Petition to Appoint Receiver, the Heritage Hospitals were not certain of how much, if any, funds might be available for the Plan following completion of the wind down of the Heritage Hospitals.") Certainly, the affidavit does not assert that SJHSRI and RWH took the position that they had no obligation to use their remaining assets to fund the Plan as laid out in the 2015 *cy pres* petition and order. As far as the Diocesan Defendants are aware, no party, settling or non-settling, plaintiff or defendant, has actually contested that proposition.

D. <u>Argument Concerning Rule 23(e)</u>

Finally, the Settling Parties argue that the Court must make a "good faith" finding in connection with preliminarily approving the settlement under Rule 23(e) and so cannot put off that determination. PH Brief at 1-4. This contention has its origin in a throwaway line in

Plaintiffs' reply brief.[5] The Court should ignore the argument because Plaintiffs' counsel took the exact opposite position at oral argument and it was not developed timely.[6]

Rule 23 does not use the term "good faith." To the extent courts have utilized such language in the Rule 23(e) context, they do so in approving the settlement as "fair, adequate, and reasonable." "Good faith" in the context of Rule 23(e) generally focuses on fairness with respect to the class members (vis-à-vis the settling defendants and each other). *See Bezdek v. Vibram USA Inc.*, No. CV 12-10513-DPW, 2015 WL 13656902, at *3 (D. Mass. Jan. 21, 2015) ("[The] Settlement Agreement, including all exhibits, have been entered into in good faith and are hereby fully and finally approved as fair, reasonable, and adequate as to, and in the best interests of, each of the Parties and the Class Members[.]"). The Settling Defendants improperly conflate that use of the term with a "good faith" finding pursuant to R.I. Gen. Laws § 23-17.14-35.

"Good faith" within the meaning of § 23-17.14-35 means a settlement that "does not exhibit collusion, fraud, dishonesty, or other wrongful or tortious conduct ***intended to prejudice the non-settling tortfeasor(s)***[.]" (Emphasis added). Nothing about a Rule 23(e) "good faith" finding does violence to the rights of non-settling defendants like such a finding would here. And the cases that the Settling Parties cite in connection with their Rule 23(e) argument do not grapple with the circumstances before this Court.[7]

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[5] Pls.' Reply to Diocesan Defs.' Opp'n To First Settlement & Atty's Fees Mots., ECF No. 82, at 11 ("Pls. Reply to Dioc. Opp'n").

[6] The Court: I'm going to stick to Rule 23 and what the requirements of Rule 23 are.
Mr. Wistow: Will you not make a finding as to whether or not it's a good faith settlement because --
The Court: How is that required by Rule 23?
Mr. Wistow: ***It's not***. But it's required by the settlement agreement.
Tr. 99:18-24 (emphasis added).

[7] Most of these authorities do not appear to involve a challenge to the good faith of the settlement or the imposition of a contribution bar against non-settling defendants; some do not even feature non-settling defendants or contested

III. THE COURT SHOULD ESTABLISH A PURELY FEDERAL RECEIVERSHIP

The Diocesan Defendants are supportive of the Court's establishment of a federal receivership for the Plan. They do not believe a joint federal and state receivership is necessary or warranted, given that (1) no party disputes that the Plan is now an ERISA plan, and (2) a joint receivership would not only be more logistically complex, but also raise the possibility for disagreements between the state and federal courts over the handling of the Plan. As such, the Court should establish a purely federal receivership.

The Diocesan Defendants cannot, however, assent to this Court ratifying all that has occurred in the state court without this Court also engaging in an independent analysis of those proceedings to satisfy itself that such approval is warranted. The Superior Court has not reviewed this receivership through the prism of ERISA to ensure that the Receiver has conformed with that statute's "comprehensive and reticulated" scheme. *Mertens v Hewitt Assocs.*, 508 U.S. 248, 251 (1993) (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980)). For example, it is not clear—even now, with the Receiver alleging that the Plan is currently subject to ERISA—whether the Receiver has paid, attempted to pay, or put

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issues at all. *Berry v. Schulman*, 807 F.3d 600, 609-16 (4th Cir. 2015) (no contribution bar); *Love Stone v. Aargon Agency, Inc.*, No. 0:17-CV-02314 (KMM), 2018 WL 3475526, at *1 (D. Minn. May 15, 2018) (no contribution bar or non-settling defendants); *Helde v. Knight Transp., Inc.*, No. 2:12-CV-00904-RSL, 2017 WL 4701323, at *1 (W.D. Wash. Oct 19, 2017) (same); *Block v. RBS Citizens, Nat'l Ass'n*, 1:15-CV-01524 (JHS) (JS), 2016 WL 8201853, *1 (D.N.J. Dec. 12, 2016) (same); *Carver v. Foresight Energy LP*, No. 3:16-CV-3013, 2016 WL 9455818, at *1 (C.D. Ill. Oct. 25, 2016) (unopposed motion for preliminary settlement approval); *Bezdek v. Vibram USA Inc.*, No. CV 12-10513-DPW, 2015 WL 13656902, at *1 (D. Mass. Jan. 21, 2015) (no non-settling defendants or contribution bar); *Saccoccio v. JP Morgan Chase Bank, N.A.*, 297 F.R.D. 683, 692 (S.D. Fla. 2014) (no contribution bar); *In re Checking Account Overdraft Litig.*, 275 F.R.D. 654, 658 (S.D. Fla. 2011) (unopposed motion for preliminary approval of class action settlement); *Zimmerman v. Zwicker & Assocs., P.C.*, No. 09-3905 (RMB/JS), 2011 WL 65912, at *3 (D.N.J. Jan. 10, 2011) (denying preliminary approval of settlement because proposed class was too indefinite, release was too broad, and class received no benefit); *Smith v. Wm. Wrigley Jr. Co.*, No. 09-60646CIV, 2010 WL 2401149, at *1-2 (S.D. Fla. June 15, 2010) (no contribution bar or non-settling defendants); *In re Stock Exchs. Option Trading Antitrust Litig.*, 99-CIV.0962(RCC), 2005 WL 1635158, at *5 (S.D.N.Y. July 8, 2005) (no contribution bar). The closest case is *Jiffy Lube*, where the court ***reversed*** an order approving a settlement as unduly prejudicial to the non-settling defendant. 927 F.2d at 161.

aside monies to pay, premiums to the Pension Benefit Guaranty Corporation on behalf of the Plan in connection with potential plan termination insurance. This Court should not ratify all of the actions in the Superior Court receivership unless and until it independently satisfies itself that the Receiver's handling of the Plan has met the standards of an ERISA fiduciary. Likewise, regardless of the Receiver's fee agreement with Plaintiffs' counsel, this Court has an independent duty to ensure that any fee applications in connection with a class action settlement are fair and reasonable. *See, e.g.*, *Mokover v. Neco Enters., Inc.*, 785 F. Supp. 1083, 1086 (D.R.I. 1992) ("[I]t must be pointed out that this Court has a fiduciary duty to review the requested counsel fees and reimbursement and to use its best judgement to determine what is a reasonable fee and what are appropriate disbursements."). Any order approving the fee agreement should not handcuff this Court in its duty to assess the reasonableness of a particular fee request. *Id.*

It is no reply for the Settling Parties to assert that non-settling defendants, who appeared in the receivership to respond to a subpoena or a motion to compel, were obligated to notify the Superior Court of anything (or everything) they considered objectionable. For example, Plaintiffs' counsel are now asking this Court to defer to the Superior Court's approval in connection with their motions for attorneys' fees.[8] But the Superior Court had approved the fee arrangement between the Receiver and Plaintiffs' counsel on October 17, 2017, more than two weeks before RCB was served with a subpoena on November 2, 2017. The Diocesan Defendants had no reason whatsoever to be monitoring the minute details of the receivership proceedings at that time, let alone filing objections to motions.

[8] Pls.' Mem. In Supp. Of First Mot. For Atty's Fees, ECF No. 64-1, at 24-25; Pls.' Mem. In Supp. Of Second Mot. For Atty's Fees, ECF No. 78-1, at 12-14; Pls.' Reply to Dioc. Opp'n at 52-56.

Likewise, any suggestion that the non-settling defendants were welcome to raise objections in the receivership is belied by the Receiver's reaction when certain non-settling defendants ***did*** file such objections. The Receiver argued that the objectors lacked standing to raise their objections,[9] and the Superior Court agreed. *See St. Joseph Health Servs. Of R.I., Inc. v. St. Joseph Health Servs. Of R.I. Retirement Plan*, No. PC-2017-3856, 2018 WL 5792151, at *8-10 (R.I. Super. Ct. Oct. 29, 2018). In light of that, this Court should not simply ratify the Receiver's handling of the Plan but engage in its own independent review of the receivership proceedings.

CONCLUSION

For the foregoing reasons, the Court should enter the non-settling defendants' proposed order preliminarily approving the settlement, decline to afford the settlement approval under R.I. Gen. Laws § 23-17.14-35, and establish a purely federal receivership.

[9] Mem. in Supp. of J. Mot. For Settlement Class Certification, Appointment Of Class Counsel & Preliminary Settlement Approval, Ex. E (Receiver's Reply in Supp. of Pet. for Settlement Instructions), ECF No. 63-6, at 12-21.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of March 2019, the foregoing document has been filed electronically through the Rhode Island ECF system, is available for viewing and downloading, and will be sent electronically to the counsel who are registered participants identified on the Notice of Electronic Filing.

/s/ Howard Merten

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EXHIBIT A

IN THE 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,	:	18-CV-00328(WES)
	:	United States Courthouse Providence, Rhode Island
vs.	:	
Prospect CharterCARE,LLC, et al., Defendants.	:	Tuesday, February 12, 2019 10:00 a.m.

TRANSCRIPT OF CIVIL CAUSE FOR MOTION HEARING
BEFORE THE HONORABLE WILLIAM E. SMITH
UNITED STATES CHIEF DISTRICT COURT JUDGE

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MR. SHEEHAN: May I proceed, your Honor?

THE COURT: Yes.

MR. SHEEHAN: Thank you, your Honor. I have prepared points to address, and I really think it might make sense to pick up where Mr. Wistow left off in response to the Court's questions before I do that, with the Court's permission.

THE COURT: Yes. You know, let's be cognizant of time here. We started around 10:00. I was a little late on the bench. It's 10:45 now. So, you know, we don't have unlimited time. So why don't you do what you can do in about 45 minutes.

MR. SHEEHAN: All right. Thank you, your Honor.

The question was why was this filed in state court. The receiver didn't file this case, your Honor. The defendant, St. Joseph Health Services of Rhode Island, filed the case in state court and they contended in their petition that this was a church plan exempt from ERISA. Now, they also contended that at some point in the future it would become an ERISA plan, and they wanted a 40 percent cut in benefits before that happened.

Then the receiver was appointed. And the receiver realized that for the benefit of the plan participants, the better argument is that this was an

ERISA plan earlier but that, your Honor, is contrary to the way that this plan has been managed since 1965. For well over 40 years, your Honor, the plan has been operated as a church plan. Now, ERISA came in in 1973 so you'd have to do the math from that. So this was the predicament that the receiver found himself in.

Now, there was a question your Honor raised which is why ask the Court to make rulings on the state law joint tortfeasor statute if we're contending it's an ERISA plan? Your Honor, we're not asking you to determine that that statute applies. We're asking you merely to determine that if that statute applies, it's been satisfied.

THE COURT: Well, what's the difference?

MR. SHEEHAN: Oh, the difference, your Honor, is night and day because at some point later on in the case when rights of contribution have to be determined, the issue will arise, does the statute apply or not?

THE COURT: I mean, that's even worse. You're asking me to make -- you're not just asking me to interpret the statute, you're asking me to interpret it in advance of there being an actual case or controversy challenge in the statute. So you're asking me to give you some kind of a preemptory ruling.

MR. SHEEHAN: 100 percent not the case, your

Honor. A condition of the settlement the defendants insisted upon and the plaintiffs wanted also was that the settlement be approved as a good faith settlement factually. So there's no advisory opinion being sought from the Court. That's a linchpin of the settlement.

THE COURT: Well, I can rule that it's a good faith settlement and approve the settlement without making any ruling on the applicability of the state statute.

MR. SHEEHAN: 100 percent.

THE COURT: Okay. Well, I thought -- maybe I misunderstood what you said. I thought you said that you wanted me to rule that if the statute was applicable later on, that it was binding.

MR. SHEEHAN: Your Honor, that is poor phrasing on my part.

THE COURT: Or I didn't understand it. So let me just get this straight.

So you're saying to me that all that you are asking me to do is to approve the settlement as a good faith settlement and that with respect to the applicability of the joint tortfeasor statute and whether it applies and how it applies, that that's a matter to be left to another day with another court or this Court, however it plays out?

MR. SHEEHAN: 100 percent.

THE COURT: But that a finding of that sort in terms of how it applies to any future contribution action is not a contingency to the settlement.

MR. SHEEHAN: No, your Honor. The settlement anticipates and would be effective even if it were determined that the state statute doesn't apply. All the settlement deals with is the factual finding, and the issue of whether it applies or not will be litigated in some other context.

THE COURT: Okay. Thank you.

MR. SHEEHAN: Your Honor, the Prospect entities take the lead on the ERISA issues and make two arguments which are more non sequiturs than arguments. The first is the settlement should not be considered by the Court until the Court determines that the plan is governed by ERISA. And that has two parts. First part is plaintiffs and defendants agree that the plan is governed by ERISA. And second is PBGC should be a party to any settlement affecting an ERISA-governed plan.

Their second argument is federal courts have exclusive jurisdiction over disputes involving ERISA Title 1 violations and over fiduciary initiated lawsuits involving an ERISA plan. That's not actually

mean, your interest, your client's interest, in all of this, only arises if and when you have liability. And if you have liability, then you go back against the settling defendants and presumably against their principals or their fiduciaries for contribution.

Now, they may say, well, we've got this special statute. They may say we've got a release. To that you will say, we don't care about any of that. We're not parties to that. The special statute's unconstitutional. We get to recover or we get contribution from you. And at that point that would be litigated.

MR. KESSIMIAN: I'd point out a couple things, your Honor. Admit, it's a very good, interesting question. The first response I would have to that is I don't know whether it's true that our contribution rights would arise at a time you suggested. I know my brother mentioned that on the other side. But I thought in *Brown*, in the Depco case, at least as far as the Rhode Island Supreme Court was concerned, when engaged in a due process analysis of whether the changing of contribution rights could be challenged, the Supreme Court of Rhode Island suggested in that Depco case that the rights to contribution arise at the time of the underlying tort.

So I'm not sure that the contribution rights aren't extant at this point. The plaintiffs' allegations of the underlying tort certainly predate this suit.

The second question I have, and this applies to the securities context, which is -- and I can cite the case, your Honor, *In re Jiffy Lube Securities Litigation*, 927 F.2d 155, where the Court suggests there that at the time of approving a settlement, that the non-settling defendants are entitled to know how their contribution rights will be affected and what the mechanism for setoff would be.

I think it's okay if everything is kind of preserved on some level, but I do think it's not entirely true to say that there's no interest in terms of analyzing this precise question at this point in time. And I think if we proceed along the lines I suggested at the beginning of my discussion where we're preserving any preclusive effect not only on the settlement statute but on the releases, I think we might avoid that problem. But if we don't, I think we face it. And I think there we're going to have to grapple with it.

One more thing. I know my time is up, your Honor. There is a question about, you know, proceeding

on a receivership in federal court. Obviously, I haven't spoken to the clients yet, but I'll throw out an important consideration which is there's no doubt that the retirement plan at this point in time is an ERISA plan now. And so it raises the question if it is an ERISA plan right now because indisputably the fiduciary of the plan is certainly not associated with the Catholic church, it's the receiver appointed by the state court. I think it's an ERISA plan indisputably at this point. Which I think raises all the questions we talked about and it makes sense for this Court's involvement.

Judge, could I incorporate all my arguments in the brief on constitutionality?

THE COURT: Yes. Thank you.

All right. Mr. Wistow.

MR. WISTOW: Your Honor, I'm torn between your obvious desire for me to be very, very brief and the profound obligation I feel for the participants to exhaust the many issues that have been raised here. I will do my level best. I ask you to indulge me.

First of all, there was an unintentional misstatement. The Diocese entered a general appearance in the receivership. They were not shown the door for lack of standing. They participated in the objections,

wrote extensive briefs. And I just want to read you briefly what Judge Stern said about their standing which will relate, I believe, to everything you need to do here.

He said -- and I'm talking specifically about Mr. Halperin's point, this convoluted issue about the 15 percent and are we breaching the agreement? Is it covered by the hospital statute? Where does that thing stand? When are you going to decide that, Judge?

Here's what Judge Stern said: Unless and until the receiver attempts to enforce any rights in PCC through CCB, this Court does not have the, quote, luxury of rendering advisory opinions. Whereas here the points are, quote, of an academic nature only. See *Blue Cross of Rhode Island vs. Cannon*, a case from this court in 1984 and he quotes a very eloquent statement, quote, from Blue Cross, In the absence of a dispute ripe for adjudication in the legal sense, these issues cannot be scratched by this Court. The Prospect entities have not suffered formal legal prejudice that would justify this Court engaging in a nontraditional task of dissecting a settlement agreement like the PSA. I would also add, and like the complex statute.

In our briefs, we wrote two things. One, they had no standing to raise this now. It's premature.

But in any event, there would be subsequent litigation if we were fortunate enough and your Honor approved to give us this admittedly questioned asset. It's a disputed asset. They say it can't be transferred. We say it can.

But the most elegant response to how to treat that is made by Mr. Halperin himself in his brief, document 101, page 34. He says, and I quote, Based upon the arguments made by plaintiffs, only one thing is clear. It is exceedingly likely that should the settlement agreement be approved in its current form, additional litigation will ensue based not only on the security agreement already granted by CCB but any future transfer or exercise of control not in compliance with the provisions of the agreement.

THE COURT: Okay. I have great respect for what Judge Stern said in his decision and he was being very thoughtful --

MR. WISTOW: I'm referring to Mr. Halperin.

THE COURT: I know what you're referring to, but you started with by quoting Judge Stern's opinion. The question or point is going to go back to that.

He was being very careful to stay within the lines of what he was being asked to do which was in the context of the receivership. He was simply being asked

by the receiver for the authority to proceed with the settlement which he knew would then be brought to this Court with the present motion to approve the settlement. So he was viewing the question that he was being asked to rule on appropriately is a very narrow question.

But the fact that he kept it narrow and kept his decision narrow doesn't mean that these issues that Mr. Halperin has raised go away. They don't go away.

MR. WISTOW: They don't go away.

THE COURT: And they are going to be ripe at some point if the receiver attempts to exercise the put.

MR. WISTOW: Without a question.

THE COURT: When that happens, something else is going to happen. Now, I don't know if it's going to happen in state court or it's going to happen here, and I don't know exactly the forum that it's going to take, whether it's going to be in the form of a further objection to the request by the receiver to exercise the put or if it's going to be the filing of a temporary restraining order by the Prospect entities to enjoin the receiver from exercising the put or taking the steps, but they're not going to just sit back and let it happen. They're going to --

MR. WISTOW: Of course not.

THE COURT: -- address it. And so at some point some judge is going to have to wrestle with the issues that Mr. Halperin has, I think, legitimately brought up. And this question of compliance with the Hospital Conversion Act and so forth is going to have to be examined. So you don't -- you're not going to be able to weave around it.

MR. WISTOW: I'm not trying to. I'm willing to stipulate, your Honor, that all I'm asking for is an assignment of that claim. And I will be forced, as Mr. Halperin acknowledges, to get involved in litigation. This happens in bankruptcy very frequently in the settlement of cases. There may be an assignment by the debtor to a creditor of a claim that's going to be disputed. And that dispute is not resolved in the bankruptcy court. It's the person who gets the assignment goes off and he brings his suit wherever it is. And the fact that it was assigned does not indicate there's any merit.

In fact, I remember we cited a case where there was a Texas district court approving a bankruptcy settlement of an assignment of a legal malpractice case. And the Texas district court judge said, you know, I think it's rather doubtful that this is even

assignable. But he allowed the assignment as part of the settlement and off they went. It really is not relevant for our purposes which way it ended up.

That's all -- I'm willing to stipulate on the record that if your Honor approves the transfer of that claim, you are not saying at all that we are legitimately entitled under the Hospital Conversion Act or the AHM to have this, nor am I saying that the transfer to us was not a breach. All I'm saying is that the court allowed us to transfer. Whether we pursue it, whether we don't pursue it, that's another issue and where we pursue it.

I would respectfully submit that a pursuit of those claims would be a court of general jurisdiction, not actually the receivership court. Just the way it wouldn't be a bankruptcy court that decided what was the malpractice case; was it a good case or a bad case?

Now, I want to go on to say, your Honor, that this issue about not getting the information from the directors -- bear with me for one moment if you would. That would really -- if I may backtrack.

The purpose of a good-faith settlement, the purpose of a decision for a good-faith settlement, is under the new statute, 23-17.14-35 and a couple of things have to be shown to get around a good-faith

settlement finding. Because it says for purposes of this section, a good-faith settlement is one that does not exhibit collusion, fraud, dishonesty or other wrongful or tortuous conduct intended to prejudice the non-settling tortfeasors. So they are going to show two things --

THE COURT: I'm not going to rule under that statute. Nothing I'm doing is going to relate -- whatever order I issue, I can assure you, is going to exclude any reference or the ability to read it as expressing any view about the applicability or the compliance with that statute.

MR. WISTOW: Will you -- I must ask you to make a finding as to whether it's a good-faith settlement or not in general.

THE COURT: I'm going to find --

MR. WISTOW: Otherwise, it's useless.

THE COURT: I'm going to stick to Rule 23 and what the requirements of Rule 23 are.

MR. WISTOW: Will you not make a finding as to whether or not it's a good-faith settlement because --

THE COURT: How is that required by Rule 23?

MR. WISTOW: It's not. But it's required by the settlement agreement.

THE COURT: But that's between you and the

settling parties.

MR. WISTOW: That's the settlement we submitted to this Court.

THE COURT: Okay. Then what I need to find is numerosity of the class, the common effects.

MR. WISTOW: Right.

THE COURT: The typicality and their representative parties fairly and ethically protect the interest and then whatever -- I forget what -- you're bringing this under 23(b), but I think it's -- is it 23(b)(3), was it?

MR. WISTOW: I'm not sure of the number, your Honor, but at the risk of confusing the situation, I must say clearly that a condition required by the defendants to do all this was a finding of good faith under the statute. I'm not asking you to find it's constitutional. I'm not asking you to find anything other than it was good faith.

THE COURT: Well, it seems like you're dialling back what you said at the very beginning.

MR. WISTOW: How so?

THE COURT: That you didn't want me to make any findings related to the applicability of the statute.

MR. WISTOW: No, no, that's not what I'm saying. What I'm saying is, I'm not asking you to make a

finding as to the constitutionality of the statute. I'm just asking you to make a finding as to good faith because that is an absolute requirement of the settlement.

I'll tell you right now, your Honor, if your Honor refuses to do that, then there is no settlement. And I'm saying that so we all understand what exactly the settlement is about. I am not for one moment suggesting, and I'll stipulate that if your Honor makes a finding of good faith under the settlement, I will stipulate that that is not a finding that is constitutional. It's not a finding that's binding on the defendants in any subsequent challenge. It's simply a finding of good faith.

And we've briefed this rather extensively. By the way, in --

THE COURT: Good faith is the key -- isn't good faith the key provision of the special statute?

MR. WISTOW: Yes, it is, absolutely. And I want to say this, your Honor: This isn't the first time this has come up. This has come up multiple times.

THE COURT: So how do I make a full determination of good faith?

MR. WISTOW: With your Honor's indulgence, I'll tell you.

THE COURT: All right. Go ahead.

MR. WISTOW: Judge Lagueux ruled on this very same question in *Gray vs. Derderian*, the Station fire case. What he said -- and this was in accordance with law throughout the United States -- there is a presumption that the settlement has been made in good faith and the burden is on the challenging party to show that the settlement is infected with collusion or other tortuous or wrongful conduct. The First Circuit, your Honor, in an earlier case said, and I quote, To establish collusion intervenor must demonstrate fraud, the use of fraudulent means or the use of lawful means to achieve an unlawful purpose.

So I ask your Honor to please read the cases that we've cited. I'm sure you have and I probably didn't write it very well. But they have to show that the settlement's infected with collusion. And they must also show it was intended to prejudice the non-settling tortfeasors. They can't use the disproportionate sense --

THE COURT: Well, a great deal of their argument with respect to prejudice was your own fault because you put things in the settlement agreement that suggest that their liability is greater than other parties' liability.

MR. WISTOW: I didn't put that in.

THE COURT: Well, somebody put it in.

MR. WISTOW: Your Honor, what happened was the plaintiff -- excuse me, the settling defendant wanted to put that in. I did not agree with that. I didn't disagree with that. It was a back-and-forth negotiation. After all was said and done, I got almost everything. That's a self-serving statement by the plaintiff which may or may not mean anything.

THE COURT: Well, obviously, they are going to object to that and they find they have issues with that, it looks like collusion to them. I mean, you can't blame them for objecting on those grounds.

MR. WISTOW: I don't blame them. I don't blame them. But I ask your Honor to look at it. If it were up to them to decide, it would be collusion, there's no doubt about that. Fortunately, it's not up to them. It's up to you.

THE COURT: Well, what I heard Mr. Halperin say was, frankly, not a really vigorous objection to the settlement going forward. I heard him say that they support the idea of joint appointment. That they want to see the money go to the plan. They've got issues with respect to some of the provisions in the -- particularly with respect to the put and the

implications for the Prospect entities' change of voting rights and potential change of composition, and that they think that ought to be -- there ought to be some oversight to that. And they're concerned about the contract breaches.

And of course, they're concerned about these gratuitous statements about who is more at fault. But, you know, what -- the gist of what I got from him, and he can stand up and correct me if I'm wrong, was, you know, if these issues were taken care of, we don't really have a big problem with the money going to the plan. That's what I got.

MR. WISTOW: Your Honor, this business, for example, on the statement that was insisted on --

THE COURT: I'm just saying that doesn't sound like a screaming objection that this is collusive and in bad faith.

MR. WISTOW: You'll have to ask Mr. Land about that. That was not something that I put in. It's a contract, it's two parts. I want to read you something that Judge Lagueux said on what I believe is the very issue your Honor is addressing, this gratuitous statement by CCB that their percentage is smaller in terms of fault.

First of all, as a matter of substantive law, it

doesn't really matter because if they were 99 percent at fault and the Prospect entities were 1 percent at fault, at common law, I would collect a hundred percent if I wanted from the 1 percent as your Honor knows. But here's what -- the same argument was made to oppose the settlement in the *Station* fire where they were saying, look, this is ridiculous, you're letting go one of the most culpable people and you're not paying any attention to the degree of fault. And here's a quote from the *Derderian* case. Judge Lagueux said, It would be incongruous to conclude that while the 2006 amendments expressly removed the proportionate liability requirement from 10-6-7 and 10-6-8 to encourage pretrial settlements in single occurrence mass torts, the General Assembly simultaneously intended to silently restore proportionate liability as a component in the good faith analysis of the settlement and reintroduce that impediment, reading proportionate liability into the 2006 amendments which are expressly excluded by applying the proportionate liability or totality of the circumstances standards for good faith after it had been expressly removed as it has here would frustrate, if not negate, the entire purpose of the amendments. That's what we have here.

I personally have no objection, if Mr. Land

doesn't want that in there, but it was a contract and I got him -- you know, one of the things that has been said here, your Honor, that really is most disturbing to me of anything in the case, as a point of personal privilege, your Honor, I would ask you to give me a little bit of time to address it. And it's the idea that all of this money was going to go flow into the fund anyway and we accomplished nothing.

THE COURT: We're going to deal with that on the attorneys' fees.

MR. WISTOW: It has to do with good faith. And as a matter of fact, your Honor, if your Honor is ready to put that out of your mind, I won't press it. But they have misstated completely what the record is on that. And I can show your Honor where they're absolutely wrong on that and I --

THE COURT: Well, you'll have a chance to do that when we get to the attorney fees.

MR. WISTOW: Then I'm going to implore your Honor to disregard those statements in connection --

THE COURT: Here's what I'm concerned about is you have a settlement that has a lot of statements in it, representations in it. These non-settling defendants say, look, all these statements, those look collusive to us, those look problematical to us. And

you want me to approve them as all in good faith and noncollusive so that you can -- let me finish. You want me to approve the settlement precluding all of those statements to -- as made in good faith so you can fit them into the parameters of the special statute.

I'm not sure I'm prepared to do that. I may well be prepared to say this settlement complies with Rule 23 because the representations in the settlement agreement between the parties, I don't really have anything to say about that. People can say whatever they want in their settlement agreements. Now you're asking me to go a step further and say that it was all done in good faith and so forth.

So, you know, but having said all that, I'm hearing a little bit different argument from Mr. Halperin than I thought I was going to hear.

MR. WISTOW: May I point out, your Honor, that what we're asking the Court to do is set forth expressly in docket 632. And the only reference to good faith is with reference to the new statute. We are not asking the Court to -- and I have no problem whatever in the Court saying that it is not passing in any way, shape or form on any representations unilateral or what on most specifically the one that seems to bother them the most, the statement that Land

says he has little liability which wouldn't be binding on anybody anyway.

But I have no problem with your Honor saying you absolutely paid no attention to that, you give no imprimatur to that. And I again implore your Honor to look at the proposed order we're asking you to sign.

THE COURT: All right. What I'm going to ask you to do -- I'm going to ask you to do two things. First is I think you should go back to that order and take a look at it and see if you think any -- based on all that's been discussed today, do you think there's any changes to that order that should be made. And then I'm going to ask that you submit that to defendants and they can comment on that order on the aspects of it that they agree with or would not have a problem with and those that they would have a problem with with the understanding that where my thinking is right now --

MR. WISTOW: I see what you're saying.

THE COURT: Let me just explain so they see.

MR. WISTOW: Forgive me, your Honor.

THE COURT: Where my thinking is right now is that this settlement complies with Rule 23 and probably should be approved, but that these issues that have been raised I think are legitimate issues and need to

be at some point addressed. And I'd like the defendants to comment on the order with that understanding of what my feeling is about it.

And then the second thing I'd like you to do, just to make sure that this is done in a thoughtful way, is to give me any submission that you think you should with respect to whether this should be converted into a joint receivership. I haven't had a chance to talk to Judge Stern about that idea or to really give it much thought myself, but I think I'd like to hear from the parties about that after you've had a chance to kind of think it through a little bit. So that's what I think you should do.

The third thing that you might want to think about is whether your -- well, if it can be done in the proposed order, essentially whether the statements that are offensive to the non-settling defendants can be disclaimed sufficiently and a finding of good faith made for those who need to be completely excised from the settlement agreement. So I'd like you to think about that and start to figure it out.

MR. WISTOW: I'm starting to premise that your Honor doesn't want to inadvertently seem to be giving an imprimatur to statements that you shouldn't be giving an imprimatur to. I'm going to try to draft an

order that is extremely limited and preserves whatever rights the defendants may have that we think they should have. And hopefully -- I doubt we'll come to an agreement because I'm convinced they've just decided they are going to starve the beast, but perhaps I can convince your Honor the legitimacy of the order. So we'll attempt to do that. Thank you, your Honor.

THE COURT: Let me just try to say one more time so that I'm really clear on what I'm looking for. If you want me to make a finding of good faith in addition to findings under Rule 23, then I think it's important that whatever is said in the order clearly preserves to the non-settling defendants whatever rights they think that they have and that this process, this settlement that you have with the settling defendants, does not in any way impede them or obstruct them with the exercise of those rights, whether it's regarding the Hospital Conversions Act in ownership or whether it's the assertion of claims they may have against fiduciaries or if it's their claim that the special statute is either unconstitutional and unenforceable.

MR. WISTOW: Absolutely.

THE COURT: All of their claims should be fully preserved. And if you can do that, then it seems to me I can say that your settlement with the settling

defendants is in good faith and not collusive because it doesn't attempt to prejudice them in any way. That's sort of a compromise position. I hope I made myself perfectly clear.

MR. WISTOW: Also with one exception. Of course it's going to compromise them potentially. It's got to wrongfully compromise them.

THE COURT: Well, it may compromise them in the sense of their ability to seek contribution later on, but their right to assert that it does not have to be --

MR. WISTOW: Absolutely. I agree with that. 90 percent of my argument about the constitutionality of the statute was just that, that it's premature. Judge Selya's decision makes it absolutely clear. So, again, I apologize for my ebullience, your Honor, but I've got a lot of people here that will beat me up if I don't stand up for them.

MR. SHEEHAN: Your Honor, may I just as a point of clarification with what your Honor suggested, your Honor, the finding by the Court that this is a good-faith settlement within the parameters of the definition in the special statute is intended to be binding. It is not something that the defendants at a later proceeding can say, well, it wasn't really in

good faith. If we cannot good that, then we have no settlement.

THE COURT: Well, it can be binding on the parties and it can be a finding that they operated in good faith and as long as it doesn't compromise their rights.

MR. SHEEHAN: As all their other rights, absolutely, your Honor.

THE COURT: Then I don't really have a problem saying it was in good faith, and I don't think that they would either.

MR. SHEEHAN: Thank you. And I apologize for perhaps asking that clarification.

THE COURT: It's fine. You all follow what I'm getting at?

MR. HALPERIN: I follow what you're getting at, but I don't think that we all have information that relates to this settlement or to agree to anything. Your Honor's finding will be based upon what your Honor has heard and read. Other issues have been brought up that we honestly know nothing about this settlement other than the fact that we've read the agreement. We're not in a position to agree or disagree that it's in good faith.

THE COURT: Okay. Well, we'll see what comes

and then I'll try to figure it out then. Okay. We'll be in recess. Thank you.

MR. WISTOW: Can we impose a timetable on this, your Honor?

THE COURT: Sure. How about two weeks?

MR. WISTOW: Then the response?

THE COURT: Two weeks from when they file. Okay. Thank you.

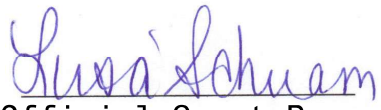
MR. WISTOW: Thank you, your Honor.

(Time noted: 1:18 p.m.)

(Proceedings concluded.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.



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