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.	:	Thursday, August 29, 2019

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

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THE COURT: All right. Good morning, everyone. We're here in the matter of Del Sesto, et al., versus Prospect CharterCare LLC, et al., for a fairness hearing of what we've been calling settlement B. So let's have counsel identify themselves for the record beginning with the plaintiffs.

MR. LEDSHAM: Good morning, your Honor. Benjamin Ledsham for plaintiffs.

MR. SHEEHAN: Good morning, your Honor. Stephen Sheehan for the plaintiffs.

MR. WISTOW: Max Wistow for the plaintiffs.

MR. DEL SESTO: Good morning, your Honor. Stephen Del Sesto. I'm here both in my capacity as a plaintiff as well as the court-appointed receiver in the superior court.

THE COURT: All right. Thank you.

MR. HALPERIN: Good morning, your Honor. Preston Halperin. I'll be speaking for the Prospect entities today.

MR. MERTEN: Your Honor, Howard Merten for the Diocesan defendants.

MR. WOLLIN: David Wollin for the Rhode Island Community Foundation.

MR. BOYAJIAN: Steven Boyajian for the Angell Pension Group.

MR. FRAGOMENI: Good morning, your Honor. Chris Fragomeni for the Prospect entities.

MR. RUSSO: Mark Russo for the Prospect entities.

MR. WILDENHAIN: Christopher Wildenhain for the Diocesan defendants.

MR. CONN: Your honor, Russell Conn for CharterCARE Foundation.

MR. DENNINGTON: Andrew Dennington for CharterCARE Foundation.

THE COURT: Okay. Very good. Thank you.

So my understanding is that the people who -- the attorneys who want to speak about the settlement are Mr. Conn, Mr. Wistow, Mr. Sheehan and also Mr. Halperin and Mr. Merten; is that correct?

MR. SHEEHAN: Yes, your Honor.

MR. MERTEN: Yes, your Honor.

THE COURT: All right. So let's get started. I have about two hours to book for this. It doesn't mean we have to use the whole thing, but let's see if we can get it done in that amount of time, all right.

MR. SHEEHAN: Good morning, your Honor. Your Honor, we believe the best way to proceed today with this hearing, just offering it as a suggestion hopefully for your Honor's approval, is to first

address settlement approval and after all the parties have been heard on that issue, then to address the application for attorneys' fees.

THE COURT: Well, I have -- I guess I have a couple of preliminary thoughts, and maybe it's just best if we get these out right at the beginning.

One is, the issues that arise with settlement B seem very much intertwined with settlement A with the exception of the collusion argument, which is not being -- as I understand it, which is not being made in this settlement. So I'm not really clear how I can approve this settlement until I hear -- fully consider the arguments that are going to be made in connection with settlement A. So that's one issue.

The second issue is with respect to the attorney fee application on both settlements, and I don't think we would reach this point until and unless I approve the settlements, I have a very strong inclination that what I would like to do on the attorney fee application is appoint a special master to review the fee application and prepare a report and recommendation to me about that. So I don't want to put the cart before the horse, but fees here are very high and there are substantial comments about them and objection and so forth. So I'm inclined to do that. And I have in mind

someone who I would want to appoint to that position. I don't think it would be a big task, but I think it would be something that could be done much more quickly if I appoint a master.

So those are a few thoughts. Why don't you react to them.

MR. SHEEHAN: Well, your Honor, your Honor's your Honor. All of the suggestions of your Honor are appropriate by your Honor's direction, and we're going to abide by them. We believe settlement A and settlement B are completely independent, but your Honor has a point that there are related factual and legal issues.

With respect to the attorneys' fee application, adding another level of delay, which is referral to a special master, is going to delay any flowing of funds into the --

THE COURT: I think it's actually the opposite.

MR. SHEEHAN: Perhaps.

THE COURT: I think a special master actually would expedite it. Given how busy I am and when I could actually get to a thorough review of the application, I actually think a master could make shorter work of it than I can.

MR. SHEEHAN: With that said, your Honor, I'll

proceed.

THE COURT: Okay.

MR. SHEEHAN: Mr. Wistow is going to address the fee issues. I'm going to address the settlement approval issues. And the first and primary issue I believe and really the key issue is the Court's jurisdiction to approve the settlement. And the Court needs both federal question subject-matter jurisdiction, and the Court needs this to be a case or controversy and therefore it has to come within Article III.

And the first point on federal question subject-matter jurisdiction depends on three issues. The first, if the answer is yes. And the second and third, if the answer is no, the Court has the federal question subject-matter jurisdiction. The first issue is does the complaint, the complaint seek recovery directly under the Constitution or the laws of the United States? And that's clear it does. We cite and assert claims under ERISA.

The second issue is, is the claim immaterial and solely made for purposes of obtaining jurisdiction? The answer to that is a resounding no. We have litigation around church plans; it's been longstanding. This is a church claim case and the claim, by no means,

is immaterial.

And then the third issue is, is the claim wholly insubstantial and frivolous? I don't believe anyone in this case would contend that plaintiffs' claims under ERISA are wholly insubstantial and frivolous. That's *Carlson vs. Principal Financial Group*, 320 F.3d 301, Second Circuit 2003. They cite *Bell vs. Hood*, United States Supreme Court. And there's a myriad of cases that state that federal question subject-matter jurisdiction depends on those three issues.

It does not depend, your Honor, on plaintiff stating a claim that would survive a motion to dismiss under Rule 12(b)(6). Absolutely does not.

Now, your Honor, we filed a motion -- rather, a memorandum for final settlement approval on August 15th. And we listed a series of decisions by five or six different courts of appeal on the issue of whether the question, is a plan governed by ERISA, jurisdiction or does it go to the merits? And each and every one of those decisions concluded that it went to the merits and was not jurisdictional. And they in turn base their decisions on the United States Supreme Court decisions. And therefore, merely asserting a claim under ERISA is sufficient for jurisdictional purposes provided it's not frivolous, provided it's not

immaterial and solely made for the purposes of obtaining jurisdiction.

The cases we cited include a series of district court and Fifth Circuit cases involving the same litigation. *Smith vs. Regional Transit Authority*. And in that case, the district court was confronted with the issue of whether a plan was a governmental plan, which is an exemption from ERISA much like the church plan is an exemption from ERISA. And the Court decided that that was a jurisdictional issue and addressed it in connection with 12(b)(1) and dismissed the claim for want of jurisdiction finding that on the facts presented to the Court, it was clear that the Plan was a governmental plan exempt from ERISA and, therefore, there was no federal question subject-matter jurisdiction.

The Fifth Circuit reversed. And the Fifth Circuit said that issue goes to the merits, and that issue has to be addressed differently. It has to be addressed either under Rule 12(b)(6), if it can be decided on the pleadings, or by motion for summary judgment.

THE COURT: So let me just interrupt you here.

MR. SHEEHAN: Yes, your Honor.

THE COURT: I read the objections that I think

you're trying to address here as more directed at whether the receiver had authority to do what he's done up to and including entering this settlement. And I take the argument to be that if the Plan was an ERISA plan, and Mr. Del Sesto has as of April 15th declared it to be an ERISA plan that dates back, I take it, to the argument is to a date prior to the appointment of him as the receiver, that the appointment as a state court receiver was invalid from the beginning. And the objectors are saying that without the authority, if it's not a proper receivership, the receiver doesn't have the authority to enter into to do all the things he's done, let alone into this settlement agreement; they're challenging that.

So isn't that more the issue?

MR. SHEEHAN: Your Honor, that issue is made up out of whole cloth; That is, they have tried to say that. They've said the point I've also addressed on jurisdiction. But that issue is made up out of whole cloth. An individual can be an administrator of an ERISA plan. Any one person in the world can be the administrator of an ERISA plan. So can a state court-appointed receiver.

There is zero law, none, that suggests that an individual can be an administrator for an ERISA plan,

but a state court receiver cannot. Zip. Your Honor, capacity is determined under state law in any case. And he has capacity to represent the Plan. That's even in a federal question jurisdiction case, he has capacity to represent the Plan.

So what my brothers are doing in making that argument is just relying on some residual notion about ERISA being a federal law and consequently from that extrapolating that only a federally appointed receiver can represent an ERISA plan. That's a false extrapolation, absolutely, your Honor. There's nothing to that argument.

Now, your Honor, we have addressed this argument in the papers, and we have pointed out the *Princess Lida* doctrine which gives the Court first to acquire jurisdictional over a race, exclusive jurisdiction. And my brothers have come up with nothing to suggest that the *Princess Lida* doctrine does not apply here.

So the receiver's capacity to represent the Plan is established by virtue of his appointment through the state court.

THE COURT: Well, I think -- I mean, they argue that the jurisdiction here is not jurisdiction over the race; it's in personam jurisdiction. So they say the *Princess Lida* doctrine has no applicability. But, I

mean, isn't it really -- I mean, it's all part and parcel of abstention generally, right? I mean, isn't that sort of your point?

MR. SHEEHAN: No, your Honor; it's not part and parcel of abstention. There's no abstention issue, your Honor, in the case unless one considers deferring to the state court to be a form of abstention.

THE COURT: Well, that is the question.

MR. SHEEHAN: I understand, your Honor. I misspoke. My brothers at one point said that this wasn't about *Princess Lida*, this was about *Colorado River*. I thought your Honor was suggesting those doctrines which are not applicable, your Honor. It is *Princess Lida*.

And your Honor, the state court's control over the race is what led to the appointment of Mr. Del Sesto. Somebody had to administer that race. So the state court's determination who that somebody would be is part of the Court's jurisdiction over the race.

THE COURT: Well, I don't want to get too lost in the weeds, but I think there's a case that says the whole *Princess Lida* doctrine is subsumed within the first prong of the *Colorado River* abstention document.

MR. SHEEHAN: Your Honor, the *Dailey* case out of the Third Circuit categorically relied on *Princess Lida*

to hold that where a Canadian court had taken jurisdiction over an ERISA plan, the Third Circuit in the United States District Court for the District of New Jersey could not act in connection with that plan. So there may well be a case out there that makes that correlation, your Honor, but I believe that the foundation principle is *Princess Lida* because we have an actual race.

I mean, it's much more specifically addressed to the facts of this case than the *Colorado River* doctrine which is broad, your Honor, much more broad than merely involving receiverships.

THE COURT: Okay.

MR. SHEEHAN: Now, we've also cited to your Honor the *Stapleton* case on this issue of federal question subject-matter jurisdiction. And that's the case that eventually ended up in the Supreme Court when the Supreme Court reversed the Seventh Circuit on the issue of what "established" meant for a church plan. But before it got to the Supreme Court, the issue came up, when there's an allegation that a plan is a church plan, is that something that goes to the jurisdiction of the Court under ERISA or does it go to the merits? And both the district court and the Seventh Circuit were categorical that it went to the merits and denied

motions to dismiss under Rule 12(b)(6). The Supreme Court reversed under Rule 12(b)(6). So there was no question there that the Court had jurisdiction to adjudicate a case which involved an allegation that a plan was either a church plan or not a church plan.

Your Honor, I would say my brothers have over and over and over again in their papers talked about it being a predicate for this honor to act -- for your Honor to act to first determine whether this plan is governed by ERISA. They must have made that argument 20 times. And the answer to that, however, is what I'm trying to address, your Honor. That's not simply true.

Not only is it not true that your Honor must decide before you approve the settlement or in connection with settlement approval, that your Honor must decide whether the Plan is governed or not by ERISA, your Honor should not decide that. It's not relevant to the issues for settlement approval.

Indeed, to the extent there was any possibility that the Plan is not governed by ERISA through the proper analysis under Rule 12(b)(6) or a motion for summary judgment, that's an argument in favor of approving the settlement.

THE COURT: So, I mean, your argument basically is -- I'm not endorsing it. I'm just saying that this

is a settlement, it's not an adjudication of the merits and that the time for adjudicating the merits is in the context of either a 12(b)(6) motion for a motion for summary judgment. But this is a settlement that comes along the path before we get to those merits type of proceedings. And the parties have the right to settle claims any time.

And part of what a settlement does is account for the risk factors associated with things just like this; that is, whether there's jurisdiction, whether there's -- you know, the authority is proper, whatever, you know. The action has been brought, a settlement has been reached and the settlement is fair and reasonable under Rule 23, and it ought to be approved without adjudicating all these kind of merit-like claims.

And I think what you're saying is I might get to those later, I might get to them in the context of these objectors, Prospect and the Diocese and so forth, and maybe I'll end up concluding that ERISA -- that this is an ERISA plan and there's a lack of authority and so forth -- I might end up doing that -- but it doesn't matter when it comes to this settlement.

MR. SHEEHAN: Yes, your Honor.

THE COURT: That's what your argument is.

MR. SHEEHAN: That's it in a nutshell. And the only reason I'm addressing jurisdiction, your Honor, is because the Court needs jurisdiction to approve the settlement. And therefore I, at the outset, addressed the case law that says what is required for that. And that's an assertion of a claim under ERISA which we have here.

THE COURT: Right.

MR. SHEEHAN: Now, next we come to this issue of Article III case or controversy. The Court also has to have a case or controversy. And for that purpose, the issue boils down to the issue under *Spokeo*, whether there is a concrete injury, which under *Spokeo* includes the risk of real harm.

Now, we have two sets of plaintiffs, really three, but two for purposes of this analysis. One is the receiver who represents the Plan. Now, his Article III standing and his Article III injury is direct; it's based on injuries to the Plan itself. I've cited your Honor to several cases from the Second Circuit that expressly make that point; that problems that have been identified with the standing of plan participants do not apply to individuals or entities that act on behalf of the Plan itself.

The problem with defined benefit plans, your

Honor, for purposes of standing is that plan participants' rights are based upon a claim to be paid benefits from the corpus. And if the injury to the corpus is insufficient to put those benefits at risk, notwithstanding there was an injury to the corpus, they don't have standing.

And the way standing for plan participants in a defined benefit plan is addressed, your Honor, is under the *LaRue* case. Does the alleged wrongdoing create or enhance risk of default of the entire plan? That's the standard for standing under Article III for plan participants. And I've cited half a dozen cases that apply that standing.

And that's significant, your Honor, because my brothers suggest that because the PBGC potentially is out there, plan participants don't have standing, but that's not the test. All ERISA cases involve the PBGC being out there, all defined benefit plan cases involve that, but the test is not is the PBGC there, it's does the wrongdoing create or enhance risk of default to the entire plan?

That addressed, your Honor, I believe jurisdiction is clear to approve this settlement and also settlement A when we get to it. The question next is, does this settlement meet the standard for final

approval? And our submission, your Honor, is that it does under Rule 23 and the law concerning class-action settlements. But before I address that, I need to address a new argument that Prospect has made for the first time in its submission on August 15th that the settlement that the Court is being asked to approve is a bad idea now that the receiver has elected to have the Plan governed by ERISA.

The Prospect entities claim that -- and I'm going to quote -- the receiver should, quote, "scuttle the pending settlement and with it the many releases that have been promised to each of the settling defendants and their current and former directors and officers and simply demand that they jointly and severally honor their contribution obligations to the Plan for the Plan years ending June 30, 2018, and June 30, 2019."

And what they're referring to there, your Honor, is the obligation under ERISA to make contributions to the Plan. And they're suggesting that the receiver and the plaintiffs walk away from a binding settlement and an immediate $4.5 million and instead simply demand money from the settling defendant CharterCARE Foundation.

And they say the receiver would have a great

deal of leverage by reporting the settling defendants to the IRS who would impose, quote, "debilitating excise taxes" on them if they fail to comply. That's a new argument, your Honor, made for the first time, and I have to address it and this is my only opportunity, your Honor. There are several major problems with it.

First, the receiver could not scuttle the settlement even if he wanted to. It's a binding agreement; subject to your Honor's approval, but it's binding on the receiver.

Second, even if the receiver could walk away, the receiver and the other plaintiffs prefer the bird in the hand of this actual negotiated settlement to simply making a demand by letter of a payment.

Third, and, your Honor, perhaps most significantly in this particular settlement, this proposal by Prospect is doomed to fail, 100 percent certain to fail. And that is, your Honor, because the obligation to make payments to a plan is the obligation of the employer and successors in interest to the employer such as Prospect.

It is not the obligation of an entity that is neither the employer nor a successor in interest. CharterCARE Foundation is not the employer and not a successor in interest to the employer. So if we were

to write a letter to CharterCARE Foundation saying please make contributions to the Plan under the requirements of ERISA, they would write back and they'd say we're neither an employer nor a successor in interest to an employer and please don't bother us. And if we were to call the IRS, the IRS would say, why are you calling me about this entity that is neither an employer nor a successor in interest of the employer? So Prospect would have to give up an existing settlement for a farcical exercise, your Honor.

Fourth, your Honor, even if CharterCARE Foundation were obligated to fund the Plan, the receiver has no interest whatsoever in subjecting any defendant to debilitating excise taxes. And it's not because we care a great deal about the defendants, your Honor. It's because the money that is paid, these taxes go to the general treasury; they don't go to the Plan. And calling the IRS to impose excise taxes would bring another creditor into these proceedings which the receiver has no reason to want to do. Why would the receiver want to bring the government in?

Now, we appreciate Prospect's solicitude in making the suggestion as to how we should proceed, but we're not inexperienced. We have Jeffrey Cohen, the former chief counsel of the PBGC, working with us. We

know our way around the law. And Prospect has its own interests in the case and they are not our interests. In fact, Prospect's interests are making this as difficult as possible for the plaintiffs and the plaintiffs' attorneys. So perhaps we could be excused for looking with a somewhat jaundiced eye on their suggestion and the fact that the suggestion turns out to be completely illusory maybe supports that.

Finally, your Honor, this is a fraud case. We don't allege that Prospect negligently but well intentionally deviated from the standard of care or was not -- and caused an injury. We alleged that they committed intentional fraud. Under those circumstances, we're not prepared to take their advice on how best to maximize recovery for the Plan.

The real issues governing settlement approval are the following, your Honor: Before I get to 23(e) factors, first settlement approval is within the Court's discretion. It's reviewed on an appeal on an abuse-of-discretion standard; that's absolutely clear.

Second, the law favors class-action settlements for the obvious reason; the law generally favors settlements but particularly class actions which are extremely complex, time-consuming and involve many different individuals.

Third, your Honor, the heightened scrutiny requirement that my brothers rely on to suggest that this Court should apply heightened scrutiny to this proposed settlement because it is being presented at the same time that we're seeking settlement class certification, is there to protect absent class members. It's not there to protect present non-settling defendants.

Then we get to the Rule 23(e) factors, your Honor. And the First Circuit in *Waste Management*, 208 F.3d 288, "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." This is apropos of your Honor's summation of my point earlier in another context.

The first element under Rule 23(e) is had the class representatives and class counsel adequately represented the class? Your Honor has already addressed that in connection with preliminary settlement approval, and we have no reason to address it again here. I understand that that was preliminary, but the facts are the facts and the points that your Honor pointed out concerning why your Honor concluded

at least preliminarily that the class representatives and class counsel have adequately represented the class, apply equally in connection with final approval.

The next is, was the proposal negotiated at arm's length? That's the second Rule 23(e) factor. Your Honor found that in connection with preliminary approval. And there's no reason, your Honor, to contend otherwise. There's no suggestion of any collusion between the plaintiffs and the settling defendant CharterCARE Foundation. And your Honor, arm's length means noncollusive. There's a bunch of cases that hold that.

Then the question is, is the relief provided the class adequate taking into account the cost, risk and delay of trial and appeal? Well, your Honor, the risks of plaintiff losing on this claim against CharterCARE Foundation are considerable. As much as we like our case, it involves overturning a superior court order. It involves persuading the Court that the superior court approved a fraudulent transfer. It involves having the Court apply the dissolution statute in Rhode Island in a context where it's never been applied in Rhode Island. There's no law on the specific issue that you have to pay creditors first.

We would have to prove the underlying creditor

status of the Plan vis-a-vis St. Joseph's who made the transfer. All of the issues in the case would be dragged in to proving our case against CharterCARE Foundation. So there are enormous risks, your Honor.

The next point under that analysis of risk is the complexity of the case. Clearly, this is very complex. The expense of depositions and experts are going to be in the hundreds of thousands of dollars. Duration; trial could be years off. And, your Honor, CCF intends to seek certification to the Rhode Island Supreme Court on this issue of the dissolution statute that I just referred to. That would delay that outcome.

Then there's the comparison with the likely outcome. Your Honor, we're getting 50 percent of the best scenario from CharterCARE Foundation.

Finally, there's the reaction of the class members. We have about a thousand members of the class represented by attorneys, attorneys Violet, Callaci and Kasle, and they are strongly in support of the settlement and, as my brother will address, the fee application.

There's only one objection, your Honor, and that's from Linda Corvasi (phonetic), and she claims that the treatment of the Plan, the 2014 asset sale,

was unjust to the Plan and plan participants. We agree. But that doesn't set forth any basis for not approving the settlement.

The final Rule 23(e) factor is does the proposal treat class members equitably relative to each other? And the answer, of course, is that it does. It treats them in accordance with the terms of the underlying retirement plan. And they all share in accordance with their benefits under that plan.

The next point, your Honor, is the non-settling defendants' objections to the proposed settlement. They have no standing to object to this settlement, your Honor, because the burden is on them to show plain legal prejudice through effectuation of the settlement and they can't do that. The possibility that the good-faith finding at some point may negatively impact them is so remote under the *Ernst & Young* case in which Judge Selya listed all of the factors that have to be resolved under this same statute we have here before a non-settling defendant is impacted, are so remote that their claim is not ripe. And, therefore, they have no standing to address even the good-faith issue.

THE COURT: So let me ask you a couple questions about that.

MR. SHEEHAN: Yes, your Honor.

THE COURT: The context of the *Ernst & Young* case in *DEPCO* was very different than the context here. That was a declaratory judgment action challenging the legality of the constitutionality of the *DEPCO* statute.

MR. SHEEHAN: Right.

THE COURT: This is in the context of a receivership objection, I guess. So how does that context affect this?

MR. SHEEHAN: Your Honor, Judge Selya listed eight events that have to happen. We're at the third event. In *Ernst & Young* they were at the first event.

THE COURT: I get that. I'm asking about the difference between a declaratory judgment action, which is brought directly by the challenger to the statute, and the context here which is the objection to the receiver's settlement. They're different, but I can't, frankly, figure out if it's a difference that matters.

MR. SHEEHAN: Your Honor, here's my analysis of that. They need Article III standing for their objection. Standing is not dispensed in gross; it's dispensed issue by issue. So they need Article III standing to object to the proposed settlement; therefore, they need a concrete injury. And *Ernst & Young* stands for the proposition that they have no concrete injury because there's three out of eight

steps, and there will be many opportunities down the line to address many of these issues.

So that's the problem they have, your Honor. And it's the same problem that they had in *Ernst & Young* even though it came up in a different context. It's not ripe.

THE COURT: Okay. So let me ask you this: Let's just say I agree with you on that and I follow Judge Selya's approach in *Ernst & Young*. So I guess what I'm trying to sort of envision and figure out here is how does this play out down the road? Let's just say the settlement is approved, receiver gets the money -- or in this case the Foundation receives -- I guess presumably receives the benefit of the settlement statute because it says, well, we've settled, the settlement was approved, there's a finding of good faith or either explicitly or implicitly a finding of good faith. And then down the road there is litigation that results in liability that exceeds their proportional share and they say, okay, now, we said we didn't have standing back then and it wasn't ripe. Well, now it's ripe, and we want that statute declared unconstitutional. We want that statute declared illegal because our rights have been prejudiced.

I don't know if it's you. I mean, you can't be

heard down the road saying, well, it's too late; you should have challenged that earlier. I mean, it's either now or it's later.

MR. SHEEHAN: It is later.

THE COURT: Okay. If it's later, what happens?

MR. SHEEHAN: Your Honor, they have a right, and your Honor previously had asked the parties to submit proposed orders to try to preserve that right. Your Honor's settlement approval is without prejudice expressly, I would suggest or submit and ask the Court, to their contention that the settlement statute itself is unconstitutional or preempted by ERISA. The Court is merely making a factual finding that's a prerequisite for the settlement. The impact of that finding will be determined later, and they will have every right to argue then that it's unconstitutional or preempted by ERISA and, therefore, it does not affect their rights of contribution regardless of the Court's finding of good faith.

THE COURT: And the Foundation in this case, the settling party, the Foundation and it will later be the other settling parties, you're saying they understand that that's a risk going forward that I might find the settlement statute is unconstitutional or ineffective. So whatever they think their immunity is by virtue of

this statute right now, it's still up for grabs later on?

MR. SHEEHAN: Absolutely. And that's true for both settlements, your Honor. In both settlements the settling defendants are aware that the benefit under the statute will be determined at some later point when these arguments of constitutionality are addressed. That if the settlement statute is declared to be unconstitutional, then the settlement will be viewed as their having received a general release which exposes them to claims for contribution because it doesn't say in it the magic language from the joint tortfeasor statute that we're releasing non-settling defendants to the extent of their proportionate fault.

That magic language is missing. So they have a general release and they're exposed to contribution. And that's the deal, your Honor.

THE COURT: Okay.

MR. SHEEHAN: And, your Honor, it's based on a confidence in the constitutionality of the statute and the weakness of the argument concerning preemption.

Now, the final issue, your Honor, is should this final approval include a finding of good faith under the settlement statute, my brothers suggest it should not, and again that has to do with arguments of

constitutionality and preemption that can be addressed later and are not a basis for not making the finding.

And we propose that the Court should make that finding in connection with final settlement approval. The statute requires judicial approval so some court is going to have to make it. And this court, your Honor, is best suited to make it because this court is familiar with the litigation. And to come to some other court that has no involvement whatsoever with it and go back in time and address this issue would not be in the favor of judicial economy.

Not only is the Court best suited, the settlement approval will not be effective unless the Court makes that finding. It's a condition of both settlements, A and B. The settling defendants were willing to take the risk --

THE COURT: Well, it seems to me that at least as to this settlement, not necessarily settlement A, but -- I'll get my As and Bs correct.

MR. SHEEHAN: No, you're right, your Honor.

THE COURT: -- that here you have less of a problem.

MR. SHEEHAN: I agree.

THE COURT: Between the standards set forth in Rule 23 and the fact that no collusion is being alleged

in this by the non-settling defendants, it doesn't seem to me to be a great leap to say that the settlement was reached in good faith. I don't see that as a major obstacle. They're not alleging collusion. You just said this; collusion is the opposite of good faith.

So, I mean, maybe -- they'll probably have something to say about this and suggest I shouldn't make that finding, but there doesn't seem to be an extraordinary ask. Now, in the other settlement it's a different ballgame because the allegation of collusion.

MR. SHEEHAN: The only point I would make, your Honor, since your Honor pointed out a problem in the other case, we are looking forward with great anticipation to that argument. We believe we represented our clients to the fullest extent of the law and obtained the benefits for our clients that they're lawfully entitled to, and that the defendants are unhappy but that there was nothing wrongful, tortuous or unlawful done and therefore it's tough luck for the defendants.

THE COURT: Okay. We're not going to argue that today. We're going to argue that in a couple weeks.

MR. SHEEHAN: That being the case, your Honor, I don't need to address the good-faith issue, I believe. All I would say is that the statute itself is -- the

words "good faith" are -- the word "collusion," rather, is predicated by wrongful or tortuous conduct. Collusion has to be wrongful or tortuous.

THE COURT: Okay.

MR. SHEEHAN: Finally, just one point, your Honor. It's just your Honor is aware that this is the first settlement in this case. The receivership has been pending two years. It's been over five years since any money was paid into the Plan. The case is 15 months old. Attorney Callaci, attorney Violet and attorney Kasle have provided submissions to your Honor concerning the extreme anxiety that the Plan participants are facing. We'd ask the Court to approve the settlement.

THE COURT: All right. Thank you.

MR. CONN: Good morning, your Honor.

THE COURT: Morning.

MR. CONN: Good morning, your Honor. I'm Russell Conn from Conn Kavanaugh in Boston. I represent CharterCARE Foundation with Mr. Dennington. Mr. McQueen, the president of the board of trustees of directors of CharterCARE Foundation, is in the back of the courtroom.

First, let me just say it's an honor and a pleasure to appear in this courtroom. This is the

ninth federal district court I've now appeared in nationally, and I've now covered seven of the nine original 13 colonies. I'll also say that on Tuesday I will begin my 43rd year of practice as a practicing lawyer, which I will come back to this later, but looking around the courtroom, I think I'm the second most senior member of the bar here exceeded only by my negotiating adversary Mr. Wistow, who will mark 50 years of practice, I believe --

MR. WISTOW: I hope I look better than him.

MR. CONN: -- who will mark 50 years of practice on October 6th of this year. So between us we have 92 years, and I'll come back to that.

I want to start actually -- I've reorganized my argument. I actually want to start with the point your Honor raised at the very outset about is B somehow beholden to A and do we need to connect these? I've been trying to separate myself and CharterCARE Foundation from the hospital defendants from the outset of this case. And we say we are separate, and it is a separate issue.

There's an amended complaint on file. There are 11 counts against CharterCARE Foundation. We have not moved to dismiss any of those counts. If your Honor doesn't approve the settlement and it gets shuttled,

then we're back answering an 11-count amended complaint. Ten of those 11 counts are state law claims. The one ERISA claim, I was sort of gratified to hear Mr. Sheehan say, yes, we weren't a fiduciary, we weren't an employer, we weren't making these decisions. I can honestly tell your Honor I've not lost a lot of sleep worrying about the single ERISA count in the complaint against us. But your Honor does have that discretionary supplemental jurisdiction over the other ten counts, and that's why we're here as a settling party.

And I'd suggest that we're somewhat unique in this case, you know. We're sort of here almost as an appendage or an appendix to this thing. We settled for three reasons, and we had these fraudulent conveyance counts that said that they had a priority against the funds, and once Judge Stern opened up the door to that argument with a motion to intervene, we started talking settlement.

Second of all, we have this interest, this issue of are we truly independent and did CCCB ever truly divest themselves? And now we face the prospect of them acquiring CCCB's interest in us.

And third, we're a small foundation. Your Honor has heard there's $8 1/2 million or so in the

Foundation. We have a million dollar wasting D & O policy that's down to $600,000. We weren't equipped to fight the battle that is going to be fought by other defendants here. There's no doubt in my mind we would have run through that million dollars. There's no doubt in my mind we would have been back before Judge Stern asking for permission to use charitable assets to continue to fund the defense.

So I would actually suggest that CharterCARE Foundation and the plaintiffs here, that the correct and right thing in the big scheme of things, we entered into discussions early. They were vigorous. They were contested. It took eight weeks or so to iron this out with Mr. Wistow. And we ended up with maybe one of the more complicated settlement documents I've done in 42 years; 27 pages with 11 exhibits and almost every exhibit had to be negotiated out with back and forth and redline and all of that.

So if your Honor doesn't approve this, we're back with a ten-count state complaint, and I'll tie this up with the settlement statute in the end, but the suggestion from Prospect, as Mr. Sheehan argued, to just scuttle this and kick it down the road, that's an easy statement to make and to say this state statute is preempted, those are easy statements to make. They're

hollow statements. But Prospect isn't standing there defending and indemnifying us.

CharterCARE Foundation has to look at the reality that maybe a fraudulent conveyance claim or maybe the interest that they have in us through CCCB potentially or potentially our lack of independence or potentially our inability to fight the long battle, preemption or not, we have to make this deal and it's a deal made principally under state law.

And your Honor knows this is a court -- I'm sure the Court hears diversity cases all the time and it presides over settlements of state law claims. That's all we're asking for here. There's no great complexity or leap of faith about this. We've got a putative class action with 2700 members, class representatives. Yes, maybe there's some issue about whether the receiver, whether Judge Stern did the right thing in appointing Mr. Del Sesto, but we have to deal with the reality. I've been in Judge Stern's courtroom a half a dozen times. It's a state law claim. It's entitled to a presumption of validity. And we think he has authority, that's why we negotiated, but we also negotiated with the class who are part of this settlement.

So we've come up with a complex settlement

agreement that was, you know, I think a little bit painful for us, but it's what we had to do to survive. And if it doesn't go through, I question our survivability, and it makes no sense to me to scuttle this and not have $4 1/2 million including what's left of our liability policy go to the Plan.

So that's sort of my pitch, your Honor, as to why you shouldn't tie us to settlement A. That there's a pretty good likelihood that ERISA doesn't preempt all ten of these state law claims against us, that we are acting intelligently and rationally in trying to settle this case and get the protection of that Rhode Island statute, that that would make sense.

THE COURT: Well, let me ask you just a couple of questions. First of all, I appreciate your presentation and the arguments that you're making and the sensibility of them. I think the issue here and the issues that have been raised by the objectors are issues that go to authority and jurisdiction and at least the ones that I think I've got to pay most attention to. And that's something I have to be satisfied about irrespective of the merits of what you just laid out which are -- frankly, I really don't hear the objectors saying much of anything about, you know, the sensibility of this settlement from the standpoint

of CCB. I mean, just all the things you just described.

But I want to be clear that on behalf of CCB you're saying you fully understand the risks associated with this settlement and that there's no finding that I am making as part of any approval of this settlement that in any way finds or suggests that the settlement statute is going to provide the kind of protection or immunity as a joint tortfeasor to CCB; I'm making no finding associated with that. And there could be, as the litigation progresses, there could be a point down the road where I have to take that up, and I may end up finding that it doesn't provide that protection.

Now, Mr. Sheehan said you're fully aware of that and that's part of the deal. I just want to make sure you're saying that on behalf of CCB.

MR. CONN: Thank you, your Honor. CCF, actually CharterCARE Foundation. Not to be confused with CCCB.

THE COURT: I'm sorry.

MR. CONN: Part of my endless -- everybody's endless difficulty in figuring out which CharterCARE entities are which.

The settlement is conditional on your Honor making a finding that the settlement is in good faith under the Rhode Island statute. We're only asking for

the factual finding. We concur with Mr. Sheehan that they are preserving their right to argue that that statute was unconstitutional. We don't think it is. We think this Court upheld a similar statute in the *Station* fire cases.

But those arguments are for another day. We're simply looking for the predicate factual finding that Mr. Wistow and I negotiated this agreement in good faith and we didn't just do it in a vacuum. I answer to Mr. McQueen and a pretty sophisticated independent board. He answers to three different unions. He answers to the receiver. He answers to Judge Stern who is intimately familiar with CCF's role in the case.

This all goes back to the cy-près that Judge Stern approved. Judge Stern knows the ins and outs of this case. He's looked at it, and he's approved it. He's satisfied. Frankly, I come back saying this settlement is so sensible, I understand why defendants have to make arguments to preserve legal positions, but it really would make no sense to me to scuttle this.

But, yes, to answer your Honor's question, we understand it. We're comfortable that the statute has a presumption of constitutionality, that it is constitutional. There is some risk. Obviously, the arguments about preemption are much stronger when we're

talking about preempting federal claims. Our briefing talks about do they have any right of federal contribution under ERISA? That's a very hot and live issue. We don't think they do for reasons we put in our brief.

But when we get to the state law contribution rights, as we put in our briefs, we think our uniqueness sort of separates us out. They weren't involved in the cy-près. You know, the acts that we're accused of doing wrong have really got nothing to do with the funding of the Plan or why there's a shortfall or anything like that.

We had a very unique -- we're a sideshow to this. And, you know, shame on them if they should, you know, come back someday and say we want a piece of CCF as well. I don't think that would serve their clients' interests to serve the public good. But we understand that is a risk. Your Honor is not ruling on constitutionality. Your Honor is not ruling on preemption. But we don't think you need to do that. We have, you know, two sophisticated entities ably assisted by counsel, I hope, that have come to a rational decision about how best to end this and try and take ourselves out of, you know, this never-ending litigation. Thank you.

THE COURT: Okay. Thank you, Mr. Conn.

All right. Let me hear from the objectors.

MR. MERTEN: Your Honor, Howard Merten for the Diocesan defendants. May I start out by saying never have I felt younger and I appreciate that.

I think the Court has it right in the number of ways in its questioning, which is at least for the Diocesan defendants, the number of objections and the quality of objections with respect to this settlement are far different than the ones that we'll hear in a couple of weeks. I don't make arguments with respect to collusion here. In fact, we use this settlement as the juxtaposition for the settlement we'll be talking about in two years -- two weeks, sorry.

But we did make some objections, and some of them have to do with some of the things we've been talking about, including the constitutionality and, in particular, the ERISA preemption which I think this is a quieter day than two weeks is going to be because there are a lot more issues. I think if we focus on the preemption issue in particular, I think it will be helpful to the Court and I think maybe will set the stage for what the Court should focus on later.

The only other thing that we raised in our papers was an issue with respect to attorneys' fees. I

think the idea of a special master makes sense. I think if I were to go to argue that, I would repeat a lot of what was in our papers so I won't belabor the Court's time with respect to that issue unless the Court has specific questions.

THE COURT: No. I really think that's the way to go. I think it precludes the need to have a lot of argument about the issue here. Both sides have put in the papers the arguments about the fees, and my intention and I'm giving -- and I really want to use this opportunity to give notice to all sides is to propose Deming Sherman as the special master to do a report and recommendation on the fee application. I think he can do it quickly, and it can be done in a parallel process with my consideration of the motions to approve the settlement so that no delay is affected by the appointment of him. And he can, frankly, work on that while I have under consideration the approval issue. So I think it will actually make things go quickly.

So that's my intention. And I think it serves a lot of different goals. So I don't think I need to hear a lot of argument on that. I would focus on the issues that you raise, with preemption issues and --

MR. MERTEN: In particular, I want to focus on

the preemption issue because I think there's been a little bit of confusion about what that preemption issue is with respect to the approval of the settlement. And I think it's a lot simpler than the parties have made it out. There's been a whole bunch of briefing and a whole bunch of case citations and a whole bunch of discussion about what the ultimate implications are of the election that the receiver made recently that goes back to January of 2017.

But with respect to this case and the motion before this Court right now is, should you approve the settlement and should you make a good-faith finding? And there have been arguments today that you can make it because it's not going to matter. I have a question, a very serious question, about, well, then, why are you pressing so hard for it if it's not going to matter? I suppose the parties could file a third-party complaint the day after you make the ruling. I'm not suggesting that that may or may not happen, but that could happen so what's the purpose behind that?

But more importantly, I think the reason you have to wrestle with whether or not you should make a good-faith finding and whether there was good faith is based entirely upon the idea that the Rhode Island

state statute applies to the approval of the settlement. I think the very simple and clear answer is it does not, your Honor, and it does not because of that election.

There is no question at this point in time that this settlement concerns and is it driven by and will affect an ERISA plan. From 2017 forward, the plaintiffs have declared that this was an ERISA plan. The statute didn't come into effect until June of 2018. And that statute directly addresses this plan. It names it. It specifically directs it. And the sole and only purpose of that state statute is to declare the mechanism and the legal implications of settlement for a plan that is irrefutably and irrevocably an ERISA plan.

So whatever this Court does, if it approves the settlement, the monies from this settlement are going to go to an ERISA plan. What that money does, how it's spent, who gets it, who has a claim to it, what impact it has on things like mandatory contributions to the Plan on a yearly basis, everything about that is going to be governed by this plan. And it doesn't matter. The confusion has been, well, they're state law claims. It doesn't matter what the claim is. What matters is, what's going to happen to the money? What is the Plan

now?

And the plaintiffs actually argue that they can bring state law claims even if there's an ERISA claim.

THE COURT: So, I mean, this whole thing, it's really kind of confusing, but the way I am trying to think about it -- maybe I'm wrong and you can tell me if I'm wrong, but you said a minute ago that it doesn't matter what the claim is. I think that's wrong. I think it matters a lot what the claim is because the claim is what gives me jurisdiction.

And the claim here is under ERISA. So what brings these plaintiffs in this court is the fact that there's a plan, it's an ERISA plan, and it brought an action under ERISA. That gives me jurisdiction.

Now, once I have jurisdiction, then I can act. And they've reached a settlement. In the settlement context, I don't have to judge the merits of the claim that's being made. I may get to that later with your clients and the Prospect entities, but right now it's just the settlement. So if I have jurisdiction, I can approve the settlement. Everything else is preserved in terms of the legal issues that you are challenging.

Nothing in the settlement is going to constitute a finding that is res judicata on any -- or collateral estoppel on any of the issues that you're raising. And

none of it is going to adjudge or make any findings or conclusions with respect to the legal effectiveness of the settlement statute itself. That's all for down the road.

MR. MERTEN: But I think the distinction I'm trying to make, your Honor, and maybe I wasn't clear, is the merits have nothing to do with the preemption issue that's before this Court today. Today, the preemption issue is, is the state statute preempted? And you can decide that and you should decide that without having any consideration of the claims or the merits because it's going to -- that statute is directed to what is clearly an ERISA plan at this point and for the entire existence of that statute.

THE COURT: Why shouldn't I judge that later on when and if it becomes an issue?

MR. MERTEN: Because this is the time that you're deciding whether to approve the statute, and the Court should decide what the standards are for proving that.

THE COURT: No, I'm not going to decide -- I'm not going to approve the statute --

MR. MERTEN: I mean, approve the settlement. I misspoke, your Honor.

THE COURT: Approve the settlement, yes, not the

statute. I'm making no judgements in the context of this settlement or the other settlement about the legality or the constitutionality of the statute. The only thing that I may do, which the plaintiffs have asked me to do, is use the words "good faith" in an order approving the settlement.

All I've said to Mr. Sheehan and Mr. Conn is that it strikes me as not crazy to say that a settlement that meets all the requirements of Rule 23 where there is no allegation of collusion, to say that that's a good-faith settlement doesn't seem like a significant leap to me. I mean, it would be like saying -- I mean, I don't see how I could ever approve a settlement under Rule 23 that was not a good-faith settlement. The two are inconsistent.

MR. MERTEN: I think, your Honor, for this one I actually don't disagree with you. We haven't actually alleged for this one that there's a collusion issue. That's why I said let's take a quieter moment because the next one is going to be a lot busier.

Say, for example, instead of the St. Joseph's Pension Plan, the statute said Hasbro. And Hasbro has been an ERISA plan all along. And Hasbro in a suit involving claims of misdeeds could include state law claims in the suit against the people who manage the

ERISA plan. If the Rhode Island General Assembly in the context of a plan that hasn't always been ERISA said we're going to enter a statute that determines how the settlement should be approved and what the standards are and what the legal impact of that settlement is, that would be wholly inappropriate.

And this case is the exact same case now. That's what I'm saying.

THE COURT: I get it. I get you've got an argument. It may even be a good argument. The question here is whether it's premature.

MR. MERTEN: With respect to this one, it might be, your Honor. But with respect to the findings that are going to have to be made in the fight that follows on the next one, this is an imperative decision for the Court to make because that's going to be a different fight and it's going to involve whether or not there's collusion.

And what I'm suggesting to the Court, if the Court takes a look at what this preemption is, not the merits and not the claims but whether the Rhode Island General Assembly can adopt a statute that sets forth legal implications for the settlement involving an ERISA plan, is that preempted? And I would submit, your Honor --

THE COURT: So, again, I don't want to jump ahead to September 10th because I know we're going to have this argument then, but I guess in a way I can't help it because it seems to me that if, as a result of that argument, I were to find that there's collusion, then there's no approval of settlement A, it just doesn't get approved; so you never even reach -- you don't even reach the issue of preemption.

Here in this settlement, there is no allegation of collusion so it seems to me the settlement could be approved again without ever reaching the issue of preemption. Now, this preemption issue has I think a great potential of rearing its head down the road when ultimately you and the Prospect entities and the receiver are fully engulfed in the litigation that you seem to be engulfed in. That preemption issue --

MR. MERTEN: I'll stop because I think I'm repeating myself, but I think what I'm trying to suggest is that this presumption issue is very narrow. It applies in this particular instance because it involves the approval of a settlement. You don't have to consider whether other causes of action are preempted to decide that this statute, because it is directed clearly and only to an ERISA plan, is preempted because it affects an ERISA plan. That's all

the Court has to decide in this context. But I'll stop.

THE COURT: Just one last question. It's not about -- it's really not about the particulars of this settlement. It's really about whether any settlement that is dependent upon or reached pursuant to the settlement statute is essentially preempted.

MR. HALPERIN: Well, it's even more narrow than that. Can the Rhode Island General Assembly pass a statute that changes or impacts the law of ERISA for an ERISA plan? That's what's happening.

THE COURT: How does it change the law of ERISA?

MR. MERTEN: Because it defines what the legal import of the settlement is. That's why they're asking for it, your Honor. It's different -- It may or may not be different from ERISA, we'll find that out, but it is a Rhode Island General Assembly passing a statute that is directly, solely and only aimed at an ERISA plan.

The Hasbro analogy is the one I use. They couldn't do that. There's no question they couldn't do that. That's exactly what's happened here because the election dates back to 2017. So for the entire time that -- before that statute was even conceived of --

THE COURT: So let me just ask this question

then: If Mr. Conn is saying on behalf of the Foundation that, you know, our eyes are wide open, we understand the risks down the road, you may find that the statute is unconstitutional or preempted, we get it, we still want to go forward with this settlement, why isn't that enough?

MR. MERTEN: Because it still changes the -- it impacts the rights of the remaining defendants with respect to contribution.

THE COURT: How? If I find later on that the settlement statute is unconstitutional, it's as good as it never got passed. So, you know, it's no skin off your client's back. It's a problem for the Foundation because they made the settlement and now they're facing the potential of --

MR. MERTEN: I'll be back in two weeks to talk about that, your Honor. That's why I said let's take a quiet moment now.

The only other comment I'll make is your Honor asked a question about the declaratory judgment posture. And I think that does make a difference. As the Court knows, the fact that that settling case was a declaratory judgment action, in this context courts have great latitude and discretion to decide whether or not to decide something.

Here, we've been sued, we've been dragged into this court on this motion for this approval, and for that reason I think it is ripe, and the arguments we're talking about especially in two weeks are ripe for consideration.

THE COURT: Okay. Thank you, Mr. Merten.

All right. Mr. Halperin.

MR. HALPERIN: Your Honor, I am going to be very brief. Everything I think has been pretty much said that I would say. However, I do think that the Prospect entities do have a slightly different approach than the Diocesan entity, and that is that it doesn't concern us if your Honor makes a good-faith finding which allows the settlement to go forward and puts money into the Plan so long as the Prospect entities' rights are in no way prejudiced. And that's been our point from the beginning.

The timing of the Court making decisions in this case is up to your Honor. It's been our position that the plaintiffs shouldn't be able to take these inconsistent positions indefinitely: the Plan is an ERISA plan, the Plan is not an ERISA plan; we made our election, but we reserved our rights to say it's not an election.

And we're trying to simply move the case

forward, but if moving the case forward today and having the Court make a decision that the special act is preempted and therefore the Court doesn't make a good-faith finding results in the monies not going to the Plan, that doesn't serve anyone's interest. So if that's what's necessary to have the Court hold off on the preemption in order for the settlement to go forward, I think that makes complete and total sense.

That said, we do believe that as soon as possible it would be helpful if the Court did look at the significance of the election and whether it's an ERISA plan. The Court could do it today if the Court chose to do that or the Court could wait until the next settlement or the motion to dismiss stage to ultimately get to that question. It has obvious impact on many of the causes of action that are going to be argued in the motion to dismiss. If the Court were to make that determination earlier, then the argument might be very different when we get to the motion to dismiss phase. Otherwise, we argue all of the claims including preemption.

THE COURT: So let me just ask you a question. So one way this could play out is, I suppose, that I could approve this settlement and not make any findings with respect to the preemption issue. Then we get to

the next settlement and there we have the same preemption arguments being made, but we also have the collusion arguments.

Now, that could go in two directions. If I find collusion, there's no approval of the settlement. If I don't find the collusion, then pretty much that settlement is just like this settlement; end up approving it, do not address the presumption arguments. In both, then the money flows to the Plan.

Then we get to the motion to dismiss. And let's just say we get to the motion to dismiss, I find that the preemption arguments are correct and I dismiss the case. It's back to state court, but the settlements have happened, the money has gone into the Plan and you're back -- you're all back before Judge Stern, I guess -- well, I don't know where you are. You're actually here, I guess, if I find preemption, you're here.

MR. HALPERIN: The case is over effectively.

THE COURT: Yes. So, you know, you are wherever you are, and the preemption issue has been addressed and the settlements have been approved. Why isn't that, from your standpoint, a good way to proceed?

MR. HALPERIN: I have no problem with that, your Honor. I think that as a practical matter, it makes

sense because these settlements are conditioned upon this good-faith finding and not upon the Court making any determination with respect to the applicability of the special act.

And with that in mind, those issues are preserved, and they will be dealt with somewhere else, you know, in the course of this proceeding. My only point is that the -- it will be the motion to dismiss stage if you follow that point. We're just trying to have the plaintiffs have it determined once and for all that we're dealing with an ERISA plan because many things flow from that.

But I have no difficulty putting that off in order to allow these funds to go to the Plan. It's really that simple.

THE COURT: Okay. Thank you.

MR. HALPERIN: Thank you.

THE COURT: All right. Well, before you reply, there was one objection from Ms. Corvesi. I don't know if she's here or if she wants to speak to her objection. No? Okay. I don't think there's been any other objections so, Mr. Sheehan, do you want --

MR. SHEEHAN: Your Honor, I'm going to be very brief. Mr. Merten talked about the settlement statute somehow changing the law of ERISA. We've briefed up,

down and sideways that there's no right of contribution under ERISA in the First Circuit. Since there's no right of contribution under ERISA, it doesn't matter what the settlement statute says; they get no right of contribution. What they want is a right of contribution based on the greater of the amount paid in the settlement or the pro rata fault. They're not going to get either one under ERISA. They get nothing.

That's the law in the First Circuit based on three district court decisions that interpret -- make the conclusion based upon the First Circuit decision and in the United States Supreme Court decision, contrary to what the Second Circuit has done in *Masters, Mates and Pilots*. So if that's the case, all this preemption goes away because they don't have a right to begin. There's no interference with rights under ERISA that don't exist.

Your Honor, Judge Selya's decision was not based on the Court exercising its discretion under the declaratory judgment act not to address an issue. It was based on ripeness. That's a constitutional element, your Honor. So my brother's attempt to distinguish *Ernst & Young* because it was a DJ action failed. We're not going to get to it because we have discretion under the DJ act not to address issues.

My brother has in several cases argued that they have some kind of constitutional right to certainty now as to what the contribution rights are going to be in the future. And they cite the case *Jiffy Lube*. And that case involved a bar order that the Court imposed that was unclear with respect to what the contribution rights would be.

And the Court of Appeals said if you're going to issue a bar order, if you, district court, are going to affirmatively reach out and bar certain claims from being asserted, you have to be clear both for the benefit of the plaintiffs and the defendants. There's no bar order in this case. Consequently, there's no right to certainty as to what one's contribution rights are going to be.

No one ever has certainty on that issue even under the general tortfeasor statute, greater of amount paid in settlement or pro rata fault. You never know what that pro rata fault is going to be until it's determined by a jury. There's no certainty.

With respect to both of the non-settling defendants that have filed objections, neither one is objecting to the factual finding of good faith. And that's all we're asking for, your Honor. That would eventually be binding in an ultimate determination. If

the Court concludes that the statute is constitutional and it's not preempted, then the factual predicate is there to apply the statute. That's it.

Now, with respect to my brother continuing to talk about the ERISA election in April of 2019 saying it has to go to the motions to dismiss, it's nine months after the complaint was filed. You don't look at events in connection --

THE COURT: Isn't it retroactive to some point?

MR. SHEEHAN: Yes, it's retroactive to some point, but it occurred, your Honor, nine months after the complaint was filed. The facts one looks at in connection with a motion to dismiss are what's alleged in the pleadings, not some subsequent event even if it has retroactive effect. I mean, it's premature to address it, but my brother brought it up.

THE COURT: I get it. But I think what Mr. Halperin said makes a lot of sense, and it's consistent with kind of how I'm viewing this whole thing. It seems to me that the most sensible approach here is to defer all these arguments about preemption and ERISA to a later date. And I don't want to prejudge what's going to be argued on September 10th, and I don't want to preclude the objectors from making the arguments that they want to make, but I think we've had a pretty

fulsome preview of what those arguments are both in the briefs and here today.

And I can't see a lot of good reasons to try to tackle that issue now in the context of this in particular, this settlement. Seems to me that that question can be deferred, it can be put down the road, and that if I do that, then I can look at this settlement with a pretty clear perspective on whether it meets the Rule 23 standard. And if, in fact, it does, which I think it does, then I could approve it without making any findings with respect to ERISA preemption or the constitutionality or applicability of the special statute. That all will be decided later.

The only thing you're asking me to do, you've already -- we're just going over the same ground, you've used the words "good faith" -- if I find no collusion and I find the Rule 23 factors met, I think I can say the words "good faith" in the order. I don't really see a problem with that. But you know that I'm going to say in that order that this has no effect on any of the arguments being made by the objectors or it's not making any findings with respect to the enforceability of this statute. So that's the way it goes. There you have it. And then the money can go into the Plan.

And then the only thing that remains to be done is the attorneys' fees. And, frankly, I think that can be separated and done parallel and can be done quickly. And whatever the outcome of that is, you know, that's what it is. Right now I forget the division, but right now the request is if the settlement is approved, then I forget the exact amount. You probably have it at your fingertips. That amount at least can go into the settlement fund.

And let's just say I don't approve the entire fee amount -- I'm not saying that's what I'm going to do, but let's just say I approve 75 percent of it or something -- then the rest of that amount that's withheld with fees, then that would go over in the settlement pot too.

MR. SHEEHAN: Your Honor, we're happy to hold the funds in escrow. That's no problem. We agree a hundred percent with what your Honor has proposed.

We believe that your Honor has come up with an approach that clarifies not only this hearing, but the next hearing on settlement A, the settlement approval. All I was doing is addressing Mr. Halperin's remark about what happens next. I'm saying it's not going to be the motion to dismiss. It's going to be some other procedural vehicle they're going to have to come up

with. It's not going to be that one.

THE COURT: Why not? Why not the motion to dismiss?

MR. SHEEHAN: Your Honor, their reliance on events that occurred nine months after the complaint was filed is not before the Court in the motion to dismiss under 12(b)(6) under any circumstances. The law is categorical. You don't look into the future and pull an event that happened into the future even if it has retroactive --

THE COURT: So they convert their motion to dismiss and do an earl motion for summary judgment.

MR. SHEEHAN: Right, right.

THE COURT: They end up in the same place.

MR. SHEEHAN: They can do it. They can get there. They're just not going to get there that way. Thank you, your Honor.

THE COURT: All right. Thank you.

MR. HALPERIN: Your Honor, may I speak for one more second?

THE COURT: Sure.

MR. HALPERIN: If the Court is inclined to put off the preemption and the applicability and whether it's ERISA to after settlement A, it would be helpful to know that today only because I wouldn't be bringing

Mr. McGowan and our ERISA attorney here to argue that if you know that. If there's still a question, we'll have him here, but if we're not going to be arguing that and it's going to be limited to the collusion issue and other factors, that would be helpful to know.

THE COURT: Yes. I think that is what I want to do. I can't see a scenario where my view about the ERISA issue is going to be different on September 10th than it is today. So I think you can save him the trouble of the trip, and the argument on the 10th can really focus on the collusion arguments that you're making.

MR. HALPERIN: All right. Thank you.

THE COURT: Okay. Now, do you all -- I'm required under the rule to give you notice of my intention to appoint a special master and an opportunity to be heard. So in order to expedite things, I'm considering this my notice to you of my intent to appoint, and my suggestion is Mr. Sherman just because I think you all know him and have worked with him. And he has the time to do this, and he has been extraordinarily effective and efficient as the special master in the UHIP matter.

And, you know, he doesn't charge much. He does the work quickly. It's all the things you want in a

special master. And he's extremely competent. So I'm giving you notice.

Do you want time to think about it and let me know, respond to that or not?

MR. WISTOW: May I say something, your Honor?

THE COURT: Sure.

MR. WISTOW: Two things. First, it wasn't so very long ago in my mind that I was the youngest guy in the courtroom. Now all of a sudden I'm the oldest.

THE COURT: That's how the mind works as you get older.

MR. WISTOW: I have no problem with your Honor sending this to a special master on the fee issue. I don't think that the money should be held in escrow pending a decision. I think all of the money -- we ought to work something out where all of the money goes into the Plan subject to some mechanism for getting us paid, whatever the number is. I don't want this delayed in any way, shape or form. People have been waiting patiently for this. So that's something your Honor can probably work out in the order.

THE COURT: Well, I actually think that Mr. Del Sesto can work that out. I mean, he's in charge of the money. If it goes into the Plan, he's the one that decides how much gets disbursed and when.

MR. WISTOW: That's fine.

THE COURT: Unless he is withholding back enough to pay your fee, then that's fine.

MR. WISTOW: I don't want him holding back anything. I want the money to go into the Plan. I'm not going to stand here and pretend that I don't want to get paid, I mean, we do and we'd like to get paid what we think is appropriate, but I don't want to in any way slow down the money going into the -- we'll work something out. I think we can do that.

MR. DEL SESTO: Yes.

THE COURT: Okay. What about you folks?

MR. HALPERIN: There's no objection from the Prospect entities, your Honor, to the suggestion of the special master.

MR. MERTEN: No objections, your Honor.

THE COURT: All right. Very good. Then what I'll do is I'll get -- I'm required under 53(b) also to set forth in an order what the duties are and the communication, the circumstances under which he can communicate wit the parties and so forth. But there is a very discrete, limited task. It will be a simple order, and it will be a short time frame. And I don't see it amounting to much money.

I think my suggestion would be that Mr. Sherman

charge what he charged in the UHIP matter. And I can't remember exactly. It was either 250 or $300 an hour or something like that. But I think he'll make short work of this and a short report and recommendation. And I'd like to get him going on it even in advance of the September 10th hearing so that he's working on that parallel with getting ready for that hearing.

And then, Mr. Del Sesto, if you can just work out -- so that it's no secret, I mean, I am going to approve the settlement, and I need to draft an order doing that. But once that occurs and then the money is transferred, I think it will be up to you to decide how to disburse and when to disburse and how much to hold back and so forth.

MR. DEL SESTO: Yes, your Honor.

MR. WISTOW: The only other issue I would like to address is whether or not Mr. Sherman will be given some standard by your Honor. If so, we'd like to be heard on what that standard is. I don't have to explain -- your Honor understands what I'm saying.

THE COURT: I do. And I think that -- you know, I think you've laid out in your application what you think what the fees are and what the standard should be. And I think the objectors have said what they think about that which is --

MR. WISTOW: They certainly have.

THE COURT: So rather than -- I don't think I'm going to dictate to him what the lodestar should be or what the -- there's well-established case law on this and he can look to that for the standard.

MR. WISTOW: Okay. Thank you, your Honor.

THE COURT: Do you agree with that?

MR. WISTOW: I don't know. I'm not sure that there shouldn't be some standard that he should be given.

THE COURT: Like what? What are you suggesting?

MR. WISTOW: I'm suggesting that he be bound by the law of the First Circuit.

THE COURT: Oh, I think that's what I just said too. So we're in agreement on that.

MR. WISTOW: Okay. Very well.

THE COURT: All right.

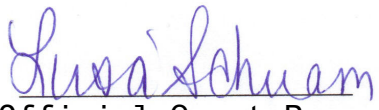
Is there anything further that we need to take up? I don't hear anything. So with that, we'll be in recess. And I'll be preparing an order as I described, and I'll see you all on September 10th.

COURTROOM DEPUTY: All rise.

(Time noted: 11:38 a.m.)

CERTIFICATION

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



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