UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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

MOTION FOR AWARD OF ATTORNEYS' FEES IN CONNECTION WITH SETTLEMENT BETWEEN PLAINTIFFS AND DEFENDANTS CHARTERCARE FOUNDATION, ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND, ROGER WILLIAMS HOSPITAL, AND CHARTERCARE COMMUNITY BOARD

Plaintiffs' Counsel Wistow, Sheehan & Loveley, P.C. hereby moves for an award of attorneys' fees based upon the retainer agreement approved by the Rhode Island Superior Court in the Receivership proceeding, of $1,049,850 (23.33% of the Gross Settlement Amount), plus costs of $19,924.41.

Movants rely in support on their Memorandum of Law submitted herewith and on the Declaration of Max Wistow dated November 21, 2018 and Supplemental Declaration of Max Wistow dated January 4, 2019.

Respectfully submitted,

All Plaintiffs,

By their Attorney,

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Dated: January 4, 2019

CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the within document was electronically filed on the 4th day of January, 2019 using the Electronic Case Filing system of the United States District Court and is available for viewing and downloading from the Electronic Case Filing system. The Electronic Case Filing system will automatically generate and send a Notice of Electronic Filing to the following Filing Users or registered users of record:

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UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

STEPHEN DEL SESTO, AS RECEIVER AND ADMINISTRATOR OF THE ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND RETIREMENT PLAN, ET AL.	:	
Plaintiffs	:	
v.	:	C.A. No: 1:18-CV-00328-WES-LDA
PROSPECT CHARTERCARE, LLC, ET AL.	:	
Defendants.	:	

PLAINTIFFS' COUNSEL'S MEMORANDUM IN SUPPORT OF MOTION FOR AWARD OF ATTORNEYS' FEES IN CONNECTION WITH SETTLEMENT BETWEEN PLAINTIFFS AND DEFENDANTS CHARTERCARE FOUNDATION, ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND, ROGER WILLIAMS HOSPITAL, AND CHARTERCARE COMMUNITY BOARD

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January 4, 2019

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The law firm of Wistow, Sheehan & Loveley, P.C. ("Plaintiffs' Counsel" or "WSL") submits this memorandum in support of its motion for an award of attorneys' fees for their representation of the named plaintiffs and the putative class members in connection with the proposed settlement (the "Proposed Settlement") between Plaintiffs Stephen Del Sesto (as Receiver and Administrator of the St. Joseph Health Services of Rhode Island Retirement Plan) ("the Receiver"), and Gail J. Major, Nancy Zompa, Ralph Bryden, Dorothy Willner, Caroll Short, Donna Boutelle, and Eugenia Levesque, individually as named plaintiffs (the "Named Plaintiffs") and on behalf[1] of all class members as defined herein (collectively "Plaintiffs"), and Defendants CharterCARE Foundation ("CCF"), CharterCARE Community Board ("CCCB"), St. Joseph Health Services of Rhode Island ("SJHSRI"), and Roger Williams Hospital ("RWH") (collectively the "Settling Defendants") (Plaintiffs and the Settling Defendants are referred to collectively as the "Settling Parties").[2]

Plaintiffs' Counsel are seeking an award of attorneys' fees of 23.33% of the gross settlement amount of $4,500,000, totaling $1,049,850, plus reimbursement of expenses of $19,924.41 (to the extent such expenses are not reimbursed in connection with the other pending settlement). As discussed below, the Rhode Island Superior Court in the Receivership Proceedings has already determined that this proposed award of

[1] Contingent upon the Court certifying the Class and appointing them Class Representatives.

[2] Defendants SJHSRI, RWH, and CCCB are also parties to the proposed settlement between Plaintiffs and Defendant CCF. However, SJHSRI, RWH, and CCCB are not making any monetary contribution. Instead, they are participating solely for the purposes of releasing Defendant CCF from any liability and disclaiming any rights they may have in Defendant CCF. In addition, although not a party to the settlement agreement, Defendant Rhode Island Foundation will be released from liability and dismissed from the case in connection with the proposed settlement, since its only role was as custodian for Defendant CCF's investment assets.

attorneys' fees based upon this contingent fee is "fair, reasonable, and very much a benefit to the receivership estate."[3]

In further support of their motion, Plaintiffs' Counsel has filed the Supplemental Declaration of Max Wistow dated January 4, 2019 ("Supp. Wistow Dec."). This motion for attorneys' fees is submitted in connection with the Joint Motion for Class Certification, Appointment of Class Counsel, and Preliminary Settlement Approval submitted by Plaintiffs and Defendants CCF, CCCB, SJHSRI, and RWH (the "Joint Motion") and supplements Max Wistow's Declaration of November 21, 2018 (Dkt #65).

I. BACKGROUND

A. This Is the Second Proposed Partial Settlement

This is the second proposed partial settlement in this matter. On November 21, 2018, Plaintiffs and Defendants SJHSR, RWH, and CCCB filed their Joint Motion for Class Certification, Appointment of Class Counsel, and Preliminary Settlement Approval, concerning a proposed settlement between them (the "First Settlement"). At the same time, Plaintiffs' Counsel filed a Motion for Attorneys' Fees in connection with that proposed settlement, and the Declaration of Max Wistow Sworn to on November 21, 2018 ("Wistow Dec."). That motion is pending: approval of the First Settlement continues to be sought, in parallel with approval of the instant Proposed Settlement.

Those submissions in connection with the First Settlement are directly relevant to both the Joint Motion and Plaintiff's Counsel's Motion for Attorneys' Fees in connection

[3] Supp. Wistow Dec. ¶ 8, Exhibit 6 (Transcript of Hearing before Hon. Brian P. Stern on December 14, 2018) at 16.

with the Proposed Settlement between Plaintiffs and Defendants CCF, SJHSRI, CCCB, and RWH. They detail:

- the role and actions of the Rhode Island Superior Court in the Receivership Proceedings concerning the retention of Plaintiffs' Counsel;
- circumstances and terms of Plaintiffs' Counsel's representation of the Receiver and the Named Plaintiffs;
- the investigative phase of Plaintiffs' Counsel's representation;
- the commencement and prosecution of this action and the related state court cases up to November 21, 2018;
- the negotiation of that settlement; and
- Plaintiffs' Counsel's total attorney time up to November 21, 2018.

Rather than burdening the record with redundant information, these filings are incorporated by reference.

The benefits to Plaintiffs under the First Settlement consist of a minimum initial lump sum of $11,150,000, certain additional sums to be determined when the initial lump sum was due, possible recoveries in connection with the judicial liquidation of SJHSRI, RWH, and CCCB, and the transfer of certain rights that CCCB had in Defendants CCF and Prospect CharterCare, LLC. In connection with the First Settlement, Plaintiffs' Counsel is seeking an award of attorneys' fees in the amount of 23.33% of the gross settlement amount, less the $552,281.25 that was paid to Plaintiffs' Counsel by the Receiver during the investigative phase.[4] The credit would reduce Plaintiffs' Counsel's fee on the minimum initial lump sum of $11,150,000 from 23.33% to approximately 18.4%.

[4] Although not obligated to give such a credit under their Retainer Agreements with the Receiver and the Named Plaintiffs, Plaintiffs' Counsel on their own volition agreed to such a reduction, to be applied to the first recoveries on the Proposed Settlement.

B. Plaintiffs' Claims Against CCF

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

In addition, if the First Settlement is approved, Plaintiffs will assert additional claims against Defendant CCF based upon certain rights that Defendant CCCB claims in Defendant CCF that are being transferred to Plaintiffs in connection with the First Settlement.

CCF denies liability to Plaintiffs. Indeed, CCF filed a motion to dismiss Plaintiffs' initial Complaint, with an extensive supporting memorandum detailing the grounds upon which CCF claimed that Plaintiffs' claims should be dismissed. If the Proposed Settlement between Plaintiffs and Defendants CCF, SJHSRI, CCCB, and RWH is not approved, CCF will file a motion to dismiss Plaintiffs First Amended Complaint.

Moreover, if CCF's motion to dismiss is not fully successful, CCF can be expected to vigorously defend this case on the merits. Notably, there is no precedent in Rhode Island directly addressing Plaintiffs' claim that the provisions of R.I. Gen. Laws §§ 7-6-51 & 7-6-61(c)(1) entitled creditors such as Plaintiffs to be paid before any funds could be transferred pursuant to the doctrine of *cy pres*. Plaintiffs rely upon precedents from other jurisdictions, but CCF can be expected to reject the applicability of those precedents and seek to offer other precedents in support of its position that charitable funds cannot be used to pay creditors. In addition, CCF can be expected to argue that Plaintiffs are not *bona fide* creditors of SJHSRI and RWH. Although Plaintiffs contend that such provisions are unenforceable, the Plan documents contain provisions that perhaps may tend to exculpate SJHSRI and RWH from any obligation to fund the Plan.[5] It would not be prudent to contend that there is no risk of any such defenses prevailing.

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

C. The Proposed Settlement

As detailed in the Joint Motion and supporting memorandum, if approved, the Proposed Settlement entails the transfer to the Receiver of $4,500,000, for deposit into the Plan assets pursuant to the orders of the Rhode Island Superior Court in the

[5] See Plaintiffs' First Amended Complaint ("FAC") ¶¶ 218-23.

Receivership Proceedings, after payment of attorneys' fees and costs. In return the Plaintiffs and Defendants SJHSRI, CCCB, and RWH will release Defendants CCF and RIF from liability. In addition, the Receiver will transfer to CCF any rights in CCF which the Receiver has in CCF. The Plaintiffs will continue to pursue their claims against the remaining Defendants.

The Proposed Settlement was negotiated after the Rhode Island Superior Court granted Plaintiffs' motion to intervene in the 2015 *Cy Pres* Proceeding, by bench decision on September 17, 2018 and order entered on October 2, 2018.[6] According to asset disclosure that Defendant CCF made in connection with the negotiation of the Proposed Settlement, Defendant CCF's total investment assets as of August 31, 2018 was $9,108,334.[7] Thus, the Proposed Settlement of $4,500,000 is approximately 50% of what Plaintiffs could hope to recover if Plaintiffs were awarded all of CCF's assets, and those assets were not diminished by costs of defense.

The Receiver is seeking settlement approval from the Court pursuant to the order of the Rhode Island Superior Court granting his Petition for Settlement Approval, which the Receiver filed in the Receivership Proceedings because the Plan is in Receivership.[8]

The Receiver's Petition for Settlement Instructions was made available to all of the Plan participants and the general public, on the web site established by the Receiver in connection with the Receivership Proceedings.[9] There were no objections

[6] Supp. Wistow Dec. ¶¶ 3-4, Exhibits 1 & 2.

[7] Supp. Wistow Dec. ¶ 10.

[8] Supp. Wistow Dec. ¶ 7, Exhibit 5 (Petition for Settlement Approval).

[9] See Receiver's website, https://www.pierceatwood.com/receivership-filings-st-joseph-health-services-rhode-island-retirement-plan.

by any of the Plan participants.[10] The court in the Receivership Proceedings held a hearing on the Petition for Settlement Approval on December 14, 2018.[11] At the hearing, Judge Stern stated that he had analyzed the Proposed Settlement under the factors set forth by the First Circuit in Jeffrey v. Desmond, 70 F.3d 183, 185 (1st Cir. 1995) for judicial approval of settlements in bankruptcy cases, and concluded that the Proposed Settlement was fair and reasonable and in the best interests of the Plan and of the Plan participants.[12] On December 27, 2018, Judge Stern issued his order expressly finding that the Proposed Settlement was in the best interests of the Plan and the Plan participants, and authorized and directed the Receiver to apply to this Court for settlement approval.[13] Judge Stern also expressly found that Plaintiffs' Counsel's contingent fee of 23 1/3% was "fair, reasonable, and a benefit to the Receivership estate."[14]

D. Attorney Time

Since filing suit, Plaintiffs' Counsel have devoted a minimum of 1,350 hours of attorney time to the representation of Plaintiffs in this and the related matters.[15] This includes the 1,120 hours of attorney time between filing suit and November 21, 2018

[10] Supp. Wistow Dec. ¶ 8, Exhibit 6 (transcript of hearing on December 14, 2018) at 3.

[11] Supp. Wistow Dec. ¶ 8, Exhibit 6 (transcript of hearing on December 14, 2018).

[12] Supp. Wistow Dec. ¶ 8, Exhibit 6 (transcript of hearing on December 14, 2018) at 8-9 (referring to "Jeffrey factors").

[13] Supp. Wistow Dec. ¶ 9, Exhibit 7 (Order by the Hon. Brian P. Stern, Associate Justice of the Rhode Island Superior Court entered on December 27, 2018).

[14] Id.

[15] Supp. Wistow Dec. ¶ 11-12.

and is in addition to the attorney time in excess of 1,472 hours during the investigative phase.[16]

II. ARGUMENT

A. The Preferred Method for Determining the Amount of Attorneys' Fees Is the Percentage of Fund Approach, with a Benchmark of 25% of the Gross Recovery

Rule 23 of the Federal Rules of Civil Procedure provides that "[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement."

Fee awards to class action plaintiffs' attorneys are essential to ensure access to the courts for large numbers of individuals who have suffered significant injuries that do not justify the great expense of litigation:

> Class action plaintiffs' attorneys provide an invaluable service by aggregating the seemingly insignificant harms endured by a large multitude into a distinct sum where the collective injury can then become apparent. Due to the expense, time and difficulty of pursuing complex litigation, it would likely not be economical for an individual Class Member to pursue such litigation on their own. *See Alpine Pharma., Inc. v. Chas. Pfizer & Co., Inc.*, 481 F.2d 1045, 1050 (2d Cir.1973) ("In the absence of adequate attorneys' fee awards, many antitrust actions would not be commenced, since the claims of individual litigants, when taken separately, often hardly justify the expense of litigation."); *In re Telectronics Pacing Sys. Inc.*, 137 F.Supp.2d 1029, 1043 (S.D.Ohio 2001) ("Attorneys who take on class action matters serve a benefit to society and the judicial process by enabling such small claimants to pool their claims and resources."); *Mazola [v. May Dept. Stores Co., 1999 WL 1261312, at *4 (*D. Mass. Jan. 27, 1999) (Gertner, J.*)*] ("The litigation is critical, because it gives voice to relatively small claimants who may not be aware of statutory violations or have an avenue to relief.").

[16] Wistow Dec. ¶¶ 18 & 39.

In re Puerto Rican Cabotage Antitrust Litigation, 815 F. Supp. 2d 448, 463 (D.P.R. 2011).

Plaintiffs' Counsel has negotiated a Proposed Settlement that establishes a common fund to benefit all members of the Settlement Class. "Under the 'common fund' doctrine, a lawyer responsible for creating a common fund that benefits a group of litigants is entitled to a fee from the fund." 5 *Newberg on Class Actions* § 15:53 (5th ed.). The First Circuit recognizes two methods for calculating attorneys' fees in the class action context involving a common fund, the "percentage of the fund" ("POF") method, or the lodestar method. See In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litigation, 56 F.3d 295, 307 (1st Cir. 1995) ("[W]e hold that in a common fund case the district court, in the exercise of its informed discretion, may calculate counsel fees either on a percentage of the fund basis or by fashioning a lodestar."). The POF "method functions exactly as the name implies: the court shapes the counsel fee based on what it determines is a reasonable percentage of the fund recovered for those benefitted by the litigation." Thirteen Appeals, supra, 56 F.3d at 305.

The POF method is preferred in common fund cases. See In re Cabletron Systems, Inc. Securities Litigation, 239 F.R.D. 30, 37 (D.N.H. 2006) ("The POF method is preferred in common fund cases because 'it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure.' This is something the lodestar method cannot do.") (quoting In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 300 (3d Cir. 2005)) (internal quotations omitted). "In complex litigation—and common fund cases, by and large, tend to be complex— the POF approach is often

less burdensome to administer than the lodestar method." Thirteen Appeals, *supra*, 56 F.3d at 307. "[U]sing the POF method in a common fund case enhances efficiency, or, put in the reverse, using the lodestar method in such a case encourages inefficiency. Under the latter approach, attorneys not only have a monetary incentive to spend as many hours as possible (and bill for them) but also face a strong disincentive to early settlement. . . . If the POF method is utilized, a lawyer is still free to be inefficient or to drag her feet in pursuing settlement options—but, rather than being rewarded for this unproductive behavior, she will likely reduce her own return on hours expended." Id. Finally:

> Another point is worth making: because the POF technique is result-oriented rather than process-oriented, it better approximates the workings of the marketplace. We think that Judge Posner captured the essence of this point when he wrote that "the market in fact pays not for the individual hours but for the ensemble of services rendered in a case of this character." In fine, the market pays for the result achieved.

Id. (quoting In re Continental Ill. Sec. Litig., 962 F.2d 566, 572 (7th Cir. 1992)).

Under the POF method, "the court shapes the counsel fee based on what it determines is a reasonable percentage of the fund recovered for those benefitted by the litigation." Thirteen Appeals, *supra*, 56 F.3d at 305.

> In weighing a common fund request, courts generally consider the following so-called Goldberger factors: "(1) the size of the fund and the number of persons benefitted; (2) the skill, experience, and efficiency of the attorneys involved; (3) the complexity and duration of the litigation; (4) the risks of the litigation; (5) the amount of time devoted to the case by counsel; (6) awards in similar cases; and (7) public policy considerations." *In re Lupron Mktg. & Sales Practices Litig.*, No. MDL 1430, 01–CV–10861–RGS, 2005 WL 2006833, at *3 (D. Mass. Aug. 17, 2005), citing *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000).

In re Neurontin Mktg. & Sales Practices Litig., 58 F. Supp. 3d 167, 170 (D. Mass. 2014) (quoting In re Lupron Mktg. & Sales Practices Litig., No. MDL 1430, 01–CV–10861–RGS, 2005 WL 2006833, at *3 (D. Mass. Aug. 17, 2005), citing Goldberger v. Integrated Res., Inc., 209 F.3d 43, 50 (2d Cir. 2000), and approving an award of 28% of the settlement fund).

The benchmark percentage considered reasonable in the First Circuit is 25%. "Within the First Circuit, courts generally award fees 'in the range of 20–30%, with 25% as the benchmark.'" Bezdek v. Vibram USA Inc., 79 F. Supp. 3d 324, 349-350 (D. Mass 2015) (quoting Latorraca v. Centennial Techs., Inc., 834 F. Supp. 2d 25, 27–28 (D. Mass. 2011) (collecting cases)), *aff'd*, 809 F.3d 78, 85 (1st Cir. 2015) ("Applying the percentage of the fund method, the district court found that twenty-five percent of the fund is consistent with what other district courts found to be reasonable.").

B. Plaintiffs' Counsel's Fee Application Is Fair and Reasonable

The Superior Court Plaintiffs' Counsel's fee request is reasonable under the Goldberger factors of "1) the size of the fund and the number of persons benefitted; (2) the skill, experience, and efficiency of the attorneys involved; (3) the complexity and duration of the litigation; (4) the risks of the litigation; (5) the amount of time devoted to the case by counsel; (6) awards in similar cases; and (7) public policy considerations," In re Neurontin Marketing and Sales Practices Litigation, *supra*, 58 F. Supp. 3d at 170. Moreover, Plaintiffs' Counsel are seeking an award which is 23.33% of the gross settlement amount, which is below the award that would be due under the 25% benchmark for common fund cases.

The Proposed Settlement is clearly an excellent outcome for the Settlement Class, for the reasons set forth in the Joint Motion and supporting memorandum.

What especially establishes the reasonableness of Plaintiffs' Counsel's proposed fee is the additional (perhaps controlling) factor that this percentage was negotiated with the Receiver and approved by the Rhode Island Superior Court in connection with the Receivership Proceedings, in advance of the filing of this case. As noted in the supporting memorandum for Plaintiffs' Counsels' Motion for Attorneys' Fees in connection with the first settlement, the Receiver Retainer Agreement determined Plaintiffs' Counsel's fee for representing the Receiver in this case in advance.

Although unquestionably the court in the Receivership Proceedings did not purport to approve the fee that would apply to Plaintiffs' Counsel's representation of the Settlement Class in Federal Court, the court in the Receivership Proceedings expressly found[17] that this fee would be fair to the Plan and the Plan participants who ultimately would be affected by the outcome. At the time the Superior Court authorized the Receiver to enter into the Receiver Retainer Agreement, the court was already familiar with the Plan and the interests of Plan participants. Even in connection with the proposed class action settlement, the Plan is the immediate beneficiary of the settlement, and the settlement class of Plan participants benefit by the increase of the Plan's assets.

The Court also can take judicial notice of Judge Stern's long experience in handling receiverships and ancillary litigation, which he could draw on to ensure that the fee he approved would be fair to the Plan and the Plan participants. Moreover, the

[17] See *supra* at 7.

Rhode Island Superior Court approved the actual proposed fee when that court approved the Proposed Settlement as fair and reasonable for the Receivership Estate on December 14, 2018:

> First, on the settlement proposal, I just don't want to miss this, I forgot to put on the record. It was also in there Special Counsel's fee is based on a contingency fee plus costs. With respect to the settlement, the Court finds that the contingency fee being charged is, in fact, fair, reasonable, and very much a benefit to the receivership estate. I want to make sure on that case it's on the record as well.[18]

In a related context, the First Circuit and other federal courts have deferred to state law in determining attorneys' fees in class action common fund cases based on diversity. See In re Volkswagen & Audi Warranty Extension Litig., 692 F.3d 4, 15 (1st Cir. 2012) ("We also start with the basic premise that the issue of attorneys' fees has long been considered for *Erie* purposes to be substantive and not procedural, and so state-law principles normally govern the award of fees."); Chieftain Royalty Company v. Enervest Energy Institutional Fund XIII–A, L.P., 888 F.3d 455, 462-63 (10th Cir. 2017) (applying Oklahoma state law to determine method of calculating attorneys' fees in settlement of class action) ("[T]here appears to be a consensus among those circuits that have considered the matter. We have found decisions from five other circuits. When state law governs whether to award attorney fees, all agree that state law also governs how to calculate the amount."). This case also has a strong state law component, and, indeed, may ultimately be based entirely on state law if the Court concludes that ERISA is inapplicable, which is all the more reason to give considerable

[18] Supp. Wistow Dec. ¶ 8, Exhibit 6 (Transcript of Hearing on December 14, 2018) at 16.

weight to Judge Stern's conclusion that "the contingency fee being charged is, in fact, fair, reasonable, and very much a benefit to the receivership estate."

Another reason to adhere to the percentage fee provided in the Receiver Retainer Agreement is that it is indisputable that the Named Plaintiffs and the Settlement Class have fully benefitted from Plaintiffs' Counsel's representation of the Receiver during the Investigative Phase. Indeed, it is impossible to separate the fruits of Plaintiffs' Counsel's labors on behalf of the Receiver from the benefits to be obtained by the Named Plaintiffs and the Class of Plan participants, or to allocate attorney time between Plaintiffs' Counsels' representation of the Receiver and Plaintiffs' Counsels' representation of the Settlement Class.

Thus, it is equally impossible to allocate any portion of the Proposed Settlement to the Settlement Class, to provide the basis upon which to calculate Plaintiffs' Counsel's fee for representing the Settlement Class, separate from the portion of the recovery that should provide the basis to calculate Plaintiffs' Counsel's fee for representing the Receiver. It is for this reason that Plaintiff's Counsel seek an award of attorneys' fees for representing the Settlement Class that is inclusive of Plaintiff's Counsel's fees for representing the Receiver.

It must be emphasized that the genesis and *raison d'etre* of the Complaint is the underfunded status of the Plan and the investigation undertaken on behalf of the Receiver. The Plan is in Receivership. The Receiver seeks recovery solely in his representative capacity, for the ultimate benefit of Plan participants. The Settlement provides that the Net Settlement Amount will be paid into the Plan, in accordance with the orders of the court in the Receivership Proceedings.

As such, the inclusion in this aspect of the case of the Settlement Class as Plaintiffs did not add to the potential recovery or provide any benefit to them in addition to the benefit that they would receive if the Receiver achieved the Proposed Settlement without their participation, since in either event the net recovery will go to fund the Plan. However, that is not to say that the inclusion of the Settlement Class was not helpful to achieving the Settlement. As set forth in the retainer agreements[19] with each of the Named Plaintiffs:

> WSL believes that the Receiver has standing to bring all necessary claims to protect participants and participants' beneficiaries. However, it is expected that there may be issues raised as to whether or not participants and participants' beneficiaries have the standing as to certain claims. To mitigate that potential issue, WSL is proposing to join class action claims along with the claims of the Receiver. You will be one of several persons represented by WSL named with regard to the class action claims.

The Named Plaintiffs and the Class Members were also needed for purposes of transparency, and so that they may participate in the settlement approval process and provide releases in accordance with the terms of the Settlement Agreement, which is essential for Defendant CCF to have 100% certainty that it will not be subject to the claims of Plan participants after they settle with the Receiver.

Finally, the Court may consider that Plaintiffs' Counsel is an experienced but nevertheless small firm, and it was clear from the outset that their undertaking of representing the Receiver and seeking class certification and representation would inevitably require them to decline undertaking other matters that they otherwise would have accepted. Moreover, by agreeing to a contingent fee, Plaintiffs' Counsel relieved the Receiver (and, through the Receiver, the Plan) of the very substantial expense of

[19] Wistow Dec. ¶ 26, Exhibits 12-18 (Retainer Agreements with the Named Plaintiffs) at 3.

legal fees in the event the claims were unsuccessful or the recoveries did not warrant the fees.

C. Plaintiffs' Counsel Should Also Be Awarded Reasonable Costs

In addition to recovery of counsel fees, it is appropriate to award recovery of reasonable costs:

> In its paradigmatic formulation, the common fund doctrine permits the trustee of a fund, or a person preserving or recovering a fund for the benefit of others in addition to himself, **to recover his costs**, including counsel fees, from the fund itself, or alternatively, from the other beneficiaries.

In re Nineteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig., 982 F.2d 603, 606 (1st Cir. 1992) (emphasis supplied). See, e.g., Trombley v. Bank of Am. Corp., No. 08-CV-456-JD, 2013 WL 5153503, at *8 (D.R.I. Sept. 12, 2013) (DiClerico, J.) (awarding both fees and nontaxable costs from common fund in approving settlement of class action).

Plaintiffs have incurred nontaxable costs of $19,924.41 since filing suit.[20] Accordingly this amount should also be awarded.[21] See Fed. R. Civ. P. 23(h) ("In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement.").

[20] Supp. Wistow Dec. ¶ 13. This amount includes the $16,122.50 in costs requested in connection with the prior motion for attorneys' fees filed on November 21, 2018.

[21] To the extent reimbursement of such costs is not awarded in whole or in part in connection with the First Settlement.

III. CONCLUSION

The Court should award Plaintiffs' Counsel attorneys' fees in connection with the Proposed Settlement based upon the retainer agreement approved by the Rhode Island Superior Court in the Receivership Proceeding, of $1,049,850, plus costs of $19,924.41.

Respectfully submitted,

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By their Attorney,

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Dated: January 4, 2019

CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the within document was electronically filed on the 4th day of January, 2019 using the Electronic Case Filing system of the United States District Court and is available for viewing and downloading from the Electronic Case Filing system. The Electronic Case Filing system will automatically generate and send a Notice of Electronic Filing to the following Filing Users or registered users of record:

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