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' AND DEFENDANTS CHARTERCARE COMMUNITY BOARD, ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND, AND ROGER WILLIAMS HOSPITAL'S POST-HEARING MEMORANDUM

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Plaintiffs Stephen Del Sesto (as Receiver and Administrator of the St. Joseph Health Services of Rhode Island Retirement Plan) (the "Receiver"), and Gail J. Major, Nancy Zompa, Ralph Bryden, Dorothy Willner, Caroll Short, Donna Boutelle, and Eugenia Levesque, individually as named plaintiffs ("Named Plaintiffs") and on behalf of all class members[1] as defined herein (the Receiver and the Named Plaintiffs are referred to collectively as "Plaintiffs"), together with Defendants CharterCARE Community Board, St. Joseph Health Services of Rhode Island, and Roger Williams Hospital (such Defendants being the "Settling Defendants") submit this memorandum in response to the Court's request for post-hearing briefing on the issues of (1) whether the Court can or should make a determination of good faith in connection with preliminary approval of the Settlement under Rule 23; and (2) whether the Court should consider converting the existing State Court receivership into a joint state-federal receivership or a solely federal receivership.

I. A finding of "good faith" is a necessary and appropriate finding under Fed. R. Civ. P. 23

A. One of the primary inquiries in approving a class action settlement is determining whether the settlement is in good faith and not collusive

"The fairness analysis is intended primarily to ensure that a 'settlement [is] reached as a result of good-faith bargaining at arm's length, without collusion.'" Berry v. Schulman, 807 F.3d 600, 614 (4th Cir. 2015) (quoting In re Jiffy Lube, 927 F.2d 155, 159 (4th Cir. 1991)). Such evaluation is appropriate at both the final-approval stage and at the preliminary-approval stage:

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

> In considering preliminary approval, courts make a preliminary evaluation of the fairness of the settlement, prior to notice. Where the proposed settlement **appears to be the product of serious, informed, non-collusive negotiations**, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted.

In re Stock Exchanges Options Trading Antitrust Litig., No. 99 CIV.0962(RCC), 2005 WL 1635158, at *5 (S.D.N.Y. July 8, 2005). See also Block v. RBS Citizens, Nat'l Ass'n, Inc., No. 115CV01524JHRJS, 2016 WL 8201853, at *4 (D.N.J. Dec. 12, 2016) ("'Preliminary approval is appropriate where the proposed settlement is the result of the parties' good faith negotiations, there are no obvious deficiencies and the settlement falls within the range of reason.'") (quoting Zimmerman v. Zwicker & Assocs., P.C., No. 09-3905 (RMB/JS), 2011 U.S. Dist. LEXIS 2161, at *7 (D.N.J. Jan. 10, 2011)); In re Checking Account Overdraft Litigation, 275 F.R.D. 654, (S.D. Fla. 2011) ("'Preliminary approval is appropriate where the proposed settlement is the result of the parties' good faith negotiations, there are no obvious deficiencies and the settlement falls within the range of reason.'") (quoting Smith v. Wm. Wrigley Jr. Co., No. 09-60646CIVCOHNSELTZ, 2010 WL 2401149, at *2 (S.D. Fla. June 15, 2010)).

Thus, judicial approvals of class action settlements typically include the express finding that the settlement was reached as a result of good-faith bargaining at arm's length. See, e.g., Love Stone v. Aargon Agency, Inc., No. 0:17-CV-02314 (KMM), 2018 WL 3475526, at *1 (D. Minn. May 15, 2018) ("The Court has conducted a preliminary evaluation of the Settlement as set forth in the Agreement. Based on this preliminary evaluation, the court finds that: (a) the Settlement is fair, reasonable, and adequate, and within the range of possible approval; (b) the Settlement has been negotiated in good faith at arm's length between experienced attorneys familiar with the legal and factual

issues of this case…"); Helde v. Knight Transportation, Inc., No. 2:12-CV-00904-RSL, 2017 WL 4701323, at *1 (W.D. Wash. Oct. 19, 2017) ("The Court finds that the Settlement was entered into in good faith as the result of arm's-length negotiations between experienced attorneys…"); Carver v. Foresight Energy LP, No. 3:16-CV-3013, 2016 WL 9455818, at *1 (C.D. Ill. Oct. 25, 2016) (preliminary settlement approval) ("Pursuant to Rule 23(e), the Court… finds that the Agreement, the Settlement set forth therein and all exhibits attached thereto and to Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement are fair, reasonable, and adequate, entered into in good faith, free of collusion and within the range of possible judicial approval to warrant sending notice of the Litigation and the proposed Settlement to the Settlement Class and to hold a full hearing on the proposed Settlement."); Bezdek v. Vibram USA Inc., No. CV 12-10513-DPW, 2015 WL 13656902, at *3 (D. Mass. Jan. 21, 2015) ("The terms and provisions of the proposed settlement and Settlement Agreement, including all exhibits, have been entered into in good faith and are hereby fully and finally approved as fair, reasonable, and adequate as to, and in the best interests of, each of the Parties and the Class Members. . . .").

Accordingly, pursuant to Fed. R. Civ. P. 23, and regardless of whether R.I. Gen. Laws § 23-17.14-35 is constitutional or preempted by ERISA, the Court should make the determination that the Proposed Settlement was negotiated in good faith at arms-length between experienced attorneys familiar with the legal and factual issues of this case.

Concurrently with the filing of this memorandum, Plaintiffs and the Settling Defendants have submitted a revised proposed order[2] concerning preliminary settlement approval under Fed. R. Civ. P. 23 that states in pertinent part that "[t]he settlement appears to have been entered into in good faith, and at arm's-length by highly experienced and informed counsel." The Prospect Entities agree in their competing proposed order[3] that "[t]he settlement appears to have been entered into at arm's-length by highly experienced and informed counsel," but not to the reference to good faith. However, arm's length negotiation is itself indicative of good faith and the absence of collusion. Saccoccio v. JP Morgan Chase Bank, N.A., 297 F.R.D. 683, 692 (S.D. Fla. 2014) ("There is a presumption of good faith in the negotiation process. Where the parties have negotiated at arm's length, the Court should find that the settlement is not the product of collusion.") (citations omitted). Moreover, Plaintiffs contend that a preliminary finding that the Settlement Agreement is in good faith is a necessary element of preliminary approval under Rule 23, for the reasons stated above.

B. The Settlement is not collusive

In the absence of evidence to the contrary, good faith and the absence of collusion are presumed. See Mees v. Skreened, Ltd., No. 2:14-CV-142, 2016 WL 67521, at *2 (S.D. Ohio Jan. 6, 2016), report and recommendation adopted, No. 2:14-CV-142, 2016 WL 305166 (S.D. Ohio Jan. 26, 2016) ("[T]he courts respect the integrity of counsel and presume the absence of fraud and collusion in negotiating the settlement, unless evidence to the contrary is offered."); In re Prandin Direct Purchaser

[2] Dkt # 108-1 (Plaintiffs' and Settling Defendants' proposed order).

[3] Dkt # 108-2 (Prospect Defendants' and Diocesan Defendants' proposed order).

Antitrust Litig., No. 2:10-CV-12141-AC-DAS, 2015 WL 1396473, at *3 (E.D. Mich. Jan. 20, 2015) ("There is a presumption that settlement negotiations were conducted in good faith and that the resulting agreement was reached without collusion, unless there is evidence to the contrary."); Saccoccio v. JP Morgan Chase Bank, N.A., *supra*, 297 F.R.D. at 692 ("There is a presumption of good faith in the negotiation process. Where the parties have negotiated at arm's length, the Court should find that the settlement is not the product of collusion. ").

Objectors bear the burden of proving collusion. See Gray v. Derderian, No. CA 03-483L, 2009 WL 2997063, at *4 (D.R.I. Aug. 14, 2009), amended, No. CA 03-483L, 2009 WL 2982637 (D.R.I. Sept. 3, 2009) ("Thus, there is a presumption that the settlement has been made in good faith, and the burden is on the challenging party to show that the settlement is infected with collusion or other tortious or wrongful conduct.") (citing Dacotah Mktg. & Research, LLC v. Versatility, Inc., 21 F. Supp. 2d 570, 578 (E.D. Va. 1998)). "The party alleging bad faith must prove this contention by clear and convincing evidence." Dacotah Mktg. & Research, LLC, 21 F. Supp. 2d at 578 n.21. They have not done so.

In attempting to carry their burden of proving collusion, the non-settling Defendants point to several facts that they contend indicate such collusion. None of these facts actually demonstrate anything of the sort.

1. Paragraphs 28 and 30 of the Settlement Agreement do not evince collusion

First, the Prospect Defendants point to paragraph 28 of the Settlement Agreement in which the Settling Defendants acknowledge that they are liable "for breach of contract to the Plaintiffs and, arguably, on at least some of the other claims

Plaintiffs have asserted against the Settling Defendants in the Federal Court Action. . . ." Settlement Agreement ¶ 28.

Second, the Prospect Defendants point to paragraph 30 of the Settlement Agreement, in which the Settling Defendants state that they "contend that their proportionate fault in tort, if any, in causing said damages is small compared to the proportionate fault of the other defendants in the Federal Court Action. . . but acknowledge that, under the law governing joint and several liability, the Settling Defendants could be required to pay the full amount of Plaintiffs' damages regardless of the proportionate fault of the other defendants." Settlement Agreement ¶ 30.

Neither of these provisions evinces any collusion. The first is merely an acknowledgment that Plaintiffs' claims have merit, which they demonstrably do.[4] Moreover, it is not binding on the non-settling Defendants. The second is a mere contention by the Settling Defendants, but it too is not binding on the non-settling Defendants, and is no more inappropriate than the Settling Defendants' denying all liability (which the non-settling Defendants fault them for *not* doing!) or the non-settling Defendants' contention that the First Amended Complaint should be dismissed. There is no prohibition against a settlement agreement's memorializing one of the parties' contentions. Court approval of the Proposed Settlement would not be an adjudication of the merits of these statements, any more than court approval of any settlement in which

[4] Indeed, the Settling Defendants' liability is the first of eight contingencies that must be satisfied before the non-Settling Defendants can bring any constitutional challenge to R.I. Gen. Laws § 23-17.14-35. See Ernst & Young v. Depositors Econ. Prot. Corp., 45 F.3d 530, 538 (1st Cir. 1995) ("In order for E & Y to be harmed by the operation of the statute, these events must come to pass: (1) at least one person, firm, or corporation other than E & Y **must admit fault**, or be found to have been at fault. . . .") (emphasis supplied). Thus, far from such admission injuring the non-settling Defendants, it may assist them in proving that the Settling Defendants are joint tortfeasors, so as to entitle them to a settlement credit if R.I. Gen. Laws § 23-17.14-35 applies, or to contribution if R.I. Gen. Laws § 23-17.14-35 is inapplicable.

a settling defendant denies liability is an adjudication that the settling defendant has no liability.

The Prospect Defendants' objections to these paragraphs are even less coherent in combination than in isolation: they essentially argue that the Settling Defendants both (1) improperly admitted too much liability in paragraph 28; and (2) improperly denied too much liability in paragraph 30. This tremendous inconsistency demonstrates the bootlessness of the objections.

There is also an egregious inconsistency among the objecting Defendants as to which of the two settlements is fairer. The Diocesan Defendants fault the instant settlement for not being more like the second settlement with CharterCARE Foundation. See Dkt # 73 at 13 ("The problems with the Agreement are obvious when compared with the deal that Plaintiffs struck with Chartercare Foundation."). The Prospect Defendants fault the CharterCARE Foundation settlement for not being more like the instant settlement. See Dkt # 81 at 2 ("In its settlement, CCCB is, essentially, liquidating itself and attempting to turn all of its assets (including its 15% interest in Prospect Chartercare) over to the Receiver. Here, CCF will retain half of its assets while handing over the other half to the Receiver.").

In any event, Plaintiffs have submitted a proposed form of order that preserves the non-Settling Defendants' objections to these statements, by expressly stating that "the Court makes no findings and does not accept, endorse or rely upon the above referenced representations made by the parties to the Settlement Agreement." See Dkt # 108-1 (Plaintiffs' and Settling Defendants' Proposed Order) ¶ V 2.

2. The timing of the Settlement does not evince collusion

The Diocesan Defendants contend that collusion is demonstrated by (1) the Diocesan Defendants' baseless innuendo that the Settlement Agreement was negotiated pre-suit but announced months later so as to entitle Plaintiffs' counsel to a higher fee under the fee agreement that had been approved by the Superior Court; and (2) the Diocesan Defendants' mistaken assertion that the benefits of the settlement were predestined to flow into the Plan through no action of Plaintiffs. Neither assertion would render the Proposed Settlement any less fair or reasonable even if it were true, since the amount of Plaintiffs' counsel's fee (not yet even before the Court) is irrelevant to whether the settlement is fair and reasonable, and the possibility that the settlement might have been inevitable would not make it unfair or unreasonable. However, in fact, both assertions are baseless.

As the basis for the first contention, for the first time at oral argument, the Diocesan Defendants purported to read but mischaracterized a portion of a June 5, 2018 letter that the Receiver wrote to Rhode Island's Speaker of the House urging the General Assembly to enact R.I. Gen. Laws § 23-17.14-35. The Diocesan Defendants did not provide a copy of this letter to the Court, because it actually proves the opposite of their contentions. That letter states in relevant part:

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

[Emphasis supplied]

Exhibit 1. Notwithstanding the Receiver's exhortation, the General Assembly did not enact R.I. Gen. Laws § 23-17.14-35 until more than a week after Plaintiffs filed this action.[5] Thus, far from demonstrating that the settlement had been consummated pre-suit, this letter actually demonstrates that settlement discussions could not even be entertained until more than a week after suit was brought.

Not only is that what *would* happen, it is what ultimately *did* happen. See Affidavit of Richard J. Land[6] sworn to on February 15, 2019 ("Land Aff.") (Exhibit 2 hereto), which summarizes what Mr. Land would have told the Court at the February 12, 2019 hearing if inclement weather had not cut the hearing short before he had an opportunity to speak.

As Mr. Land states, the actual settlement negotiations "occurred only after the filing of Complaint"[7] and proceeded from an initial proposed settlement offer that would have "provided the Plan with no benefit,"[8] *i.e.* "to initiate judicial liquidation of the [Settling-Defendant] entities to provide a forum for the Receiver to prove its claim, without any admission of liability or transfer of any assets."[9] Such liquidation was anticipated to "take several years, if not longer, to complete"[10] with no certainty of "how much, if any, funds might be available for the Plan following completion of the wind

[5] This action was filed on June 18, 2018, prior to and to avoid the passing of another anniversary of the June 20, 2014 closing. R.I. Gen. Laws § 23-17.14-35 subsequently became law on June 26, 2018.

[6] One of counsel to Defendants CharterCARE Community Board, St. Joseph Health Services of Rhode Island, and Roger Williams Hospital.

[7] Land Aff. ¶ 2.

[8] Land Aff. ¶ 3.

[9] Land Aff. ¶ 2.

[10] Land Aff. ¶ 6.

down of the heritage hospitals."[11] In contrast, the Settlement negotiated by Plaintiffs' counsel and presented to the Court for approval will (if approved) result in an immediate payment of more than $11,150,000 (as well as the immediate transfer of certain rights and interests from CharterCARE Community Board to the Plaintiffs), all followed by subsequent judicially supervised liquidations to mop up any remaining assets. This large and immediate payment will be the first payment received by the Plan since 2014 when Defendants orphaned the Plan.

Plaintiffs are also receiving Settling Defendant CharterCARE Community Board's membership interests in Prospect CharterCare, LLC and CharterCARE Foundation. Although these rights are disputed by other Defendants, they are potentially valuable. Indeed, as Defendant CharterCARE Foundation has informed the Court, the assignment of CharterCARE Community Board's membership interest in CharterCARE Foundation is of significant value, since that assignment was one of the significant factors in CharterCARE Foundation's decision to reach its separate settlement (of $4.5 million) with Plaintiffs.[12]

Obviously, therefore, the Settlement Agreement has obtained an enormous value for the Plaintiffs and the proposed class. Absent approval of the Settlement, the Settling Defendants "will be compelled to litigate all claims, including denying liability on [t]he basis that the governing Plan documents limit recovery for the plan participants

[11] Land Aff. ¶ 5.

[12] See Dkt # 86 (Defendant Chartercare Foundation's Reply Brief in Further Support of Joint Motion for Preliminary Approval of Settlement Agreement with Respect to Chartercare Foundation) at 8 ("CCF argued that, while CCCB formerly was CCF's sole controlling member, that sole membership interest previously had terminated through wavier and/or abandonment. Accordingly, in the absence of settlement, plaintiffs and CCF faced further litigation with an uncertain outcome as to the enforceability of any rights in CCF that plaintiffs may have acquired through the Heritage Hospital Defendants Settlement Agreement.").

(including plaintiffs) to the Plan Assets."[13] Such litigation would entail "significant litigation expenses that would be incurred in the defense of the litigation"[14] all of which would reduce the amounts available to pay pensions assuming (*arguendo*) Plaintiffs ultimately prevailed against the Settling Defendants (which would not be assured).

In the face of these realities, the Diocesan Defendants offer only reckless misreadings of the Petition for Appointment of a Receiver,[15] the 2015 Cy Pres Petition, and other documents discussed in the First Amended Complaint, which Plaintiffs have addressed in their prior Reply memorandum (Dkt # 82).

The Diocesan Defendants inaccurately claim:

> The 2015 Cy Pres Petition confirms the language in the Receivership Petition that additional assets were destined for the Plan. Specifically, the 2015 Cy Pres Petition indicates that "it was necessary for each of the Heritage Hospitals [SJHSRI and RWH] at the closing [of the transaction with Prospect Medical Holdings] to . . . satisfy outstanding pre and post closing liabilities during their subsequent wind-down period (the "Outstanding Pre and Post Closing Liabilities") as is more fully set forth in the [Asset Purchase Agreement]." Ex. 3 (2015 Cy Pres Pet. and selected exhibit) ¶ 12 & Ex. C. To that end, RWH requested approval to use $12,288,848 to satisfy Outstanding Pre and Post Closing Liabilities "as more fully described in Exhibit C." *Id.* ¶¶ 24 & Ex. C.

Dkt # 73 at 27 (bracketed insertions by the Diocesan Defendants). It is false to suggest that the Asset Purchase Agreement set forth anything of the sort alleged above. The Diocesan Defendants fail to point to anything in the Asset Purchase Agreement actually saying so, because they cannot. In fact, Exhibit C to the *Cy Pres* Petition allocated only

[13] Land Aff. ¶ 7.

[14] Land Aff. ¶ 7.

[15] The Petition for Appointment of a Receiver, filed by Defendant St. Joseph Health Services of Rhode Island, actually stated: "Upon conclusion of such wind-down efforts, the net assets of Petitioner [SJHSRI], RWH and CCCB **may** become available to assist with the Plan." Dkt # 65-1 at 16 (emphasis supplied).

the single $14 million payment which was made in connection with the June 20, 2014 closing, *and nothing thereafter*. See Dkt # 73-3 at 24. The Diocesan Defendants are parroting and doubling down on some of the very misrepresentations for which Plaintiffs brought suit against the Settling Defendants (and for that matter, against Defendant CharterCARE Foundation, whose settlement is separately pending before the Court).

Notwithstanding that not a single penny has been paid into the Plan since the last (inadequate) payment in 2014, the Diocesan Defendants insist that the Settling Defendants were destined to turn over all their assets to the Plan (however small that sum might prove to be, at some indeterminate future time). Even if (*arguendo*) the Settling Defendants had made that commitment absent the Settlement (which they had not), it would simply be another basis for Plaintiffs' existing claim for breach of contract (Count XI).

C. The release of Settling Defendants' post-2014 directors does not evince collusion

The non-Settling Defendants contend that it is collusive for Plaintiffs and the proposed class to give releases to the Settling Defendants' present directors who voted to approve the Settlement but have not contributed any personal assets to the Settlement. See Land Aff. ¶ 9. Such releases are an utterly standard[16] component of

[16] See, e.g., In re Prudential Ins. Co. of Am. Sales Practices Litig., 962 F. Supp. 450 (D.N.J. 1997):

> The Court rejects also Beauvias' objection to the release of claims against Prudential officers, directors, and agents. The need for finality on Prudential's part requires that any settlement include a release also as to individuals. A settlement with Prudential alone would lack finality because if dissatisfied policyholders sued Prudential agents, the agents would likely turn to Prudential for indemnity or contribution.

Id., 962 F. Supp. at 559 (approving class action settlement over class members' objections). Other class action have involved ERISA claims and releases of officers and directors. See In re Beazer Homes USA, Inc. ERISA Litig., No. 1:07-CV-00952-RWS, 2010 WL 11508545, at *3 (N.D. Ga. Nov. 15, 2010)

any settlement. Corporate directors who have potential personal liability or defense costs generally seek indemnification from the corporation. In those instances in which the settling corporation is left with assets after the settlement, the corporation wants a release of its officers and directors to avoid having to indemnify those officers and directors for defense costs and liability to the plaintiffs with whom the corporation is settling, because otherwise the corporation's settlement does not end its exposure. In cases such as this in which the corporation is essentially tendering all its assets in settlement, corporate officers and directors cannot be expected to approve such settlements without requiring releases for themselves, since their rights of indemnification will be worthless after the settlement denudes the corporation of its assets. The affidavit of Richard J. Land attests to the fact that these directors insisted on the releases being exchanged here as a condition for agreeing to a settlement that included the vast proportion of the Settling Defendants' assets, because otherwise they might be exposed to liability for which they would have no meaningful right to indemnification.[17]

(releasing class action claims for breach of ERISA fiduciary duties); Bach v. Amedisys, Inc., No. CV 10-395-BAJ-SCN, 2014 WL 12613399, at *1-2 (M.D. La. July 24, 2014) (releasing class action claims for breach of ERISA fiduciary duties); In re Bimbo Bakeries USA FLSA Actions, No. C 05-00829 JW, 2010 WL 11586521, at *2-3 (N.D. Cal. June 18, 2010) (releasing class action ERISA and FSLA claims). They are also common in other types of class action. See, e.g., In re Anadarko Petroleum Corp. Class Action Litig., No. 4:12-CV-00900, 2014 WL 12599765, at *14 (S.D. Tex. June 12, 2014); In re LIBOR-Based Fin. Instruments Antitrust Litig., 327 F.R.D. 483 (S.D.N.Y. 2018); Cunningham v. Elec. Data Sys. Corp., No. 06-CV-03530-LAP-MHD, 2015 WL 13679069 (S.D.N.Y. June 16, 2015); Larey v. Allstate Prop. & Cas. Ins. Co., No. 4:14-CV-4008, 2018 WL 811103 (W.D. Ark. Feb. 9, 2018); In re Janney Montgomery Scott LLC Fin. Consultant Litig., No. 06-3202, 2009 WL 2137224 (E.D. Pa. July 16, 2009).

[17] Land Aff. ¶ 9.

D. In making this "good faith" determination, it is not necessary to adjudicate the Defendants' premature disputes about the value of other rights or assets being transferred or the releases being given

In evaluating the benefits of the Settlement to the class and determining whether to grant preliminarily approval to the Settlement, the Court need only determine whether the settlement is "within the range of reasonable outcomes." Bezdek v. Vibram USA, Inc., 809 F.3d 78, 83 (1st Cir. 2015) (affirming district court's approval of settlement that lacked a minimum value and ultimately was much less valuable than anticipated). Even as to final settlement approval, "precise value determinations are not required." Halley v. Honeywell Int'l, Inc., 861 F.3d 481, 492 (3d Cir. 2017). Moreover, the fact that the amount of the ultimate recovery from a proposed settlement will depend on uncertain future litigation does not preclude judicial approval. See In re AremisSoft Corp. Securities Litigation, 210 F.R.D. 109, 126 (D.N.J. 2002) (approving class action settlement that included assignment of claims against third parties) ("Furthermore, even though the pecuniary gain the settlement affords the Class is somewhat speculative, the Settlement is fair in light of the attendant risks of litigation.").

This settlement is clearly within the range of reasonable outcomes vis-à-vis recovery from the Settling Defendants, since it transfers substantially all of their assets to the Plan (including an immediate cash payment of at least $11,150,000). The non-settling Defendants' insistence that the Court precisely determine the value of every scrap of consideration being transferred by the Settling Defendants inappropriately attempts to convert the settlement approval process not only into a trial on the merits

but seeks to convert it into a trial on the merits of subsequent enforcement actions[18] that are not presently before the Court (and will likely be for another[19] court to decide).

Plaintiffs have submitted a proposed form of order that preserves the non-Settling Defendants' various disputes for another day concerning CharterCARE Community Board's purported transfer to the Receiver of certain rights in Chartercare Foundation and Prospect Chartercare, LLC, the constitutionality of R.I. Gen. Laws § 23-17.14-35, and whether R.I. Gen. Laws § 23-17.14-35 is preempted by ERISA. See Dkt # 108-1 (proposed order) ¶¶ V 2. & 3.

II. Whether the State Court Receivership should be converted to a Federal Equity Receivership or Joint State/Federal Receivership

The Court can accord complete relief among the parties as the parties are presently constituted, with Attorney Del Sesto acting pursuant to his authority as Receiver appointed by the Superior Court. Nevertheless, Plaintiffs have no objection to the Court converting the state court Receivership into a federal equity receivership and appointing Attorney Del Sesto as Receiver to continue to assert claims on behalf of the Plan, and ratifying all prior actions of the Receiver, and the actions, decisions, and orders of the Superior Court and the Receiver, provided the Defendants agree not to seek further delay and provided the Superior Court relinquishes jurisdiction over the Plan and the Plan assets.

[18] The Prospect Defendants in their surreply acknowledge as much. See Dkt # 101 at 31-32 ("[I]t is exceedingly likely that should the Settlement Agreement be approved in its current form, additional litigation will ensue based not only on the security agreement already granted by CCCB, but any future transfer or exercise of control not in compliance with the provisions of the LLC Agreement.").

[19] For example, the Prospect Defendants have requested permission from the Superior Court to bring a suit against Defendant CharterCARE Community Board in Delaware. See Dkt # 83-1.

Plaintiffs contend that, absent the state court's relinquishing jurisdiction, the Princess Lida doctrine precludes the Court from putting the Plan or the Plan assets into federal receivership. Plaintiffs are also concerned that a joint federal and state receivership in the circumstances of this case is barred by the Princess Lida doctrine and would be unworkable.

A. The Court cannot acquire jurisdiction over the Plan's assets without the Superior Court's first relinquishing jurisdiction

Upon St. Joseph Health Services of Rhode Island's filing of the Petition for Appointment of Receiver in August 2017, the Superior Court appointed the Receiver as its judicial officer to "take control"[20] of the Plan. He has done so. It further "directed" him to "collect and receive the debts, property and other assets and effects" of the Plan.[21] He has done so, bringing the Plan's assets (*inter alia*) into the possession and control of the Superior Court and consequently within its *in rem* jurisdiction. See Philadelphia Indem. Ins. Co. v. Providence Cmty. Action Program, Inc, No. CV 15-388 S, 2017 WL 354279, at *3 (D.R.I. Jan. 24, 2017) (Smith, C.J.) ("When the Rhode Island Superior Court orders a company into receivership, the court and its receiver (as an officer of the court) take possession of the company *in custodia legis*.") (citing Manchester v. Manchester, 94 A.2d 235, 238 (R.I. 1962)) (other citation omitted). Indeed, this lawsuit and the Proposed Settlement are pursuant to that same direction.

[20] St. Joseph Health Services of Rhode Island, Inc. v St. Josephs Health Services of Rhode Island Retirement Plan, No. PC-2017-3856, 2018 WL 6074195, at *1 (R.I. Super. Nov. 14, 2018).

[21] St. Joseph Health Services of Rhode Island, Inc. v St. Josephs Health Services of Rhode Island Retirement Plan, No. PC-2017-3856, 2018 WL 5792151, at *5 (R.I. Super. Oct. 29, 2018).

Because the Plan's assets are within the *in rem* jurisdiction of the Superior Court, this Court cannot exercise *in rem* jurisdiction over them, under "the settled principle that a court cannot exercise jurisdiction over a *res* that is already subject to the *in rem* jurisdiction of another court." United States v. One 1986 Chevrolet Van, 927 F.2d 39, 44 (1st Cir. 1991) (citing inter alia Princess Lida v. Thompson, 305 U.S. 456 (1939)). "According to this rule, the first court to exercise *in rem* jurisdiction over the *res* exercises jurisdiction to the exclusion of a second court that later attempts to proceed against the same *res*." United States v. One 1986 Chevrolet Van, 927 F.2d at 44. See Mattei v. V/O Prodintorg, 321 F.2d 180, 184 (1st Cir. 1963) (dismissing an admiralty suit for replevin of cargo that had been taken into the custody of the Superior Court of Puerto Rico through its court-appointed guardian, because "a federal court may not seize and control the property which is in the possession of the state court").

This prior-exclusive-jurisdiction rule (also known as the Princesss Lida doctrine[22]) applies to ERISA plan funds the same as any other types of *res*. See Dailey v. National Hockey League, 987 F.2d 172, 178-179 (3d Cir. 1993) (concluding that "ERISA does not negate the continuing applicability of *Princess Lida*") (dismissing ERISA suit alleging mismanagement of ERISA pension plan where parallel Canadian suit had been filed first). See also CIGNA Corp. v. Amara, 563 U.S. 421, 442 (2011) (citing Princess Lida in discussing the availability of surcharge as an equitable remedy under ERISA).

[22] In Princess Lida, the Supreme Court considered parallel state and federal lawsuits concerning the handling of a trust. The state court action, in which the trustees' sought to confirm an account of their management, had been filed first, while the subsequent federal action was brought by the beneficiaries to challenge the trustees' management and sought their removal. The Supreme Court concluded that because the state court had first exercised in-rem jurisdiction over the trust res, the federal court lacked jurisdiction and the federal lawsuit must be dismissed. See Princess Lida of Thurn & Taxis v. Thompson, 305 U.S. 456, 467–68 (1939).

As the Dailey case makes clear, the fact that ERISA embodies important federal policies and laws does not exempt ERISA cases from the Princess Lida doctrine. See also Asbestos Workers Local 14 v. Hargrove, No. CIV. A. 93-0728, 1993 WL 183990, at *5 (E.D. Pa. May 25, 1993) (receivership) ("As the earlier discussion of *Dailey* indicated, the Third Circuit dismissed a federal ERISA claim even though the plaintiffs' [ERISA] claims were going to be lost when the case was limited to the Canadian court system under *Princess Lida*. The holding in *Dailey* forecloses the Union's current argument that 'important federal policies and laws' require this Court to exercise its jurisdiction.") (citing Dailey v. National Hockey League, *supra*, 987 F.2d at 176).

A joint state/federal receivership also would appear to conflict with "the settled principle that a court cannot exercise jurisdiction over a *res* that is already subject to the *in rem* jurisdiction of another court." United States v. One 1986 Chevrolet Van, supra, 927 F.2d at 44. It would also have the potential to be completely unworkable, in the event the Court and the state court do not agree on how the Receiver should proceed.

B. The Superior Court can continue to administer the Plan's assets while having instructed the Receiver to pursue this federal litigation

Although this Court presently lacks jurisdiction to appoint a receiver over the Plan, this does not pose a problem inasmuch as it is not necessary—either for the Plan in general or for this litigation in particular—to have a federally appointed receiver. Here the Receiver has affirmatively invoked the jurisdiction of this Court by bringing this action, the State Court has stayed the parallel state court proceeding pending the outcome of this action, and the State Court has expressly authorized and directed the Receiver to seek settlement approval from this Court. Accordingly, the principles of comity and federalism which seek to avoid conflict between state and federal courts,

upon which the Princess Lida doctrine is predicated, are advanced by the Receiver's prosecution of this action.

Plaintiffs have already cited several cases in which state-court appointed receivers have asserted ERISA rights in federal court.[23] It is also clear that the Court can adjudicate ERISA issues notwithstanding that the Plan is under state court receivership. See Koken v. Pension Benefit Guaranty Corp. (PBGC), 383 F. Supp. 2d 712, 719 (E.D. Pa. 2005) (federal court may adjudicate PBGC's claims for liens on entities in state court receivership arising out of entities' responsibility for ERISA plans) ("The *Princess Lida* doctrine does not apply, however, where a court's declaration 'of the existence and amount of a claim against the debtor [and, *a fortiori*, against the assets of a debtor's subsidiaries] in no way disturbs the possession of the liquidation court, in no way affects title to the property, and does not necessarily involve a determination of what priority the claim should have.'") (quoting Gross v. Weingarten, 217 F.3d 208, 221 (4th Cir. 2000)).[24]

[23] See Dkt # 83 (Plaintiffs' Reply Memorandum replying to the Prospect Defendants' objections to this settlement) at 13-14.

[24] Unlike the situation in bankruptcy, in which the bankruptcy court has exclusive jurisdiction over the debtor's estate, see 28 U.S.C. § 1334(e)(1), there is no law giving federal courts exclusive jurisdiction over the assets of a plan governed by ERISA. The only case Plaintiffs have been able to find even suggesting (in *dicta*) that only federal courts can appoint receivers of ERISA plans is utterly distinguishable because it dealt with the appointment of a receiver as an equitable remedy for an ERISA claim over which the federal court had exclusive jurisdiction. See T & M Meat Fair, Inc. v. United Food & Commercial Workers, Local 174, AFL-CIO, 210 F. Supp. 2d 443 (S.D.N.Y. 2002). There, the plaintiffs brought suit in state court, asserting ERISA claims for breach of fiduciary duty, and requested that the state court appoint a receiver as an equitable remedy for such breach. T & M Meat Fair, Inc., 210 F. Supp. 2d at 447. After the defendants removed the suit to federal court, the court denied the plaintiffs' motion to remand, noting federal courts have exclusive jurisdiction over claims for breach of ERISA fiduciary duties and that the statute which controls such claims expressly provides for appropriate equitable relief, and concluded that only a federal court could grant such relief, including appointment of a receiver. T & M Meat Fair, Inc., 210 F. Supp. 2d at 448 n.3. Here, the Receiver's appointment by the Superior Court was at the Plan's fiduciaries' own request, not sought by anyone as a remedy for breach of fiduciary duty.

The Receiver's capacity to sue is determined by state law. Fed. R. Civ. P. 17(b)(3); Wright & Miller, 6A Fed. Prac. & Proc. Civ. § 1567 (3d ed.) ("The capacity of receivers appointed by state courts to sue and be sued in the federal courts is governed by the law of the forum state under Rule 17(b)(3)."). Here the state court expressly empowered the Receiver to bring suit.[25] Accordingly, the Receiver has the same right to bring suit in federal court as any other litigant. His status is also analogous to that of a bankruptcy trustee, who is appointed by the bankruptcy court and subject to its supervision, but who litigates claims on behalf of the estate in other forums or jurisdictions. See, e.g., Samson v. Manlove, No. CV -13-212-M-DLC-JCL, 2014 WL 5017917 (D. Mont. Sept. 30, 2014) (bankruptcy trustee acting as plan fiduciary had standing to pursue ERISA claims in U.S. District Court); In re Murdock Mach. & Eng'g Co. of Utah, 990 F.2d 567, 571 (10th Cir. 1993) (bankruptcy trustee entitled to assert claims before the Armed Services Board of Contract Appeals) ("Thus, when jurisdiction over disputed claims is placed by law in a specialized tribunal, we expect that the litigation over the trustee's claims to recovery will be conducted in that forum."); Haley v. Nakhla, No. 1 CA-CV 13-0123, 2014 WL 457680, at *3 (Ariz. Ct. App. Feb. 4, 2014)

Moreover, the Princess Lida doctrine was not applicable in T & M Meat Fair, Inc., because the act of removal literally "removes" and transfers the case from the state court to the federal court, with the result that there were no parallel state and federal proceedings. See Barr v. Hagan, 322 F. Supp. 2d 1280, 1282 (M.D. Ala. 2004) ("*Princess Lida* is inapplicable 'where only a single case is pending and the removal statutes are used to transfer the case from state to federal court.' *American Lung Assoc. of New Hampshire v. American Lung Assoc.,* 2002 WL 1728255, *3 (D.N.H. 2002). This is because the removal of a case from state to federal court terminates the state court's jurisdiction, unless and until the case is remanded back to state court. *Maseda v. Honda Motor Co.*, 861 F.2d 1248, 1255 n.11 (11th Cir. 1988). Thus, there is no jurisdictional conflict between the state and federal courts, and the *Princess Lida* rule does not apply.").

[25] See Dkt # 65-6 (Order Appointing Permanent Receiver) ¶ 5.

(We presume that permission was granted to pursue the estate's claims in the venue of Trustee's choice.... As a result, the state trial court's exercise of jurisdiction over state law claims brought by the bankruptcy trustee against in-state defendants does not interfere with the jurisdiction of the bankruptcy court.").

C. If the Superior Court relinquishes jurisdiction, Plaintiffs have no objection to the Court converting the Receivership into a federal equity receivership provided the Court ratifies the prior actions of the Receiver and the state court and it does not unduly delay the pending settlements

If the Superior Court relinquishes jurisdiction, and provided it does not unduly delay these proceedings, Plaintiffs have no objection to the Court converting the Receivership into a federal equity receivership, for the purpose of enabling Atty. Stephen Del Sesto as Receiver to continue assert claims on behalf of the Plan, including the claims that have already been asserted in this litigation.[26]

If the Court is inclined to convert the receivership into a federal equity receivership, the Court's federal subject matter jurisdiction would be based upon the allegations in the existing Complaint,[27] which confer federal question jurisdiction notwithstanding that Plaintiffs have alleged state law claims in the alternative that the Plan is not governed by ERISA at all, or was not governed by ERISA when Plaintiffs' state law claims arose.[28]

[26] With the previously referenced provisos that the Court ratify all prior actions of the Receiver, and the actions, decisions, and orders of the Superior Court and the Receiver.

[27] Referring to the First Amended Complaint filed on October 5, 2017.

[28] This point is addressed *in extenso* in Plaintiffs' Omnibus Memorandum in Support of Their Objection to Defendants' Motions to Dismiss (Dk. # 100) at 158-62.

Moreover, the Complaint already asserts claims under ERISA for which appointment of a federal equity receiver is an appropriate remedy. The Complaint includes the request in each of Plaintiffs' claims based upon ERISA (Counts I - III) that the Court award "all relief under 29 U.S.C. § 1132(a), or any other applicable law, that the Court deems proper, and such appropriate relief as the Court may order…."[29] That broad request for relief should encompass appointment of a receiver. Moreover, Counts I & III of the Complaint expressly seek relief under 29 U.S.C. § 1132(a)(3).[30] 29 U.S.C. § 1132(a)(3)(B) authorizes Plaintiffs to bring a civil action to "obtain other appropriate equitable relief." That includes appointment of a receiver. See Schultz v. Stoner, 308 F. Supp. 2d 289 (S.D.N.Y. 2004) ("The provisions of section 502(a)(3), which authorizes "a participant, beneficiary, or fiduciary" to sue "to obtain other appropriate equitable relief (i) to redress ... violations [of ERISA's employee benefit rights provisions] or (ii) to enforce any [such ERISA] provisions or the terms of the plan," encompass the plan-wide relief, such as appointment of an independent fiduciary, that Plaintiffs seek."). Count II of the Complaint seeks relief under 29 U.S.C. § 1132(a)(2) and 29 U.S.C. § 1109.[31] 29 U.S.C. § 1109 also authorizes the remedy of appointment of a receiver. See, e.g., Priddy v. Healthcare Servs. Corp., No. 14-3360, 2016 WL 1122844, at *8–9 (C.D. Ill. Mar. 22, 2016) (denying motion to dismiss count for appointment of a receiver); Marshall v. Snyder, 572 F.2d 894, 901 (2d Cir. 1978) ("The statute does not explicitly provide for the appointment of a receiver. However 29 U.S.C. s 1109(a) provides that any person who is a fiduciary with respect to a plan who

[29] First Amended Complaint ("FAC") at 138, 141, 143.

[30] First Amended Complaint ("FAC") at 136, 142.

[31] First Amended Complaint ("FAC") at 140.

breaches any of the duties imposed upon fiduciaries by the statute not only is personally liable to make good to the plan any losses resulting from the breach, but also is 'subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. . . . The district court plainly had the power to appoint a receiver. . . .'"); Sommers Drug Stores Co. Employee Profit Sharing Tr. v. Corrigan Enterprises, Inc., 793 F.2d 1456, 1463 (5th Cir. 1986) ("'Equitable or remedial' relief generally includes all of the kinds of relief available to restore the plaintiff's losses or protect him from future harm—rescission, removal of the trustee, appointment of a receiver, and other similar relief.") (citations omitted) (construing 29 U.S.C. § 1109(a)).

Thus, appointment of a federal equity receiver is already a remedy available to Plaintiffs based under the existing pleadings.

Respectfully submitted,

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By their Attorney,

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and

Defendants St. Joseph Health Services of Rhode Island, Roger Williams Hospital, and CharterCARE Community Board,
By their Attorney,

/s/ Robert D. Fine

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Dated: February 26, 2019

CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the within document was electronically filed on the 26th day of February, 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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Exhibit 1

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June 5, 2018

Via first class mail, postage pre-paid and electronic mail

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House Majority Leader K. Joseph Shekarchi
RI State House
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Re: **St. Josephs Health Services of Rhode Island Retirement Plan, as amended ("the "Plan")**
An Act Relating to Health And Safety - The Hospital Conversions Act (applies to settlement of St. Joseph Hospital Retirement Plan settlements/joint tortfeasors' releases)
House Bill No. 8166 and Senate Bill No. 2112

Dear Speaker Mattiello, President Ruggerio and Majority Leader Shekarchi:

As you know, I am the Court-appointed Receiver for the Plan and have been charged with the task of investigating and protecting this Plan for the approximately 2,700 dedicated former employees of St. Joseph's and Fatima Hospitals. As you also know, the failure of this Plan has left those 2,700 shocked, confused, angry and fearful for their financial future. Having said that, I, on behalf of myself and on behalf of the 2,700 citizens who have been devastated by this circumstance, want to extend my sincere thanks and appreciation to each of you for sponsoring the St. Joseph's joint tortfeasor legislation and thank the other dedicated members of your respective chambers for their support of this legislation.

I cannot express how critical the quick passage of this legislation is to my and Special Counsel's, Attorney Max Wistow, ability to obtain the best possible recovery for the Plan for the benefit of the 2,700 vested participants. As I have recently reported to the Court, we expect to initiate actions against the various parties that we believe are responsible for the failure of the Plan at some point

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

I understand that the close of this year's session is likely to happen later this month and, as such, this time of year is an extremely busy and active period at the State House. However, for the obvious reasons and the reasons stated above it is critical that this legislation be passed by both chambers as soon as possible and, hopefully, before June 15, 2018. I again thank you for your dedicated service and willingness to assist the efforts to protect and possibly save this Plan. Most importantly for the participants of the Plan, I thank you for your prompt attention to the passage of this legislation through both chambers prior to June 15th.

Of course, I will make myself available at any time should you or any member of your respective chambers have any questions or concerns.

Sincerely,

Stephen F. Del Sesto, Esq.
Court Receiver for St. Josephs Health Services
of Rhode Island Retirement Plan

cc: St. Josephs Health Services of Rhode Island Retirement Plan Participants (*via posting on the Receiver's dedicated website*)

Exhibit 2

AFFIDAVIT OF RICHARD J. LAND

I, Richard J. Land, on oath depose and state:

1. I am the attorney for CharterCare Community Board ("CCB"), St. Joseph Health Services of Rhode Island ("SJHSRI") and Roger Williams Hospital ("RWH") (CCB, SJHSRI and RWH are hereinafter referred to collectively as the "Heritage Hospitals") and in that capacity participated, along with Robert D. Fine of my office, in the negotiation of the Settlement Agreement (the "Settlement Agreement") among the Heritage Hospitals and the Receiver of the St. Joseph Health Services of Rhode Island Pension Plan, et al. (the "Receiver") and his Special Counsel.
2. The Settlement Agreement resulted from contested and often-times heated negotiations between the Heritage Hospitals and the Receiver and his Special Counsel which occurred only after the filing of the Complaint in this matter. While the Heritage Hospitals had expressed a willingness to discuss settlement, at the time the Complaint was filed, the Heritage Hospitals were only prepared to initiate judicial liquidation of the entities to provide a forum for the Receiver to prove its claim, without any admission of liability or transfer of any assets.
3. The Heritage Hospitals' initial proposal to the Receiver and his Special Counsel after the Complaint was filed was rejected and the Receiver asserted that the proposed offer provided the Plan with no benefit. Settlement negotiations continued over a period of months.
4. Based upon the "Church Plan" status of the St. Joseph Health Services of Rhode Island Pension Plan (the "Plan") and the governing Plan documents, SJHSRI did not believe it had an obligation to make contributions to the Plan, nor did SJHSRI have available assets to fund the Plan.
5. At the time of filing of the Petition to Appoint Receiver, the Heritage Hospitals were not certain of how much, if any, funds might be available for the Plan following completion of the wind down of the Heritage Hospitals.

6. At the time of the filing of the Petition to Appoint Receiver, the Heritage Hospitals anticipated that the wind down of the Heritage Hospitals could take several years, if not longer, to complete.
7. If the Settlement Agreement is not approved, the Heritage Hospitals will be compelled to litigate all claims, including denying liability on he basis that the governing Plan documents limit recovery for the plan participants (including plaintiffs) to the Plan assets.
8. The Settlement Agreement is intended by the Heritage Hospitals and the plaintiffs to try to avoid significant litigation expenses that would be incurred in the defense of the litigation, including defense costs to be incurred by the Heritage Hospitals as well as defense and indemnification claims that would be asserted by other potential defendants, and also is structured to give the Heritage Hospitals and other "Releasees" as defined in the Joint Tortfeasor Releases, the benefit of Rhode Island statutes protecting joint tortfeasors from claims of contribution.
9. Those Directors of the Heritage Hospitals, who were required to approve the Settlement Agreement and who voted, insisted that the releases contained in the Settlement Agreement were a required component as the payment of the vast majority of the assets of the Heritage Hospitals, absent such releases, would expose the directors and others to potential liability for which they would seek indemnification from the Heritage Hospitals.
10. The Heritage Hospitals did not and do not warrant that the purported transfer of assets in the Settlement Agreement were or would be valid and enforceable, and merely transfer their respective interests in the assets subject to any other parties' rights and defenses with respect thereto.

Richard J. Land

Subscribed and sworn to before me this 15th of February, 2019.

Notary Public
My Commission expires:
7/1/21