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' REPLY TO THE DIOCESAN DEFENDANTS' POST-HEARING MEMORANDUM IN OPPOSITION TO SETTLEMENT MOTION

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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")[2] submit this memorandum in reply to post-hearing memorandum filed by the Roman Catholic Bishop of Providence, Diocesan Administration Corporation, and Diocesan Service Corporation (the "Diocesan Defendants").

I. The Settling Parties' Proposed Order Properly Preserves the Non-Settling Defendants' Rights, and the Non-Settling Defendants Can Have No Legitimate Objections to Its Entry

During the February 12, 2019 hearing, the Court expressed its inclination to enter an order preliminarily approving the Proposed Settlement and finding it had been entered into in good faith, so long as the order preserved the Settling Defendants' other objections—*e.g.* that there has been a breach of the Prospect Chartercare LLC Agreement, or that Rhode Island's amendment of its joint tortfeasor statutes last year was unconstitutional and/or preempted. Dkt # 115-1 (hearing transcript) at 108:22–109:2. The colloquy between the Court and Plaintiffs' counsel then stated:

> THE COURT: Let me just try to say one more time so that I'm really clear on what I'm looking for. If you want me to make a finding of good faith in addition to findings under Rule 23, then I think it's important that whatever is said in the order clearly preserves to the non-settling defendants

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

[2] Plaintiffs together with Defendants CharterCARE Community Board, St. Joseph Health Services of Rhode Island, and Roger Williams Hospital are the "Settling Defendants".

> whatever rights they think that they have and that this process, this settlement that you have with the settling defendants, does not in any way impede them or obstruct them with the exercise of those rights, whether it's regarding the Hospital Conversions Act in ownership or whether it's the assertion of claims they may have against fiduciaries or if it's their claim that the special statute is either unconstitutional and unenforceable.
>
> MR. WISTOW: Absolutely.
>
> THE COURT: All of their claims should be fully preserved. And if you can do that, then it seems to me I can say that your settlement with the settling defendants is in good faith and not collusive because it doesn't attempt to prejudice them in any way. That's sort of a compromise position. I hope I made myself perfectly clear.
>
> MR. WISTOW: Also with one exception. Of course it's going to compromise them potentially. It's got to wrongfully compromise them.
>
> THE COURT: Well, it may compromise them in the sense of their ability to seek contribution later on, but their right to assert that it does not have to be –
>
> * * *
>
> THE COURT: Well, it can be binding on the parties and it can be a finding that they operated in good faith and as long as it doesn't compromise their rights.
>
> MR. SHEEHAN: As all their other rights, absolutely, your Honor.
>
> THE COURT: Then I don't really have a problem saying it was in good faith, and I don't think that they would either.

Dkt # 115-1 (hearing transcript) at 110:23–112:11.

The proposed order that the Settling Parties have presented expressly preserves all of the non-settling Defendants' rights to litigate these various other issues going forward, and it does so in the context of making all appropriate findings under Fed. R. Civ. P. 23(e). The Settling Parties' proposed order states in relevant part:

V. Preservation of Rights of Non-Settling Parties.

1. The Court notes that the non-settling defendants, Prospect Medical Holdings, Inc., Prospect East Holdings, Inc., Prospect Chartercare, LLC, Prospect Chartercare SJHSRI, LLC, and Prospect Chartercare RWMC, LLC (collectively, "Prospect Defendants") and Roman Catholic Bishop of Providence, Diocesan Administration Corporation and Diocesan Service Corporation (collectively, the "Diocesan Defendants"), have objected to the Settlement Agreement primarily on the following grounds:

a. That certain provisions of the Settlement Agreement allegedly evidence collusion. Specifically, the non-settling Defendants point to paragraphs 28 & 30 in which the Settling Defendants admit to liability and damages of $125,000,000; and state that their proportionate fault is small compared to the non-settling Defendants;

b. That certain provisions in the Settlement Agreement (including, paragraphs 17-19, 24, and 29) are allegedly in violation of the Amended & Restated Limited Liability Company Agreement of Prospect Chartercare, LLC; and that certain of those provisions allegedly implicate the Rhode Island Hospital Conversions Act, the Health Care Facility Licensing Act of Rhode Island and/or Health Care Facility Licensing Act of Rhode Island.

c. That because state law may be pre-empted by ERISA and/or unconstitutional, the Settlement Agreement allegedly improperly seeks to apply limitations on the rights of contribution by the non-settling parties as provided by R.I. Gen. Laws § 23-17.14-35.

2. In granting preliminary approval of the Settlement Agreement, 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. In addition, the Court expressly declines to rule at this time on the merits of non-Settling Defendants' objections to the applicability, constitutionality or validity of R.I. Gen. Laws § 23-17.14-35.

3. Accordingly, preliminary approval of the Settlement Agreement is without prejudice to any rights of the non-Settling Defendants to assert claims against any party or non-party and/or to assert in this proceeding or in a subsequent proceedings, including without limitation, that (a) there has been a breach of the Prospect Chartercare LLC Agreement, (b) that certain provisions of the Settlement Agreement implicate the Rhode Island

> Hospital Conversions Act, the Health Care Facility Licensing Act of Rhode Island and/or Health Care Facility Licensing Act of Rhode Island, and (c) that R.I. Gen. Laws § 23-17.14-35 is unconstitutional, or is preempted by ERISA.

Dkt # 108-1 (Settling Parties' Proposed Order) at 5-6.

The Diocesan Defendants object to the Court's making *any finding of good faith*, notwithstanding all these caveats and carve-outs.[3] In their memorandum, however, they muddy the waters by asserting that "good faith" has a different meaning under Rule 23(e) than it does under R.I. Gen. Laws § 23-17.14-35, and they accuse the Settling Defendants [sic] of "improperly conflat[ing]" "good faith" in "the context of Rule 23(e)" with "a 'good faith' finding pursuant to R.I. Gen. Laws § 23-17.14-35." Diocesan Post-Hearing Memo. at 9. However, "good faith" means "good faith," and has the same meaning for purposes of Rule 23(e) as it does for R.I. Gen. Laws § 23-17.14-35.

Moreover, even if the term had a different meaning under R.I. Gen. Laws § 23-17.14-35, the interests of party and judicial economy make it advisable for the Court in granting preliminary settlement approval to also at least preliminarily ascertain that the settlement is a good faith settlement under R.I. Gen. Laws § 23-17.14-35, as well as fair and reasonable (including made in good faith) under Rule 23(e), because the settlement agreement will become void unless such *both* findings are made in connection with final settlement approval. The Settlement Agreement is absolutely clear that judicial approval of the settlement *both* "as fair, reasonable, and adequate" *and* "as a good faith settlement under R.I. Gen. Laws § 23-17.14-35" must occur for the settlement to be

[3] See Dkt # 108-2 (non-Settling Defendants' proposed order) § V-2 ("In addition, the Court expressly declines to rule at this time on the merits of non-Settling Defendants' objections to the applicability, constitutionality or validity of R.I. Gen. Laws § 23-17.14-35, including, whether or not the Settlement Agreement is in good faith and free of collusion.").

binding, and for the Settling Defendants to be obligated to make any payment.[4] Since both findings are *sine qua nons* of the settlement, it is only prudent and entirely appropriate for the Court to make both determinations at least preliminarily, before taking steps that would be wasteful exercises in futility if such findings cannot be made, such as ordering that notice be sent to the class, scheduling briefing for the final approval hearing, and the rest.

Plaintiffs anticipate that the non-settling Defendants will contend that it is somehow improper for the Court to make that finding of good faith under R.I. Gen. Laws § 23-17.14-35 without having first determined whether R.I. Gen. Laws § 23-17.14-35 is constitutional or preempted by ERISA. The reason why it is appropriate to make that finding, and to refrain from addressing those other issues, is that the question of whether the proposed settlement qualifies as a good faith settlement under R.I. Gen. Laws § 23-17.14-35 is ripe for determination, whereas the other issues are not. It is ripe because the Settling Defendants have made that finding a condition of the settlement. If the Settlement Agreement were also conditioned upon a judicial determination that R.I. Gen. Laws § 23-17.14-35 is constitutional and not preempted by ERISA, those issues also would be ripe. Instead, the Settling Defendants were willing to consummate their settlement without judicial resolution of those issues. However, the Settling Defendants were not willing to consummate their settlement without a judicial

[4] Dkt. # 63.2 (Settlement Agreement) ¶ 1(m) (defining "Effective Date" as "the date upon which the Order Granting Final Approval is entered"); ¶ 1(x) (stating that "Order Granting Final Settlement Approval means the order approving the Settlement 1) as fair, reasonable, and adequate, 2) **as a good faith settlement under R.I. Gen. Laws § 23-17.14-35,** 3) awarding attorneys' fees to Plaintiffs' Counsel, and 4) such other and further relief as the Court may direct.")) (emphasis added); and ¶ 35 ("If the Order Granting Final Settlement Approval is not entered for any reason, this Settlement Agreement will be null and void and the Settling Parties will return to their respective positions as if this Settlement Agreement had never been negotiated, drafted, or executed.").

determination that the proposed settlement qualifies as a good faith settlement under R.I. Gen. Laws § 23-17.14-35.

Thus, the Settling Parties have an immediate concrete interest in having the settlement be approved. Although Plaintiffs do not agree, the non-settling Defendants allege they also have an immediate concrete interest in having the settlement rejected. Accordingly, all of the parties have an immediate concrete interest in the issue of good faith being determined, and that issue is ripe for determination. As a result, there is a real dispute between the parties, and the Court's determination of whether the settlement qualifies as a good faith settlement under R.I. Gen. Laws § 23-17.14-35 would not be an advisory opinion.

However, none of the parties (including the non-settling Defendants) have an immediate concrete interest as to whether R.I. Gen. Laws § 23-17.14-35 is constitutional or preempted by ERISA, such that resolution of those issues would be an advisory opinion. This lawsuit may proceed without those issues ever becoming ripe, such as if the non-settling Defendants ultimately settle, or prevail pre-trial or at trial. However, the lawsuit cannot proceed without the parties knowing if Plaintiffs have a binding settlement with the Settling Defendants.

The Diocesan Defendants also argue that it is improper to "leave the non-settling defendants' contribution and judgment reduction rights unclear" when approving a class settlement. Diocesan Defendants' Memo. at 2 (citing In re Jiffy Lube Sec. Litig., 927 F.2d 155 (4th Cir. 1991)). However, whenever a plaintiff settles with some defendants but not others, the remaining defendants always have a great deal of uncertainty concerning their "contribution and judgment reduction rights," but that does not constitute a concrete legal injury that entitles them to block a settlement or to a judicial

determination concerning the effect of the proposed settlement on such rights. See especially Ernst & Young v. Depositors Econ. Prot. Corp., 45 F.3d 530, 538 (1st Cir. 1995) (Selya, J.) (holding that defendants who had not yet been found liable were not entitled a judicial determination concerning the constitutionality of Rhode Island's DEPCO settlement statute, R.I. Gen. Laws § 42-116-40 because of the long chain of contingencies that would need to be satisfied before any of them could suffer a concrete legal injury under that settlement statute). Although the list of contingencies in Ernst & Young concerned contribution rights under a settlement statute similar to R.I. Gen. Laws § 23-17.14-35, virtually the same list would apply to contribution rights under Rhode Island Uniform Joint Tortfeasors Act, R. I. Gen. Laws § 10-6-1, et seq., and to the determination of the non-settling Defendants rights of setoff under either statutory framework.

Indeed, if the releases applicable to the Proposed Settlement had been given pursuant to R. I. Gen. Laws § 10-6-1, et seq. (instead of pursuant to R.I. Gen. Laws § 23-17.14-35), the non-settling Defendants would have had even less "clarity" concerning their "judgment reduction rights," because then the setoff to which they would be entitled would consist of the "greater of" the amount paid in settlement or the Settling Defendants' *pro rata* fault. The latter could only be determined through special jury findings at the conclusion of trial. In contrast, under R.I. Gen. Laws § 23-17.14-35, the amount of their setoff would be known as soon as the amount of the settlement was known. In other words, R.I. Gen. Laws § 23-17.14-35 provides *more* "clarity" and certainty than would be the case in the normal joint tortfeasor settlement.

The Jiffy Lube case upon which the Diocesan Defendants rely is also completely distinguishable on several grounds. First, that is a securities case in which the court, in

connection with a partial settlement, imposed a settlement bar order prohibiting contribution claims by a non-settling defendant against the settling defendant. In such cases, the court was obligated to fashion an order that ensured that the non-settling defendant "was fairly compensated for yielding its right to seek contribution." In re Jiffy Lube Sec. Litig., 927 F.2d 155, 165 (4th Cir. 1991). The Court in the case *sub judice* is not being asked to fashion a settlement bar order.

Second, and most importantly, the Fourth Circuit in that case held that the *class plaintiffs* were injured by leaving the non-settling defendants' rights of contribution and setoff uncertain. See In re Jiffy Lube Sec. Litig., 927 F.2d 155, 161 (4th Cir. 1991) ("As to plaintiffs, it is clear that the method of setoff chosen affects the desirability of a proposed partial settlement."). There is no such uncertainty in the case *sub judice* concerning the non-settling defendants' right of setoff against the Plaintiffs.[5] To the contrary, it is clear that the non-settling Defendants have no right of setoff based upon proportionate fault. They will not be entitled to a *pro rata* credit if R.I. Gen. Laws § 23-17.14-35 applies because the statute provides only for *pro tanto* reduction. The Defendants also will not be entitled to a *pro rata* credit if R.I. Gen. Laws § 23-17.14-35

[5] If R.I. Gen. Laws § 23-17.14-35 applies, then at most the non-settling defendants will be entitled to a right of setoff in the amount of the settlement. If R.I. Gen. Laws § 23-17.14-35 is preempted, the only possible setoff against the non-settling defendants' judgment liability to Plaintiffs would be under the federal common law of setoff which in most instances prohibits plaintiffs from obtaining a double recovery. But see Brown v. Health Care and Retirement Corp. of America, 25 F.3d 90 (2d Cir. 1994) (holding that the federal common law right of setoff, which prohibits double recoveries, does not apply to ERISA cases involving an employer's failure to make contributions to a plan) ("[W]e decline HCRC's invitation to recognize a separate right to setoff under federal common law in addition to the rights provided employers under ERISA.").

is unconstitutional or preempted. No such right exists under state law given the terms of the releases that Plaintiffs are providing in connection with the settlement.[6]

If R.I. Gen. Laws § 23-17.14-35 does not apply for any reason, the Diocesan Defendants can seek contribution from the Settling Defendants. [7] However, it is one thing to find (as the Second Circuit has) that there is an implied right of contribution *between defendants* in an ERISA case. It is quite another to hold that ERISA allows an implied right for a liable defendant to reduce an ERISA plaintiff's judgment based upon the *pro rata* fault of another defendant. To the contrary, ERISA plaintiffs are entitled to collect their entire judgment from any defendant. See McDonald v. Centra, 118 B.R. 903, 914 (D. Mary. 1990) (ERISA case) ("Under the principles of joint and several liability, the Fund can sue one or more of the defendants and can collect the entire judgment from one or more of them.").

In any event, these issues are preserved in the proposed order granting preliminary settlement approval, for resolution if and when they become ripe, after the

[6] The releases Plaintiffs are giving do not agree to a *pro rata* reduction of their claims against the non-settling Defendants, as would be required for the non-settling defendants to be entitled to a *pro rata* reduction. See Shepardson v. Consolidated Medical Equipment, Inc., 714 A.2d 1181,1183-1184 (R.I. 1998)("Simply stated, amounts paid by settling defendants are credited to the verdict amount returned against the remaining defendants, or the award of the jury is reduced by the proportion of reduction provided by the release, whichever is greater.").

[7] Although the Diocesan Defendants claim that ERISA [permits contribution claims, they rely on Second Circuit precedents, whereas three district courts in the First Circuit have expressly held that there are no contribution rights under ERISA. See Plaintiffs' Memorandum in Reply to the Prospect Entities' Objection to the Joint Motion for Settlement Approval (Dkt # 83) at 55-56 (citing Charters v. John Hancock Life Ins. Co., 583 F. Supp. 2d 189,195 (D. Mass. 2008) ("Holding that ERISA does not permit claims for contribution and indemnification is consistent with Supreme Court and First Circuit precedent, both of which caution against finding implied remedies under the statute.") (citing Great–West Life & Annuity Insurance Co. v. Knudson, 534 U.S. 204, 209 (2002) and State St. Bank & Trust Co. v. Denman Tire Corp., 240 F.3d 83, 89 (1st Cir. 2001)); Anthony v. JetDirect Aviation, Inc., 725 F. Supp. 2d 249, 255 (D. Mass. 2010) ("Although both positions have merits, this court agrees with Judge Gorton's conclusion in *Charters*, buttressed as it is by the authoritative dicta in *Knudson*."); Perez-Perez v. Int'l Shipping Agency, Inc., No. CIV. 05-2083 (FAB), 2008 WL 1776405, at *4 (D.P.R. Feb. 7, 2008) ("ERISA did not create a right of contribution for insurer against company that performed administrative and investment services for insurance trust, another fiduciary.").

occurrence of all of the contingencies upon which their ripeness depends, as discussed in Ernst & Young v. Depositors Econ. Prot. Corp., supra, 45 F.3d at 538.

The burden remains on any objecting Defendants to prove any 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 (and are not entitled to discovery to do so). There is therefore no proper reason to decline to enter the Settling Parties' proposed order.

II. The Diocesan Defendants' Other Filibustering

The Diocesan Defendants unfairly accuse the settling parties' submission of exceeding the scope of the Court's request for post-hearing briefing. Diocesan Defendants' Memo. at 1-2. Not so. The Court properly left the exact issues to be addressed open at the end of the February 12, 2019 hearing. See Dkt # 115-1 (hearing transcript) at 112:25-113:1 ("THE COURT: Okay. Well, we'll see what comes in and then I'll try to figure it out then. Okay. We'll be in recess.").

A. The June 5, 2018 Letter to Legislative Leaders

The Diocesan Defendants for the first time at the hearing raised and misquoted a June 5, 2018 letter sent by the Receiver to leaders of the Rhode Island General

Assembly. See Dkt # 115-1 (hearing transcript) at 89:1 – 90:5. The Diocesan Defendants insinuated at the hearing that the letter indicated settlement discussions had occurred pre-suit—a fact that would be unremarkable if true but, as it turns out, is false. Plaintiffs and the Settling Defendants submitted a copy[8] of that letter with their post-hearing memorandum. The letter actually stated: "we cannot entertain those discussions [with potential defendants] until this legislation is in place," which did not occur until after this lawsuit was brought.

The Diocesan Defendants respond not just by moving the goalposts but by carrying a table onto the football field and inviting the Court to play ping pong. *Now*, they contend, the question is whether "Plaintiffs had an opportunity to negotiate a settlement prior to filing this lawsuit, but offered no evidence that they made any attempt to do so." Diocesan Defendants' Memo. (Dkt # 115) at 4. The Diocesan Defendants do not tie that new inquiry in any way to the actual issues of settlement fairness and good faith that are properly before the Court.

B. The Land Affidavit

In any event, the Land Affidavit establishes that pre-suit settlement negotiations with the Settling Defendants would have been fruitless, because even for weeks afterwards, the Settling Defendants were still unwilling to make any settlement offer that would have benefited the Retirement Plan. See Dkt # 109-2 (Land Affidavit) ¶¶ 2-3 (quoted below).

[8] Dkt # 109-1.

The Diocesan Defendants pretend that the affidavit does not state whether the Settling Defendants "had expressed a willingness" to settle. Diocesan Defendants' Memo. (Dkt # 115) at 5. That issue is still irrelevant for the reasons previously briefed. In any event, the affidavit in fact does state so. See Dkt # 109-2 (Land Aff.) ¶ 2 ("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 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."). Plaintiffs rejected settlement on those terms.

The Diocesan Defendants also persist in contending that the extent of pre-suit settlement negotiations (*vel non*) is somehow relevant to "the good faith and fairness of the settlement to the class and the non-settling parties." Diocesan Defendant's Memo. at 5. It is not. As the Court recognized at the hearing, the extent of Plaintiffs' and the Settling Defendants' settlement negotiations is relevant, at most, to the fairness of Plaintiffs' counsel's fee application, a subject which the Diocesan Defendants (as non-settling and non-paying Defendants) lack standing to contest and which is not presently before the Court. See Fed. R. Civ. P. 23(h)(2) ("A class member, or a party from whom payment is sought, may object to the [fees] motion.").

The Diocesan Defendants also add the following bit of baseless irrelevance:

> The affidavit concedes that SJHSRI did not "have available assets to fund the Plan," PH Brief, Ex. 2 ¶ 4, yet goes on to declare that the directors who voted "insisted" on releases of any claims *against them* as a condition of the settlement. *Id.* ¶ 9. This is tantamount to an admission that actors with fiduciary and ethical obligations to SJHSRI, RWH, and CCCB—or more accurately, the creditors of SJHSRI, RWH, and CCCB given the insolvency of those entities—held up a settlement to further their own individual self-interest.

Diocesan Defendants' Memo. at 5-6.

The factual premise for the Diocesan Defendants' above-quoted accusation is untrue. The Settling Defendants' directors obtained the opinion of independent counsel before agreeing to the settlement.[9] The insolvency of the Settling Defendants will come into play only if the settlement is approved (insofar as it contains a concession of liability and requires the Settling Defendants to pay substantially all their assets into the Plan). Absent settlement approval, that concession and those payments will evaporate,[10] and the Settling Defendants will resume disputing liability and refusing to pay anything. See Land Aff. (Dkt # 109-2) ¶ 7 ("If the Settlement Agreement is not approved, the Heritage Hospitals 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 (including plaintiffs) to the Plan assets.").

The Diocesan Defendants' accusation is also legally irrelevant. There is certainly no basis for expanding the scope of the Court's inquiry to include determining whether the Settling Defendants' proposed settlement is somehow unfair *to the Settling Defendants* themselves.[11]

[9] See Dkt # 119 (Settling Defendants' Reply Memorandum) at 3 (identifying Edward Feldstein, Esq.).

[10] See Settlement Agreement (Dkt # 63-2) ¶ 35 ("If the Order Granting Final Settlement Approval is not entered for any reason, this Settlement Agreement will be **null and void** and the Settling Parties will return to their respective positions as if this Settlement Agreement had never been negotiated, drafted, or executed.") (emphasis supplied).

[11] Even if they were insolvent before the settlement, the Settling Defendants would have owed no duty to allocate their assets among all their creditors. See Faiella v. Tortolani, 72 A.2d 434, 437 (R.I. 1950) ("[A]t common law a debtor had the right to prefer one creditor over another."); Elliott v. Benedict, 13 R.I. 463, 466 (1881) ("At common law it is no fraud for a debtor to pay in full any debt which he owes, out of any property which he has, whether attachable or not, though the result, and even the purposed result, of the payment may be that other debts will have to go unpaid.").

C. The Diocesan Defendants' arguments about the 2014 Asset Purchase Agreement and the 2015 *Cy Pres* Petition

In casually accusing the Settling Parties and their counsel of collusion, the Diocesan Defendants *again* repeat and adopt the 2015 *Cy Pres* Petition's misrepresentation that the Asset Purchase Agreement "more fully set forth" the Settling Defendants' obligation to pay any funds into the Plan. Diocesan Defendants' Memo. at 7. The Asset Purchase Agreement still does no such thing. The Asset Purchase Agreement attempted to prevent any transfer of liability for the Plan to the Prospect Defendants; it purported to leave all obligations concerning the Plan to the Settling Defendants, without specifying what those obligations were. It was completely silent about whether the Plan would be funded in the future.

Having been previously called to task for repeating this misrepresentation to the Court, the Diocesan Defendants still cannot point to anything in the Asset Purchase Agreement supporting it. Instead, they quote the 2015 *Cy Pres* Petition and their own prior submission, as though either were accurate or truthful.

The Diocesan Defendants also falsely assert that the 2015 *Cy Pres* Petition "sought permission to use these funds to pay post-closing liabilities as defined by the Asset Purchase Agreement, including liabilities relating to the Plan." Diocesan Defendants' Memo. at 8. The 2015 *Cy Pres* Petition sought permission to use funds to pay post-closing liabilities *as defined by the 2015 Cy Pres Petition*, which only allocated $14 million to the Plan (which was paid in 2014). See the Settling Parties' post-hearing memorandum (Dkt # 109) at 11-12 (quoting the 2015 *Cy Pres* Petition and citing Exhibit C thereto).

D. The Court should make a finding of good faith under Rule 23(e)

For the reasons discussed in the Settling Parties' post-hearing memorandum (Dkt # 109) and in reply to the Prospect Defendants' post-hearing memorandum, the Court should can and should make a finding of good faith under Fed. R. Civ. P. 23(e) in connection with preliminary and final settlement approval.

The Diocesan Defendants contend that the Settling Parties are estopped from arguing that a finding of "good faith" is appropriate under Fed. R. Civ. P. 23(e), because (the Diocesan Defendants contend) "Plaintiffs' counsel took the exact opposite position at oral argument and it was not developed timely." Diocesan Defendants' Memo. at 8-9. Both contentions are incorrect.

First, the excerpt of the hearing transcript that the Diocesan Defendants selectively quote, when read in its more complete context, was directed towards the statutory finding under R.I. Gen. Laws § 23-17.14-35. While Rule 23 does not incorporate this Rhode Island statute, Rule 23 does separately permit—and indeed require—the Court to inquire into the good faith of any class action settlements presented to it for approval. Both the proposed order that the Settling Parties submitted to the Court with their initial settlement papers last November,[12] and the revised

[12] See Dkt # 63-2 (Settlement Agreement) at 57-62; id. ¶ 3 ("The Court has conducted a preliminary evaluation of the Settlement as set forth in the Settlement Agreement for fairness, adequacy, and reasonableness. Based on this evaluation, the Court finds there is cause to believe that: (i) the Settlement Agreement is fair, reasonable, and adequate, and within the range of possible approval; (ii) the Settlement Agreement has been negotiated in good faith at arms-length between experienced attorneys familiar with the legal and factual issues of this case; and (iii) with respect to the forms of notice of the material terms of the Settlement Agreement to Settlement Class Members for their consideration and reaction, that notice is appropriate and warranted. Therefore, the Court grants preliminary approval of the Settlement.").

proposed order the Settling Parties submitted after the hearing,[13] omit any reference to R.I. Gen. Laws § 23-17.14-35 and instead makes such findings under Rule 23.

Second, the Court ordered the parties to address these issues and develop them further in written submissions, and so the Settling Parties have done so. The Diocesan Defendants' contention that the Settling Parties' argument is somehow waived, by virtue of having been more thoroughly developed in their post-hearing memorandum than at oral argument, is simply a quarrel with the Court's order and the very notion of post-hearing briefing.

III. The Possible Federal Receivership

If the Court does establish a federal receivership—assuming the Superior Court first relinquishes jurisdiction—then the Court should ratify all prior acts taken by the Receiver. Not doing so would defeat the purpose of transferring the Receivership from the Superior Court to the U.S. District Court, *i.e.* to moot Defendants' legally unsound[14] but vehemently asserted collateral attacks on the Superior Court's jurisdiction. Transferring the Receivership without ratifying the Receiver's prior acts would simply add a new layer of procedural complexity to the Receivership proceedings without accomplishing anything.

The Diocesan Defendants contend that their failure to raise various objections within the Superior Court proceedings is excused, because prior to being served with a

[13] Dkt # 108-1; id. § I-3 ("The settlement appears to have been entered into in good faith, and at arm's-length by highly experienced and informed counsel. Therefore, the court preliminarily approves the proposed settlement as regards to the proposed class subject to all the terms of this order.").

[14] Neither the Diocesan Defendants nor the Prospect Defendants have mustered any actual case law supporting these jurisdictional attacks. For the reasons Plaintiffs have previously briefed, the Superior Court properly acquired jurisdiction over the Plan when Defendant St. Joseph Health Services of Rhode Island filed its receivership petition in August 2017.

subpoena on November 2, 2017, they "had no reason whatsoever to be monitoring the minute details of the receivership at that time, let alone filing objections to motions." Diocesan Defendants' Memo. at 11. The Diocesan Defendants deliberately employ hyperbole in making this assertion, because the insinuation that they were not closely monitoring the Receivership proceedings in October 2017 is false: regardless of their reasons for doing so, the simple fact is that the Diocesan Defendants *were* closely monitoring the Receivership proceedings. Indeed, they even reviewed and commented on drafts of the Receivership Petition in July 2017, weeks before the Superior Court proceedings were initiated.[15]

The Diocesan Defendants also contend that their failure to contest the Superior Court's jurisdiction within the Superior Court proceedings is excused, because the Superior Court held that non-settling Defendants lacked standing to raise certain objections to the Receiver's Petition for Settlement Instructions. Diocesan Defendants' Memo. at 12. This contention is not well taken, for at least three reasons.

First, the only instance where the Superior Court held that any of the Defendants lacked standing was in connection with its ruling on the Prospect Defendants' and CharterCARE Foundation's particular objections to the Petition for Settlement Approval. The Superior Court has never suggested that anyone lacked standing in other contexts.

Second, the Diocesan Defendants were not among the Defendants who objected to the Settlement in the Superior Court and thus were never held to lack standing even in *that* context. The Superior Court cannot be faulted for not accepting the Diocesan

[15] See Exhibit 1 (highlighted excerpt of Defendant Roman Catholic Bishop of Providence's privilege log produced in the Receivership proceedings).

Defendants' hypothetical arguments that for reasons of litigation strategy they never presented to the Superior Court.

Third, the Diocesan Defendants' contention incorrectly presupposes that they would have any basis—either procedurally or substantively—for objecting to any of the Receiver's prior acts. The Diocesan Defendants' efforts to kick up dust and keep it billowing around the Receivership is not in the interest of the Receivership estate or its beneficiaries.

IV. Conclusion

The Proposed Settlement was entered into as of August 31, 2018, nearly seven months ago. The non-Settling Defendants have offered no legitimate reasons to delay its approval any further. Accordingly, Plaintiffs and the Settling Defendants respectfully request that the Court enter their proposed order (Dkt # 108-1) so that proposed class members (*i.e.* the persons with standing to object to the settlement) can finally appear and weigh in.

Respectfully submitted,

All Plaintiffs,
By their Attorney,

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Dated: March 26, 2019

CERTIFICATE OF SERVICE

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

St. Joseph Health Services of Rhode Island, Inc. v. St. Josephs Health Services of Rhode Island Retirement Plan, as amended,
R.I. Super. Ct., No. PC-2017-3856 (Stern, J.)

Privilege Log of Non-Party Roman Catholic Bishop of Providence, A Corporation Sole[1]

	Date	Author	Recipient(s)	CC, BCC	Description	Basis
1.	Undated	Amy Null*			Redline between two drafts of the Lay Employee Retirement Plan prepared by counsel	Attorney-Client Privilege
2.	1/12/1994	J. Timothy Kocab	Charles Rogers, Jr.*		Letter requesting proposal for legal opinion regarding Diocese of Providence Retirement Plan.	Attorney-Client Privilege
3.	9/1/1994	Amy Null*	James Sullivan	J. Timothy Kocab; Deborah Jackson Weiss*	A letter with attachments providing legal advice regarding Diocese of Providence Retirement Plan.	Attorney-Client Privilege
4.	3/24/1995	Amy Null*	Controller's Office		Draft minutes from legal counsel reflecting legal advice and recommendations regarding separation of St. Joseph Health Services of Rhode Island, Inc. ("SJHSRI") and Diocesan Lay Employee Retirement Plans.	Attorney-Client Privilege
5.	3/24/1995	Amy Null*	Controller's Office		Facsimile of draft minutes from legal counsel reflecting legal advice and recommendations regarding separation of SJHSRI and Diocesan Lay Employee Retirement Plans.	Attorney-Client Privilege
6.	5/3/1995	Amy Null*	H. John Keimig; James Sullivan	Edward Groden; J. Timothy Kocab	Letter regarding draft SJHSRI Retirement Plan and Diocesan Lay Employee Retirement Plan and reflecting legal advice regarding same and handwritten notes by client on same regarding that advice.	Attorney-Client Privilege; Joint-Interest
7.	5/3/1995	Ropes & Gray LLP*/ Controller's Office	N/A		Draft Lay Employee Retirement Plan drafted by Ropes & Gray* with handwritten notes.	Attorney-Client Privilege

[1] Attorneys and legal staff listed under "Author," "Recipient(s)", "CC, BCC" and "Description" are denoted with an asterisk and are listed with their respective firms at Exhibit A.

	Date	Author	Recipient(s)	CC, BCC	Description	Basis
49.	1/9/2015	Rev. Timothy Reilly	Eugene Bernado*		Email chain reflecting comments on draft letter prepared by counsel concerning SJHSRI and the OCD and reflecting legal advice regarding same.	Attorney-Client Privilege
50.	1/9/2015	Rev. Timothy Reilly	Kimberly McCarthy*		Email chain responding to and reflecting legal advice regarding draft letter to SJHSRI and concerning the OCD.	Attorney-Client Privilege
51.	1/20/2015	Kimberly McCarthy*	Rev. Timothy Reilly	Eugene Bernardo*	Email providing legal advice regarding draft letter to SJHSRI concerning SJHSRI's admission to the OCD.	Attorney-Client Privilege
52.	1/20/2015	Rev. Timothy Reilly	Cathy Landry		Email chain and attachment reflecting legal advice from Kimberly McCarthy* regarding draft letter to SJHSRI concerning SJHSRI's admission to the OCD.	Attorney-Client Privilege
53.	1/20/2015	Rev. Timothy Reilly	Kimberly McCarthy*	Eugene Bernardo*; Cathy Landry	Email chain and attachment reflecting legal advice regarding draft letter to SJHSRI concerning SJHSRI's admission to the OCD.	Attorney-Client Privilege
54.	10/5/2015	Kimberly McCarthy*	Rev. Timothy Reilly	Eugene Bernardo*	Email chain with attachment providing legal advice regarding SJHSRI and the OCD.	Attorney-Client Privilege
55.	10/6/2015	Rev. Timothy Reilly	Velia Lisi	Cathy Landry	Email chain and attachment seeking input to provide information to Kimberly McCarthy* to assist in providing legal advice and also reflecting legal advice from same regarding SJHSRI and the OCD.	Attorney-Client Privilege
56.	10/6/2015	Rev. Timothy Reilly	Kimberly McCarthy*	Eugene Bernardo*; Cathy Landry; Velia Lisi	Email chain reflecting legal advice and the provision of information to assist in the provision of same regarding SJHSRI and the OCD.	Attorney-Client Privilege
57.	12/9/2015	Rev. Timothy Reilly	Kimberly McCarthy*		Email chain commenting on counsel's assistance in responding to counsel for SJHSRI regarding the OCD.	Attorney-Client Privilege
58.	12/9/2015	Kimberly McCarthy*	Rev. Timothy Reilly		Email chain responding to comment from client regarding legal assistance provided by counsel in connection with the OCD.	Attorney-Client Privilege
59.	7/31/2017	Rev. Timothy Reilly	Michael Sabatino		Email chain regarding provision of information to Eugene Bernardo* to assist in the provision of legal advice regarding draft of the petition for appointment of the receiver.	Attorney-Client Privilege

	Date	Author	Recipient(s)	CC, BCC	Description	Basis
60.	7/31/2017	Rev. Timothy Reilly	Michael Sabatino		Email commenting on draft petition and provision of information to Eugene Bernardo* to assist in the provision of legal advice regarding draft petition for appointment of the receiver.	Attorney-Client Privilege
61.	8/15/2017	Rev. Timothy Reilly	Eugene Bernardo*		Email chain and attachments reflecting provision of information to assist in the provision of legal advice regarding receivership proceeding.	Attorney-Client Privilege
62.	8/19/2017	Bishop Thomas Tobin	Rev. Timothy Reilly	Rev. Msgr. Albert Kenney	Email and attachment reflecting draft statement and request for legal advice from Eugene Bernardo* regarding same.	Attorney-Client Privilege/Work Product
63.	8/19/2017	Rev. Timothy Reilly	Bishop Thomas Tobin	Rev. Msgr. Albert Kenney	Email chain regarding draft statement and reflecting a request for legal advice from Eugene Bernardo* regarding same.	Attorney-Client Privilege/Work Product
64.	8/19/2017	Karen Davis	Carolyn Cronin		Email chain and attachment reflecting communications with Eugene Bernardo* and Kimberly McCarthy* requesting and receiving legal advice of counsel regarding draft statement.	Attorney-Client Privilege/Work Product
65.	8/19/2017	Rev. Timothy Reilly	Bishop Thomas Tobin	Rev. Msgr. Albert Kenney; Rev. Timothy Reilly	Email chain and attachment regarding suggested edits and legal advice proposed by Eugene Bernardo* regarding draft statement on receivership proceeding and pension funds.	Attorney-Client Privilege/Work Product
66.	8/19/2017	Bishop Thomas Tobin	Rev. Timothy Reilly		Email chain regarding draft statement and revisions to same reflecting legal advice by Eugene Bernardo* on draft statement on receivership proceeding and pension funds.	Attorney-Client Privilege/Work Product
67.	8/19/2017	Rev. Timothy Reilly	Bishop Thomas Tobin		Email chain regarding draft statement and revisions to same reflecting legal advice by Eugene Bernardo* on draft statement on receivership proceeding and pension funds.	Attorney-Client Privilege/Work Product
68.	8/19/2017	Rev. Timothy Reilly	Rev. Timothy Reilly		Email chain regarding draft statement and revisions to same reflecting legal advice by Eugene Bernardo* on draft statement on receivership proceeding and pension funds.	Attorney-Client Privilege/Work Product
69.	8/20/2017	Rev. Timothy Reilly	Michael Sabatino		Email chain reflecting legal advice from Eugene Bernardo* regarding draft proposed statement and client feedback regarding same.	Attorney-Client Privilege/Work Product