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 MEMORANDUM TO THE PROSPECT ENTITIES' POST-HEARING MEMORANDUM IN OPPOSITION TO SETTLEMENT MOTION

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TABLE OF CONTENTS

Plaintiffs submit this memorandum in reply to the Prospect Entities' Post-Hearing Memorandum in Opposition to Settlement Motion ("Prospect Post-Hearing Memorandum").

I. Summary of Argument

Plaintiffs do not want to complicate the motion for preliminary settlement approval by requesting an unnecessary finding, or to be perceived as choosing between two courts. However, Plaintiffs must respond in accordance with their understanding of the law, which is that a preliminary finding of good faith is both an appropriate and necessary element to preliminary settlement approval, and that the Princess Lida Doctrine precludes a federal court receivership unless the State Court first relinquishes jurisdiction. The Receiver as the appointed agent of the Superior Court has a special duty with respect to the Princess Lida issue.

II. A preliminary finding of "good faith" is a necessary and appropriate finding in connection with preliminary settlement approval under Fed. R. Civ. P. 23

Plaintiffs and the Settling Defendants have cited numerous cases holding that a preliminary finding of "good faith" is a necessary and appropriate finding in connection with preliminary settlement approval under Fed. R. Civ. P. 23. See Plaintiffs' and Defendants CharterCARE Community Board, St. Joseph Health Services of Rhode Island, and Roger Williams Hospital's Post-Hearing Memorandum ("Settling Parties' Post-Hearing Memorandum") at 2-3. As stated in a leading treatise:

> The general rule that the court will grant preliminary approval where the proposed settlement "is neither illegal nor collusive and is within the range of possible approval" contains both procedural and substantive elements. The procedural element focuses on the nature of the settlement negotiations and the possibility of collusion, while the substantive element focuses on the terms of the agreement itself. As discussed more fully in a

> preceding section, courts in most circuits use some variation of this dual test, relying in particular on a phrase that appeared in an early version of the Manual for Complex Litigation calling for approval if "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 [judicial] approval."

4 Newberg on Class Actions § 13:15 (5th ed.) (citing Trombley v. Bank of Am. Corp., No. 08-CV-456-JD, 2011 WL 3273930, at *5 (D.R.I. July 29, 2011) ("A proposed settlement of a class action may be given preliminary approval where it is the result of serious, informed, and non-collusive negotiations, where there are no grounds to doubt its fairness and no other obvious deficiencies (such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys), and where the settlement appears to fall within the range of possible approval.")) (other citations omitted). See also 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. . . .").

The Prospect Entities acknowledge that the Court "may" make a preliminary finding of good faith in connection with preliminary settlement approval, but contend that such a finding is not a required determination at the preliminary approval stage of this settlement proceeding. See Prospect Post-Hearing Memo. at 7 n.7 ("While some in-

circuit district courts[1] may have made a finding of good faith, there is simply nothing to suggest that such finding is required at the preliminary stage."). However, they cite no case law or other authority holding that such a finding need not (let alone should not) be made.

Instead, the Prospect Entities quote excerpts from decisions that they claim state the standard for preliminarily approval of a class action settlement, and which do not expressly include a finding of good faith *in haec verba*. Prospect Post-Hearing Memo. at 2-6 (citing five cases). However, in three of those five cases, the court actually did make a finding of lack of collusion in connection with granting preliminary settlement approval. See Hochstadt v. Bos. Sci. Corp., 708 F. Supp. 2d 95, 107 (D. Mass. 2010) ("Plaintiff Hochstadt argues that the settlement agreement was the result of collusion and did not occur at arms' length. The record shows otherwise.") (concluding, based upon the settling parties having taken two months to negotiate their settlement, that "the Amended Settlement Agreement was not the result of collusion but rather the result of negotiations conducted at arms' length"); In re M3 Power Razor Sys. Mktg. & Sales Practice Litig., 270 F.R.D. 45, 63 (D. Mass. 2010) ("The Objecting Plaintiff Corrales has not offered evidence that the negotiations were not at arm's length or were collusive in any way, and I see no reason to find otherwise."). See also Nat'l Ass'n of Chain Drug Stores v. New England Carptenters Health Benefits Fund, 582 F.3d 30 (1st Cir. 2009) (affirming New England Carpenters Health Benefits Fund v. First DataBank, Inc., 602 F. Supp. 2d 277, 282 (D. Mass. 2009) ("The quality of counsel on both sides and their

[1] Notably including the District of Rhode Island. See Trombley v. Bank of America Corp., *supra*, 2011 WL 3273930, at *5.

conduct during the initial phases of litigation have been top-notch, and the settlement negotiations have been conducted diligently and at arms-length.")).

The Prospect Entities try to support their position that no good faith finding is necessary at the preliminary approval stage with the following quote from In re Puerto Rican Cabotage Antitrust Litig., 269 F.R.D. 125, 140 (D.P.R. July 12, 2010):

> At the preliminary approval stage, the Court need not make a final determination regarding the fairness, reasonableness and adequateness of a proposed settlement; rather, the Court need only determine whether it falls within the range of possible approval.

Prospect Post-Hearing Memo. at 4. Tellingly, they leave out the very next sentence, which completely contradicts their position that collusion or lack of good faith is irrelevant to preliminary settlement approval: "An illegal or collusive settlement agreement will not fall within the range of possible approval." Id.

The fourth case the Prospect Entities cite did not involve an allegation that the settlement was collusive or not in good faith, hence the court apparently saw no need to address that issue. See Nilsen v. York County, 228 F.R.D. 60, 62 (D. Me. 2005). The fifth case is the Court's decision in Div. 618, Amalgamated Transit Union v. R.I. Pub. Transit Auth., 2018 U.S. Dist. LEXIS 174000 (D.R.I. Oct. 10, 2018), in which the Court, in preliminarily approving a class-action settlement, made a finding that was the functional equivalent to good faith, by holding that "[t]he [proposed] settlement appears to have been entered into at arm's-length by highly experienced and informed counsel."

Prospect cites no authority for the proposition that, in connection with preliminary settlement approval, the court should refrain from at least a preliminary assessment of good faith, if such good faith is disputed. Indeed, refraining from a preliminary assessment of good faith in those circumstances in which good faith is disputed would

obligate courts to preliminarily approve settlements notwithstanding even an obvious lack of good faith that would preclude final settlement approval. Such "restraint" would be contrary to party and judicial economy, and would result in unnecessary preliminary settlement class certifications, unnecessary notice being given to the putative settlement class, and unnecessary hearings for final approval.

Moreover, the Prospect Entities' claim that no good faith finding is required is contradicted by their proposed order granting preliminary settlement approval. The Prospect Entities and the Diocesan Defendants have jointly submitted a proposed order granting preliminary settlement approval which states that "[t]he settlement appears to have been entered into at arm's-length by highly experienced and informed counsel." As noted above, the Prospect Entities also cite with approval the Court's decision in Div. 618, Amalgamated Transit Union v. R.I. Pub. Transit Auth., *supra*, 2018 U.S. Dist. LEXIS 174000 (D.R.I. Oct. 10, 2018), in which the Court in preliminarily approving a settlement held that "[t]he [proposed] settlement appears to have been entered into at arm's-length by highly experienced and informed counsel." Id. at *6. By definition, "arm's length negotiation" indicates 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). Thus, the Prospect Entities' position is not substantively different from Plaintiffs'.

The Prospect Entities certainly have not overcome the prohibition against discovery of settlement negotiations by making the required preliminary showing of collusion or other improper behavior. Manual Complex Lit. § 21.643 (4th ed.) ("A court

should not allow discovery into the settlement-negotiation process unless the objector makes a preliminary showing of collusion or other improper behavior."). This preliminary showing requires the movants to "furnish additional independent evidence of collusion" before they can obtain leave to rifle through their opponents files. See Bowling v. Pfizer, 143 F.R.D. 141, 146 (S.D. Ohio 1992) ("Objectors may discover the details of a class counsel's negotiations with the defendants only where the objectors lay a foundation by adducing from independent sources of evidence that the settlement may be collusive.") (citing Mars Steel Corp. v. Continental Ill. Nat'l Bank and Trust, 834 F.2d 677, 684 (7th Cir. 1987).

Although acknowledging that the Court has at least the discretion to make a finding of good faith in connection with preliminary settlement approval, Prospect contends that the Court should not do so because of issues on the merits concerning ERISA:

> And since, if ERISA applies—a question that the Court has not yet decided—a "good faith" determination would be irrelevant, the Court should on prudential grounds refrain from engaging in such an analysis at this point, given that it is not necessary for the decision of the matter at hand.

Prospect Post-Hearing Memo. at 7 n.7. The Prospect Entities' contention that "if ERISA applies—a question that the Court has not yet decided—a 'good faith' determination would be irrelevant" is another in a long series of improper demands that the Court decide legal and factual issues in connection with the proposed settlement. See In re Lupron Marketing and Sales Practices Litigation, 228 F.R.D. 75, 97 n.43 (D. Mass. 2005) ("A settlement court reviewing the fairness of a compromise does not 'decide the merits of the case or resolve unsettled legal questions.'") (quoting Carson v. Am. Brands, Inc., 450 U.S. 79, 88 n.14 (1981)); Wright and Miller, 6A Fed. Proc., L. Ed. §

12:374 ("The settlement hearing should not be turned into a hearing on the merits or be transformed into a trial or a rehearsal of the trial. Thus, the court need not reach any dispositive conclusions on the admittedly unsettled legal issues in the case since it is not part of the court's duty in approving a settlement to establish as a matter of legal certainty whether the subject of the claim involved is worthless or valuable.").

Prospect's argument that a good faith determination would be irrelevant if ERISA applies is also simply incorrect, since such a finding is required for settlement of the class action, regardless whether ERISA applies or not.

Indeed, what is "irrelevant" are Prospect's preemption arguments concerning the applicability of R.I. Gen. Laws § 23-17.14-35.[2] Prospect and the other non-settling Defendants have no rights of contribution under ERISA that could be prejudiced by application of R.I. Gen. Laws § 23-17.14-35. Thus, the only consequence if R.I. Gen. Laws § 23-17.14-35 is preempted by ERISA is that the non-settling Defendants have no rights of contribution under either state or federal law. The law applied by the courts in the First Circuit is that, under ERISA, non-settling Defendants such as the Prospect Entities have no rights of contribution, because ERISA makes no provision therefor, and allowance of such rights as an implied remedy would be contrary to the goals and policies of ERISA. See Plaintiffs' Memorandum in Reply to the Prospect Entities' Objection to the Joint Motion for Settlement Approval (Dkt # 83) at 55-56.[3] Moreover,

[2] They are also premature and contingent, for the reasons set forth in the Settling Parties' Memorandum in Support of Their Motion for Preliminary Settlement Approval, at 41-54. See especially Ernst & Young v. Depositors Econ. Prot. Corp., 45 F.3d 530, 538 (1st Cir. 1995) (Selya, J.) (tracing the long chain of contingencies that would need to be satisfied before anyone could suffer a concrete legal injury under Rhode Island's DEPCO settlement statute, R.I. Gen. Laws § 42-116-40).

[3] 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

the Prospect Entities and the other non-settling Defendants insist that all of Plaintiffs' claims are governed by ERISA. Accordingly, they must also accept that, by definition, the proposed settlement and R.I. Gen. Laws § 23-17.14-35 cannot injure their rights of contribution.

In any event, the proposed order granting preliminary settlement approval preserves the non-settling Defendants' arguments concerning the constitutionality of R.I. Gen. Laws § 23-17.14-35, as well as whether that statute is preempted by ERISA, and any decision now on those issues would be premature. Should the non-settling Defendants prevail pre-trial or at trial on the merits of Plaintiffs' claims, R.I. Gen. Laws § 23-17.14-35 will be simply irrelevant.

In other words, the only entities that would suffer any prejudice if the Proposed Settlement were not made in good faith would be the putative settlement class. Over 1,000 Plan participants through their counsel Attys. Callaci, Violet, and Kasle, have expressed their wholehearted support of the Proposed Settlement, and any putative class participants who disagree will be given the opportunity to be heard in connection with the proceedings for final settlement approval.

Great–West Life & Annuity Insurance Co. v. Knudson, 534 U.S. 204, 209, 122 S.Ct. 708 (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.").

III. Whether the Court may convert the State Court Receivership to a Federal Equity Receivership or Joint State/Federal Receivership, absent the State Court relinquishing jurisdiction

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

Plaintiffs believe that a Federal Court receivership possibly would moot some (but not all) of the non-settling Defendants' objections to the Proposed Settlement. But, because those objections are completely without merit, they do not need to be mooted. Moreover, unless the State Court relinquishes jurisdiction over the Plan and the Plan's assets, this Court cannot exercise *in rem* jurisdiction over them. See Settling Parties' Post-Hearing Memo. at 17 (quoting United States v. One 1986 Chevrolet Van, 927 F.2d 39, 44 (1st Cir. 1991) for "the settled principle that a court cannot exercise jurisdiction over a *res* that is already subject to the *in rem* jurisdiction of another court"). See also 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).[4]

The Prospect Entities argue that "a federal court receiver is necessary and appropriate." Prospect Memo. at 9. However, tellingly, they cite no law specifically on this issue. Instead, they predicate that conclusion on "all of the reasons stated by the Prospect Entities in its [sic] prior memoranda regarding the exclusive jurisdiction of the federal court with respect to pension plans governed by ERISA. . . ." Id. Yet in those

[4] The Prospect Entities' efforts at oral argument to distinguish Dailey on the grounds that ERISA preempts state law, not foreign law, are completely misplaced because Dailey did not even concern preemption, but, rather, dealt with jurisdictional conflicts between two courts over a *res*.

prior submissions the Prospect Entities did not cite a single case in which a federal court even considered interfering with state court receiverships or jurisdiction over a *res*.

In their submissions, the Prospect Entities express their lack of regard for the State Court by proclaiming, without citing any legal authority or factual support, "that the state court is not conversant with either ERISA's statutory scheme or its complicated fiduciary duty rules (thus, making that court ill-equipped to weigh the reasonableness of the proposed settlement). . . ." Prospect Sur-Reply Memo. at 2. However, the Prospect Entities' view of the competency of the State Court is not shared by the federal courts. "State courts are courts of general jurisdiction, and are fully capable of dealing with federal constitutional as well as statutory issues." Keystone Properties, LLC v. Jacksonville Port Auth., No. 306CV894JTWTTEM, 2007 WL 9719016, at *2 (M.D. Fla. June 26, 2007). "It is 'axiomatic' that state courts 'are generally presumed competent to interpret and apply federal law.'" Marren v. Stout, 930 F. Supp. 2d 675, (W.D. Tex. 2013) (quoting Mikulski v. Centerior Energy Corp., 501 F.3d 555, 561 (6th Cir. 2007) (en banc)); Browning Corp. Intern. v. Lee, 624 F. Supp. 555, 557 (N.D. Tex. 1986) (""[S]tate courts as well as federal courts are of competent jurisdiction to determine whether a particular plan is governed by ERISA and therefore not by state law.").

The Prospect Entities also gratuitously criticize the Receiver (and, by clear implication, the Superior Court's supervision of the Receivership), with the following contention:

> While not much attention appears to have been paid by the Receiver to the physical location of the Plan assets, they appear to be in the custody of Bank of America, N.A., which serves as trustee of and for the Plan. The actual situs of those assets is reasonably believed to be New York, New York, USA.

Prospect Memo. at 8 n.6. In fact, under the express terms of the St. Joseph Health Services of Rhode Island Retirement Plan Trust Agreement, and in accordance with R.I. Gen. Laws §§ 18-1-2 & 18-1-3, the actual trust situs is Rhode Island. In addition (and over the objection of the Prospect Entities), the Plan's contingent rights to CCCB's 15% (or greater) ownership interest in Prospect Chartercare has been held to be "part of the Plan estate" and "at the very least, assets of the Plan's estate." 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 *4 (R.I. Super. Nov. 29, 2018) (the "Decision"). The situs of that interest is certainly in Rhode Island.

The Prospect Entities also still do not explain how the State Court Receivership would interfere with the Court's adjudication of this dispute. They cannot. The State Court has retained jurisdiction over the trust *res*, but has otherwise already deferred to this Court, first by allowing the Receiver to proceed in this forum while staying the parallel state court proceeding pending the outcome of this case, and, more recently, on the issue of the ultimate approval of this settlement.

B. Converting the State Court receivership into a Federal Court receivership would inevitably delay and unnecessarily complicate this proceeding

Although the Prospect Entities not surprisingly deny intentionally delaying this proceeding, their denial is belied by their prior conduct both generally in this litigation and specifically as concerns the Proposed Settlement which was entered into nearly seven months ago and has not even reached the stage of preliminary approval. Moreover, the Prospect Entities' goal of delay is manifest in the conditions with which

they freight their agreement to the Court converting the State Court receivership into a Federal Court receivership.

Although purporting to favor that approach, the Prospect Entities do so on terms that will unnecessarily delay and complicate this proceeding. For example, the Prospect Entities favor the Court converting the State Court receivership into a Federal Court receivership, but object to the Court ratifying any of the prior actions of the State Court or of the Receiver in connection therewith. Instead the Prospect Entities argue that the Court must review the State Court proceedings before ratifying any of the actions of the State Court or the Receiver:

> [T]he Prospect Entities respectfully suggest that the Court should not accept or ratify the Receiver's prior actions wholesale. To the extent a joint receivership is established, it is likely unnecessary[5]; if an exclusively federal receivership is established, absent any challenge to a prior action of the Receiver, it also seems unnecessary to effect a sweeping "*nunc pro tunc*" ratification. If needed, prior to ratifying specific actions of the Receiver, the Court should conduct its own review of the Receiver's previous actions.

Prospect Post-Hearing Memo. at 10 n.7.

Thus, the Prospect Entities seek to open up an entirely new avenue of delay, in which the parties will have to litigate and the Court will be asked to adjudicate the propriety of the Receiver's actions pursuant to the orders of the State Court. The consequence if the Court ratifies the State Court proceedings, over the Prospect Entities' objection, will be to open up another avenue of appeal for the Prospect Entities in the event Plaintiffs prevail at trial. Indeed, on appeal the Prospect Entities can be expected to rely upon this Court's actions in commencing a federal court receivership as

[5] Why it would be unnecessary is not explained.

implicitly if not explicitly supporting the contention that the actions of the Receiver and the orders of the State Court were void *ab initio* because the State Court lacked jurisdiction, and, therefore, were not subject to ratification.

Similarly, the Prospect Entities only agree to appointment of Attorney Del Sesto as a "temporary" receiver, and subject to conditions which they do not clearly articulate, but instead incorporate by referring to certain statutes and rules. See Prospect Post-Hearing Memo. at 8 ("The Prospect Entities also have no objection to the Court taking control over the Plan and, indirectly, its assets and appointing Del Sesto—at least, on a temporary basis—to serve as the Plan's receiver in accordance with Rule 66 and 28 U.S.C. §§ 754 and 959(a) (as applicable), provided the requisite statutory conditions are timely met.") (footnote omitted). This so-called agreement constitutes no agreement at all, but, instead, is an invitation to more unnecessary litigation.

C. Conversion of the State Court receivership into a Federal Court receivership would be a premature adjudication of the merits

The Prospect Entities approve of the Court converting the State Court receivership into a Federal Court receivership because they construe such action as an adjudication of legal and factual issues in the case. The Prospect Entities make that clear in their memorandum:

> As the Prospect Entities noted in their Surreply (ECF No. 101), the federal court appointment of a receiver is a longstanding and well settled remedy to a finding of a fiduciary breach, see ECF No. 101 at 8-9 (citing and discussing *Marshall v. Snyder*, 572 F.2d 894, 901 (2d Cir. 1978); and *Donovan v. Bierwirth*, 689 F.2d 263, 276-77 (2d Cir. 1982)), and such an appointment indisputably qualifies as "appropriate equitable relief" within the meaning of Section 502(a)(3) of ERISA. **The fact that some or all of the Settling Defendants have now acknowledged and admitted that they were in breach of their fiduciary duties to the Plan**, incident to settling the Plaintiffs' claims against them (however one views the process

> that produced such a result), makes the ordering of such equitable relief an uncontroversial process.

Prospect Post-Hearing Memo. at 8 (emphasis supplied). Statements such as this are examples of the Prospect Entities playing fast and loose with the facts. None of the Settling Defendants have "admitted that they were in breach of their fiduciary duties to the Plan", whether "incident to settling the Plaintiffs' claims against them", or otherwise. To the contrary, the Settling Defendants have admitted, *on the condition that the Proposed Settlement is ap*proved, solely that they breached their contract with Plan participants, and the Settlement Agreement expressly provides that such admission shall have no force or effect if the settlement is not approved.[6] They have also stated that if the Proposed Settlement is *not approved*, they intend to deny any liability, in contract and otherwise.[7]

Moreover, such statements make clear that the Prospect Entities' belief that institution of a Federal Receivership will aid their positions on the merits. The Prospect Entities assert that, if the Court converts the state court receivership into a Federal Court receivership, the Court:

> should proceed post-haste to find that the Plan is subject to ERISA, as Plaintiffs have twice alleged[8] (ECF Nos. 1 and 60) and as the Prospect Entities have repeatedly agreed. **Since the Court's jurisdiction over this matter hinges on this question, the appointment of a federal receiver**

[6] 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).

[7] See Affidavit of Richard Land (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 the grounds that the Plan documents limit recovery for the plan participants (including plaintiffs) to the Plan assets.").

[8] In fact, Plaintiffs have plead in the alternative, both alleging that the Plan at certain times was governed by ERISA, and also acknowledging that it may never have been covered by ERISA.

> **should compel the quick assurance of a jurisdictional basis for that step and for any actions that the Receiver then takes going forward**.

Prospect Post-Hearing Memo. at 8 (emphasis supplied). Thus, the Prospect Entities contend that such conversion at least implicitly would compel the "quick" determination by the Court that the Plan is governed by ERISA.

Plaintiffs strongly disagree that the Court's federal question subject matter jurisdiction "hinges" on the Court's determination that the Plan is subject to ERISA. To the contrary, the Court's federal question subject matter jurisdiction is established by the allegations in Plaintiffs' complaint that the Plan is subject to ERISA, even if the Court were to determine that the Plan is not subject to ERISA. As stated in Carlson v. Principal Fin. Group, 320 F.3d 301 (2d Cir. 2003):

> [T]he question of whether a federal statute supplies a basis for subject matter jurisdiction is separate from, and should be answered prior to, the question of whether the plaintiff can state a claim for relief under that statute. The jurisdictional inquiry is rather straightforward and depends entirely upon the allegations in the complaint: "'where the complaint ... is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions later noted, must entertain the suit." The two exceptions occur "where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." Thus, in order to sustain federal jurisdiction, the complaint must allege a claim that arises under the Constitution or laws of the United States and that is neither made solely for the purpose of obtaining jurisdiction nor wholly insubstantial and frivolous.

Carlson, 320 F.3d at 306 (quoting Bell v. Hood, 327 U.S. 678, 681–83 (1946)). In light of the Prospect Entities' own insistence that the Plan is, in fact, subject to ERISA, even they cannot contend that Plaintiffs' ERISA claims (pled in the alternative) are "insubstantial and frivolous."

Thus, even if the Court ultimately determines that the Plan is not subject to ERISA, the Court would retain federal subject matter jurisdiction over Plaintiffs' state-law claims pursuant to 28 U.S.C. § 1367(a), subject to the Court's exercise of its discretion to decline jurisdiction in accordance with the provisions of 28 U.S.C. § 1367(c). As the First Circuit stated in Lawless v. Steward Health Care System, LLC, 894 F.3d 9 (1st Cir. 2018), the fact that pretrial discovery may establish the absence of a federal claim does not deprive the Court of federal question jurisdiction to hear remaining state claims:

> After all, it is common ground that when a federal court may validly exercise federal-question jurisdiction over at least one claim, it may also exercise supplemental jurisdiction over pendent state-law claims. And once such supplemental jurisdiction has attached, the mere fact that the anchoring federal claim subsequently goes up in smoke does not, without more, doom all pendent state-law claims.

Lawless, 894 F.3d at 19 (citation omitted).

Prospect also continues to ignore the fact that ERISA is not retroactive. Even if the Plan became subject to ERISA in August 2017, due to the appointment of the Receiver (for example), Plaintiffs' state law claims all arose before that date, and, therefore, ERISA preemption would be completely inapplicable to those claims. See Geter v. St. Joseph Healthcare Sys., Inc., 575 F. Supp. 2d 1244, 1250 (D.N.M. 2008) (state law claims arising before "Church Plan" became subject to ERISA are not preempted by ERISA); Cotner v. Hartford Life & Annuity Ins. Co., No. CIV.A. 3:07-CV-0487G, 2008 WL 59174, at *4 (N.D. Tex. Jan. 4, 2008) (state law claims which preexisted creation of ERISA plan were not preempted).

In any event, the applicability of ERISA preemption involves issues of law that are fact dependent. These facts cannot be determined at this time and need not be

determined prior to settlement approval. A Federal Court receivership will not change that.

Respectfully submitted,

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By their Attorney,

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Dated: March 26, 2019

CERTIFICATE OF SERVICE

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