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 SUPPLEMENTAL MEMORANDUM SUBMITTED BY PROSPECT ENTITIES AND THE ANGELL PENSION GROUP INC. IN SUPPORT OF THEIR MOTIONS TO DISMISS

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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"), submit this memorandum in reply to the joint supplemental memorandum ("Joint Supp. Memo.") filed by Defendants Prospect Medical Holdings, Inc., Prospect East Holdings, Inc., Prospect Chartercare, LLC, Prospect Chartercare SJHSRI, LLC, and Prospect Chartercare RWMC, LLC (collectively the "Prospect Entities") and Defendant The Angell Pension Group, Inc. ("Angell"), pursuant to the Court's allowance of "supplemental briefing in connection with the motions to dismiss, concerning the significance *vel non* of the Receiver's ERISA election and payment of premium to Pension Benefit Guaranty Corporation ["PBGC"] on or about April 15, 2019"[2] (hereinafter the "Receiver's Post-Complaint Regulatory Filings"[3]).

I. "RELEVANT" FACTS

Defendants' motions to dismiss are based on Fed. R. Civ. P. 12(b)(6) (failure to state a claim) and Fed. R. Civ. P. Rule 12(b)(1) (alleging lack of Article III standing). As discussed herein, the Receiver's Post-Complaint Regulatory Filings are completely

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

[2] Dkt # 125 (Stipulation Establishing Schedule for Supplemental Briefing) ("Briefing Stipulation and Order") dated June 7, 2019 and entered as an order of the Court on June 10, 2019.

[3] Unless otherwise noted, referring to the Form 5500 filing, the payment of a premium to PBGC, and the Receiver's § 410(d) filing, all of which occurred on April 15, 2019.

irrelevant to those motions for many reasons concerning the merits of the case. They are also completely irrelevant *ab initio* because they were filed many months after the operative complaint. As discussed herein, motions to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim are decided based upon the allegations in the complaint and certain documents referred to therein, and motions under Fed. R. Civ. P. Rule 12(b)(1) alleging lack of Article III standing are decided based upon the facts that existed at the inception of litigation.

Insofar as any "facts" concerning the Receiver's Post-Complaint Regulatory Filings are considered in connection with Defendants' motions to dismiss, Plaintiffs face a dilemma. Because post-commencement-of-litigation documents are beyond the scope of materials that can be considered, it is not surprising that there are no precedents or other legal standards concerning how such documents (or the facts they allegedly prove) are to be addressed in connection with motions to dismiss on standing grounds[4] under Fed. R. Civ. P. 12(b)(1), or for failure to state a claim under Fed. R. Civ. P. 12(b)(6). On the other hand, were this a motion for summary judgment, Plaintiffs would respond by offering their own factual submissions, to demonstrate that there are material issues of disputed fact concerning the Receivers' Post Complaint Regulatory Filings and what they tend to prove. Those factual submissions would be manifestly beyond the purview of motions to dismiss for the same reason that Defendants' submissions concerning the Receiver's Post-Complaint Regulatory Filings are inappropriate in the context of their motions to dismiss.

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[4] As noted *infra*, Defendants have not asserted that the Receiver's Post-Complaint Filings render the instant suit moot.

As also discussed herein, Defendants improperly make arguments that are beyond the scope of the supplemental briefing, which has been limited to the effect (*vel non*) of the Receiver's Post-Complaint Regulatory Filings. They also ask the Court to consider documents that are beyond the scope of the supplemental briefing and cannot be considered in connection with motions to dismiss. Specifically, Defendants ask the Court to consider correspondence between PBGC and the Receiver. See Dkt # 127 (Joint Supp. Memo.) Exhibits 3 (PBGC letter dated June 5, 2018) & 4 (PBGC letter dated May 15, 2019). In addition to being beyond the scope of the supplemental briefing, those documents are outside the pleadings and cannot be considered in connection with Defendants' motions to dismiss. PBGC's letter dated June 5, 2018 is not referred to in the Complaint, and PBGC's letter dated May 15, 2019 did not even come into existence until nearly a year after the Complaint was filed. Accordingly, these documents should be disregarded (albeit such correspondence fully supports Plaintiffs' claims).

However, insofar as the Court chooses to consider these documents in connection with the motions to dismiss, Plaintiffs request that the Court also consider the Receiver's letter dated May 14, 2019, to which PBGC expressly responded on May 15, 2019, so that the context of PBGC's letter is clear. The Receiver's letter is attached hereto as Exhibit 1. In short, it asks PBGC to address Defendants' contention that PBGC and not the Receiver is the real party in interest in this case. Specifically, the Receiver made the following request for PBGC guidance:

> The Prospect Entities Defendants then sent the attached email dated May 10, 2019 to the district judge presiding over the Federal Action, taking a position with which we believe PBGC would disagree, including specifically the position that existence of PBGC termination insurance

> coverage means that the Plan and Plan participants have no damages from funding shortfalls resulting from the wrongful actions or omissions of third parties. We ask that you confirm that unless and until the Plan is terminated and PBGC becomes statutory trustee of the Plan, the current plan administrator of the Plan can pursue any claims the Plan may have against third parties, including claims for funding shortfalls, and regardless of whether PBGC termination insurance coverage may make up for such shortfalls in the event the recovery on such third party claims does not result in the Plan being fully funded.

Ex. 1 hereto (Receiver's letter to PBGC dated May 14, 2019). The PBGC's prompt response was as follows:

> Even if the Plan were found to be covered by ERISA, including Title IV of ERISA, the Plan administrator remains responsible for administering the Plan – including decisions with regard to collecting amounts owed to the Plan and pursuing suits on behalf of the Plan. The Plan administrator must continue to act for the Plan unless and until the Plan is terminated under Title IV and PBGC is appointed its statutory trustee. For your information, when PBGC does become trustee of a terminated plan, it succeeds to a plan's claims and causes of action, including any ongoing litigation. And PBGC may bring litigation on behalf of a terminated plan for at least three years after the date PBGC becomes trustee. 29 U.S.C. § 1303(e)(6)(B)(ii).

Dkt # 127 (Joint. Supp. Memo.) Ex. 4. Thus, PBGC thereby confirmed not only that, notwithstanding the Receiver's Post-Complaint Regulatory Filings, including the ERISA § 410(d) Election, the Receiver can pursue claims on behalf of the Plan, but, in fact, the Receiver is required to do so.

II. ARGUMENT

A. Defendants' arguments to the effect that PBGC coverage is a certainty are cavalier

Defendants' argument is that Plaintiffs have no injury from the Plan deficits because PBGC's obligation to pay all benefits is certain. There are two fundamental problems with that argument, each of which is fully sufficient to require rejection of the argument. First, as discussed in Plaintiffs' prior memorandum in opposition to Defendants' motions to dismiss, and again in this memorandum, the collateral source rule would make PBGC coverage irrelevant even if it were certain that PBGC would terminate the Plan and pay all benefits that were due. A tortfeasor is not relieved of liability because the injured party has sufficient insurance to cover his injuries. Second, it is not certain that PBGC would terminate the Plan and pay all benefits when due. That lack of certainty is due to many different reasons which are addressed in Plaintiffs' prior memorandum in opposition to Defendants' motions to dismiss, and to some extent herein.

However, if Defendants were sincere in their contention that adequate PBGC coverage is a certainty, Defendants could go a long way towards eliminating the second fundamental problem, by offering to pay all benefits when due if PBGC fails to do so. They should be willing to make that offer, because if adequate PBGC coverage is a certainty, the offer would cost them nothing. However, Defendants have not made that offer. Instead, they ask the Court to dismiss Plaintiffs claims, so that *Plaintiffs* will bear all of the risk if PBGC coverage is later determined to be non-existent or inadequate. In other words, Defendants argue with impunity. We submit that Defendants' purported assurance that PBGC coverage is an absolute certainty should be viewed with a great deal of skepticism, given their unwillingness to guarantee that Plaintiffs will be made whole if PBGC coverage turns out to be non-existent or inadequate.

B. The Receiver's Post-Complaint Regulatory Filings are consistent with Plaintiffs' position since the inception of this litigation

The Receiver's Post-Complaint Regulatory Filings are completely consistent with Plaintiffs' position in this litigation.

Plaintiffs contend that the Plan ceased to qualify as a church plan years ago, before the Receiver was appointed. However, that determination is a mixed question of law and fact.[5] That is especially the case given that the Plan was purported to be a church plan ostensibly exempt from ERISA, right up until the time the Plan was put into Receivership on August 17, 2017. As previously noted,[6] the Receiver as litigant in this proceeding must await the determination of the finder of fact and the Court as decider of the law on the issue of when and whether the Plan became subject to ERISA, and, therefore, is entitled to plead in the alternative. Accordingly, Plaintiffs have asserted their claims in the alternative, both on the assumption that the Plan ceased to qualify as a church plan and became subject to ERISA years ago, and on the assumption that the Plan continues to qualify as a church plan exempt from ERISA.

The Receiver's Post-Complaint Regulatory Filings preserve that duality, in that the ERISA § 410(d) election is expressly made "without prejudice to the position taken [in this litigation] that the Plan ceased to qualify as a church plan (and became subject

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[5] One key issue here is whether St. Joseph Health Services of Rhode Island ("SJHSRI") was associated with a church. 29 U.S.C.A. § 1002(33)(C)(iv). Although the First Circuit has not addressed the issue, two Courts of Appeals have applied a three part test to make that determination, which is heavily factual. See Chronister v. Baptist Health, 442 F.3d 648, 653 (8th Cir. 2006) ("'[T]hree factors bear primary consideration: (1) whether the religious institution plays an official role in the governance of the organization, (2) whether the organization receives assistance from the religious institution, and (3) whether a denominational requirement exists for any employee or patient/customer of the organization.' ") (quoting Lown v. Cont'l Cas. Co., 238 F.3d 543, 548 (4th Cir. 2001)).

[6] See Dkt # 100 (Plaintiffs' Omnibus Memorandum in Support of Their Objection to Defendants' Motions to Dismiss) at 160-61.

to ERISA) on or prior to the Effective Date, possibly as of 2009 or earlier." Dkt # 127-1 at § 3.

Not inconsistently, the Receiver has chosen to administer the Plan as an ERISA plan, which requires, *inter alia*, the filing of the 2017 Form 5500 and payment of a premium to PBGC. However, mere payment of a premium to PBGC does not ensure coverage. To the contrary, to obtain coverage the Plan will have to be shown to be governed by ERISA.[7] The Receiver filed the § 410(d) Election to increase the likelihood that the Plan will be determined to be subject to ERISA going forward, and that the premium was not paid in vain. In other words, the Receiver did not want to pay a premium for coverage that might not exist.

C. The Receiver's Post-Complaint Regulatory Filings do not affect the pending motions to dismiss

1. Because they occurred many months after the Complaint was filed

Defendants' motions to dismiss are predicated on two sub-sections of Fed. R. Civ. P. Rule 12. They seek dismissal of Plaintiffs' claims under Rule 12(b)(6) for failure to state a claim; and they seek dismissal of Plaintiff's claims under Rule 12(b)(1) for lack of constitutional standing (specifically, no Article III injury-in-fact).

It is elementary that motions to dismiss for failure to state a claim ordinarily are decided based upon the allegations contained within the four corners of the complaint. Young v. Lepone, 305 F.3d 1, 10-11 (1st Cir. 2002) ("The fate of a motion to dismiss

[7] Payment of a premium to PBGC does not ensure coverage: PBGC coverage is predicated on the Plan being subject to ERISA. 29 U.S.C. § 1321(a).

under Rule 12(b)(6) ordinarily depends on the allegations contained within the four corners of the plaintiff's complaint.").

Such motions to dismiss also may be decided based on statements in documents that are referred to and relied in the complaint.[8] Young v. Lepone, *supra*, 305 F.3d at 11 ("The key fact is that the amended complaint contained extensive excerpts from, and references to, these letters. When the factual allegations of a complaint revolve around a document whose authenticity is unchallenged, 'that document effectively merges into the pleadings and the trial court can review it in deciding a motion to dismiss under Rule 12(b)(6).'") (quoting Beddall v. State St. Bank & Trust Co., 137 F.3d 12, 17 (1st Cir. 1998)) (other citation omitted). See also Diva's Inc. v. City of Bangor, 411 F.3d 30, 39 (1st Cir. 2005) ("Under First Circuit precedent, when 'a complaint's factual allegations are expressly linked to—and admittedly dependent upon—a document (the authenticity of which is not challenged),' then the court can review it upon a motion to dismiss.") (quoting Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co., 267 F.3d 30, 34 (1st Cir. 2001)) (internal quotation omitted).

Motions to dismiss under Fed. R. Civ. P. Rule 12(b)(1) for lack of constitutional standing are also "assessed under the facts existing when the complaint is filed." Lujan v. Defenders of Wildlife, 504 U.S. 555, 571 n.4 (1992). See Keene Corp. v. United States, 508 U.S. 200, 207 (1993) (There is a "longstanding principle that the 'jurisdiction of the Court depends upon the state of things at the time of the action brought.' ") (internal citations omitted); Minneapolis & St. Louis R.R. v. Peoria & Perkin Union Ry.

[8] Plaintiffs and Defendants disagree concerning the extent to which reference to a document in the Complaint makes the document relevant to the motions to dismiss, but that is an issue completely different from whether events that occurred nearly a year after suit is brought are relevant to motions to dismiss.

Co., 270 U.S. 580, 586 (1926) ("The jurisdiction of the lower court depends upon the state of things existing at the time the suit was brought."); SPH Am., LLC v. Huawei Techs., Co., No. 13-CV-2323-CAB-KSC, 2017 WL 1331920, at *2 (S.D. Cal. Apr. 10, 2017) ("Article III standing must be present at the time the suit is brought.") (citing Sicom Sys., Ltd. v. Agilent Techs., Inc., 427 F.3d 971, 975-76 (Fed. Cir. 2005)).

Defendants fail to cite any authority whatsoever for their request that the Court consider events that occurred months subsequent to the filing of the Complaint, either in connection with their motions to dismiss under either Rule 12(b)(6) for failure to state a claim, or their motions to dismiss under Rule 12(b)(1) alleging lack of constitutional standing. Indeed, Defendants do not even acknowledge there is any issue in asking the Court to consider documents that only came into existence ten months after the lawsuit was initiated. Instead they argue that the undisputed authenticity of the documents that comprise the Receiver's Post-Complaint Regulatory Filings "make them fair game to be considered as part of the Court's Rule 12 deliberations." Dkt # 127 (Joint Supp. Memo.) at 7 ("The origins and nature of those documents, we submit, make their authenticity unassailable and make them fair game to be considered as part of the Court's Rule 12 deliberations.").

However, it should go without saying the mere fact that the authenticity of post-commencement-of-litigation documents is unchallenged does not mean that such documents can be considered in connection with Rule 12(b)(6) for failure to state a claim, or under Rule 12(b)(1) alleging lack of constitutional standing. If mere authenticity were sufficient to warrant consideration of documents not referred to in the pleadings, the exception would effectively swallow the rule that motions to dismiss are decided on the pleadings. Thus, in addition to proving authenticity, Defendants must also demonstrate, at a minimum,[9] that the document was in existence at the time the complaint was filed.

The prohibition against consideration of post-filing documents in connection with a motion to dismiss is a product of the requirement that the document must have relied upon by the non-movant in order to be considered on a motion to dismiss. By definition, a plaintiff in drafting his or her complaint could not have relied on documents that were not in existence at the time:

> Merck suggests that, even if the District Court did not exclude the report, the Court was allowed to take judicial notice of that document. This is true, however, only if "the plaintiff's claims are based on the document." *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993). Here, plaintiffs' complaint references the Merck board's demand-rejection process but does not explicitly discuss the report. It is mentioned in exhibits to plaintiffs' complaint, but only insofar as their counsel and Schulte Roth were arguing over access to the report. Plaintiffs did not even receive the report until after the suit was filed, so they were not able to rely on the document to frame their complaint. As such, their claims were not "based on" the report.

Fagin v. Gilmartin, 432 F.3d 276, 286 (3d Cir. 2005) (reversing District Court's grant of motion to dismiss based on the District Court's taking judicial notice of documents received by plaintiff after filing of the complaint, and holding that "it would be better for the District Court to consider this issue on summary judgment"). See, e.g., Guo v. IBM 401(k) Plus Plan, 95 F. Supp. 3d 512, 522 (S.D.N.Y. 2015) ("To consider a 'document on a dismissal motion[,] [a plaintiff's] mere notice or possession is not enough.' Instead,

[9] Not to mention that the "complaint's factual allegations are expressly linked to—and admittedly dependent upon—a document (the authenticity of which is not challenged)…" Diva's Inc. v. City of Bangor, *supra*, 411 F.3d at 39.

‘a plaintiff's reliance on the terms and effect of a document in drafting the complaint is a necessary prerequisite to the court's consideration’ of the document at this stage of a case.”) (quoting Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002)); Marbi Corp. of New York v. Puhekker, 9 F. Supp. 2d 425, 428 (S.D.N.Y. 1998) (refusing to consider document where there was no evidence plaintiff relied on it in framing complaint) (“There is no evidence, however, that plaintiffs relied on or even knew of Puhekker's letter in framing their complaint.”).

In addition to relying on authenticity to justify consideration of the Receiver’s Post-Complaint Regulatory Filings on the motions to dismiss, Defendants point to the fact that the documents are public records, records from a federal government agency, and/or were filed under oath. Dkt # 127 (Joint Supp. Memo.) at 7 (“We also are mindful, though, that the PBGC correspondence emanated from a federal agency, that Plaintiff’s Church Plan Election was attached to, and made part of, an Annual Return/Report that Plaintiff filed under oath with the U.S. Department of Labor (the “DOL”) and with the Internal Revenue Service (the “IRS”), two other federal agencies, and that all of the documents were provided to the Joint Defendants by the Plaintiff (at least two of which are now a matter of public record).”). However, none of these facts overcome the fundamental obstacle to the Court considering the Receiver’s Post-Complaint Regulatory Filings in deciding Defendants’ motions to dismiss, which is that the Receiver’s Post-Complaint Regulatory Filings are irrelevant because they did not happen until more than ten months after the Complaint was filed.

A court should not take judicial notice of irrelevant facts:

Specified fact must be relevant

> Although judicial notice is not "evidence" so Rule 402 does not apply and Rule 201 does not require the noticed fact to be "relevant", courts would be foolish to take judicial notice of an irrelevant fact. The common law required that noticed facts be relevant. The earlier reform codes received a similar interpretation. The writers agree that Rule 201 does not authorize courts to judicially notice irrelevant facts. An irrelevant fact could hardly be an "adjudicative fact" within the meaning of Rule 201. In any event, the few federal cases considering the issue have insisted that noticed facts be relevant. The same is true when the facts are not noticed under Rule 201 but under some other statute authorizing or requiring judicial notice. The state courts take the same position regarding their versions of Rule 201.

Wright & Graham et al., 21B Fed. Prac. & Proc. Evid. § 5104 (2d ed.) (emphasis in the original) (citations omitted). See Blye v. Cal. Supreme Ct., CV 11–5046–DWM, 2014 WL 295022 *1 (N.D. Cal. Jan. 21, 2014) ("[A]n irrelevant fact is one not of consequence in determining the action, *see* Fed. R. Evid. 401(b), and therefore cannot be classified as an adjudicative fact" subject to judicial notice); Anthes v. New York Univ., No. 17CV2511 (ALC), 2018 WL 1737540, at *4 (S.D.N.Y. Mar. 12, 2018) ("Of course, a court can only sensibly take judicial notice of facts relevant to the matters before the court.").

The only case law Defendants cite in support of their argument that the Court may consider the Receiver's Post-Complaint Regulatory Filings in connection with the motions to dismiss is Powell v. UNUM Life Ins. Co. of Am., No. 116CV01197AWISKO, 2016 WL 8731383, at *1 n.2 (E.D. Cal. Sept. 30, 2016), which they summarize as "Form 5500 'Annual Report' filing taken into consideration for motion to dismiss purposes as official record, and one capable of being considered under FRE 201(b)(2)." Dkt # 127 (Joint Supp. Memo.) at 8. However, the filing of Form 5500 in Powell was part of the plan sponsor's filing of an ERISA § 410(d) election in 2013,[10] three years before suit was filed in 2016, and the court took judicial notice of the filing in concluding that the plan in question was governed by ERISA *when the complaint was filed*. Powell v. UNUM Life Ins. Co. of Am., *supra*, 2016 WL 8731383, at *1 n.2 ("The 'Annual Return/Report of Employee Benefit Plan (Form 5500)' filed with the Internal Revenue Service by Fresno Pacific University is the appropriate subject of judicial notice. Unum's request for judicial notice is granted."). Again, the issue here is not whether the Court should or may take judicial notice of a Form 5500 (or any of the other documents involved in the Receiver's Post-Complaint Regulatory Filings) filed *before the complaint*. That issue is not before the Court. Powell provides no support whatsoever for the issue that is before the Court, *viz.*, whether the doctrine of judicial notice (or any other exception to the rule that such motions are decided on the pleadings) allows a court deciding a motion to dismiss to consider documents (including official records) that did not even exist when the complaint was filed, and, therefore could not have been relied upon in the drafting of the complaint. It clearly does not.

Although post-filing events may be relevant to a plaintiff's Article III "injury-in-fact," those events are assessed under the doctrine of mootness, not standing. Becker v. Federal Election Com'n, 230 F.3d 381, 387 n.3 (1st Cir. 2000) ("[W]hile it is true that a plaintiff must have a personal interest at stake throughout the litigation of a case, such interest is to be assessed under the rubric of standing at the commencement of the case, and under the rubric of mootness thereafter."). Mootness and standing are not to

[10] See Powell v. UNUM Life Ins. Co. of Am., *supra*, 2016 WL 8731383 at *1 ("In 2013, FPU elected for ERISA to govern its employee health and welfare benefit plan.") (citation to record omitted).

be conflated. Id. ("The problem with the approach taken in *Powder River* is that it conflates questions of standing with questions of mootness. . . .") (referring to Powder River Basin Resource Council v. Babbitt, 54 F.3d 1477 (10th Cir. 1995)).

"[Q]uestions of standing and questions of mootness are distinct, and it is important to treat them separately." Becker v. Federal Election Com'n, *supra*, 230 F.3d at 387 n.3 (citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000)). "Mootness doctrine encompasses the circumstances that destroy the justiciability of a suit previously suitable for determination." Wright & Miller, et al., 13B Fed. Prac. & Proc. Juris. § 3533 (3d ed.). The fact that Plaintiffs had standing at the outset suggests that the Plaintiffs can continue the action. Id. ("The fact that once there was a suitable basis for litigation indicates that the full factual development required by ripeness continues to be available to guide decision. And the fact that once there was sufficient interest to satisfy standing requirements may very well indicate that the temper of original adversariness continues, as shown by the very fact that at least one of the parties remains willing to litigate.").

However, Defendants completely fail to even address mootness in connection with the Receiver's Post-Complaint Regulatory Filings. Indeed, they do not even use the term. Given the complete absence of any such argument, Plaintiffs in fairness cannot be expected to anticipate and then to respond to Defendants' unasserted arguments.

Accordingly, the Court need go no further and should reject any arguments based upon the Receiver's Post-Complaint Regulatory Filings. As discussed below, however, there are many additional reasons to reject such arguments.

2. Because ERISA does not apply retroactively

The Receiver's Post-Complaint Regulatory Filings are also irrelevant to the motions to dismiss because all of Plaintiffs' claims are based on conduct that precedes the effective date thereof. Defendants contend that the effective date for the Election is July 1, 2018,[11] nearly two weeks after Plaintiffs initiated this lawsuit. Of course, the Complaint does not refer to any factual events occurring after the Complaint was filed. In fact, that was nearly four years after the closing of the Asset Purchase Agreement on June 20, 2014, and many months after the most recent acts of wrongdoing alleged in the Complaint.

Indeed, Defendants do not even argue that the Receiver's Post-Complaint Regulatory Filings have any retroactive effect prior to the effective date. Nor could they, since the law concerning the ERISA § 410(d) election is clear that ERISA applies, if at all, only after the effective date of such an election, and that state-law claims based upon acts or omissions prior to that date are *not* preempted by ERISA. See Robinson v. Metro. Life Ins. Co., No. 12-CV-01373-JAM-AC, 2013 WL 1281868, at *6 (E.D. Cal. Mar. 27, 2013) ("The plain text of 29 U.S.C. § 1003(b)(2) states that a church plan is exempt from ERISA until it makes a § 410(d) election. There is no reference to retroactive ERISA coverage, and no basis for inferring it. Disability claims arising before the election are therefore not governed by ERISA, and claims arising after the election are."); Welsh v. Ascension Health, No. 3:08CV348/MCR/EMT, 2009 WL 1444431, at *8

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[11] See Dkt # 127 (Joint Supp. Memo.) at 3 n.5 ("By its terms, the Plaintiff's Church Plan Election caused the Plan to be subject to ERISA effective 'as to all Plan years beginning on or after August 17, 2017.' Ex. 1. **For the Plan, which has a June 30th fiscal year end, that would place the effective date of Plaintiff's Church Plan Election at July 1, 2018**.") (emphasis supplied). For purposes of this memorandum only, Plaintiffs do not dispute that contention.

(N.D. Fla. May 21, 2009) ("[T]his court likewise concludes that preemption in this case began at the time of Ascension's 2008 election and not before. Therefore, at the time Welsh's claims under the LTD plan arose in 2003 Ascension's church plan was not governed by ERISA."); Geter v. St. Joseph Healthcare Sys., Inc., 575 F. Supp. 2d 1244, 1250 (D.N.M. 2008) ("Until January 12, 2004, CHI's long-term disability plan was a 'church plan[ ] with respect to which no election had been made.' Thus, under the statute's plain language, ERISA did not preempt' [sic] state law until January 12, 2004.") (quoting 29 U.S.C. § 1003(b)); Catholic Charities of Maine, Inc. v. City of Portland, 319 F. Supp. 2d 88, 89–90 (D. Me. 2004) ("[T]the plain language of ERISA suggests that preemption occurs upon the 'making' or filing of a section 410(d) election.").

3. Defendants' collateral source arguments exceed the scope allowed for their supplemental memorandum and are clearly wrong

Defendants sought and were granted permission to file a supplemental memorandum concerning solely the Receiver's Post-Complaint Regulatory Filings. Indeed, they entered into a stipulation (the "Briefing Stipulation") that they were allowed to file a supplemental memorandum "concerning the significance *vel non* of the Receiver's ERISA election and payment of premium to Pension Benefit Guaranty Corporation on or about April 15, 2019...." The Briefing Stipulation was entered as an Order of the Court.[12] Notwithstanding this limitation, Defendants improperly re-argue issues that have already been fully addressed in connection with the motions to dismiss, and are not significantly affected by the Receiver's Post-Complaint Regulatory Filings.

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[12] Dkt # 125 (Stipulation Establishing Schedule for Supplemental Briefing) ("Briefing Stipulation and Order") dated June 7, 2019 and entered as an order of the Court on June 10, 2019.

For example, Defendants devote pages of the Joint Supplemental Memorandum to the issue of whether the collateral source rule applies to PBGC, including arguing for the first time that this Court's holding in Beta Grp., Inc. v. Steiker, Greenaple, & Croscut, P.C., No. CV 15-213 WES, 2018 WL 461097, at *3 (D.R.I. Jan. 18, 2018) (Smith, C.J.) that the collateral source rule "readily applies in the ERISA context" was "incorrectly decided." Dkt # 127 (Joint Supp. Memo.) at 20 ("But *Steiker, Greenapple* failed to address or even acknowledge controlling First Circuit precedent (in the form of *LaRocca*), and thus appears to have been incorrectly decided.").

That argument is beyond the scope allowed for supplemental briefing. The collateral source rule has already been addressed. In their opposition memoranda and at the hearing on the motions to dismiss, Plaintiffs argued that PBGC was at most a possible collateral source of recovery which should be disregarded under the collateral source rule. [13] Defendants' reply memoranda ignored that issue, and certainly made no claim that the Court's case of Beta Grp., Inc. v. Steiker, Greenaple, & Croscut, P.C. was "incorrectly decided."[14]

The Receiver's Post-Complaint Regulatory Filings do not provide justification to revisit that argument. Defendants contend that the Receiver's Post-Complaint Regulatory Filings make PBGC coverage more certain, but Plaintiffs' argument in

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[13] See, e.g., Dkt # 100 (Plaintiffs' Omnibus Memorandum in in Support of Their Objection to Defendants' Motions to Dismiss) at 118 ("At most, PBGC is a possible prospective collateral source of recovery for the Plan participants. Accordingly, possible PBGC coverage does not detract from the Plan participants' injury in fact, because the collateral source rule requires that it be disregarded in determining whether Plaintiffs have constitutional standing.").

[14] Indeed, Defendants waited until their sur-reply memoranda in opposition to Plaintiffs' motions for settlement approval (to which Plaintiffs were not permitted to reply) to even cite LaRocca v. Borden, Inc., 276 F.3d 22 (1st Cir. 2002). See Dkt # 101 (Prospect Entities' Sur-Reply Memoranda) at 26-27. Accordingly, this memorandum is Plaintiffs' first opportunity to point out why LaRocca has no application to this case.

opposition to Defendants' motions to dismiss that PBGC coverage is subject to the collateral source rule already assumed, *arguendo*, the existence of PBGC coverage and explained that the collateral source rule makes such coverage irrelevant. Accordingly, Defendants' efforts to re-argue this issue in connection with the Receiver's Post-Complaint Regulatory Filings violates the Court's Order and should be disregarded.

Defendants' argument is also incorrect on the merits. For their contention that the collateral source rule does not apply in ERISA cases, Defendants rely entirely on the First Circuit's decision in LaRocca v. Borden, Inc., 276 F.3d 22 (1st Cir. 2002), in which they claim the First Circuit ruled that the collateral source rule is preempted by ERISA. See Dkt # 127 (Joint Supp. Memo.) at 19 ("However, the collateral source doctrine—a common law doctrine—is also inapplicable for another reason: it is specifically preempted by ERISA, according to controlling First Circuit precedent.") (citing LaRocca). However, the First Circuit's preemption holding in LaRocca was limited to attempts to invoke the collateral source rule to override express provisions in an ERISA plan. LaRocca involved an attempt by participants in an ERISA welfare plan to recover certain medical expenses that the plan participants had incurred but which had been paid by the plan participants' health insurers. The plan participants argued that the payments by their health insurers should be disregarded under the collateral source rule. However, there was a provision in the ERISA welfare plan which "expressly preclude[d] reimbursement [to plan participants] under its coordination of benefits provisions when a claimant's bills are paid by a collateral source." LaRocca v. Borden, Inc., *supra*, 276 F.3d at 30. Thus, the plan participants were seeking to employ the common law collateral source rule to negate an express provision in the ERISA plan which entitled the plan to deny payments to participants who had already been reimbursed by a collateral source.

The First Circuit held that the collateral source rule was preempted by ERISA in such circumstances:

> However, ERISA preempts state legislation designed to limit plans' subrogation and coordination of benefits provisions. *See FMC Corp. v. Holliday*, 498 U.S. 52, 111 S.Ct. 403, 112 L.Ed.2d 356 (1990); *Travitz v. Northeast Dept. ILGWU Health and Welfare Fund*, 13 F.3d 704 (3d Cir.1994). Such preemption applies *a fortiori* to state common law doctrines (like the collateral source rule) which purportedly alter the benefit limitation provisions of a plan. See *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52–57, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987) (precluding both state claims to recover benefits under an ERISA plan and state claims to recover compensation for harms suffered because of improper denial of such benefits).
>
> * * *
>
> The Borden Plan expressly precludes reimbursement under its coordination of benefits provisions when a claimant's bills are paid by a collateral source. Therefore, the district court ruled properly that a claimant whose medical bills have been paid collaterally cannot demand that the Plan reimburse the claimant for these bills.

<u>LaRocca v. Borden, Inc.</u>, supra, 276 F.3d at 30.

In contrast, neither the case *sub judice* nor <u>Beta Grp., Inc. v. Steiker, Greenaple, & Croscut, P.C.</u> involved application of the collateral source rule to override express plan provisions. To the contrary, there are no plan provisions in either case which conflict with the application of the collateral source rule. Accordingly, <u>LaRocca v. Borden, Inc.</u> is completely distinguishable and irrelevant to our case. Indeed, unlike <u>LaRocca</u>, in which the plaintiffs sought a recovery *from the plan*, both the case *sub judice* and <u>Beta Grp., Inc. v. Steiker, Greenaple, & Croscut, P.C.</u> involve application of the collateral source rule to *increase* an ERISA plan's recovery from culpable defendants. Thus, the fundamental purpose of ERISA of strengthening the nation's pension system is served by allowing the collateral source rule in such circumstances. Accordingly, the Court's assertion in Beta Grp., Inc. v. Steiker, Greenaple, & Croscut, P.C. that the collateral source rule "readily applies in ERISA actions" is entirely correct.

Defendants continue to argue that Plaintiffs lack any Article III injury-in-fact, because financial losses inflicted by wrongdoers upon defined benefit pension plans are not an injury-in-fact if the benefit obligations of the plans are insured by PBGC. However, they fail to cite any precedent (because none exists) holding that an injured party has no injury-in-fact from a tortfeasor's conduct if the injured party's losses are insured. See e.g., Thompson v. Florida Drum Co., 651 So.2d 180, 182 (Fla. 2d DCA 1995), aff'd *sub nom.* Florida Drum Co. v. Thompson, 668 So.2d 192, 193 (Fla. 1996) (fact that yacht owner had insurance covering damage to yacht that occurred when it was being repaired at shipyard was irrelevant to amount of damages sustained by owner, to any duty that owner had to mitigate damages, or to shipyard's liability for such damages, regardless of whether owner's theory of recovery was negligence or breach of contract).

Indeed, the logical consequence of Defendants' argument that Plaintiffs have no injury because of PBGC coverage would be that, if PBGC took over the Plan and made benefit payments from its own funds because the Plan is underfunded, PBGC's right of subrogation would not entitle PBGC to recover those payments from the Defendants, notwithstanding that Defendants' misconduct caused the Plan to be underfunded. A subrogee can have no greater rights than a subrogor. E.H. Ashley & Co., Inc. v. Wells

Fargo Alarm Services, 907 F.2d 1274, 1277 (1st Cir. 1990) ("The law of Rhode Island governs the interpretation of the contract in question; and it is well settled in Rhode Island, as elsewhere, that an insurer, by a right of subrogation, steps into the shoes of the insured and can recover only if the insured could have recovered. The subrogee has no greater rights against a third party by virtue of its status as the insurer."). Such a result is legally without support and defies both common sense and public policy.

Defendants make a new argument in their supplemental memorandum, that PBGC does not provide funds, and, therefore, is not a collateral source of funds. See Dkt # 127 (Joint Supp. Memo.) at 5-6 ("It [PBGC] does not in any circumstance pay any amount to the plan, or serve as a source of 'funds.'") and 19 ("It is not possible to view the PBGC as a potential source of funds, rather than the government agency that simply spirits them away if and when an underfunded plan terminates or is terminated.").

The suggestion that PBGC does not serve as a "source of funds" but instead is "the governmental agency that simply spirits [plan assets] away if and when an underfunded plan terminates or is terminated" is both other-worldly and absurd. The fact that PBGC may take over an insolvent plan and its assets does not mean PBGC does not pay benefits from its own funds when plan assets are insufficient. Indeed, Defendant Angell has already acknowledged that is precisely what happens, directly contradicting its current assertion. See Dkt # 68-1 (Angell's Memorandum in Support of Motions to Dismiss) at 12 ("Thus, when a covered ERISA pension plan terminates with insufficient assets to satisfy its pension obligations, 'the PBGC becomes trustee of the plan.'. After using available plan assets to cover benefit obligations, the **PBGC then**

uses 'its own funds to ensure payment of most of the remaining 'non-forfeitable' benefits . . . to which participants have earned entitlement under the plan terms as of the date of termination.'") (quoting Pension Ben. Guar. Corp. v. LTV Corp., 496 U.S. 633, 637-38 (1990)) (emphasis supplied).

In any event, it should be incontrovertible that PBGC is a "potential source of funds," because PBGC is an insurer that pays benefits. See Trustees of Local 138 Pension Trust Fund v. F.W. Honerkamp Co. Inc., 692 F.3d 127, 130 (2d Cir. 2012) (referring to PBGC as "the insurer of protected pension benefits"); Pension Ben. Guar. Corp. v. Oneida Ltd., 562 F.3d 154, 155-56 (2d Cir. 2009) ("The PBGC is essentially an insurer of pension funds. 'Termination Premiums' paid to the PBGC are designed to help insure employees against the non-payment of pension benefits if the employer terminates a covered fund under specified circumstances."); DiFelice v. Aetna U.S. Healthcare, 346 F.3d 442, 454 (3d Cir. 2003) ("ERISA contained a raft of provisions designed to protect plan participants against negligent or malfeasant plan managers. For example, it created the Pension Benefit Guarantee Corporation ('PBGC'), an insurer akin to the Federal Deposit Insurance Corporation, to protect against employer insolvency."); Nachman Corp. v. Pension Ben. Guar. Corp., 446 U.S. 359, 379 n.28 (1980) (referring to "the insurance system run by the PBGC").

4. The inferences Defendants ask the Court to draw from the Receiver's Post-Complaint Regulatory Filings are improper

Defendants mischaracterize Plaintiffs' contention that the solvency of PBGC when and if the Plan is terminated is speculative, and then suggest that the Receiver's

Post-Complaint Regulatory Filings contradict that contention. See Dkt # 127 (Joint Supp. Memo.) at 16:

> Plaintiffs claim that the PBGC is on the verge of insolvency and that its guarantee is therefore worthless. Yet, as a Plan fiduciary, Del Sesto chose to pay $1.6 million in Plan assets to the PBGC, as a premium, to obtain those very protections. *See* Ex. 5 at 2. This, itself, speaks volumes. Del Sesto did not have to make the Church Plan Election (it is, after all, an "election"), and if the Plan indeed was a church plan as recently as April 15, 2019, Plaintiff could have used that $1.6 million to pay Plan participants' benefits. Plaintiff's protestations that PBGC's guarantees are worthless thus simply do not hold up.[[15]]

Plaintiffs have not and do not allege that "PBGC is on the verge of insolvency and that its guarantee is therefore worthless," and it is grossly improper for Defendants to make such an unsupported and unsupportable statement. Plaintiffs' argument is that PBGC's guarantee is only as good as its solvency, which can only be determined when PBGC is called upon to pay and to continue to pay benefits. See Dkt # 100 (Plaintiffs' Omnibus Memorandum in in Support of Their Objection to Defendants' Motions to Dismiss) at 103-05. Defendants do not and cannot dispute that argument.

Instead, Defendants offer evidence (which is beyond the scope of the supplemental briefing allowed by the Court) that PBGC in 2018 has a surplus in the fund covering single employer defined benefit plans. See Dkt # 127 (Joint Supp. Memo.) at 17 ("The fact that the relevant PBGC plan termination fund—the one which now covers the Plan—currently has a $2.4 billion surplus, not a deficit, means it hardly is 'at risk'…."). Defendants omit the fact that this is the first surplus PBGC had in the

[15] Defendants lack standing to challenge the Receiver's decisions on how to spend plan assets. The Receiver's fiduciary duties run to the plan's participants, not to the Defendants.

relevant fund in 15 years.[16] Indeed, the 2018 Annual report lists the prior nine years of annual deficits ranging from a low of $10.1 billion to a high of over $29 billion.[17] A one-time $2.4 billion surplus, over liabilities in excess of $101 billion,[18] after many years of annual deficits ranging from four to twelve times greater than that surplus, hardly ensures solvency for years to come. That surplus could quickly become a deficit. Indeed, in connection with another issue, Defendants themselves have informed the Court that the $2.4 billion surplus has already been greatly diminished, because since that surplus was calculated PBGC has taken on an additional $1.4 billion liability in connection with the Sears bankruptcy![19]

In any event, the key point is that, contrary to the Prospect Entities' claim,[20] PBGC is not taxpayer-funded and is not backed by the full faith and credit of the United States.[21] Therefore, it will always have a degree of credit risk, which renders benefits uncertain until they are actually paid.

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[16] See PBGC 2018 Annual Report at 33 ("This is the first positive year-end net position for the Single-Employer Program since FY 2001."). The 2018 Annual Report can be found on the PBGC's website at https://www.pbgc.gov/sites/default/files/pbgc-annual-report-2018.pdf. Thus, any "surplus" is merely a snapshot at a given moment in time. It is indisputable that PBGC has operated at a deficit for most of its 45 year existence.

[17] PBGC 2018 Annual Report at 31.

[18] PBGC 2018 Annual Report at 31.

[19] See Dkt # 101 (Prospect Defendants' Joint Surreply) at 4-5, 24-25.

[20] See Dkt # 70-1 (Prospect Entities' Memorandum in Support of their Motions to Dismiss) at 1 ("This is a lawsuit that should never have been filed, and reflects an attempt by the Plaintiff-Receiver to do the job that an entire federal agency has been created to fulfill—**which it does at taxpayer expense** and without depleting the assets of a retirement plan that the Receiver himself claims is terribly underfunded.") (emphasis supplied).

[21] See PBGC Press Release 08-19 ("The PBGC is not funded by tax dollars, and does not enjoy the full faith and credit of the United States government. The agency is financed by premiums paid by employers, assets from failed pension plans, recoveries from bankruptcies and returns on invested assets."), available on PBGC's website at https://www.pbgc.gov/news/press/releases/pr08-19.

Defendants also ask the Court to draw the inference that the Receiver's motivation in making the Receiver's Post-Complaint Regulatory Filings, including paying the PBGC premium, was to secure PBGC coverage for the damages that Plaintiffs are seeking to recover from Defendants, which supposedly is inconsistent with Plaintiffs' claim that PBGC solvency is speculative. All of Defendants' arguments concerning the Receiver's motivation are beyond the pleadings and, indeed, contrary to the rule that all inferences are to be drawn in favor of the non-moving party. They also ignore the clear law that once the Receiver concluded that he should administer the Plan under ERISA, the Receiver was *legally required* to tender a premium to PBGC,[22] regardless of whether or not PBGC is solvent, and whether or not PBGC's coverage will extend to plan deficits that preceded the effective date of the Receiver's Post-Complaint Regulatory Filings.

Defendants also improperly ask the Court to view the Receiver's Post-Complaint Regulatory Filings as conclusive evidence that invalidates Plaintiffs' allegations in the Complaint that the Defendants knew for years that the Plan no longer qualified as a church plan, but fraudulently agreed to continue to claim church plan status in order to avoid liability for the Plan deficit. Defendants argue:

> Given the admitted ambiguity as to whether the Plan is still a church plan, allegations in the FAC that any Defendants "conspired to falsely claim that the Plan continued to qualify as a church plan," no longer can be taken seriously. *See* FAC at ¶¶ 55(d)(ii), 56, 65, 114, 135. A claim must be known to be false for the Defendants to have conspired to make a false claim.4 And even if the standard were negligent disregard of the truth, the allegation could not stand because Plaintiff has admitted that either

[22] See PBGC's "Comprehensive Premium Filing Instructions for 2019 Plan Years" at 1 ("Every covered plan under ERISA section 4021 must make a premium filing each year.") (PBGC's website at https://www.pbgc.gov/sites/default/files/2019-premium-payment-instructions.pdf) (accessed July 1, 2019).

> position—church plan or ERISA plan—must be reasonable, because he now takes both positions.

Dkt # 127 (Joint Supp. Memo.) at 2: (citation omitted). See also Dkt # 127 (Joint Supp. Memo.) at 2:

> Such allegations cannot be taken seriously, given that Plaintiff himself does not now know whether the Plan meets the various requirements to qualify as a church plan despite almost two years of investigations, consultations with legal counsel, and correspondence and meetings with the PBGC.

See also Dkt # 127 (Joint Supp. Memo.) at 14:

> Simply, if Plaintiff could not find clear evidence of a church plan "problem" after 18 to 24 months[[23]] of searching and consulting with both its legal counsel and the PBGC, it is logical to infer that the Prospect Defendants could not have possibly picked up on any inconsistencies or irregularities in 2014, while it and its counsel were conducting due diligence based on the documents that CCCB chose to provide to them.

Such arguments would be unavailing even if this were a motion for summary judgment, since in that circumstance the significance of the Receiver's Post-Complaint Regulatory Filings would be a disputed issue of fact that would preclude summary judgment on Plaintiffs' fraud claims. Such arguments are completely improper in support of Defendants' motions to dismiss for failure to state a claim, which are to be decided based upon the allegations in the Complaint and certain documents referred to therein, with all inferences drawn in favor of Plaintiffs.

For example, the inference Defendants ask the Court to draw from the Receiver's Post-Complaint Regulatory Filings that "Plaintiff could not find clear evidence of a church plan 'problem' after 18 to 24 months of searching and consulting with both its

[23] It should be noted that Plaintiffs have conducted no discovery whatsoever in this case.

legal counsel and the PBGC"[24] is hardly drawn in Plaintiffs' favor. To the contrary, even before the Complaint was filed, Plaintiffs had found a great deal of evidence of a church plan "problem"-- much of which is detailed in the Complaint. Plaintiffs have pled these issues in the alternative and are entitled to do so. The Receiver was also entitled to file the ERISA § 410(d) Election "without prejudice to the position taken [in this litigation] that the Plan ceased to qualify as a church plan (and became subject to ERISA) on or prior to the Effective Date, possibly as of 2009 or earlier." Dkt # 127-1 at § 3.

Defendants make additional arguments in support of their motions to dismiss Plaintiffs' fraud claims that are self-evidently fact-dependent, and, therefore, are not appropriate for consideration in connection with these motions, such as the following:

> It also bears remembering that the Prospect Defendants had no direct access to the Plan's records, had far less access to records than Plaintiff has had (along with less time to consider what had been provided by the sellers), and could only rely on the clear and un-caveated representations and warranties being made to them by CCCB and the other settling co-defendants—as part of a purchase of business assets and in regard to an obligation the Prospect Defendants were not assuming and reasonably believed they could not lawfully assume—that the Plan was then a non-electing church plan.

Dkt # 127 (Joint Supp. Memo.) at 13. The contention that the Prospect Defendants "had no direct access to the Plan's records" is both a question of fact, and contrary to the allegations in the complaint concerning the Prospect Entities' direct dealings with the Plan's actuaries prior to the 2014 Asset Sale. See Dkt # 60 (First Amended Complaint) ¶¶ 248-49 & 252.

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[24] Dkt # 127 (Joint Supp. Memo.) at 14.

Defendants make a convoluted argument[25] to the effect that the Receiver's Post-Complaint Regulatory Filings mandate dismissal of Plaintiff's successor liability claims because they establish that the Prospect Entities did not know that the Plan was governed by ERISA in 2014. That argument has at least three fatal deficiencies. First, the argument is a total *non-sequitur*: the Receiver's Post-Complaint Regulatory Filings (including the "without prejudice" language) are not inconsistent with the Plan's already being governed by and subject to ERISA in 2014.[26] Second, the argument is inappropriate for consideration on a motion to dismiss for the same reasons that all of Defendants' other fact-based arguments are inappropriate. Plaintiffs have alleged that the Prospect Entities had such knowledge,[27] and such fact-based issues are not decided in connection with such motions. Third, the argument mistakenly assumes that for successor liability to apply, Plaintiffs must demonstrate that the Prospect Entities knew the Defendant SJHSRI's pension liability was based on ERISA in 2014, rather than state law. To the contrary, in addition to substantial continuity, all Plaintiffs need to show is that when the Prospect Defendants acquired SJHSRI's assets they knew that SJHSRI had pension obligations. Upholsterers' Int'l Union Pension Fund v. Artistic Furniture, 920 F.2d 1323, 1329 (7th Cir. 1990) (The "predicates to the imposition of

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[25] Dkt # 127 (Joint Supp. Memo.) at 25 ("Plaintiff's decision to now make and file a Church Plan Election casts his successor liability claims against the Prospect Defendants, however configured, in an entirely new light, for if the Plan either was a church plan in 2014 or its status as a church plan was at least colorable, there is no practical way the Prospect Defendants—as prospective purchasers at the time, weighing whether to purchase the business assets of the St. Joseph's Hospital of Rhode Island and the Roger Williams Hospital but knowing that, as secular for-profit enterprises, they certainly could not assume and maintain a "church plan"—that there was any ERISA-based funding obligation, or any other ERISA-based liability, to be dealt with, or avoided.").

[26] To the contrary, they were made expressly without prejudice to that contention.

[27] Plaintiffs expressly allege that the Prospect Entities knew that the Plan no longer qualified for exemption from ERISA and participated in a scheme to falsely continue to claim church plan status for the Plan. See, e.g., Dkt # 60 (First Amended Complaint) ¶¶ 55(d)(ii), 127-29, 135 & 158.

successor liability are as follows: to hold a successor liable we must find that there exist sufficient indicia of continuity between the two companies and that the successor firm had notice of its predecessor's liability."). There is no requirement that the Prospect Entities "knew" that SJHSRI's pension liabilities were *based on ERISA*, as opposed to being based on state law claims under the law of contract, promissory estoppel, and/or fraud.

5. The Defendants' contention that PBGC and not Plaintiffs is the "real party in interest" in this case is both beyond the scope of the supplemental briefing and clearly wrong

Defendants also improperly use their supplemental memoranda to repeat arguments in support of their contentions that Plaintiffs' claims must be dismissed for failure to join an indispensable party, or that the Court should order joinder of PBGC.

For example, Defendants argue that "the PBGC's substantial Title IV obligations make it the real party in interest." Dkt # 127 (Joint Supp. Memo.) at 17. See also Dkt # 127 (Joint Supp. Memo.) at 21 ("Indeed, the PBGC's economic interest in this litigation—as the federal agency that provides plan termination insurance (and related benefit guarantees)—is so substantial that the PBGC should be a party to this litigation, to prevent the risk of inconsistent outcomes as to the interpretation and enforcement of the relevant ERISA Title IV provisions."). However, Defendants have already made that argument and Plaintiffs have already addressed all the reasons why PBGC is not the real party in interest, even assuming, *arguendo*, that the plan is covered by ERISA.[28] Plaintiffs have also already addressed all the reasons why PBGC cannot be compelled

[28] Dkt # 100 (Plaintiffs' Omnibus Memorandum in in Support of Their Objection to Defendants' Motions to Dismiss) at 125-140.

to join this lawsuit, including that PBGC does not claim an interest in the subject matter of this lawsuit.[29] The Receiver's Post-Complaint Regulatory Filings do not affect those arguments. Accordingly, the Court should disregard these assertions as beyond the scope of supplemental briefing.

These assertions are also clearly wrong. PBGC would not be the "real party in interest" in this case, even if (*arguendo*) PBGC coverage for pre-Receivership Plan deficits losses were certain (which it is not). As previously noted, PBGC is an insurer. Until an insurer pays a claim, the insured *and not the insurer* remains the real party in interest. See Wright & Miller, 6A Fed. Prac. & Proc. Civ. § 1546 (3d ed. 2016) ("The general rule in the federal courts is that if the insurer has paid the entire claim, it is the real party in interest and must be sue in its own name. If no money or enforceable promise to pay money has been advanced, then there has not been any subrogation and the insured remains the real party in interest."); Sawyer Brothers, Inc. v. Island Transporter, LLC, 887 F.3d 23, 34 (1st Cir. 2018) ("When an insurer has paid the entire loss suffered by its insured, the insurer becomes the real party in interest. However, when an insurer pays only part of the loss suffered by its insured, the insured remains a real party in interest together with the insurer.") (citations omitted); AJC Logistics, LLC v. Economy Intern. Services, Inc., 967 F. Supp. 2d 546, 551 (D.P.R. 2013) ("The law is clear that an insurer is a real party in interest sufficient for Article III standing 'only when direct actions are maintained against them or when they become subrogated to the rights of their insureds after payment of the loss.' ") (quoting Compton v. D'Amore, 101

[29] Dkt # 100 (Plaintiffs' Omnibus Memorandum in in Support of Their Objection to Defendants' Motions to Dismiss) at 136-137.

A.D.2d 800, 801, 475 N.Y.S.2d 463, 466 (1984)) (additional citation omitted). PBGC has made no payments to the Plan or Plan participants. Indeed, PBGC has not even taken over the Plan. Accordingly, it is not a necessary party.

6. The Defendants' contention that PBGC coverage extends to the Plan deficit prior to the effective date of the § 410(d) Election is beyond the scope of the supplemental briefing, not appropriate for determination in this case, and is a conclusion that is by no means clear

Defendants claim that, as a result of the Receiver's Post-Complaint Regulatory Filings, "PBGC has to fully guarantee all of the Plan participants' benefits." Dkt # 127 (Joint Supp. Memo.) at 20. However, the scope of PBGC coverage, *vel non*, for pre-effective date Plan deficits is beyond the scope of the supplemental briefing, and completely irrelevant to the motions to dismiss for a number of reasons, including but not limited to the collateral source rule. Accordingly, the Court should disregard Defendants' numerous assertions on that issue.

Moreover, this litigation is certainly not the proper forum and this is not the time to litigate that issue. PBGC is not a party, and none of PBGC's coverage obligations could conceivably have been triggered because the Plan has not been terminated. Whether (and to what extent) PBGC has any defenses to future claims for coverage is by no means clear, notwithstanding Defendants' unequivocal assertions to the contrary.

In any event, Defendants do not cite (and Plaintiffs are not aware of) any authority that comes even close to addressing the scope of PBGC coverage for a defined benefit plan that operated for many years at a funding deficit under a claimed church plan exemption, during which time it paid no premiums to PBGC, and then, after being placed in receivership, elected ERISA coverage under § 410(d) and paid a single premium, and sought to obtain PBGC coverage for the deficit by terminating the Plan. This case presents issues of first impression.

Unable to cite any authority that addresses PBGC's coverage obligation in circumstances such as this, Defendants contend that the answer lies in general statutory language, arguing that "[t]he exact scope of PBGC's guarantee obligations are set forth in ERISA § 4022." Dkt # 127 (Joint Supp. Memo.) at 15. However, it is by no means clear under ERISA § 4022 (29 U.S.C. § 1322) that the Receiver's payment of the premium results in immediate coverage by PBGC. ERISA § 4022 excludes from PBGC coverage any "plan" which has not been in effect for five years prior to termination. 29 U.S.C. § 1322(b)(1)(A). Ordinarily, a non-electing church plan is excluded from the statutory definition of "plan." 29 U.S.C. § 1321(b)(3). Moreover, 29 U.S.C. § 1322(b)(2) expressly provides that this five-year period begins on the first date on which ERISA applies to the plan. 29 U.S.C. § 1322(b)(2) ("For purposes of determining what benefits are guaranteed under this section in the case of a plan to which section 1321 of this title does not apply on September 3, 1974, the 60-month period referred to in paragraph (1) shall be computed beginning on the first date on which such section does apply to the plan.").[30]

To the extent it was the Receiver's Post-Complaint Regulatory Filings that made the Plan subject to ERISA, it could be argued that for purposes of PBGC coverage, the Plan has only been in existence since the effective date of the Receiver's Election,

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[30] When ERISA first applied to the Plan is an issue currently before the Court. The Receiver contends (in the alternative) that such date is in 2009 or earlier. The Receiver expressly made the Election without prejudice to this position.

which Defendants claim is July 1, 2018. In that case the earliest date when there may be PBGC coverage would be July 1, 2023.

Defendants make a contrary argument that the five-year requirement is inapplicable because the Plan was in effect "since 1965." Dkt # 127 (Joint Supp. Memo.) at 15 n.11 ("Generally, these provisions require the PBGC to guarantee all nonforfeitable benefits under a single employer plan which terminates at a time the plan is subject to its insurance provisions, subject to certain limitations not applicable to a plan that has been in effect 60 months or more (**here, since 1965**).") (emphasis supplied). However, Defendants ignore 29 U.S.C. § 1322(b)(2), which, as noted, states that "[f]or purposes of determining what benefits are guaranteed under this section in the case of a plan to which section 1321 of this title does not apply on September 3, 1974, the 60-month period referred to in paragraph (1) shall be computed **beginning on the first date on which such section does apply to the plan**." (emphasis supplied). Thus, it could be argued that the five-year period does not begin on the date the Plan was established, but, rather, on the date the Plan first became subject to ERISA. If the Receiver's Post-Complaint Regulatory Filings are what caused the Plan to become subject to ERISA, then that date is the effective date for the § 410(d) Election, which Defendants claim is July 1, 2018. Accordingly, it is by no means certain that the Receiver's Post-Complaint Regulatory Filings, standing alone, provide immediate PBGC coverage.

7. Defendants' claim that the "Plaintiffs Could End This Litigation Now by Filing for a Distress Termination of the Plan" is both beyond the scope of supplemental briefing and wrong. To the contrary, the Receiver likely cannot even consider filing for a distress termination until the Plaintiffs' claims against Defendants are resolved in this litigation.

Consistent with their strategy of attempting to deflect the Court from Plaintiffs' claims and Defendants' misconduct, and, instead, shift the focus to PBGC, Defendants devote pages of their memorandum to the argument that the Receiver could "end this litigation now" by compelling PBGC to take over the Plan in a distress termination. See Dkt # 127 (Joint Supp. Memo.) at 22-25 ("Plaintiffs Could End This Litigation Now By Filing For A Distress Termination Of The Plan"). Once again, that argument is both irrelevant to the motions to dismiss and exceeds the scope of the supplemental briefing allowed by the Court.

In addition, Defendants misread the statute on distress terminations. As discussed below, and contrary to Defendants' argument that Plaintiffs could end this litigation now by filing for a distress termination of the Plan, resolution of this litigation may be necessary for the Receiver to consider filing for a distress termination. That is because some of Plaintiffs' claims, including Plaintiffs' claims that the Prospect Entities have successor liability for SJHSRI's obligations under the Plan, are inconsistent with the criteria required for a distress termination.[31] The Receiver as Plan Administrator is obligated to assert those claims. See Dkt # 127 (letter dated May 15, 2019 from PBGC to the Receiver) Ex. 4 ("Even if the Plan were found to be covered by ERISA, including

[31] Plaintiffs' successor liability claims against the Prospect Entities are based both on state law and ERISA and are extensively discussed in Plaintiff's Opposition Memorandum (Dkt # 99 at 13-19), which is not repeated herein.

Title IV of ERISA, the Plan Administrator remains responsible for administering the Plan – including decisions with regard to collecting amounts owed to the Plan and pursuing suits on behalf of the plan.").[32]

Moreover, for a distress termination to be effective, PBGC must determine that the distress termination is in compliance with ERISA, including that the necessary distress criteria have been met with respect to the contributing sponsor and every member of its controlled group. 29 U.S.C. § 1341(c)(1)(C).[33] This is not the proper time and forum to adjudicate that issue, but, if the Receiver were to file for a distress termination now, PBGC certainly could contend that the criteria for a distress termination are not satisfied. The necessary distress criteria are set forth in 29 U.S.C. § 1341(c)(2)(B):

> (B) **Determination by the corporation of necessary distress criteria** Upon receipt of the notice of intent to terminate required under subsection (a)(2) and the information required under subparagraph (A), the corporation shall determine whether the requirements of this subparagraph are met as provided in clause (i), (ii), or (iii). The requirements of this subparagraph are met if each person who is (as of the proposed termination date) a contributing sponsor of such plan or a member of such sponsor's controlled group meets the requirements of any of the following clauses:
>
> > (i) **Liquidation in bankruptcy or insolvency proceedings** The requirements of this clause are met by a person if—
> >
> > > (I) such person has filed or has had filed against such person, as of the proposed termination date, a petition

[32] If Defendants are permitted to refer to this letter, so too can the Receiver.

[33] The PBGC's determination likely is not judicially reviewable. See Becker v. Weinberg Group, Inc. Pension Trust, 473 F. Supp. 2d 48, 69 (D.D.C. 2007) (PBGC's decision whether or not to issue a notice of non-compliance for a "standard" plan termination is not judicially reviewable) ("Second, even if the Court had found in Plaintiff's favor, the Court lacks jurisdiction to review her claim against PBGC because its decision to exercise its enforcement authority in this area is committed by law to the agency's discretion by law. 5 U.S.C. § 701(a)(2)") (citing Heckler v. Chaney, 470 U.S. 821, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985)).

seeking liquidation in a case under title 11 or under any similar Federal law or law of a State or political subdivision of a State (or a case described in clause (ii) filed by or against such person has been converted, as of such date, to a case in which liquidation is sought), and

(II) such case has not, as of the proposed termination date, been dismissed.

(ii) **Reorganization in bankruptcy or insolvency proceedings** The requirements of this clause are met by a person if—

(I) such person has filed, or has had filed against such person, as of the proposed termination date, a petition seeking reorganization in a case under title 11 or under any similar law of a State or political subdivision of a State (or a case described in clause (i) filed by or against such person has been converted, as of such date, to such a case in which reorganization is sought),

(II) such case has not, as of the proposed termination date, been dismissed,

(III) such person timely submits to the corporation any request for the approval of the bankruptcy court (or other appropriate court in a case under such similar law of a State or political subdivision) of the plan termination, and

(IV) the bankruptcy court (or such other appropriate court) determines that, unless the plan is terminated, such person will be unable to pay all its debts pursuant to a plan of reorganization and will be unable to continue in business outside the chapter 11 reorganization process and approves the termination.

(iii) **Termination required to enable payment of debts while staying in business or to avoid unreasonably burdensome pension costs caused by declining workforce** The requirements of this clause are met by a person if such person demonstrates to the satisfaction of the corporation that—

(I) unless a distress termination occurs, such person will be unable to pay such person's debts when due and will be unable to continue in business, or

> (II) the costs of providing pension coverage have become unreasonably burdensome to such person, solely as a result of a decline of such person's workforce covered as participants under all single-employer plans of which such person is a contributing sponsor.

Defendant SJHSRI itself likely does not meet any of the necessary criteria. Defendants claim that a distress termination is available under the bankruptcy and liquidation criteria. See Dkt # 127 (Joint Supp. Memo.) at 24 ("For its part, subparagraph (B) simply involves demonstrating to the PBGC that the **Plan's contributing sponsors (CCCB, et al.) are in bankruptcy (or a similar process under state law, such as a receivership)** or are in the process of being liquidated. *See* ERISA §4041(c)(2)(B), at (i) and (ii) (codified at 29 U.S.C. §1341(c)(2)(B)(i), (ii)).") (emphasis supplied). However, SJHSRI, CCCB, and RWH are not presently in bankruptcy or liquidation,[34] and, therefore, do not satisfy the requirements of 29 U.S.C. § 1341(c)(2)(B)(i) or (ii).

As for sub-section (B)(iii)(I), SJHSRI arguably is no longer "in business," and, therefore, has no need to "continue in business." Moreover, PBGC is quite exacting in applying this test, which is committed to PBGC's discretion.[35] As for sub-section (B)(iii)(II), SJHSRI's difficulty in meeting its pension obligations is *not* "**solely** as a result of a decline of such person's workforce covered as participants under all single-employer plans of which such person is a contributing sponsor." 29 U.S.C. § 1341(c)(2)(B)(iii)(II) (emphasis added). Rather than being due "solely" to a declining

[34] Notably, the statute does not refer to "voluntary dissolution" or "wind-down" as grounds for distress termination.

[35] There are no cases reviewing PBGC's decision-making under this distress test. Furthermore it is an extremely lengthy process.

workforce, SJHSRI's difficulty arises certainly at least in part out of its transferring all of its operating assets to the Prospect Entities. Thus, this distress test could not possibly be met in this case. Finally, if Plaintiffs' recovery in this case is sufficient to fully fund the Plan's benefit obligations to all of the Plan participants, then, by definition, SJHSRI's pension liability will not be "unreasonably burdensome."

Moreover, even if SJHSRI satisfied one or more of these criteria, Plaintiffs claim that Defendants Prospect Chartercare, LLC, Prospect Chartercare SJHSRI, LLC, and Prospect Chartercare RWMC, LLC (*inter alia*) have successor liability under state and/or federal law for SJHSRI's pension obligations, and that Prospect Medical Holdings, Inc. and Prospect East Holdings, Inc. as members of the "controlled group" of Prospect Chartercare, LLC, Prospect Chartercare SJHSRI, LLC, and Prospect Chartercare RWMC, LLC also have successor liability. See Dkt # 99-1 (Plaintiffs' Memorandum in Opposition to the Prospect Entities' Motion to Dismiss) at 12-25, 97-109.

If those claims are valid, then, for the Plan to be eligible for a distress termination, the Prospect Entities that acquired SJHSRI's assets (and the related Prospect Entities that are in the same "controlled group" as the asset acquirers) would *all* have to qualify for these criteria,[36] since these requirements are met only if "**each**

[36] Plaintiffs are not aware of any precedent applying the doctrine of successor liability to hold a successor liable under the discharge criteria set forth in 29 U.S.C. § 1341. However, the federal common law of successor liability applies to hold successors liable for contribution obligations of sponsors of single employer defined benefit plans in the context of asset transfers. See Pension Benefit Guaranty Corporation v. Findlay Industries, Inc., 902 F.3d 597, 611-612 (6th Cir. 2018) (holding asset transferee liable for contribution obligations of plan sponsor) ("Not only does successor liability promote fundamental policies of ERISA, refusal to apply the principles of successor liability here would frustrate ERISA policies. If there is no successor liability here, this case will provide an incentive to find new, clever financial transactions to evade the technical requirements of ERISA and, thus, escape any liability—a result that flies in the face of § 1001(b)."), petition for cert. filed (U.S. April 2, 2019) (No. 18-1265, sub nom.

person who is a contributing sponsor of such plan or a member of such sponsor's controlled group meets the requirements of any of the . . . clauses." 29 U.S.C. § 1341(c)(2)(B) (emphasis supplied). It is highly unlikely that each of them would qualify. Indeed, it is difficult to conceive how *any* of these Prospect Entities meet the requirements of *any* of these clauses. They are not in bankruptcy or liquidation, and likely cannot demonstrate that "unless a distress termination occurs" they "will be unable to continue in business," or that the pension costs "have become unreasonably burdensome" to them "solely" due to a declining workforce. 29 U.S.C. § 1341(c)(2)(B)(iii).

In other words, notwithstanding the precarious financial position of the Plan itself, there would be no financial "distress" that would entitle the Receiver to initiate a "distress termination" if one or more of the Prospect Entities have successor liability. Unless and until the Plaintiffs' claims that those Prospect Entities have successor liability are rejected in this litigation or the Receiver reasonably concludes that these claims will not be successful, the Receiver likely cannot establish to PBGC's satisfaction that the Plan should be terminated in a distress termination. Thus, rather than PBGC insurance relieving the Prospect Entities of liability, as they claim it should, the Prospect Entities' successor liability prevents the Receiver from filing a successful application for a distress termination.

September Ends. Co. v. Pension Benefit Guaranty Corp.). The same considerations require application of successor liability to distress terminations of single employer defined benefit plans following an asset sale.

8. Defendants' argument that the Receiver "could have ensured PBGC coverage" by seeking a private letter ruling from the IRS or an advisory opinion from Department of Labor is both irrelevant and plainly mistaken

Defendants contend that the Receiver "could have ensured PBGC coverage" by seeking "a private letter ruling from the Internal Revenue Service (or the U.S. Department of Labor), to confirm that the Plan did not and does not constitute a church plan. . . ." Dkt # 127 (Joint Supp. Memo.) at 4. That contention is irrelevant to the motions to dismiss. Moreover, assuming the IRS[37] or Department of Labor[38] would have agreed to that request, the outcome could have gone either way. An IRS or DOL ruling that the Plan *remained* a church plan certainly would not have "ensured PBGC coverage."

In any event, an IRS private letter ruling that the Plan did or did *not* qualify as a church plan would only be effective to confirm the Plan's status for tax purposes. IRS Rev. Proc. 2011-44 § 2 ("Although a church plan is not required to have a favorable letter ruling from the IRS, a letter ruling would ordinarily confirm a plan's status for tax purposes, as noted in Rev. Proc. 2011-4, section 4."). It definitely would not be binding in this lawsuit. See Rollins v. Dignity Health, 19 F. Supp. 3d 909, 913 (S.D. Cal. 2013) (declining to accept IRS private letter ruling that plan qualified as a church plan) ("The

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[37] "[T]he IRS and its agents are not required to issue private letter rulings…" Tobin v. I.R.S. Com'r, No. CIV. 07-53-B-W, 2007 WL 2908819, at *4 (D. Me. Sept. 26, 2007) (citing Am. Ass'n of Commodity Traders v. Dep't of Treasury, 598 F.2d 1233, 1235 (1st Cir. 1979) ("Nothing in the Internal Revenue Code requires the Commissioner to issue private letter rulings. When such rulings do issue, they represent the application of the Commissioner's unique expertise and judgment to a particular set of facts. We can think a few more discretionary functions than deciding how and when to issue private letter rulings.")).

[38] DOL also has discretion whether or not to issue advisory opinions. See DOL ERISA Proc. 76-1 § 5 *Discretionary Authority to Render Advisory Opinions* (listing sections of ERISA for which DOL will not issue advisory opinions, and stating that "[t]his list is not all inclusive and the Department may decline to issue advisory opinions relating to other sections of the Act whenever warranted by the facts and circumstances of a particular case.").

IRS's private letter rulings apply only to the persons or entities who request them and are not entitled to judicial deference. The Court instead conducts its own independent analysis of the statute."); Martinez–Gonzalez v. Catholic Schools of Archdioceses of San Juan Pension Plan, 235 F. Supp. 3d 334, 345-346 (D.P.R. 2017) ("To the extent the [defendant] relies on the IRS's private letter ruling to contest the result of the statutory analysis above, that reliance is misplaced….Thus, while the IRS has interpreted the scope of the church-plan exemption in a manner favorable to the [defendant], that position is not entitled to deference and should be rejected because it strays from the text of the statute and because there is no evidence that Congress acquiesced to the IRS's interpretation."). See also PBBM-Rose Hill, Limited v. Commissioner of Internal Revenue, 900 F.3d 193, 208 (5th Cir. 2018), in which the court stated:

> But even assuming *arguendo* the regulation were ambiguous, we would not defer to the interpretation in that IRS private letter ruling. While such a ruling can 'reveal the [agency's] interpretation,' *Smith v. Reg'l Transit Auth.*, 827 F.3d 412, 420 n.3 (5th Cir. 2016) (quoting *Hanover Bank v. Comm'r*, 369 U.S. 672, 686, 82 S.Ct. 1080, 8 L.Ed.2d 187 (1962)), it is "not binding with respect to parties other than the taxpayer to whom it was issued," *id.*, and may not be "cited as precedent,"; *Transco Expl. Co. v. Comm'r*, 949 F.2d 837, 840 (5th Cir. 1992) (citation omitted).

See also Bowler v. Hawke, 320 F.3d 59, 63 (1st Cir. 2003) (referring to IRS private letter ruling as "an authoritative but non-binding legal opinion"). Furthermore, the underlying material facts and representations upon which an IRS private letter ruling would be based are obviously in dispute in this case.

Similarly, the courts agree that DOL advisory opinions "are informative but not binding." Lipnicki v. Meritage Homes Corp., No. 3:10-CV-605, 2014 WL 923524, at *3

(S.D. Tex. Feb. 13, 2014) ("The focus on these letters is so great that it sometimes seems the parties treat the opinion letters as if they have the force of law. They do not."). See Barfield v. New York City Health and Hospitals Corp., 537 F.3d 132, 149 (2d Cir. 2008) ("Statutory interpretations contained in DOL opinion letters, as opposed to those arrived at after formal agency adjudication or notice-and-comment rulemaking, are not binding authority.") (citations omitted); Misewicz v. City of Memphis, 864 F. Supp. 2d 688, 703 (W.D. Tenn. 2012) ("The Supreme Court has held that DOL opinion letters 'lack the force of law,' and yet to the extent the DOL opinions are persuasive, they are entitled to respect. Even though the opinion letters are not binding on the Court, the Court holds that the letters cited by the parties are not dispositive of the issues presented and therefore are not persuasive.") (quoting Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000)).

Indeed, even DOL contends they are binding only on the requesting party, and are dependent on the accuracy of the facts presented.

> An advisory opinion is an opinion of the Department as to the application of one or more sections of the Act, regulations promulgated under the Act, interpretive bulletins, or exemptions. The opinion assumes that all material facts and representations set forth in the request are accurate, and applies only to the situation described therein. Only the parties described in the request for opinion may rely on the opinion, and they may rely on the opinion only to the extent that the request fully and accurately contains all the material facts and representations necessary to issuance of the opinion and the situation conforms to the situation described in the request for opinion.

DOL ERISA Proc. 76-1 § 10. As would be the case with an IRS private letter ruling, the material facts and representations upon which a DOL advisory opinion would be based are obviously in dispute in this case.

9. Defendants' arguments that PBGC is the "direct beneficiary" of this lawsuit, and that this lawsuit "bails out" PBGC are irrelevant, exceed the scope of the supplemental briefing, and are simply wrong

Defendants contend that PBGC and not Plaintiffs is the "direct beneficiary" of this lawsuit, and that this lawsuit "would bail out the PBGC." Dkt # 127 (Joint Supp. Memo.) at 20. Accordingly, they argue that the relief Plaintiffs are seeking is not "appropriate equitable relief" under ERISA. See Dkt # 127 (Joint Supp. Memo.) at 21-22 ("It would be hardly 'appropriate' to pursue private entities that are strangers to the Plan[[39]] for 'appropriate equitable relief' (as ERISA § 502(a)(3) requires), when the direct beneficiary of that relief not only would be a nonparty, but would also be a federal government agency that is being paid millions in premiums to provide the benefit guarantees it is required by statute to provide under ERISA Title IV.").

This argument is invalid for so many reasons that it is difficult to decide where to begin. As is fully set out in Plaintiffs' Memorandum in Opposition to the Prospect Entities' Motion to Dismiss,[40] the claim that the Prospect Entities were "strangers to the Plan" is contradicted by the express allegations in the Complaint, including allegations of the Prospect Entities' direct dealings with the Plan's actuaries prior to the 2014 Asset Sale. See Dkt # 60 (First Amended Complaint) ¶¶ 248-49, 252.

The claims that this litigation seeks a "bail-out" of PBGC or that PBGC and not the Plan participants would be the "direct beneficiary" of any recovery in this case demonstrate extraordinary chutzpah. Holding tortfeasors liable for the losses they

[39] Defendants refer to the Prospect Entities as "strangers to the Plan," not Angell. Angell's role as third party administrator, Plan actuary, and drafter of many Plan amendments forecloses even defendants from making that assertion as to Angell.

[40] Dkt # 99 (Plaintiffs' Memo. in Opp. to Prospect Entities' Motion to Dismiss) at 3, 18-19, 26-29.

cause is not a "bail-out" of an insurer that otherwise would bear the loss. If it were, equitable subrogation[41] would not exist. The only "bail-out" at issue here is the Defendants' attempts to use PBGC coverage to bail themselves out of a well-earned liability for the Plan. Rather than PBGC being the direct beneficiary of Plaintiffs' recoveries in this case, if Defendants are successful in shielding themselves from liability because of PBGC, *Defendants* will be the bailed-out beneficiaries of that coverage. That is contrary to ERISA, under which it is absolutely clear that employers (and entities held to be employers under the doctrine of successor liability) have primary responsibility for pension obligations, not PBGC. See Pension Benefit Guaranty Corporation v. Findlay Industries, Inc., 902 F.3d 597, 607 (6th Cir. 2018) ("And although PBGC exists to ensure that employees receive the pensions that they were promised, ERISA holds the employers primarily accountable and relies on PBGC to pay only as a last resort.") (applying doctrine of successor liability in context of a single employer plan), *petition for cert. filed* (U.S. April 2, 2019) (No. 18-1265, sub nom. September Ends. Co. v. Pension Benefit Guaranty Corp.).

Holding the Prospect Entities liable under the doctrine of successor liability preserves PBGC's resources, and, therefore, is essential to ERISA's purposes:

> Not only does successor liability promote fundamental policies of ERISA, refusal to apply the principles of successor liability here would frustrate ERISA policies. If there is no successor liability here, this case will provide an incentive to find new, clever financial transactions to evade the technical requirements of ERISA and, thus, escape any liability—a result that flies in the face of § 1001(b). And if employers can so easily escape

[41] See e.g., St. Paul Fire and Marine Ins. Co. v. Birch, Stewart, Kolasch & Birch, LLP., 379 F. Supp. 2d 183, 192-93 (D. Mass. 2005) ("Even in the absence of an agreement permitting subrogation, an insurer who has paid an insured's claims has, with some limitations, an implied or equitable right to indemnification against losses it has sustained in paying an insured's claims.") (citations omitted).

> millions of dollars in liabilities, PBGC will be left to pay the underfunded pension benefits. That situation will force PBGC to raise its rates, which will strain still-existing plans further, and which risks forcing them to be underfunded and possibly fail. Such a result plainly would frustrate the purpose of Subchapter III.

Pension Benefit Guaranty Corporation v. Findlay Industries, Inc., *supra*, 902 F.3d at 611-12. The fact that the Receiver has now paid a premium to PBGC does not change that calculus – insurers always charge premiums. Indeed, Defendants' claim that payment of a single premium of $1.6 million makes it equitable to relieve Defendants of their liability and hold PBGC primarily responsible for years of plan deficits that preceded that payment is ludicrous. Such a result clearly "would force PBGC to raise its rates, which will strain still-existing plans further, and which risks forcing them to be underfunded and possibly fail." Id. Accordingly, such a result clearly would frustrate the purposes of ERISA.

III. CONCLUSION

Defendants' motions to dismiss should be denied.

Respectfully submitted,

Plaintiffs,
By their Attorney,

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Dated: July 8, 2019

CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the within document was electronically filed on the 8th day of July, 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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/s/ Max Wistow

PIERCE ATWOOD LLP

Charles L. Finke, Esq.
Deputy General Counsel
Pension Benefit Guaranty Corporation
1200 K Street, NW Suite 340
Washington DC 2005

May 14, 2019

Re: Del Sesto, *et al.* v Prospect CharterCARE, LLC, *et al.*

Civil Action No. 1:18-cv-00328-WES-LDA (D.R.I.) (the "Federal Action")

VIA EMAIL: Finke.Charles@pbgc.gov

Dear Mr. Finke:

As you know, in my capacity as the Receiver and Plan Administrator of the St. Joseph Health Services of Rhode Island Retirement Plan (the "Plan"), I brought the above Federal Action against various parties on behalf of the Plan. A class of participants in the Plan are also plaintiffs in the action. Further, as you may know, in my Ninth Interim Report dated May 6, 2019 (copy attached) to the Rhode Island Superior Court that appointed me Receiver, at pages 7-8, I described certain filings made on behalf of the Plan in April 2019 with the Internal Revenue Service, the U.S. Department of Labor, and PBGC. I also noted that there is no assurance that PBGC will provide termination insurance coverage with respect to the Plan.

The Prospect Entities Defendants then sent the attached email dated May 10, 2019 to the district judge presiding over the Federal Action, taking a position with which we believe PBGC would disagree, including specifically the position that existence of PBGC termination insurance coverage means that the Plan and Plan participants have no damages from funding shortfalls resulting from the wrongful actions or omissions of third parties. We ask that you confirm that unless and until the Plan is terminated and PBGC becomes statutory trustee of the Plan, the current plan administrator of the Plan can pursue any claims the Plan may have against third parties, including claims for funding shortfalls, and regardless of whether PBGC termination insurance coverage may make up for such shortfalls in the event the recovery on such third party claims does not result in the Plan being fully funded.

Very truly yours,

Stephen Del Sesto
Receiver

cc: Jeffrey B. Cohen, Esq.
Max Wistow, Esq.

Jeffrey B. Cohen

From: Preston Halperin <phalperin@shslawfirm.com>
Sent: Friday, May 10, 2019 2:40 PM
To: Judge Smith
Cc: Stern, Brian; Ryan Jackson; Benjamin Ledsham; Stephen P. Sheehan; Max Wistow; jvc3@blishcavlaw.com; jvc@blishcavlaw.com; mrusso@frlawri.com; Dean Wagner; Robert Fine; rland@crfllp.com; erhow@birdmarella.com; jmcgowan@bakerlaw.com; treichert@birdmarella.com; adennington@ckrpf.com; csweeney@connkavanaugh.com; rconn@connkavanaugh.com; Wollin, David A.; cdieter@hinckleyallen.com; Merten, Howard; cmw@psh.com; egb@psh.com; Kessimian, Paul M.; dsullivan@rc.com; david.godofsky@alston.com; pat.dicarlo@alston.com; Boyajian, Steven J. (SBoyajian@rc.com); Maria Lenz; Christopher J. Fragomeni; Jessica Rider; jmcgowan@bakerlaw.com
Subject: Re: Update from the Prospect Entities; New Development
Attachments: Ninth Interim Report and Eighth Interim Request for Approval of Fees, Costs and Expenses 05.06.19.pdf

Dear Judge Smith,

With the mediation scheduled for next week, the Prospect Entities wanted to bring to your attention a change in the status quo regarding the involvement of PBGC in the St. Joseph's Health Services Pension Plan. We will follow this e-mail with an appropriate pleading so that the information provided herein will be part of the formal record for the Court's consideration in connection with the pending motions to dismiss.

Attached is the Receiver's Ninth Interim Report submitted to Judge Stern in the receivership matter. In paragraph 13, the report indicates that on April 15, 2019, the Receiver adopted a revised Plan document with a retroactive effective date of July 1, 2017 to cause the plan to comply with the requirements of ERISA. The Receiver filed an election to have the Plan covered by ERISA for all plan years beginning July 1, 2017. The Receiver tendered an initial premium to PBGC, which was reported in the press to be more than $1 Million Dollars. Finally, the Receiver states in his report at the bottom of page 8, that there is no assurance that PBGC will provide any coverage for pension fund shortfalls.

In light if this important new development, we are concerned that it may be premature to attempt to settle this matter via mediation. Until it is known whether PBGC will provide coverage for any pension shortfalls, it is not possible to determine whether the named plaintiffs will suffer any damages. Having spoken with Mr. Wistow, I know that it is the Receiver's position that the pending claims are unaffected by this new development.

We respectfully suggest that a conference call or an in-court conference might be helpful.

Preston W. Halperin,
Managing Partner

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From: Judge Smith <Judge_Smith@RID.USCOURTS.GOV>
Sent: Tuesday, April 23, 2019 4:42 PM
To: Preston Halperin
Cc: Stern, Brian; Ryan Jackson; bledsham@wistbar.com; Stephen P. Sheehan; mwistow@wistbar.com; jvc3@blishcavlaw.com; jvc@blishcavlaw.com; mrusso@frlawri.com; Dean Wagner; Robert Fine; rland@crfllp.com; erhow@birdmarella.com; jmcgowan@bakerlaw.com; treichert@birdmarella.com; adennington@ckrpf.com; csweeney@connkavanaugh.com; rconn@connkavanaugh.com; Wollin, David A.; cdieter@hinckleyallen.com; Merten, Howard; cmw@psh.com; egb@psh.com; Kessimian, Paul M.; dsullivan@rc.com; david.godofsky@alston.com; pat.dicarlo@alston.com; Boyajian, Steven J. (SBoyajian@rc.com); Maria Lenz; Christopher J. Fragomeni; Jessica Rider
Subject: RE: Update from the Prospect Entities

Judge Stern and I have conferred. We feel you should proceed with Mr. Isserles, for several reasons: First, he was proposed and agreed to by the parties; second, he seems very much qualified for the job (even though he lacks the church plan experience of Mr. Meyer); and third, time is of the essence, and his ability to get started soon may be quite helpful, particularly where the mediation may well take more than the two days you currently have reserved with him.

Given his availability, I will not be issuing the preliminary approval order regarding the main settlement agreement just yet, nor ordering discovery on the good faith issue. We discussed a 60 day window to attempt to resolve the case, and these dates fit within that time frame.

With respect to Mr. Sheehan's request for input on splitting the fees, it appears he has a proposal out there that has not been responded to, so we will defer on that for now. If you need our assistance with this, let us know.

Judge Stern and I request that you give us an update as to where things stand after your session in mid-May.

Thank you all,

Chief Judge William E. Smith

United States District Court
District of Rhode Island
One Exchange Terrace
Providence, Rhode Island 02903

-----Original Message-----
From: Preston Halperin <phalperin@shslawfirm.com>
Sent: Wednesday, April 17, 2019 4:36 PM
To: Judge Smith <Judge_Smith@RID.USCOURTS.GOV>
Cc: Stern, Brian <bstern@courts.ri.gov>; Ryan Jackson <Ryan_Jackson@RID.USCOURTS.GOV>; bledsham@wistbar.com; Stephen P. Sheehan <sps@wistbar.com>; mwistow@wistbar.com; jvc3@blishcavlaw.com; jvc@blishcavlaw.com; mrusso@frlawri.com; Dean Wagner <dwagner@shslawfirm.com>; Robert Fine <rfine@crfllp.com>; rland@crfllp.com; erhow@birdmarella.com; jmcgowan@bakerlaw.com; treichert@birdmarella.com; adennington@ckrpf.com; csweeney@connkavanaugh.com; rconn@connkavanaugh.com; Wollin, David A. <dwollin@hinckleyallen.com>; cdieter@hinckleyallen.com; Merten, Howard <hmerten@psh.com>; cmw@psh.com; egb@psh.com; Kessimian, Paul M. <pkessimian@psh.com>; dsullivan@rc.com; david.godofsky@alston.com; pat.dicarlo@alston.com; Boyajian, Steven J. (SBoyajian@rc.com) <SBoyajian@rc.com>; Maria Lenz <marialenz@riag.ri.gov>; Christopher J. Fragomeni <cfragomeni@shslawfirm.com>; Jessica Rider <JRider@riag.ri.gov>
Subject: RE: Update from the Prospect Entities

Dear Judge Smith,

I am writing to report where we stand on our efforts to negotiate an agreement to produce financial records to CCCB and the Receiver and our efforts to agree on a mediator. As to the financial records, the parties are making progress in our exchange of drafts of a proposed agreement. We intend to continue our efforts to reach an agreement and would like to report to each of you by the close of business on Friday, April 19, 2019.

On the issue of selecting a mediator, we do not have a final agreement among the Receiver, CCCB, and the defendant groups, the Prospect Entities, the Diocesan Defendants and Angell Pension (collectively, "the Non-Settling Defendants"). However, the parties have agreed to be guided by the Court on whether to select one of two mediators. Marc E. Isserles is available to mediate May 16 and May 17 and Robert A. Meyer is available to mediate May 23-24 in NYC and June 19-21 in Rhode Island. The Non-Settling Defendants are united in their belief that Mr. Meyer's unique experience gives us the best chance at a successful mediation. Mr. Meyer not only has substantial experience with complex litigation, but also has successfully mediated numerous "church plan" cases that involve ERISA. He is known nationally in this area. This mediation will likely require more than one session (and perhaps more than two) and oversight by someone already experienced with the complex issues arising from church plan-related litigation will be invaluable that we save time and move toward a resolution. Educating a mediator inexperienced with these issues will only reduce the chances of a resolution on what is already an expedited timeline.

The Receiver and CCCB are willing to accept Mr. Meyer as the mediator but do not wish to travel to NYC May 23-24 and do not want to delay mediation until June 19 in Rhode Island, if it will delay the Court's ruling on the pending motion for preliminary approval of the CCCB settlement. To address the Receiver and CCCB's concern with delay, the Receiver, the Prospect Entities and Angell request that the Court consider issuing its ruling on the pending motion for preliminary approval of the CCCB settlement without waiting for mediation to occur in June. As we understand it, should the Court preliminarily approve the settlement, notice to the class would issue and a subsequent final approval hearing would be scheduled approximately 90 days following notice to the class. The Receiver, the Prospect Entities and Angell believe that this window will provide the time necessary to mediate with Mr. Meyer on June 19th. In addition, should the Court permit discovery on the issue of whether the settlement was made in "good faith," with the Court's permission, paper discovery could begin immediately with depositions scheduled for dates following the June mediation. With that sequence of events, discovery should not have a deleterious effect on mediation.

The Diocesan Defendants ask that I report their position as follows in order to speed resolution of this issue: (1) the Court has already rejected plaintiffs' request that discovery proceed alongside or prior to mediation and that decision was correct in that such discovery will be divisive and distract the parties' focus on mediating this dispute. (2) The Diocesan Defendants agree that this mediation will likely require more than one session, and therefore the proposal to somehow stage discovery will not avoid the problems noted by the Court at the last conference (as discovery will need to be completed before the final approval hearing). (3) The choice of the best mediator for this complex dispute is sufficiently important that should not be conditioned upon accepting plaintiffs' refusal to travel to New York or to wait an additional 27 days or, alternatively, conditioned upon the waiver of substantive rights by the Diocesan Defendants.

That said, the Receiver and the Non-Settling Defendants (including the Diocesan Defendants) will be governed by the Courts' guidance on this. If you and/or Judge Stern wish the parties to mediate with Mr. Isserles on May 16 and 17, rather than waiting for Mr. Meyer to be available June 19th, the Non-Settling Defendants are willing to do so. Alternatively, the Court might suggest that CCCB and the Receiver reconsider their position and mediate with Mr. Meyer in NYC on May 23-24 in order to avoid delay. The Non-Settling Defendants' concern is that once we start with a mediator, it might be difficult to start again with a different mediator if the initial effort is not successful. We ask that you review the background of the two mediators being considered.

https://www.jamsadr.com/meyer/

https://www.jamsadr.com/isserles/

Preston W. Halperin,
Managing Partner

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-----Original Message-----
From: Stern, Brian <bstern@courts.ri.gov>
Sent: Wednesday, April 10, 2019 4:35 PM
To: Preston Halperin <phalperin@shslawfirm.com>; judge_smith@rid.uscourts.gov
Cc: Ryan Jackson <Ryan_Jackson@rid.uscourts.gov>; bledsham@wistbar.com; Stephen P. Sheehan <sps@wistbar.com>; mwistow@wistbar.com; jvc3@blishcavlaw.com; jvc@blishcavlaw.com; mrusso@frlawri.com; Dean Wagner <dwagner@shslawfirm.com>; Robert Fine <rfine@crfllp.com>; rland@crfllp.com; erhow@birdmarella.com; jmcgowan@bakerlaw.com; treichert@birdmarella.com; adennington@ckrpf.com; csweeney@connkavanaugh.com; rconn@connkavanaugh.com; Wollin, David A. <dwollin@hinckleyallen.com>; cdieter@hinckleyallen.com; Merten,

Howard <hmerten@psh.com>; cmw@psh.com; egb@psh.com; Kessimian, Paul M. <pkessimian@psh.com>; dsullivan@rc.com; david.godofsky@alston.com; pat.dicarlo@alston.com; Boyajian, Steven J. (SBoyajian@rc.com) <SBoyajian@rc.com>; Maria Lenz <marialenz@riag.ri.gov>; Christopher J. Fragomeni <cfragomeni@shslawfirm.com>; Jessica Rider <JRider@riag.ri.gov>
Subject: RE: Update from the Prospect Entities

Preston,

Thank you very much for the update.

J. Stern

-----Original Message-----
From: Preston Halperin [mailto:phalperin@shslawfirm.com]
Sent: Wednesday, April 10, 2019 4:19 PM
To: Stern, Brian; judge_smith@rid.uscourts.gov
Cc: Ryan Jackson; bledsham@wistbar.com; Stephen P. Sheehan; mwistow@wistbar.com; jvc3@blishcavlaw.com; jvc@blishcavlaw.com; mrusso@frlawri.com; Dean Wagner; Robert Fine; rland@crfllp.com; erhow@birdmarella.com; jmcgowan@bakerlaw.com; treichert@birdmarella.com; adennington@ckrpf.com; csweeney@connkavanaugh.com; rconn@connkavanaugh.com; Wollin, David A.; cdieter@hinckleyallen.com; Merten, Howard; cmw@psh.com; egb@psh.com; Kessimian, Paul M.; dsullivan@rc.com; david.godofsky@alston.com; pat.dicarlo@alston.com; Boyajian, Steven J. (SBoyajian@rc.com); Maria Lenz; Christopher J. Fragomeni; Jessica Rider
Subject: RE: Update from the Prospect Entities

Dear Judge Stern and Judge Smith,

I am writing to provide you with a status report on our efforts to select a mediator or agree on a process for selecting a mediator. The plaintiffs and the 3 defendant groups, Prospect, Diocesan defendants and Angell Pension, have been working toward an agreement to mediate the pending litigation. The plaintiffs submitted the names of 5 potential mediators to the defendants. Before submitting the names of possible mediators to the plaintiffs, the three defendant groups were able to agree on three potential mediators. The three potential mediators agreed upon by the defendants have now been submitted to plaintiff's counsel. The next steps are to agree on one of the 8 potential mediators, to agree upon dates for mediation and to agree on how to divide the costs of mediation among the parties. I have suggested to plaintiff's counsel, Mr. Sheehan, that he and I discuss the best way to move forward now that we have a pool of eight possible candidates.

Regarding a possible agreement between CCCB and Prospect Chartercare LLC on the production of financial information relative to the "put option," the parties have not yet reached an agreement, although drafts have been exchanged. At this point, the ball is in Prospect's court and we plan to respond to the latest draft no later than tomorrow.

With your permission, I would like to report again by the close of business Friday in the hope that we will have made greater progress by that time.

Preston W. Halperin,
Managing Partner

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-----Original Message-----
From: Stern, Brian <bstern@courts.ri.gov>
Sent: Monday, April 8, 2019 5:03 PM
To: Preston Halperin <phalperin@shslawfirm.com>
Cc: judge_smith@rid.uscourts.gov; Ryan Jackson <Ryan_Jackson@rid.uscourts.gov>; bledsham@wistbar.com; Stephen P. Sheehan <sps@wistbar.com>; mwistow@wistbar.com; jvc3@blishcavlaw.com; jvc@blishcavlaw.com; mrusso@frlawri.com; Dean Wagner <dwagner@shslawfirm.com>; Robert Fine <rfine@crfllp.com>; rland@crfllp.com; erhow@birdmarella.com; jmcgowan@bakerlaw.com; treichert@birdmarella.com; adennington@ckrpf.com; csweeney@connkavanaugh.com; rconn@connkavanaugh.com; Wollin, David A. <dwollin@hinckleyallen.com>; cdieter@hinckleyallen.com; Merten, Howard <hmerten@psh.com>; cmw@psh.com; egb@psh.com; Kessimian, Paul M. <pkessimian@psh.com>; dsullivan@rc.com; david.godofsky@alston.com; pat.dicarlo@alston.com; Boyajian, Steven J. (SBoyajian@rc.com) <SBoyajian@rc.com>; Maria Lenz <marialenz@riag.ri.gov>; Christopher J. Fragomeni <cfragomeni@shslawfirm.com>; Jessica Rider <JRider@riag.ri.gov>
Subject: Re: Update from the Prospect Entities

Thank you.

On Apr 8, 2019, at 4:34 PM, Preston Halperin <phalperin@shslawfirm.com<mailto:phalperin@shslawfirm.com>> wrote:

Dear Judge Stern,

Our understanding at the April 1 joint conference was that we would report to you and Judge Smith by this Wednesday on our efforts to agree on a mediator or a process for selecting a mediator. As Mr. Sheehan has indicated in e-mails today, he has been sending us names of potential mediators. We are in the process of considering the mediators identified by Mr. Sheehan and we are also in the process of identifying additional names that we intend to circulate to counsel for the Receiver and CCCB. Between now and Wednesday, we should be in a position to report to you and Judge Smith the results of our efforts to agree on a mediator or at least a process for selecting one.

Preston W. Halperin,
Managing Partner

<image001.png>

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error, or are not the named recipient(s), please immediately notify sender and delete this e-mail message from your computer.

From: Stern, Brian <bstern@courts.ri.gov<mailto:bstern@courts.ri.gov>>
Sent: Monday, April 8, 2019 10:37 AM
To: Christopher J. Fragomeni <cfragomeni@shslawfirm.com<mailto:cfragomeni@shslawfirm.com>>
Cc: judge_smith@rid.uscourts.gov<mailto:judge_smith@rid.uscourts.gov>; Ryan Jackson <Ryan_Jackson@RID.USCOURTS.GOV<mailto:Ryan_Jackson@RID.USCOURTS.GOV>>; bledsham@wistbar.com<mailto:bledsham@wistbar.com>; 'Stephen P. Sheehan' <sps@wistbar.com<mailto:sps@wistbar.com>>; 'mwistow@wistbar.com<mailto:mwistow@wistbar.com>' <mwistow@wistbar.com<mailto:mwistow@wistbar.com>>; 'jvc3@blishcavlaw.com<mailto:jvc3@blishcavlaw.com>' <jvc3@blishcavlaw.com<mailto:jvc3@blishcavlaw.com>>; 'jvc@blishcavlaw.com<mailto:jvc@blishcavlaw.com>' <jvc@blishcavlaw.com<mailto:jvc@blishcavlaw.com>>; 'mrusso@frlawri.com<mailto:mrusso@frlawri.com>' <mrusso@frlawri.com<mailto:mrusso@frlawri.com>>; Dean Wagner <dwagner@shslawfirm.com<mailto:dwagner@shslawfirm.com>>; 'Robert Fine' <rfine@crfllp.com<mailto:rfine@crfllp.com>>; rland@crfllp.com<mailto:rland@crfllp.com>; Preston Halperin <phalperin@shslawfirm.com<mailto:phalperin@shslawfirm.com>>; 'erhow@birdmarella.com<mailto:erhow@birdmarella.com>' <erhow@birdmarella.com<mailto:erhow@birdmarella.com>>; 'jmcgowan@bakerlaw.com<mailto:jmcgowan@bakerlaw.com>' <jmcgowan@bakerlaw.com<mailto:jmcgowan@bakerlaw.com>>; 'treichert@birdmarella.com<mailto:treichert@birdmarella.com>' <treichert@birdmarella.com<mailto:treichert@birdmarella.com>>; adennington@ckrpf.com<mailto:adennington@ckrpf.com>; 'csweeney@connkavanaugh.com<mailto:csweeney@connkavanaugh.com>' <csweeney@connkavanaugh.com<mailto:csweeney@connkavanaugh.com>>; 'rconn@connkavanaugh.com<mailto:rconn@connkavanaugh.com>' <rconn@connkavanaugh.com<mailto:rconn@connkavanaugh.com>>; Wollin, David A. <dwollin@hinckleyallen.com<mailto:dwollin@hinckleyallen.com>>; 'cdieter@hinckleyallen.com<mailto:cdieter@hinckleyallen.com>' <cdieter@hinckleyallen.com<mailto:cdieter@hinckleyallen.com>>; Merten, Howard <hmerten@psh.com<mailto:hmerten@psh.com>>; 'cmw@psh.com<mailto:cmw@psh.com>' <cmw@psh.com<mailto:cmw@psh.com>>; 'egb@psh.com<mailto:egb@psh.com>' <egb@psh.com<mailto:egb@psh.com>>; 'Kessimian, Paul M.' <pkessimian@psh.com<mailto:pkessimian@psh.com>>; dsullivan@rc.com<mailto:dsullivan@rc.com>; 'david.godofsky@alston.com<mailto:david.godofsky@alston.com>' <david.godofsky@alston.com<mailto:david.godofsky@alston.com>>; 'pat.dicarlo@alston.com<mailto:pat.dicarlo@alston.com>' <pat.dicarlo@alston.com<mailto:pat.dicarlo@alston.com>>; Boyajian, Steven J. (SBoyajian@rc.com<mailto:SBoyajian@rc.com>) <SBoyajian@rc.com<mailto:SBoyajian@rc.com>>; 'Maria Lenz' <marialenz@riag.ri.gov<mailto:marialenz@riag.ri.gov>>; 'Jessica Rider' <JRider@riag.ri.gov<mailto:JRider@riag.ri.gov>>
Subject: RE: Update from the Prospect Entities

With respect to the financial records requested by CCCB, Clerk Miley is scheduling a conference call this Thursday with the Parties in the PC-2019-3654 matter. If the issue is resolved before the call, just let her know, and we will cancel the call.

Would you also provide an update on the progress identifying a "global" mediator? After the Joint conference, the Parties (in all Federal and State matters) were going attempt to agree on a mediation provider list and submit five names to determine if we have any matches.

Thank you.

J. Stern

From: Christopher J. Fragomeni [mailto:cfragomeni@shslawfirm.com]
Sent: Friday, April 05, 2019 2:11 PM
To: Stern, Brian
Cc: judge_smith@rid.uscourts.gov<mailto:judge_smith@rid.uscourts.gov>; Ryan Jackson; bledsham@wistbar.com<mailto:bledsham@wistbar.com>; 'Stephen P. Sheehan'; 'mwistow@wistbar.com<mailto:mwistow@wistbar.com>'; 'jvc3@blishcavlaw.com<mailto:jvc3@blishcavlaw.com>'; 'jvc@blishcavlaw.com<mailto:jvc@blishcavlaw.com>'; 'mrusso@frlawri.com<mailto:mrusso@frlawri.com>'; Dean Wagner; 'Robert Fine'; rland@crfllp.com<mailto:rland@crfllp.com>; Preston Halperin; 'erhow@birdmarella.com<mailto:erhow@birdmarella.com>'; 'jmcgowan@bakerlaw.com<mailto:jmcgowan@bakerlaw.com>'; 'treichert@birdmarella.com<mailto:treichert@birdmarella.com>'; adennington@ckrpf.com<mailto:adennington@ckrpf.com>; 'csweeney@connkavanaugh.com<mailto:csweeney@connkavanaugh.com>'; 'rconn@connkavanaugh.com<mailto:rconn@connkavanaugh.com>'; Wollin, David A.; 'cdieter@hinckleyallen.com<mailto:cdieter@hinckleyallen.com>'; Merten, Howard; 'cmw@psh.com<mailto:cmw@psh.com>'; 'egb@psh.com<mailto:egb@psh.com>'; 'Kessimian, Paul M.'; dsullivan@rc.com<mailto:dsullivan@rc.com>; 'david.godofsky@alston.com<mailto:david.godofsky@alston.com>'; 'pat.dicarlo@alston.com<mailto:pat.dicarlo@alston.com>'; Boyajian, Steven J. (SBoyajian@rc.com<mailto:SBoyajian@rc.com>); 'Maria Lenz'; 'Jessica Rider'
Subject: Update from the Prospect Entities

Dear Judge Stern,

At the conference this past Monday, April 1, 2019, we agreed to report to you by Friday as to whether we were able to reach agreement on producing financial records requested by CCCB. You will recall that we indicated at the conference that the previous Friday, March 29, 2019, we received an e-mailed proposal from CCCB relative to producing documents. Yesterday, at the end of the day, we sent over our counter-proposal to CCCB's and the Receiver's counsel. While we may or may not receive a reply today from CCCB and the Receiver, unless the response is an outright acceptance of our proposal as drafted, it is likely that more time will be required for the parties to reach a final agreement. For this reason, I would like to report back to the Court one week from today, during which time we will continue to work diligently in an effort to reach an agreement.

Thank you,

Christopher J. Fragomeni, Esq.
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HEARING DATE:
WEDNESDAY, MAY 15, 2019 AT 9:30 AM
PROVIDENCE COUNTY BUSINESS CALENDAR BEFORE JUDGE STERN

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

St. Joseph Health Services of Rhode Island, Inc.
Petitioner

vs.

St. Josephs Health Services of Rhode Island Retirement Plan, as amended
Respondent

Bank of America, in its capacity as Trustee of Respondent
Nominal Respondent

PC-2017-3856

RECEIVER'S NINTH INTERIM REPORT AND EIGHTH INTERIM REQUEST FOR APPROVAL OF FEES, COSTS AND EXPENSES

NOW COMES Stephen F. Del Sesto, Esq., solely in his capacity as the Receiver (the "Receiver") for St. Josephs Health Services of Rhode Island Retirement Plan (the "Plan"), and hereby submits this Ninth Interim Report (the "Ninth Report") and Eighth Interim Request for Approval of Fees, Costs and Expenses (the "Eighth Fee Application"). In support of the Ninth Report and Eighth Fee Application the Receiver states as follows:

1. This case was commenced on August 17, 2017, upon the Petition for the Appointment of a Receiver (the "Petition") filed by St. Joseph Health Services of Rhode Island, Inc. ("Petitioner"). As a result of that Petition, on August 18, 2017, this Court appointed Stephen F. Del Sesto, Esq. as Temporary Receiver of the Plan under surety bond ordered by this Court in the amount of One Million and 00/100 ($1,000,000.00) Dollars (the "Temporary Receiver Order").

2. The Plan is a defined benefit plan organized by Petitioner on or about July 1, 1965, for the benefit of Petitioner's employees. As of the date of the Petition, the Plan had approximately 2,729

vested participants[1] of which approximately 1,229 were then receiving monthly benefits payments. As of the benefits payments issued by Bank of America on May 1, 2019, 1,393 participants are currently receiving monthly benefits payments.

3. Typically, a hearing on permanent receiver is set for a date approximately twenty (20) days after the appointment of temporary receiver. Here however, the Petitioner requested that the Court set a hearing date no sooner than thirty (30) days to afford the Temporary Receiver time to consider the Petitioner's suggested 40% uniform benefit reduction. Based on that request, the Court docketed the hearing on permanent receiver for October 11, 2017.

4. Immediately upon appointment, in order to provide pension holders with a direct means to obtain answers to questions and access to information, the Receiver established a dedicated email address (stjosephretirementplan@pierceatwood.com) and two dedicated phone lines (401-490-3436 and 401-865-6249). In addition, the Receiver established a dedicated, public website (https://www.pierceatwood.com/st-joseph-health-services-rhode-island-retirement-plan) where all pleadings and other information would bc posted for easy accessibility to pension holders and other interested parties. Notice of the dedicated email, phone lines and website was sent to all Plan participants via first class mail. The Receiver believes that establishing these various means of communication has been invaluable to the pension holders and the Receiver. Since establishing the email address and phone lines the Receiver has received hundreds of email and voicemail communications from pension holders. The dedicated website has been revised to now include access to filings made in both the State and Federal litigation matters as well as other related litigation matters related to this proceeding.

5. Due to their day-to-day involvement with the Plan, the Receiver initially had consistent and regular communications with Bank of America (the Plan's Trustee and custodian of the assets) and Angell Pension Group (the Plan's actuary and benefits administrator at the time) regarding the management and administration of the Plan. The Receiver has reviewed quarterly reports and had

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[1] According to documents reviewed by the Receiver, excluding United Nurses and Allied Professionals Local 5110 ("UNAP") members hired before October 1, 2008, the Plan was closed to all employees on or about October 1, 2007. Thereafter, benefit accruals were frozen for non-union employees on September 30, 2009, for Federation of Nurses and Health Professionals and other non UNAP union employees on September 30, 2011 and for UNAP employees on June 19, 2014.

periodic discussions with Mercer Investment (the Plan's discretionary Investment Manager) regarding the performance of asset investments, the allocation of the asset investments and market conditions and projections that may impact those investments. The Receiver is aware that, among the pension holders and other interested parties, there existed a level of distrust and concern regarding the pre-receivership administration and oversight of the Plan. As a result, the Receiver has already made changes regarding the day-to-day management and administration of the Plan and its assets and will continue to evaluate and make changes as may be prudent or necessary.

6. Approximately every 4-6 weeks throughout this proceeding the Receiver hosts town-hall style, informational meetings at Rhodes on the Pawtuxet in Cranston, Rhode Island. At these meetings the Receiver provides a current status of the receivership proceedings. In addition and in an effort to assure complete transparency of the receivership process and the Receiver's efforts, the Receiver responds to questions raised by the meeting participants regarding various aspects of the receivership and the Plan. Understanding that not all participants can attend these meetings, the Receiver digitally records each meeting and a link to the meeting recordings are posted to the Receiver's dedicated website.

7. Prior to this Ninth Report and Eighth Request for Approval of Fees, the Receiver has filed eight (8) prior reports with the Court and seven (7) prior requests for approval of fees. Rather than set forth summaries for each prior Report, copies of the First Report, Second Report, Third Report, Fourth Report, Fifth Report, Sixth Report, Seventh Report, Eighth Report and related Orders are on file with the Clerk of the Court and accessible on the Receiver's dedicated website and all are incorporated by reference and made a part of this Ninth Interim Report as if fully set forth herein.

8. On March 29, 2018, this Honorable Court held a hearing on the "Receiver's Initial Recommendations Regarding (1) Monthly Benefit Payment Modifications; and (2) Release of Stay Relative to the Processing of Pending Benefits Elections and Properly Filed Applications" (the "Initial Benefits Recommendation"). Subsequent to the hearing on the Initial Benefits Recommendation on April 4, 2018, this Court entered an Order (a) approving the Receiver's Recommendation, (b) deferring any recommendation on benefits modification for a period of approximately ninety (90) additional days, and (c) lifting the September 1, 2017, stay regarding

the processing of elections and benefits applications (the "Initial Benefits Recommendation Order").

9. On or about June 28, 2018, as part of the Fourth Report, the Receiver advised the Court that litigation had been initiated in both State Court (*Stephen Del Sesto, et. al. v. Prospect CharterCARE, LLC, CharterCARE Community Board; St. Joseph Health Services of Rhode Island; Prospect CharterCARE SJHSRI, LLC; Prospect CharterCARE RWMC, LLC; Prospect East Holdings, Inc.; Prospect Medical Holdings, Inc.; Roger Williams Hospital; CharterCARE Foundation; The Rhode Island Community Foundation; Roman Catholic Bishop of Providence; Diocesan Administration Corporation; Diocesan Service Corporation; and The Angell Pension Group, Inc.* (PC-2018-4386)) (the "State Litigation") and Federal Court (*Stephen Del Sesto, et. al. v. Prospect CharterCARE, LLC, CharterCARE Community Board; St. Joseph Health Services of Rhode Island; Prospect CharterCARE SJHSRI, LLC; Prospect CharterCARE RWMC, LLC; Prospect East Holdings, Inc.; Prospect Medical Holdings, Inc.; Roger Williams Hospital; CharterCARE Foundation; The Rhode Island Community Foundation; Roman Catholic Bishop of Providence; Diocesan Administration Corporation; Diocesan Service Corporation; and The Angell Pension Group, Inc.* (1:18-cv-00328-WES-LDA)) (the "Federal Litigation" together with the State Litigation shall be referred to as the "Litigation") against various defendants and Special Counsel provided the Court with a status update of those actions and related next steps for the Litigation.

10. On March 1, 2019 this Court held a hearing on the Receiver's Eighth Interim Report and Seventh Interim Request for Approval of Fees, Costs and Expenses (the "Eighth Report"). Upon conclusion of the hearing, the Court granted the Eighth Report and granted the Receiver's oral recommendation to further postpone any modification to benefits payments until, at least, the hearing on this Ninth Report.

11. Since the filing of and hearing on the Eighth Report, the following events have occurred in this Superior Court Receivership action:

a. On or about January 2, 2019, the Prospect Entities jointly filed a Notice of Intent to Sue CharterCare Community Board, or in the Alternative, Motion for Relief From the Injunctive Provisions of the Permanent Receivership Order, with supporting Memorandum (the "Notice and Motion for Relief"). The parties engaged in discussions and jointly conferenced with both this Honorable Court and the United States District Court for the District of Rhode Island regarding this and all related issues which resulted in several continuances by agreement of the parties. On March 11, 2019 the Receiver filed an Objection to the Notice and Motion for Relief with Supporting Memorandum. On April 27, 2019, the Prospect Entities filed a Reply to the Receiver's Objection and on May 1, 2019, the Receiver filed a Sur-Reply. The matter was heard on May 2, 2019, and upon conclusion of the hearing, this Honorable Court took the matter under advisement.

12. Since the filing of and hearing on the Eighth Report, the following events have occurred in the Federal Litigation:

a. On February 18, 2019, the Prospect Entities filed a Joint Motion for Leave to Propound Limited Discovery Relating to Settlement Between Plaintiffs and CharterCare Community Board. On March 4, 2019, Plaintiffs filed an Objection to the Motion for Discovery of Settlement Negotiations with supporting Memorandum. As of the date of this filing no action has been taken on this Motion.

b. On February 12, 2019, the Federal Court conducted a hearing on the Joint Motion for Settlement Class Certification, Appointment of Class Counsel, and Preliminary Settlement Approval (the "First Federal Motion to Approve Settlement") Settlement and all Oppositions, Replies and Sur-Replies filed in connection therewith. Upon conclusion of oral argument by all parties, the Court took the Motion under advisement, directed Plaintiffs to prepare and circulate to all objecting parties a proposed order, and established timeframes for parties to either agree to the form of order or, absent a consensus, present their own form of order. In addition, the Court requested parties submit post-hearing memorandum. In accordance with the Court's instruction:

    i. Parties exchanged forms of proposed orders preliminary approving the first settlement. No one form of proposed order was agreed upon and as a result, on February 26, 2019, Plaintiffs filed a Notice of Proposed Orders which presented (i) Plaintiffs' and Settling Defendants' proposed Order, and (ii) Prospect Entities' and Diocesan Entities' proposed order;

ii. In addition, and at the request of the Court, parties submitted post-hearing memorandums and replies to same:

a. On February 26, 2019, Plaintiffs and Defendants, CCCB, SJHSRI and RWH, jointly submitted a Post-Hearing Memorandum;

b. On March 12, 2019, the Diocesan Entities submitted their Post-Hearing Brief Addressing Proposed Orders on Preliminary Settlement Approval and Question Regarding Federal Receivership;

c. Also, on March 12, 2019, the Prospect Entities submitted their Post-Hearing Memorandum in Opposition to Settlement Motion;

d. Angell Pension Group, Inc. filed a Statement Regarding Appointment of Federal Receiver on March 12, 2019; and

e. Plaintiffs and CCCB, SJHSRI and RWH filed Replies to the Diocesan Entities' and Prospect Entities' Post-Hearing Memorandums.

c. On or about December 4, 2018, the Prospect Entities (jointly), the Roman Catholic Bishop of Providence, Diocesan Administration Corporation and Diocesan Service Corporation (jointly), and Angell Pension Group, Inc. filed their respective Motions to Dismiss the Federal Action pursuant to Fed. R. Civ. P. 12(b)(6). In their Motions, those Defendants generally set forth arguments that dismissal is warranted because the Receiver failed to join an indispensable party, the Pension Benefit Guaranty Corporation; the Class Plaintiffs lack standing; the First Amended Complaint fails to state a claim for which relief can be granted, including pleading fraud with particularity; and/or the Receiver's claims are preempted by federal law. On February 4, 2019, the Receiver and other Litigation Plaintiffs filed individual Objections to each Motion to Dismiss, an Omnibus Memorandum in Support of Objections to Defendants' Motions to Dismiss, and an Objection to Angell Pension Group's Request for Judicial Notice. Since the filing of the last report:

i. On March 4, 2019, Angell Pension Group filed (i) Reply to Plaintiffs' Objection to Request for Judicial Notice, and (ii) Reply to Plaintiffs' Objection to Motion to Dismiss, Prospect Entities filed a Reply to Plaintiffs' Opposition to their Motion to Dismiss, and the Diocesan Entities filed their Reply in Further Support of their Motion to Dismiss the First Amended Complaint;

ii. During a joint conference conducted by both the Federal Court and Superior Court Judges, and attended by counsel to all parties, parties agreed to mediation in which Plaintiffs, settling Defendants and non-settling Defendants will all take part. Presently, mediation sessions are scheduled for Thursday, May 16, 2019, and Friday, May 17, 2019.

13. In addition to the events and actions identified above relative to the Federal Court litigation and Superior Court Receivership actions, the Receiver took a significant action which he believed was necessary and appropriate and which he is hopeful will provide a possible and substantial benefit to the Plan's survival for the benefit of its participants who rely on its survival.

In the Order Appointing Permanent Receiver (the "Permanent Receiver Order") entered on October 27, 2017, this honorable Court established the Receiver's duties with respect to the St. Joseph Health Services of Rhode Island Retirement Plan (the "Plan). The Order generally authorizes the Receiver to monitor, manage and administer the Plan and its assets on behalf of its participants and beneficiaries. Among other actions, the Receiver may engage actuaries, investment advisors, benefit administrators and other professionals to perform various administrative tasks and services for the Plan. The Receiver may also initiate and litigate claims against third parties on the Plan's behalf, acquire and dispose of property, direct investments and pay Plan-related expenses from the assets held in trust.

Typically, pension plans are subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and are administered in accordance with ERISA's requirements. However, there are certain types of retirement plans that are exempt from the rules and protections of ERISA, including non-electing "Church Plans" (which are defined under Section 414(e) of the Internal Revenue Code). Prior to the Receiver's appointment, the entities that historically sponsored and administered the Plan claimed that the Plan qualified as a Church Plan at all times following its adoption by St. Joseph Health Services of Rhode Island on July 1, 1965 (and therefore, was always exempt from ERISA).

In the federal lawsuit brought by the Receiver, the Receiver contends that these prior sponsors intentionally misclassified the Plan as a Church Plan in an effort to avoid their obligations and responsibilities as fiduciaries of an ERISA-covered defined benefit pension plan. The Receiver contends in the lawsuit that the Plan was not exempt (at various times) and, therefore, was governed by ERISA. The Receiver has also asserted state law claims, in the alternative, that ERISA was not applicable (at various times). These questions are dependent on factual and legal issues that are expected to be determined by the Court in the federal lawsuit as it proceeds.

Pending those determinations and based upon advice from his retained experts, the Receiver has taken steps to revise the Plan's terms and to administer benefits in a manner that complies with the requirements of ERISA and the tax-qualification rules of the Internal Revenue Code on a going forward basis. As part of that effort, the Receiver adopted a revised Plan document on April 15, 2019, subject to a retroactive effective date of July 1, 2017 (the "Effective Date"). The Receiver also retained and directed certified public accountants and an actuary to prepare and file an annual financial report on behalf of the Plan with the United States Department of Labor and Internal Revenue Service, as is normally required of ERISA-covered pension plans. Lastly, the Receiver also has filed an election (as part of that annual report) to have the Plan covered by ERISA for all Plan Years beginning on or after the Effective Date.

In connection with the above actions and filings, the Receiver has tendered an initial premium (calculated by the Plan's Actuaries) to the Pension Benefit Guaranty Corporation ("PBGC"). PBGC is a federally chartered corporation created by ERISA to protect the rights and retirement benefits of individuals who participate in ERISA-covered pension plans. PBGC is essentially an insurance company funded by premiums it collects and not financially supported by the federal government. Subject to certain limitations, PBGC guarantees payment of benefits to ERISA-plan participants during retirement in exchange for annual premiums paid by their employer. However, there can be no assurance that PBGC will provide any coverage for pension fund shortfalls as a result of underfunding prior to that Effective Date or at all.

It is the Receiver's position that these actions were necessary and should not affect the claims the Receiver and the other plaintiffs have asserted in the federal lawsuit, which are based on conduct that preceded the Effective Date.

14. As of the Eighth Report, regarding the general administration of the Estate, the Receiver held a town-hall style, informational meeting on April 8, 2019. At this meeting, the Receiver provided the status of (i) the proposed Settlement between the Receiver, the other Litigation Plaintiffs, Special Counsel, SJHSRI, CCCB and RWH; (ii) the proposed Second Settlement between the Receiver, other Litigation Plaintiffs, Special Counsel, CCF, SJHSRI, CCCB and RWH; (iii) disputes concerning CCCB and Prospect; and (iv) addressed questions and concerns raised by Plan participants regarding the proceedings and the Plan generally. It is anticipated the next town-hall style meeting will occur toward the end of May, or earlier in the event the Receiver deems appropriate.

15. The Receiver continues to receive and review documents related to the Plan and its history although he has temporarily suspended meetings with Advisory Committee until GRS, the new Plan actuary, has been able to complete its intake and analysis of all information relative to the Plan. The suspension was necessary because an essential component of the Advisory Committee meetings is current and hypothetical benefits data that provide the basis for the Committee to discuss possible benefits adjustments scenarios in order to endeavor for the Committee to cooperatively identify an equitable, interim adjustment in the event that an adjustment becomes absolutely necessary or unavoidable to better protect and preserve the Plan's assets.

16. With regard to Plan assets, since the inception of this proceeding in August 2017, the Plan assets have reduced by approximately thirteen and a half percent (13.5% or approximately $12,000,000). As the Court may recall, as of the start of this proceeding, the Plan assets totaled approximately $85,795,641.99. In the nineteen (19) months since (as of March 31, 2019), the Plan assets totaled approximately $73,911,517.93. The largest factor in the reduction of the Plan assets is monthly benefit payments. It is important to note that during that 19 month period the Plan paid out monthly benefit payments, retroactive benefit payments and other payments and fees related to Plan maintenance and services totaling approximately $22,000,000. Thus, during that same 19

month period the re-allocation of investments and resulting investment income has off-set the Plan's $22M in expenses so that the reduction impact experienced by the Plan is $12M as opposed to $22M.

The erosion of Plan assets became more significant following the end of March 2018 when the Plan assets totaled approximately $83,238,244.35. In addition to the typical monthly benefit payment and Plan related expense obligations, there have been several factors/changes that have occurred which have negatively impacted the Plan asset value, including, without limitation:

a. The "unfreezing" of benefit applications in March 2018. This resulted in significant retroactive payments being made to newly collecting participants. In addition, as a result of those processed applications and elections the monthly benefits payments increased from approximately $850,000 per month to slightly less than $1M per month. The monthly benefit increase alone accounts for an additional annual benefit payment obligation of approximately $1,500,000;
b. Beginning in or about February 2018, the consistent and strong market performance that the Plan had been experiencing for a significant period of time has been more volatile, and recently, less strong. The Receiver adjusted the investment allocation for the Plan assets in or about February 2018/March 2018 which provided some protection from the recent market down-turn. Over the past six (6) or more months the market's volatility has resulted in, at least, some short term uncertainty as to the Plan's investment performance.

Based upon the value of the Plan assets and the current and projected market performance, the need for additional funds (to be realized from the settlements presented to this Court) to support the Plan is becoming more critical every day.

17. Contemporaneous with seeking this Court's approval, confirmation and ratification of all of the Receiver's acts and doings through and in connection with this Ninth Report, absent any emergency circumstances, the Receiver is recommending and requesting this Honorable Court's approval to further postpone a modification to monthly benefit payments until the hearing on the Receiver's Tenth Interim Report which will be docketed for approximately sixty (60) days from

the hearing on this Ninth Report. Consistent with the reasons set forth in the "Receiver's Initial Recommendations Regarding (1) Monthly Benefit Payment Modifications; and (2) Release of Stay Relative to the Processing of Pending Benefits Elections and Properly Filed Applications for Benefits" (the "March Recommendation") and approved by this Court via Order entered on or about April 4, 2018, the Receiver recommends that a further deferral of any recommendation on benefits adjustments until the hearing on the Tenth Interim Report is appropriate. Copies of the March Recommendation and related Order are on file with the Clerk of the Court and accessible on the Receiver's dedicated website and each are incorporated by reference and made a part of this Ninth Interim Report as if fully set forth herein.

18. In connection with the administration of the within proceeding, as of the filing of the Eighth Report on or about February 19, 2019, your Receiver had cash-on-hand totaling $69,195.40. Since that time, your Receiver has not had any additional receipts and has had additional disbursements totaling $9,324.54, leaving current cash-on-hand in the sum of $58,870.86, all as set forth in the "**Schedule of Receipts and Disbursements**" attached hereto.

19. In connection with this Ninth Report, your Receiver is requesting that the Court approve the Eighth Fee Application. The Receiver's fees, costs, and expenses associated with the Eighth Fee Application and incurred for the two (2) month period from February 1, 2019 through, and including, March 31, 2019, total approximately $65,000.00. The Receiver respectfully requests that this Court approve the Eighth Fee Application of the Receiver and authorize him to pay himself such approved fees. A copy of your Receiver's Eighth Fee Application Invoice will be presented, in redacted form, under separate cover to the Court for review in advance of the Hearing on this Ninth Report. Due to the Litigation and the related descriptions and narratives in time entries, to avoid any potential disclosure, strategy, attorney-client privileged communications, etc., the Receiver requests that the redacted invoices submitted to the Court be filed under seal.

20. As of April 22, 2019, Special Counsel has incurred out-of-pocket expenses and costs totaling $33,071.16. Consistent with the Receiver's engagement with WSL, the Receiver respectfully requests that this Court approve and authorize the Receiver to satisfy said out-of-pocket expenses and costs of Special Counsel, subject to available cash-on-hand.

WHEREFORE, your Receiver prays that this honorable Court enter an order or orders: (1) approving, confirming and ratifying all of the Receiver's acts, doings, and disbursements as Temporary and Permanent Receiver as of the filing of this Ninth Report; (2) authorizing the Receiver to satisfy the fees, costs and expenses incurred by the Receiver and presented in connection with the Eighth Fee Application for his services as Temporary and Permanent Receiver herein; (3) approving Special Counsel's out-of-pocket costs incurred through April 22, 2019, in the amount of $33,071.16, and authorizing the Receiver to satisfy said expenses, subject to available cash-on-hand; (4) approving the Receiver's recommendation, absent any emergency circumstances, to further postpone any modification to monthly benefit payments until the hearing on the Receiver's Tenth Interim Report; (5) directing that this proceeding remain open pending final resolution of all the issues identified herein and the general winding down of the Receivership Estate; and (6) granting such further relief as this Honorable Court deems necessary and appropriate.

Respectfully submitted,

/s/ Stephen F. Del Sesto
Stephen F. Del Sesto, Esq. (#6336)
Solely in his capacity as Permanent Receiver for St. Josephs Health Services of Rhode Island Retirement Plan, and not individually
One Financial Plaza, 26th Floor
Providence, RI 02903
Tel: 401-490-3415
sdelsesto@pierceatwood.com
Dated: May 6, 2019

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of May, 2019, I electronically filed and served the within document via the Electronic Case Filing System of the Superior Court with notice to all parties in the system.

/s/ Stephen F. Del Sesto

SCHEDULE OF RECEIPTS AND DISBURSEMENTS

10:45 AM
05/06/19
Accrual Basis

St Joseph Health Services of RI Retirement Plan
Transactions by Account 021919
As of May 6, 2019

	Date	Num	Name	Memo			Balance
BankRI Checking Account							69,195.40
	03/29/2019	306	Relevant Discover-e	Inv #5086; copying & postage		3,046.54	66,148.86
	04/04/2019	307	Rhodes on the Pawtuxet	Inv #1739; 4/8/19 meeting with participants		1,500.00	64,648.86
	04/09/2019	308	William White Legal Video Services	Inv #1683; video & audio for 4/8/19 meeting		700.00	63,948.86
	04/16/2019	309	US Department of Labor DFVCP	delinquent filer payment in connection with Form 5500 filing ma...		740.00	63,208.86
	04/29/2019	310	Relevant Discover-e	Inv #5250; copying & postage		3,338.00	59,870.86
Total BankRI Checking Account					0.00	9,324.54	59,870.86
TOTAL					**0.00**	**9,324.54**	**59,870.86**