UNITED STATES DISTRICT COURT
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. PROSPECT CHARTERCARE, LLC, et al. *Defendants*.	Case No. 1:18-cv-00328-WES-LDA

JOINT OPPOSITION OF DEFENDANTS PROSPECT MEDICAL HOLDINGS, INC., PROSPECT EAST HOLDINGS, INC., PROSPECT CHARTERCARE, LLC, PROSPECT CHARTERCARE SJHSRI, LLC AND PROSPECT CHARTERCARE RWMC, LLC TO JOINT MOTION FOR SETTLEMENT CLASS CERTIFICATION, APPOINTMENT OF CLASS COUNSEL, AND PRELIMINARY SETTLEMENT APPROVAL OF ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND, ROGER WILLIAMS HOSPITAL, AND CHARTERCARE COMMUNITY BOARD (ECF No. 63)

NOW COME Prospect Medical Holdings, Inc., Prospect East Holdings, Inc., Prospect Chartercare, LLC, Prospect Chartercare SJHSRI, LLC, and Prospect Chartercare RWMC, LLC (collectively, "Prospect Entities"), by and through their attorneys, and hereby oppose the Joint Motion for Settlement Class Certification, Appointment of Class Counsel, and Preliminary Settlement Approval by Plaintiffs and Defendants St. Joseph Health Services of Rhode Island, Roger Williams Hospital, and Chartercare Community Board (ECF No. 63, the "Settlement Motion"). In support hereof, the Prospect Entities submit a memorandum filed contemporaneously herewith. Pursuant to Local Rule 7(c), the Prospect Entities request that the Court schedule a hearing for oral argument on the Settlement Motion, and estimate that at least one and one half (1.5) hours will be necessary for such hearing

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By their attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of December, 2018, I have caused the within Opposition to be filed with the Court via the ECF filing system. As such, this document will be electronically sent to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants.

/s/ Christopher J. Fragomeni, Esq.

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

STEPHEN DELSESTO, AS RECEIVER AND ADMINISTRATOR OF THE ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND RETIREMENT PLAN, et al. *Plaintiffs*, v. PROSPECT CHARTERCARE, LLC, et al. *Defendants*.	Case No. 1:18-cv-00328-WES-LDA

JOINT MEMORANDUM OF DEFENDANTS PROSPECT MEDICAL HOLDINGS, INC., PROSPECT EAST HOLDINGS, INC., PROSPECT CHARTERCARE, LLC, PROSPECT CHARTERCARE SJHSRI, LLC AND PROSPECT CHARTERCARE RWMC, LLC'S IN OPPOSITION TO JOINT MOTION FOR SETTLEMENT CLASS CERTIFICATION, APPOINTMENT OF CLASS COUNSEL, AND PRELIMINARY SETTLEMENT APPROVAL OF ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND, ROGER WILLIAMS HOSPITAL, AND CHARTERCARE COMMUNITY BOARD

PROSPECT MEDICAL HOLDINGS, INC.
and PROSPECT EAST HOLDINGS, INC.

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INTRODUCTION

Is the retirement plan at issue here an ERISA-covered plan or not? In order to analyze this motion, the propriety of the settlement agreement ("Settlement Agreement") that Stephen DelSesto ("Receiver") has entered into and the state law-based limits it purports to place on indemnity and contribution obligations to benefit the settling parties, the Court must decide that threshold issue. Plaintiffs and the Prospect defendants agree that the St. Joseph Hospital of Rhode Island Retirement Plan (the "Plan") is an ERISA-covered plan. Therefore, the Court must deny this motion, because (1) the Pension Benefit Guaranty Corporation ("PBGC") rightly should control the process of managing and, if necessary, terminating an underfunded plan such as this one, not a state-court appointed receiver paid from Plan assets, and (2) the Settlement Agreement not only fails to comport with ERISA but is predicated almost entirely on a state law that ERISA supersedes and preempts. Separately, the motion should be denied because the Settlement Agreement includes hypothecation and change of control provisions that flout the contractual obligations of one of the settling parties and ignore the need for approval from the state regulatory agencies that were instrumental in establishing the current structure of the Hospitals' corporate parent.

The Receiver, who is the current Administrator of the Plan, contends that the Plan has been subject to the Employee Retirement Income Security Act, as amended ("ERISA") at least since 2009, which is why he brought this lawsuit under Sections 502(a)(2) and 502(a)(3) of ERISA and alleged that various defendants were Plan fiduciaries who breached their fiduciary duties (or, were third parties who aided and abetted them or were sufficiently affiliated or aligned so as to share their liability in some way).

Where there is a dispute over the administration and funding of a plan subject to ERISA,[1] and particularly where fiduciary breach claims and claims of statutory violations predominate, the federal court, and not a state court, has—as a matter of law—exclusive jurisdiction to appoint a receiver. As such, the Receiver and his counsel have improperly settled claims relative to the Plan in state court.

Moreover, where an ERISA-regulated plan is involved, the Receiver, as the Plan's Administrator, should not be seeking to invoke a specially-tailored Rhode Island state statute, R.I. Gen. Laws § 23-17.14-35 ("Settlement Statute"), designed to limit the liability of those alleged fiduciaries if they settle with him. This is especially true given ERISA § 410, which invalidates many forms of fiduciary indemnification and exculpatory arrangements, and ERISA § 405, which sets out specific rules for allocating fiduciary liability among co-fiduciaries. It is further compelling given ERISA's "comprehensive and reticulated" statutory scheme, *Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980), and ERISA's "terse but comprehensive" preemption statute which preempts and supersedes any and all state laws, and state rulings that relate to or interfere with that statutory scheme. *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 943 (2016).

As a matter of federal law, the proceedings before the state court have been unlawful because they are preempted. ERISA explicitly provides federal courts with *exclusive* jurisdiction to hear and resolve breach-of-fiduciary duty claims arising out of the operation of an ERISA-regulated employee benefit plan. ERISA also explicitly preempts and supersedes all state laws and rulings that relate to an ERISA-regulated employee benefit plan. Nothing could be more

[1] While Prospect Entities agree that the Plan is currently subject to ERISA and has been since the Receiver took over, they disagree as to when the Plan lost its status as a non-electing "church plan" and became subject to ERISA. However, this disagreement is irrelevant for purposes of the Court resolving this motion.

directly "related" to ERISA than the Settlement Statute, which shields plan fiduciaries who settle their claims from any and all further liability caused by their misconduct. Further, settling claims relative to the Plan before a key stakeholder, the PBGC, can weigh in and make its own liability determinations smacks of impropriety.

Accordingly, this Court should reject the Settlement Agreement; rule that ERISA preempts and supersedes the Settlement Statute and the pending state receivership proceeding; and find that ERISA's comprehensive fiduciary duty rules set forth in Part 4 of ERISA Title I, and relevant federal common law, control any outcome involving liability here.

FACTUAL BACKGROUND

The Receiver and seven Plan participants (collectively, "Plaintiffs") filed suit against Prospect Medical Holdings, Inc., Prospect East Holdings, Inc. ("Prospect East"), Prospect Chartercare, LLC ("Prospect Chartercare"), Prospect Chartercare SJHSRI, LLC ("Prospect SJHSRI"), Prospect Chartercare RWMC, LLC ("Prospect RWMC") (collectively, "Prospect Entities"), and others in connection with the Plan's insolvent status. Plaintiffs allege that the Plan, which was established over fifty years ago, was exempt from ERISA's requirements as a non-electing "church plan" but that, at some time after 2009, the Plan eventually failed to qualify as a non-electing church plan. *Amend. Compl*. at ¶¶ 68, 211. Plaintiffs claim that the unfunded liability of the Plan ballooned from $29 million in 2008 to $91 million as of April 30, 2013, before the Prospect Entities entered the scene. *Amend. Compl.* at ¶¶ 121, 237, 253. Plaintiffs further aver that a scheme was conceived in 2011 to transfer assets of St. Joseph Health Services of Rhode Island ("SJHSRI"), the Plan's then-Administrator, to entities controlled by SJHSRI, but beyond the reach of Plan participants. *Amend. Compl*. at ¶ 55(d). Plaintiffs maintain that this scheme was accomplished when, in 2014, SJHSRI and Our Lady of Fatima ("the Hospitals") and their assets

were sold ("2014 Asset Sale") for (1) a cash payment of $45 million, (2) a commitment to capital projects and network development, and (3) a grant to Chartercare Community Board ("CCCB")[2] of a fifteen percent (15%) ownership interest in a newly-formed limited liability company, Prospect Chartercare, which wholly owned Prospect SJHSRI and Prospect RWMC (the entities holding ownership of the Hospitals post-sale). Plaintiffs concede that the 2014 Asset Sale was expressly conditioned upon any liability for the Plan remaining with SJHSRI. The Rhode Island Attorney General ("RIAG") and Rhode Island Department of Health ("RIDOH") reviewed, evaluated, and approved the 2014 Asset Sale pursuant to the Hospital Conversion Act ("HCA") and the Health Care Facility Licensing Act of Rhode Island ("HLA").

As to the Prospect Entities, the wrongful conduct alleged by Plaintiffs to have occurred prior to the 2014 Asset Sale generally consisted of (1) an alleged conspiracy among the Prospect Entities and other Defendants to characterize the Plan as a non-electing "church plan" in order to evade liability under ERISA and purported misrepresentations relating thereto; (2) SJHSRI and other Defendants' transfer of SJHSRI's assets, cash, and charitable income to entities controlled by SJHSRI's parent company; and (3) several Defendants' purported misrepresentations to state regulators and courts relating to the terms and effect of the 2014 Asset Sale. *Amend. Compl.* at ¶¶ 55, 63-64, 68. Plaintiffs' allegations relative to conduct occurring at the time of or after the 2014 Asset Sale generally pertain to (1) a conspiracy to include SJHSRI in the Catholic Directory, which gave the Plan "church plan" status and would allow it to evade any and all obligations under ERISA; and (2) the Prospect Entities' purported misrepresentations to Plan participants about the funded status of the Plan.

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[2] CCCB was previously known as CharterCare Health Partners, which was the combined health system that included the Hospitals.

The Hospitals are currently owned by Prospect SJHSRI and Prospect RWMC, both wholly owned subsidiaries of Prospect Chartercare. Prospect Chartercare has two members, Prospect East, which holds an eighty-five percent membership interest, and CCCB, which owns a fifteen percent membership interest. In connection with such membership, Prospect East and CCCB executed an Amended and Restated Limited Liability Company Agreement ("LLC Agreement"), which set forth the obligations and rights of Prospect Chartercare, Prospect East and CCCB. Specifically, relative to transfers of a member's interests in Prospect Chartercare, the LLC Agreement provides the following:

> a member may not sell, assign (by operation of Law or otherwise), transfer, pledge or hypothecate ("Transfer") all or any part of its interest in the Company[3] (either directly or indirectly through the transfer of the power to control, or to direct or cause the direction of the management and policies of, such Member.

LLC Agreement at § 13.1. The LLC Agreement further states that:

> [n]o Transfer of an interest in the Company that is in violation of this Article XIII shall be valid or effective, and the Company shall not recognize any improper transfer for the purposes of making allocations, payments of profits, return of capital contributions or other distributions with respect to such Company interest or part thereof.

Id. at § 13.6.

The Receiver, CCCB, and other defendants (collectively with CCCB, "Settling Defendants") entered into the Settlement Agreement, under which, CCCB would hold its interest in Prospect Chartercare "in trust for the Receiver," and the Receiver "[would] have the full beneficial interest therein." *See* Settlement Agreement at ¶ 17. It further provides that at the

[3] "Company" is defined as Prospect Chartercare. *See* LLC Agreement at introductory paragraph.

direction of the Receiver, CCCB will exercise the Put Option[4] in the LLC Agreement and remit to the Receiver the proceeds of the Put Option. *See id.* ¶ 18. Additionally, the Settlement Agreement states that (1) the Receiver has the right to sue in the name of CCCB to collect or otherwise obtain the value of CCCB's beneficial interest in Prospect Chartercare; (2) CCCB, upon the Receiver's written demand, must file a petition for its judicial liquidation and follow the request of the Receiver to marshal its assets and oppose claims of creditors; and (3) CCCB will grant a security interest to the Receiver in essentially all its assets, which includes its membership interest in Prospect Chartercare. *See id.* at ¶¶ 19, 24, 29. In connection with his purported rights under the Settlement Agreement, on September 4, 2018, before obtaining state or federal court approval of the settlement, the Receiver filed a UCC-1, asserting a purported interest in essentially all of CCCB's assets.

LEGAL ARGUMENT

Plaintiffs request that the Court approve the Settlement Agreement with CCCB, certify a class of plaintiffs and approve their counsel's application for legal fees. However, the Court should deny Plaintiffs' motion until the Court has determined (a) whether the Plan is governed by ERISA; and (b) whether the PBGC is a necessary party. In addition, the Court should nonetheless deny Plaintiffs' motion because the Settlement Agreement (1) is contrary to ERISA and federal common law governing settlements, and is improperly predicated on a facially-invalid, ERISA-preempted state law; (2) violates state law (to the extent that law survives ERISA preemption) inasmuch as the Settlement Agreement is the product of collusion among the Receiver and Settling Defendants

[4] The Put Option provides that upon certain conditions and after a certain date, CCCB "shall have the option to sell to [Prospect East], and [Prospect East] shall have the obligation to purchase, all of the Units held by CC[CB] in exchange for a payment in case of a purchase price equal to the Appraised Value of the Units . . ." LLC Agreement at § 14.5(a).

to unfairly prejudice the rights of the Prospect Entities and other non-settling defendants; (3) will be the impetus of a breach of the LLC Agreement; and (4) will effect a change control of Prospect Chartercare without the requisite approvals from the Rhode Island regulators—the RIAG and RIDOH—who oversaw and approved the conversion of the Hospitals in 2014.

In addition to the foregoing, in an effort to avoid duplicative legal memoranda, the Prospect Entities support and join in the following arguments submitted by the Roman Catholic Bishop of Providence, Diocesan Administration Corporation and Diocesan Service Corporation: (1) that the Settlement Statute violates the equal protection clause of the U.S. Constitution and the Rhode Island Constitution (2) that in considering the application for attorneys' fees, the Court should determine whether the time spent by Plaintiffs' counsel (for which it was not previously paid on an hourly basis by the Receiver) resulted specifically in the settlement with CCCB; and (3) that the non-settling defendants be afforded the opportunity to conduct discovery from the Receiver and CCCB to determine when CCCB agreed to turn over all of its assets to the Receiver and whether the Settlement Agreement is collusive.

I. THE SETTLEMENT SHOULD NOT BE CONSIDERED BY THE COURT UNTIL THE COURT DETERMINES WHETHER THE PLAN IS GOVERNED BY ERISA.

A. Plaintiffs and the Prospect Entities Agree that the Plan is Governed by ERISA.

Plaintiffs premise their ERISA claims on the assertion that the Plan, while formerly a non-electing church plan exempt from ERISA, ceased being a church plan at some point after 2009 and thus became an ERISA-regulated pension plan. A fair reading of the Amended Complaint together with ERISA's "church plan" statute strongly suggests, at the very least, that the Plan became subject to ERISA when SJHSRI put the Plan into receivership, because at that point, the Plan permanently ceased to be controlled by or associated with any church. Thus, Plaintiffs and the Prospect Entities agree that, since entry of the 2017 state court order appointing the Receiver (or

earlier according to Plaintiffs), the Plan has been governed by ERISA. Because of this, unless the Court rejects the parties' assertions that the Plan is governed by ERISA, the Settlement Agreement should not be considered at least until the Court decides if PBGC is a necessary party.[5]

B. The PBGC Should be a Party to any Settlement Affecting an ERISA-Governed Plan.

The viability of so-called "defined benefit" pension plans that are subject to ERISA and are tax-qualified is the central focus and concern of Title IV of ERISA, and the PBGC is the federal agency with primacy over the interpretation and enforcement of Title IV of ERISA. *PBGC v. LTV Corp*., 496 U.S. 633, 648 (1990) (explaining PBGC's role). Plaintiffs allege, and the Prospect Entities concede, that the Plan is currently subject to ERISA because the Receiver has been firmly in control of it since September 2017. The importance of the PBGC's role in ensuring the payment of benefits to participants of underfunded plans cannot be overstated, and neither can the significance of this being an ERISA plan for purposes of evaluating the Settlement Agreement.

To carry out its responsibilities, the PBGC can "sue and be sued, complain and defend, in its corporate name and through its own counsel, in any court, State or Federal." ERISA § 4002(b)(1). It also can bring civil actions for appropriate relief—legal, equitable, or both—to enforce the provisions of Title IV of ERISA under a variety of civil relief provisions, including ERISA §§ 4003(e)(1)(A), 4067, 4068(d), 4070. The PBGC thus plays a critical role in the termination of tax-qualified-defined, benefit-type pension plans.

If the Plan is governed by ERISA, Plaintiffs have no standing to assert the very claims that they are attempting to settle. To the extent the PBGC's payment of guaranteed benefits completely satisfies the Plan's obligations to some or all of the Plan's participants and beneficiaries, it would

[5] As the Court is aware, the Prospect Entities have moved to dismiss the Amended Complaint under Rule 12(b)(7) for failure to join the PBGC as an indispensable party or, in the alternative, to join the PBGC as a necessary party under Rule 19(a).

completely eliminate Plaintiffs' ERISA claims against the Prospect Entities, and with it, their standing to pursue those claims (or have the Receiver pursue them). *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) ("injury in fact is a constitutional requirement"); *see also Feather v. SSM Health*, 2018 U.S. Dist. LEXIS 122346, at *9-10 (D. Mo. July 23, 2018) (ERISA claims based on alleged misclassified and underfunded church plan dismissed for lack of standing, where plaintiffs failed to allege imminent risk of unpaid benefits).

Moreover, the PBGC's involvement seems both inevitable and imminent. The Amended Complaint concedes that the Plan has allegedly not met the Code's minimum funding standard since it ceased to qualify as a non-electing church plan, and the looming inability of the Plan to pay all benefits as and when they come due is cited as the catalyst for the entire lawsuit. *See* ERISA § 4042(a), (c). The Receiver (the Plan's controlling ERISA plan fiduciary since September 2017) and his Special Counsel improperly seek payment of millions of dollars in fees from settlement proceeds, further diminishing the Plan's assets, and there can be little doubt that further dissipation of Plan assets will follow unless the PBGC takes over in connection with a distress or involuntary termination of the Plan. The PBGC was organized, and exists, to handle situations precisely like this. *See*, *e.g.*, 29 U.S.C. §§ 1083(k)(4), (k)(5) (creation, enforcement and release statutory liens for failure to satisfy ERISA's minimum funding requirements); *see also LTV Corp.*, 496 U.S. at 637 (describing PBGC's pivotal role in dealing with underfunded defined benefit plans). The PBGC is a government agency that is specifically tasked with handling the types of duties that the Receiver and his Special Counsel have been undertaking, with no dissipation of Plan assets in the process.

Perhaps more compelling, in the event that the PBGC were to assume responsibility for the Plan, it would have the *exclusive* right to prosecute the same statutory and fiduciary breach claims

the Receiver is now asserting in this litigation (*including* the claims he seeks to settle against CCCB), *e.g.*, *PBGC v. Beverly*, 404 F.3d 243 (4th Cir. 2005); *PBGC v. Scherling*, 905 F.2d 173 (8th Cir. 1990), in addition to paying guaranteed benefits in its insurer-of-last-resort capacity to the Plan's participants and beneficiaries. Rather than relying on the PBGC to undertake this work (at no cost to Plan participants), the Receiver has instead consumed countless Plan assets in fees and expenses (including fees paid to his hand-picked legal counsel), and now proposes to settle a variety of fiduciary breach and ERISA statutory claims pending against CCCB and SJHSRI—the very parties responsible (and culpable) for creating the alleged defects in the Plan's "church plan" status and allegedly running the Plan into the ground between 2014 and 2017. Bleeding a beleaguered pension plan dry before seeking relief from the PBGC, while at the same time attempting to preclude the PBGC from asserting those same claims against CCCB, is not what Congress intended when it enacted Title IV of ERISA. The PBGC should be handling this ERISA matter and making all the critical decisions regarding it, not a private receiver appointed under state law.

Ultimately, whatever the PBGC does will have significant ramifications over the claims asserted against CCCB, the Prospect Entities, and all other defendants. Thus, if the PBGC is not a party, the Court may be in the position of having "decid[ed] issues unnecessarily" while "wasting time and effort." *W.R. Grace & Co. v. United States EPA*, 959 F.2d 360, 366 (1st Cir. 1992). Deciding whether to approve the Settlement Agreement and award counsel fees before deciding whether the Plan is governed by ERISA and requires PBGC's presence as a party, is putting the cart before the horse.

II. FEDERAL COURTS HAVE EXCLUSIVE JURISDICTION OVER DISPUTES INVOLVING ERISA TITLE I VIOLATIONS, AND OVER FIDUCIARY-INITIATED LAWSUITS INVOLVING AN ERISA PLAN.

The state-court-appointed Receiver, now firmly in control of the Plan and the lead plaintiff in this lawsuit, has behaved as though the receivership is a run-of-the-mill, state-law-based receivership involving a distressed business or some failing non-profit entity. It is not. The distressed entity, according to the Receiver himself, is an employee pension benefit plan subject to ERISA. That changes, fundamentally, which laws govern the Receiver's conduct. Although the Receiver was appointed by the Rhode Island Superior Court ("Superior Court") to serve as the Plan's "named" fiduciary, he was implicitly tasked with asserting a variety of ERISA-based claims. That placed the Receiver's actions—at least, his actions and conduct as a Plan fiduciary—squarely beyond the jurisdiction of the Superior Court, because ERISA broadly preempts and supersedes all relevant state law and generally strips state courts of their jurisdiction.

While the Receiver no doubt has a continuing obligation to keep the Superior Court informed, and while the Superior Court no doubt has the right to exercise its authority to remove the Receiver from his position, the Superior Court's jurisdiction does not extend to how the Receiver handles (or, mishandles) the Plan's assets, pays its bills (including its legal counsel), otherwise discharges its obligations, or compromises and settles its claims, which are firmly grounded in federal law over which the federal courts have exclusive jurisdiction. By way of illustration, if an ERISA plan fiduciary pays (or, agrees to pay) a law firm excessive compensation, that act constitutes a "prohibited transaction" under ERISA Section 406(a)—a violation of federal statute—that would expose both the plan fiduciary paying the excessive compensation and the law firm receiving it to a variety of ERISA-based sanctions and remedies. *See e.g.*, *Rutledge v. Seyfarth Shaw*, 201 F.3d 1212 (9th Cir. 2000), *as modified*, 208 F.3d 1170 (9th Cir. 2000), *cert.*

denied, 531 U.S. 992 (2000). Thus, even if the Receiver was properly appointed under state law, critical aspects of that relationship are exclusively regulated by federal law.

A. Exclusive Jurisdiction Over Exclusively Federal Law.

Almost 45 years ago, when crafting ERISA, Congress decided to vest the federal courts with *exclusive* subject matter jurisdiction over all cases or controversies involving an ERISA-regulated employee benefit plan, with the sole exception of simple claims participants or beneficiaries might bring to recover benefits, or to clarify their right to benefits, under a plan's terms.[6] The statutory language Congress chose could not have been more clear:

> (e) JURISDICTION
>
> (1) Except for actions under subsection (a)(1)(B) of this section [to recover benefits or clarify rights to benefits], *the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary*, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

29 U.S.C. §1132(e)(1) (emphasis added).

Indeed, ERISA's jurisdiction language makes plain that Congress placed responsibility solely with federal courts to construe and apply ERISA Title I and Title IV, including those provisions that govern the conduct of ERISA plan fiduciaries and determine whom to hold accountable for misfeasance, malfeasance and nonfeasance that causes or leads to plan harm. *See* Part 4 of ERISA Title I, starting at ERISA § 401, *et seq*. (prescribing, by statute, who can be held liable as a plan fiduciary, who can be held liable as a co-fiduciary, what conduct constitutes a

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[6] Congress later expanded the jurisdiction of state courts in 1993, but very narrowly in ways not relevant here.

prohibited (and therefore unlawful) transaction, voiding and invalidating certain efforts to indemnify or shield fiduciaries from personal liability, etc.).

As this Court well knows from the Amended Complaint, the Receiver is one of those plan fiduciaries. The Receiver has brought his claims in this Court as a "named" fiduciary—specifically, as the Administrator—of the Plan. *See Amend. Compl.* at ¶ 2. The Receiver nonetheless has continued vigorously to engage in Plan-related activities in the Superior Court, despite having now served as one of the primary "named" fiduciaries of the Plan for more than sixteen months. During that period, and relying solely on the review and approval of the Superior Court that is divested of jurisdiction over ERISA matters, (including, e.g., ERISA's "prohibited transaction" rules), the Receiver retained and paid his legal counsel from Plan assets; compensated himself from Plan assets; and, most recently, purported to compromise and settle claims with CCCB and the other defendants (including SJHSRI, the corporate defendant whose actions led to his appointment) primarily responsible for the Plan's dire financial condition and for its anticipated demise, in an effort to enable them to benefit from the Settlement Statute.

The Receiver cannot administer the Plan in state court, given his vigorously-espoused view (which the Prospect Entities share) that the Plan constitutes an ERISA-regulated employee pension benefit plan at least since August 2017 when the Receiver took control of it[7]—and given ERISA's sweeping preemption provision, found in ERISA §514(a) and codified at 29 U.S.C. §1114(a), which ensures that all or virtually all issues involving the administration and funding of an ERISA-

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[7] While the Prospect Entities vigorously disagree with the Receiver's assertion that the Plan became subject to ERISA years ago, sometime around 2009, they do agree that the Plan became subject to ERISA as soon as the Receiver took control of it. That conclusion is undeniable, since the Receiver certainly does not qualify as a "church" and certainly is not controlled by a "church" or a church-affiliated organization. And the question of "when" is relevant for present purposes—since the Plan is currently subject to ERISA, the Receiver's actions are subject to ERISA.

regulated plan, and the conduct of its fiduciaries and parties-in-interest, are decided based exclusively on federal law, and not state law. *See, e.g., Gobeille*, 136 S. Ct. at 936.

B. The Receiver's Actions Are Governed by ERISA, Not State Law, and His Attempted Settlement Under State Law is Wholly Unlawful.

The Receiver has repeatedly tried to have it both ways. He has sought to hold the Prospect Entities accountable under ERISA while steadfastly attempting to treat his own conduct as governed exclusively by Rhode Island state law and subject solely to supervision—and protection—by a state court that has no jurisdiction over his post-appointment conduct involving the Plan, and has no expertise, authority or control over the Plan itself. ERISA § 514(c), which explicitly defines what "state law(s)" are preempted and superseded by ERISA Title I and Title IV *and expressly includes state court decisions* in that definition, makes that plain as well:

> (c) DEFINITIONS. – For purposes of this section:
>
> (1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.
>
> (2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

ERISA §514(c) [29 U.S.C. §1144(c)].

The Receiver's ongoing activities in the Superior Court suggest that he does not appreciate that nothing he has been doing comports with the law. Since the Receiver is actively functioning as an ERISA plan fiduciary, his post-appointment conduct vis-a-vis the Plan can only be judged by federal law standards and in federal court; it cannot be protected by a state court that—as a matter of federal law—lacks jurisdiction over that conduct. That extends to any notion the

Receiver may have that his own conduct somehow is not open to scrutiny under ERISA, or that he is protected by some form of immunity. It is axiomatic that there are limits to immunity and quasi-judicial immunity, and that whether immunity or quasi-judicial immunity is available depends on the actions being taken rather than the identity of the actor. *Cleavinger v. Saxner*, 474 U.S. 193, 200 (1985). Most important, there is no immunity for actions taken in the "clear absence of jurisdiction." *Stump v. Sparkman*, 435 U.S. 349, 357 (1978). Tellingly, a state court (here, the Superior Court) has no jurisdiction over any of the substantive or administrative actions the Receiver has taken under or in connection with the Plan.

That no doubt explains why others, such as the United States Department of Labor (the "DOL"), when confronted with potential violations involving ERISA-regulated plans and the specter of looming plan funding problems caused by ERISA plan fiduciaries, have responded to § 502(e)(1)'s clear jurisdictional mandate and the overarching role ERISA plays in such disputes by pursuing relief exclusively in federal court, including the initiation of federal receivership proceedings. *See, e.g., SEC v. Capital Consultants, LLC*, 397 F.3d 733 (9th Cir. 2005) (investment management company in control of both ERISA plan assets and non-ERISA assets pursued by DOL and Securities and Exchange Commission ("SEC") in federal court, and put in federal court receivership, in part to ensure that receiver's fiduciary decision-making could be properly reviewed for ERISA compliance); *see also Cutler v. 65 Security Plan*, 831 F. Supp. 1008 (E.D.N.Y. 1993) (financially distressed ERISA-regulated multi-employer health and welfare fund placed into federal receivership; state court proceedings were stayed pursuant to All Writs Act, notwithstanding the Anti-Injunction Act).

Here, acting on behalf of the Plan, the Receiver has cut a state law-based deal with a selective group of favored defendants; a deal clearly intended to insulate those defendants

(pursuant to a state law enacted specifically for this matter) from any further claims despite those defendants being primarily culpable for starving the Plan of cash and then running it into the ground (as employers and prior plan fiduciaries). The Receiver then submitted that deal to the Superior Court (the same court that lost jurisdiction over the Receiver's actions as a Plan fiduciary the day he was appointed and took control of the Plan as a named ERISA plan fiduciary) for its approval under a generic state court receivership standard of whether the settlement sufficiently benefits the receivership estate – completely disregarding ERISA and an entire body of federal law governing such settlements for ERISA plans. By so doing, the Receiver blatantly ignored ERISA and its jurisdictional mandates—and arguably acted in breach of his fiduciary duty to the Plan and to its participants and beneficiaries—in two important respects.

First, because the Plan is an ERISA-regulated plan (and the Receiver is judicially estopped from contending otherwise), Rhode Island law is preempted and federal common law controls—notably, federal common law that is grounded firmly in traditional trust law principles rather than the sort of politicized line-drawing animate in most state statutes that allocates liability among co-defendants (such as the Settlement Statute that the Receiver recently used to help settle the Plan's claims against the most culpable defendants). *Masters, Mates & Pilots Pension Plan and IRAP Litig*., 957 F.2d 1020, 1026-29 (2nd Cir. 1992) (rejecting New York state law); *see also Duncan v. Santaniello*, 900 F. Supp. 547, 550-52 (D. Mass. 1995) (following *Masters, Mates*).

Second, and again because the Receiver was purporting to bind the Plan (as the fiduciary of an ERISA-regulated plan) to a state law-based settlement with the most culpable of the defendants, some or all of which are or were parties-in-interest to the Plan in a manner designed to shield them from further liability, the Receiver was obliged to consider (and follow) the terms of *Prohibited Transaction Class Exemption ("PTCE") 2003-39*, 68 Fed. Reg. 75682 (Dec. 31,

2003), as amended by 75 Fed. Reg. 33830 (June 15, 2010) (Class Exemption for Settlement and Release of Certain Claims in Litigation). Indeed, the mere existence of *PTCE 2003-39* (as amended) demonstrates the central role ERISA plays not only in the assertion of ERISA-based claims but also in their resolution, particularly those involving the settlement of ERISA claims asserted (or, capable of assertion) against so-called "insiders."

Congress provided for the preemption of all state laws that "relate to" any employee benefit plan governed by ERISA. 29 U.S.C. § 1144(a); *see also Colonial Life & Acc. Ins. Co. v. Medley*, 572 F.3d 22, 27 (1st Cir. 2009) ("ERISA preempts any and all State laws insofar as they may now or hereafter relate to any employee benefit plan [. . .]"). "Express ERISA preemption analysis . . . involves two central questions: (1) whether the plan at issue is an 'employee benefit plan' [within ERISA] and (2) whether the cause of action 'relates to' this employee benefit plan." *Id.* at 29 (citing *Hampers v. W.R. Grace & Co., Inc.*, 202 F.3d 44, 49 (1st Cir. 2000)).

Nothing "relates" more directly "to" an ERISA-regulated plan than the conduct of its fiduciaries, particularly when it comes to dealing with prior plan fiduciaries and resolving breach-of-duty claims it has asserted against those prior plan fiduciaries, or spending the plan's money improvidently in order to appear before a court that has no jurisdiction over the plan fiduciary or the plan matter it is handling. Indeed, state laws dealing with those areas with which ERISA is expressly concerned—funding, reporting and disclosure, vesting, fiduciary responsibility—are clearly preempted. *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co*., 514 U.S. 645, 651 (1995); *see, e.g., Hewlett-Packard Co. v. Barnes*, 571 F.2d 502 (9th Cir. 1978), *cert. denied*, 439 U.S. 831 (1978) (state law regulating funding and disclosure requirements of ERISA plans is preempted). When a state law touches upon a "central matter of plan

administration," it relates to an ERISA-regulated plan and is preempted. *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001).

The First Circuit has "consistently held that a cause of action 'relates to' an ERISA plan *when a court must evaluate or interpret the terms of the ERISA-regulated plan to determine liability under the state law cause of action*." *Hampers*, 202 F.3d at 52 (emphasis added). Furthermore, the First Circuit has held that "ERISA preempts state law causes of action for damages *where the damages must be calculated using the terms of an ERISA plan*." *Id.* (emphasis added). A law is preempted "even if the law is not specifically designed to affect such plans, or the effect is only indirect." *Zipperer v. Raytheon Co.*, 493 F.3d 50, 53 (1st Cir. 2007) (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990)). Where "the very same conduct" underlies both the state law claim and the ERISA claim, that overlap "suggests that the state law claim is an *alternative mechanism for obtaining ERISA plan benefits*," and the state law claim is preempted. *Hampers*, 202 F.3d at 52 (emphasis added).

In determining whether a claim under state law has a connection with a benefit plan and is thus preempted, courts in the First Circuit look to "the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Vlahos v. Alight Sols. Ben. Payment Servs., LLC*, 2018 U.S. Dist. LEXIS 133212, at *5 (D. Mass. Aug. 8, 2018) (citing *Zipperer*, 493 F.3d at 53). "ERISA's objectives include uniformity of administration of ERISA plans and avoiding inconsistent state regulation of such plans." *Id.* "[A]ny state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 210 (2004) (holding that if entitlement to benefits exists "only because of the terms of an ERISA-regulated employee benefit plan, and where

no legal duty (state or federal) independent of ERISA or the plan terms is violated, then the suit [is preempted]"). "There is a strong presumption that common-law claims that intrude on ERISA's civil enforcement regime are preempted." *Anthony v. JetDirect Aviation, Inc.*, 725 F. Supp. 2d 249, 256 (D. Mass. 2010).

Here, everything that the Receiver has done since his appointment—gathering evidence regarding the possible dissipation of Plan assets, and then litigating a variety of claims on behalf of the Plan, including now attempting to settle his contributions and fiduciary breach claims against the very entity that put the Plan into receivership as a result of its gross underfunding and neglect of the Plan over many years—"relates to" an ERISA plan, and thus all of this conduct, and the Court's evaluation of it, must be viewed not from the perspective of state law, which is pre-empted, but through the lens of ERISA. This is not a run-of-the-mill state law receivership; the Plan is an ERISA-covered plan, and ERISA is the yardstick by which everything must be measured.

II. THE SETTLEMENT AGREEMENT SHOULD NOT BE APPROVED BECAUSE IT PLAINLY EVIDENCES COLLUSION AMONG THE SETTLING DEFENDANTS, THE RECEIVER, AND SPECIAL COUNSEL AND PREJUDICES THE RIGHTS OF THE PROSPECT ENTITIES.

A. The Settlement Agreement is Collusive.

Regardless of whether the Settlement Agreement is analyzed under the Settlement Statute, or under federal common law, the Court should not approve the Settlement Agreement because it plainly evidences collusion among the Receiver, Special Counsel, and the Settling Defendants. The Settlement Statute provides the following:

> The following provisions apply solely and exclusively to judicially approved good-faith settlements of claims relating to the St. Joseph Health Services of Rhode Island retirement plan, also sometimes known as the St. Joseph Health Services of Rhode Island pension plan:
>
> [. . .]

> (3) For purposes of this section, a good-faith settlement is one that *does not exhibit collusion, fraud, dishonesty, or other wrongful or tortious conduct intended to prejudice the non-settling tortfeasor(s)*, irrespective of the settling or non-settling tortfeasors' proportionate share of liability.

(Emphasis added).

Here, the Settlement Agreement unambiguously and plainly evidences the Settling Defendants' complicit capitulation to its provisions. Such collusion is evident in the Settling Defendants' admission of liability, their admission of causing "at least" $125,000,000 in damages, and their permitting of the Receiver to oversee and conduct the Settling Defendants' dissolution and liquidation.[8] The Settling Defendants' yielding to the Receiver and Special Counsel's demands can be nothing more than the Receiver, Special Counsel, and Settling Defendants acting in concert to the detriment of other litigants in this instant action; which is the exact conduct that the Settlement Statute was enacted to prevent. The collusion among the Settling Defendants, the Receiver, and Special Counsel is plainly evident in several paragraphs of the Settlement Agreement.

First, despite the Receiver *not* being appointed to administer the affairs of the Settling Defendants, the Settlement Agreement authorizes the Receiver to direct the judicial liquidation of the Settling Defendants and requires the Settling Defendants to cooperate with the Receiver in opposing or limiting claims of their creditors. *See* Settlement Agreement at ¶¶ 21-25. Specifically,

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[8] Significantly, the entity that filed the petition for state court receivership, St. Joseph's Health Services of Rhode Island, the previous Plan Administrator, was represented by Chace Ruttenberg & Freedman, LLP and under typical Rhode Island receivership practice, Chace Ruttenberg in all likelihood interviewed Attorney DelSesto as the potential Receiver and recommended his appointment. Shortly thereafter, Chace Ruttenberg attorneys negotiated a prompt settlement with the Receiver's counsel on behalf of their other client, CCCB, in which the collusive provisions were agreed to.

the Settlement Agreement provides (1) that the Settling Defendants, upon demand of the Receiver, will file petitions to liquidate their assets; and (2) that the Settling Defendants will "cooperate with and follow the requests of the Receiver and [] take all reasonable measures" to obtain court approval for the petitions for liquidation, including opposing and seeking to limit the claims of other creditors. *See id.* The Settling Defendants' apparent uncontested acquiescence to their relinquishment of control over *all* their assets evidences their collaboration with the Receiver and Special Counsel in negotiating the Settlement Agreement. Furthermore, the Receiver, in negotiating these provisions has grossly overstepped the limits of his authority by compelling the Settling Defendants to allow him to direct a subsequent judicial liquidation proceeding. The forced judicial liquidation of a third-party entity not subject to the State Court receivership is not a proper role for the Receiver and should not be approved by the Court.

Second, the Settlement Agreement requires the Settling Defendants to request that this Court certify a class of plaintiff-litigants pursuant to Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure. *See id.* at ¶ 5. As the Settling Defendants will ultimately be dismissed from the Federal Action if the Settlement Agreement is approved, such requested certification of the plaintiff class is *solely* to benefit the plaintiffs and prejudice the remaining defendants in this suit. While a Receiver settling claims against defendants may be appropriate, it is clearly inappropriate for a court-appointed Receiver to then use those defendants as pawns in pending litigation against third-parties.

Third, the Settlement Agreement includes an astonishing admission of liability by the Settling Defendants that the Receiver's claims in the Federal Action are "at least $125,000,000." *See id.* at ¶ 28. Very few, if any, settlement agreements include an admission of liability and a statement of unproven damages. Almost universally, settlement agreements include provisions

stating that the defendant denies liability while agreeing to the terms of the settlement. Once again, such concession, as to the Federal Action in which the Settling Defendants will be dismissed as a result of the settlement, would solely be "intended to prejudice the non-settling tortfeasors, *irrespective of the settling or non-settling tortfeasors' proportionate share of liability*." R.I. Gen. Laws § 23-17.14-35 (emphasis added).

Fourth, the Settlement Agreement includes an admission of the Settling Defendants that their proportionate fault in causing the $125,000,000 in damages "is small compared to the proportionate fault of the other defendants in the Federal [] Action and the State Court Action . . . ." *See* Settlement Agreement at ¶ 30. This extraordinary statement that the Settling Defendants percentage share of damages is "small" is ludicrous on its face. It is undisputed that the Settling Defendants, prior to the 2014 Asset Sale, were the actual employers under the Plan, and both before and after the 2014 Asset Sale, were directly responsible for funding the Plan. A statement by the Settling Defendants that their proportionate fault is "small compared to the proportionate fault of the other defendants" borders on the absurd, is factually incorrect, and is further evidence of collusion. Although this Court would not be bound by the gratuitous, self-serving statements set forth in the Settlement Agreement, in all likelihood the collusive "fault" provisions are intended to influence a future determination by the Court or by a jury of the relative fault of the defendants should such an inquiry be warranted.[9]

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[9] In its memorandum of support of its motion to dismiss, the Prospect Entities address the statutory framework and case law that makes it clear that ERISA does not provide for claims against non-fiduciaries such as the Prospect Entities, except in limited circumstances in which ERISA's "catchall" provision, § 502(a)(3), creates equitable remedies against non-fiduciary third parties shown to have engaged in wrongful conduct with respect to the plan (or with a party-in-interest to the plan). *Mertens v. Hewitt & Assocs*., 508 U.S. 248, 252 (1993). If the Court agrees that ERISA preempts state law, including the Settlement Statute, *and* nevertheless finds that the Prospect Entities are liable to Plaintiffs despite being non-fiduciaries, the Court would be required to conduct a "fairness hearing" and determine whether to bar contribution and/or indemnification

Finally, the Settlement Agreement includes an agreement by the Settling Defendants to allow the Receiver to direct and control the Settling Defendants in the pending *Cy Pres* Proceeding. *See id.* at ¶ 32. In essence, the Settling Defendants are also agreeing to collude with the Receiver to influence the outcome of the pending *Cy Pres* Proceeding. As a result of the plain evidence of collusion among the Receiver, Special Counsel, and Settling Defendants, the Court should not approve the Settlement Agreement as it violates the Settlement Statute (if applicable), and represents an extraordinary overreach by a court-appointed fiduciary.[10]

B. The Court Should Reject the Settlement Agreement Because it Disregards Administrative and Regulatory Decisions and Violates the HCA, HLA, and LLC Agreement.

The Court should not approve the Settlement Agreement because it (1) disregards prior administrative and regulatory decisions relative to the Hospitals; (2) violates the HCA and HLA; and (3) violates the LLC Agreement.

i. The Settlement Agreement Seeks To Transfer Interests That are the Subject of Final Administrative Orders Resulting From Agency Proceedings Under R.I. Gen. Laws §§ 23-17.14-1 et seq. and 23-17-1 et seq.

The 2014 Asset Sale was subject to RIAG and RIDOH approval under the HCA, which is codified at §§ 23-17.14-1 et seq., and subject to the HLA, which is codified at §§ 23-17-1 et seq. The proposed transfer under the Settlement Agreement by CCCB of its fifteen percent membership interest in Prospect Chartercare violates the hospital conversion decision relative to the Hospitals,

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claims by the non-settling defendants. In such a case, the Court would apply federal common law in which it may adopt a system of proportional fault in which the liability of a non-settling defendant would be limited to its proportionate share of liability to the plaintiff *See Chemung Canal Trust Co. v. Sovran Bank/Maryland,* 939 F.2d 12, 16 (2nd Cir. 1991); *Masters, Mates*, 957 F.2d at 1020. Presumably, the collusion engaged in by the Settling Defendants is an effort to increase the liability of the non-settling parties.

[10] The Court should permit the non-settling defendants to conduct discovery to probe this matter further.

which is incorporated into the Hospitals' current licensure. Furthermore, the transfer contemplated by the Settlement Agreement of CCCB's fifteen percent interest in Prospect Chartercare implicates Prospect Chartercare's voting authority under the LLC Agreement, and regulatory approval is required from the RIDOH to alter the voting authority of Prospect Chartercare.

ii. The Transfer of CCCB's Membership Interest in Prospect Chartercare Violates the LLC Agreement.

The Court should not approve the Settlement Agreement because it proposes to transfer CCCB's membership interest in Prospect Chartercare to the Receiver in direct contravention of the LLC Agreement. Specifically, the LLC Agreement provides that

> [A] member may not sell, assign (by operation of Law or otherwise), transfer, pledge or hypothecate ("Transfer") all or any part of its interest in the Company (either directly or indirectly) through the transfer of the power to control, or to direct or cause the direction of the management and policies, of such Member.

However, despite such provision, the Settlement Agreement provides that CCCB will hold its membership interest in Prospect Chartercare in trust for the Receiver and that the Receiver will have the full beneficial interests of that interest. *See* Settlement Agreement at ¶ 17. It further provides that the Receiver shall have the right and power to (1) direct and control CCCB's Put Option under the LLC Agreement, *see id.* at ¶ 18; and (2) sue in the name of CCCB to collect or otherwise obtain the value of the beneficial interest in Prospect Chartercare, *see id.* at ¶ 19. Additionally, the Settlement Agreement provides that (1) upon the Receiver's demand, CCCB will file a petition for judicial liquidation; and (2) the Receiver may take a security interest in CCCB's assets, investment property, and general intangibles, all of which would include its membership interest in Prospect Chartercare. *See id.* at ¶¶ 24, 29. Such provisions of the Settlement Agreement plainly include a hypothecation of CCCB's interest in Prospect Chartercare, by the granting of a security interest, by the transfer of CCCB's beneficial interest, and by the transfer to the Receiver

of the power to control and direct CCCB.[11] As such, the purported transfers contemplated by the Settlement Agreement violate the LLC Agreement and constitute invalid transfers under the LLC Agreement; therefore, the Court should not approve the Settlement Agreement.

C. To the Extent that the Court is Inclined to Approve a Settlement, the Receiver Should Be Required to Obtain all Necessary Regulatory Approvals to Exercise the Put Option in the LLC Agreement.

If, despite the forgoing objections, the Court is inclined to approve a settlement that implicates CCCB's interest in Prospect Chartercare, the Receiver should be instructed to do so in a manner that respects the contractual obligations of CCCB under the LLC Agreement and that complies with all regulatory requirements. In an amended version of the Settlement Agreement, the Receiver would be free to contract with CCCB to require CCCB to pay money to the Receiver and to exercise the Put Option set forth in the LLC Agreement. However, any Order approving the Settlement Agreement should be conditioned on the Receiver obtaining any and all necessary regulatory approvals implicated by the transfer of control of CCCB and/or Prospect Chartercare. Assuming that the Court rejects the Prospect Entities' preemption and jurisdictional arguments and approves the Settlement Agreement, the Receiver should be instructed to accomplish his goal of bringing value to the receivership estate without trampling the rights of Prospect East and without disregarding the important regulatory requirements that govern the effective control of the Hospitals.

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[11] Any suggestion by the Receiver that CCCB has not hypothecated its interest in Chartercare should be rejected out of hand. The plain meaning and definition of hypothecate is "to enter into a contract whereby certain specified real or personal property is designated as security for the performance of an act, without any transfer of the possession of the property." *Ballantine's Law Dictionary*. CCCB's granting of a security interest to the Receiver, without more, is a clear hypothecation of its interest.

CONCLUSION

Based upon the foregoing, the Prospect Entities request that this Honorable Court refuse to approve the Settlement Agreement until the Court determines whether the Plan is governed by ERISA, and whether the state-court-appointed Receiver has authority to enter into a settlement which impacts Plan assets. In addition, the Prospect Entities respectfully request that the Court reject the settlement as being collusive and unfairly prejudicial to their rights.

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of December, 2018, I have caused the within Memorandum to be filed with the Court via the ECF filing system. As such, this document will be electronically sent to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants.

/s/ Christopher J. Fragomeni, Esq.