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 SURREPLY OF DEFENDANTS PROSPECT MEDICAL HOLDINGS, INC., PROSPECT EAST HOLDINGS, INC., PROSPECT CHARTERCARE, LLC, PROSPECT CHARTERCARE SJHSRI, LLC AND PROSPECT CHARTERCARE RWMC, LLC TO PLAINTIFF'S MEMORANDUM IN REPLY TO THEIR OBJECTIONS TO PLAINTIFFS' 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

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INTRODUCTION

When a 28-page opposition brief draws an almost 90-page reply, it can be difficult to determine how to respond. But not here. Without conceding the many minor points on which the plaintiff is plainly wrong, we limit our response to a handful of particularly important points.

When plaintiff Stephen Del Sesto, appearing here in his capacity as the Administrator and named fiduciary of the St. Joseph Health Services of Rhode Island Retirement Plan (respectively, the "Administrator" and the "Plan"), brought this lawsuit in this Court, he specifically invoked the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and alleged that the Plan was subject to its funding, fiduciary and other provisions despite attempts by its longtime sponsoring employers to characterize it as a non-electing "church plan."[1] He also asserted in his Amended Complaint that the Plan was insolvent and had been financially neglected by its sponsoring employers, and that it was "essential" to determine whether the Plan was subject to ERISA because it affected the rights of the parties. Amended Complaint at ¶¶ 54 & 66. As we pointed out to the Court in the arguments made and authorities cited in connection with the Prospect Entities' recently filed (and still pending) Motion to Dismiss, we readily agreed with the Administrator.

But while the Administrator asserts that the Plan is subject to ERISA, he has elected to run back to **state** court and invoke **state** law to settle what are plainly the most important ERISA statutory and fiduciary breach claims that he brought before this Court, since this settlement, if approved, would release the defendants that actually were in charge of the Plan and whose neglect

[1] Indeed, this Court's jurisdiction over this matter is entirely premised on this federal question, since there is not complete diversity.

brought it to its present state. The Administrator cannot have it both ways: he can't bring a federal lawsuit premised on ERISA jurisdiction over the Plan, and then revert to state court to settle the core claims of his case.

His indignant reply brief was his response to the Prospect Entities[2] calling him on this inconsistency (the "Prospect Objection"). We challenged the tentative settlement the Administrator reached with the Plan's sponsoring employers and prior plan fiduciaries, primarily on the grounds that the settlement was both ill-conceived and ill-advised, and likely failed to fully consider all the ERISA implications of settling claims against the primary defendants. There, we at least suggested that a state court is not conversant with either ERISA's statutory scheme or its complicated fiduciary duty rules (thus, making that court ill-equipped to weigh the reasonableness of the proposed settlement), and we specifically and vigorously objected to the fact that the Administrator chose to predicate his settlement on a specially-enacted Rhode Island statute that, on its face, is invalid and superseded by ERISA if the Plan indeed is subject to ERISA.[3] That makes the releases inherently suspect, and likely fatally flawed.[4]

In his Memorandum in Reply, filed January 21, 2019 (the "Administrator's Reply"), the Administrator pushes back hard and covers a wide variety of topics. But the Administrator's Reply

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[2] Those entities, of course, are the co-defendants Prospect Medical Holdings, Inc., Prospect East Holdings, Inc., Prospect Chartercare, LLC, Prospect Chartercare SJHRI, LLC, and Prospect Chartercare RWMC, LLC.

[3] As a cursory review of the Prospect Objection makes apparent, the Prospect Entities did not object to the certification of a class in this litigation, or to the use of the Administrator's hand-picked legal counsel to serve as class counsel.

[4] While we did not elaborate at the time, it is worth noting that the Administrator's state law-based settlement, and the broadly-worded releases the Administrator no doubt has agreed to provide, likely fail to take into consideration that fiduciary breach claims could be brought against certain of the settling defendants' officers and directors, who may well have served as *de facto* fiduciaries under ERISA's broad – and functional – fiduciary definition. See ERISA § 3(21)(A), codified at 29 U.S.C. § 1002(21)(A) (an ERISA fiduciary includes, *inter alia*, any person that has, or exercises, discretionary authority over plan assets or plan administration, to the extent that discretion can be shown to have been exercised).

is as short on substance as it is long on style, if (as the Administrator repeatedly has alleged, and we agree) the Plan is determined to be an "employee pension benefit plan" subject to Title I and Title IV of ERISA. What all of this makes plain is that the status of the Plan – whether it is, or isn't, an ERISA-regulated plan – is a critically important threshold issue. If ERISA applies, ERISA preemption sweeps away the very premise for the state law-based settlement, and ERISA's jurisdictional provisions deprives the state court of the jurisdiction needed to consider it. When the Administrator brought this lawsuit less than ten months ago, he obviously agreed with that point of view: he strenuously asserted that determining the Plan's status as an ERISA plan "is essential to determining the rights of the parties." Amended Complaint, at ¶ 66 (emphasis added).

Notably, and contrary to the misimpression the Administrator seems to have, the Prospect Entities do not challenge the legitimacy of the Administrator's initial appointment: he was duly appointed by the Rhode Island Superior Court to serve as the Plan's principal fiduciary when the Plan's sponsor(s) effectively surrendered their control over the Plan to that Court.[5] But once the Administrator finished his months-long review and decided that the Plan was indeed an insolvent ERISA-regulated retirement plan, and then brought suit in this Court under Title I of ERISA to obtain appropriate equitable relief, he submitted himself to this Court's jurisdiction. If the Plan is an ERISA-covered plan – a matter for this Court to decide – then everything about his administration, including the settlement of claims, is governed by ERISA. In particular, this means that he cannot ping-pong between state court and federal court, selectively settling with the

[5] Certainly, for those defendants (now, seeking to settle under favorable state law), that step was entirely self-serving: at least at that time, those defendants maintained that the Plan was a non-electing church plan, completely exempt from ERISA and wholly subject to Rhode Island state law.

"fiduciary" co-defendants and invoking state law while asserting claims under ERISA in this Court. ERISA is not an "a la carte" statute.

That is why it is "essential" for this Court to first determine – and presumably confirm – that the Plan indeed is an ERISA-regulated plan, so this Court can apply the proper standards to all the parties – and to the settlement(s) being presented for its review and approval. And particularly if the Plan is found to be an ERISA-regulated plan, that is why this Court needs to take a fresh, *de novo* look at whether the Administrator's proposed settlement makes sense in the context of ERISA; whether the releases the Administrator has offered to the settling defendants make sense in the context of ERISA (such as whether the releases protect a host of individual actors from personal liability, even if their actions make them *de facto* Plan fiduciaries); and whether the entire process the Administrator has chosen to follow justifies paying the Administrator's legal counsel millions in legal fees.

That is why it also is important for this Court to first determine – again, as a threshold matter – whether the federal Pension Benefit Guaranty Corporation ("PBGC") either is willing or would be required to take over this self-described "insolvent" Plan, Amended Complaint at ¶ 54, in an involuntary termination pursuant to ERISA § 4042(a) (codified at 29 U.S.C. § 1342(a)). The Administrator's spirited protestation of this course of action (he describes the PBGC as "irrelevant" to this litigation and its role in this litigation entirely "speculative"; see Administrator's Reply at 18-40) is simply riddled with errors and does not deserve to be taken seriously. This Court does not need to look further than the newspapers to recognize the Administrator's arguments are mere conjecture. Just three weeks ago, on January 18, 2019, the PBGC announced it would be terminating and taking over two Sears Holding Corp. retirement plans covering 90,000 participants. In the process, the PBGC reportedly will absorb a shortfall of

approximately $1.4 billion. Of more interest, the Sears retirement plans are reported be 64% funded – a funding percentage comparable to the Plan's reported 68.5% funded status. Administrator's Reply at 4 (citing the actuarial report prepared by co-defendant The Angell Pension Group). Simply, if the Plan is an ERISA plan and is in as desperate a financial condition as the Administrator claimed when he first brought this lawsuit, the PBGC indeed has a legitimate and compelling – and threshold – role to play here.

ARGUMENT

A. Contrary to the Administrator's Contentions, This Court Has Exclusive Jurisdiction Over the Administrator's Attempt to Settle Plan Fiduciary Breach-Of-Duty Claims, And Thus Should Consider *De Novo* The Proposed Settlement – And Conclude That It Either Is Fatally Flawed or Contrary to ERISA.

One of the Administrator's most fundamental arguments is that he was duly appointed by the Rhode Island Superior Court, has taken control of the Plan's assets subject to that state court's supervision, and, having benefited from the race to the courthouse, this Court (or, any other federal court) has no jurisdiction over his conduct as a state court-supervised receiver, *even though the entity entrusted to his care is, itself, an ERISA-regulated pension plan*. Administrator's Reply at 14-18, citing, *inter alia*, *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456 (1939) ("*Princess Lida*") and *Goldfine v. United States*, 300 F. 2d 260, 263 (1st Cir. 1962).

Notably, while ridiculing the Prospect Entities for not having provided extensive legal authority about ERISA and ERISA's sweeping preemptive provision (to us, the points were obvious), Administrator's Reply at 12-14, the Administrator conspicuously avoids discussing (1) ERISA's sweeping preemption provision, see ERISA §514(a), codified at 29 U.S.C. §1144(a), and more important, (2) ERISA's comprehensive and reticulated remedial scheme, including its jurisdictional statute (ERISA §502(e)(1), codified at 29 U.S.C. §1132(e)(1)), which explicitly

provides that the federal courts have exclusive jurisdiction over claims involving fiduciary breaches, and claims which contemplate any ordering of appropriate equitable relief. See ERISA §502(a)(3), codified at 29 U.S.C. §1132(a)(3). The Administrator no doubt avoids these discussions for a reason: he well knows that, despite knowing where the federal courthouse doors can be found and despite having voluntarily walked through them, he chose to use a state court proceeding, and state law, to settle some of the ERISA fiduciary breach and funding claims he has expressly asserted in the lawsuit he filed in this Court.

Yet both ERISA's sweeping preemption statute and its comprehensive and reticulated remedial scheme are confounded by the stunning, and ill-conceived, procedural position the Administrator is taking: that a state court can take control of an ERISA-regulated retirement plan and decide its fate, to the exclusion of the federal courts. Why has the Administrator chosen to do so? No doubt, to advance the litigation strategy his counsel has convinced him to pursue.

1. <u>ERISA Comprehensively Regulates Private Sector Retirement Plans and Preempts All Related State Law.</u>

From other cases this Court has handled over the years, we know this Court already is well-educated on the general subject of ERISA, such as the breadth of ERISA's preemption statute as it pertains to retirements plans, e.g., *Massey v. Stanley-Bostitch, Inc.*, 255 F. Supp. 2d 7 (D.R.I. 2003) and the scope of an ERISA-regulated retirement plan's fiduciary obligations. E.g., *Short, et al., v. Brown University*, no. 1:17-cv-00318-WES-PAS (D.R.I.). There thus is no need to offer an exhaustive analysis of ERISA's sweeping preemptive provision and how it applies to the Plan, or how ERISA's remedial scheme divides jurisdictional control over ERISA between the federal and state courts. It is sufficient to observe that, in the realm of ERISA preemption jurisprudence, a few things are quite clear.

For instance, from ERISA's inception, the U.S. Supreme Court has made clear that when it enacted ERISA, Congress "meant to establish [non-governmental] pension plan regulation as exclusively a federal concern." See *Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504, 523 (1981) (displacing New Jersey state wage payment and workers' compensation laws that interfered with an ERISA-regulated retirement plan, and how its pension offset formula worked). The Supreme Court also has made clear that, when it comes to ERISA preemption, there are no state laws which are "sacred cows." Even state domestic relations laws and intestacy laws are preempted if found to "refer to" or to otherwise "relate to" an ERISA-regulated retirement plan. See *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001) (preempting Washington state law prescribing who can qualify as a plan beneficiary following a divorce, in the event of a participant's intestate death).

Accordingly, what clearly has emerged from repeated Supreme Court examination of ERISA preemption is a general principle: if a state law either refers directly to an ERISA-regulated benefit plan or relates to such a plan (e.g., its provisions require its fiduciaries to administer the plan differently in order to comply with that state law), that state law is preempted. E.g., *Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. ____, 136 S. Ct. 936 (2016) (Vermont law, requiring self-insured plans and plan fiduciaries to compile and report on the payment of certain benefits to in-state providers, held to be ERISA preempted).

2. ERISA Places Federal Courts Exclusively in Charge of Hearing and Resolving Claims Involving Fiduciary Conduct and Statutory Infractions.

Perhaps more important to this case is the fact that when Congress enacted ERISA and "establish[ed] pension plan regulation as exclusively a federal concern," *Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. at 523, Congress also placed the federal courts firmly – and exclusively – in charge of interpreting and enforcing ERISA's statutory scheme, and as important, determining

what kind(s) of equitable relief would be appropriate. The operative federal statute is completely unambiguous:

> **(1)** Except for actions under subsection (a)(1)(B) of this section [to decide benefit claims under a plan's terms], the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the [U.S. Department of Labor] 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 [pertaining to the recognition of qualified medical child support orders].

ERISA §502(e)(1) [29 U.S.C. §1132(e)(1)] ERISA's remedial scheme, of which Section 502(e) is an essential feature, has long been viewed by the U.S. Supreme Court as "comprehensive and reticulated," *Nachman v. Pension Benefit Guaranty Corp*., 446 U.S. 359, 361 (1980) and its enforcement provisions have long been seen as "carefully integrated." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985).

This jurisdictional mandate has extended to the appointment of receivers in those situations where it has become necessary to remove incumbent plan fiduciaries and replace them with individuals and institutions willing to faithfully follow ERISA's many requirements. Indeed, some of the earliest and most significant ERISA cases have ended with the appointment, by a federal court, of a receiver or replacement fiduciary – frequently at the behest of the U.S. Department of Labor (the "DOL"), which is the federal agency placed firmly in charge of enforcing ERISA Title I, but sometimes as the result of a private lawsuit brought by participants and beneficiaries. *E.g.*, *Marshall v. Snyder*, 572 F.2d 894, 901 (2d Cir. 1978) (affirming the district court's appointment of a receiver and confirming that doing so qualifies as appropriate equitable relief under ERISA) and *Donovan v. Bierwirth*, 680 F.2d 263, 276-77 (2d Cir. 1982)(Sweet, J.) (affirming district court's appointment of receiver *pendente lite* due to finding of fiduciary misconduct). *Also*, *Chao v. Merino*, 452 F.3d 174 (2d Cir. 2006) (same); *Hugler v. Lily Pond Nursing Home Savings Plan*,

2017 U.S. Dist. LEXIS 15001 (ED NY; Feb. 1, 2017); and *T&M Meat Fair, Inc. v. United Food & Commercial Workers Health & Welfare Fund*, 210 F. Supp. 2d 443 (S.D.N.Y. 2002)(Sweet, J.) (same).

As the Second Circuit pointedly observed over 40 years ago in *Marshall v. Snyder*:

> Defendants argue finally that the remedy of receivership is not warranted by [ERISA's] statutory scheme nor justified on the evidence. The statute does not explicitly provide for the appointment of a receiver. However 29 U.S.C. § 1109(a) provides that any person who is a fiduciary with respect to a plan who breaches any of the duties imposed upon fiduciaries by the statute not only is personally liable to make good to the plan any losses resulting from the breach, but also is "subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." Section 1132 of the statute, providing for civil enforcement, by sub-section (a)(5) empowers the [DOL] to bring a civil action (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter . . . [Discussion of ERISA's legislative history, omitted]
>
> The district court plainly had the power to appoint a receiver, *Gordon v. Washington,* 295 U.S. 30, 37 (1935), and the appointment of a receiver in the present case was peculiarly appropriate to arrest what was shown at the evidentiary hearing to be continuing conduct violative both of the consent order and of the provisions of ERISA. The injunctions of the consent order had not, on the evidence, been obeyed, and the scale and circumstances of the ongoing expenditures threatened dissipation of the assets of the employee benefit plans.

Marshall v. Snyder, 572 F.2d, at 901. Indeed, as the district court in *T&M Meat Fair, Inc. v. United Food and Commercial Workers Health & Welfare Fund*, observed:

> [T]he Amended Complaint alleges in Count I that the Defendants breached their fiduciary duties under ERISA. Such breaches are governed by section 404 of ERISA, 29 U.S.C §1104. Further, Plaintiffs seek as relief in Count I the appointment of a receiver to administer the Local 174 Affiliated Funds. Such relief is expressly authorized by section 409 of ERISA, 29 U.S.C. §1109, and can be granted only by a federal court.

T&M Meat Fair, Inc., 210 F. Supp. 2d 443, at 448, n.3 (S.D.N.Y. 2002).

3. The Administrator's Authorities Miss the Mark or Are Wholly Irrelevant.

What, then, to make of the authorities cited by the Administrator in his Reply to support his contention that the state receivership proceeding has primacy over ERISA, such as *Asbestos Workers Local 14 v. Hargrove*, Civ. No. 93-0728, 1993 WL 183990 (E.D. Pa. May 25, 1993); *Dailey v. National Hockey League*, 987 F.2d 172 (3rd Cir. 1993); *Trustees of 1199 Nat'l Benefit Fund for Health & Human Serv. E'ees v. United Presbyterian Home at Syosset, Inc.*, No. 01-civ-10910 (S.D.N.Y.; 7.11.02), *Credit Managers Ass'n of So. Calif. v. Kennesaw Life and Accident Ins. Co.*, 809 F.2d 617 (9th Cir. 1987) and *Mutual Life Ins. Co. v. New York v. Yampol*, 840 F.2d 421 (7th Cir. 1988)? Administrator's Reply at 13-16. In a phrase, the authorities the Administrator has marshaled are irrelevant and an invitation to err. A cursory examination of each case makes that conclusion inescapable.

First off, *Asbestos Workers Local 14 v. Hargrove* did not even involve an ERISA-regulated plan; it involved a fight over labor union funds being held by a Pennsylvania state bank that had been taken over by the Pennsylvania Deposit Insurance Corporation (PDIC), the regulator that had control over the failed state bank's funds. *Hargrove*, 1993 WL 183990 at *1-2. Second, *Dailey v. National Hockey League* does not implicate ERISA preemption, because (as ERISA § 514(c) makes plain by defining "state law" to really mean *state* law, except for certain federal laws only applicable to the District of Columbia) ERISA only preempts state law, not federal law or the laws of other countries (in *Dailey*, Canadian law), much less the jurisdiction of foreign courts over their own citizens (in Dailey, Canadian courts and Canadian citizens playing in the NHL).

Third, in *United Presbyterian*, it wasn't the multiemployer pension fund that was in receivership; it was one of the fund's contributing employers. There, the pension fund's trustees had brought suit against one of the dozens of unrelated employers contributing to the fund, which

was then in the hands of a receiver, to collect delinquent contributions the employer allegedly owed. As such, the receiver merely stood as a general creditor to the pension fund; the receiver had no interest in the pension fund as a fiduciary and no control over its assets.

Fourth, both *Credit Managers Ass'n of So. Calif. v. Kennesaw Life and Accident Ins. Co.* and *Mutual Life Ins. Co. v. New York v. Yampol* involve the state-supervised liquidation of so-called "multiple employer welfare arrangements" (known also as "MEWAs"). In far too many MEWA situations, where – too often – an unlicensed insurance company organized by promoters attempts to masquerade as an ERISA-regulated health and welfare plan, only to be challenged by federal and state regulators on the grounds that (a) ERISA only regulates employee benefit plans, (b) ERISA's preemption statute prominently includes a "savings clause" (found at ERISA §514(b)(2) and codified at 29 U.S.C. §1144(b)(2)) which "saves" state laws regulating insurance, banking and securities from federal preemption, and permits state regulators to continue to freely operate in those areas, and (c) ERISA even makes special provision for MEWAs (in ERISA §514(b)(6)) and plainly permits states to directly regulate (and in *Kennesaw Life* and *Yampol*, to liquidate) underfunded or insolvent MEWAs. The Plan, here, is a retirement plan, and no insurance policies, contracts or products are involved. *Kennesaw Life*, 809 F.2d 617, at 622; and *Yampol*, 840 F.2d 421, at 426.

4. The Administrator Mistakenly Relies on *Princess Lida*; This is About *Colorado River* Abstention – and the Administrator is the Plaintiff and not a Defendant Here.

The Administrator's breathtaking suggestion, that ERISA's reach (and federal court jurisdiction) can be avoided by a simple workaround – that the federal courts' exclusive jurisdictional control over ERISA controversies can be avoided if a litigant acts quickly and

appears first in state court and invokes pre-ERISA comity law such as *Princess Lida* – is nonsensical for at least three reasons.

First, *Princess Lida* did not involve federal law, much less a federal law like ERISA which expressly preempts and supersedes all relevant state law. Rather, *Princess Lida* involved the interpretation and administration of a Pennsylvania trust, applying relevant Pennsylvania state law, where both federal and state courts were competing to hear the same case, could have had jurisdiction, and would have applied the same substantive state law(s).

Second, by its terms, the *Princess Lida* doctrine applies only where the federal court action is an *in rem* or *quasi in rem* proceeding, and control over the underlying *res* is being sought. This is an *in personem* proceeding, where the Administrator has voluntarily appeared and submitted himself to this Court's jurisdiction and nothing in this lawsuit involves this Court taking direct control over the Plan's assets. The Administrator should know better, since this is one of the teachings of *Dailey v. National Hockey League*, 987 F.2d 172, 176 (3rd Cir. 1993), which – at least regarding this issue – has some relevance. See also *Bassler v. Arrowood*, 500 F.2d 138, 141-142 (8th Cir. 1974) (explaining the distinction).

Third, while the *Princess Lida* doctrine may be followed elsewhere, it is not followed in this Circuit, which instead analyzes competing jurisdiction cases like this one by applying the eight (8)-factor abstention test set forth in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), which prominently takes into account, *inter alia*, whether federal or state law controls, the inconvenience of the federal forum and the adequacy of the state forum to protect the parties' interests. *United States v. Fairway Capital Corp*., 483 F.3d 34, 39-42 (1st Cir. 2007). In such cases, as the First Circuit panel in *Fairway Capital Corp*. noted, there is a "heavy presumption

favoring the exercise of jurisdiction." *Id.* at 40, quoting from *Villa Marina Yacht Sales, Inc. v. Hatteras Yachts*, 915 F.2d 7, 13 (1st Cir. 1990). And here, federal law controls – to the exclusion of state law – and the Administrator already knows where the doors to the federal courthouse can be found. He willingly walked through them.

Simply, the Administrator grasps at straws by contending that *Princess Lida* has application here.

B. Plaintiff's Standing Arguments Not Only Concede that the Administrator Primarily is Attempting to Settle Fiduciary Breach Claims, But Also Reflect a Misunderstanding of the Prospect Entities' Ripeness Argument by Conflating Standing and Ripeness.

The Administrator devotes a significant number of pages in his Reply to defending and justifying his right to bring suit as the named fiduciary of an ERISA-regulated retirement plan and the named participants' right to participate in this action, and to settle the claims against the primary defendants in this lawsuit. He does so primarily by arguing at length that both he and the Plan-covered participants have demonstrable injuries-in-fact, which provides them with standing. Administrator's Reply at 18-28.

At virtually the same time, the Administrator goes to great lengths to cast doubt by contending (1) that the Plan does not need to be rescued by the Pension Benefit Guaranty Corporation ("PBGC"), (2) that the Plan, in its present funded state, cannot be rescued by the PBGC, (3) that the PBGC has no obligation or inclination to rescue the Plan, and (4) that, somehow, the PBGC is fiscally incapable of rescuing the Plan (or if the PBGC does step in, the Plan would – and could – get a windfall). Administrator's Reply at 29-44. The Administrator even attempts to cast doubt on his own case. *Id.* at 38-39.

We deal separately (in Part C, below) with the Administrator's attempts to sow doubt about the PBGC's role and relevance to this lawsuit but are compelled to make a couple key points in response to the hail of verbal bullets from the Administrator regarding standing. We start with the basic proposition that Constitutional standing requires a rifle, not a shotgun – an important point that somehow got left out of the Administrator's Reply.

1. Standing is Claims-Specific, and Plaintiff- and Defendant-Specific.

We completely agree with the Administrator that Article III standing now requires a showing that three elements exist: the presence of a demonstrable injury-in-fact; the presence of a "traceable" (i.e., causal) connection between that injury and a given defendant's conduct; and the ability of the court to provide relief to redress that injury. Administrator's Reply at 18-19, *citing, inter alia, Bank of America Corp. v. City of Miami*, 137 S. Ct 1296 (2017) and *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

However, the Administrator either neglects to mention, or for some reason downplays, an important corollary: standing is not "dispensed in gross." *Davis v. Federal Election Comm'n*, 554 U.S. 724, 734 (2008), *quoting from Lewis v. Casey*, 518 US. 343, 358, n. 6 (1996). Rather, "'A plaintiff must demonstrate standing for each claim he seeks to press' and 'for each form of relief that is sought.'" *Davis*, 554 U.S., at 734*, quoting from DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006).[6]

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[6] The Administrator also neglects to mention that when there are multiple parties to a lawsuit brought in federal court, "[f]or all relief sought, there must be a litigant with standing, whether that litigant joins the lawsuit as a plaintiff, a co-plaintiff, or an intervenor as of right." *See Town of Chester v. Laroe Estates, Inc.,* 581 U.S. ___, 139 S. Ct. 1645 (2017).

2. Claims to Recoup (Fiduciary-Caused) Losses Are Not the Same as Claims for "Appropriate Equitable Relief."

What import does this well-recognized Constitutional nuance have to this litigation? There is a three-pronged reason why it has considerable importance here.

First, it bears remembering that the Administrator has brought several ERISA claims – four, in fact – and only one of those ERISA claims is a breach-of-fiduciary-duty claim under ERISA §502(a)(2) (codified at 29 U.S.C. §1132(a)(2)).[7] The other three ERISA claims are brought under ERISA §502(a)(3) (codified at 29 U.S.C. §1132(a)(3)) and seek "appropriate equitable relief" from an array of co-defendants (including the Prospect Entities) – not "relief at large." *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 252 (1993). *Compare* Amended Complaint at ¶¶ 462-468 (Count II/Breach of Fiduciary Duty, asserting funding-related claims under ERISA §502(a)(3)) *with* Amended Complaint at ¶¶ 452-461 (Count I/ERISA Minimum Funding, asserting funding-related claims under ERISA §502(a)(3)); at ¶¶ 470-472 (Count III/Aiding and Abetting Fiduciary Breaches – same); and at ¶¶ 473-476 (Count IV/Declaratory Relief – seeking a simple declaration as to the Plan's status as an ERISA plan).

Second, the legal authority the Administrator has offered in his Reply, on its face, only supports his contention that he (and the others) have standing to assert Count II – the Section 502(a)(2) claim. The "misconduct by administrators"/"risk of default" quote the Administrator takes from *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 252 (2008) and seeks to transform into a chant, see Administrator's Reply at 3, 22, 24-27, actually appears as *dicta* in *LaRue* and is taken directly from *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 139-141 (1985),

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[7] This has significance, because the Administrator can only bring a Section 502(a)(2) claim against a plan fiduciary for having caused plan "losses" that are capable of being redressed under ERISA §409 (codified at 29 U.S.C. §1109). As it happens, only CharterCare Community Board ("CCCB") and the other entities with whom the Administrator now seeks to settle claims qualify as Plan fiduciaries.

a breach-of-fiduciary-duty case brought solely under ERISA §502(a)(2).[8] See *LaRue*, 552 U.S. 248, at 252.

The five other standing cases listed in the Administrator's Reply do nothing to expand the Administrator's claimed authority. From *Rollins v. Dignity Health*, 338 F. Supp. 3d 1025 (N.D. Cal. 2018) to *Lee v. Verizon Communications*, 954 F, Supp. 2d 486 (N.D. Tex. 2013) Administrator's Reply at 25-26, each case in turn invokes *LaRue* and solely involves an ERISA §502(a)(2) breach-of-duty claim. As such, none of them directly supports the Administrator's contention that he (or the others) has standing to assert the Section 502(a)(3) "equitable relief" claims they have brought against CCCB and the other would-be settling defendants (or against the Prospect Entities, for that matter).

Third, a more in-depth examination of *LaRue*'s brief standing discussion – as it pertains to defined benefit plans like the Plan – is revealing. The two sentences lifted from a paragraph found in *LaRue* and repeatedly quoted in the Administrator's Reply are preceded by a sentence which reveals the precedent the Supreme Court was invoking – *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985); the two oft-quoted sentences are then followed by a closing sentence which pointedly refers to the critically important role the PBGC and its plan termination program plays in determining whether a participant faces a real risk of loss in a given case:

> **The "entire plan" language in *Russell* speaks to the impact of §409 on plans that pay defined benefits.** Misconduct by the administrators of a defined benefit plan will not affect an individual's entitlement to a defined benefit unless it creates or enhances the risk of default by the entire plan. **It was that default risk that prompted Congress to**

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[8] As it happens, *Russell* is the seminal case that instructs that ERISA's remedial scheme cannot be expanded through judicial *fiat*. See *Massachusetts Mut. Life Ins. Co. v. Russell,* 473 U.S. 134, at 146 ("The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted, however, provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.")

> **require defined benefit plans (but not defined contribution plans) to satisfy complex minimum funding requirements, and to make premium payments to the Pension Benefit Guaranty Corporation for plan termination insurance**. See Zelinsky, 114 Yale L. J., at 475–478.

LaRue, 552 U.S., at 252 (emphasis added). These additional (and unquoted) sentences, drawn from the Supreme Court's majority opinion in *LaRue*, cut sharply against the Administrator's sweeping assertion that the "PBGC is irrelevant to standing" under *LaRue*, or the Administrator's more remarkable assertion that "The Supreme Court did not create a separate test or make an exception for defined benefit plans which are covered by a PBGC guarantee." Administrator's Reply at 27. To the contrary, it invites the conclusion that the Supreme Court believes Congress fixed the "risk of default" problem for defined benefit plans by creating the PBGC to take it away – at least, to the extent benefits are covered by the PBGC guarantee(s) under its plan termination insurance program.

That also explains, tellingly, why the district court in *Rollins v. Dignity Health* held that that plan's participants had standing to pursue their ERISA §502(a)(2) claims against the plan's fiduciaries, but only because the plaintiffs there alleged in their complaint (albeit, mistakenly) that the PBGC guarantees, and the PBGC's plan termination program, would not be available to a church plan – an argument the district court took as true despite its being an incorrect statement of law rather than a factual allegation.[9] *Rollins v. Dignity Health*, 338 F. Supp. 3d 1025, at 1040.

So what does the Administrator really have, here, in terms of support for standing for himself and for the other plaintiffs? Under *Davis*, each of the plaintiffs, including the

[9] While it is true that a non-electing church plan, even one that is tax-qualified, would not have access to the PBGC's plan termination program, if it is a failed church plan – thus, a tax qualified plan found to be subject to ERISA – all the conditions needed for the PBGC's plan termination program would exist. The Administrator of such a plan would simply owe the PBGC premiums for some (perhaps, many) "back" years.

Administrator, must be able to demonstrate that they have standing to bring each one of those claims against each of the defendants against whom that claim has been asserted. And as the above breakdown of the standing authorities makes reasonably clear, at least the four ERISA claims made in the Amended Complaint do not all "stand" on the same footing – or are subject to the same standing analysis.

3. The Administrator May Have Standing, But Only For Two ERISA Claims; the Participants Have None.

Here's what we think. The Administrator may or may not have good grounds upon which to assert the standing needed to support his ERISA §502(a)(2) breach-of-duty claim (Count II) against CCCB and the other "fiduciary" defendants with which he is now attempting to settle at least that claim.[10] But the ability of individual Plan participants to claim standing for the same (Count II) claim is quite circumspect, once the Supreme Court's observations in *LaRue* are more completely taken into account, because for most (if not all) of them, there may not be any *bona fide* risk of default. The PBGC's plan termination program stands ready to prevent default from occurring (making it quite "relevant"). Bluntly, if, as we have contended in our Opposition, the PBGC can be expected to step in and pay statutorily-guaranteed benefits – now, because the Plan indeed is insolvent (sort of), as the Administrator has alleged (which at this stage we take as true), or in the near future because it is irrevocably headed in that direction – the vast majority of the putative class members (possibly, even some of the participants serving as named plaintiffs) likely have no injury in fact, because they have no real risk of default.

[10] We believe the Administrator's Count II claim suffers from several problems, but acknowledge his claim of standing – for himself, as Administrator – is at least colorable.

As for the three ERISA §502(a)(3) claims the Administrator is advancing (two of which are solely concerned with obtaining funding for the Plan[11]), not only has the Administrator failed to offer any support for his claim that he has the Article III standing he needs to assert those claims against the various named defendants (including those with whom he is attempting to settle claims), but the Administrator also has not provided any standing support for any of the other plaintiffs. And it goes without saying that when a plan participant is seeking, and can only obtain, funding-related "appropriate equitable relief," *Mertens*, 508 U.S. 248, at 252, the presence of the PBGC – and its plan termination program and its statutory commitment to pay guaranteed benefits that either substantially eliminate (or completely eliminate) the participant's loss – can be dispositive of the participant's claim to have suffered an injury in fact.

Indeed, we believe the presence of such facts – an underfunded (perhaps, insolvent), tax-qualified single employer defined benefit plan whose benefits are substantially guaranteed by a federally-chartered corporation that maintains a plan termination program – undercuts two of the three *Lujan*/*Bank of America* standing elements, both for the Administrator and for the Plan participants who are plaintiffs here, at least when it comes to Counts I and III (the two funding-related Section 502(a)(3) claims):

1. The need by the claimant to demonstrate an injury in fact; and
2. The need by the claimant to show that the court is able to provide relief that is both "equitable" and "appropriate," taking into account the Supreme Court's teaching that (a) Congress placed strict limits on Section 502(a)(3) claims by limiting relief to make-whole relief traditionally available in equity, *e.g., Montanile v. Bd. of Trustees of Nat'l Elevator Ind. Health Benefit Plan*, 577 U.S. ___, 136 S. Ct 651 (2016); *also*, *Cigna Corp. v. Amara*, 563 U.S. 421 (2011), and that (b) Section 502(a)(3) serves as a "catchall provision" which functions "as a safety net, offering other appropriate

[11] The third Section 502(a)(3) claim, Count IV, simply seeks declaratory relief as to the Plan's status under ERISA, which the Prospect Entities support.

> equitable relief for injuries caused by violations that ERISA §502 does not elsewhere remedy." *Varity Corp. v. Howe*, 516 U.S. 489, 518 (1996).

Correspondingly, we see the Administrator only having a reasonable claim to standing under Count IV, where the Administrator invokes ERISA §502(a)(3) to seek a declaratory judgment to determine the Plan's status as an ERISA plan.

Ultimately, the extensive effort the Administrator makes in his Reply to defend and justify his standing (and his fellow plaintiff's standing) to bring their ERISA claims, and to settle them with CCCB and a handful of other "fiduciary" entities, misses the basic point the Prospect Entities sought to make in their Opposition (and perhaps made more effectively in the papers filed in support of their pending motion to dismiss). At this particular stage in the Administrator's lawsuit, given the Amended Complaint and the list of parties that either have come to court or have been hailed into court, the Administrator and the other plaintiffs have a ripeness problem that can only be solved by ascertaining the Plan's regulatory posture as, e.g., an employee pension benefit plan subject to both ERISA Title I and Title IV, and if applicable, beginning to make all requisite DOL and PBGC filings, and PBGC premium payments, consistent with the conclusion(s) reached.

C. Based on the Administrator's Amended Complaint, the PBGC Has an Obligation to Take Over the Plan on the Basis of Insolvency; the Administrator's Depiction of the PBGC In Any Event is Erroneous, and Amount to Fearmongering.

In his Amended Complaint, the Administrator strenuously alleges that the Plan is both "insolvent" (sort of), see Amended Complaint at ¶¶ 54 & 55(d)(i), and starved of statutorily-required contributions that the Plan's contributing sponsor(s) have refused or forgotten to make for years. See Amended Complaint at ¶¶ 59, 456, 458 & 459 (no minimum required contributions have been made for years, since the Prospect Entities purchased those sponsors' operating assets in 2014).

Yet the Administrator continues to contend that there are no grounds for involving the PBGC as a necessary (much less indispensable) party and goes so far as to suggest that the PBGC is at Death's Door due to its fiscally-troubled multiemployer pension plan program. Administrator's Reply at 27-40. The Administrator's attempt to trivialize and downplay the importance of the PBGC is as unconvincing as it is factually erroneous.

1. The PBGC's Single Employer Plan Fund Is Stable, And the PBGC Is Actively Taking Over Comparably-Funded Plans.

The Administrator attempts to trivialize the PBGC's role, and to question its financial ability to provide relief to the Plan's 2,700 participants if it were to step in. We think the Administrator has his facts wrong and does not understand how the PBGC really functions.

Indeed, the Administrator's attempt to portray the PBGC as a freestanding entity teetering on financial failure, due in large part to its financially-stressed multiemployer pension plan fund, Administrator's Reply at 29-31, should be squarely rejected as an attempt to fear-monger. *See espec.* Administrator's Reply at 31 (implying that the PBGC's seriously endangered multiemployer plan fund could pull down the PBGC's single employer plan fund). In fact, and as a matter of federal law, the PBGC is a quasi-governmental entity: a federal corporation organized under the U.S. Department of Labor and operated by a Presidential appointee who acts under the supervision of a board of directors comprised of the Secretary of Labor, the Secretary of the Treasury and the Secretary of Commerce. ERISA §§4002(a), (d).

More relevant here, and contrary to the Administrator's unfounded suggestions, the PBGC's single employer pension plan guarantee funds (described in 29 U.S.C. §1322) are kept separate by the United States Treasury from the multiemployer pension plan guarantee funds

(described in 29 U.S.C. §1322a). ERISA §4005(a) (codified at 29 U.S.C. §1305(a)) makes that abundantly clear:

> **ESTABLISHMENT OF FOUR REVOLVING FUNDS ON BOOKS OF TREASURY OF THE UNITED STATES.** There are established on the books of the Treasury of the United States four revolving fund[s] to be used by the [PBGC] in carrying out its duties under this subchapter. One of the funds shall be used with respect to basic benefits guaranteed under section 1322 of this title, one of the funds shall be used with respect to basic benefits guaranteed under section 1322a of this title, one of the funds shall be used with respect to nonbasic benefits guaranteed under section 1322 of this title (if any), and the remaining fund shall be used with respect to nonbasic benefits guaranteed under section 1322a of this title (if any), other than subsection (g)(2) thereof (if any). Whenever in this subchapter reference is made to the term "fund" the reference shall be considered to refer to the appropriate fund established under this subsection.

29 U.S.C. §1305(a).

Indeed, in the PBGC's 2018 Annual Report, which covered its most recent fiscal year ending September 30, 2018, the PBGC indicated that its financial condition had greatly improved, and that in particular its single employer insurance program (the one covering the Plan, if determined to be subject to ERISA) had assets of $109.9 billion and liabilities of $107.5 billion, Simply, the relevant PBGC plan termination fund has a surplus, not a deficit, and hardly is "at risk," as the Administrator contends based on, *inter alia*, a Governmental Accounting Office ("GAO") report dating from 2003. Administrator's Reply at 30-31.

In fact, the PBGC continues to take over and terminate comparable underfunded pension plans like the Plan, and just did so within the past seven days. On February 1, 2019, the PBGC filed suit in United States District Court for the Northern District of Illinois, seeking to take over and terminate the two defined benefit pension plans heretofore sponsored and maintained by Sears Holding Corp., on the basis that such plans either had not met the Internal Revenue Code's minimum funding standards (ERISA §4042(a)(1)), or that such plans would be unable to pay benefits when due (ERISA §4042(a)(2)). According to the PBGC, the plans were 64% funded

(comparable to the Plan's funded status) and face a shortfall of $1.4 billion on a termination basis. A copy of the PBGC's complaint in *PBGC v. Sears Holding Corp*., Case 1:19-cv-00669 (N.D. Ill.) (filed 2.1.19), and the PBGC's related press release dated January 18, 2019, are attached as Exhibits A and B hereto.

2. The PBGC Routinely Takes Over and Terminates Both Insolvent and Underfunded Plans and Abandoned Plans; the Plan Already Satisfies the Standards Under ERISA §4042(a).

Both plan insolvency and funding neglect constitute events capable of triggering PBGC intervention under ERISA Section 4042(a), codified at 29 U.S.C. §1342(a), and one of the two events – plan insolvency – actually requires it. If indeed the Plan were proven to be insolvent, as the Administrator originally alleged (of course, the Administrator changed his story and amended his Complaint once we raised the specter of PBGC involvement; compare Complaint at ¶ 64 with Amended Complaint at ¶ 54), the PBGC is obligated to step in. See 29 U.S.C. §1342(a) (flush language) ("The [PBGC] shall as soon as practicable institute proceedings under this section . . . whenever [it] determines that the plan does not have assets available to pay benefits which are currently due under the terms of the plan.")

Certainly, if the Plan is not currently insolvent, the operative statute (ERISA §4042(a)) provides the PBGC with the discretion needed to control the exact timing. But while the Administrator's description of ERISA §4042(a) and the PBGC's machinations are at least somewhat accurate, Administrator's Reply at 33-37, the Administrator fails to tell the whole story, to the point of being misleading. The Administrator not only engages in hyperbole when he describes the PBGC as "irrelevant" (Administrator's Reply at 28) and when he depicts the PBGC's single employer termination program as being "at risk" (*id.* at 29-30), but he is disingenuous when he contends that the PBGC's role is "too speculative to be considered." (*Id.* at 38-40).

Given the Administrator's baleful report(s) regarding the Plan's financial condition and its pernicious lack of funding, e.g., Amended Complaint at ¶63 (noting failure by CCCB and the other sponsoring defendants to sufficiently fund the Plan in 2010, 2011, 2012, 2013, 2014, 2015 and 2016), there is no way the Plan could continue indefinitely, or that the PBGC would permit it. As noted above, the PBGC just terminated Sears Holdings Corp.'s two comparably-funded plans (64% versus the Plan's 68%), and will be absorbing a $1.4 billion shortfall in the process. When the PBGC did so it notably invoked two of the ERISA §4042(a) conditions the Administrator has suggested the PBGC never invokes.

In reality, the termination of an underfunded defined benefit plan like the Plan is inevitable, particularly when its sponsors/contributing employers run out of money (which the proposed settlement, if approved, will make certain). When a traditional pension plan subject to ERISA become unsustainable and its sponsor(s) stop making the minimum required contributions to it, thus positioning the plan to be terminated by the PBGC under ERISA § 4042(a)(1)), federal excise tax liability begins to be imposed upon the contributing employers and other members of their controlled group.[12] Those excise taxes start at 10% per year, based on the accumulated amount of the required contribution(s) not made (and continue each year such contribution(s) remain unpaid), but quickly rise to 100% per year, based on the accumulated amount of the required the contribution(s) not made (and continue each year such contribution(s) remain unpaid). The liability to the Internal Revenue Service ("IRS"), first under IRC § 4971(a) (the 10% tax) and then under §4971(b) (the 100% tax) quickly adds up, with interest, and very quickly rivals and ultimately exceeds the liability the contributing employers have to contribute directly to the plan. It makes the continuation of the plan (and any residual ability of the contributing employers to

[12] See, generally, Internal Revenue Code ("IRC") §4971, codified at 26 U.S.C. §4971.

further contribute, or to satisfy any termination-related liability to the PBGC under ERISA §§4062-4064) wholly impractical.

3. Concerted Efforts by the Administrator Meet With and Dissuade the PBGC From Discharging Its Statutory Responsibilities, Do Not Make the PBGC Less of a Necessary Party, And Undercut the Administrator's Attempt to Characterize the PBGC's Role As Speculative.

In his Reply, the Administrator reveals that he and a phalanx of lawyers (all, presumably being paid from Plan assets) have met with PBGC officials to discuss the Plan and, presumably, this litigation. Administrator's Reply at 56-57. By so doing, the Administrator's actions acknowledge and concede what his Reply does not: that he is acutely aware that the PBGC could intervene; that he is well aware of the financial consequences – to him and his counsel, as well as to the Plan's participants and beneficiaries – if the PBGC were to step in and take over the Plan as it took over the two Sears Holding Corporation plans, last week; and that the PBGC is closely following the developments in this litigation.

Indeed, the PBGC may be so closely shadowing the Administrator's actions, and this case, that the PBGC might be held bound (or at least, partially estopped) by any outcome in this case. *See Taylor v. Sturgell*, 553 U.S. 880 (2008) (rejecting the virtual representation doctrine as to nonparties, but recognizing six exceptions, including representation by an aligned party and representation by a controlled party).

4. The Collateral Source Rule is Preempted by ERISA.

The Administrator broadly asserts that the collateral source rule applies in the ERISA context, and that even the PBGC might be a collateral source of funds in the future, in an obvious attempt to undercut our contention that the PBGC's role protects participants from downside risk. Administrator's Reply, at 40-44 (*quoting, inter alia, Beta Group, Inc. v. Steiker, Greenaple, & Croscut, P.C.*, 2018 WL 461097, *3 (January 1, 2018)).

That's not accurate. In *LaRocca v. Borden, Inc.*, 276 F.3d 22, 30 (1st Cir. 2002), the First Circuit Court of Appeals properly held that the collateral source rule, a state common law doctrine, was preempted by ERISA. In that case, the court was concerned that the doctrine would alter the coordination of benefit provisions of an ERISA plan, and thus interfere with ERISA's carefully integrated civil enforcement provisions. *Massachusetts Mut. Life Ins. Co. v. Russell,* 473 U.S. 134 (1985). The fact that appellate courts in other circuits (and a few district courts in this Circuit) have recognized the collateral source rule and have not dealt with ERISA's sweeping preemption provision (or, it seems, *LaRocca*), when called upon to deal with claims brought against breaching plan fiduciaries under ERISA §502(a)(2) to recover plan losses under ERISA §409, does not change the fact that in this Circuit, *LaRocca* controls. Indeed, while there are instances where federal courts have fashioned federal common law from state common law where necessary to properly effectuate ERISA's purposes, e.g., *Miller v. Taylor Insulation Co.*, 39 F.3d 755 (7th Cir. 1994), adoption of the collateral source rule would frustrate ERISA's enforcement scheme and its commitment to "make whole" relief.

In the instant case, the rationale for invoking ERISA preemption is even more compelling. Here, ERISA preemption is necessary to preserve the Congressionally-mandated role of the PBGC to protect the basic benefits of participants covered by underfunded pension plans. Perhaps more important, ERISA preemption is necessary to preserve the carefully

constructed balance reflected in ERISA's remedial provisions. *See LaRocca*, 276 F.3d at 30-31. A state common law doctrine cannot be invoked to upset this balance, which is precisely what would happen if the Administrator is permitted to use it as he has proposed – i.e., to effectively relegate the PBGC to spectator status while dramatically expanding the relief available under ERISA's remedial scheme far beyond anything Congress could have imagined. This Court should not permit that to occur.

In any event, by characterizing the PBGC as merely a collateral source, the Administrator again fails or refuses to acknowledge the legal implications of administering an ERISA-regulated retirement plan. As noted above, the Prospect Entities have been sued based upon wholly equitable theories of recovery, grounded solely in ERISA §502(a)(3). There simply can be no equitable recovery against the Prospect Entities (or, we would argue, any of the other non-fiduciary defendants not being pursued under ERISA §502(a)(2)) without first recovering benefits from a readily available source such as the PBGC, which was created by Congress specifically to prevent or ameliorate the financial risks associated with plan financial failure. It is absolutely untenable to pursue the Prospect Entities in equity without even attempting to make the Plan whole through the backstop Congress put in place: the PBGC.

D. Contrary to the Administrator's Contentions, ERISA Plays A Pivotal Role In Determining Whether the Administrator's Selective Settlement, and Payment of Fees, is At All Appropriate.

ERISA fiduciary standards are "the highest known to law," *Donovan v. Bierwirth*, 680 F.2d 263, 271-72, n. 8, and this includes state laws governing the actions of tax-exempt organization and corporate board members. Under ERISA §3(21)(A), a person is held to be a "fiduciary" with respect to a plan:

> ...to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting

> management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

In other words, under this functional definition, anyone who exercises discretionary control or authority over the plan's management, administration, or assets is an ERISA "fiduciary." *Mertens v. Hewitt Assocs*., 508 U.S. 248, 251 (1993). Furthermore, ERISA §409(a) makes fiduciaries liable for any breach of these duties, and specifies the remedies available against them: the fiduciary is personally liable for damages ("to make good to [the] plan any losses to the plan resulting from each such breach"), for restitution ("to restore to [the] plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary"), and for "such other equitable or remedial relief as the court may deem appropriate," including removal of the fiduciary. *Mertens*, 508 U.S. at 252 (quoting ERISA §502(a)(2), 29 U.S.C. § 1132(a)(2)).

By all appearances, the proposed settlement was conceived, considered, negotiated, drafted and executed by all involved without reference to or understanding of ERISA's enforcement scheme. For instance, individual officers of CCCB or other defendants may have been fiduciaries of the Plan, throughout their association with CCCB, for extended periods when they had particular executive roles or perhaps even with respect to a discrete transaction or matter. In fact, this is quite likely the case. Despite the clarity of ERISA's provisions for personal liability of fiduciaries, the proposed settlement releases the officers, employees, directors and other agents of CCCB without regard to, or we suspect, understanding of, the potential liability of these individuals – many of whom may be covered by insurance. We strongly suspect that the Administrator's settlement, if approved, would release these and other ERISA claims unwittingly, to the detriment of the Plan's participants and beneficiaries.

E. Contrary to Plaintiffs' Arguments, CCCB has already breached the terms of the Prospect Chartercare LLC Operating Agreement and the Settlement Agreement, if approved, would result in a further breach of the LLC Agreement.

In objecting to the Settlement Agreement, the Prospect Entities assert that the Court should decline to approve the settlement because it authorizes the Receiver as Plan Administrator to cause CCCB to breach the express terms of the Prospect Chartercare LLC Operating Agreement ("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.

In their Reply, Plaintiffs' assert that the transfer of rights and control contemplated by the Settlement Agreement between CCCB and the Receiver, are permitted by the terms of the LLC Agreement. Referring the Court to Section 13 of the LLC Agreement, Plaintiffs argue that the transfer of CCCB's rights fall within the exception set forth in Section 13.2, which permits transfers to "affiliates" or "successors" of CCCB. Plaintiffs assert that not only is the Receiver himself an "affiliate" of CCCB, but also that the Plan itself is an "affiliate" of CCCB. Whether a creditor such as the Receiver who assumes ownership or control over another entity such as CCCB should be construed to be an "affiliate" within the meaning of Section 13.2 (a)(ii) is in dispute. The Receiver further argues that the Plan itself should be construed to be an "Affiliate" of CCCB "because CCCB indirectly controlled SJHSRI, which, in turn, directly controlled the Plan…" Plaintiffs' Reply at page 71. Even if it were true that CCCB "indirectly" controlled SJHSRI at a point in time, whether an entity's indirect control of another entity is sufficient to satisfy the definition of "affiliate" is an issue to be determined at a later date if and when that issue is litigated. At this point, it is far from clear that the Plan or the Receiver is an affiliate of CCCB since the role of both SJHSRI and now the Receiver is that of a fiduciary, an entirely different relationship than

that of an affiliate entity that controls or is controlled by another entity (e.g. parent and subsidiary corporations).

Even if the transfers from CCCB to the Receiver were authorized by Section 13.2 as "permitted transfers," those transfers cannot take place without full compliance with the transfer conditions set forth in Section 13.1, none of which have been satisfied. Section 13.1, which Plaintiffs have elected not cited in its entirety, states as follows:

> 13.1 Transfers by Members. Except as otherwise set forth in this Article XIII, 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[13] (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). **If a transfer is otherwise permitted by this Article XIII, then a Member may sell its interest in the Company if each of the following conditions is satisfied:**
>
> (a) The sale, transfer or assignment is with respect to one or more Units;
>
> (b) The Member and its transferee execute, acknowledge and deliver to the Manager such instruments of Transfer and assignment with respect to such transaction as are in form and substance satisfactory to the Manager;
>
> (c) Unless waived in writing by the Manager, the Member delivers to the Manager an opinion of counsel satisfactory to the Manager covering such federal and state securities, healthcare (e.g., Medicare and DOH) and tax Laws and other aspects of the proposed Transfer as the Manager may reasonably request;
>
> (d) The Member has furnished to the transferee a written statement showing the name and taxpayer identification number of the Company in such form and together with such other information as may be required under Section 6050K of the Code and the Regulations thereunder; and

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

> (e) The Member pays the Company a transfer fee that is sufficient to pay all reasonable expenses of the Company (which shall include any and all expenses of the Manager) in connection with such transaction.

[Emphasis Supplied].

To date, before obtaining either state of federal court approval of the proposed Settlement Agreement with CCCB, the Receiver has already taken a security interest in CCCB's assets, which is a clear violation of Section 13.1. There can be no dispute that the conditions set forth in Section 13.1 (a)-(e) have never been satisfied and as a result the security interest is in clear violation of the LLC Agreement and is invalid and ineffective. Moreover, it cannot be assumed that the Receiver will be able to satisfy the conditions set forth in 13.1(a)-(e) should the Settlement Agreement be approved. To the extent that the Settlement Agreement were to result in a change of control of the Prospect Chartercare LLC board of directors, it is unlikely that the Receiver will be able to satisfy 13.1 (b) and to obtain an opinion of counsel satisfactory to the Manger as required by 13.1(c).

Straining to legitimize its control over CCCB within the terms of the LLC Agreement, Plaintiffs also argue that the Receiver is a "successor" to the entity in receivership which for this purpose Plaintiffs argue is St. Joseph Health Services of Rhode Island, Inc. ("SJHSRI"). Plaintiff's Reply at page 73. In fact, SJHSRI is merely the entity that petitioned the Plan into receivership. The entity in receivership is not SJHSRI, but St. Josephs Health Services of Rhode Island Retirement Plan. Thus, under no circumstances is the Receiver SJHSRI's "successor" with respect to any interest belonging to SJHSRI. The mere fact that SJHSRI was the prior Plan administrator does not make the Receiver CCCB's successor in any way, shape or form. Based upon the arguments made by Plaintiffs, only one thing is clear -- it is exceedingly likely that should the Settlement Agreement be approved in its current form, additional litigation will ensue based not

only on the security agreement already granted by CCCB, but any future transfer or exercise of control not in compliance with the provisions of the LLC Agreement.

CONCLUSION

The Administrator asserts that "the state court and the Receiver have gone to considerable lengths to reserve issues concerning ERISA for this Court to decide." Administrator's Reply at 18. This innocuous statement, by all appearances made earnestly and in good faith by the Administrator, goes to the heart of the Prospect Entities' objections to the proposed settlement. The Prospect Entities respectfully submit that the Administrator fails or is unwilling to recognize, or even acknowledge, that ERISA exclusively establishes: (1) the standards for his conduct when acting as named fiduciary of the Plan, including his conduct of this litigation and its resolution; and (2) the contours of the rights, responsibilities and potential liabilities of the parties to this litigation and various other actors relative to the Plan.

By his own acknowledgment, the Administrator serves as an ERISA fiduciary bringing ERISA claims relative to an ERISA plan against other ERISA fiduciaries. Under these circumstances, virtually <u>every</u> <u>issue</u> and <u>every</u> <u>action</u> of the Administrator concerns ERISA. This Court should not accede to the Administrator's request to, in effect, rubber stamp a settlement of fiduciary breach and related claims ginned up in state court, but rather should assert its jurisdictional authority over the Plan and over the parties, as explicitly contemplated by ERISA §502(e), and decline to approve this deeply flawed, state law-based settlement.

Accordingly, and based upon the foregoing, the Prospect Entities renew their 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 and potentially impairs Plan rights. In addition, the Prospect Entities respectfully request that the Court reject the settlement as being collusive and unfairly prejudicial to their rights.

Dated: February 5, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of February 2019, that I have caused the within *Joint Sur-Reply* 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/ Preston W. Halperin, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

PENSION BENEFIT GUARANTY CORPORATION,
1200 K Street, N.W., Suite 340
Washington, D.C. 20005

Plaintiff.

v.

SEARS HOLDINGS CORPORATION
3333 Beverly Road
Hoffman Estates, IL 60179

Defendant.

CASE NO. 1:19-cv-00669

COMPLAINT

Plaintiff Pension Benefit Guaranty Corporation ("PBGC") files this Complaint against Sears Holdings Corporation ("SHC"), as administrator of Sears Holdings Pension Plan 1 and Sears Holdings Pension Plan 2 (collectively, the "Pension Plans" or "Plans"), and states:

1. This action arises under Title IV of the Employee Retirement Income Security Act of 1974, *as amended*, 29 U.S.C. §§ 1301- 1461 ("ERISA").

2. By this action, PBGC seeks an order, pursuant to 29 U.S.C. §§ 1342 and 1348, (i) terminating the Pension Plans; (ii) appointing PBGC as the statutory trustee of the Pension Plans; (iii) fixing January 31, 2019 as the Pension Plans' termination date; and (iv) commanding SHC and any third parties to transfer to PBGC all of the Pension Plans' assets, information, and documents relating to the Plans.

Jurisdiction

3. The Court has subject matter jurisdiction over this action pursuant to 29 U.S.C. § 1331 and 29 U.S.C. §§ 1303(e)(3) and 1342.

4. The Court has personal jurisdiction over SHC under 29 U.S.C. § 1303(e)(2). Venue is appropriate in this district pursuant to 29 U.S.C. § 1342(g).

The Parties

5. Plaintiff PBGC is the federal agency and wholly owned corporation of the United States government that administers the pension plan insurance program under Title IV of ERISA.

6. Defendant SHC is a Delaware corporation formed in 2004, with its principal place of business located at 3333 Beverly Road, Hoffman Estates, IL 60179.

7. Upon information and belief, Defendant SHC is the Pension Plan's plan sponsor and administrator within the meaning of 29 U.S.C. §§ 1002(16) and 1301(a)(1).[1]

Statutory Background

8. PBGC may institute proceedings to terminate a defined benefit pension plan whenever it determines that the plan has not met the minimum funding standard required by the Internal Revenue Code or that the plan will be unable to pay benefits when due. 29 U.S.C. § 1342(a)(1), (2).

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[1] The plan documents for each of the Pension Plans list the "Sears Holdings Corporation Administrative Committee (or its successor)" (the "Administrative Committee") as the administrator for the Pension Plans within the meaning of 29 U.S.C. § 1002(16). However, it is unclear if the Administrative Committee still exists or if a successor has been appointed. Rather, SHC has represented to PBGC in formal filings with the agency that it is the administrator of the Pension Plans. SHC has made similar representations of its role as administrator of the Pension Plans to the Plans' participants. PBGC hereby reserves all rights to amend this Complaint to add defendant(s) to this action if the representations made by SHC with respect to its role as administrator of the Pension Plans were incorrect.

9. PBGC may institute proceedings to terminate a defined benefit pension plan whenever it determines that termination is necessary to protect the interest of the participants. 29 U.S.C. § 1342(c).

10. After determining that a pension plan should be terminated and notifying its plan administrator of such determination, PBGC may "apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the [PBGC insurance] fund." 29 U.S.C. § 1342(c). Alternatively, PBGC and the plan administrator may enter into an agreement to terminate the plan. *Id.*

11. When an underfunded defined benefit pension plan terminates, PBGC typically becomes statutory trustee of the plan and, subject to certain statutory limitations, uses PBGC's insurance funds to pay the plan's unfunded benefits. *See* 29 U.S.C. § 1322.

12. The termination date of a pension plan is either agreed upon by PBGC and the plan administrator or, in the absence of an agreement, established by the district court. 29 U.S.C. § 1348(a)(4).

13. Upon issuing a termination decree under 29 U.S.C. § 1342(c), the district court must appoint and authorize a trustee to terminate the pension plan in accordance with Title IV of ERISA. 29 U.S.C. § 1342(b),(c). PBGC may request its appointment as trustee in any case. 29 U.S.C. § 1342(b)(1).

Factual Background

14. Upon information and belief, the original Sears Pension Plan ("Original Plan") was established effective January 1, 1944 to cover all eligible employees of Sears, Roebuck, and Co., its former plan sponsor. The Original Plan was fully frozen effective December 31, 2005.

15. On January 30, 2008, the Kmart Corporation Employee Pension Plan, which was sponsored by Kmart Holding Corporation and fully frozen effective January 31, 1996, was merged with and into the Original Plan. The resulting plan was renamed the Sears Holdings Pension Plan ("SHC Plan"). SHC became the plan sponsor of the SHC Plan.

16. Effective December 1, 2016, the SHC Plan transferred certain benefit liabilities and assets to the newly established Sears Holdings Pension Plan 2. The remaining SHC Plan was renamed Sears Holdings Pension Plan 1.

17. The Pension Plans are defined benefit pension plans covered under Title IV of ERISA. *See* 29 U.S.C. § 1002(35), 1321(a).

18. On October 15, 2018, SHC and certain of its affiliates (collectively, the "Debtors" or the "Company") filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court").

19. On January 14, 2019, the Debtors commenced an auction for the sale or disposition of substantially all of the Debtors' assets pursuant to procedures approved by the Bankruptcy Court (the "Auction").

20. On January 18, 2019, the Debtors filed a notice with the Bankruptcy Court naming Transform Holdco, LLC ("Buyer") the successful bidder at the Auction. The Debtors further submitted to the Court an executed asset purchase agreement ("APA") between the

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Debtors and the Buyer whereby, *inter alia*, the Buyer agreed to purchase substantially all of the Debtors' assets pursuant to 11 U.S.C. §§ 363, 365 (the "Sale").

21. The Bankruptcy Court will determine whether to approve the Sale on or around February 6, 2019.

22. Upon information and belief, SHC will cease operations as a result of the Sale. Upon further information and belief, if the Court denies the Sale, SHC will initiate an orderly liquidation and wind down of the Company.

23. PBGC estimates that Pension Plans are collectively underfunded by approximately $1.4 billion on a termination basis. Due to the impending Sale and/or liquidation, and the funding status of the Pension Plans, the Plans will not have assets available to pay benefits when due under their terms.

24. On January 17, 2019, in accordance with 29 U.S.C. § 1342(c), PBGC issued Notices of Determination (the "Notices") to SHC, notifying SHC that PBGC had determined that the Pension Plans will not be able to pay benefits when due and must be terminated in order to protect the interest of the Pension Plans' participants under 29 U.S.C. § 1342. Copies of the Notices are attached hereto as Exhibit 1.[2]

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[2] Along with the Notices, PBGC sent agreements to SHC that would consensually terminate the Pension Plans and appoint PBGC as statutory trustee of the Plans (the "Agreements"). SHC was informed that, if the Agreements were not executed, PBGC would initiate the current action. Instead of sending to PBGC executed Agreements, thereby consensually ending the termination and trusteeship process, SHC filed distress termination applications with PBGC on January 29, 2019 to terminate the Pension Plans pursuant to 29 U.S.C. § 1341(c) ("Distress Applications"). Given the statutory authority and discretion PBGC is afforded (and had already exercised) with respect to the termination of the Pension Plans under 29 U.S.C. § 1342, PBGC views the Distress Applications as moot and intends to move forward with terminating the Pension Plans under 29 U.S.C. § 1342 as outlined herein.

25. On January 22, 2019, PBGC published notice in *USA Today* of its determination that the Pension Plans should terminate effective January 31, 2019. *See* Exhibit 2.

COUNT I

26. PBGC realleges and incorporates by reference paragraphs 1 through 25.

27. Under 29 U.S.C. § 1342(c), PBGC is authorized, after determining that a pension plan covered by Title IV of ERISA should be terminated, "[to] apply to the appropriate United States District Court for a decree adjudicating that the plan must be terminated in order to protect the interests of participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of [PBGC's insurance] fund."

28. PBGC has made determinations under 29 U.S.C. § 1342(a)(2) and (c) that the Pension Plans must be terminated. As mentioned above, PBGC issued the Notices to SHC informing SHC that PBGC had determined that the Pension Plans will not be able to pay benefits when due and must be terminated in order to protect the interest of the Pension Plans' participants under 29 U.S.C. § 1342. Accordingly, this Court may issue a decree terminating the Pension Plans.

COUNT II

29. PBGC realleges and incorporates by reference paragraphs 1 through 28.

30. Upon issuing a termination decree under 29 U.S.C. § 1342(c), a United States district court may appoint PBGC as statutory trustee of the terminated plan. 29 U.S.C. § 1342(b)(1).

31. PBGC is willing and able to serve as statutory trustee of the Pension Plans.

32. If appointed trustee of the Pension Plans, PBGC will complete the termination of the Pension Plans in accordance with Title IV of ERISA, pursue statutory claims for liability

under 29 U.S.C. § 1362, pay benefits under the Pension Plans in accordance with ERISA, and administer the Pension Plans in accordance with their terms and the provisions of 29 U.S.C. § 1342(d).

COUNT III

33. PBGC realleges and incorporates by reference paragraphs 1 through 32.

34. The termination date of a pension plan is the date agreed to by PBGC and the plan administrator, or, in the absence of such an agreement, the date established by the Court. 29 U.S.C. § 1348(a)(3) and (a)(4).

35. PBGC's published notice to the Pension Plans' participants of its determination that the Pension Plans must be terminated and that PBGC should become trustee of the Pension Plans extinguished participants' reasonable expectations that the Pension Plans would continue after January 31, 2019.

36. The termination date that best serves PBGC's interests is January 31, 2019.

37. The Court should establish January 31, 2019, as the termination date for both of the Pension Plans.

COUNT IV

38. PBGC realleges and incorporates by reference paragraphs 1 through 37.

39. Under 29 U.S.C. § 1342(d), a court-appointed statutory trustee is authorized, among other things, to pay pension plan benefits and manage pension plan assets in accordance with Title IV of ERISA.

40. To carry out its statutory duties with respect to a pension plan, the court-appointed statutory trustee must receive all pension plan assets and all documents relating to the plan, the participants, and the plan's assets.

41. The Court should therefore order the transfer to PBGC all of the assets of the Pension Plans and documents related to the Pension Plans, wherever located, as an incident of appointing PBGC as statutory trustee of the Plans.

WHEREFORE, PBGC requests that the Court enter a judgment on all counts of this Complaint, and the Court enter an Order:

A. Adjudicating that the Pension Plans are terminated under 29 U.S.C. § 1342(c);

B. Appointing PBGC statutory trustee of the Pension Plans under 29 U.S.C. § 1342(c);

C. Establishing January 31, 2019 as the Pension Plans' termination date under 29 U.S.C. § 1348(a);

D. Ordering SHC and all other persons or entities having possession, custody, or control over any records, assets, or other property of the Pension Plans, or any documents required to determine benefits under the Pension Plans, to transfer, convey, and deliver all such items to PBGC; and

E. Granting such other relief as the Court deems just and proper.

[*Remainder of page intentionally left blank*]

Dated: February 1, 2019

Respectfully submitted,

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Pension Benefit Guaranty Corporation
A U.S. GOVERNMENT AGENCY

PBGC to Pay Pension Benefits

for Employees and Retirees at Sears and Kmart

FOR IMMEDIATE RELEASE

January 18, 2019

WASHINGTON — The Pension Benefit Guaranty Corporation is taking steps to assume responsibility for Sears Holdings Corporation's two defined benefit pension plans, which cover about 90,000 people. The national retail chain headquartered in Hoffman Estates, Illinois, operates through its subsidiaries, which include Sears, Roebuck and Co. and Kmart Corporation.

Sears filed for Chapter 11 protection on October 15, 2018. PBGC is stepping in to become responsible for the company's two pension plans because it is clear that Sears' continuation of the plans is no longer possible.

"Our mission is to protect the retirement income of plan participants and their families," said PBGC Director Tom Reeder. "When it's no longer possible for plan sponsors to maintain their pension plans, PBGC plays the crucial role of providing lifetime retirement income for the workers and retirees."

PBGC has worked with Sears for several years to improve funding for the company's plans. PBGC estimates that the Sears' plans are underfunded by $1.4 billion leaving them 64 percent funded.

PBGC is seeking to terminate the plans as of January 31, 2019. The agency will become responsible for the pension plans when Sears agrees or a court orders plan termination.

Until PBGC assumes responsibility for the pension plans, they remain the responsibility of Sears Holdings Corporation. Retirees will continue to receive benefits without interruption, and future retirees can apply for benefits as soon as they are eligible. Sears pension plan participants with questions about their benefits should contact Sears Holdings Pension Service Center at a 1-866-682-3480, Monday through Friday 8:00 a.m. to 6:00 p.m., Central Time.

PBGC covers Sears' two pension plans under its Single-Employer Insurance Program. Benefit accruals under the plans have been frozen since 2005. PBGC expects that its guarantees will cover the vast majority of pension benefits earned under these plans. For more information on PBGC and benefits guaranteed by PBGC for single-employer pension plans, see PBGC Guaranteed Benefits. For additional information see Questions and Answers for Participants in the Sears Holdings Corporation Pension Plans.

Termination of the Sears pension plans will not have a significant effect on PBGC's financial statements because the claim was previously included in the agency's fiscal year 2017 and 2018 financial statements, in accordance with generally accepted accounting principles.

About PBGC:

PBGC protects the pension benefits of nearly 37 million Americans in private-sector pension plans. The agency operates two separate insurance programs — one covering pension plans sponsored by a single-employer and another covering multiemployer pension plans, which are sponsored by more than one employer and maintained under collective bargaining agreements. PBGC is currently responsible for the benefits of about 1.5 million people in failed pension plans. PBGC receives no taxpayer dollars. Its operations are financed by insurance premiums, investment income, and, for the Single-Employer Program, assets and recoveries from failed single-employer plans. For more information, visit PBGC.gov.

Press Release Number: 19-01

Pension Benefit Guaranty Corporation

Customer Contact
For Workers & Retirees 1-800-400-7242
8:00 a.m. to 7:00 p.m. Eastern Time Monday Through Friday
(Except Federal Holidays)

For Employers & Practitioners 1-800-736-2444
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