Case Number: PC-2017-3856
Filed in Providence/Bristol County Superior Court
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Reviewer: Sharon S.

STATE OF RHODE ISLAND PROVIDENCE, SC.		SUPERIOR COURT
ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND, INC.	:	
vs.	:	C.A. No: PC-2017-3856
ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND RETIREMENT PLAN, as amended	:	**Hearing: Nov. 2, 2018 @ 9:30 a.m.**

THE RECEIVER'S MEMORANDUM OF LAW IN SUPPORT OF HIS OBJECTION TO THE ATTORNEY GENERAL'S MOTION TO STRIKE PORTIONS OF THE RECEIVER'S REPLY TO OBJECTIONS TO THE RECEIVER'S PETITION FOR SETTLEMENT INSTRUCTIONS

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TABLE OF CONTENTS

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BACKGROUND

The Receiver, Stephen F. Del Sesto, Esq. (the "Receiver") of the St. Joseph Health Services of Rhode Island Retirement Plan (the "Plan"), submits this memorandum in support of his objection to the Attorney General's motion to strike portions of the Receiver's Reply Memorandum previously filed in support of his Petition for Settlement Instruction.[1]

The Receiver's statements to which the Attorney General takes offense need to be taken in context. The Attorney General approved a Hospital Conversion which left the Plan in such a state that it would inevitably fail. Three years later, it was petitioned into receivership by one of the transacting parties in the conversion that the Attorney General had approved.

The Receiver and Court-appointed Special Counsel have labored to obtain recovery for the Plan. To that end, the Receiver and three of the Defendants in the Federal Court action entered into a Settlement that would provide a modicum of relief to the more than 2,700 innocent pensioners, and petitioned the Court for permission to present it to the Federal Court for approval. The Attorney General's response was to raise objections to the Settlement.

Now, however, the Attorney General has gone a step further, filing procedurally defective motion. There is no such thing as a Rule 12(f) motion to strike legal memoranda, which are not pleadings. And even if (*arguendo*) the Attorney General's

[1] The Court has subsequently ruled on that Petition for Settlement Instruction in a written decision filed on October 29, 2018, allowing the Settlement to go forward and seek to obtain Federal Court approval.

motion were procedurally sound (which it is not), the substance of Attorney General's motion is utterly meritless.

The Attorney General insists he is not a party to these various proceedings. He was, however, a participant in the underlying events that gave rise to these proceedings. The Receiver is entitled to comment on the Attorney General's performance (*vel non*) of his duties in those underlying events and transactions without essentially being accused of committing lèse-majesté. In this country, criticism of the government is constitutionally protected, not something to be extirpated as "scandalous." Moreover, those comments were legitimate and absolutely "pertinent" to the issues before the Court, in connection with the Court's decision on the Petition for Settlement Instruction and the Attorney General's objections thereto. The motion should be denied.

ARGUMENT

I. The Attorney General's motion is procedurally defective: Super. R. Civ. P. 12(f) does not permit motions to strike memoranda of law or other motion papers

The Attorney General brings his instant motion pursuant to Super. R. Civ. P. 12(f), which provides:

> (f) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty (20) days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken **from any pleading** any insufficient defense, or any redundant, immaterial, impertinent, or scandalous matter.

Super. R. Civ. P. 12(f) (emphasis supplied).

By its own express terms, however, Super. R. Civ. P. 12(f) only applies to pleadings, not legal memoranda:

> [W]hile Rule 12(f) provides that "the court may order stricken from any pleading any insufficient defense, or any redundant, immaterial, impertinent, or scandalous matter," this Rule applies only to pleadings and therefore is not applicable to allegations raised by Plaintiff through argument within his memorandum.

Rosano v Mers, Equifirst Corp., No. PC 2010-0310, 2012 WL 2377517, at *4 (R.I. Super. June 19, 2012) (Rubine, J.). In other words:

> Rule 12(f) motions only may be directed towards pleadings as defined by Rule 7(a); thus motions, affidavits, briefs, and other documents outside of the pleadings are not subject to Rule 12(f).

Wright and Miller, 5C Fed. Prac. & Proc. Civ. § 1380 (3d ed.).[2]

The case law outside Rhode Island denying motions to strike legal memoranda and other non-pleadings as improperly brought under the substantively similar[3] federal counterpart to Super. R. Civ. P. 12(f), Fed. R. Civ. P. 12(f), are legion:

> A review of Defendants' motion and the memorandum that Defendants seek to strike leads the Court to conclude that this is not the rare case where a motion to strike should be granted. As stated above, Rule 12(f) provides that "the court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f) (emphasis added). **Consequently, motions to strike pursuant to Rule 12(f) are appropriate only to strike matters contained in the pleadings. The document at issue, a memorandum in opposition to Defendants' motion for summary judgment, is not considered to be a pleading, so a motion under 12(f) is not a proper proceeding.**
>
> As Chief Judge Easterbrook noted in *Redwood v. Dobson*, 476 F.3d 462 (7th Cir. 2007), "Motions to strike disserve the interest of judicial economy. The aggravation comes at an unacceptable cost in judicial time." 476 F.3d at 471. The Chief Judge's observation is equally applicable to the motion

[2] The Attorney General incorrectly cites to a different section of Wright & Miller discussing only the striking of *pleadings*. See Attorney General's Memo. at 4 (citing 5C Fed. Prac. & Proc. Civ. § 1382).

[3] Because Super. R. Civ. P. 12(f) is substantively similar to Fed. R. Civ. P. 12(f), it is appropriate for the Court to look to the federal courts for guidance on interpreting our rule. See Hall v. Kuzenka, 843 A.2d 474, 476 (R.I. 2004) ("Where the Federal rule and our state rule are substantially similar, we will look to the Federal courts for guidance or interpretation of our own rule.") (quoting Heal v. Heal, 762 A.2d 463, 466-67 (R.I. 2000) and construing Super. R. Civ. P. 12(b)).

> to strike filed in this case. The motion does not serve to refine issues and aid in a more expeditious resolution of this matter; **rather, the motion has generated another round of briefing that the Court must read and address** before it can reach the merits of Defendants' motion for partial summary judgment.
>
> [Emphasis supplied]

Custom Foam Works, Inc. v. Hydrotech Sys., Ltd., No. 09-CV-0710-MJR, 2010 WL 4386710, at *1 (S.D. Ill. Oct. 29, 2010). Obviously the same result obtains for reply memoranda:

> First, **the motion is invalid on its face**. Rule 12(f) permits a court to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). **The rule is thus confined on its face to pleadings, and Plaintiff's January 27, 2014 reply memorandum is not a pleading.** *See* Fed. R. Civ. P. 7(a) (identifying pleadings as a complaint, an answer to a complaint, an answer to a counterclaim designated as a counterclaim, an answer to a crossclaim, a third-party complaint, an answer to a third-party complaint, and a court-ordered reply to an answer). **Defendants therefore cannot use Rule 12(f) to strike the reply memorandum.**
>
> [Emphasis supplied]

Ohio State Univ. v. Skreened Ltd., No. 2:12-CV-662, 2014 WL 12656916, at *1 (S.D. Ohio Apr. 2, 2014).

Rejecting a motion to strike a portion of a party's summary judgment papers, a federal district court in Massachusetts stated:

> The Court does not, however, have the authority to strike information from a party's memorandum of law. A motion to strike is brought pursuant to Rule 12(f) which permits a court to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. Pro. 12(f). **The term "pleading" is strictly defined by Rule 7(a) and does not encompass motions, memoranda or exhibits to memoranda. Fed. R. Civ. P. 7(a). The First Circuit Court of Appeals and other sessions of this court have refused to strike motions under Rule 12(f) for this reason.** *See, e.g.*, *Pilgrim v. Trs. of Tufts Coll.*, 118 F.3d 864, 868 (1st Cir. 1997), abrogated on other grounds by *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387 (1st Cir. 2002); *Judson v. Midland Credit Mgmt., Inc.*, No. CIV.A. 13–11435–TSH, 2014 WL 4965944, at *3 (D. Mass. Oct. 1, 2014).

> [Emphasis supplied]

McGrath v. Town of Sandwich, 169 F. Supp. 3d 251, 260 (D. Mass. 2015). Likewise:

> Pursuant to Rule 12(f), a "court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." District courts enjoy considerable discretion when ruling on a motion to strike. *See Nationwide Ins. Co. v. Cent. Mo. Electric Coop., Inc.*, 278 F.3d 742, 748 (8th Cir. 2001). **This Court need not exercise that discretion, however, as neither a response nor a surreply to a motion constitute a pleading; thus, the Motion to Strike is an improper method by which to challenge the filing.** *See Mecklenburg Farm v. Anheuser–Busch, Inc.*, 250 F.R.D. 414, 420 n.7 (E.D. Mo. 2008) ("A motion to strike is properly directed only to material contained in pleadings.... Motions, briefs, memoranda, objections or affidavits may not be attacked by a motion to strike."); see also Fed. R. Civ. P. 7(a) (defining a pleading as including a complaint, an answer to a complaint, an answer to a counterclaim designated as a counterclaim, an answer to a crossclaim, a third-party complaint, an answer to a third-party complaint, and a reply to an answer when ordered by the court).
>
> [Emphasis supplied]

All Energy Corp. v. Energetix, LLC, 985 F. Supp. 2d 974, 984 (S.D. Iowa 2012). In other words:

> Motions to strike are governed by Federal Rule of Civil Procedure 12(f), which allows the Court to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed.R.Civ.P. 12(f); see also Fed.R.Civ.P. 7 (distinguishing between pleadings and motions). **The rule applies to pleadings, not to motions or briefs filed in support of motions.**
>
> [Emphasis supplied]

Circle Grp., L.L.C. v. Se. Carpenters Reg'l Council, 836 F. Supp. 2d 1327, 1349 (N.D. Ga. 2011). Similarly:

> Initially, the Court notes that "motions to strike only apply to pleadings." *Nwachukwu*, 362 F.Supp.2d at 190; see also Fed. R. Civ. P. 12(f) (providing that a court "may strike from a pleading" certain matters (emphasis added)). " 'Pleadings' are defined in Federal Rule of Civil Procedure 7(a) as various iterations of complaints, answers[,] and replies to answers[, and t]he definitions contained in Rule 7 do not admit motions to dismiss [or replies in support of motions] as 'pleadings.' " *Burford v. Yellen*, 246 F.Supp.3d 161, 182 (D.D.C. 2017); *see also Henok v. Chase*

> *Home Fin., LLC*, 925 F.Supp.2d 46, 52–53 (D.D.C. 2013) (holding that "motions, affidavits, briefs, and other documents [are] outside of the pleadings and are not subject to being stricken" (alteration in original) (citation and internal quotation marks omitted)). **Thus, the plaintiff's motion to strike is not directed at pleadings that are subject to being stricken under Rule 12(f).**
>
> [Emphasis supplied]

Ahuruonye v. United States Dep't of Interior, 312 F. Supp. 3d 1, 10 (D.D.C. 2018)

There are too many to cite, but here are a few more precedents. See also Melvin v. Soc. Sec. Admin., 126 F. Supp. 3d 584, 596 (E.D.N.C. 2015) ("The specific documents Plaintiff seeks stricken are memoranda filed in support of, or in opposition to, motions. These do not constitute 'pleadings.'") (denying motion to strike); Miller v. Monumental Life Ins. Co., 761 F. Supp. 2d 1123, 1143 (D.N.M. 2009) ("A motion to strike is limited to challenges of pleadings, and is not appropriate to question motions or memoranda."); Petaway v. City of New Haven Police Dep't, 541 F. Supp. 2d 504, 507 (D. Conn. 2008) ("Neither a motion nor a memorandum is a pleading as defined in Rule 7(a) of the Federal Rules of Civil Procedure. Because the defendants' motion for summary judgment is not a pleading, Petaway's motion to strike/dismiss is denied."); Structural Concrete Prod., LLC v. Clarendon Am. Ins. Co., 244 F.R.D. 317, 324 (E.D. Va. 2007) ("The Court may not grant a motion to strike a motion, and therefore the Court may not grant [plaintiff] SCP's Rule 12(f) Motion to Strike Clarendon's Motion to Dismiss.") (citation omitted); Lane v. Page, 250 F.R.D. 634, 641 (D.N.M. 2007) ("The Court notes, as a preliminary matter, that a motion to strike is limited to challenges to pleadings, and is not properly directed at a motion or memorandum."); Nwachukwu v. Rooney, 362 F. Supp. 2d 183, 190 (D.D.C. 2005) ("Because the defendants' reply memorandum is not a pleading, as defined in Federal Rule of Civil Procedure 7(a), and motions to strike only apply to pleadings, the plaintiff's motion to strike is improperly

directed at the defendants' reply."); Hrubec v. Nat'l R.R. Passenger Corp., 829 F. Supp. 1502, 1506 (N.D. Ill. 1993) ("Here, the Hrubecs have moved to strike Amtrak's motion to strike and its memorandum in support of that motion. Neither of the offending items, however, constitutes a pleading. Thus, neither are candidates for Rule 12(f), and we deny the Hrubec's motion.").

As one Court observed in rejecting the State of Illinois's procedurally defective Rule 12(f) motion to strike a portion of "a memorandum, not a pleading":

> That memorandum [which Illinois moved to strike] was the fifth one filed on the principal motion. Then the briefing and supporting documents on Illinois' motion to strike added perhaps 70 more pages to the Court's reading burden (time that, without offense to counsel's literary style, might have been spent more profitably on matters-fiction or non-fiction-of greater appeal).

Bd. of Educ. of Evanston Twp. High Sch. Dist. No. 202 v. Admiral Heating & Ventilation, Inc., 94 F.R.D. 300, 304 & 304 n.8 (N.D. Ill. 1982). Coincidentally, the Receiver's Reply Memorandum, which the Attorney General moves to strike, was also the fifth[4] memorandum filed on the principal motion (the Petition for Settlement Instruction).

The Attorney General cites four cases for the proposition that Rule 12(f) should apply to his motion. One of these cases, Alvarado-Morales v. Digital Equip. Corp., 843 F.2d 613 (1st Cir. 1988), involved the striking of an amended complaint, *i.e.* a pleading. See id. at 618. Another of these cases, In re Johnson, 236 B.R. 510 (D.D.C. 1999), involved a motion for sanctions under Fed. R. Bankr. P. 9011—the bankruptcy rules' analog to Fed. R. Civ. P. 11—inasmuch as Fed. R. Civ. P. 12(f) is not even applicable

[4] More if one also counts the interim emergency motions requesting that the hearing on the settlement petition be postponed.

to contested matters under the bankruptcy rules. See id. at 517 & 521 (disclaiming any application of Rule 12(f)).

In the Attorney General's third case, Nault's Auto. Sales, Inc. v. Am. Honda Motor Co., Acura Auto. Div., 148 F.R.D. 25 (D.N.H. 1993) (overruled on other grounds), the court did strike several legal memoranda under Fed. R. Civ. P. 12(f). See id. at 35. In doing so, however, that court erroneously characterized the legal memoranda in question as "pleadings," see id. at 29–30, an error likely caused by a failure of the parties to bring the issue to the attention of the court. Cf. Ohio State Univ. v. Skreened Ltd., *supra*, 2014 WL 12656916, at *1 ("They have dubiously transformed briefing on a motion to strike into additional summary judgment briefing, so much so that no party takes the time or effort to discuss or even note the erroneous reliance on Rule 12(f).").

Finally, in the Attorney General's fourth case, Pigford v. Veneman, 215 F.R.D. 2 (D.D.C. 2003) the court did strike a party's motion papers while acknowledging that Fed. R. Civ. P. 12(f) "applies by its terms only to 'pleadings'". See id. at 4 n.1. The only support that court cited for the proposition that "courts occasionally have applied the Rule to filings other than those enumerated in Rule 7(a) of the Federal Rules of Civil Procedure," however, was to a one-page district court opinion reaching that result without any analysis of the issue. See id. (citing Cobell v. Norton, No. CIV.A. 96-1285 RCL, 2003 WL 721477 (D.D.C. Mar. 3, 2003)).

II. The Attorney General's motion is substantively meritless: the various "accusations" in the Receiver's Reply Memorandum replying to the Attorney General's objections to the Settlement were well-founded and pertinent

More importantly, even assuming (*arguendo*) that the Attorney General's instant motion were not *procedurally* defective under the Superior Court Rules of Civil

Procedure (which it is), his motion should also be denied as utterly lacking in substantive merit.

The Attorney General lodges the following four grievances against the Receiver's Reply Memorandum:

1. Without any reference to applicable criminal law, the Reply states that "in connection with the 2015 Cy Pres Proceeding, the Attorney General completely disregarded, affirmatively violated, and allowed others to violate R.I. General Laws § 23-17.14-22 and related HCA statutes on at least eight levels. Such actions would have been outrageous and likely criminal if a private citizen were responsible" (page 55 of the Reply) (emphasis added).

2. The Reply claims that "the Attorney General violated the law in order to transfer power over $8.2 million from the Presiding Justice to himself," and that this "power grab . . . ultimately benefited private interests that had no right to the funds" (page 59)(emphasis added).

3. The Reply asserts without evidence that "there will be more revelations of equally or even damaging [sic] serious violations by the Attorney General of the letter and the spirit of the laws governing his role in connection with the 2014 Asset Sale, in favor of private interests" (pages 59-60).

4. The Reply characterizes the Attorney General's assertion of his right—and duty—to uphold the law as the chief legal officer of the State of Rhode Island as making "extortionate threats [that] applied to the facts of the Proposed Settlement are disturbing indeed, when made by an actor with unclean hands" (page 62).

Attorney General's Memo. at 2. The Attorney General also offers the utterly self-serving assertion that the Receiver characterized him as one of the "innocent victims" of Prospect's fraud:

> Indeed, the Receiver's own amended complaint in the recently filed federal court case characterizes the Attorney General's Office (along with the Superior Court and Rhode Island Department of Health) as the innocent victims of fraudulent machinations by the Prospect Entities. U.S. D. Ct. Am. Compl. ¶¶ 220, 221, 305, 332, 333, 335, 345, 348, 357-362, 370, 377, 379, 381, 392, 395, 401, 402, 421.
>
> [Emphasis in original]

Attorney General's Memo. at 3.

Most of these paragraphs from the complaint in the Federal Court Action cited by the Attorney General have nothing to do with the 2015 Cy Pres proceedings, which were the basis for the Attorney General's objection to the settlement, to which the Receiver was replying. The paragraphs cited by the Attorney General that do relate to those Cy Pres proceedings (the subject of his grievances ## 1 and 2, *supra* at 9), however, stand for the opposite of his assertion.

For example, the Attorney General professes to be shocked that he has been accused of violating R.I. Gen. Laws § 23-17.14-22 and arrogating power to himself over the moneys transferred in connection with the 2015 Cy Pres proceeding, instead of requiring that such moneys be transferred to an independent foundation set up and initially controlled by the Presiding Justice. See Attorney General's Memo. at 2. In disputing that assertion, however, the Attorney General cites to paragraphs 379 and 381 of the First Amended Complaint which contain precisely the same assertion he disputes (here underlined):

> 379. Those injuries included the fraudulent transfer from Defendants SJHSRI and RWH to their related entity Defendant CC Foundation of approximately $8,200,000 that should have been deposited into the Plan. This fraudulent scheme had two parts. First Defendants SJHSRI, RWH, CCCB, CC Foundation, Prospect Chartercare, Prospect Chartercare St. Joseph, Prospect Chartercare Roger Williams, Prospect Medical Holdings, and Prospect East conspired to persuade the Rhode Island Attorney General to disregard the mandatory requirements of the Hospital Conversions Act, and second, Defendants SJHSRI, RWH, and CC Foundation misled the Court into approving this transfer in the 2015 Cy Pres Proceedings as detailed below.
>
> 380. R.I. Gen. Laws § 23-17.14-22 states on pertinent part as follows:
>
> § 23-17.14-22. Distribution of proceeds from acquisition – Selection and establishment of an **independent foundation**.

> (a) In the event of the approval of a hospital conversion involving a not-for-profit corporation and a for-profit corporation results in a new entity as provided for in § 23-17.14-7(c)(25)(i), it **shall be required** that the proceeds from the sale and any endowments, restricted, unrestricted and specific purpose funds shall be transferred to a charitable foundation operated by a board of directors.
>
> (b) The presiding justice of the superior court **shall have the authority** to:
>
> > (1) Appoint the initial board of directors.
> >
> > (2) Approve, modify, or reject proposed bylaws and/or articles of incorporation provided by the transacting parties and/or the initial board of directors.
>
> (Emphasis supplied)

381. However, Defendants SJHSRI, RWH, CCCB, CC Foundation, Prospect Chartercare, Prospect Chartercare St. Joseph, Prospect Chartercare Roger Williams, Prospect Medical Holdings, and Prospect East requested and the Rhode Island Attorney General agreed that this statute would be ignored, notwithstanding that its provisions are mandatory, such that failure to follow its provisions would violate the statute. Defendants SJHSRI, RWH, CCCB, CC Foundation, Prospect Chartercare, Prospect Chartercare St. Joseph, Prospect Chartercare Roger Williams, Prospect Medical Holdings, and Prospect East made that request because Defendants SJHSRI, RWH, CCCB, CC Foundation wanted the money to go CC Foundation, of which CCCB was the sole member, and not an "independent foundation," and wanted to name the board of directors for that foundation, instead of the directors being named by the Presiding Justice of the Superior Court.

First Amended Complaint ¶¶ 379-381 (bolding in the original and underlining supplied).

The Attorney General also fundamentally misunderstands the import of the other paragraphs of the First Amended Complaint that he cites. Yes, those paragraphs recite falsehoods that were submitted to the Attorney General by the various defendants. However, those paragraphs were incorporated by reference into two counts of the First Amended Complaint—Count XVI and Count XVIII—concerning the submission of false statements to (*inter alia*) the Attorney General. There is liability for such false

statements, regardless of whether the recipients (including the Attorney General) were actually deceived by the false statements. Counts XVI and XVIII seek recovery against all Defendants except the Rhode Island Foundation.

The following table sets forth how each of the twenty three paragraphs cited by the Attorney General (see page 9 *supra*) is incorporated into either or both of Counts XVI and XVIII:

Paragraph of the First Amended Complaint	**Count XVI** (Civil liability for violations of the Hospital Conversions Act)	**Count XVIII** (Civil liability for violations of R.I. Gen. Laws § 11-18-1)
FAC ¶ 220	–	✓
FAC ¶ 221	–	✓
FAC ¶ 305	–	✓
FAC ¶ 332	✓	✓
FAC ¶ 333	✓	✓
FAC ¶ 335	✓	✓
FAC ¶ 345	✓	✓
FAC ¶ 348	✓	✓
FAC ¶¶ 357–362	✓	✓
FAC ¶ 370	✓	✓
FAC ¶ 377	✓	✓
FAC ¶ 379	✓	✓
FAC ¶ 381	✓	✓
FAC ¶ 392	–	✓
FAC ¶ 395	–	✓
FAC ¶ 401	✓	✓
FAC ¶ 402	✓	✓
FAC ¶ 421	–	✓

Count XVI seeks to impose civil liability under R.I. Gen. Laws § 9-1-2 for criminal violations of R.I. Gen. Laws § 23-17.14-30, which criminalizes knowing violations of the HCA Act and knowingly giving false or incorrect information:

> If any person knowingly violates or fails to comply with any provision of this chapter or willingly or knowingly gives false or incorrect information:
>
> * * *
>
> (2) The Superior Court may, after notice and opportunity for a prompt and fair hearing, may impose a fine of not more than one million dollars ($1,000,000) or impose a prison term of not more than five (5) years.

R.I. Gen. Laws § 23-17.14-30.

Similarly, Count XVIII seeks to impose civil liability under R.I. Gen. Laws § 9-1-2 for criminal violations of R.I. Gen. Laws § 11-18-1, which criminalizes (*inter alia*) the giving of false documents to public officials, regardless of whether the public officials have been actually misled by the false documents:

> (a) No person shall knowingly give to any agent, employee, servant in public or private employ, or public official any receipt, account, or other document in respect of which the principal, master, or employer, or state, city, or town of which he or she is an official is interested, which contains any statement which is false or erroneous, or defective in any important particular, and which, to his or her knowledge, is intended to mislead the principal, master, employer, or state, city, or town of which he or she is an official.
>
> (b) Any person who violates any of the provisions of this section shall be deemed guilty of a misdemeanor, and, upon conviction, shall be imprisoned, with or without hard labor, for a term not exceeding one year or be fined not exceeding one thousand dollars ($1,000).

R.I. Gen. Laws § 11-18-1.

Neither of these counts requires proof that the Attorney General was misled in any way by the false statements or information, but rather only that the false statements or information be submitted. In other words, the issue for these counts is not whether the Attorney General, in investigating or responding to the false statements or information, did a good job, a bad job, no job, or even a corrupt job. The crimes were complete when the false statements or information was submitted to him or the other governmental officials.

The Attorney General fares no better regarding his four particular grievances (quoted *supra* at 9) than he fares regarding his generalized claim of victimhood. In his first two grievances, the Attorney General bristles at the suggestion that his violated R.I. Gen. Laws § 23-17.14-22 and that such violations "would have been outrageous and likely criminal if a private citizen were responsible," insisting that "the Receiver fails to present any supporting legal authority or any factual basis for his extraordinary claims" and has failed to make "any reference to applicable criminal law." But in fact, we did that very thing. The basis and legal authority appear in the same paragraphs 379-381 of the First Amended Complaint (quoted *supra* at 10-11) that the Attorney General cited in his memorandum on the instant motion. R.I. Gen. Laws § 23-17.14-30 (quoted *supra* at 13) criminalizes violations of R.I. Gen. Laws § 23-17.14-22. See also the Attorney General's own Objection to the Receiver's Petition for Instructions at 2-3 (discussing these same statutes, R.I. Gen. Laws §§ 23-17.14-22 & 23-17.14-30).

In lodging his third grievance, the Attorney General resorts to amputating a portion of the Reply Memorandum. The Attorney General contends:

> The Reply asserts without evidence that "there will be more revelations of equally or even damaging [sic] serious violations by the Attorney General of the letter and the spirit of the laws governing his role in connection with the 2014 Asset Sale, in favor of private interests" (pages 59-60).

Attorney General's Memo. at 2. However, the entire paragraph, from which the Attorney General has deleted the missing context, stated:

> **As these matters proceed, it will become clear that the Attorney General also failed in his fundamental role of securing and monitoring Prospect East's binding commitment (and Prospect Medical Holding's binding guarantee of that commitment) to invest $50,000,000 over four years for long term capital projects, and an additional $10,000,000 per year for regular capital expenditures. This commitment and guarantee were touted proudly, frequently, and publically as part of a public relations campaign to push through the 2014 Asset Sale in which the Attorney General played a prominent**

> **part, but the reality was very different from what the Attorney General and others portrayed. In other words,** there will be more revelations of equally or even damaging serious violations by the Attorney General of the letter and spirit of the laws governing his role in connection with the 2014 Asset Sale, in favor of private interests.
>
> [Emphasis supplied]

Receiver's Reply Memorandum at 59-60. The basis for that assertion was not only discussed at the October 10, 2018 hearing attended by counsel for the Attorney General[5] but was extensively briefed in connection with Receiver's pending Motion to Adjudge Prospect CharterCare, LLC in Contempt for Willful Failure to Comply with Subpoena and Deliberate Interference with the Receiver's Collection of the Assets of the Receivership Estate, which was already filed (and served on the Attorney General on October 23, 2018) the day before the Attorney General filed his instant motion (on October 24, 2018).

Finally, the Attorney General complains:

> The Receiver has made allegations that staff in the Office of the Attorney General, and the Attorney General himself, have committed criminal acts and **made "extortionate threats" in connection with the 2015 Cy Pres Proceeding, the 2014 Asset Sale, and perhaps other unenumerated incidents.**

Attorney General's Memo. at 3. In fact, the reference to "extortionate threats" in the Receiver's Reply Memorandum related to the Attorney General's unseemly invocation, *in his Opposition Memorandum*, of his authority to <u>criminally indict the Settling Defendants for implementing the Proposed Settlement Agreement</u>:

[5] Exhibit 1 (October 10, 2018 Hearing Tr. at 98-99). This excerpt is also Exhibit 12 to the Receiver's Memorandum of Law in Support of His Motion to Adjudge Prospect CharterCare, LLC in Contempt for Willful Failure to Comply with Subpoena and Deliberate Interference with the Receiver's Collection of the Assets of the Receivership Estate.

> The General Assembly has authorized the Attorney General to take corrective action, both civilly **and criminally, should information come to light suggesting that the parties which engaged in the original hospital conversion transaction have failed to adhere in whole or in part to the Department's conditions**. *Id.* §§ 23-17.14-17, 23-17.14-30.
>
> * * *
>
> **More fundamentally, it seems apparent that the implementation of the Proposed Settlement Agreement as currently drafted would at the very least violate Conditions #1 and #2**, concerning the CharterCARE Foundation's ("the Foundation") board membership, **and Condition #9**, which requires the Prospect/CharterCARE acquisition to "be implemented as outlined in the Initial Application."
>
> [Emphasis supplied]

Attorney General's Opposition Memo. at 2-3 & 4.

While the Attorney General's assertion that the Proposed Settlement Agreement violated the enumerated conditions of his 2014 HCA decision was specious,[6] the Receiver reasonably perceived the Attorney General's pronouncement—that he could indict the Settling Defendants for what he was accusing them of doing—as a threat and an obvious attempt to impede the settlement. Such threats constitute extortion under Rhode Island law:

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[6] Conditions ## 1, 2 & 9 state as follows:

> 1. There shall be no board or officer overlap between or among the CCHP Foundation, CCHP, and Heritage Hospitals.
>
> 2. There shall be no board or officer overlap between or among the Prospect entities and the CCHP Foundation, CCHP and the Heritage Hospitals.
>
> * * *
>
> 9. That the transaction be implemented as outlined in the Initial Application, including all Exhibits and Supplemental Responses.

Conditions ## 1 and 2 have not been violated, because there remains (and will remain) no board or officer overlap among the referenced entities. Condition # 9 has not been violated, because (*inter alia*) it is a blunderbuss condition relating only to the original Prospect / CharterCARE transaction. Condition #9 by its express terms required the hospital conversion to be implemented as outlined in the application documents and has no relationship whatsoever to the transaction described in the Settlement.

> **Whoever, verbally or by a written or printed communication, maliciously threatens to accuse another of a crime or offense** or by a verbal or written communication maliciously threatens any injury to the person, reputation, property, or financial condition of another, or threatens to engage in other criminal conduct with intent to extort money or any unlawful pecuniary advantage, **or with intent to compel any person to do any act against his or her will, or to prohibit any person from carrying out a duty imposed by law**, shall be punished by imprisonment in the adult correctional institutions for not more than fifteen (15) years or by a fine of not more than twenty-five thousand dollars ($25,000), or both.

R.I. Gen. Laws § 11-42-2 (emphasis supplied). The prohibition against extortionate threats is expressly applicable to the Attorney General as an elected state official:

> **Any person, being an elected or appointed official or employee of the state,** or of any political subdivision of the state, or of any city or town of the state, or representing himself or herself to be, or assuming to act as an official or employee, **who, under color or pretense of office, commits or attempts to commit an act of extortion**, shall, upon conviction, be imprisoned for a term of not more than fifteen (15) years or fined not more than twenty-five thousand dollars ($25,000), or both, and shall forfeit all unjust enrichment.

R.I. Gen. Laws § 11-42-1.1 (emphasis supplied).

Rather than filing an indignant and procedurally defective motion to strike the Attorney General's threats, the Receiver responded appropriately and addressed them in his Reply Memorandum.

CONCLUSION

For all of the foregoing reasons, the Attorney General's motion to strike should be denied.

Respondent,
Stephen F. Del Sesto, Esq., Solely in His Capacity as Permanent Receiver of the Receivership Estate,
By his Attorneys,

/s/ Max Wistow

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Envelope: 1779901
Reviewer: Sharon S.

CERTIFICATE OF SERVICE

I hereby certify that, on the 31st day of October, 2018, I filed and served the foregoing document through the electronic filing system on the following users of record:

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/s/ Max Wistow

Exhibit 1

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PROVIDENCE, SC. SUPERIOR COURT

ST. JOSEPH'S HEALTH SERVICES OF RHODE ISLAND	)	
VS.	)	C.A. NO. PC-2017-3856
ST. JOSEPH'S HEALTH SERVICES OF RHODE ISLAND RETIREMENT PLAN	)	

HEARD BEFORE

THE HONORABLE ASSOCIATE JUSTICE BRIAN P. STERN

ON OCTOBER 10, 2018

APPEARANCES:

STEPHEN DEL SESTO, ESQUIRE	THE RECEIVER
MAX WISTOW, ESQUIRE	SPECIAL COUNSEL
STEPHEN SHEEHAN, ESQUIRE	FOR THE RECEIVER
BENJAMIN LEDSHAM, ESQUIRE	FOR THE RECEIVER
SCOTT BIELECKI, ESQUIRE	FOR CHARTERCARE
ANDREW DENNINGTON, ESQUIRE	FOR CHARTERCARE
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ROBERT FINE, ESQUIRE	FOR CHARTERCARE
LYNNE DOLAN, ESQUIRE	FOR CHARTERCARE
PRESTON HALPERIN, ESQUIRE	FOR PROSPECT MEDICAL
JOSEPH CAVANAGH, ESQUIRE	FOR PROSPECT MEDICAL
DEAN WAGNER, ESQUIRE	FOR PROSPECT MEDICAL
EDWAN RHOW, ESQUIRE	FOR PROSPECT MEDICAL
CHRISTINE DIETER, ESQUIRE	FOR R.I. FOUNDATION
LAUREN ZURIER....ESQUIRE	ATTORNEY GENERAL'S OFFICE
MARIA LENZ, ESQUIRE	ATTORNEY GENERAL'S OFFICE
DAVID MARZILLI, ESQUIRE	ATTORNEY GENERAL'S OFFICE
ARLENE VIOLET, ESQUIRE	FOR THE PENSIONERS
ROBERT SENVILLE, ESQUIRE	FOR THE PENSIONERS
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STEVEN BOYAJIAN, ESQUIRE	FOR ANGELL PENSION

GINA GIANFRANCESCO GOMES
COURT REPORTER

motion.

MR. WISTOW: I just want to emphasize I really think it would be outrageous to not ask permission of this Court to invalidate a contract in Delaware as he is planning to do.

By the way, he says he has been a Receiver for many years and this is absolutely unique to agree to damages. I don't think I have ever been a Receiver, to be honest with you. So I'm not going to talk about what is common or uncommon in receiverships, but I have been involved in I will say hundreds of settlements of contested cases and it absolutely is common for a Defendant to agree to the damages in a case so that it can be used by the plaintiffs against non-settling Defendants or more particularly against an insurance company. So maybe it's unique in his experience. It's common in mine.

And, by the way, nobody is suggesting that that admission by them is somehow binding on the other Defendants. The fact of the matter is, Judge, I'm not going to get into -- your Honor, has amply shown over the time that I have been before you that you read the papers carefully, and justifiably get a little short if I start going over them in too much detail.

I do want to add this one point. This 13 percent -- 15 percent is a huge deal because I can tell you as part

of the settlement process that we have been trying to get through the 15 percent holder, CCB, an accounting of the promised $50 million that was supposed to have been put in by Prospect CharterCare. That was part of the original consideration. It was flaunted. It was publicized. We had every reason to believe, because we have been so frustrated about getting information about what they put in, that we actually are going to file another motion to adjudge Prospect CharterCare in contempt because they have not responded to the subpoenas which you had authorized us to settle in giving this information. They have actually affirmatively said they would not give the information to Mr. Fine because they were afraid he was going to share it with us. That was the information we were entitled to.

So all I ask is this, your Honor: There is nothing final about any of this. This whole issue of can they transfer this to us, can they not, if your Honor wants to sit down and read through the papers and make an adjudication of whether or not it's legal, then I would suggest that that probably should be res judicata when we get to the Federal Court on that issue.

So I still suggest probably the simplest straightforward thing is -- this is for the benefit of the estate. You know, my brother says and I really thank