UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

STEPHEN DEL SESTO, AS RECEIVER AND ADMINISTRATOR OF THE ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND RETIREMENT PLAN, ET AL.	:
Plaintiffs	:
v.	: C.A. No:1:18-CV-00328-WES-LDA
PROSPECT CHARTERCARE, LLC, ET AL.	:
Defendants.	:

PLAINTIFFS' REPLY TO THE DIOCESAN DEFENDANTS' OPPOSITION TO THE MOTIONS FOR SETTLEMENT CLASS CERTIFICATION, APPOINTMENT OF CLASS COUNSEL, AND PRELIMINARY SETTLEMENT APPROVAL AND FOR AWARD OF ATTORNEYS' FEES

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TABLE OF CONTENTS

On December 21, 2018, Defendants Roman Catholic Bishop of Providence, Diocesan Administration Corporation, and Diocesan Service Corporation (collectively the “Diocesan Defendants”) filed a combined objection to both the proposed settlement and Plaintiffs’ counsel’s motion for attorneys’ fees.

The Diocesan Defendants insist that the Court should refuse to approve the Proposed Settlement as a good-faith settlement pursuant to R.I. Gen. Laws § 23-17.14-35, insofar as the Diocesan Defendants contend that statute is preempted by ERISA (it is not) and/or is unconstitutional as violative of equal protection and due process. (It is not.) In addition, they contend the Proposed Settlement is tainted by collusion. (It is not.) Finally the Diocesan Defendants contend the record is insufficient to approve an award of attorneys’ fees to Plaintiffs’ counsel. (It is not, and in any event, that Fee Motion will not be decided until after the settlement is preliminarily approved and the class is certified.)

Plaintiffs address each of these arguments in turn. Although there is considerable overlap between the Diocesan Defendants’ objection and the Prospect Defendants’ objection, there are also nuances that require separate responses (except in those places where the objectors incorporate each other’s objections wholesale by reference).

I. The Diocesan Defendants' Joinder of Other Arguments

The Diocesan Defendants incorporate the Prospect Defendants' separate objections by reference.[1] Accordingly, as indicated *supra*, Plaintiffs' herein incorporate by reference their separate reply to those objections.

II. R.I. Gen. Laws § 23-17.14-35 Is Neither Preempted by ERISA Nor Unconstitutional

A. The Diocesan Defendants' ERISA Arguments

1. The Diocesan Defendants Should Hope That ERISA Does Not Preempt R.I. Gen. Laws § 23-17.14-35

For the reasons discussed below concerning lack of relevance and lack of ripeness, the Court need not and should not address the merits of Diocesan Defendants' argument that ERISA preempts R.I. Gen. Laws § 23-17.14-35. Specifically, the Court need not address the impact of R.I. Gen. Laws § 23-17.14-35 on the non-settling Defendants' rights of contribution. We note, however, that although the First Circuit has not addressed whether ERISA allows contribution rights, two recent decisions from the District of Massachusetts and a decision from the District of Puerto Rico have analyzed relevant First Circuit and Supreme Court precedent and held it does not.

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[1] One of the ironies of the objections of the Diocesan Defendants and the Prospect Entities to the Proposed Settlement is that they accuse the Settling Parties of "collusion" for working together against them, notwithstanding their own close coordination and cooperation against the Settling Defendants. However, such alliances are normal in litigation, not nefarious. See Hodgson v. Lodge 851, Intern. Ass'n of Machinists and Aerospace Workers, 454 F.2d 545, 549 (7th Cir. 1971) ("As in politics it seems that litigation makes strange bedfellows…"). We do not object to the non-Settling Defendants' close cooperation, and only point it out because of the non-Settling Defendants' objections to the Settling Parties' similar behavior.

In Charters v. John Hancock Life Ins. Co., 583 F. Supp. 2d 189 (D. Mass. 2008), the court reached the following conclusion:

> Holding that ERISA does not permit claims for contribution and indemnification is consistent with Supreme Court and First Circuit precedent, both of which caution against finding implied remedies under the statute.

Charters, 583 F. Supp. 2d at 195 (citing Great–West Life & Annuity Insurance Co. v. Knudson, 534 U.S. 204 (2002) and State St. Bank & Trust Co. v. Denman Tire Corp., 240 F.3d 83, 89 (1st Cir. 2001)). In Anthony v. JetDirect Aviation, Inc., 725 F. Supp. 2d 249 (D. Mass. 2010), the court stated:

> Although both positions have merits, this court agrees with Judge Gorton's conclusion in *Charters*, buttressed as it is by the authoritative dicta in *Knudson*.

Anthony, 725 F. Supp. 2d at 255. In Perez-Perez v. Int'l Shipping Agency, Inc., No. CIV. 05-2083 (FAB), 2008 WL 1776405, at *4 (D.P.R. Feb. 7, 2008), the court stated that "ERISA did not create a right of contribution for insurer against company that performed administrative and investment services for insurance trust, another fiduciary."

If this, indeed, is the law of this Circuit, then the Diocesan Defendants have no ERISA contribution rights that could be prejudiced by R.I. Gen. Laws § 23-17.14-35. Indeed, they might not even be entitled to a credit for the amounts Plaintiffs receive in settlement (a benefit they would be entitled to under that statute if they found to be joint tortfeasors, and a benefit they would be entitled to if the common law of setoff applies). We are aware of no cases discussing whether the federal common law right of setoff applies to ERISA cases involving breach of fiduciary duty and failure to make minimum required contributions to a single employer defined benefit plan. However, there is precedent holding that the federal common law right of setoff, which prohibits double recoveries, does not apply to ERISA cases involving an employer's failure to make contributions to a multiemployer plan under 29 U.S.C. § 1145 (at least not where the effect of allowing such a right would be to reduce the assets available to pay benefits and the plan does not provide for such refunds). See, e.g., Brown v. Health Care and Retirement Corp. of America, 25 F.3d 90 (2d Cir. 1994) ("[W]e decline HCRC's invitation to recognize a separate right to setoff under federal common law in addition to the rights provided employers under ERISA."). We by no means are suggesting that issue need be decided now, but its existence suggests that the Diocesan Defendants perhaps should hope that ERISA does *not* preempt R.I. Gen. Laws § 23-17.14-35, because if it does then they may be entitled to no credit whatsoever for sums Plaintiffs receive from the Settling Defendants.[2]

2. ERISA Does Not Preempt the Application of R.I. Gen. Laws § 23-17.14-35 to Limit the Non-Settling Rights of Contribution under ERISA

To prevail on their preemption arguments, the Diocesan Defendants must prove two things: 1) they must establish that ERISA affords them a right of contribution; and 2) then they must establish that ERISA preempts state laws that limit such rights of contribution (which is what R.I. Gen. Laws § 23-17.14-35 does). As noted, the law in this Circuit appears to be against them on their first task. But even if they succeed on

[2] The Diocesan Defendants apparently realize but seek to obscure the fact that their argument fails if ERISA does not allow contribution, because although they acknowledge that "[h]ow contribution operates under federal law is a matter of some dispute," they suggest that the Court need not decide that issue, and that "[a]t this point, the Court need only determine that federal law preempts § 23-17.14-35 and that state law does not apply here." Diocesan Memo. at 5 n.5. They have it backwards: if the Court decides that ERISA does not allow contribution, it does not matter whether federal law preempts § 23-17.14-35, because if ERISA does not allow contribution, then § 23-17.14-35 does not affect the Diocesan Defendants' rights under ERISA whether or not it is preempted, and the Diocesan Defendants have no cause for complaint.

the first requirement, they have cited no case law or other authority concerning whether ERISA preempts state laws that purport to *limit rights of contribution*.

The only cases we have found on whether ERISA preempts state laws on contribution are cases that also hold that there are *no contribution rights under ERISA*. See Tatham & Assocs., Inc. 401(k) Plan v. SagePoint Fin., Inc., No. 3:09-CV-00724, 2011 WL 13243588, at *5 (M.D. Tenn. Jan. 24, 2011) (dismissing state law claim for contribution for liability imposed under ERISA) ("Although there is a circuit split on the availability of contribution under ERISA, about which the Sixth Circuit has yet to weigh in, district courts within this circuit have found that no such remedy exists under the ERISA scheme or the federal common law. To allow a state-law remedy that courts within this district have found unavailable under the federal regulatory scheme implicated in this case would seem to defy the directive from *Smith* cited above.") (citing Smith v. Provident Bank, 170 F.3d 609 (6th Cir. 1999)) (other citations omitted).

We have found no cases concerning whether ERISA preempts state laws that purport to *limit rights of contribution*. Accordingly, insofar as the Court elects to decide this issue, it must be on the basis of general preemption principles.

The Diocesan Defendants correctly note that "ERISA preempts all state laws that 'relate to' any employee benefit plan governed by ERISA. " Diocesan Memo. at 4 (quoting 29 U.S.C. § 1144(a)). However, the Supreme Court has rejected a strictly literal reading of the words "relate to." De Buono v. NYSA-ILA Medical and Clinical Services Fund, 520 U.S. 806, 813 1751 (1997) (referring to the Court's "rejection of a strictly literal reading of § 514(a)" in New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995)). The words "relate to" do not "extend to the furthest stretch of its indeterminacy, [or] for all practical purposes preemption would never run its course, for '[r]eally, universally, relations stop nowhere.'" De Buono, *supra*, 520 U.S. at 513 (quoting Travelers, *supra*). See also California Div. of Labor Standards Enforcement v. Dillingham Constr., N. A., Inc., 519 U.S. 316, 335 (1997) (Scalia, J., concurring) ("[A]pplying the 'relate to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else").

ERISA does not modify "the starting presumption that Congress does not intend to supplant state law." De Buono, *supra*, 520 U.S. at 513 (in Travelers, the Court "unequivocally concluded that it did not"). "In order to evaluate whether the normal presumption against pre-emption has been overcome in a particular case," the Court "'must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.' " De Buono, *supra*, 520 U.S. at 513-14 (quoting Travelers, *supra*, 514 U.S. at 656).

We submit that the Settlement Statute clearly does not adversely affect the objectives of ERISA. "ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." Shaw v. Delta Air Lines, 463 U.S. 85, 90 (1983). The principles underlying ERISA would not be offended by state laws that limit the ability of persons liable under ERISA to shift their losses to other parties. To the contrary, such limitations impose no burden on ERISA plans. State statutes which restrict the rights of non-settling parties to reduce their liabilities actually promote the interests of employees and beneficiaries of employee benefit plans. Thus, the Settlement Statute is not be preempted by ERISA.

3. ERISA Does Not Preempt the Application of R.I. Gen. Laws § 23-17.14-35 to Plaintiffs' Recovery On State Law Claims

Plaintiffs have also asserted extensive state-law claims against all Defendants, some of which are asserted in the alternative. It is appropriate for Rhode Island to provide by statute for the treatment—including release—of these claims under state law, regardless of whether the claims are also subject to any additional federal defense of preemption. That is especially true here where some state law claims are surely not preempted, and there is, at minimum, considerable doubt as to whether others are preempted.

For example, Counts V and VI of Plaintiffs' First Amended Complaint assert state law fraudulent transfer claims, which ERISA does not preempt. See Cent. States, Se. & Sw. Areas Pension Fund v. LaCasse, 254 F. Supp. 2d 1069, 1072 (N.D. Ill. 2003) ("Whether it is viewed as a state or a federal common law claim, then, the plaintiffs' fraudulent conveyance claim is not preempted by ERISA."); Cent. States, Se. & Sw. Areas Pension Fund v. Denny, 250 F. Supp. 2d 948, 957 (N.D. Ill. 2003) (Illinois's four-year statute of limitations for fraudulent conveyance claims held not preempted by ERISA's six-year statute of limitations); Oregon Laborers-Employers Health & Welfare Tr. Fund v. All State Indus. & Marine Cleaning, Inc., 850 F. Supp. 905, 910 (D. Or. 1994) ("The claims of the Trusts for fraudulent conveyance are not preempted by ERISA."); Planned Consumer Mktg., Inc. v. Coats & Clark, Inc., 522 N.E.2d 30, 36 (N.Y. 1988) (claims for fraudulent conveyance and corporate wrongdoing not preempted by

ERISA). This is because fraudulent transfer statutes are debtor-creditor statutes of general application:

> Nevada's fraudulent transfer statute does not have a connection with or refer to employee benefit plans because it does not act immediately and exclusively upon the plans and the plans are not essential to the fraudulent transfer statute's operation. Rather, Nevada's fraudulent transfer statute is a law of general applicability governing the debtor-creditor relationship that functions irrespective of the existence of ERISA plans. While ERISA may provide the context in which the debtor becomes liable to the creditor, the fraudulent transfer statute is a procedural mechanism by which a creditor may attempt to ensure assets exist against which to enforce a judgment. As such, it is similar to other state laws of general application relating to the enforcement of judgments which ERISA does not preempt, such as garnishment or a payment bond remedy.

Klemme v. Shaw, No. 2:05CV01263PMP-LRL, 2007 WL 838958, at *2 (D. Nev. Mar. 16, 2007). Clearly if ERISA does not preempt such claims, it does not preempt state laws governing their release.

In addition, ERISA expressly does not preempt "any generally applicable criminal law of a State". 29 U.S.C. § 1144(b)(4). This exemption is "directed toward criminal laws that are intended to apply to conduct generally criminal laws against larceny and embezzlement, for example." Com. v. Federico, 419 N.E.2d 1374, 1377 (Mass. 1981). Plaintiff has asserted claims against Defendants for having committed such crimes, including larceny. See Counts XVI – XIX. These claims are not preempted, and their release remains governed by Rhode Island law.

In addition, and significantly, Plaintiffs' allegations that the Plan is an ERISA plan are also made in the alternative, both as to whether the Plan presently is, and—if so—as to when the Plan became one. ERISA preemption does not apply retroactively. For example, ERISA expressly does not preempt "any cause of action which arose, or any act or omission which occurred, before January 1, 1975." 29 U.S.C. § 1144(b)(1).[3] ERISA also does not provide for retroactive preemption when exempt plans later become subject to ERISA. For example, church plans can elect to become ERISA plans, but ERISA does not preempt claims that arose prior to such election. See Robinson v. Metro. Life Ins. Co., No. 12-CV-01373-JAM-AC, 2013 WL 1281868, at *6 (E.D. Cal. Mar. 27, 2013); Welsh v. Ascension Health, No. 3:08CV348/MCR/EMT, 2009 WL 1444431, at *8 (N.D. Fla. May 21, 2009); Geter v. St. Joseph Healthcare Sys., Inc., 575 F. Supp. 2d 1244, 1250 (D.N.M. 2008); Catholic Charities of Maine, Inc. v. City of Portland, 319 F. Supp. 2d 88, 89–90 (D. Me. 2004). Accord Cotner v. Hartford Life & Annuity Ins. Co., No. CIV.A. 3:07-CV-0487G, 2008 WL 59174, at *4 (N.D. Tex. Jan. 4, 2008) (state law claims which preexisted creation of ERISA plan were not preempted). While the non-settling Defendants themselves assert that the Plan is presently an ERISA plan, they have not even attempted to stake a position as to when the Plan *first* became subject to ERISA.

Where state law claims are asserted in the alternative, defenses based upon preemption cannot be decided on the pleadings. See Hembree v. Mid-Continent Transp., Inc., No. 08-6094-CV-SJ-HFS, 2009 WL 10705050, at *1 (W.D. Mo. Jan. 22, 2009) (denying motion to dismiss state law claims plead in the alternative to ERISA claims) ("[T]he Federal Rules of Civil Procedure permit pleading in the alternative, and a rule allowing for alternative pleading would be meaningless if the assumption of facts in

[3] Plaintiffs' state law claims involve facts that date back to 1965, when the Plan's predecessor originated. See First Amended Complaint ("FAC") ¶ 211. The First Amended Complaint sets forth the basis over time for concluding that the Plan became subject to ERISA, but the ultimate issue of when and whether the Plan was governed by ERISA is a mixed question of law and fact that will have to be decided in the course of this proceeding.

favor of the plaintiff at the motion to dismiss stage of a lawsuit could foreclose mutually exclusive theories."); Siegel v. Lincoln Financial Group, 2015 WL 1307384 *2 (D.N.J. 2015) (denying motion to dismiss and allowing alternative pleading of state law and ERISA claims where there was a dispute over whether 401K plan was governed by ERISA) ("Should discovery establish that the 401(k) plan is an ERISA plan, the state law claims may not survive. If not, or if they lie outside the scope of preemption, then the state law claims may survive.").

As the court stated in Coleman v. Standard Life Ins. Co., 288 F. Supp. 2d 1116 (E.D. Cal. 2003):

> In the ERISA context, in particular, there will often be good reason for alternatively pleading state and federal claims. When there is some doubt over whether ERISA is applicable under a given set of facts, especially where there is doubt about whether a particular plan is in fact an ERISA plan, proceeding in any other way can be hazardous for the plaintiff. If the plaintiff brings only state law claims and the court determines there is an ERISA plan, the state law claims are preempted. But if the plaintiff brings only an ERISA claim and the plan turns out not to be an ERISA plan, the plaintiff is also out of luck. Thus, ERISA preemption often presents the sort of situation for which Rule 8's alternative pleading provision is designed. To use the ERISA allegation in paragraphs 26 and 27 of plaintiff's complaint as the sole evidence against his state claims would seem to fly in the face of the Ninth Circuit's admonition that "a pleading should not be construed as an admission against another alternative or inconsistent pleading in the same case."

Coleman, 288 F. Supp. 2d at 1120 (quoting Molsbergen v. United States, 757 F.2d 1016, 1019 (9th Cir. 1985)).

4. Even If ERISA Allows for Contribution Claims and (*Arguendo*) Preempts R.I. Gen. Laws § 23-17.14-35 (Which It Does Not), That Is No Basis for Declining to Approve the Settlement or Declining to Make a Finding of Good Faith

Notably while the Proposed Settlement, including the duty of the Settling Defendants to pay the Initial Lump Sum to Plaintiffs, was conditioned on this Court's finding the Proposed Settlement to be a "good faith settlement" within the meaning of R.I. Gen. Laws § 23-17.14-35,[4] the Proposed Settlement was not conditioned upon or in any way made subject to R.I. Gen. Laws § 23-17.14-35 being declared constitutional or to the Settling Defendants' obtaining the benefit of any contribution bar thereunder.

If (*arguendo*) R.I. Gen. Laws § 23-17.14-35 is later found to be ineffective on constitutionality or preemption grounds to bar contribution claims in whole or in part (which should not happen for the reasons discussed herein), that will have no effect on the Proposed Settlement. Thus, the efficacy or inefficacy (*vel non*) of that statute is no reason to withhold making a finding that the Proposed Settlement is a good faith settlement, which is a determination that the Court should properly be making under Fed. R. Civ. P. 23 in any event.

B. R.I. Gen. Laws § 23-17.14-35 Is Not Unconstitutional

1. The Diocesan Defendants' Constitutional Challenge Is Not Ripe

It is "important to avoid the premature adjudication of constitutional questions," and courts "ought not to pass on questions of constitutionality unless such adjudication

[4] Proposed Settlement Agreement ¶ 10 (payment of Initial Lump Sum within ten days after the Effective Date); id. ¶ 1(m) (defining "Effective Date" as "the date upon which the Order Granting Final Settlement Approval" is entered by this Court); id. ¶ 1(x) (defining the "Order Granting Final Settlement" without respect to any appeals).

is unavoidable." Matal v. Tam, 137 S. Ct. 1744, 1755 (2017) (quotations omitted). "Even a facial challenge to a statute is constitutionally unripe until a plaintiff can show that federal court adjudication would redress some sort of imminent injury that he or she faces." Reddy v. Foster, 845 F.3d 493, 501 (1st Cir. 2017) (rejecting First Amendment challenge to statute as unripe).

In dismissing a premature challenge by Ernst & Young to Rhode Island's similar DEPCO settlement statute, R.I. Gen. Laws § 42-116-40, Judge Selya traced the long chain of contingencies that would need to be satisfied before Ernst & Young would suffer a concrete legal injury:

> . . . E & Y's [Ernst & Young's] claim lacks the needed dimensions of immediacy and reality. The challenge is not rooted in the present, but depends on a lengthy chain of speculation as to what the future has in store. Tracing the links in this chain demonstrates their fragility. In order for E & Y to be harmed by the operation of the statute, these events must come to pass: (1) at least one person, firm, or corporation other than E & Y must admit fault, or be found to have been at fault, and must have caused recoverable damages arising out of the banking crisis; (2) that other party must settle with Depco; (3) **the settlement must be entered into in good faith and approved by a competent court;** (4) under the bargained terms, the settlor must pay less than its pro rata share, measured by relative fault; (5) **perhaps most critically, E & Y—which, to this date, has steadfastly denied fault—must be found to have been negligent, and its negligence must be found to have caused or contributed to the damages**; (6) Depco must attempt to collect an amount greater than E & Y's pro rata share of the damages; (7) a court must find E & Y liable for, and order it to pay, the tribute demanded; and (8) E & Y must then seek contribution from one or more of the "underpaying" joint tortfeasors (who, presumably, will interpose the statute as a defense). This is a long string of contingencies—so long that E & Y's assertion of fitness for judicial review trips over it and falls.

Ernst & Young v. Depositors Econ. Prot. Corp., 45 F.3d 530, 538 (1st Cir. 1995) (emphasis supplied). In the instant case, if the Court approves the settlement as being "in good faith", we will be only at step three. The non-settling Defendants would still need to get through at least steps four through eight, including the "most critical" step of being found liable.

Here the Diocesan Defendants—indeed all the non-settling Defendants—have asserted no cross-claims against the Settling Defendants. Moreover, it is completely speculative whether the Diocesan Defendants will ever suffer any injury in fact from any inability to assert cross-claims against the Settling Defendants in the future. The Diocesan Defendants may prevail on the merits; the Diocesan Defendants may settle before trial; the Settling Defendants' proportional fault may produce a *pro rata* share of liability smaller than the settlement amount; the Settling Defendants may not be joint tortfeasors with the Diocesan Defendants; or contribution may be unavailable altogether, as the Diocesan Defendants themselves speculate.[5] Indeed, the Diocesan Defendants have moved to dismiss the First Amended Complaint in its entirety, and, therefore, must be assumed to have a good faith basis to believe the Court may dismiss Plaintiffs' claims against them outright. Under all of those circumstances, the Diocesan Defendants have no injury in fact and their unconstitutionality claims are not ripe.

2. R.I. Gen. Laws § 23-17.14-35 Does Not Violate Equal Protection Rights under the United States Constitution

"Social and economic regulation is generally subject to rational basis review, and is therefore afforded a presumption of validity, not bad faith." Perfect Puppy, Inc. v. City of E. Providence, 98 F. Supp. 3d 408, 419 (D.R.I. 2015) (Smith, C.J.). "[A] classification neither involving fundamental rights nor proceeding along suspect lines cannot run afoul

[5] See Diocesan Defendants' Memo. at 5 n.5.

of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." Armour v. City of Indianapolis, Ind., 566 U.S. 673, 680 (2012). That is, "within an area of social and economic policy, . . . a legislative classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Mulero-Carrillo v. Roman-Hernandez, 790 F.3d 99, 107 (1st Cir. 2015). "Rational basis review requires only that the state could rationally have concluded that the challenged classification *might* advance its legitimate interests." Gonzalez-Droz v. Gonzalez-Colon, 660 F.3d 1, 10 (1st Cir. 2011) (italics in original). See Jeneski v. City Of Worcester, 476 F.3d 14, 16 (1st Cir. 2007) ("Absent a suspect classification or undue burden on fundamental constitutional rights, a classification made by government actors is vulnerable under the Equal Protection Clause only if no rational justification can be *imagined* for its use.") (emphasis supplied).

"[T]he fact that the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 316 (1993). "[T]he legislature must be allowed leeway to approach a perceived problem incrementally". Id. "[S]cope-of-coverage provisions are unavoidable components of most economic or social legislation." Id. Such a law is constitutionally valid if "there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." Armour, 566

U.S. at 681. Indeed, the Court "need not examine what such reasonably conceivable state of facts may be because remedial choices made by regulatory bodies are rebuttable only where the party challenging the . . . regulation can establish that there exists no fairly conceivable set of facts that could ground a rational relationship between the challenged classification and the government's legitimate goals." Mulero-Carrillo, 790 F.3d at 107 (quotations omitted).

"[C]ourts are compelled under rational-basis review to accept a legislature's generalizations **even when there is an imperfect fit between means and ends**." Heller v. Doe by Doe, 509 U.S. 312, 321 (1993). "A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." Id. "Courts are constrained under the rational basis analysis to accept legislative decisions even when the fit between means and ends is less than ideal." Prices Corner Liquors, Inc. v. Delaware Alcoholic Beverage Control Comm'n, 705 A.2d 571, 576 (Del. 1998). In other words:

> "Rationality review in equal protection cases is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." Rather, an inquiring court must ask whether "there is a rational relationship between the disparity of treatment and some legitimate governmental purpose."

Boivin v. Black, 225 F.3d 36, 43 (1st Cir. 2000) (quoting FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993)).

The Rhode Island General Assembly has expressly found that R.I. Gen. Laws § 23-17.14-35 is necessary to "protect public health and welfare and public and charitable assets" and "[a]ssure the viability of a safe, accessible and affordable healthcare system that is available to all of the citizens of the state". R.I. Gen. Laws §§ 23-17.14-2(9) & -3(4). However, the inquiry is not confined to whether those particularly articulated reasons are sufficient, since "the State need not articulate its reasoning at the moment a particular decision is made." Bd. of Trustees of Univ. of Alabama v. Garrett, 531 U.S. 356, 367 (2001). "Rather, the burden is upon the challenging party to negative 'any reasonably conceivable state of facts that could provide a rational basis for the classification.'" Id.

The Diocesan Defendants place considerable reliance on Boucher v. Sayeed, 459 A.2d 87 (R.I. 1983), in which the Rhode Island Supreme Court struck down a claims screening scheme, limited only to medical malpractice claims, as violating federal Equal Protection rights. That result is questionable, inasmuch as the Rhode Island Supreme Court declined "to speculate about unexpressed or unobvious permissible state interests" that might support the statute. First Circuit decisions as well as subsequent Rhode Island Supreme Court decisions have noted that courts must speculate about all possible legislative interests before striking down a statute on rational basis review.[6] In any event, no speculation is required in the instant case, since the General Assembly has made statutory findings, and since in any event "encouraging settlement is a legitimate objective that will pass a rational basis equal protection analysis." Rhode Island Economic Development Corp. v. Wells Fargo Securities LLC.,

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[6] See Jeneski v. City Of Worcester, 476 F.3d 14, 16 (1st Cir. 2007) ("Absent a suspect classification or undue burden on fundamental constitutional rights, a classification made by government actors is vulnerable under the Equal Protection Clause only if no rational justification can be imagined for its use.") (emphasis supplied); Starlight Sugar, Inc. v. Soto, 253 F.3d 137, 146 (1st Cir. 2001) ("Since equal protection analysis does not subject legislative choice to courtroom factfinding, and a court may uphold such legislation on the basis of rational speculation unsupported by evidence or empirical data, we need go no further.") (citation and quotations omitted); State v. Faria, 947 A.2d 863, 868 (R.I. 2008) ("Thus, to overcome the presumption of validity, a party seeking to attack a statutory classification [under rational-basis review] has the burden 'to negate every conceivable basis which might support it.'") (emphasis original).

No. PB 12-5616, 2014 WL 3709683, at *5 (R.I. Super. July 22, 2014) (upholding the 38 Studios special settlement statute, R.I. Gen. Laws § 42-64-40).

Boucher is also entirely distinguishable even within the limited intelligibility of its own terms. The statute *sub judice* contains legislative findings, whereas the statute in Boucher contained none. See id. at 93 ("Statutes aimed at providing relief in a time of crisis depend for their validity upon a proper exercise of the police power and ordinarily contain a declaration of legislative findings of fact involving the public health, safety, or morals. The statute in question does not contain such a declaration.") (citation omitted). The statute *sub judice* was precipitated by the crisis engendered by SJHSRI's filing of the receivership petition, whereas in Boucher specific findings were made that "at the time the legislation in controversy was enacted in 1981, the malpractice crisis of 1975-76 justifying the earlier act no longer existed." Id. at 92. In addition, in Boucher, the trial courts had specifically found that "no rational basis existed" to justify the statute. Id. at 91 (emphasis supplied). That finding, while dubious on the merits, certainly has not been made here.

The Diocesan Defendants also include a passing citation to City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432 (1985). See Diocesan Defendants' Memo. at 6 (citing City of Cleburne, 473 U.S. at 440-41).[7] In City of Cleburne, the U.S. Supreme Court applied what has been characterized as a "more searching form of rational basis review" to strike down a zoning ordinance targeting persons with intellectual disabilities that was motivated solely by animus and irrational prejudice towards such group. See

[7] Tellingly, the portion of City of Cleburne that the Diocesan Defendants cite is a discussion of how heightened scrutiny applies to classifications based on race, alienage, national origin, or sex.

Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) ("We have consistently held, however, that some objectives, such as 'a bare desire to harm a politically unpopular group,' are not legitimate state interests. When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.") (citing City of Cleburne and Romer v. Evans, 517 U.S. 620, 632 (1996)). These cases simply recognize that "irrational prejudice," City of Cleburne, 473 U.S. at 450, is not a rational or legitimate basis for legislative classification, regardless of whether the targeted group constitutes a suspect or quasi-suspect class deserving heightened equal-protection scrutiny. See Am. Exp. Travel Related Servs. Co. v. Kentucky, 641 F.3d 685, 692 (6th Cir. 2011) (discussing this less-deferential standard of review, sometimes known as "rational basis with bite"). Here, there is no suggestion that the General Assembly was motivated to enact R.I. Gen. Laws § 23-17.14-35 solely (or even at all) by irrational prejudice towards for-profit hospitals or the Catholic Church or the other original Defendants.

The Diocesan Defendants attempt to distinguish the DEPCO and 38 Studios cases by asserting that here "there is no government backstop" and so public funds are not at issue. Diocesan Defendants' Memo. at 9. That argument is obviously incorrect, for two reasons. First, the objecting Defendants' principal argument is that PBGC (*i.e.* a governmental agency), rather than Defendants, should be paying these pension benefits. Second, if the already meagre pensions of nearly three thousand Rhode Islanders and their beneficiaries and dependents are slashed or discontinued, it can hardly be assumed that there will be no impact on existing social welfare programs, or that the state will not be called upon through the political processes to craft a solution that imposes a fiscal impact on the state (as was the case in DEPCO). Indeed, the instant Settlement Statute demonstrates one way in which the state has already done so.

More significantly, fiscal interests are not the only legitimate governmental interests for Equal Protection analyses. "The rational-basis standard is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic **or social** policy." U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 175 (1980) (emphasis supplied and quotations omitted).

The Diocesan Defendants assert that the General Assembly could have "passed a prospective statute that applied to all cases going forward." Diocesan Defendants' Memo. at 12. That assertion achieves the remarkable feat of being simultaneously correct, false, and irrelevant. First, the instant statute is a prospective statute, in the sense that it is being applied to subsequent releases, and Defendants' contribution claims have not yet ripened or even been asserted. See *supra* at 11-13. Second, insofar as the Diocesan Defendants contend these particular Defendants' rights have been impermissibly altered, they would lodge the same objection to any other statute that had the effect of furthering the public purpose of encouraging settlements in this case. And third, "[a] court's belief that the legislature's alleged goals could be accomplished through more reasonable means is irrelevant to rational-basis review." Starlight Sugar, Inc. v. Soto, 253 F.3d 137, 146 (1st Cir. 2001). Rational-basis review simply "does not demand that a State employ less burdensome alternatives if those are available." Id.

3. R.I. Gen. Laws § 23-17.14-35 Does Not Violate Due Process Rights under the United States Constitution

The Diocesan Defendants also challenge the constitutionality of R.I. Gen. Laws § 23-17.14-35 on due process grounds. This argument fares no better than the equal protection argument, since due process in this context is satisfied by demonstrating a rational legislative purpose.

"The retroactive aspects of economic legislation, as well as the prospective aspects, must meet the test of due process: a legitimate legislative purpose furthered by rational means." Gen. Motors Corp. v. Romein, 503 U.S. 181, 191 (1992). "[T]he strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively." Pension Ben. Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 729 (1984) (upholding constitutionality of retroactive withdrawal liability provisions of Multiemployer Pension Plan Amendments Act of 1980)). "Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." Id.

The Diocesan Defendants assert, in conclusory fashion, that R.I. Gen. Laws § 23-17.14-35 eliminates "vested" property right. Diocesan Defendants' Memo. at 11 (citing Matthies v. Positive Safety Mfg. Co., 628 N.W.2d 842, 856 (Wis. 2001)[8] and O'Reilly v. Town of Glocester, 621 A.2d 697, 706-07 (R.I. 1993)).[9] That assertion is both irrelevant and incorrect.

First, the distinction between "vested" and non-"vested" rights is not a meaningful distinction under modern due process analysis.[10] See Rhode Island Depositors Econ. Prot. Corp. v. Brown, 659 A.2d 95, 103 (R.I. 1995) ("We have recognized the concept of 'vesting' as being merely conclusory and disfavored when considering due process challenges.").

Second, nobody has a "vested" right to application of any particular legal rule. Legislatures are free to modify such rules until claims have been reduced to judgment:

> Our cases have clearly established that "[a] person has no property, no vested interest, in any rule of the common law." *Second Employers' Liability Cases*, 223 U.S. 1, 50, 32 S.Ct. 169, 175, 56 L.Ed. 327 (1912), quoting *Munn v. Illinois*, 94 U.S. 113, 134, 24 L.Ed. 77 (1877). The "Constitution does not forbid the creation of new rights, or the abolition of

[8] In Matthies, the Wisconsin Supreme Court held that retroactive abrogation of vested property rights sometimes violated due process. The Wisconsin Supreme Court has since distinguished Matthies in Lands' End, Inc. v. City of Dodgeville, 881 N.W.2d 702 (Wis. 2016), in which it applied a new Wisconsin prejudgment interest statute (dropping the rate from 12% to 1% over prime) in a case that had already been pending when the statute was enacted. The Wisconsin court found there was no "vested right" to application of the 12% interest rate, even though the plaintiff would have obtained that rate if the lower court had not erroneously denied the plaintiff's summary judgment motion, because plaintiff "did not acquire a legally enforceable right to recover interest until it recovered a judgment", and the "vesting of a right does not occur until the right is no longer contingent." Id. at 718.

[9] In O'Reilly v. Town of Glocester, 621 A.2d 697 (R.I. 1993), the Rhode Island Supreme Court applied a balancing analysis and concluded that a statute retroactively declaring certain unmaintained roads and driftways to be abandoned, and therefore not deserving of just compensation for their destruction, violated due process. Subsequently, the Rhode Island Supreme Court applied a similar balancing analysis in upholding the DEPCO settlement statute in Rhode Island Depositors Econ. Prot. Corp. v. Brown, 659 A.2d 95, 103 (R.I. 1995).

[10] As opposed to in some other contexts such as deprivation of property without just compensation under the Takings Clause, which the Diocesan Defendants do not and cannot allege.

> old ones recognized by the common law, to attain a permissible legislative object," *Silver v. Silver*, 280 U.S. 117, 122, 50 S.Ct. 57, 58, 74 L.Ed. 221 (1929), despite the fact that "otherwise settled expectations" may be upset thereby. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976). *See also Arizona Employers' Liability Cases*, 250 U.S. 400, 419–422, 39 S.Ct. 553, 555–556, 63 L.Ed. 1058 (1919). Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts.

Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 88 (1978).

> "No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." New York Central R.R. Co. v. White, 243 U.S. 188, 198, 37 S.Ct. 247, 250, 61 L.Ed. 667 (1917); Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 88 n. 32, 98 S.Ct. 2620, 2638 n. 32, 57 L.Ed.2d 595 (1978); Second Employers' Liability Cases, 223 U.S. 1, 50, 32 S.Ct. 169, 175, 56 L.Ed. 327 (1912); Ducharme v. Merrill-National Laboratories, 574 F.2d 1307, 1309 (5th Cir.), cert. denied, 439 U.S. 1002, 99 S.Ct. 612, 58 L.Ed.2d 677 (1978). This is true after suit has been filed and continues to be true until a final, unreviewable judgment is obtained. . . .
>
> Because rights in tort do not vest until there is a final, unreviewable judgment, Congress abridged no vested rights of the plaintiff by enacting § 2212 and retroactively abolishing her cause of action in tort.

Hammond v. United States, 786 F.2d 8, 12 (1st Cir. 1986) (federal statute permissibly abolished state wrongful death claims after the death of plaintiff's decedent and commencement of suit). See In re TMI, 89 F.3d 1106, 1113 (3d Cir. 1996) (retroactive application of state statute of limitations to bar properly filed and already pending causes of action does not violate federal constitutional due process) ("Under the United States Constitution, legislation affecting a pending tort claim is not subject to 'heightened scrutiny' due process review because a pending tort claim does not constitute a vested right.") (citing Hammond).

In Rhode Island, R.I. Gen. Laws § 10-6-3 "create[d] a right of contribution among joint tortfeasors which did not exist at common law." New Amsterdam Cas. Co. v. Homans-Kohler, Inc., 310 F. Supp. 374, 376 (D.R.I. 1970) (citing Hackett v. Hyson, 48 A.2d 353, 355 (R.I. 1946)). Thus, in Rhode Island, the right of contribution is a statutory right, which the legislature may choose to alter from time to time on public policy grounds, and such alteration does not offend Due Process:

> It must be emphasized that, to the extent that legislative actions succeed in destroying property interests, there can be no federal due process claim. **It is well settled that "no due process violation occurs when 'the legislature which creates a statutory entitlement (or other property interest) ... alter[s] or terminat[es] the entitlement by subsequent legislative enactment.**' " *Correa–Ruiz v. Fortuño*, 573 F.3d 1, 14 (1st Cir.2009) (alteration in original) (quoting *Gattis v. Gravett*, 806 F.2d 778, 780 (8th Cir.1986)); *see also id.* at 14–15 (collecting cases).
>
> [Emphasis supplied]

Torres-Rivera v. Garcia-Padilla, 783 F.3d 42, 46 (1st Cir. 2015).

Kansas Pub. Employees Ret. Sys. v. Reimer & Koger Assocs., Inc., 927 P.2d 466 (Kan. 1996) ("KPERS") is a case involving a pension plan that is strikingly similar to the case *sub judice*, except that the Plan in our case has much greater losses. The Kansas Public Employees Retirement System ("KPERS") brought suit to recover approximately $24,000,000 lost due to the negligence of their financial advisor in making certain direct placement investments. After suit was brought, the legislature passed the KPERS settlement statute "for the purpose of encouraging settlement between KPERS and various defendants in litigation over the losses incurred in direct placement investments." KPERS, supra, 927 P.2d at 478. The statute eliminated non-settling defendants' statutory rights of contribution for sums paid in excess of their *pro* *rata* fault, and common law right of indemnity, but gave them a right of setoff for sums paid by the settling defendants. KPERS reached a settlement with the law firm for the financial advisor contingent upon court approval, and the financial adviser asserted due process and equal protection objections to the elimination of its rights of contribution. The court held that the legislature had the power to amend the statutory right of contribution in the KPERS settlement statute; that due process was not offended, because the non-settling defendants' right of contribution would not vest until judgment was entered against them; and equal protection was not violated, because the KPERS settlement statute had a rational basis.

It should be noted that prospective application of revised rules to pending cases is not even properly described as "retroactive":

> Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations. When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive.

Landgraf v. USI Film Prod., 511 U.S. 244, 273 (1994). See also Dairyland Ins. Co. v. Mumert, 212 N.W.2d 436, 441 (Iowa 1973) ("We have repeatedly said that if a state legislative enactment classifies various parties for purposes of regulation, and that classification is neither premised on suspect criteria nor infringes upon a fundamental right, the presumption of constitutionality attaches and the statute will be set aside as violative of due process or equal protection only if it is arbitrary and without foundation in public policy, its means are unrelated to its objectives, or distinctions drawn therein are invidious and lack rational basis incapable of justification under any conceivable set of facts.") (upholding dram shop statute's retroactive bar of contribution claims) (overruled on other grounds by Lewis v. State, 256 N.W.2d 181 (Iowa 1977)).

In Bank Markazi, the U.S. Supreme Court surveyed its precedents and broadly stated that retroactive application of special legislation to pending cases does not offend Due Process[11] or the separation of powers:

> As we explained in *Landgraf v. USI Film Products*, 511 U.S. 244, 267, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), the restrictions that the Constitution places on retroactive legislation "are of limited scope":
>
> > "The Ex Post Facto Clause flatly prohibits retroactive application of penal legislation. Article I, § 10, cl. 1, prohibits States from passing ... laws 'impairing the Obligation of Contracts.' The Fifth Amendment's Takings Clause prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a 'public use' and upon payment of 'just compensation.' The prohibitions on 'Bills of Attainder' in Art. I, §§ 9–10, prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct. The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause 'may not suffice' to warrant its retroactive application." *Id.*, at 266–267, 114 S.Ct. 1483 (citation and footnote omitted).
>
> **"Absent a violation of one of those specific provisions," when a new law makes clear that it is retroactive, the arguable "unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give [that law] its intended scope."** *Id.*, at 267–268, 114 S.Ct. 1483. So yes, we have affirmed, Congress may indeed direct courts to apply newly enacted, outcome-altering legislation in pending civil cases. *See Plaut*, 514 U.S., at 226, 115 S.Ct. 1447. Any lingering doubts on that score have been dispelled by *Robertson*, 503 U.S., at 441, 112 S.Ct. 1407 and *Plaut*, 514 U.S., at 218, 115 S.Ct. 1447.
>
> [Emphasis supplied]

[11] The Diocesan Defendants observe that Bank Markazi was not decided on Equal Protection grounds. This is true but beside the point.

Bank Markazi v. Peterson, 136 S. Ct. 1310, 1324–25, 194 L. Ed. 2d 463 (2016). The Supreme Court also broadly rejected the proposition that constitutionally sound legislation must be "generally applicable" rather than "particularized":

> The Bank's argument is further flawed, for it rests on the assumption that legislation must be generally applicable, that "there is something wrong with particularized legislative action." *Plaut*, 514 U.S., at 239, n. 9, 115 S.Ct. 1447. We have found that assumption suspect:
>
>> "While legislatures usually act through laws of general applicability, that is by no means their only legitimate mode of action. Private bills in Congress are still common, and were even more so in the days before establishment of the Claims Court. Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid—or else we would not have the extensive jurisprudence that we do concerning the Bill of Attainder Clause, including cases which say that [the Clause] requires not merely 'singling out' but also punishment, *see, e.g.*, *United States v. Lovett*, 328 U.S. 303, 315–318 [66 S.Ct. 1073, 90 L.Ed. 1252] (1946), [or] a case [holding] that Congress may legislate 'a legitimate class of one,' Nixon v. Administrator of General Services, 433 U.S. 425, 472 [97 S.Ct. 2777, 53 L.Ed.2d 867] (1977)." Ibid.27
>
> This Court and lower courts have upheld as a valid exercise of Congress' legislative power diverse laws that governed one or a very small number of specific subjects.

Bank Markazi v. Peterson, 136 S. Ct. at 1327–28.[12]

[12] In a footnote, the Diocesan Defendants contend that Plaintiffs have mischaracterized the statute at issue in Bank Markazi as applying to a single pending case, inasmuch as the single case identified in that statute by docket number was a consolidation of claims filed by numerous plaintiffs. See Diocesan Defendants' Memo. at 10 n.8. That is a distinction without a difference, since the instant case is a class action, and R.I. Gen. Laws § 23-17.14-35 applies to the claims of thousands of persons relating to the St. Joseph Pension Plan irrespective of docket number. It is also an argument that cannot survive Patchak v. Zinke, 138 S. Ct. 897 (2018), which involved only a single nonconsolidated case identified by docket number. See also Robertson v. Seattle Audubon Soc., 503 U.S. 429, 440 (1992) (upholding legislation that singled out two pending cases by name and caption).

4. R.I. Gen. Laws § 23-17.14-35 Does Not Violate the Rhode Island Constitution

The Diocesan Defendants also contend, without articulating any applicable standard, that R.I. Gen. Laws § 23-17.14-35 violates equal protection and due-process rights under the Rhode Island Constitution. The Rhode Island Constitution's equal-protection rights are coextensive with those afforded by the United States Constitution:

> Although Plaintiff makes separate assertions based on federal and Rhode Island constitutional rights, Rhode Island's equal protection and due process guarantees are analogous to those provided by the United States Constitution. *Pelland v. Rhode Island*, 317 F.Supp.2d 86, 97 (D.R.I. 2004) (analysis of Rhode Island equal protection and due process rights is "identical" to parallel federal rights); *see also Jones v. Rhode Island*, 724 F.Supp. 25, 34–35 (D.R.I. 1989); Kleczek v. Rhode Island Interscholastic League, Inc., 612 A.2d 734, 740 (R.I. 1992). Therefore, this Court's analysis applies equally to Plaintiff's federal and state equal protection and due process claims.

Perfect Puppy, Inc. v. City of E. Providence, 98 F. Supp. 3d 408, 418 n.8 (D.R.I. 2015). Since this statute passes constitutional muster under the United States Constitution, it therefore does so under the Rhode Island Constitution as well.

III. The Proposed Settlement Should Not Be Disapproved on the Basis of Collusion

A. Legal Standard under R.I. Gen. Laws § 23-17.14-35

"[T]here is a presumption that the settlement has been made in good faith, and the burden is on the challenging party to show that the settlement is infected with collusion or other tortious or wrongful conduct." Gray v. Derderian, No. 03-483L, 2009 WL 1575189, at *5 (D.R.I. June 4, 2009) (Lageux, S.J., adopting recommendation of Martin, M.J.) (construing indistinguishable provisions of R.I. Gen. Laws §§ 10-6-7 & -8). "It is the non-settling Defendants' burden to prove that the settlement was not made in good faith." Rhode Island Economic Development Corp. v. Wells Fargo Securities LLC, No. PB 12-5616, 2014 WL 3709683, at *2 (R.I. Super. July 22, 2014) (construing the indistinguishable 38 Studios settlement statute, R.I. Gen. Laws § 42-64-40).

Under this standard, "collusion" refers to receiving less money from the settling parties in exchange for achieving the tortious purpose of intentionally injuring the nonsettling parties:

> The collusion proscribed by the good faith standard occurs when the arm's length negotiation between plaintiff and settling tortfeasor breaks down. *Dacotah Marketing and Research, L.L.C. v. Versatility, Inc.*, 21 F. Supp. 2d 570, 578 (E.D. Va. 1998). As the *Dacotah Marketing* court explained:
>
> > If the plaintiff no longer seeks to gain as much as possible through settlement, but is otherwise motivated, the nonsettling defendant is left exposed, his interests unprotected in a transaction that may significantly affect those interests. Collusion in violation of [Virginia's "good faith" settlement statute] **occurs when the release is given with the tortious purpose of intentionally injuring the interests of nonsettling parties**, rather than as the product of arm's length bargaining based on the facts of the case and the merits of the claim. When settlement ceases to be the result of a bargain at arm's length, it is no longer a "good faith" settlement.
>
> *Id.* (footnotes omitted).

Gray v. Derderian, No. 03-483L, 2009 WL 1575189, at *3 n.3 (D.R.I. June 4, 2009) (emphasis added) (explaining the good faith standard adopted by the Rhode Island General Assembly).

This standard is supported by the language of the Settlement Statute, which states as follows:

> For purposes of this section, a good faith settlement is one that does not exhibit collusion, fraud, dishonesty, or other wrongful or tortious conduct

> intended to prejudice the non-settling tortfeasor(s), irrespective of the settling or non-settling tortfeasors' proportionate share of liability.[13]

As a matter of statutory construction, the reference to "collusion, fraud, dishonesty", followed by a comma, followed by "or other wrongful or tortious conduct intended to prejudice the non-settling tortfeasor(s)" establishes that "collusion" should be given a similar meaning as "fraud" and "dishonesty."

Similarly, "collusion" is a sub-set of, and, therefore, must involve "wrongful or tortious conduct intended to prejudice the non-settling" defendants. See S.D. Warren Co. v. Maine Bd. of Environmental Protection, 547 U.S. 370 (2006) ("The canon, *noscitur a sociis*, reminds us that 'a word is known by the company it keeps,' *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995), and is invoked when a string of statutory terms raises the implication that the 'words grouped in a list should be given related meaning,' *Dole v. Steelworkers*, 494 U.S. 26, 36, 110 S.Ct. 929, 108 L.Ed.2d 23 (1990) (internal quotation marks omitted); *see also Beecham v. United States*, 511 U.S. 368, 371, 114 S.Ct. 1669, 128 L.Ed.2d 383 (1994) ('That several items

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[13] By expressly providing that "good faith" is to be determined "irrespective of the settling or non-settling tortfeasors' proportionate share of liability," the General Assembly made explicit what would otherwise be implicit, as the U.S. District Court held in connection with the prior Station Nightclub Fire settlement statutory amendments:

> The non-collusive, non-tortious standard for evaluating whether a settlement is in good faith is the only standard in which the defendant's proportionate liability is not a factor. It would be incongruous to conclude that, while the 2006 amendments expressly removed the proportionate liability requirement from § 10–6–7 and § 10–6–8 to encourage pre-trial settlements in single occurrence mass torts, the General Assembly simultaneously intended to silently restore proportionate liability as a component in the good faith analysis of a settlement, and reintroduce that impediment. Reading proportionate liability into the 2006 amendments—by applying the "proportionate liability" or "totality of the circumstances" standards for good faith—after it had been expressly removed, would frustrate, if not negate, the entire purpose of the amendments.

Gray v. Derderian, No. 03-483L, 2009 WL 1575189, at *4 (D.R.I. June 4, 2009) (declining to apply the proportionate liability analysis of Tech–Bilt, Inc. v. Woodward–Clyde & Assocs., 698 P.2d 159 (Cal. 1985)).

in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well').").

This standard also conforms to the generally accepted meaning of the terms "collusion" and "collusive." In Dickerman v. N. Tr. Co., 176 U.S. 181 (1900), the Court said:

> We have no doubt that this judgment was collusive in the sense that it was obtained by the plaintiff and consented to by the defendant company for the purpose of giving the trustees a legal excuse for declaring the principal and interest of the mortgage to be due, and to give authority for a foreclosure. But this did not constitute collusion in the sense of the law, nor does it meet the exigencies of the petitioners' case. Collusion is defined by Bouvier as 'an agreement between two or more persons to defraud a person of his rights by the forms of law, or, to obtain an object forbidden by law,' and in similar terms by other legal dictionarians. It implies the existence of fraud of some kind, the employment of fraudulent means, or lawful means for the accomplishment of an unlawful purpose; but if the action be founded upon a just judgment, and be conducted according to the forms of law and with a due regard to the rights of parties, it is no defence that the plaintiff may have had some ulterior object in view beyond the recovery of a judgment, so long as such object was not an unlawful one.

Dickerman, 176 U.S. at 189–90. In the case of In Re Reisenberg, 208 U.S. 90 (1931), the Court addressed allegations of collusion in connection with the appointment of receivers:

> It is asserted also, that there was collusion between the complainants and the street railway companies, on account of which the court had no jurisdiction to proceed…Whether the suit involved a substantial controversy we have already discussed, and the only question which is left under that act is as to collusion.
>
> In this case we can find no evidence of collusion, and the Circuit Court found there was none. It does appear that the parties to the suit desired that the administration of the railway affairs should be taken in hand by the Circuit Court of the United States, and to that end, when the suit was

> brought, the defendant admitted the averments in the bill and united in the request for the appointment of receivers. This fact is stated by the Circuit Judge; but there is no claim made that the averments in the bill were untrue, or that the debts, named in the bill as owing to the complainants, did not in fact exist; nor is there any question made as to the citizenship of the complainants, and there is not the slightest evidence of any fraud practiced for the purpose of thereby creating a case to give jurisdiction to the Federal court. That the parties preferred to take the subject matter of the litigation into the Federal courts, instead of proceeding in one of the courts of the State, is not wrongful. So long as no improper act was done by which the jurisdiction of the Federal court attached, the motive for bringing the suit there is unimportant.

In re Reisenberg, 208 U.S. at 110–11 (citations omitted). See also In re Thompson, 965 F.2d 1136, 1144 (1st Cir. 1992) ("to establish collusion, intervenor must demonstrate fraud, the use of fraudulent means, or the use of lawful means to achieve an unlawful purpose") (citing Point Pleasant Canoe Rental, Inc. v. Tinicum Township, 110 F.R.D. 166, 169 (E.D. Pa. 1986)).

In Point Pleasant the court set forth the following summary of collusion:

> Collusion has been defined to mean the following: An agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law. It implies the existence of fraud of some kind, the employment of fraudulent means, or of lawful means for the accomplishment of an unlawful purpose. A secret combination, conspiracy or concert of action between two or more persons for fraudulent or deceitful purpose.

Point Pleasant Canoe Rental, Inc. v. Tinicum Tp., supra, 110 F.R.D. at 169 (citing Black's Law Dictionary 240 (5th ed. 1979)). See also Warrior Sports, Inc. v. Nat'l Collegiate Athletic Ass'n, No. 08-14812, 2009 WL 646633, at *4 (E.D. Mich. Mar. 11, 2009) ("Although Plaintiffs allege that the NCAA colluded with Warrior Sports' competitors in adopting the 2008 Rule Change, Plaintiffs' allegations do not show that the adoption of the 2008 Rule Change was done with a malicious and unlawful purpose…"); W. Diamond LLC v. Barnes, No. 4:12-CV-00028-JHM, 2013 WL 253281, at *4 (W.D. Ky. Jan. 23, 2013) ("Kentucky courts have defined collusion as an 'agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law.' *Conyers v. Conyers*, 224 S.W.2d 688, 689 (Ky. 1949) (citing Webster's New Int'l Dictionary). Collusion thus implies the existence of fraud of some kind, the employment of fraudulent means, or the employment of lawful means to accomplish an unlawful purpose. It follows that a claim of collusion cannot survive without evidence of a fraudulent activity.") (citing AAA Installers v. Sears Holdings Corp., 764 F. Supp. 2d 931, 941–42 (S.D. Ohio 2011)).

As the court stated in AAA Installers v. Sears Holdings Corp.,

> Courts have defined collusion as "[a]n agreement between two or more persons to defraud a person of his rights by the forms of law or to obtain an object forbidden by law." *Warren v. Union Bank of Rochester*, 157 N.Y. 259, 51 N.E. 1036, 1038–39 (1898). In a simpler definition, collusion is "[a]n agreement between two or more persons to defraud another of his rights by the forms of law or to secure an object forbidden by law." *Ballentine's Law Dictionary* (3d ed.2010). "In Ohio, collusion is defined as 'an agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by the law. It implies the existence of fraud of some kind, the employment of fraudulent means, or of lawful means for the accomplishment of an unlawful purpose.' " *Williams v. Ohio Edison*, Slip Copy, 2009 WL 3490945 (Ohio App. 8th Dist.2009). "In law, collusion is a species of fraud." *Gaer Bros., Inc. v. Mott*, 144 Conn. 303, 130 A.2d 804, 807 (1957).

AAA Installers, 764 F. Supp. 2d at 941–42.

Construing "collusion" to require a "tortious or unlawful purpose" enables courts in determining what is collusive to apply defined standards as to what constitutes a tort and what is unlawful. However, if "collusion" includes lawful agreements, courts would be left to probe the motives of parties to lawful agreements with no established criteria. Courts do not interfere with lawful agreements or lawful conduct.

As will be seen, none of the Diocesan Defendants' allegations of collusion come close to satisfying this standard of tortious or other unlawful conduct. The settlement they seek to obstruct is one that indisputably maximizes the recovery for the proposed class members: it not only shears the Settling Defendants of all their presently available assets but ships the Settling Defendants to the knackery for liquidation. The Diocesan Defendants cannot point to a single settlement term that is not aimed at maximizing recovery from the Settling Defendants for the proposed class, much less demonstrate that the Proposed Settlement sacrifices potential recovery from the Settling Defendants to inflict tortious injury on the non-settling Defendants.

B. The Proposed Settlement Is Not "Facially" Collusive (Whatever That Means)

1. It Is Hardly Unusual and Certainly Not Tortious or Wrongful Conduct Towards the Diocesan Defendants That the Settling Defendants Admit Liability for Plaintiffs' Damages While Denying They Were the Sole Wrongdoers

The Diocesan Defendants contend that the Proposed Settlement Agreement is "collusive on its face" because it contains "[a]dmissions of liability and damages" which are "contrary to the basic principles which underlie settlements". Diocesan Defendants' Memo. at 15. For the proposition that settlements should never admit liability, they cite two cases that stand only for the obvious proposition that a settlement is not required to concede liability as a precondition for obtaining judicial approval.

In In re Cabletron Sys., Inc. Sec. Litig., 239 F.R.D. 30 (D.N.H. 2006) (Smith, J.), this Court (sitting by designation) approved a settlement that did not contain an admission of liability. See id. at 34 n.4 ("Defendants, of course, support the settlement but do not concede liability."). This Court in no way suggested such denial was required.

The second case the Diocesan Defendants cite is City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974), which they cite as standing for the principle that "[a]dmissions of liability and damages are 'contrary to the basic principles which underlie settlements.' " Diocesan Defendants' Memo. at 15 (quoting Grinnell, 495 F.2d at 459). This is not accurate, to put it charitably. What the court described as "contrary to the basic principles which underlie settlements," were not "admissions of liability," but, rather, the "judicial assumption that settlement negotiations were predicated on defendants' admission of guilt." The issue was whether in calculating a reasonable settlement value based upon a settlement agreement in which the defendant denied liability, the court should assume that the plaintiffs would have prevailed and received statutory attorneys' fees if they had proceeded to trial. The full quote states:

> Here, plaintiffs have settled in order to avoid the considerable risk that they would not be able to recover at all. There can be no warrant for urging that in such circumstances the court is required to add on the attorney's fees that would accrue to plaintiffs only if they were successful in litigating these actions. To do so would be tantamount to a judicial assumption that settlement negotiations were predicated on defendants' admission of guilt. Such an assumption is contrary to the basic principles which underlie settlements.

Grinnell, 495 F.2d at 459-60. In other words, in approving a settlement which did not contain an admission of liability, the court declined to apply a standard that presupposed that liability had been admitted. Plaintiffs wholeheartedly endorse that logic and result, but it has nothing to do with the propriety of a defendant agreeing to a settlement agreement that contains an admission of liability, or of a plaintiff requiring such an admission as a condition of settlement, as in the case *sub judice*.

Not only if the proposition not supported by the cases they cite, the Diocesan Defendants' assertion that "admissions of liability and damages are contrary to the basic principles which underlie settlements" is simply wrong in many cases. Many settlements include admissions of liability and stipulated judgments in connection with settlements. See, e.g., United Services Auto. Ass'n v. Morris, 741 P.2d 246, 253 (Ariz. 1987) (stipulated judgment in connection with settlement); Miller v. Shugart, 316 N.W.2d 729, 735 (Minn. 1982) (stipulated judgment in connection with settlement); Chaussee v. Maryland Cas. Co., 803 P.2d 1339, 1342–1343 (Wash. App. 1991) (stipulated judgment in connection with settlement). See also Sala v. Nat'l R.R. Passenger Corp., No. CIV.A. 88-1572, 1988 WL 84125, at *1 (E.D. Pa. Aug. 4, 1988) ("In the instant case, Amtrak's concession as to liability should advance the settlement of compensatory damage claims of members of the class."). More importantly, it would be irrelevant even if this were the first case in history involving an admissions of liability in connection with settlement, because the Diocesan Defendants do not (and cannot assert) that these admissions of liability were tortious or unlawful. Plaintiffs were lawfully entitled to include that requirement in the Proposed Settlement.[14]

Most importantly, the Diocesan Defendants do not (and cannot assert) that these admissions of liability are prejudicial as to the Diocesan Defendants. Indeed, the

[14] It is irrelevant why Plaintiffs made this a requirement, but the reason was to prevent the Settling Defendants from taking a contrary position after the settlement, e.g. in the liquidation proceedings. To have permitted a denial of liability in the settlement agreement would have frustrated a material term of that agreement.

Prospect Entities admit that such statements are not binding on the Court. See Prospect Memo. at 23 (noting that "this Court would not be bound by the gratuitous, self-serving statements set forth in the Settlement Agreement").

The fact that the Proposed Settlement Agreement recognizes that the Settling Defendants are liable "for breach of contract to the Plaintiffs and, arguably, on at least some of the other claims Plaintiffs have asserted" in this case, Proposed Settlement Agreement ¶ 28, simply goes a long way towards explaining why the Settling Defendants have entered into a settlement that contains such favorable monetary terms, *i.e.* turning over nearly all of their assets to the Plaintiffs now and liquidating the rest later. The Diocesan Defendants can no more prevent these defendants from admitting liability in connection with the settlement than they could control which admissions of liability might be contained in the Settling Defendants' Answer to the First Amended Complaint if this settlement is disapproved by the Court.

2. The Diocesan Defendants Misread the Settling Defendants' Statements about Proportionate Fault

Having previously faulted the Settling Defendants for not disclaiming all liability whatsoever, the Diocesan Defendants proceed to do an about-face and misread the Proposed Settlement Agreement as containing a "facially ridiculous" agreement "by Plaintiffs... and Settling Defendants" that the Settling Defendants' proportionate fault is minimal. Diocesan Defendants' Memo. at 16. This is a misreading of the Proposed Settlement Agreement, which states that such denial of major fault is *the Settling Defendants'* contention:

> 30. **The Settling Defendants contend** that their proportionate fault in tort, if any, in causing said damages is small compared to the

> proportionate fault of the other defendants in the Federal Court Action and the State Court Action, but acknowledge that, under the law governing joint and several liability, the Settling Defendants could be required to pay the full amount of Plaintiffs' damages regardless of the proportionate fault of the other defendants.

Proposed Settlement Agreement ¶ 30 (emphasis supplied).

It is also impossible to logically reconcile the Diocesan Defendants' simultaneous arguments that 1) Plaintiffs' claims are not viable; 2) the Settling Defendants nevertheless should have admitted they were "the lead conspirators and wrongdoers in Plaintiffs' tale" (Diocesan Defendants' Memo. at 16); and 3) the Settling Defendants should have denied any liability. All those arguments demonstrate is that the Diocesan Defendants have no principled objection, but, rather, want to block the Proposed Settlement by any means possible. Clearly, if the Settling Defendants denied liability—as the Diocesan Defendants claim they should—then with equal logic, that would be argued as a more egregious act than claiming the Settling Defendants' fault, if any, "is small" in comparison to the fault of the other Defendants.

3. The Settling Defendants' Agreement Not to Dispute Plaintiffs' Counsel's Application for Attorneys' Fees Is Entirely Appropriate

The Diocesan Defendants contend that the Settling Defendants' agreement not to contest Plaintiffs' counsel's motion for attorneys' fees is a "clear sailing agreement," which the Court should scrutinize. That argument is based on three demonstrably false assumptions. This is not a true "clear sailing agreement" because the Settling Defendants did not defer to Plaintiffs' counsel on what would constitute a reasonable fee—the Superior Court in the Receivership Proceedings had already determined what Plaintiffs' counsel's fee should be for representing the Receiver. Secondly, the Settling

Defendants' agreement not to object hardly ensured "clear sailing." As has been borne out by subsequent events, in what is now the second round of contested motion practice concerning this very settlement, there was absolutely no risk that Plaintiffs' counsel's motion for attorneys' fees would be unopposed, much less rubberstamped.

Thirdly, "clear sailing agreements" are questionable only when they suggest that "perhaps class counsel agreed to a smaller class recovery in exchange for a heftier fee." 4 Newberg on Class Actions § 13:9 (5th ed.). The Diocesan Defendants do not even pretend that it was possible to obtain a better settlement from the Settling Defendants than what has been achieved here. Indeed, the focus of their objection almost entirely rests on the alleged unfairness of the Proposed Settlement to the non-settling defendants, *i.e.* the risk that the Proposed Settlement is unfairly advantageous to the class.

In any event, it was certainly appropriate for the Settling Defendants to abstain from objecting, since money not expended by the Settling Defendants on their own attorneys' fees in support of such objection will be available to pay pensions at the end of the day.

The Diocesan Defendants contend this is a "clear sailing" agreement of the type that courts scrutinize closely, but cite no cases where the proposed fee was the product of pre-suit negotiation between a Receiver and Special Counsel and a contract approved by a court. Indeed, their "clear sailing" cases are inapposite even putting aside those unique facts. Most of the cases they cite do not involve common funds.[15]

[15] The last case involved a request for attorneys' fees and costs comprising an extraordinarily high 66% of the total recovery. See Trombley v. Bank of Am. Corp., No. 08-CV-456-JD, 2012 WL 1599041, at *3 (D.R.I. May 4, 2012).

See Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 520 (1st Cir. 1991) ("This appeal requires that we consider, for the first time, how a district court should respond to an application for attorneys' fees made in conjunction with the voluntary discontinuance of a class action suit under circumstances where there is no common fund and the fees are to be paid pursuant to a "clear sailing" agreement."); Redman v. RadioShack Corp., 768 F.3d 622, 637 (7th Cir. 2014) ("[C]lear-sailing clauses are found mainly in cases such as the present one in which the value of the settlement to the class members is uncertain because it is not a cash settlement."); In re Bluetooth Headset Prod. Liab. Litig., 654 F.3d 935, 947 (9th Cir. 2011) (criticizing "when the parties negotiate a 'clear sailing' arrangement providing for the payment of attorneys' fees separate and apart from class funds, which carries 'the potential of enabling a defendant to pay class counsel excessive fees and costs in exchange for counsel accepting an unfair settlement on behalf of the class.'"). The agreement in the Bluetooth case even included "a kicker arrangement reverting unpaid attorneys' fees to the defendant rather than to the class". In re Bluetooth, 654 F.3d at 949. Here, in contrast, the monies not wasted on attorneys' fees by the Settling Defendants in contesting fees will be added to the proposed class's recovery.

The Diocesan Defendants contend it is inappropriate for the Settling Defendants, who are turning over most of their assets now and will be liquidating the rest of their assets later, to demand a release for their present "officers, directors, attorneys, and agents" serving after June 2014, with the exception of Monsignor Timothy Reilly who both is at least nominally a director of Defendant SJHSRI while more actively serving in other capacities for the Diocesan Defendants.[16] The Diocesan Defendants contend it is improper to release any individuals until it is determined what their potential assets and liabilities may be.

Of course, releases of corporate officers, directors, and agents are completely standard components of most settlements. Moreover, if these individuals do not obtain a release now, they may potentially assert claims against the Settling Defendants for indemnity. That indemnity, if provided, would deplete assets that would otherwise flow to the proposed class.

The Diocesan Defendants' erroneously cite In re Telectronics Pacing Sys., Inc., 221 F.3d 870 (6th Cir. 2000) for the proposition that the Proposed Settlement "unfairly release[s] other potentially responsible parties" without inquiring into those parties' personal assets. The Sixth Circuit panel in that case did *not* determine that a proposed action settlement was unfair, but, rather, that a mandatory non-opt-out "limited fund" class should not have been certified where two affiliated and named corporate defendants—not non-defendant individuals affiliated with the defendants—were participating in the settlement and receiving releases without any judicial determination that they too had limited funds. See id. at 878. Here, all of the affiliated defendant corporations—CCCB, SJHSRI, and RWH—are contributing all of their funds, either now or in the subsequent liquidation proceedings. Moreover although Plaintiffs are seeking

[16] In footnote 14 of their memorandum, the Diocesan Defendants incorrectly chastise the settling parties for excluding Monsignor Reilly from the release inasmuch as the releases already expressly exclude the Diocesan Defendants. At most, Plaintiffs can be accused of taking a belt-and-suspenders approach to ensuring that the Proposed Settlement does not affect their claims against the Diocesan Defendants, by expressly excluding both Monsignor Reilly and the Diocesan Defendants from the releases. Even the Diocesan Defendants cannot legitimately argue that approach was collusive.

certification of the class as a limited fund class, they are also seeking certification of a non-opt-out class on other grounds including ERISA.

4. The Separate Settlement with CharterCARE Foundation, While Also a Good Faith Settlement, Does Not Provide a Baseline Comparison

The Diocesan Defendants contend that the "questionable nature of the [instant] Agreement is starker when compared" to the separate proposed settlement that Plaintiffs has reached with CharterCARE Foundation ("CCF"), which was subsequently filed with the Court on January 4, 2019 (the "Second Settlement"). Of course, the briefing regarding the Second Settlement is not yet before the Court, and any comparisons are impossible until then.

However, if the Second Settlement is considered, it should be noted that the provisions in the Proposed Settlement transferring CCCB's rights in CCF to the Receiver that the non-settling Defendants presently claim are improper were a factor in, if not a direct cause of, the Second Settlement. The Second Settlement was reached after the first Settlement Agreement had been executed and approved by the Superior Court. The instant Proposed Settlement includes the transfer to the Receiver of all of the Settling Defendants' rights in CCF. CCCB is CCF's sole member according to CCF's articles of incorporation. Those rights include Defendant CCCB's rights as the sole member of Defendant CCF, the right to replace the current board of CCF with directors of the Receivers' choosing, and the right to agree to a settlement of Plaintiffs claims against CCF, which potentially could have included all of CCF's assets. Although CCF claimed that CCCB's membership rights were waived or abandoned (among other defenses), the consequence if CCF was incorrect was that all of CCF's assets were at risk. Rather than risk losing on these arguments and Plaintiffs other arguments, CCF chose to settle.

The Diocesan Defendants state: “The CCF Settlement contains no admission of liability or concession on damages, no tactical statements concerning proportionate fault, and no consent to judicial liquidation by the Receiver, and more restrictive release language.” Diocesan Defendants’ Memo. at 19. In other words, according to the Diocesan Defendants, the Proposed Settlement is too favorable for Plaintiffs and the Settlement Class, compared to the Second Settlement? A favorable settlement cannot be the product of arms’ length negotiation? Must all settlements be equally harsh to the settling defendants? Is the fact that the first settlement is more favorable to Plaintiffs than the second settlement, as a percentage of assets, a reason to deny the first?

The Diocesan Defendants claim without explanation that the Second Settlement includes “more restrictive release language.” If they mean “more limited release language” that is incorrect. The releases provided in the settlement with CCF are different from those in the instant settlement, but—if anything—the releases to be given to CCF are broader, not more restrictive. For example, the releases Plaintiffs propose to give to CCF would include CCF’s agents and directors regardless of date limitation, whereas the releases Plaintiffs propose to give in the instant settlement apply to officers and directors only serving since June 2014 (and not even all of those).

The other arguments are simply irrelevant. CCF is not admitting liability on any breach of contract claims, because Plaintiffs have not asserted any against CCF. CCF is not being judicially liquidated, because CCF—in light of its different factual and legal bases for liability and potential defenses—negotiated a settlement payment that involves payment of only approximately half of the value of CCF's assets and allows CCF to remain in operation.

The Diocesan Defendants' argument is essentially that in comparison to the proposed settlement with CCF, the Proposed Settlement is too favorable to Plaintiffs. That is no reason to disapprove either settlement. In any event, the Diocesan Defendants articulate no reason why either settlement should provide the baseline by which the other should be judged. Each settlement must be evaluated on its own merits.

C. The Proposed Settlement Is Not "Contextually" Collusive (Whatever That Means)

1. The Diocesan Defendants Misconstrue the Superior Court's Decision

The Superior Court's decision was not limited to the "'best interests' of the Plan's estate" as the Diocesan Defendants contend. It also encompassed the "best interest of the Plan's creditors". See St. Joseph Health Services of Rhode Island, Inc. v. St. Josephs Health Services of Rhode Island Retirement Plan, No. PC-2017-3856, 2018 WL 5792151, at *10 (R.I. Super. Oct. 29, 2018) ("To delve into the 'litany of wrongs,' CCF alleges, would 'skew' this Court's task in determining whether the settlement is in the best interest of the Plan's creditors.").

While the Superior Court did not presume to take on this Court's task by issuing its own finding of good faith under R.I. Gen. Laws § 23-17.14-35, or expressly considering the factors relevant to the Court's inquiry under Fed. R. Civ. P. 23(e), the factors applied by the Superior Court in approving the Proposed Settlement are similar and certainly relevant. Rather than further lengthen this memorandum, Plaintiffs respectfully ask the Court to review this discussion from the Plaintiffs' Reply to the Prospect Entities' objection to the Proposed Settlement.

2. There Is No Basis for Presuming That the Settling Defendants Would Have Entered into a Comparable Settlement Prior to Plaintiffs' Filing Suit.

The Diocesan Defendants assert that the Proposed Settlement accomplished nothing, because the Settling Defendants' monies were predestined to "pour… into the Plan without any litigation at all" and, therefore, the settlement payments "cannot be attributed to any efforts by Plaintiffs' Counsel". Diocesan Defendants' Memo. at 26. Certainly Judge Stern, in his October 29, 2018 Decision, concluded the opposite, *i.e.* that the Proposed Settlement was of enormous benefit to the Plan and its beneficiaries and therefore should be presented to this Court for approval.

The Diocesan Defendants hallucinate the pre-suit existence of "dissolving corporations willing to concede liability and transfer virtually all of their assets to the Receiver". Diocesan Defendants' Memo. at 26. Of course, that is nothing like the case. The Complaint sets forth years of wrongdoing by the Settling Defendants, even prior to the 2014 Asset Sale. The Complaint sets forth specific misconduct thereafter, which if not undisputed is indisputably well detailed and documented. For example:

- The Plan documents never shared with Plan participants purport to limit their rights to existing Plan assets and to disclaim any obligation by the Settling Defendants to contribute to the Plan;
- Internal documents show that for years the Settling Defendants were casting about for a means to cut the Plan loose with no possible liabilities to them;
- In connection with the 2014 Asset Sale, Defendant CCCB secured a 15% interest in Prospect Chartercare, notwithstanding that it contributed virtually no assets, and thereby put over $15,000,000 out of reach of

Defendant SJHSRI's creditors, including the Plan participants, under an arrangement whereby CCCB would exist "for a long time" if not indefinitely;

- The Settling Defendants transferred over $8,200,000 to Defendant CCF in 2015, in what Plaintiffs claim was a fraudulent transfer of funds that should have been deposited into the Plan, in an arrangement in which CCF would exist in perpetuity;

- The Settling Defendants since the 2014 Asset Sale have retained over $10,000,000 in liquid investments, but have not put a single cent into the Plan;

- In August of 2017, the Settling Defendants put the plan into receivership, and asked the court that their "**request for appointment of a permanent receiver and for an immediate 40% uniform reduction in benefits be set for hearing thirty (30) days from the date this petition is heard.**" [emphasis added]

The last action in particular completely belies any suggestion that, before they were sued in this case and confronted with the facts laid out in the Complaint detailing their misdeeds, the Settling Defendants actually intended to contribute their assets to the Plan. In the Petition for Appointment of a Temporary Receiver, the Settling Defendants based their request for a 40% cut in benefits on calculations which showed that the then existing Plan assets, with that 40% reduction, would have sufficient to fully fund Plan liabilities *with no contributions from the Settling Defendants*. In other words, through the Receivership, the Settling Defendants attempted to completely cut the Plan adrift with reduced liabilities, leaving the Settling Defendants with assets and liquid investments worth more than $25,000,000.[17]

To make their intentions perfectly clear that they had no legal liability to fund the plan, Settling Defendant SJHSRI in the verified Petition for Appointment of Temporary

[17] SJHSRI and RWH retained assets worth over $12,000,000, and CCCB's 15% interest in Prospect Chartercare was estimated in 2014 to be worth over $15,000,000.

Receiver stated that the need for urgency was that they were concerned that the plan could lose church plan status by December of 2018, thereby obligating the Settling Defendants to make contributions to the plan. The petition states as follows:

> 7. Petitioner is advised and believes that the Plan will lose "church plan" status on or before December 31, 2018.
>
> 8. If the Plan loses its status as a "church plan," Petitioner would be required to make minimum annual contributions and annual payments to PBGC, and would otherwise be required to comply with ERISA. Petitioner does not have the financial resources to make such payments, or to comply with the other financial and regulatory requirements of ERISA.

Petition ¶¶ 7-8. Instead of embracing that outcome, which would have served the interests of the Plan participants, they brought the Receivership to cut the Plan down to size and cut it loose, *before* they were "required to make minimum annual contributions. . . ."

Moreover, they were unwilling to *legally commit* to fund the Plan from their own assets even after the 40% reduction in benefits, stating as follows:

> 16. Petitioner, and, Petitioner's affiliates, Roger Williams Hospital and CCCB,[7] [original footnote] are winding down their respective affairs. Upon conclusion of such wind-down efforts, the net assets of Petitioner, RWH and CCCB may become available to assist with the Plan.[8] [original footnote] While the availability of additional funds is uncertain at this time, such additional funds could be used to support the Plan for long-term pay-outs to beneficiaries or provide supplemental distributions to beneficiaries Whose benefit payments might be reduced as part of the Plan's wind-down process. The potential for additional Plan funds is not contemplated by the Benefit Adjustment Analysis.

Petition ¶ 16.[18] So SJHSRI was telling the court under oath that the availability of future funds was uncertain, and that if they existed it was only possible that they “could” (not “would”) be used to make up some of the losses of the Plan participants.

Then when Special Counsel was appointed, the Settling Defendants were not even willing to hand over their documents pursuant to subpoena without the Receiver having filed two motions to compel, much less hand over all their assets without a fight.

The Diocesan Defendants’ arguments about RWH’s payment of Receivership expenses are based only on one quote, taken out of context, from statement the Receiver made (in laymen’s language) to one of the Pension beneficiaries at a town hall meeting.[19] That statement is unclear at best, but it appears that the Receiver was addressing concerns that fees and expenses were being paid out of the Plan’s existing assets, rather than addressing the liability (*vel non*) of the Settling Defendants, which prior to this suit was in no way conceded. RWH’s payment of Receivership expenses was a matter of public record, noted even in the Petition for Appointment of Temporary Receiver. Petition ¶ 22. The Settling Defendants’ agreement to foot the bill for the Receivership (but only for so long as they wished) does not demonstrate their “collusion” with the Receiver. To the contrary, it was necessary to secure any court

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[18] Footnote 7 of the Receivership Petition stated that “The wind-down of CCCB could potentially take a long time due to its ownership interest in the Hospital Purchaser.” By August of 2017, however, RWH and SJHSRI had ostensibly already been in wind-down for over three years with no payments to the Plan! Footnote 8 stated “Petitioner anticipates that the wind-down of RWH and SJHSRI is likely to take several years to complete.” If RWH and SJHSRI’s wind-down was estimated to take “several years,” one can only guess how many years were intended in the reference to “a long time.”

[19] The Diocesan Defendants, notwithstanding their freewheeling arguments about collusion, have quoted a video of the town hall meeting that the Receiver himself posted on the Internet in an exercise of transparency.

order cutting all benefits by 40%, which in turn was necessary to protect all their assets from Plan participants.

3. There Is Absolutely No Basis for Providing Discovery and Facilitate a Fishing Expedition into Settlement Negotiations

Discovery prior to class action settlement approval "should be minimal and conditioned on a showing of need, because it will delay settlement, introduce uncertainty, and might be undertaken primarily to justify an award of attorney fees to the objector's counsel." In re Lupron Mktg. & Sales Practices Litig., No. CIV.A. 01-10861-RGS, 2005 WL 613492, at *2 (D. Mass. Mar. 16, 2005). "The burden is higher when a party seeks discovery of settlement negotiations. 'It is only proper where 'the party seeking it lays a foundation by adducing from other sources evidence indicating that the settlement may be collusive.'" Id. (citing Vollmer v. Publishers Clearing House, 248 F.3d 698, 708 (7th Cir. 2001)). See In re Celexa & Lexapro Mktg. & Sales Practices Litig., No. MDL 09-2067-NMG, 2014 WL 2547543, at *4 (D. Mass. June 3, 2014) ("Moreover, discovery of settlement negotiations is generally disfavored and is appropriate only where the objector puts forward sufficient evidence that the settlement was collusive.") (citing Hemphill v. San Diego Ass'n of Realtors, Inc., 225 F.R.D. 616, 621 (S.D. Cal. 2005)).

It would not take a crystal ball to know what would happen if the non-Settling Defendants are permitted to take discovery concerning "collusion", especially if "collusion" is not limited to tortious or other unlawful conduct. They will seek document discovery from, and depositions of, Plaintiffs' counsel, the Receiver, counsel for the Settling Defendants, the officers and directors of the Settling Defendants, and, indeed, possibly Judge Stern. Moreover, since the non-Settling Defendants question the Settling Defendants' intention to fight Plaintiffs' suit, Plaintiffs would be entitled to obtain the Settling Defendants' internal documents and to depose them and their counsel to prove that they were forced to the settlement table.

Then, when discovery was complete, the Settling Defendants would be expected to request evidentiary hearings. At the end of those, the Court would have the task of sorting through the acrimony to decide whether the Proposed Settlement should be rejected as a product of collusion, <u>notwithstanding its enormous benefit to the Settlement Class</u>.

IV. At the Appropriate Time (in Connection with Final Approval of the Proposed Settlement), the Court Should Grant the Fee Motion

Perhaps because the Diocesan Defendants inappropriately attempt to inject attorneys-fees issues into the Court's decision whether to grant preliminary class certification and to make the finding of good faith under R.I. Gen. Laws § 23-17.14-35, the Diocesan Defendants raise premature objections to the Fee Motion (which they lack standing to assert, as discussed *infra*). That Fee Motion will not be heard until after class members have been notified of the Proposed Settlement and have had an opportunity to appear and assert any objections.[20]

The substance (such as it is) of the Diocesan Defendants' objection with regard to the Fee Motion is limited to expressions of "concerns" that the record is insufficient. Diocesan Defendants' Memo. at 23-24 ("Apart from the issues of ERISA preemption

[20] In connection with finalizing the form of the proposed Class Notice, the Court will select a date for class members to raise any objections to the Fee Motion.

and the role of the PBGC in this litigation, which preclude any resolution of the Fee Motion at this juncture, the Diocesan Defendants' objection with regard to the Fee Motion is limited to concerns that there is insufficient information in the record to grant the Fee Motion's request relative to the initial lump sum payment."). However, while the record is already more than sufficient to grant the proposed fees, it is not yet time for the Court to decide that Fee Motion. See Dkt. # 63-1 (Memorandum in Support of Joint Motion for Settlement Class Certification, Appointment of Class Counsel, and Preliminary Settlement Approval) at 69 (requesting that the Court merely "[s]chedule[ ] the hearing for final approval of the settlement and approval of Wistow, Sheehan & Loveley, P.C.'s motion for an award of attorneys' fees."). The request for preliminary approval of the Proposed Settlement does not include approval (preliminary or otherwise) of attorneys' fees.

A. The Non-Settling Defendants Do Not Have Standing to Contest Any Award of Attorneys' Fees, Which They Are Not Paying

Since its amendment in 2003, Fed. R. Civ. P. 23(h)(2) has stated:

> (h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:
>
> * * *
>
> (2) A class member, or a party from whom payment is sought, may object to the motion.

Fed. R. Civ. P. 23(h)(2). The advisory committee's note to the 2003 amendment to Fed. R. Civ. P. 23(h)(2) clarifies that this provision means only class members and parties who would be paying the fees may object to such a Fee Motion:

> A class member and any party from whom payment is sought may object to the fee motion. Other parties--for example, **nonsettling defendants--may not object** because they lack a sufficient interest in the amount the court awards.

Fed. R. Civ. P. 23. advisory committee's note. The Diocesan Defendants, as non-settling defendants, are not paying any portion of the fees. Accordingly they lack standing to object to the Fee Motion:

> In other contexts, we have recognized that "a non-settling defendant ... is not prejudiced by the settlement and therefore has no standing to complain about the settlement." *In re Beef Industry Antitrust Litigation*, 607 F.2d 167, 172 (5th Cir.1979). On the facts of this case, none of the appellants is responsible for paying the plaintiffs' attorneys' fees; none would suffer any imaginable concrete injury if those fees were increased, nor would they enjoy any concrete benefit if those fees were eliminated altogether. Instead, these hypothetical injuries or benefits would accrue to the class members themselves. The class members proved themselves capable of objecting to the fees at trial, and they elected not to appeal the fee award before this court. The appellants have no legal basis for waging a battle that the allegedly injured class members elected not to pursue.

Wolff v. Cash 4 Titles, 351 F.3d 1348, 1355–56 (11th Cir. 2003).

The Diocesan Defendants do not seriously grapple with their lack of standing to object to the Fee Motion, confining their brief discussion to one footnote. See Diocesan Defendants' Memo. at 24 n.20.

First, they contend that the same issues are relevant to the issue of whether this is a good faith settlement. See id. Plaintiffs disagree for the reasons discussed *infra*. In any event, the Court's determination of good faith does not require the Court to decide the sufficiency of the Fee Motion at this time.

Second, the Diocesan Defendants contend the Court should disregard standing issues and allow the Diocesan Defendants to assert the objections, because perhaps class members will not assert them if the Diocesan Defendants do not. See Diocesan Defendants' Memo. at 24 n.20 (citing Reynolds v. Beneficial Nat. Bank, 288 F.3d 277, 282 (7th Cir. 2002) and In re Fleet/Norstar Sec. Litig., 974 F. Supp. 155, 158 (D.R.I. 1997) (Boyle, S.J.)). Neither of those cases involves objections by any non-settling defendants. Reynolds involved objections by class members to an allegedly collusive "reverse auction" settlement[21] not present here. See Reynolds, 288 F.3d at 282. In re Fleet involved objections by a court-appointed guardian ad litem, also not present here. See In re Fleet, 974 F. Supp. at 158. In any event, both cases predate the amendments to Fed. R. Civ. P. 23(h) and comments thereto, quoted *supra*, which revised the procedure for fee motions and expressly provide that non-settling defendants lack standing to object.

B. The Diocesan Defendants Do Not Address the State Court's Role in Determining Attorneys' Fees in This Case

The Diocesan Defendants express "concerns" over Plaintiffs' Counsels' motion for attorneys' fees, but do not even acknowledge, much less address, any of the reasons set forth in Plaintiffs' Counsels' Memorandum in Support of the Motion for Attorneys' Fees ("Plaintiffs' Counsels' Memo.").

Most importantly, they ignore the fact that the fee Plaintiffs' Counsel are seeking was negotiated with the Receiver and approved by the Rhode Island Superior Court in connection with the Receivership Proceedings, in advance of the filing of this case, as

[21] A "reverse auction" settlement is one involving "the practice whereby the defendant in a series of class actions picks the most ineffectual class lawyers to negotiate a settlement with in the hope that the district court will approve a weak settlement that will preclude other claims against the defendant." Reynolds, 288 F.3d at 282.

fair and reasonable for the Plan. Consequently, they offer no reasoning why the Court should not simply apply this fee. There are numerous reasons why to do so would be appropriate.

In a related context, the First Circuit and other federal courts have deferred to state law in determining attorneys' fees in class action common fund cases based on diversity. See In re Volkswagen & Audi Warranty Extension Litig., 692 F.3d 4, 15 (1st Cir. 2012) ("We also start with the basic premise that the issue of attorneys' fees has long been considered for *Erie* purposes to be substantive and not procedural, and so state-law principles normally govern the award of fees."); Chieftain Royalty Company v. Enervest Energy Institutional Fund XIII–A, L.P., 888 F.3d 455, 462-63 (10th Cir. 2017) (applying Oklahoma state law to determine method of calculating attorneys' fees in settlement of class action) ("[T]here appears to be a consensus among those circuits that have considered the matter. We have found decisions from five other circuits. When state law governs whether to award attorney fees, all agree that state law also governs how to calculate the amount.").

This case also has a strong state law component, and, indeed, may ultimately be based entirely on state law if the Court concludes that ERISA is inapplicable, which is all the more reason to give considerable weight to the retainer agreement approved by Judge Stern. Given that it is impossible to determine what law is applicable at this time, the Court in the exercise of its discretion may apply state law to determine entitlement to attorneys' fees. See New York v. Microsoft Corp., 297 F. Supp. 2d 15, 22 (D.D.C. 2003) ("The Court observes, as an initial matter, that since Plaintiff is entitled to fees under both federal and Massachusetts law, whichever regime provides Plaintiff with the largest award should be applied."). See also Alhassid v. Bank of America, N.A., 688 F. App'x 753, 761 (11th Cir. 2017) ("The district court had both diversity and federal question jurisdiction, and we have not determined whether state law or federal law governs interest rates on prejudgment interest in that circumstance. However, five of Alhassid's six claims were based in state law, and the court awarded the underlying attorneys' fees and costs based on a Florida statute. Thus, it was within the district court's discretion that the interest rate should be governed by state law.").

The Diocesan Defendants are asking the Court to reconsider the fee approved by the Superior Court. However, the state court receivership action preceded this case, and the fees are sums that otherwise would be paid to the receivership estate. Awarding a fee other than as provided for in the retainer agreement would conflict with the state court's determination concerning receivership property, something the Court should be reluctant to do regardless of the possibility that ERISA will provide some or all of the rules of decision in this case. See Dailey v. National Hockey League, 987 F.2d 172, 178-179 (3rd Cir. 1993) (Canadian court has prior exclusive jurisdiction over funds governed by ERISA, notwithstanding that would result in ERISA not being applied) ("In conducting our analysis we recognize the strong public policy reflected in ERISA designed to protect pension rights. However, the potential for conflicting determinations clearly exists here as to some aspects of the 'property' issues involved. This possibility calls into play the consideration that in part prompted the formulation of the *Princess Lida* doctrine. We therefore conclude that ERISA does not negate the continuing applicability of *Princess Lida* under these facts.").

It must be emphasized that the genesis and *raison d'etre* of the Complaint is the underfunded status of the Plan and the investigation undertaken on behalf of the Receiver. The Plan is in Receivership. The Receiver seeks recovery solely in his representative capacity, for the ultimate benefit of Plan participants. The Settlement provides that the Net Settlement Amount will be paid into the Plan, in accordance with the orders of the court in the Receivership Proceedings.

Indeed, it is impossible to separate the fruits of Plaintiffs' Counsel's labors on behalf of the Receiver from the benefits to be obtained by the Individual Named Plaintiffs and the Class of Plan participants, or to allocate attorney time between Plaintiffs' Counsels' representation of the Receiver and Plaintiffs' Counsels' representation of the Settlement Class. It is for this reason that Plaintiff's Counsel seek an award of attorneys' fees for representing the Settlement Class that is inclusive of (rather than in addition to) Plaintiff's Counsel's fees for representing the Receiver.

The only significance the Diocesan Defendants attribute to the retainer agreement approved by the Superior Court is to imply that Plaintiffs' Counsel manipulated the timing of the Proposed Settlement to ensure it took place after suit was brought when the contingent fee shifted to 23.33%, which they contend entitles them to conduct discovery into any pre-suit settlement negotiations they speculate may have occurred. Here they are suggesting that Plaintiffs' Counsel acted in bad faith in performing a contract approved by the Superior Court. However, rather than applying to the Superior Court for relief, they suggest that this Court should police Plaintiffs' Counsels' compliance with their obligations under the retainer.

In addition to referring to the retainer agreement solely to create conflict between the Court and the state court, the Diocesan Defendants would like to have it both ways. They ignore that the retainer is a judicially approved contract, and that Plaintiffs' Counsel of their own volition have reduced their fee application by $552,281.25 from what they would be entitled under that contract.

C. The Proposed Fees are Reasonable under the Percentage of Fund Approach

The Diocesan Defendants do not dispute or even address Plaintiffs' argument, or the supporting case law cited by Plaintiffs, that the percentage-of-the-fund ("POF") approach is the correct method of determining attorneys' fees in connection with this settlement, rather than the lodestar method. See Plaintiffs' Memo. at 19-22. See also In re AT & T Corp., 455 F.3d 160, 164 (3d Cir. 2006)("[T]he percentage-of-recovery method is generally favored because it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure."). Under the percentage of the fund method, the Court has "extremely broad" latitude to determine an appropriate fee award. In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig., 56 F.3d 295, 309 (1st Cir. 1995). They also do not dispute that the proposed fee, of less than 19% of the Initial Lump Sum and 23.33% of the balance, is in accordance with the benchmark in the First Circuit. See Plaintiffs' Counsels' Memo. at 22 (citing cases describing 25% as the "benchmark" for common fund cases).

Instead, the Diocesan Defendants have "concerns" over the proposed fee because Plaintiffs' Counsel have not calculated it using the lodestar method. Diocesan Memo. at 29 ("Courts use the lodestar method of calculating fees awards as a check when considering fee applications. Here, such a calculation is impossible, as the only information before the Court is the total number of hours Plaintiffs' Counsel say they devoted to all of the claims of the Receiver and the class since suit was filed.") (citation omitted). However, neither Plaintiffs' Counsel nor the Court are required to engage in calculating the lodestar method when awarding fees based upon the POF method. In re Puerto Rican Cabotage Antitrust Litig., 815 F. Supp. 2d 448, 464 (D.P.R. 2011) ("The First Circuit does not require a court to engage in calculating the lodestar method when awarding fees based upon the percentage of the fund method."). Indeed, in those instances in which courts in the First Circuit have exercised their discretion to consider attorney hours as a "cross check" against the percentage of the fund to be awarded, they have done so without providing the detail required for the lodestar method. See Walsh v. Popular, Inc., 839 F. Supp. 2d 476, 487 & 487 n.24 (D.P.R. 2012) (approving attorneys' fees in common fund using the POF method, while noting that using the lodestar method would be "impossible based upon the record before the court at the present time" because class counsel did not provide detailed time records).

The only case the Diocesan Defendants cite as purporting to support their argument that the Court must apply the lodestar method is Heien v. Archstone, 837 F.3d 97 (1st Cir. 2016). That case, however, recognized that the district court has discretion to apply either a percentage-of-the-fund approach or a lodestar method depending on the circumstances. See id. at 100. Heien certainly does not stand for the Diocesan Defendants' proposition that lodestar is the only permissible method.

D. The Expenditure of Time on Related Actions in Order to Preserve and Facilitate Claims Asserted in This Action Is Appropriate

The Diocesan Defendants seem to insinuate, on the basis of nothing, that Plaintiffs' counsel may have already been paid for time spent litigating this case since it was filed. See Diocesan Defendants' Memo. at 25-26 (noting that the Receiver has paid Plaintiffs' counsel's fees for pre-suit work and professing to be unable to tell whether the 1,120+ hours spent *since filing this suit* included any of that pre-suit work). The extent and amounts of Plaintiffs' counsel's compensation paid by the Receiver ($552,281.25) are a matter of public record in the Superior Court.

The Diocesan Defendants also contend it would be inappropriate to include any of the time spent litigating issues in the Superior Court when calculating Plaintiffs' counsel's fee. The only case they cite as purportedly citing that proposition is Heien v. Archstone, 837 F.3d 97 (1st Cir. 2016), in which the court noted in *dicta* that a fair fee for the plaintiffs' counsel in a second tag-along class action should take into account the fact that they had already successfully prosecuted a prior class action involving the same exact claims against the defendants' corporate affiliate (against whom the plaintiffs obtained summary judgment on liability), and very little additional work was required to achieve the same result in the second class action. See id. at 98, 101. Here, the instant class action is the first class action involving these claims, and prior to this settlement, none of the liability issues had been conclusively adjudicated.

Courts approving class action fee awards also routinely consider attorney time spent in related litigation. See, e.g., Rawa v. Monsanto Co., No. 4:17CV01252 AGF, 2018 WL 2389040, at *9 (E.D. Mo. May 25, 2018) (awarding 33% of a common fund after taking into account the hours spent in related cases); Doe 1-2 v. Deja Vu Servs., Inc., No. 2:16-CV-10877, 2017 WL 2629101, at *10 (E.D. Mich. June 19, 2017) (awarding a request for 18% of the common fund after also considering hours expended in "related cases" against the same defendants); Wiles v. Sw. Bill Tel. Co., No. 09-4236-CV-C-NKL, 2011 WL 2416291, at *4 (W.D. Mo. June 9, 2011) (awarding 33% of a common fund after noting counsel "expended tremendous time and energy in this and related cases"); Loretz v. Regal Stone, Ltd., 756 F. Supp. 2d 1203, 1214 (N.D. Cal. 2010) ("With regard to the other time entries that refer to related cases, the Court finds that the work performed advanced this class action."); In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 410 F. Supp. 680, 697 (D. Minn. 1975) ("The Court however, feels that these hours [spent in related cases] benefited the Doughboy class and is including them in this award."). See also In re Pine Top Ins. Co., 686 N.E.2d 657, 663 (Ill. App. 1997) (trial court committed abuse of discretion when reducing class counsel's attorney fees because of fees already received in three related cases involving the same issue).

The particular examples that the Diocesan Defendants point to, of litigation efforts in the Superior Court that should not be considered in determining appropriate attorneys' fees in this case, are also bizarre. The Diocesan Defendants complain that substantial time was spent litigating Plaintiffs' intervention in the *Cy Pres* proceedings. As discussed extensively in the First Amended Complaint, however, that intervention was necessary to unwind fraudulent transfers committed by the Settling Defendants and to make the proceeds of those transfers available to the Plaintiffs in this proceeding.[22]

[22] Thanks to the second settlement achieved with CharterCARE Foundation, the Court will likely be spared the necessity of deciding such issues relating to the Cy Pres transfers.

That motion practice was not only of obvious benefit to the proposed class but directly advanced this litigation.

The Diocesan Defendants also complain that time was spent in the Receivership proceedings holding Defendant Prospect CharterCare, LLC in contempt of the Superior Court. The Diocesan Defendants do not note, however, that what Prospect CharterCare, LLC was being held in contempt for, however, was initiating administrative proceedings before the Department of the Attorney General and the Rhode Island Department of Health *to scuttle the instant settlement and to obtain a declaration of the validity of Defendants' affirmative defenses that they intend to assert in this case*. It is absurd to pretend that such motion practice was not of benefit to the proposed class or did not advance this litigation.

E. No Defendants Raise Any Arguments Concerning the Request for Reasonable Costs

Neither the Diocesan Defendants nor any other Defendants make any arguments concerning Plaintiffs' counsel's request for reimbursement of out-of-pockets. Accordingly that request should also be granted at the appropriate time.

V. Conclusion

The Diocesan Defendants' objections to the Proposed Settlement should be overruled, and the Joint Motion should be granted.

Respectfully submitted,
Plaintiffs,
By their Attorney,

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Dated: January 21, 2019

Request for Oral Argument

Pursuant to LR Cv 7(c), Plaintiffs request oral argument and estimate that 1 – 1.5 hours will be required to address the Diocesan Defendants' objections.

CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the within document was electronically filed on the 21st day of January, 2019 using the Electronic Case Filing system of the United States District Court and is available for viewing and downloading from the Electronic Case Filing system. The Electronic Case Filing system will automatically generate and send a Notice of Electronic Filing to the following Filing Users or registered users of record:

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