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

Max Wistow, Esq. (#0330)
Stephen P. Sheehan, Esq. (#4030)
Benjamin Ledsham, Esq. (#7956)
Wistow, Sheehan & Loveley, PC
61 Weybosset Street
Providence, RI 02903
(401) 831-2700
(401) 272-9752 (fax)
mwistow@wistbar.com
spsheehan@wistbar.com
bledsham@wistbar.com

January 21, 2019

## TABLE OF CONTENTS


I. INTRODUCTION .......... 1

II. ALLEGATIONS ESTABLISHING PLAINTIFFS' INJURIES IN FACT .......... 2

III. ARGUMENT .......... 7

A. The Merits of the Proposed Settlement .......... 7

B. The Receiver Is the Lawfully Appointed Officer of the State Court With Authority to Assert Claims on Behalf of the Plan .......... 11

C. Plaintiffs Have Article III Standing to Seek Settlement Approval .......... 18

1. Requirements for Standing .......... 18

2. Plaintiffs Have Standing .......... 22

a. The Receiver Has the Requisite Injury in Fact .......... 23

b. The Individual Named Plaintiffs Have the Requisite Injury in Fact .......... 24

c. PGBC Is Irrelevant to Plaintiffs' Standing .......... 27

i. PBGC Is Irrelevant to Standing under LaRue v. DeWolff, Boberg & Associates, Inc. .......... 27

ii. PBGC Is Especially Irrelevant to the Receiver's Claims .......... 28

iii. What PBGC Is, How It Operates, How It Is Funded, and the Risks That PBGC Itself Is Facing .......... 29

iv. PBGC Guarantee is Predicated on Plan Termination .......... 32

v. PBGC Cannot Be Compelled to Terminate the Plan or Assert a Claim .......... 33

vi. PBGC's Role is Too Speculative to be Considered .......... 38

vii. At Most, PBGC Would Be a Possible Future Collateral Source .......... 40

D. Settlement Is Proper Before the Court Determines Whether or Not the Plan Is Governed by ERISA .......... 44

E. The Approval of the Proposed Settlement as a Good Faith Settlement under the Settlement Statute Does Not Conflict with ERISA .......... 49

1. The Issue of Whether the Settlement Statute Will Be Enforceable If Plaintiffs Prevail Against the Prospect Entities at Trial Is Not before the Court .......... 49

2. ERISA § 410 Does Not Apply to Settlements .......... 51

3. ERISA § 405 Does Not Apply to Settlements .......... 52

4. The "Prohibited Transaction Class Exemption" Is Another Red Herring .......... 53

5. The Settlement Statute Does Not Prejudice the Non-Settling Parties' Rights under ERISA Because There Is No Right to Contribution under ERISA .......... 54

F. Settlement Approval Should Not Be Postponed or Denied Pending the Determination of Whether PBGC Is a Necessary party .......... 56

1. Standards for Compulsory Joinder .......... 57

2. Plaintiffs Have No Claim Against PBGC .... 62
3. PBGC Cannot Be Made a Compulsory Plaintiff .... 63
4. Joinder under Rule 19(a)(1)(A) Is Foreclosed Because Nonjoinder Will Not Prevent Complete Relief Between the Parties .... 63
5. Joinder under Rule 19(a)(1)(B) Is Foreclosed Because PBGC Does Not Claim a Legally Protected Interest .... 63

G. The 15% Transfer to the Receiver Is Not Relevant to Settlement Approval, Unlawful, or Otherwise Improper .... 64
1. The Prospect Entities' Objections Are Not Ripe .... 64
2. The 15% Transfer to the Receiver Does Not Violate the LLC Agreement .... 66
3. The Transfer of CCCB's 15% Interest in Prospect Chartercare to the Receiver Would Not Be a "Conversion" under the HCA .... 76
4. The Restrictions on Transfer in the LLC Agreement Are Void .... 77

H. The Statements in the Settlement Agreement to Which the Prospect Entities Object Are Not Collusive .... 80
1. "Collusion" Refers to Tortious Or Other Wrongful Conduct, Not Lawful Combined Action .... 80
2. There Is Nothing Objectionable about the Settling Defendants' Agreeing to Undergo a Judicially Supervised Liquidation .... 80
3. There Is Nothing Objectionable about the Settling Defendants' Agreeing to Join the Receiver in Seeking Settlement Approval from this Court .... 81
4. There Is Nothing Objectionable about the Settling Defendants' Acknowledgment That the Plaintiffs' Damages Are Large and That Their Proportionate Fault Is Small .... 82
5. There Is Nothing Objectionable about the Settling Defendants' Agreeing Not to Object to the Receiver's Claims in the *Cy Pres* Proceeding .... 84

IV. CONCLUSION .... 85

On December 24, 2018, Defendants Prospect Medical Holdings, Inc. ("Prospect Medical"), Prospect East Holdings, Inc. ("Prospect East"), Prospect Chartercare, LLC ("Prospect Chartercare"), Prospect Chartercare SJHSRI, LLC ("Prospect SJHSRI"), and Prospect Chartercare RWMC, LLC ("Prospect RWH") (collectively the "Prospect Entities") filed an objection and supporting memorandum ("Prospect Memo.") to the Joint Motion for Class Certification, Appointment of Class Counsel, and Preliminary Settlement Approval submitted by Plaintiffs and the Settling Defendants (Joint Motion").[1]

This is Plaintiffs' reply.

## I. INTRODUCTION

The Prospect Entities' opposition to the Joint Motion is obstructionism divorced from, and in most cases directly contrary to, the law and the facts. They contend without the slightest authority that the Court should declare that the appointment of the Receiver and the entire state court receivership proceedings are "unlawful." They argue that the Court cannot approve the Proposed Settlement until the Court determines whether the Plan is governed by ERISA, and the Pension Benefit Guaranty Corporation ("PBGC") is made a party to this case, but whether the Plan is governed by ERISA is irrelevant to the settlement, and PBGC is not even subject to permissive joinder, much less a necessary party. They assert arguments that are premature, including that the

[1] The Prospect Entities have neither filed a separate objection to Plaintiffs' Counsel's Motion for Attorneys' Fees, nor do they refer to it in the title of their memorandum objecting to the Proposed Settlement. However, on page 9 of that memorandum, they purport to join in and incorporate by reference the Diocesan Defendants' argument "that in considering the application for attorneys' fees, the Court should determine whether the time spent by Plaintiffs' counsel (for which it was not previously paid on an hourly basis by the Receiver) resulted specifically in the settlement with CCCB." Plaintiffs object to that argument for several reasons, all of which are set forth in Plaintiffs' Reply Memorandum to the Diocesan Defendants.

Settlement Statute is unconstitutional and/or preempted by ERISA and that the transfer to the Receiver of CCCB's 15% interest in Prospect Chartercare violates the LLC Agreement that was entered into in connection with the 2014 Asset Sale, none of which need be or should be addressed in connection with the Joint Motion.

The Prospect Entities' decision to burden the resolution of the Joint Motion with reckless, premature, and irrelevant arguments, albeit in a mixed-up, undeveloped, and legally unsupported form, puts Plaintiffs in the position of having to choose between two options, neither of which is fair to the Plaintiffs or the Court; 1) not addressing these arguments on the merits because they are so clearly reckless, irrelevant and premature; or 2) fully addressing these issues notwithstanding that both complicates what should be a relatively straightforward determination and significantly duplicates much of Plaintiffs' forthcoming opposition to the motion to dismiss. With apologies to the Court, Plaintiffs have no real choice but to fully address these issues given that the pensions of over 2,700 hardworking Rhode Islanders are at stake.

Plaintiffs normally might respond to opposition arguments *seriatim*. Here, however, those arguments are mixed together and follow no logical order. Accordingly, Plaintiffs address those arguments in logical order.

## II. ALLEGATIONS ESTABLISHING PLAINTIFFS' INJURIES IN FACT

The Receiver's injury in fact is based, *inter alia*, upon the following allegations in the Complaint[2] concerning his appointment as Receiver and his control over Plan assets, which entitle him to sue for injuries to the Plan under ERISA and/or state law.

---

[2] Referring to Plaintiffs' First Amended Complaint ("FAC") served on October 5, 2018.

The Named Plaintiffs' injuries in fact and claims of individualized harm are based, *inter alia*, on the following allegations that plausibly demonstrate that the misconduct of the Defendants created and/or enhanced the risk of failure of the entire Plan, which satisfies the constitutional requirement for individualized harm for participants in defined benefit pension plans under the standard set in LaRue v. DeWolff, Boberg & Associates, Inc., 552 U.S. 248, 255 (2008) ("Misconduct by the administrators of a defined benefit plan will not affect an individual's entitlement to a defined benefit unless it creates or enhances the risk of default by the entire plan."). The Settlement Class's injuries in fact are also based, *inter alia*, on the allegations that the misconduct of the Defendants created and/or enhanced the risk of failure of the entire Plan.

The Plan is a defined benefit plan established by Defendant St. Joseph Health Services of Rhode Island ("SJHSRI") with over 2,700 participants.[3] In August 2017 SJHSRI petitioned ("the "Receivership Petition") the Rhode Island Superior Court to place the Plan into receivership, in the case captioned *St. Joseph Health Services of Rhode Island, Inc. v. St. Josephs Health Services of Rhode Island Retirement Plan, as amended*, PC-2017-3856 (the "Receivership Proceedings").[4]

Attorney Stephen Del Sesto was appointed Receiver of the Plan by the Superior Court.[5] He is also the Administrator of the Plan.[6] The individual Named Plaintiffs are all participants in the Plan.[7]

---

[3] FAC ¶¶ 1, 54.

[4] FAC ¶ 81.

[5] FAC ¶ 2.

[6] FAC ¶ 2.

[7] FAC ¶¶ 3-9.

The Receivership Petition, which was signed under oath by the President of Defendants SJHSRI, RWH, and CCCB, alleged that the Plan was severely underfunded.[8] Specifically, SJHSRI stated as follows:

> Petitioner is informed and believes that the Plan is unsustainable absent court intervention and will be unable to pay all accrued benefits as they become due.

To substantiate that conclusion, the Petition attached the actuarial report prepared by Defendant The Angell Pension Group, Inc. ("Angell").[9] The report estimated the present value of the Plan's liability as of December 31, 2016 to be $126,717,720.[10] That report stated that the present value of Plan assets as of July 1, 2016 was $86,780,384.[11] The report estimated that the sum of $43,032,480 would be needed as of July 1, 2016 to reach a 100% funding level.[12] The report concluded that the Plan was only 68.5% funded.[13]

The Receivership Petition noted, however, that that this calculation assumed a future annual rate of investment return on Plan assets of 7.75%, and that "going forward there is concern that 7.75% projected annualized return is unlikely to be sustained in the

---

[8] Receivership Petition ¶ 19. The Receivership Petition, including exhibits, should be considered in connection with the resolution of the Prospect Entities' argument that the Plaintiffs lack standing to seek settlement approval, for several reasons: 1) it is extensively referred to in the First Amended Complaint; 2) it is a court record of which the Court may take judicial notice; and 3) the relevant exhibits are authored by Defendant Angell and adopted by Defendant SJHSRI.

[9] Receivership Petition ¶ 9 (attaching actuarial report as Exhibit 2).

[10] Receivership Petition Exhibit 2 at 5.

[11] Receivership Petition Exhibit 2 at 15.

[12] Receivership Petition Exhibit 2 at 15.

[13] $86,780,384 divided by $126,717,720 = 0.685 (rounded).

long term."[14] The Receivership Petition stated that "[a]pplying a lower anticipated annual rate of return would result in a higher underfunding projection."[15]

The Receivership Petition then addressed what was to be done with the Plan, given its grossly underfunded status. Petitioner informed the Court:

> Absent judicial intervention, Petitioner anticipates that the Plan will be terminated and its funds distributed in a manner that will result in current Plan beneficiaries receiving approximately 60% of their accrued benefits and all others receiving nothing.[[16]]

The Receivership Petition stated that ""Petitioner requested that Angell perform analyses of different Plan termination and liquidation scenarios to facilitate an evaluation of options for the Plan and its beneficiaries,"[17] and attached those analyses.

The Receivership Petition labelled the first analysis the "Initial Termination Analysis" and explained its conclusions as follows:

> The Initial Termination Analysis demonstrated that upon an immediate termination of the Plan, **beneficiaries currently receiving benefits would receive a payout of approximately 60% of their accrued benefits** and all other beneficiaries would receive no distributions whatsoever.[[18]]

The Initial Termination Analysis noted that there were 2,724 Plan participants in total, and quantified the "beneficiaries currently receiving benefits" as 1,382 Plan participants, and "all other beneficiaries" as 1,442 Plan participants.[19] Thus, under the Initial Termination Analysis, out of the 2,724 Plan participants, 1,382 would receive *only*

---

[14] Receivership Petition ¶ 10.

[15] Receivership Petition ¶ 10.

[16] Receivership Petition ¶ 20.

[17] Receivership Petition ¶ 11.

[18] Receivership Petition ¶ 12 (emphasis supplied).

[19] Receivership Petition Exhibit 3 at 4.

*60% of their benefits*, and the remaining 1,442 Plan participants would receive *nothing*. In other words, all of the Plan participants would suffer very substantial injuries to their pension benefits.

The Petitioner advised the state court that this was the scenario that would occur "absent court intervention."[20] The Petitioner went on to state, however, that "Petitioner believes that such an outcome represents the least favorable result."[21] As an alternative to immediate termination of the Plan, the Petitioner asked the state court to cut the benefits of *all Plan participants by 40%*, and to permit the Plan to continue *indefinitely*, to enable the Plan to earn investment rates of return.[22]

In support of that recommendation, the Petition attached additional analyses prepared by Defendant Angell as of July 1, 2017, setting forth the effect of such an across-the-board 40% reduction under two different scenarios, 1) if the Plan continued, such that its assets could earn investment rates of return, or 2) plan termination, which would be accomplished by substituting the Plain's obligations for insurance company annuities purchased with the Plan's assets. As to plan continuation, these actuarial calculations concluded that, even with a 40% across-the-board cut in benefits, the minimum annual rate of return on investments that would avoid plan insolvency was 6.66%.[23] In other words, if that rate of return were obtained, all of the Plan participants would suffer an injury at least in the amount of 40% of their original benefits, but a lower

---

[20] See supra at 5 n.16 (quoting Receivership Petition ¶ 20).

[21] Receivership Petition ¶ 12.

[22] First Amended Complaint ("FAC") ¶¶ 54-55.

[23] Receivership Petition Exhibit 3 (actuarial calculations) at 1.

rate of return would necessitate an even greater across-the-board cut in benefits than 40%.

Under the scenario of Plan termination, Angell estimated that if the Plan were restructured by reducing benefits across-the–board by 40%, and the Plan were terminated with annuities purchased at an interest rate of 2.58%, then there were would be sufficient funds to pay only 67% of the benefits (already reduced by 40%) that were due, virtually all (99%) of which would go to existing retirees and fully vested employees, leaving the remaining 1,442 Plan participants with nothing.[24] Once again, all of the Plan participants would suffer grievous injury.

In other words, Defendants SJHSRI and Angell presented no scenario under which all or any of the Plan participants would avoid very significant injuries.

## III. ARGUMENT

### A. The Merits of the Proposed Settlement

Before addressing the Prospect Entities' objections, it is important to put them into the context of this very favorable settlement. In this respect we can do no better than to refer to the Superior Court's analysis in its October 29, 2018 decision, 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 (R.I. Super. Oct. 29, 2018) (the "Decision"), approving the Proposed Settlement.

While the factors applied by the Superior Court in approving the Proposed Settlement were not identical to the Court's inquiry under Fed. R. Civ. P. 23(e) and R.I.

---

[24] Receivership Petition Exhibit 3 (actuarial calculations) at 3.

Gen. Laws § 23-17.14-35, they are similar and certainly relevant. The Superior Court considered the following factors, drawn from the criteria from Jeffrey v. Desmond, 70 F.3d 183, 185 (1st Cir. 1995) to be applied by the bankruptcy court in connection with settlement approval:

> "(i) the probability of success in the litigation being compromised; (ii) the difficulties, if any, to be encountered in the matter of collection; (iii) the complexity of the litigation involved, and the expense, inconvenience and delay attending it; and, (iv) the paramount interest of the creditors and a proper deference to their reasonable views in the premise."

Decision at *4 (quoting In re Yacovi, 411 F. App'x 342, 346 (1st Cir. 2011) (citing Jeffrey, supra, 70 F.3d at 185).

The Superior Court described the evaluation of the first factor, concerning probability of success, as typically requiring "balancing of strengths and weaknesses of the Receiver's underlying claims to assess whether they raise a 'serious question' [regarding the merits of the Receiver's claims]." Decision at *12 (quoting In re Anolik, 107 B.R. 426, 430 (Bankr. D. Mass. 1989)). The Superior Court stated in connection with this settlement:

> The Court need not even engage in the typical balancing of strengths and weaknesses of the Receiver's underlying claims to assess whether they raise a "serious question." The PSA[25] presents the rare settlement agreement where the terms are so favorable to the Plan's estate that the Receiver is unlikely to recover a higher sum by proceeding to, and prevailing at, trial. Pursuant to the PSA, the Settling Defendants have agreed to pay to the Receiver 95% of the Settling Defendants' liquid assets in exchange for a release. Further, the PSA obligates the Settling Defendants to seek judicial liquidation with the hope that the remaining, non-liquid assets can be distributed in the Plan's favor. Hence, even assuming this Court was to conclude the Receiver had a 100% chance of

---

[25] Proposed Settlement Agreement.

> prevailing in his claims against the Settling Defendants, in all likelihood, the Receiver could not net a higher sum by proceeding to judgment at trial. The probability factor weighs in favor of approving the PSA.

Decision at *12.

With respect to the second factor, difficulty of collection, the Superior Court was equally categorical in its support of the Proposed Settlement:

> In this case, the difficulty of collection turns in favor of approving the PSA. As explained, the Defendant's ability to pay is a key consideration, and here, the Settling Defendants have a limited pool of assets that will only continue to deteriorate as litigation wears on. *Cf. In re McDonald*, 430 B.R. 5, 12 (Bankr. D. Me. 2010) (expressing concern that the - defendant's own litigation costs might drain her recoverable assets was the litigation to wear on). The PSA obligates the Settling Defendants to remit the bulk of their assets in favor of the Plan's estate and, therefore, it appears every dollar the Settling Defendants spend in continuing to litigate is a dollar less available to the Plan for the ultimate benefit of the Plan's beneficiaries. Stated differently, the Receiver would jeopardize the Plan's recovery by continuing to litigate against the Settling Defendants in lieu of accepting the PSA'S terms. The Settling Defendants' solvency has always been a real and concrete concern, which is why the Settling Defendants entered into the 2014 Sale in the first place. Thus, the collection factor weighs in favor of approving the PSA.

Decision at *13 (footnote omitted).

The Superior Court concluded that the Proposed Settlement also met the third Jeffrey factor, of complexity of litigation,

> Here, the underlying Federal Court Action is highly complex as it involves fourteen related entities, most, if not all, of which were involved in the 2014 Sale. At a minimum, the Federal Court Action presents many of the same complications underlying any multi-party suit. *See In re Anolik*, 107 B.R. at 430. Moreover, much like in *Procto*r, a case which involved a "myriad" of legal issues relating to ERISA, similarly here, the Federal Court Action invokes questions pertaining to ERISA as well as dozens of other complicated counts arising under fraudulent-transfer law. 2009 WL 1271953, at *2. Many of the underlying counts involve allegations of bad intent and issues of first impression, which are necessarily difficult to

> establish. At the very least, the 139-page Complaint filed in the Federal Court Action will take a great deal of time to unwind, and protracted litigation is all but guaranteed. *Cf. In re Servisense.com, Inc.*, 382 F.3d at 72 (citing to "acrimony which was evident during the hearings . . . and which permeated the affidavits" in suspecting litigation costs and complexity were likely to be high). The Federal Court Action's associated complexity suggests settlement via the PSA is an approach that favors the Plan's estate. This way, even if the Receiver is unable to prevail against the remaining non-settling entities, the Receiver ensures some source of recovery for the underfunded Plan.

Decision at *13.

The Superior Court also concluded that the Proposed Settlement was in the interests of the creditors of the Receivership Estate:

> This Court has received no objection to the PSA by any creditors with claims against the Plan, suggesting the PSA does an adequate job of sweeping assets into the Plan's estate for those parties "ultimately entitled to possess [them]." *See Peck*, 2006 WL 3059981, at *5. Moreover this Court has received widespread support of the PSA from the Plan's participants. In particular, Attorney Arlene Violet, lead counsel for over 285 participants in the Plan, stated the PSA "is an excellent first step in attempting to secure additional funds to bolster the [ ] Plan." Similarly, Attorney Jeffrey W. Kasle, representative for over 200 Plan participants, wrote that he "represent[s] wholeheartedly and unequivocally" his support for the PSA. Attorney Christopher Callaci, counsel for about 400 Plan participants, expressed similarly "unwavering support" for the PSA. The creditors' perspective favors approving the PSA for purposes of this proceeding.

Decision at *14.[26] The Superior Court summed up his analysis and conclusion as follows:

> After "canvassing" the issues presented by the PSA, this Court can definitively say that the PSA falls well within a "range of reasonableness,"

---

[26] Attorneys Violet, Kasle, and Callaci, represent Plan participants in the Receivership Proceedings.

> and therefore, the Receiver did not abuse his discretion in entering into the settlement.

Decision at *14.

### B. The Receiver Is the Lawfully Appointed Officer of the State Court With Authority to Assert Claims on Behalf of the Plan

For the sake of good order rather than merit, the first of the Prospect Entities' arguments that needs to be laid to rest is the contention that the Receiver was not lawfully appointed and entitled to administer the Plan, because the state court receivership proceedings are without jurisdiction, and, therefore, "unlawful".

The Prospect Entities make that and similar claims over and over again, such as in the following statements:

> Where there is a dispute over the administration and funding of a plan subject to ERISA, and particularly where fiduciary breach claims and claims of statutory violations predominate, the federal court, and not a state court, has—as a matter of law—exclusive jurisdiction to appoint a receiver. As such, the Receiver and his counsel have improperly settled claims relative to the Plan in state court.
>
> [Prospect Memo. at 4 (footnote omitted)];
>
> As a matter of federal law, the proceedings before the state court have been unlawful because they are preempted.
>
> [Prospect Memo. at 4];
>
> Although the Receiver was appointed by the Rhode Island Superior Court ("Superior Court") to serve as the Plan's "named" fiduciary, he was implicitly tasked with asserting a variety of ERISA-based claims. That placed the Receiver's actions—at least, his actions and conduct as a Plan fiduciary— squarely beyond the jurisdiction of the Superior Court, because ERISA broadly preempts and supersedes all relevant state law and generally strips state courts of their jurisdiction.
>
> [Prospect Memo. at 13];

> The Receiver cannot administer the Plan in state court, given his vigorously-espoused view (which the Prospect Entities share) that the Plan constitutes an ERISA-regulated employee pension benefit plan at least since August 2017 when the Receiver took control of it—and given ERISA's sweeping preemption provision, found in ERISA §514(a) and codified at 29 U.S.C. §1114(a), which ensures that all or virtually all issues involving the administration and funding of an ERISA regulated plan, and the conduct of its fiduciaries and parties-in-interest, are decided based exclusively on federal law, and not state law.
>
> [Prospect Memo. at 15-16 (footnote omitted)]; and
>
> The Receiver's ongoing activities in the Superior Court suggest that he does not appreciate that nothing he has been doing comports with the law.
>
> [Prospect Memo. at 16];

The contrast between these statements and the law is stark. Litigants normally would (and certainly should) refrain from making such serious allegations without solid legal support.

The cases the Prospect Entities cite concerning receiverships are not even slim reeds on which to build very weighty arguments; in fact, they are not even relevant to those claims. They cite only two cases: SEC v. Capital Consultants, LLC, 397 F.3d 733 (9th Cir. 2005) and Cutler v. 65 Security Plan, 831 F. Supp. 1008 (E.D.N.Y. 1993). Prospect Memo. at 17. The case of SEC v. Capital Consultants, LLC involved a federal equity receivership at the request of the Securities and Exchange Commission[27] and the Department of Labor over an ERISA fiduciary that had over $1 billion in client funds under management, based on allegations of disloyal conduct and self-dealing. 397 F.3d at 736. The receivership was not based on any statutory authority under ERISA or

[27] The Court and the Receiver are both familiar with SEC Receiverships. See Securities and Exchange Commission v. Churchville, District of Rhode Island Civ. 1:15-cv-00191-WES-LDA (in which the Court appointed Stephen Del Sesto as Receiver).

otherwise; there was no objection to the receivership; and there was no discussion of state court receivership powers over ERISA plans. In other words, this case supports the principle that, in appropriate circumstances,[28] a federal court has the power to put an ERISA plan into receivership. That is irrelevant here since none of the parties are asking the Court to put the Plan into a federal receivership.

The case of Cutler v. 65 Security Plan is even less supportive of the Prospect Entities' position. It did not even involve an actual receivership; instead the federal district court in *dicta* discussed whether it would have the power to administer an equity receivership over an ERISA benefit plan if the court chose to do so, and concluded that the court would, but that a receivership was unnecessary. Cutler, 831 F. Supp. at 1019. Adding *dicta* supportive of an irrelevant principle hardly advances the Prospect Entities' argument that the state court receivership proceedings are unlawful and that the Receiver has no lawful authority.

On the other hand, the case law that actually addresses the issues concerning state court receiverships over ERISA plans is completely contrary to the Prospect Entities' claims. See, e.g., Trustees of 1199 Nat'l Ben. Fund for Health & Human Serv. Employees v. United Presbyterian Home at Syosset, Inc., No. 01 CIV. 10910 (LMM), 2002 WL 1492133, at *4 (S.D.N.Y. July 11, 2002) (state receivership law is not preempted by ERISA even if it shields the receiver from ERISA liability) ("[T]he Second Circuit has stated that 'state laws of general application that merely impose some burdens on the administration of ERISA plans but are not 'so acute' as to force an

[28] One disqualifying circumstance would be if the ERISA plan was already under a state court receivership and the state court wished to retain jurisdiction. See *infra* at 15-16 (discussing the Princess Lida doctrine).

ERISA plan to adopt certain coverage or to restrict its choice of insurers should not be disturbed.'") (quoting Plumbing Indus. Bd., Plumbing Local Union No. 1 v. E.W. Howell Co., Inc., 126 F.3d 61, 67 (2d Cir. 1997)); Credit Managers Ass'n of Southern California v. Kennesaw Life and Accident Insurance Company, 809 F.2d 617, 626 (9th Cir. 1987) (state court appointed receiver for ERISA fiduciary is also an ERISA fiduciary with standing to assert claims under ERISA against another ERISA fiduciary) ("The fact that both [the Receiver] CMA and Kennesaw could be ERISA fiduciaries provides [the Receiver's] CMA's standing to sue Kennesaw."), subsequent appeal after remand, 25 F.3d 743, 751 (9th Cir. 1994) (ERISA does not preempt state receivership law) ("Because California receivership law has, at most, only a tenuous relationship with the ERISA action, the state law is not preempted.") (citation omitted); Mutual Life Ins. Co. of New York v. Yampol, 840 F.2d 421, 426-27 (7th Cir. 1988) (designee of Illinois Director of Insurance whom state court appointed as liquidator of ERISA plan is an ERISA fiduciary with standing to assert ERISA claims on behalf of the plan, because the Director is an ERISA fiduciary) ("The Director's standing to sue as an ERISA fiduciary does not derive from Illinois statutory authority to bring the suit, but rather from the Director's status as an ERISA fiduciary under the facts of this case.").

Not only is a state-court-appointed receiver of an ERISA plan entitled to assert ERISA claims in federal court, a federal court lacks jurisdiction over the assets of an ERISA plan that have been placed in receivership by a state court. See Goldfine v. U.S., 300 F.2d 260, 263 (1st Cir. 1962) (distinguishing between state court receiverships, with which a federal court cannot interfere, from state court guardianships) ("Appellants invoke the well-settled principle that a federal court cannot

interfere with a state court's prior possession of a *res*…In the case of a receivership, any action against the *res* in another court is necessarily a disturbance.'") (citations omitted); Jacobs v. DeShetler, 465 F.2d 840 (6th Cir. 1972) (receivership) ("It is a well-settled rule that when a State Court has taken possession of or jurisdiction over property in an *in rem* or *quasi in rem* proceeding, the Federal Courts cannot exercise jurisdiction over the same property in such a way as to interfere with the orderly disposition of the litigation by the State Court."); Safeway Trails, Inc. v. Stuyvesant Ins. Co., 211 F. Supp. 227, 237 (M.D.N.C. 1962) ("State courts are as equally free as federal courts from interference with property in their possession. The Supreme Court has consistently upheld state court receiverships first assuming jurisdiction.") (citing Princess Lida of Thurn & Taxis v. Thompson, 305 U.S. 456 (1939)) (other citation omitted).

The prior-exclusive-jurisdiction rule (also known as the Princesss Lida doctrine) applies to ERISA cases, even if the result is that ERISA is never applied. Dailey v. National Hockey League, 987 F.2d 172, 178-179 (3d 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.").

Thus, the fact that ERISA reflects important federal policies does not entitle a federal court to interfere with a state court receivership over an ERISA plan. See Asbestos Workers Local 14 v. Hargrove, No. CIV. A. 93-0728, 1993 WL 183990, at *5 (E.D. Pa. May 25, 1993) (receivership) ("As the earlier discussion of *Dailey* indicated, the Third Circuit dismissed a federal ERISA claim even though the plaintiffs' [ERISA] claims were going to be lost when the case was limited to the Canadian court system under *Princess Lida.* The holding in *Dailey* forecloses the Union's current argument that 'important federal policies and laws' require this Court to exercise its jurisdiction.") (citing Dailey v. National Hockey League, *supra*, 987 F.2d at 176).

These established principles are completely contrary to the Prospect Entities' assertions that (a) the Court should conclude that "the federal court, and not a state court, has—as a matter of law—exclusive jurisdiction to appoint a receiver" (Prospect Memo. at 4); (b) "[a]s a matter of federal law, the proceedings before the state court have been unlawful because they are preempted" (Prospect Memo. at 4); (c) "ERISA broadly preempts and supersedes all relevant state law and generally strips state courts of their jurisdiction" (Prospect Memo. at 13); (d) "[t]he Receiver cannot administer the Plan in state court" (Prospect Memo. at 15-16)]; and (e) "[t]he Receiver's ongoing activities in the Superior Court suggest that he does not appreciate that nothing he has been doing comports with the law" (Prospect Memo. at 16).

Not surprisingly, the Prospect Entities fail to cite[29] a single case in which a federal court commented on the jurisdiction or lack of jurisdiction of a state court over receivership proceedings that preceded federal court involvement. Nevertheless, and

[29] This is one of many arguments for which Prospect Entities cite no authority, relying on *ipse dixit*.

notwithstanding the above-cited case law *confirming* the powers of state court receiverships over ERISA plans, *and* the prior-exclusive-jurisdiction rule,[30] the Prospect Entities would have the Court sit in judgment over the state court, and rule that the state court a) has no jurisdiction over the Plan, b) unlawfully authorized the receiver to assert ERISA claims, c) unlawfully found that the Proposed Settlement was fair and reasonable to the receivership estate, and d) unlawfully directed the Receiver to apply to the Court for settlement approval. This last request is especially bizarre: the Prospect Entities ask the Court to rule that ERISA prevents the state court from directing the Receiver to assert his ERISA claims in this federal court. In fact, the state court and the Receiver have gone to considerable lengths to reserve issues concerning ERISA for this Court to decide.[31]

It should be noted that the Prospect Entities did not object to, much less appeal from, the order appointing the Receiver. See Texas Capital Bank, N.A. v. Dallas Roadster, Ltd., No. 4:13-CV-625, 2015 WL 12910775, at *4 (E.D. Tex. Aug. 5, 2015) (federal district court to which case had been removed refused to reconsider state court order appointing receiver) ("In essence, DR asks the court to re-open a state court order—an order that became final due to DR's failure to appeal that order within the applicable state law deadlines—and retroactively apply federal rules of civil procedure to reconsider that state court order."). They also have participated in the Receivership Proceedings and appeared before the state court on dozens of occasions, and have

---

[30] It is difficult to understand how learned counsel for the Prospect Entities could be unaware of the law.

[31] The state court is entitled to waive its exclusive jurisdiction and defer to the Court. See United States v. Taylor, 284 F. 489, 490 (M. D. Tenn. 1921) ("[P]rior and exclusive jurisdiction over the defendants…is, however, primarily the right of the court itself, and not the personal privilege of the defendants, and may be either insisted upon or waived by that court.").

sought affirmative relief from the state court, even after questioning the state court's jurisdiction as shown in their most recently filed in the state court.[32] However, they have never suggested to the state court, or even reserved their right to contend, that those proceedings were "unlawful" or that the state court lacked jurisdiction.

### C. Plaintiffs Have Article III Standing to Seek Settlement Approval

#### 1. Requirements for Standing

There are three elements to constitutional standing:

> To satisfy the Constitution's restriction of this Court's jurisdiction to "Cases" and "Controversies," Art. III, § 2, a plaintiff must demonstrate constitutional standing. To do so, the plaintiff must show an "injury in fact" that is "fairly traceable" to the defendant's conduct and "that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. ——, 136 S.Ct. 1540, 1547, 194 L.Ed.2d 635 (2016) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992)).

Bank of America Corp. v. City of Miami, Fla., 137 S. Ct. 1296, 1302 (2017). "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" Spokeo, Inc. v. Robins, *supra*, 136 S. Ct. at 1548 (quoting Lujan v. Defenders of Wildlife, *supra*, 504 U.S. at 560). "This does not mean, however, that the **risk of real harm** cannot satisfy the requirement of concreteness." Id. (citation omitted and emphasis supplied).

Although the elements of Article III standing are constant throughout litigation, the standard used to establish these three elements is not constant but becomes

---

[32] Attached hereto as Exhibit 1.

gradually stricter as the parties proceed through the stages of the litigation. In re Deepwater Horizon, 739 F.3d 790, 800 (5th Cir. 2014) ("[T]the elements of Article III standing are constant throughout litigation: injury in fact, the injury's traceability to the defendant's conduct, and the potential for the injury to be redressed by the relief requested. As *Lujan* emphasized, however, the standard used to establish these three elements is not constant but becomes gradually stricter as the parties proceed through "the successive stages of the litigation.") (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61, 112 S.Ct. 2130 (1992)).

In Lewis v. Casey, 518 U.S. 343, 358 (1996), the Supreme Court reaffirmed this formulation:

> Since they are not mere pleading requirements, but rather an indispensable part of the plaintiffs case, each element of standing must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim. In response to a summary judgment motion, however, the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be supported adequately by the evidence adduced at trial.

Lewis v. Casey, *supra*, 518 U.S. at 358.

The standard applicable when issues of standing are raised in connection with a proposed class action settlement while the case is still in the pleadings stage is that the plaintiffs' allegations are accepted as true. See Deepwater Horizon, *supra*, 739 F.3d at 821 (approving class action settlement at pleadings stage) ("As we wrote in *Cole*, 'it is

sufficient for standing purposes that the plaintiffs seek recovery for an economic harm that they **allege** they have suffered,' because we 'assume *arguendo* the merits' of their claims at the Rule 23 stage.") (emphasis in original) (quoting Cole v. General Motors Corp., 484 F.3d 717, 723 (5th Cir. 2007)).

Indeed, in many judicially approved class action settlements, the possibility that at a later stage of the litigation, or on appeal, the plaintiffs may be determined to lack standing is a risk of litigation that justifies the proposed settlement. See, e.g., Zink v. First Niagara Bank, N.A., 206 F. Supp. 3d 810, 817-18 (W.D.N.Y. 2016) (approving class action settlement) ("In my view, under the present state of the law the scales tip slightly (but only slightly) in favor of finding that plaintiff has Article III standing to pursue claims on behalf of himself and the class. However, the substantial possibility that a higher court might eventually rule otherwise, particularly when coupled with the other defenses potentially available to First Niagara, warrants the settlement agreement's significant reduction from full value of the class members' claims."); Edwards v. First Am. Corp., No. CV0703796SJOFFMX, 2016 WL 8999934, at *6 (C.D. Cal. Oct. 4, 2016) (approving class action settlement of claims for violations of the anti-kickback provisions of the federal Real Estate Settlement Procedures Act which caused no harm to plaintiffs) (citing as a substantial litigation risk that favored settlement that "the U.S. Supreme Court has not resolved the issue of whether a plaintiff has Article III standing based on a violation of a federal statute absent financial harm"); Esomonu v. Omnicare, Inc., No. 15-CV-02003-HSG, 2018 WL 3995854, at *6 (N.D. Cal. Aug. 21, 2018) ("Defendant asserts, for example, that Plaintiff and the class members would face risks

in proving Article III standing….The Court finds that the settlement amount, given these risks, weighs in favor of granting preliminary approval.”).

When issues of federal question subject matter jurisdiction are raised in the context of a motion to dismiss, the rule is the court has federal question jurisdiction if the complaint alleges a federal cause of action, regardless even of whether those allegations are sufficient to state a claim. As stated in Carlson v. Principal Fin. Group, 320 F.3d 301 (2d Cir. 2003):

> [T]he question of whether a federal statute supplies a basis for subject matter jurisdiction is separate from, and should be answered prior to, the question of whether the plaintiff can state a claim for relief under that statute. The jurisdictional inquiry is rather straightforward and depends entirely upon the allegations in the complaint: “where the complaint ... is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions later noted, must entertain the suit.” The two exceptions occur “where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.” Thus, in order to sustain federal jurisdiction, the complaint must allege a claim that arises under the Constitution or laws of the United States and that is neither made solely for the purpose of obtaining jurisdiction nor wholly insubstantial and frivolous.”

Carlson, 320 F.3d at 306 (quoting Bell v. Hood, 327 U.S. 678, 681–83 (1946)). Neither of these two exceptions is remotely applicable here. Plaintiffs clearly have stated a claim, but the Court need not even reach that issue since the fact that the complaint clearly seeks recovery under ERISA establishes the Court’s federal question subject matter jurisdiction to approve the Proposed Settlement.

### 2. Plaintiffs Have Standing

The Prospect Entities focus their attack on Plaintiffs' alleged lack of injury in fact, based upon PBGC's alleged guarantee of benefits for certain ERISA plans:

> If the Plan is governed by ERISA, Plaintiffs have no standing to assert the very claims that they are attempting to settle. To the extent PBGC's payment of guaranteed benefits completely satisfies the Plan's obligations to some or all of the Plan's participants and beneficiaries, it would completely eliminate Plaintiffs' ERISA claims against the Prospect Entities, and with it, their standing to pursue those claims (or have the Receiver pursue them). *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) ("injury in fact is a constitutional requirement"); see also *Feather v. SSM Health*, 2018 U.S. Dist. LEXIS 122346, at *9-10 (D. Mo. July 23, 2018) (ERISA claims based on alleged misclassified and underfunded church plan dismissed for lack of standing, where plaintiffs failed to allege imminent risk of unpaid benefits).

Prospect Memo. at 10-11.

Here the Prospect Entities make the same errors they commit in their motion to dismiss,[33] of 1) failing to differentiate between the Receiver's injury in fact and the Plan participants' injuries in fact; 2) consequently ignoring that the Receiver indisputably has the requisite injury in fact based upon his right to recover for injuries to the Plan; and 3) ignoring the test for determining whether participants in defined benefit plans have the requisite individualized harm to recover for misconduct involving the Plan, set forth in LaRue v. DeWolff, Boberg & Associates, Inc., *supra*, and applied by the lower courts. Each of these lacunae must be filled, and support Plaintiffs' standing.

---

[33] Plaintiffs will address these deficiencies in opposition to the motion to dismiss, but they also undermine the Prospect Entities' claim that the proposed settlement should be rejected on grounds of standing. They also are difficult to reconcile with the Prospect Entities' duty of candor to the Court.

### a. The Receiver Has the Requisite Injury in Fact

Insofar as the Plan is governed by ERISA, the Receiver is an ERISA fiduciary. S.E.C. v. Capital Consultants, LLC, 2002 WL 32502450 *4 (D. Or. 2002) ("It is undisputed that the Receiver is an ERISA fiduciary …because he has authority and control over ERISA plan assets…"); Solis v. J.P. Maguire Co. Salary Sav. Plan, No. 11-CV-2904 KAM JMA, 2012 WL 4060569, at *3 n.4 (E.D.N.Y. July 24, 2012) ("The receiver's duties fell within the statutory definition of a fiduciary because the receiver had the power to make decisions affecting plan policy for the duration of his or her appointment."). As an ERISA fiduciary, the Receiver is entitled to sue for injuries to the Plan. See Beta Grp., Inc. v. Steiker, Greenaple, & Croscut, P.C., No. CV 15-213 WES, 2018 WL 461097, at *3 (D.R.I. Jan. 18, 2018) (Smith, C.J.) ("Moreover, Romeo, as a named fiduciary, is expressly permitted to assert claims for losses on behalf of the Plan stemming from fiduciary breaches.") (citing 29 U.S.C. § 1132(a)(2)).

By alleging injuries to the Plan itself, the Receiver meets the requirement for injury in fact. In Nationwide Life Ins. Co. v. Haddock, 460 F. App'x 26, 28 (2d Cir. 2012) (summary order), the Second Circuit held that trustees of an employees' benefit plan covered by ERISA had standing to sue plan fiduciaries (Nationwide) for disgorgement of hidden commissions, notwithstanding that plan participants may not have standing, stating as follows:

> As a preliminary matter, Nationwide argues that plaintiffs lack constitutional standing to seek disgorgement, citing decisions by this Court holding "that an ERISA Plan participant or beneficiary must plead a direct injury in order to assert claims [for monetary relief] on behalf of a Plan." *See, e.g., Central States Se. & Sw. Areas Health & Welfare Fund v. Merck–Medco Managed Care, L.L.C.,* 433 F.3d 181, 200 (2d Cir.2005). Nationwide misreads that line of authority. Plaintiffs are ERISA Plan

> trustees, *not* "Plan participant[s] or beneficiar[ies]." *Id.* Thus, their allegations of injuries to plans resulting from Nationwide's alleged breaches of fiduciary duties are in no sense indirect, and we have no difficulty concluding that plaintiffs have properly pleaded the required injury in fact.

Nationwide, 460 F. App'x at 28. See also Central States Southeast and Southwest Areas Health and Welfare Fund v. Merck-Medco Managed Care, L.L.C., 504 F.3d 229, 243 (2d Cir. 2007) (finding that trustee as fiduciary of employee benefit plan had constitutional standing to sue based on injuries to the plan); Allen v. Bank of America Corporation, 2016 WL 4446373 (S.D.N.Y. 2016) (plan trustees have constitutional standing based upon injury to the plan) (citing Nationwide Life Ins. Co. v. Haddock, 460 F. App'x at 28).

**b. The Individual Named Plaintiffs Have the Requisite Injury in Fact**

The Prospect Entities' claim that the Plan participants lack constitutional standing is also based on the claim that the Plan participants lack injury in fact. However, they inexcusably ignore the standard set by the Supreme Court for proving "individualized harm" to plan participants in the context of defined benefit plans:

> Misconduct by the administrators of a defined benefit plan will not affect an individual's entitlement to a defined benefit **unless it creates or enhances the risk of default by the entire plan.**

LaRue v. DeWolff, Boberg & Associates, Inc., 552 U.S. 248, 255 (2008) (emphasis supplied). See also Spokeo, Inc. v. Robins, *supra*, 136 S. Ct. at 1548) (the requirement of demonstrating a concrete injury "does not mean, however, that the **risk of real harm** cannot satisfy the requirement of concreteness.") (citation omitted and emphasis supplied).

The lower federal courts have embraced the Supreme Court's statement in LaRue v. DeWolff, Boberg & Assocs. as the standard for determining whether participants in defined benefit pension plans have individualized harm sufficient to confer constitutional standing for violations of ERISA. The following cases involving claims by participants in defined benefit plans all rely on and/or quote this statement from LaRue v. DeWolff, Boberg & Assocs.:

- Rollins v. Dignity Health, 2018 WL 4262334 *9 (N.D. Cal. 2018) ("'[A] trustee's misconduct will give rise to Article III standing where the [m]isconduct ... creates or enhances the risk of default by the entire plan.'") (quoting Slack v. Int'l Union of Operating Eng'rs, No. C-13-5001 EMC, 2014 WL 4090383, at *14 (N.D. Cal. Aug. 19, 2014);

- Adedipe v. U.S. Bank, Nat. Ass'n, 62 F. Supp. 3d 879, 891 (D. Minn. 2014) ("In a standing analysis, the import of this alleged increased risk of default can only lie in the concomitant increase in the risk that the participants will not receive the level of benefits they have been promised due to the Plan being inadequately funded at termination.");

- Fox v. McCormick, 20 F. Supp. 3d 133, 141 (D.D.C. 2013) ("[A] a participant in a defined benefit plan can sue trustees for their failure to collect contributions when the participant faces a risk of non-payment of his pension—such as when trustees' dereliction threatens the financial stability of a plan—or when the participant specifically retains a reversionary interest in excess contributions if monies remain after all benefits are paid.");

- Perelman v. Perelman, 919 F. Supp. 2d 512, 518 (E.D. Pa. 2013) ("However, the [third amended complaint]'s claims for monetary relief under § 502(a)(2) require that Jeffrey allege an injury in fact. As a beneficiary to a defined benefit pension plan, he cannot establish standing to sue on behalf of the Plan absent a plausible allegation that the breach of fiduciary duty created or enhanced a risk of default by the entire plan."), aff'd, supra, 793 F.3d at 374 ("By contrast, there is some support for the notion that a participant or beneficiary in a defined benefit plan has suffered an injury sufficient to pursue a claim for 'make-whole' equitable monetary relief under § 502(a) where the fiduciary's alleged misconduct

"creates or enhances the risk of default by the entire plan.") (quoting LaRue v. DeWolff, Boberg & Assocs., Inc.);

- Lee v. Verizon Communications Inc., 954 F. Supp. 2d 486, 497 (N.D. Tex. 2013) ("For defined benefit plans such as the Plan, a decrease in the value of plan assets does not necessarily result in an injury in fact because the benefit amount is fixed regardless of the value of assets in the Plan. '[T]he employer typically bears the entire investment risk and—short of the consequences of plan termination—must cover any underfunding as the result of a shortfall that may occur from the plan's investments.' *Hughes Aircraft*, 525 U.S. at 439, 119 S.Ct. 755. Therefore, a decrease in the amount of plan assets "will not affect an individual's entitlement to a defined benefit unless it creates or enhances the risk of default by the entire plan." (quoting LaRue v. DeWolff, Boberg & Assocs., Inc., 552 U.S. 248, 255, 128 S.Ct. 1020, 169 L.Ed.2d 847 (2008)).

In short, standing for a participant in a defined benefit pension plan governed by ERISA depends upon whether the alleged violations of ERISA resulted in the plan being underfunded. See Adedipe v. U.S. Bank, Nat. Ass'n, supra, 62 F.Supp.3d at 902 n. 8 ("The Court recognizes, as has the Eighth Circuit, that one implication of the standing analysis outlined in *Harley* is that a private cause of action to remedy a fiduciary breach will be available to a participant when a plan is underfunded, but the same participant will have no recourse for the very same misconduct when the plan is overfunded.") (finding plan participant standing because alleged ERISA violations resulted in substantial underfunding) (citing Harley v. Zoesch, 413 F.3d 866, 871, 908 n.5 (8th Cir. 2005)).

#### c. PGBC Is Irrelevant to Plaintiffs' Standing

Plaintiffs address below the Prospect Entities' request that PBGC be made a party to this litigation.[34] However, the Prospect Entities also rely on the role of PBGC to support their claim that Plaintiffs lack constitutional standing. The Prospect Entities argue that Plaintiffs have not alleged an individualized injury in fact because, if ERISA is applicable, then PBGC will take over the Plan and pay the Plan participants the benefits to which they are entitled.

Contrary to these arguments, the existence and role of PBGC have no effect on Plaintiffs' standing, for the following reasons.

##### i. PBGC Is Irrelevant to Standing under LaRue v. DeWolff, Boberg & Associates, Inc.

Under the test stated in LaRue v. DeWolff, Boberg & Associates, Inc., as applied by the lower federal courts, participants in a defined benefit plan satisfy the requirement for injury in fact when the complained-of ERISA violation "creates or enhances the risk of default by the entire plan." LaRue, 552 U.S. at 255. The Supreme Court did not create a separate test or make an exception for defined benefit plans which are covered by a PBGC guarantee. Such an exception would have swallowed the rule, since LaRue was an ERISA case, and virtually all defined benefit plans covered by ERISA are also covered by a PBGC guarantee. Accordingly, the role of PBGC is irrelevant to Plaintiffs' standing.

[34] As discussed below, Plaintiffs through Washington counsel have provided PBGC with all of the filings in this and the related cases, and met with PBGC. PBGC has not chosen to intervene.

#### ii. PBGC Is Especially Irrelevant to the Receiver's Claims

As previously noted, the Receiver's standing, including injury in fact, is satisfied by allegations of injury to the Plan. The Plan is a juridical entity, not merely a means of providing benefits to plan participants. Pickett v. Cigna Healthplan of Texas, Inc., 742 F. Supp. 946 S.D. Tex. 1990) ("It [the plan] is a juridical entity separate and distinct from the providers of the plan's services and from the plan's trustees.") (citing 29 U.S.C. § 1132(g)(1) ("An employee benefit plan may sue or be sued under this subchapter as an entity.")). See also Pressroom Unions-Printers League Income Sec. Fund v. Continental Assur. Co., 700 F.2d 889, 893 (2d Cir. 1983) ("Subsection (d)(1) [of 29 U.S.C. § 1132] only establishes the right of employee benefit plans created by ERISA to sue and be sued like corporations and other legal entities. Without such a provision a pension plan would not be a legally cognizable body."). As such, it can be injured, and the Receiver as an ERISA fiduciary can bring suit to recover damages and other relief for such injuries.

Injuries to the Plan not only do not necessarily result in PBGC involvement; they usually do not involve PBGC. As discussed below, the only circumstance in which PBGC becomes involved with a plan is through *termination of the plan*. Plan termination certainly does not make the plan whole. Upon PBGC's involuntary termination, PBGC takes over the remaining assets of the plan. That also is a clear detriment to the plan.

### iii. What PBGC Is, How It Operates, How It Is Funded, and the Risks That PBGC Itself Is Facing

The Prospect Entities try to persuade the Court that PBGC is a panacea. However, they neglect to address what PBGC is, how it operates, how it is funded, and the risks PBGC itself is facing, all of which make the role of PBGC too speculative to be relevant to the determination of whether the Plan participants have individualized injuries in fact sufficient to confer constitutional standing.

"PBGC is a self-financed federal corporation. **The federal government is not responsible for the agency's liabilities or obligations**." Lee T. Polk, ERISA Practice and Litigation § 10:36 (emphasis supplied). PBGC acts as an insurer, both in funding and function. PBGC's current Mission Statement states in pertinent part as follows:

> The Pension Benefit Guaranty Corporation (PBGC) protects the retirement incomes of more than 40 million American workers in nearly 24,000 private-sector defined benefit pension plans. A defined benefit plan provides a specified monthly benefit at retirement, often based on a combination of salary and years of service. PBGC was created by the Employee Retirement Income Security Act of 1974 to encourage the continuation and maintenance of private-sector defined benefit pension plans, provide timely and uninterrupted payment of pension benefits, and keep pension insurance premiums at a minimum.
>
> **PBGC is not funded by general tax revenues. PBGC collects insurance premiums from employers that sponsor insured pension plans, earns money from investments and receives funds from pension plans it takes over**.

https://www.pbgc.gov/about/who-we-are (emphasis added).

PBGC itself is at risk. The United States Government Accountability Office ("GAO")[35] since 1990 has been reporting on government operations and programs that the GAO considers "high-risk." https://www.gao.gov/highrisk/overview/background. Every two years the GAO publishes a report to Congress that "identifies government operations with greater vulnerabilities to fraud, waste, abuse, and mismanagement or the need for transformation to address economy, efficiency, or effectiveness challenges." GAO 3-17-317 Highlights. The GAO "designated the [PBGC] single-employer program as high risk in July 2003 and added the multiemployer program in January 2009." GAO 3-17-317 at 609.

The latest GOA "High Risk" report, issued in February of 2017, analyzed why PBGC's risk is high, and stated the GAO's conclusions as to "what is to be done," as follows:

> Although Congress and PBGC have taken significant and positive steps to strengthen the agency over the past 3 years, concerns persist related to the multiemployer program and challenges related to PBGC's overall funding structure and governance. While changes were made with passage of MPRA, PBGC officials believe there is a 50 percent chance that the multiemployer program will be insolvent by the year 2025, and after that, the risk of insolvency rises rapidly—reaching 90 percent by 2032. Further, the premium structure for PBGC's single-employer program continues to result in rates that do not align with the risk the agency insures against and the effectiveness of PBGC's board remains hampered by its size and composition.
>
> Moreover, PBGC continues to face the ongoing threat of losses from the termination of underfunded plans, while grappling with a steady decline in

---

[35] See https://www.gao.gov/about ("The U.S. Government Accountability Office (GAO) is an independent, nonpartisan agency that works for Congress. Often called the 'congressional watchdog,' GAO examines how taxpayer dollars are spent and provides Congress and federal agencies with objective, reliable information to help the government save money and work more efficiently.") (accessed January 18, 2019).

> the defined benefit pension system. With each passing year, fewer employers are sponsoring defined benefit plans and the sources of funds to finance future claims are becoming increasingly inadequate. **Absent additional steps to improve PBGC's finances, the long-term financial stability of the agency remain uncertain and the retirement benefits of millions of American workers and retirees could be at risk of dramatic reductions.**

GAO 3-17-317 at 615 (emphasis supplied).

For these "additional steps" to occur, however, *congressional action* would be required. The GAO 2017 report made the following suggestions to Congress:

> To improve the long-term financial stability of both PBGC's insurance programs, Congress should consider:
>
> • authorizing a redesign of PBGC's single employer program premium structure to better align rates with sponsor risk;
>
> • adopting additional changes to PBGC's governance structure—in particular, expanding the composition of its board of directors;
>
> • strengthening funding requirements for plan sponsors as appropriate given national economic conditions;
>
> • working with PBGC to develop a strategy for funding PBGC claims over the long term, as the defined benefit pension system continues to decline; and
>
> • enacting additional structural reforms to reinforce and stabilize the multiemployer system that balance the needs and potential sacrifices of contributing employers, participants and the federal government.

GAO 3-17-317 at 615-616. Predicating the Plan participants' welfare on effective future congressional action to stabilize PBGC would be both speculative and risky, to say the least.

**iv. PBGC Guarantee is Predicated on Plan Termination**

PBGC's coverage obligation is set forth in 29 U.S.C. § 1322 as follows:

> Subject to the limitations contained in subsection (b), the corporation shall guarantee, in accordance with this section, the payment of all nonforfeitable benefits (other than benefits becoming nonforfeitable solely on account of the termination of a plan) under a single-employer plan **which terminates at a time when this subchapter applies to it**.

29 U.S.C. § 1322 (emphasis supplied). Thus, the issues of both 1) whether a pension plan's benefits are guaranteed by PBGC, and 2) the amount of that guarantee, are to be determined *at the time the plan is terminated*.

Accordingly, the PBGC guarantee is "plan termination insurance." 29 U.S.C. § 1001(c) ("It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring **plan termination insurance**.") (emphasis supplied). See United Food and Commercial Workers Union-Employer Pension Fund v. Rubber Associates, Inc., 812 F.3d 521, 525 (6th Cir. 2016) ("With the enactment of ERISA in 1974, Congress created the Pension Benefit Guaranty Corporation ("PBGC") to administer a **plan termination insurance program**.") (citations omitted and emphasis supplied).

However, the Plan has not been terminated, such that the benefits of Plan participants are not currently guaranteed by PBGC, even if it were assumed that the Plan is covered by ERISA. Accordingly, PBGC has no possible present obligation to determine coverage, much less provide insurance to the Plan participants.

**v. PBGC Cannot Be Compelled to Terminate the Plan or Assert a Claim**

PBGC's authority to terminate a pension plan is set forth in 29 U.S.C. § 1342(a), which states in pertinent part as follows:

> (a) Authority to institute proceedings to terminate a plan
>
> The corporation **may** institute proceedings under this section to terminate a plan whenever it determines that—
>
> (1) the plan has not met the minimum funding standard required under section 412 of Title 26, or has been notified by the Secretary of the Treasury that a notice of deficiency under section 6212 of Title 26 has been mailed with respect to the tax imposed under section 4971(a) of Title 26,
>
> (2) the plan will be unable to pay benefits when due,
>
> (3) the reportable event described in section 1343(c)(7) of this title has occurred, or
>
> (4) the possible long-run loss of the corporation with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated.
>
> The corporation **shall** as soon as practicable institute proceedings under this section to terminate a single-employer plan whenever the corporation determines that the plan does not have assets available to pay benefits which are currently due under the terms of the plan.

29 U.S.C. § 1342(a) (emphasis supplied).

The term "may" connotes discretion, especially when used in contraposition to the word "shall." Jama v. Immigration and Customs Enforcement, 543 U.S. 335, 346, 125 S.Ct. 694, 703 (2005) (construing 8 U.S.C. § 1231) ("The word 'may' customarily connotes discretion. That connotation is particularly apt where, as here, 'may' is used in contraposition to the word 'shall'…") (citation omitted). See also Kelly v. United States, 924 F.2d 355, 360 (1st Cir. 1991) (holding that the discretionary function exception

applies when statutory language "interweave[es] imperatives with weaker, precatory verbs and generalities more characteristic of discretion than of mandatory directives"); SESCO Enterprises, LLC ex rel. Schubiger v. United States, No. CIV 10-1470 AET, 2010 WL 4749327, at *3 (D.N.J. Nov. 16, 2010) ("Under established doctrine, mandatory statutory language (e.g. 'shall') supports judicial review while precatory language (e.g. 'may') bespeaks discretion."), vacated and remanded on other grounds, 450 F. App'x 141 (3d Cir. 2011).

Thus, PBGC has discretion when and if it will terminate a plan under 29 U.S.C. § 1342(a) sub-sections (1) – (4), unless PBGC determines "that the plan does not have assets available to pay benefits which are currently due under the terms of the plan," in which case PBGC is required to terminate the plan as soon as practicable.

This construction of the statute is further supported by the language of 29 U.S.C. § 1342(c)(1), which concerns PBGC's commencement of proceedings in the United States District Court to terminate a plan pursuant to its enforcement authority under 29 U.S.C. § 1342(a). 29 U.S.C. § 1342(c)(1) refers to that enforcement authority as sometimes mandatory and at other times discretionary, as follows:

> (1) **If the corporation is required under subsection (a) of this section to commence proceedings under this section with respect to a plan or, after issuing a notice under this section to a plan administrator, has determined that the plan should be terminated, it may**, upon notice to the plan administrator, apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund

29 U.S.C. § 1342(c)(1) (emphasis supplied). The contrast between the statutory language of "the corporation is required," on the one hand, and PBGC "has determined

that the plan should be terminated," on the other hand, illustrates the mandatory/discretionary dichotomy. The two scenarios of 1) PBGC is "required" to commence proceedings to terminate a plan, or 2) PBGC "has determined that the plan should be terminated" confirm that PBGC has discretion when and if it will terminate a plan under sub-sections (1) – (4), unless PBGC determines "that the plan does not have assets available to pay benefits which are currently due under the terms of the plan," in which case PBGC "may" (*i.e.*, if it chooses to) apply to the court for an order requiring termination.

If an agency decision to take enforcement action is discretionary, the agency's decision *not to take such action* is not reviewable by the courts. This issue was discussed extensively by the Supreme Court in Heckler v. Chaney, 470 U.S. 821 (1985), as follows:

> This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion. This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement.
>
> The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. Similar concerns animate the principles of administrative law that courts generally will defer to an agency's

> construction of the statute it is charged with implementing, and to the procedures it adopts for implementing that statute.
>
> In addition to these administrative concerns, we note that when an agency refuses to act it generally does not exercise its coercive power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect. Similarly, when an agency does act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers. Finally, we recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict-a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3.

Heckler v. Chaney, *supra*, 470 U.S. at 831-32 (citations omitted). Thus, the general rule is that agency non-enforcement decisions are not judicially reviewable. Baltimore Gas and Elec. Co. v. F.E.R.C., 252 F.3d 456, 459 (D.C. Cir. 2001) ("*Chaney* sets forth the general rule that an agency's decision not to exercise its enforcement authority, or to exercise it in a particular way, is committed to its absolute discretion. Such matters are not subject to judicial review.").

The principle that agency *non-enforcement* is not judicially reviewable applies to PBGC. Thus, it has been held that the decision of PBGC, after it takes over a plan, *not to* assert the Plan's claims against third parties is not judicially reviewable. Paulsen v. CNF Inc., 559 F.3d 1061 (2009) ("Based on the presumption in *Heckler v. Chaney*, 470 U.S. 821, 105 S. Ct. 1649, 84 L.Ed.2d 714 (1985), we hold that PBGC's discretionary decision not to pursue such claims is not subject to judicial review."). Indeed, this principle has been applied to preclude judicial review of PBGC non-enforcement

decisions concerning the *termination* of a defined benefit pension plan. See Becker v. Weinberg Group, Inc. Pension Trust, 473 F.Supp.2d 48 (D.D.C. 2007).

That is especially relevant insofar as the Prospect Entities suggest that PBGC can be compelled to terminate the Plan. In Becker, the court rejected the plan participants' claims that PBGC's non-enforcement decision was unjustifiable, and then provided the following, alternative basis for its refusal to enjoin PBGC:

> Second, even if the Court had found in Plaintiff's favor, the Court lacks jurisdiction to review her claim against PBGC because its decision to exercise its enforcement authority in this area is committed by law to the agency's discretion by law. 5 U.S.C. § 701(a)(2); see *Heckler v. Chaney*, 470 U.S. 821, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985). Under *Chaney*, an agency's decision not to exercise its enforcement authority, or to exercise it in a particular way, is committed to its absolute discretion and is not subject to judicial review. *Balt. Gas & Elec. Co. v. FERC*, 252 F.3d 456, 459 (D.C.Cir.2001) (citing *Chaney*, 470 U.S. at 831, 105 S.Ct. 1649).

Becker v. Weinberg Group, Inc. Pension Trust, *supra*, 473 F. Supp. 2d at 69. The court elaborated on its reasoning as follows:

> PBGC's obligation to issue a notice of noncompliance is triggered only "if it determines" one of the several listed factors applies. This language provides PBGC with a subjective standard whose application cannot be reviewed by this Court.
>
> PBGC's decision not to audit or issue a notice of noncompliance is analogous the exercise of "prosecutorial discretion" discussed in *Chaney*. Its discretion to not act in this case is a "single-shot nonenforcement decision," i.e., "an agency's decision to decline enforcement in the context of an individual case," and is unreviewable.

Becker v. Weinberg Group, Inc. Pension Trust, supra, 473 F. Supp. 2d at 69-70 (quoting Crowley Caribbean Transport, Inc. v. Pena, 37 F.3d 671, 676 (D.C. Cir. 1994)).

The case *sub judice* involves a similar discretionary trigger[36] for PBGC action, set forth in 29 U.S.C. § 1342(c)(1): "(1) If the corporation…**has determined** that the plan **should be terminated**…" (emphasis supplied). The determination whether the plan "should be terminated" is for *PBGC* to make, and the statute provides no criteria a court could employ to evaluate whether PBGC has acted correctly. Accordingly, as in Becker v. Weinberg Group, Inc. Pension Trust, "[t]his language provides PBGC with a subjective standard whose application cannot be reviewed by this Court." Becker, *supra*, 473 F. Supp. 2d at 70. Thus, PBGC's failure to terminate a plan under sub-sections (1) – (4) is not judicially reviewable. Consequently, PBGC could not be required to join this lawsuit as a plaintiff, or compelled to terminate the Plan.

**vi. PBGC's Role is Too Speculative to be Considered**

Although Plaintiffs assert that the Plan is covered by ERISA, Plaintiffs also candidly recognize that it may not be.[37] Defendants' claim that the Plan participants may rely upon PBGC guarantee is based upon certain assumptions of future events: that 1) the Plan will be covered under ERISA at the time is terminated; 2) PBGC's current level of coverage will continue; 3) PBGC will remain in existence in its current

---

[36] The arguably mandatory trigger set forth in 29 U.S.C. § 1342(c)(1), which applies when PBGC determines that a plan is currently failing to pay benefits when due, is not applicable here because the Plan is continuing to make payments when due.

[37] In cases in which the applicability of ERISA is disputed, there is "good reason for alternatively pleading state and federal claims." Coleman v. Standard Life Ins. Co., 288 F. Supp. 2d 1116, 1120 (E.D. Cal. 2003) ("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.").

As discussed below, In addition to asserting alternative state law claims in this case, Plaintiffs have commenced an action in state court that is essentially identical to this case, except that it does not assert any claims under ERISA. That action was commenced in the event the Court determines that ERISA is inapplicable and chooses not to exercise supplementary jurisdiction over Plaintiffs' state law claims. That case is stayed pending the resolution of this case.

form; and 4) PBGC will have the funds necessary to pay the required benefits. All of these assumptions are speculative and problematic.

The consequences for the Plan participants likely will be severe if the Receiver terminates the Plan and there is no PBGC coverage, because any of these assumptions do not materialize or for any other reason. According to the Angell report attached to the Petition for Appointment of a Temporary Receiver, if the Plan were terminated, the current assets of the Plan would be sufficient to fund merely 60% of the benefits due to the approximately 1,300 retirees currently receiving benefits, with nothing for the remaining (approximately 1,440) Plan participants. To protect the Plan participants from that dire outcome, the Receiver has taken the sensible course of maintaining the Plan while taking all possible steps to secure its solvency, including bringing this lawsuit.

It is the speculative nature of future third party payments, including benefit programs, that makes future benefits inadmissible to mitigate damages. Joerg v. State Farm Mut. Auto. Ins. Co., 176 So.3d 1247, 1254 (Fla. 2015) ("[I]t is absolutely speculative to attempt to calculate damage awards based on benefits that a plaintiff has not yet received and may never receive, should either the plaintiff's eligibility or the benefits themselves become insufficient or cease to continue.") (excluding evidence of social legislation benefits to mitigate damages).

Such future benefits are inadmissible even when funded by public revenues. Cates v. Wilson, 361 S.E.2d 734, 739 (N.C. 1987) ("All public programs exist subject to legislative approval. While some programs maintain more stability than others, injured plaintiffs cannot count on their continued availability."). As poetically described in Cates:

> To encourage juries to mitigate damages based on tenuous public resources forces plaintiffs, like the foolish house builder in the parable, to

> rebuild lives on shifting sands. The floods may come, and the winds blow, and great will be the fall.

Id.

As noted above, PBGC is dependent upon having sufficient income from premiums and other private resources which place it at even higher risk than programs funded from general tax revenues. See GAO 3-17-317 at 615 (“Absent additional steps to improve PBGC’s finances, the long-term financial stability of the agency remain uncertain and the retirement benefits of millions of American workers and retirees could be at risk of dramatic reductions.”).

**vii. At Most, PBGC Would Be a Possible Future Collateral Source**

At most, PBGC is a possible prospective collateral source of recovery for the Plan participants. Accordingly, possible PBGC coverage does not detract from the Plan participants’ injury in fact, because the collateral source rule requires that it be disregarded in determining whether Plaintiffs have constitutional standing.

A “collateral source” is compensation already received by the plaintiff from a different source when this source is collateral to the defendant. Chisholm v. UHP Projects, Inc., 205 F.3d 731, 737 (4th Cir. 2000) (“The ‘collateral source rule’ prevents the defendant from claiming an offset from compensation already received by the plaintiff from a different source when this source is collateral to the defendant.”). Evidence that the injured party has been compensated by a collateral source is prohibited by the collateral source rule. Hartnett v. Reiss S.S. Co., 421 F.2d 1011, 1016 n.3 (2d Cir. 1970) (“The general rule in the federal courts is that the collateral

source rule is applied and defendants cannot show payments of this kind in mitigation.”).

“The collateral source rule readily applies in the ERISA context.” Beta Grp., Inc. v. Steiker, Greenaple, & Croscut, P.C., No. CV 15-213 WES, 2018 WL 461097, at *3 (D.R.I. Jan. 18, 2018) (Smith, C.J.). As the Court held In Beta Group, Inc.,

> The collateral source rule readily applies in the ERISA context. See, e.g., Merriam v. Demoulas, No. 11–10577–RWZ, 2013 WL 2422789, at *3 (D. Mass. June 3, 2013). To this end, courts have recognized that payments made by a fiduciary or plan sponsor to correct errors connected to the operation of an ERISA-governed plan do not rescind or set off fiduciaries' capacity to recover from actual wrongdoers. See Chao v. Merino, 452 F.3d 174, 184–85 (2d Cir. 2006); Merriam, 2013 WL 2422789, at *3; In re State St. Bank & Tr. Co. ERISA Litig., 579 F. Supp. 2d 512, 517 (S.D.N.Y. 2008).

Beta Group, Inc., *supra*, 2018 WL 461097, at *3 (citing Chao v. Merino, 452 F.3d 174, 184–85 (2d Cir. 2006); Merriam v. Demoulas, No. CIV.A. 11-10577-RWZ, 2013 WL 2422789, at *3 (D. Mass. June 3, 2013); In re State St. Bank & Tr. Co. ERISA Litig., 579 F. Supp. 2d 512, 517 (S.D.N.Y. 2008)).

The consequence is that collateral sources of recovery are *not* considered in determining a plaintiff's injury in fact for purposes of constitutional standing. This has been held in a number of ERISA cases, as well as cases outside of ERISA. The ERISA cases include the Court's decision in Beta Group, Inc., *supra*, in which the Court accepted the report and recommendation of Magistrate Judge Almond that applied the collateral source rule to reject the defendants' claims that the plaintiffs had suffered no cognizable injury because they had been fully compensated for their losses. See Beta Group, Inc., 2018 WL 461097, at *3 (“Accordingly, the Court ACCEPTS the R&R (ECF

No. 54) in its entirety and adopts its reasoning and recommendations. "). The Magistrate Judge ruled as follows:

> Thus, the narrow issue before the Court at the dismissal stage is whether the Plan and its Trustee have alleged a cognizable injury. Based on the allegations contained in the Amended Complaint, I find that Plaintiffs have alleged a cognizable injury, and decline to dismiss the Plan and Mr. Romeo as Plaintiffs at this time. In a relatively recent case from the District of Massachusetts, the defendant argued that "even if the collateral source rule is generally applicable in ERISA cases, it should not apply here because it would provide the Plan a double recovery," the District Court rejected that argument, and noted that, "the entire point of the collateral source rule is that a double recovery for the injured plaintiff is better than a windfall for the tortfeasor."

Beta Group, Inc., 2018 WL 461097 *11 (Almond, U.S.M.J.) (quoting Merriam v. Demoulas, 2013 WL 2422789, at *3).

Similarly, Merriam v. Demoulas, *supra*, is another ERISA case in which the court relied upon the collateral source rule and held that plan participants had suffered the constitutionally required injury in fact and were entitled to sue for $46 million in losses to plan assets caused by the plan trustees' breach of fiduciary duty, even though the plan sponsor had reimbursed the plan in full for the loss. Merriam v. Demoulas, *supra*, 2013 WL 2422789, at *3 ("In summary, plaintiffs have suffered a cognizable injury in fact even if they have been made whole by a third party. Their complaint is not subject to dismissal on this basis.").

In re State St. Bank & Tr. Co. ERISA Litig., 579 F. Supp. 2d 512 (S.D.N.Y. 2008) is another ERISA case in which the court held that the plaintiffs' receipt from a third party of full compensation for their losses after filing suit did not deprive the plaintiffs of a "legally cognizable injury." In re State St. Bank & Tr. Co. ERISA Litig., *supra*, 579 F. Supp. 2d at 517 ("The premise of State Street's motions—that an action is necessarily

mooted when a plaintiff's damages are reimbursed—is flawed. Federal courts regularly apply the 'collateral source rule,' which permits a plaintiff to recover damages from a tortfeasor though the plaintiff has already received compensation for its injuries from a third-party and even when such an award would lead to double recovery.").

The collateral source rule applies even if plaintiffs obtain a double recovery as a consequence, because that is preferable to allowing the defendants to gain a windfall by avoiding liability. See Merriam v. Demoulas, *supra*, 2013 WL 2422789, at *3 ("But the entire point of the collateral source rule is that a double recovery for the injured plaintiff is better than a windfall for the tortfeasor.") (citing 22 Am. Jur. 2d Damages § 392). However, there is no risk of double recovery here. There is no scenario under which the Plan participants will receive double benefits. The Plan is, after all, a defined benefit plan, with no provision for payments in excess of the defined benefits. Accordingly, there is even more reason to apply the collateral source rule to exclude consideration of PBGC guarantee.

Our case is similar in that sense to In re State St. Bank & Tr. Co. ERISA Litig., *supra*, in which application of collateral source rule also did not result in a double recovery. That fact made application of the collateral source rule "particularly appropriate" according to the court in In re State Street Bank:

> **In fact, application of the collateral source rule is particularly appropriate in this case**…. Furthermore, because the terms of the Loans require the Plans to repay Prudential the Loan amount from any recovery obtained in this litigation, there is no threat of double recovery in this case.

In re State St. Bank & Tr. Co. ERISA Litig., *supra*, 579 F. Supp. 2d at 518-19 (emphasis supplied).

Moreover, not reducing the Plan participant's recovery for anticipated benefits from PBGC has the additional benefit of preserving PBGC's limited assets to pay benefits to participants in other plans upon default, since to the extent there is recovery from the Defendants, any need for payments from PBGC will be reduced.

These ERISA cases all stand for the proposition that collateral sources of present or future recovery do not affect constitutional standing. The Plan participants' constitutional standing, including specifically their injuries in fact, is not affected by the speculative possibility that someday they may be entitled to coverage by PBGC guarantee.

### D. Settlement Is Proper Before the Court Determines Whether or Not the Plan Is Governed by ERISA

Without citing any supporting case law or other authority, the Prospect Entities argue that "the Court should deny the Joint Motion until the Court has determined . . . whether the Plan is governed by ERISA." Prospect Memo. at 8. According to the Prospect Entities, that is because, if ERISA applies, then:

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

Prospect Memo. at 5. In support of that argument, the Prospect Entities contend that the "Plaintiffs and the Prospect Entities agree that the Plan is subject to ERISA." Prospect Memo. at 9. They make the following additional claim:

> Plaintiffs premise their ERISA claims on the assertion that the Plan, while formerly a nonelecting church plan exempt from ERISA, ceased being a church plan at some point after 2009 and thus became an ERISA-

> regulated pension plan. A fair reading of the Amended Complaint together with ERISA's § statute strongly suggests, at the very least, that the Plan became subject to ERISA when SJHSRI put the Plan into receivership, because at that point, the Plan permanently ceased to be controlled by or associated with any church. Thus, Plaintiffs and the Prospect Entities agree that, since entry of the 2017 state court order appointing the Receiver (or earlier according to Plaintiffs), the Plan has been governed by ERISA. **Because of this, unless the Court rejects the parties' assertions that the Plan is governed by ERISA, the Settlement Agreement should not be considered at least until the Court decides if PBGC is a necessary party.**

Prospect Memo. at 9-10 (emphasis supplied).

However, Parties cannot stipulate to whether a plan is governed by ERISA. Woerner v. Fram Grp. Operations, LLC, 658 F. App'x 90, 94 n.4 (3d Cir. 2016) ("In proceedings before the District Court, the parties stipulated that an ERISA plan, offered by FRAM, existed as of January 1, 2012. The District Court should not have accepted this stipulation as true because the existence of a plan is not a purely factual question but a mixed question of law and fact… Parties are free to stipulate to the 'surrounding circumstances' indicating the existence and terms of an insurance plan, *Shaver v. Siemens Corp.*, 670 F.3d 462, 475 (3d Cir. 2012) (quoting *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982) (en banc)), but they cannot stipulate to the ultimate legal conclusion that the plan is governed by ERISA."). Accordingly, "the parties' assertions that the Plan is governed by ERISA" would not be conclusive.

But that is irrelevant because "the parties" *do not* assert that the "Plan is governed by ERISA." None of the Defendants have answered the complaint, and, therefore, none of the Defendants have admitted or denied Plaintiffs' allegations.

Most importantly, Plaintiffs are entitled to settle their ERISA and other claims against the Settling Parties prior to any determination whether the Plan is governed by

ERISA. The Prospect Entities cite absolutely no authority for the proposition that the Court should deny the Joint Motion until the Court determines whether the Plan is governed by ERISA, and specifically no authority applicable to a church plan case, or, indeed, to any case in which there is a dispute as to whether the subject plan is governed by ERISA. Public policy favors settlement, even in ERISA cases:

> Public policy favors out of court settlements, even in the context of suits arising under ERISA. *Leavitt v. Northwestern Bell Telephone Co.*, 921 F.2d 160, 162 (8th Cir.1990) ("We will not assign to Congress 'the intent of making an unreasonable law [ERISA]—one requiring terminal litigation, rather than favoring settlements as does the general law.' "); *Anita Foundations v. ILGWU National Retirement Fund*, 710 F.Supp. 983 (S.D.N.Y.1989), aff'd, 902 F.2d 185 (2nd Cir.1990) (involving ERISA § 4225; to permit the defendant multi-employer pension plan to avoid the settlement agreement reached with an employer would be to seriously undermine the strong public policy favoring out of court settlements).

John Boettcher Sewer & Excavating Co., Ltd. v. Midwest Operating Engineers Welfare Fund, 803 F. Supp. 1420, 1425 (N.D. Ind. 1992). See Haig, 10 Bus. & Com. Litig. Fed. Cts. § 106:9 (4th ed.) (Disputes under ERISA may — and often should — be settled.") (citations omitted).

Indeed, the public policy in favor of settlement in ERISA cases is so strong that courts will enforce a settlement agreement, notwithstanding that the trial court entered summary judgment for one party after the settlement agreement was reached but before the settlement was presented to the trial court for approval. See In re Syncor ERISA Litigation, 516 F.3d 1095, 1100 (9th Cir. 2008) ("At the time of the settlement, Defendants knew they had dispositive motions pending and chose the certainty of settlement rather than the gamble of a ruling on their motions."). Given that settlements will be upheld even if based upon a compromise of legal issues that have been resolved

by judicial determinations in the case, it would be absurd to require a judicial determination before settlement can be reached.

Insisting upon judicial determination of legal issues prior to settlement ignores the fact that settlements by their very nature are a compromise on legal and/or factual issues. Metlyn Realty Corp. v. Esmark, Inc., 763 F.2d 826, 831-32 (7th Cir. 1985) ("The settlement itself is an exercise in compromise rather than resolution of legal issues. The parties compromise on legal and factual matters, and there could be a very substantial range within which the compromise would be reasonable. There is no 'right' settlement."). Requiring judicial determination of legal or fact issues prior to settlement would fundamentally change the settlement process, from a compromise, into a ratification of a judicial determination.

The Prospect Entities cite no authorities for the proposition that the Court's determination of ERISA status is required before settlement approval. As noted, the Court's federal question subject matter jurisdiction is established by the complaint's assertion of a claim under ERISA, regardless of the merits of that claim. See Carlson v. Principal Fin. Group, 320 F.3d 301 (2d Cir. 2003) ("[T]he question of whether a federal statute supplies a basis for subject matter jurisdiction is separate from, and should be answered prior to, the question of whether the plaintiff can state a claim for relief under that statute."). Indeed, class action settlements have been approved after the trial court dismissed the plaintiffs' complaint for failure to state a claim, and while that dismissal was on appeal. In re Crocs, Inc. Securities Litigation, 306 F.R.D. 672, 679 (D. Co. 2011) (class action settlement in 10(b)(5) securities litigation) (holding that whether securities were subject to Rule 10(b)(5) did not affect subject matter jurisdiction)

("'whether § 10(b) applies to certain conduct is a 'merits' question'") (quoting Absolute Activist Value Master Fund, Ltd. v. Ficeto, 677 F.3d 60, 67 (2d Cir. 2012)).

The Prospect Entities also ignore the many class action settlements that have been approved by federal courts in "church plan" cases, prior to any determination whether or not the plan was a "church plan" and, therefore, prior to any determination whether or not the Plan was governed by ERISA, in which the defendants agreed to pay significant amounts in settlement. None of these settlements would or even could have been approved if there was a requirement that the trial court first determine whether or not the plan in question was a church plan exempt from ERISA.[38]

[38] See, e.g., Hodges v. Bon Secour Health System, Inc., United States District Court, D. Maryland, Civil Action Nos. RDB-16-1079, RDB-16-1150, Dk. 90 (Motion for Settlement attaching settlement agreement providing for payment of $98,000,000, filed before any ruling on whether alleged "church plan" was in fact governed by ERISA), Dk. 117 (Order and Final Judgment approving settlement); Lisser v. Saint Francis Hospital and Medical Center, United States District Court, D. Conn., Civil Action No. 3:15-cv-01113 Dk. 46 (Declaration of Robert Izard in Support of Plaintiffs' Unopposed Motion for Preliminary Settlement Approval of Class Action Settlement, attaching settlement agreement providing for payment of $107,000,000, reached while motions to dismiss on church plan issue were pending); Dk. 61 (Final Judgment Approving Settlement) ("Defendants previously filed a motion to dismiss, arguing that ERISA's statutory text, case law, and administrative agency interpretations all support the conclusion that the Plan is church plan that is exempt from ERISA's requirements… Nonetheless, before the motion to dismiss was fully briefed, the parties agreed to mediation…Following the second meeting on February 18, 2016, the parties successfully reached an agreement-in-principle to settle the case and, at the conclusion of the meeting, signed a term sheet reflecting the material terms of the agreement… The Settlement Agreement provides, in part, that SFH shall contribute a total of $107 million (the "Settlement Amount" or "Settlement Fund") to the Plan over a period of ten years… the Court finds that the proposed settlement is fair, adequate and reasonable."); Nicholson v. Franciscan Missionaries of Our Lady Health System, United States District Court, M.D. La., Civil Action No.: 3:16-cv-00258-SDD-EWD, Dk. 69-2 (Plaintiffs' Memorandum of Law in Support of Preliminary Approval of Class Action Settlement) ("While the Motions to Dismiss were pending, the Parties recognized that it might be possible to resolve the case… The Settlement provides that the Operating Entities will aggregately contribute $125 million to the Plans over the next 5 years.") (emphasis added), Dk. 99 (Final Judgment Approving Settlement)("The Court finds after a hearing and based upon all submissions of the Parties and interested persons that the Parties' proposed Settlement is fair, reasonable, and adequate."); Griffith v. Providence Health and Services, United States District Court, W.D. Wa.,Case No. C14-1720-JCC, Dk. 50 (Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement Agreement) ("The monetary consideration provided under this Settlement is substantial, totaling $351.9 million.") (emphasis added), Dk. 69 (Final Judgment Approving Settlement)("Having considered the Settlement, the objections thereto, the parties' briefing, and the relevant record, the Court concludes that the Settlement is fair, reasonable, and adequate.").

### E. The Approval of the Proposed Settlement as a Good Faith Settlement under the Settlement Statute Does Not Conflict with ERISA

The Prospect Entities argue that the Settling Parties are not entitled to request that the Proposed Settlement be approved as a good faith settlement under the Settlement Statute:

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

Prospect Memo. at 4. This argument is completely without merit, for several reasons.[39]

#### 1. The Issue of Whether the Settlement Statute Will Be Enforceable If Plaintiffs Prevail Against the Prospect Entities at Trial Is Not before the Court

The Settling Parties are merely requesting that the Court make a factual finding that the Proposed Settlement is a good faith settlement. That is the only requirement in the Settlement Agreement concerning the Settlement Statute. The Settling Parties are *not* requesting that the Court rule now that the Settlement Statute will apply if Plaintiffs prevail against the non-Settling Defendants. Specifically, the Settling Parties are *not*

[39] The Prospect Entities preemption arguments are addressed in Plaintiffs' Reply Memorandum to the Diocesan Defendants' objection to the Proposed Settlement.

asking the Court to determine now whether 1) the non-settling Defendants will be limited to a *pro tanto* settlement credit, for sums paid by the Settling Defendants, 2) the non-settling Defendants will be entitled to a settlement credit based upon proportionate fault (*pro rata*), or 3) whether the non-Settling Defendants' contribution claims against the Settling Defendants will be barred. The Prospect Entities do not (and could not) contend that ERISA preempts the Court from simply making a factual finding that the Proposed Settlement is a good faith settlement, which will be relevant only in the event that it is later determined that the Settlement Statute applies to the non-Settling Defendants.

The Prospect Entities do contend that ERISA preempts the Settlement Statute from being applied to them, but that issue is not before the Court. The Settlement Statute will only come into play if the Plaintiffs prevail against the non-Settling Parties at trial, and the determination of the degree of fault of the Settling Defendants compared to the non-settling Defendants demonstrates that a *pro rata* settlement credit will be larger than a *pro tan*to settlement credit. Until then, the non-Settling Defendants will have no possible injury from the Settlement Statute. For example, the Settlement Statute may never impact the non-Settling Defendants, because the non-Settling Defendants ultimately also settle with Plaintiffs, because the non-Settling Defendants are found not liable, or because the *pro tanto* settlement credit is greater than the *pro rata* settlement credit such they receive the same settlement credit under the Settlement Statute as they would under Rhode Island's general contribution statute.

In dismissing a premature challenge by Ernst & Young to Rhode Island's 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.

**2. ERISA § 410 Does Not Apply to Settlements**

As quoted above, the Prospect Entities contend that the Settlement Statute conflicts with ERISA § 410 (29 U.S.C. § 1110). However, the Prospect Entities cite no support for the proposition that that statute applies to settlements. In fact, the

established (and, as far as we can determine, uncontradicted) law is that 29 U.S.C. § 1110 only prohibits agreements that *prospectively* diminish the statutory obligations of a fiduciary, not settlements of disputes involving alleged prior fiduciary breaches.

> In our view, a release is not an "agreement or instrument" within the meaning of section 1110(a). Section 1110(a) prohibits agreements that diminish the statutory obligations of a fiduciary. A release, however, does not relieve a fiduciary of any responsibility, obligation, or duty imposed by ERISA; instead, it merely settles a dispute that the fiduciary did not fulfill its responsibility or duty on a given occasion. Indeed, Leavitt recognizes in his brief that section 1110(a) "does not mean ... that whenever there is a claim for breach of fiduciary duty under ERISA, litigation must be continued to its bitter end without hope of legitimate, fair, negotiated compromise." We will not assign to Congress "the intent of making an unreasonable law—one requiring terminal litigation, rather than favoring settlements as does the general law." *Stobnicki v. Textron, Inc.*, 868 F.2d 1460, 1463 (5th Cir. 1989) (ERISA permits settlement of benefit disputes). We conclude section 1110(a) does not bar releases of breach of fiduciary duty claims under ERISA.

Leavitt v. Northwestern Bell Telephone Co., 921 F.2d 160, 161-162 (8th Cir. 1990) (holding that "private settlements of ERISA claims do not compromise the policies underlying ERISA."). See also Howell v. Motorola, Inc., 633 F.3d 552, 561 (7th Cir. 2011) ("Howell argues that the part of the release that purports to cover all claims, past, present, and future, even those that arise from a breach of fiduciary duty, violates this part of the statute. . . . We conclude that Howell has read too much into section 410(a), and that his interpretation would make it impossible, as a practical matter, to settle any ERISA case.") (rejecting argument that 29 U.S.C. § 1110 is applicable to settlements).

### 3. ERISA § 405 Does Not Apply to Settlements

The Prospect Entities' claim that the Settlement Statute conflicts with ERISA § 405 (29 U.S.C. § 1105) is a red herring. That statute refers solely to liability under

ERISA of one fiduciary for the fiduciary breaches of another ERISA fiduciary. Thus, it is a basis to impose liability on co-fiduciaries. However, the Prospect Entities do not cite (and we have not found) a single case in which a court held that this statute somehow controls a settlement of a claim for breach of fiduciary duty.

#### 4. The "Prohibited Transaction Class Exemption" Is Another Red Herring

The Prospect Entities make the following statement, in support of their argument that the Proposed Settlement violates ERISA:

> Second, and again because the Receiver was purporting to bind the Plan (as the fiduciary of an ERISA-regulated plan) to a state law-based settlement with the most culpable of the defendants, some or all of which are or were parties-in-interest to the Plan in a manner designed to shield them from further liability, the Receiver was obliged to consider (and follow) the terms of Prohibited Transaction Class Exemption ("PTCE") 2003-39, 68 Fed. Reg. 75682 (Dec. 31, 2003), as amended by 75 Fed. Reg. 33830 (June 15, 2010) (Class Exemption for Settlement and Release of Certain Claims in Litigation). Indeed, the mere existence of PTCE 2003-39 (as amended) demonstrates the central role ERISA plays not only in the assertion of ERISA-based claims but also in their resolution, particularly those involving the settlement of ERISA claims asserted (or, capable of assertion) against so-called "insiders."

Prospect Memo. at 18-19.

This statement is both obfuscatory jargon and inexcusably misleading. The so-called "PTCE" is an exemption granted by the Secretary of Labor from the list of prohibited transactions set forth in ERISA § 406 (29 U.S.C. § 1106). That statute applies to and prohibits certain transactions between an ERISA plan and a "party-in interest." The term "party-in-interest" is defined at great length and with great detail in 29 U.S.C. § 1002(14). However, the Court need not delve into that definition, because it is clear as a matter of law that even if the Settling Defendants once were "parties in

interest," they ceased to have that capacity when they terminated their connection with the Plan upon the appointment of the Receiver, and, therefore, the Proposed Settlement is not a prohibited transaction. In the words of the Department of Labor:

> In many cases where a plan has brought, or is considering, a lawsuit against a party in interest, the plan will have terminated its relationship with the party, and the party will no longer be party in interest at the time of the settlement. A settlement of the claims against such a party would not constitute a prohibited transaction.

Adoption of Amendment to the Class Exemption for the Release of Claims and Extensions of Credit in Connection With Litigation (PTE 2003-39), 75 FR 33830-01 (June 15, 2010), at *33831. Accordingly, rather than "the mere existence of PTCE 2003-39" (Prospect Memo. at 19) supporting the Prospect Entities' claims that the Proposed Settlement violates ERISA, it further establishes that the Proposed Settlement is *not* prohibited under ERISA.

**5. The Settlement Statute Does Not Prejudice the Non-Settling Parties' Rights under ERISA Because There Is No Right to Contribution under ERISA**

For the reasons previously discussed concerning lack of relevance, and Plaintiffs' arguments concerning prematurity and lack of ripeness in their Reply Memorandum to the Diocesan Defendants, the Court need not and should not decide whether or not there is a right under ERISA for the non-settling Defendants to receive a settlement credit based upon the proportionate fault of the Settling Defendants.

However, Plaintiffs would be remiss to fail to note that the Prospect Entities' arguments in this regard are based upon Second Circuit precedent that is contrary to the law applied by the District Courts in this Circuit and by many other Circuits. The Prospect Entities argue that the determination that the Proposed Settlement is a good

faith settlement under R.I. Gen. Laws § 23-17.14-35, combined with the statement in the Settlement Agreement that the Settling Defendants' proportional fault is slight, somehow conflicts with their alleged right under ERISA to a settlement credit based upon proportionate fault:

> If the Court agrees that ERISA preempts state law, including the Settlement Statute, *and* nevertheless finds that the Prospect Entities are liable to Plaintiffs despite being non-fiduciaries, the Court would be required to conduct a "fairness hearing" and determine whether to bar contribution and/or indemnification claims by the non-settling defendants. In such a case, the Court would apply federal common law in which it may adopt a system of proportional fault in which the liability of a non-settling defendant would be limited to its proportionate share of liability to the plaintiff. Presumably, the collusion engaged in by the Settling Defendants is an effort to increase the liability of the non-settling parties.

Prospect Memo. at 24-25 n.9 (citing Chemung Canal Trust Co. v. Sovran Bank/Maryland, 939 F.2d 12, 16 (2d Cir. 1991) and Masters, Mates & Pilots Pension Plan and IRAP Litig., 957 F.2d 1020 (2d Cir. 1992)).

In those Second Circuit precedents, the court held that under the federal common law applicable to ERISA, a liable fiduciary may be entitled to contribution. However, the Prospect Entities fail to note that these precedents have been criticized and rejected by numerous district and circuit courts outside of the Second Circuit, including on two separate occasions by the United States District Court for the District of Massachusetts, and once by the United States District Court for the District of Puerto Rico. See Travelers Cas. and Sur. Co. of America v. IADA Services, Inc., 497 F.3d 862, 866 (8th Cir. 2007) ("For reasons we explain here, we think the dissenting opinion in *Chemung Canal* and the unanimous panel of the Ninth Circuit in *Kim v. Fujikawa*, 871 F.2d 1427, 1432 (9th Cir.1989), express the better view that a right of contribution is not

available."); Charters v. John Hancock Life Ins. Co., 583 F. Supp. 2d 189, 195 (D. Mass. 2008) ("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.") (citing Great–West Life & Annuity Insurance Co. v. Knudson, 534 U.S. 204, 209, 122 S.Ct. 708 (2002) and State St. Bank & Trust Co. v. Denman Tire Corp., 240 F.3d 83, 89 (1st Cir. 2001)); Anthony v. JetDirect Aviation, Inc., 725 F. Supp. 2d 249, 255 (D. Mass. 2010) ("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*."); Perez-Perez v. Int'l Shipping Agency, Inc., No. CIV. 05-2083 (FAB), 2008 WL 1776405, at *4 (D.P.R. Feb. 7, 2008) ("ERISA did not create a right of contribution for insurer against company that performed administrative and investment services for insurance trust, another fiduciary.").

The consequence of holding that "ERISA does not permit claims for contribution" is that, by definition, the non-settling Defendants' rights of contribution under ERISA would not be prejudiced by application of the Settlement Statute, because they have no such rights.

### F. Settlement Approval Should Not Be Postponed or Denied Pending the Determination of Whether PBGC Is a Necessary party

The Prospect Entities argue that settlement approval should be denied until the Court determines whether PBGC is a necessary party. As discussed below, Plaintiffs through Washington counsel[40] have provided PBGC with all of the filings in this and the related cases. Moreover, Washington counsel, Special Counsel, and the Receiver have

[40] Jeffrey Cohen, Esq. of Bailey & Ehrenberg. Mr. Cohen was previously Chief Counsel of the PBGC.

met with PBGC. As is obvious from the Court's docket, they have not chosen to intervene.

The Prospect Entities cite absolutely no precedent supporting their contention that settlement approval should be denied until the Court determines whether PBGC is a necessary party. They do not even make any argument for compulsory joinder under Fed. R. Civ. P. 19. Accordingly, they have failed to meet their burden. Phoenix Ins. Co. v. Delangis, No. CIV.A. 14-10689-GAO, 2015 WL 1137819, at *2 (D. Mass. Mar. 13, 2015) ("'[T]hose courts of appeals that have addressed the issue all lay the burden upon the defendant. We adopt this standard as our own. Therefore, compulsory joinder or dismissal for failure to join an indispensable party will only be ordered where the movant has carried the burden of producing evidence which shows the nature of the interest possessed by the absentee and that the protection of that interest will be impaired by the absence.") (quoting Weinstein–Bacal v. Wendt–Hughes, 2012 WL 538235, at *3 (D.P.R. Feb. 17, 2012)) (internal quotation marks and citations omitted).

Insofar as that failure alone is insufficient to foreclose the argument, it is clear that PBGC is not a necessary party under any theory the Prospect Entities might espouse.

#### 1. Standards for Compulsory Joinder

Fed. R. Civ. P. 19(a) sets forth the requirements for compulsory joinder:

> (a) Persons Required to Be Joined if Feasible.
>
> (1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> > (i) as a practical matter impair or impede the person's ability to protect the interest; or
> >
> > (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Thus:

> Rule 19(a) is applicable when nonjoinder would have either of the following effects. First, it would prevent complete relief from being accorded among those who are parties to the action or, second, the absentee "claims an interest relating to the subject matter of the action and is so situated" that the nonparty's absence from the action will have a prejudicial effect on that person's ability to protect that interest or will "leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations."

Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 1604 (3d ed. 2018) (citations omitted).

"When making that determination, the court must base its decision on the pleadings as they appear at the time of the proposed joinder…" Id. (citations omitted). Defendants have chosen to file motions to dismiss rather than answer the complaint. Thus, the decision must be based upon the allegations of the complaint, without consideration of Defendants' possible answers thereto, affirmative defenses, counter-claims, cross-claims, or third party claims. See Associated Dry Goods Corp. v. Towers Financial Corp., 920 F.2d 1121, 1124 (2d Cir. 1990) ("It is troubling that the district court reached its conclusion by considering Towers' 'putative answer' and proposed, but not

yet pled, third-party claims. Indeed, it is the general rule that a court considering ‘whether [an] absent person's interest in the litigation is sufficient to satisfy . . . the first sentence of Rule 19(a) . . . must base its decision on the pleadings as they appear at the time of the proposed joinder.’”) (quoting Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 1604).

“A plaintiff ordinarily is free to decide who shall be parties to his lawsuit.” Simpson v. Alaska State Com'n for Human Rights, 608 F.2d 1171, 1174 (9th Cir. 1979). “As a general rule, plaintiffs are entitled to decide who shall be included as parties to a litigation. Thus, compulsory joinder of a party is an exception to the general practice and should be ordered only where significant countervailing considerations make the joinder of particular absentees desirable.” Generadora De Electricidad Del Caribe, Inc. v. Foster Wheeler Corp., 92 F. Supp. 2d 8, 13 (D.P.R. 2000) (citing Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 1602). See also Ford Motor Credit Co. v. Beard, 45 F.R.D. 523, 525 (D.S.C. 1968) (“However, it is within the Court's discretion to determine if one is a necessary party to a suit, and such discretion must take cognizance of the fact that compulsory joinder of parties is an exception to the usual practice which permits plaintiffs to decide who shall become parties to a law suit.”).

Moreover, if the defendant is capable of bringing into the litigation a nonparty whose presence is allegedly required to fully resolve the controversy, and if that nonparty is otherwise capable of intervening, then the burden of bringing in the nonparty is on the defendant and the nonparty, and the nonparty is not subject to compulsory joinder under Rule 19(b). Thunder Basin Coal Co. v. Southwestern Public Service Co., 104 F.3d 1205, 1211 (10th Cir. 1997) (“Underlying the Seventh Circuit's decision is this

proposition: if the defendant is capable of bringing into the litigation a nonparty whose presence is allegedly required to fully resolve the controversy and if that nonparty is otherwise capable of intervening, then the nonparty cannot be considered indispensable under Rule 19(b).") (citing with approval Pasco Int'l (London) Ltd. v. Stenograph Corp., 637 F.2d 496, 503 (7th Cir. 1980)) (other citations omitted).

With respect to the second basis for compulsory joinder, that the absent party "claims an interest relating to the subject of the action," the movant must demonstrate that the absent party *actually* claims an interest, not merely that the absent party *might* claim an interest, or that the movant would be entitled to assert an interest on behalf of the absent party. Peregrine Myanmar Ltd. v. Segal, 89 F.3d 41, 49 (2d Cir. 1996) ("As to the second part of Rule 19(a), Segal's argument fails here if only because the Ministry has not 'claim[ed] an interest relating to the subject of the action.' Segal's attempt to assert on behalf of the Ministry its supposed concern about the dilution of its interest in MAFCO falls outside the language of the rule. It is the absent party that must 'claim an interest.'") (quoting Rule 19(a)(1)(B)).

In short, the absent party is the best judge of its own interests, and its choice not to intervene should not be second guessed without good reason. As the First Circuit stated in U.S. v. San Juan Bay Marina, 239 F.3d 400 (1st Cir. 2001):

> We add that the Commonwealth, well aware of this situation, never moved to intervene, and so it is apparently of the view that its interests either were not at stake or were aligned with those of the United States. Cf. Fed.R.Civ.P. 19(a)(2) (compulsory joinder appropriate where the person "claims an interest" relating to the subject of the action that is threatened by litigation in his absence) (emphasis added). Since its decision to forgo intervention indicates that the Commonwealth does not deem its own interests substantially threatened by the litigation, the court should not second-guess this determination, at least absent special circumstances.

U.S. v. San Juan Bay Marina, 239 F.3d at 406-07.

In addition, for the interest claimed by the absent party to be significant under Rule 19, it must be a "legally protected" interest. U.S. v. San Juan Bay Marina, *supra*, 239 F.3d at 406 ("However, a party is necessary under Rule 19(a) only if they claim a 'legally protected interest' relating to the subject matter of the action.") (citing Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1043 (9th Cir. 1983)). That "interest must be more than a financial stake, and more than speculation about a future event." Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California, 547 F.3d 962, 970 (9th Cir. 2008). "Speculation about the occurrence of a future event ordinarily does not render all parties potentially affected by that future event necessary or indispensable parties under Rule 19." Northrop Corp. v. McDonnell Douglas Corp., *supra*, 705 F.2d at 1046.

Under the mandate of Rule 19, it is only after the movant demonstrates that the absent party "claims an interest relating to the subject matter of the action" under Rule 19(a)(1)(B) that it is even relevant whether non-joinder will "leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest" under Fed. R. Civ. P. 19(a)(1)(B)(i). The latter element depends upon the former. In other words, Rule 19 only protects parties from the risk of inconsistent obligations involving nonparties if the non-parties claim a legally protected interest in the subject matter of the action. If the non-party does not claim a legally protected interest in the subject matter of the action, the risk of inconsistent obligations is not a sufficient predicate for compulsory joinder.

Furthermore, it must be emphasized that Rule 19 refers to "inconsistent obligations" which is a much narrower basis for compulsory joinder than "inconsistent results":

> "Inconsistent obligations" are not, however, the same as inconsistent adjudications or results. Inconsistent obligations occur when a party is unable to comply with one court's order without breaching another court's order concerning the same incident. Inconsistent adjudications or results, by contrast, occur when a defendant successfully defends a claim in one forum, yet loses on another claim arising from the same incident in another forum. ….Unlike a risk of inconsistent obligations, a risk that a defendant who has successfully defended against a party may be found liable to another party in a subsequent action arising from the same incident—i.e., a risk of inconsistent adjudications or results—does not necessitate joinder of all of the parties into one action pursuant to Fed.R.Civ.P. 19(a).

Delgado v. Plaza Las Americas, Inc., 139 F.3d 1, 3 (1st Cir. 1998) (citations omitted).

### 2. Plaintiffs Have No Claim Against PBGC

Plaintiffs cannot be expected to sue PBGC if Plaintiffs presently have no claim against PBGC. Claims against PBGC are controlled by 29 U.S.C. § 1303(h), which states as follows:

> Except with respect to withdrawal liability disputes under part 1 of subtitle E, any person who is a plan sponsor, fiduciary, employer, contributing sponsor, member of a contributing sponsor's controlled group, participant, or beneficiary, **and is adversely affected by any action of the corporation [i.e. PBGC] with respect to a plan** in which such person has an interest, or who is an employee organization representing such a participant or beneficiary so adversely affected for purposes of collective bargaining with respect to such plan, may bring an action against the corporation for appropriate equitable relief in the appropriate court.

29 U.S.C. § 1303(h) (emphasis supplied). PBGC has taken no action with respect to the Plan, adverse or otherwise. Accordingly, PBGC cannot be joined as a Defendant.

### 3. PBGC Cannot Be Made a Compulsory Plaintiff

As discussed, the issues of both 1) whether a pension plan's benefits are guaranteed by PBGC, and 2) the amount of that guarantee, are to be determined *at the time the plan is terminated*. However, the Plan has not been terminated, such that the benefits of Plan participants are not currently guaranteed by PBGC, even if it were assumed that the Plan is covered by ERISA. Accordingly, PBGC has no possible present obligation to determine coverage, much less provide insurance to the Plan participants. Moreover, the PBGC's decision not to join this case is discretionary and non-reviewable under Heckler v. Chaney, *supra*, and its progeny.

### 4. Joinder under Rule 19(a)(1)(A) Is Foreclosed Because Nonjoinder Will Not Prevent Complete Relief Between the Parties

This Court's judgments against Defendants and in favor of Plaintiffs can afford the latter complete relief entirely without the presence of PBGC. In that event, the Plan will have sufficient funds to pay benefits, and PBGC will not be involved either because the Plan will not be terminated, or because, if the Plan is terminated, the Plan will have sufficient funds to meet its termination liabilities without recourse to PBGC guarantee.

### 5. Joinder under Rule 19(a)(1)(B) Is Foreclosed Because PBGC Does Not Claim a Legally Protected Interest

Fed. R. Civ. P. 19(a)(1)(B) states as follows:

> (a) Persons Required to Be Joined if Feasible.
>
> (1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> * * *

> (B) that person claims an interest relating to the subject of the action **and** is so situated that disposing of the action in the person's absence may:
>
> > (i) as a practical matter impair or impede the person's ability to protect the interest; or
> >
> > (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1)(B) (emphasis supplied). Thus, the threshold and essential requirement for joinder under Rule 19(a)(1)(B) is that the person to be joined "claims an interest relating to the subject of the action."

The Receiver through counsel met with PBGC prior to suit, and has provided PBGC, the Department of Labor, and the IRS, with copies of all complaints, as well as all of the filings in this case and the related state court lawsuits. See Declaration of Jeffrey B. Cohen dated January 16, 2019 ("Cohen Dec.") ¶ 4-5. PBGC has not moved to intervene. Accordingly, PBGC does not claim an interest in the subject matter of this action.

PBGC not only does not claim an interest, the failure of PBGC to assert its statutory right of intervention is discretionary and non-reviewable under Heckler v. Chaney, *supra*, and its progeny.

### G. The 15% Transfer to the Receiver Is Not Relevant to Settlement Approval, Unlawful, or Otherwise Improper

#### 1. The Prospect Entities' Objections Are Not Ripe

The Prospect Entities object to the Proposed Settlement on the grounds that it allegedly violates the anti-transfer provisions in the Prospect Chartercare Limited Liability Agreement ("LLC Agreement") between and among CCCB, Prospect East, and

Prospect Chartercare. Specifically they argue that "[t]he Court should not approve the Settlement Agreement because it proposes to transfer CCCB's membership interest in Prospect Chartercare to the Receiver in direct contravention of the LLC Agreement." Prospect Memo. at 26.

The Prospect Entities have raised this objection before, in the Superior Court in opposition to the Receiver's Petition for Settlement Instructions, to which the Receiver replied with a detailed explanation for why the provisions of the Settlement Agreement to which the Prospect Entities object do not violate the LLC Agreement. The Superior Court then rejected the Prospect Entities' objection, on grounds of ripeness:

> Ripeness is the underlying defect with the Prospect Entities' claims: any potential injury to the Prospect Entities depends on future contingent events. *See Gaylor*, 971 A.2d at 614-15. As in [State v.] *McKenna* [512 A.2d 113 (R.I. 1986)] where the Supreme Court held a double jeopardy claim was not ripe for adjudication because the prosecutor had not yet instituted a second prosecution. Similarly, here, the Prospect Entities' claim of future harm is not yet ripe because CCCB has not attempted to exercise any rights in favor of the Receiver. 512 A.2d at 115. This Court understands that the Receiver, if granted Rule 23(e) approval by the federal court, might request that CCCB exercise the put, for instance. However, for strategic reasons, the Receiver might choose not to do so. Further, if the Receiver is successful in the Federal Court Action in asserting that PCC [Prospect Chartercare] received the subject assets in a "fraudulent transfer," then the base of assets under PCC's charge may change significantly—a put option in PCC might have considerably less value. Unless and until the Receiver attempts to enforce any rights in PCC (through CCCB), this Court does not "have the luxury of rendering advisory opinions" whereas here, the points "are of an academic nature only." *See Blue Cross of Rhode Island v. Cannon*, 589 F. Supp. 1483, 1494 (D.R.I. 1984) ("In the absence of a dispute ripe for adjudication in the legal sense, these itches cannot be scratched by this court."). The Prospect Entities have not suffered formal legal prejudice that would justify this Court engaging in the non-traditional task of dissecting a settlement agreement like the PSA.

Decision at *9.

In their memorandum before this Court, however, the Prospect Entities fail to address either the Receiver's arguments as to why the Settlement Agreement does not violate the LLC Agreement, or the Superior Court's Decision denying the Prospect Entities' objection. They do not even mention ripeness. In other words, they proceed as if this issue were being addressed on a clean slate.

As a result, neither the Receiver nor the Court is favored with an explanation as to how or why the Receiver's arguments as to why the Settlement Agreement does not violate the LLC Agreement, or the Superior Court Decision denying the Prospect Entities' objection on grounds of ripeness, is incorrect. Accordingly, they leave the Receiver no option other than to rely on the reasoning of the Superior Court denying the Prospect Entities' objection on grounds of ripeness.

If the Court agrees that the Prospect Entities' objection should be rejected on grounds of ripeness, then it is unnecessary to address the merits as to why the 15% transfer does not violate the LLC Agreement, and why, even if it did, those restrictions are void based on fraud. Accordingly, the following discussion is offered solely assuming *arguendo* that the Prospect Entities' arguments are not barred on grounds of ripeness.

#### 2. The 15% Transfer to the Receiver Does Not Violate the LLC Agreement

The relevant provisions of the Settlement Agreement and the language of the LLC Agreement must both be addressed for the merits of that argument to be considered by the Court.

The Prospect Entities object to the provisions of the Settlement Agreement that give the Receiver any rights with respect to CCCB's interests in Prospect Chartercare, including especially CCCB's 15% membership interest. Those provisions consist of a definition and certain substantive terms. The definition is as follows:

> d. "CCCB's Hospital Interests" means all of the claims, rights and interests against or in Prospect CharterCare, LLC that CCCB received in connection with the LLC Agreement or subsequently obtained, including but not limited to the 15% membership interest in Prospect CharterCare LLC, and any rights or interests that SJHSRI or RWH may have in connection therewith.

Settlement Agreement ¶ 1(d).

The substantive terms to which the Prospect Entities object state as follows:

> 17. The Settling Defendants warrant and represent that, to their knowledge, CCCB's Hospital Interests stand solely in the name of CCCB, that CCCB has not participated in the amendment or revision of the LLC Agreement from its original terms, and that CCCB has not assigned, transferred, or otherwise limited or encumbered such rights or interests, and that following the execution of the Settlement Agreement, CCCB will not assign, transfer, or otherwise limit or encumber such rights or interests except with the express written consent of the Receiver. The Settling Defendants agree to hold the CCCB Hospital Interests in trust for the Receiver, and that the Receiver will have the full beneficial interests therein.
>
> 18. At the written direction of the Receiver addressed to Counsel for the Settling Defendants at any time the Receiver may choose, provided it is more than five (5) business days after the Effective Date,[41] the Settling Defendants agree that CCCB will exercise the put option referred to in the LLC Agreement as the "CCHP Put Option," (the "Put Option") in accordance with the terms of the LLC Agreement pertaining to said exercise, or as the Receiver may

---

[41] "'Effective Date' means the date upon which the Order Granting Final Settlement Approval is entered." Settlement Agreement ¶ 1(m).

otherwise direct, at such time as the Receiver may elect, and that the Receiver shall participate with CCCB in all matters concerning the exercise of the Put Option, and that the Settling Defendants shall promptly take all steps reasonably requested by the Receiver in connection therewith, and transfer to the Receiver any payment to or on behalf of CCCB for all or any part of the CCCB Hospital Interests, to be disposed of by the Receiver for the benefit of the Plan in accordance with the orders of the court in the Receivership Proceeding, as set forth in paragraph 33 of this Settlement Agreement.

19. The Settling Defendants agree that, in the event that the Receiver decides that CCCB should not exercise the Put Option, or if CCCB attempts to exercise the Put Option but the attempt is rejected, or in the judgment of the Receiver the result of that attempted exercise is not wholly successful, the Receiver may sue in the name of CCCB to collect or otherwise obtain the value of such beneficial interests, and to cooperate in any litigation commenced by the Receiver and to comply with all of the Receiver's reasonable requests to maximize and realize the full value of CCCB's Hospital Interests, subject to any orders of the court in the Liquidation Proceedings concerning CCCB's responsibilities, to be paid to and distributed by the Receiver for the benefit of the Plan in accordance with the orders of the court in the Receivership Proceedings, as set forth in paragraph 33 of this Settlement Agreement.

20. In the event that the Settling Parties are still seeking the Order Granting Final Settlement Approval on June 20, 2019, the Settling Defendants agree to exercise the Put Option upon the request of the Receiver and at such time as the Receiver may select, provided the Settling Defendants shall have no such obligation if the Receiver makes the request after the Court has refused to grant final settlement approval.

* * *

29. In connection with the execution of this Settlement Agreement, the Settling Defendants and the Receiver will execute a security agreement granting to the Receiver a security interest (the "Receiver's Security Interest") in all of their accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods,

> instruments, investment property, letter-or-credit rights, letters of credit, money, and general intangibles (the "Security Agreement") and the UCC-1 Financing Statement attached hereto as Exhibits 19 & 20, respectively, and such other documents as the Settling Parties agree are reasonably necessary to effectuate and perfect the Receiver's Security Interest, to secure the payment of the Initial Lump Sum and the obligations of the Settling Defendants under paragraphs 12, 13, 15, 18, 19, 20, 21, and 26 of this Settlement Agreement.

Settlement Agreement ¶¶ 17-20, 29. Moreover, the Prospect Entities object to the fact that the UCC-1 Financing Statement referred to in paragraph 29 has actually been filed with the Rhode Island Secretary of State.

The Prospect Entities assert that the above-quoted provisions of the Settlement Agreement violate Section 13.1 of the LLC Agreement, which states in pertinent part as follows:

> 13.1 Transfers by Members. **Except as otherwise set forth in this Article XIII**, a Member may not sell, assign (by operation of Law or otherwise), transfer, pledge or hypothecate ("Transfer") all or any part of its interest in the Company (either directly or indirectly through the transfer of the power to control, or to direct or cause the direction of the management and policies of; such Member).

LLC Agreement Article XIII, Section 13.1 (emphasis supplied).

The Receiver concedes, for purposes only of the Joint Motion only, that the paragraphs of the Settlement Agreement to which the Prospect Entities object, taken collectively, might be argued to violate this provision of the LLC Agreement *unless* they were allowed "as otherwise set forth in Article XIII." However, the Receiver makes that concession because it is clear as a matter of law that the paragraphs of the Settlement Agreement to which the Prospect Entities object *are* expressly permitted in Article XIII of the LLC Agreement, which permit transfers to "affiliates" or "successors" of CCCB,

because the Receiver and the Plan come within the definitions set forth in the LLC Agreement for “affiliates” and “successors” of CCCB.

Section 13.2(a)(ii) of Article XIII of the LLC Agreement permits transfers to affiliates:

> 13.2 Permitted Transfers.
>
> (a) Notwithstanding the restriction in Section 13.1, the following Transfers are permitted and shall not be deemed to violate the restrictions contained in Section 13.1:
>
> * * *
>
> (ii) Transfers by a Member to one or more of its Affiliates, or a Transfer by CCHP to CharterCARE Health Partners Foundation (f/k/a St. Joseph Health Services Foundation), any such transferee automatically becoming a Substituted Member;

LLC Agreement Article XIII, Section 13.2(a)(ii). The capitalized word “Affiliate” is a defined term, as follows:

> 1.4 “Affiliate" means, as to the Person in question, any Person that directly or indirectly controls, is controlled by, or is under common control with, the Person in question and successors or assigns of such Person; and the term "control" means possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person whether through ownership of voting securities, by appointment of trustees, directors, and/or officers, by contract or otherwise.

LLC Agreement Article I, Section 1.4.

The determination whether the Receiver and/or the Plan are an “Affiliate” also depends on the definition of the capitalized word “Person”, which the LLC Agreement defines as follows:

> 1.30 "Person" means any individual, partnership, corporation, trust, limited liability company or other entity.

LLC Agreement Article I, Section 1.30.

Applying these defined terms, the Plan is an "Affiliate" of CCCB because CCCB indirectly controlled SJHSRI, which, in turn, directly controlled the Plan, and because the Plan is a "Person" under the contractual definition that an "entity" is a "Person." The transfers from CCCB to the Receiver to which Prospect East objects are transfers to the Plan. In addition, the Order Appointing Permanent Receiver (entered October 27, 2017) expressly provides:

> 3. **The Receiver shall have all powers, authorities, rights and privileges heretofore possessed by the Respondent's plan administrator, officers, directors and managers** under applicable state and federal law, the Plan, as amended, the Trust Agreement, as may have been amended **and/or other agreements** in addition to all powers and authority of a receiver at equity, and all powers conferred upon a receiver by the provisions of RI Rules of Civil Procedure, Rule 66.
>
> [Emphasis supplied]

Thus the rights to receive any transfers under Article XIII of the LLC Agreement were not severed by virtue of SJHSRI's petitioning the Plan into receivership in August 2017. Accordingly, the transfers in the Settlement Agreement of certain of CCCB's rights with respect to its 15% interest in Prospect Chartercare are transfers to an "Affiliate" and, therefore, are "Permitted Transfers' under Article XIII of the LLC Agreement.

This analysis not only is indisputable based on the contract language, it also makes perfect sense and is consistent with the overall intent of the parties to the LLC Agreement that CCCB, if it wished, would be able to transfer its 15% interest to any entity which it indirectly or directly controlled. Moreover, the LLC Agreement was reviewed and approved by both the Attorney General and the Department of Health in connection with their approval of the Conversion, who thereby approved CCCB having the right to transfer its interests to an "Affiliate" as defined in the LLC Agreement.

We need not go further, having already demonstrated that the transfers in the Settlement Agreement to which the Prospect Entities object are "Permitted Transfers" under Article XIII of the LLC Agreement. However, the fact that the Plan is an "Affiliate" of CCCB is not the only reason the Settlement Agreement does not violate the LLC Agreement. The Receiver is also an "affiliate" of CCCB, to whom CCCB's interests in Prospect Chartercare may be transferred pursuant to Article XIII of the LLC Agreement.

The Receiver is an "affiliate" of CCCB for three reasons. The first reason is that the Receiver is the legal representative of the Plan. See Chitex Communication, Inc. v. Kramer, 168 B.R. 587, 590 (S.D. Tex. 1994) (receiver for insolvent corporation has full rights of corporation); Haas v. Sinaloa Explor. & Dev. Co., 152 A. 216, 219 (Del.Ch. 1930) ("receiver stands in the shoes of the debtor"); AG Route Seven P'ship v. United States, 57 Fed. Cl. 521, 534 (2003) ("Here, the FDIC is present as such legal representative of the corporate entity, to wit, as receiver, and has alleged all claims that it perceives the entity can successfully pursue."). Insofar as the Plan is entitled to receive CCCB's 15% interest in Prospect Chartercare as an "affiliate" of CCCB, then the Receiver in his capacity as legal representative of the Plan is entitled to receive CCCB's 15% interest in Prospect Chartercare on behalf of the Plan.

The second reason the Receiver is an "Affiliate' to whom CCCB may transfer its 15% interest is because, under the terms of the LLC Agreement, the "successor" of an "Affiliate" is thereby also an "Affiliate." Under the LLC Agreement, the term "Affiliate" includes the "successors or assigns of" an "Affiliate." LLC Agreement Article I, Section 1.4. As court-appointed Receiver, and as the current Administrator of the Plan, the Receiver is the "successor" Administrator of the Plan, and specifically the "successor" to

SJHSRI, who, until the Receivership Proceedings, completely controlled and was the Administrator of the Plan.

Indeed, the Order appointing the Receiver expressly states that "[t]he Receiver shall have all powers, authorities, rights and privileges heretofore possessed by the **Respondent's plan administrator**"[42] (emphasis supplied). Accordingly, the Receiver is SJHSRI's "successor," and, therefore, an "Affiliate" of CCCB under the definition set forth in the LLC Agreement. That also makes complete sense, even though CCCB does not directly or indirectly control the Receiver, because "successors" typically are not controlled by their predecessors.

Because the term "successor" is not defined in the LLC Agreement, it should be given its plain and ordinary meaning. See Terrien v. Zwit, 648 N.W.2d 602, 613 (Mich. 2002) ("As this Court has repeatedly stated, the fact that a contract does not define a relevant term does not render the contract ambiguous. Rather, if a term is not defined in a contract, we will interpret such term in accordance with its 'commonly used meaning.'") (quoting Henderson v. State Farm Fire & Casualty Co., 460 Mich. 348, 354, 596 N.W.2d 190 (1999)) (additional citation omitted); American Family Life Assur. Co. of Columbus v. Intervoice, Inc., 659 F. Supp. 2d 1271, 1276 (M.D. Ga. 2009) ("Undefined terms in a contract 'are to be given their ordinary and generally accepted meaning unless the [contract] shows that the words were meant in a technical or different sense.'"); Jack v. Paul Revere Life Ins. Co., 982 P.2d 1228, 1234 (Wash. App. 1999) ("Washington law requires us to enforce unambiguous terms in an insurance policy. In

---

[42] See *supra* at 71.

so doing, we view the contract in its entirety and read the policy's terms as an average insured would, giving undefined terms their 'ordinary and common meaning.'").

The common meaning of "successor" would include the Receiver.

> Generally, a successor is "[a] person who succeeds to the office, rights, responsibilities, or place of another." Black's Law Dictionary (9th ed. 2009). The word successor can mean one who is entitled to succeed, or it can mean one who has in fact succeeded.

Holly Woods Ass'n of Residence Owners v. Hiller, 708 S.E.2d 787, 796 (S.C. App. 2011). A receiver by definition is a "legal successor" of the entity in receivership. See U.S. Fire Ins. Co. v. Moseley, 551 S.W.2d 429, 431 (Tex. App. 1976) ("[The] Receiver is a successor of the Debtor for many purposes."); Husers v. Papania, 22 So.2d 755 (La. App. 1942) ("The expression in defining a person in the above section [as] including the successor or representative of an individual, corporation, partnership, association or other organized group, evidently means the **legal successor or representative of these, such as a receiver**, liquidator, executor, administrator, guardian or tutor.") (emphasis supplied).

The third reason the Receiver is an "Affiliate" to whom CCCB could transfer its rights in the 15% interest is, as noted *supra*, the Order Appointing Permanent Receiver expressly provided: "The Receiver shall have all powers, authorities, rights and privileges heretofore possessed by the Respondent's plan administrator, officers, directors and managers under . . . **other agreements** . . . ." Order Appointing Permanent Receiver ¶ 3 (emphasis added). Thus the Receiver possesses all the contract rights SJHSRI (*i.e.* the Plan's administrator) had under the LLC Agreement, including the right to receive transfer of CCCB's 15% interest in Prospect Chartercare as an "Affiliate" of CCCB.

Accordingly, the terms of the Settlement Agreement to which the Prospect Entities object do not in fact violate the LLC Agreement, for at least four reasons: 1) because the Plan is an “Affiliate” of CCCB, 2) because the Receiver is also an “Affiliate” of CCCB since the Receiver is the legal representative of the Plan, 3) because the Receiver himself, as successor administrator to the Plan, is the successor to SJHSRI with reference to the Plan, and therefore also an “Affiliate” of CCCB, and 4) because the order appointing the Receiver gave him SJHSRI’s rights under the LLC Agreement to be transferred CCCB’s interests (including its 15% membership interest) as an “Affiliate” of CCCB.

The Prospect Entities complain especially that the UCC-1s filed to perfect the Receiver’s security interests in the Proposed Settlement violate the anti-transfer provisions of the Plan because they constitute a prohibited “hypothecation.” However, the Receiver and the Plan are “Affiliates” for the reasons previously discussed. The LLC Agreement expressly defines “Transfer” to include hypothecations,[43] and permits transfers between affiliates. Hypothecations between affiliates are permitted because hypothecations are a form of transfer, and transfers between affiliates are permitted. Accordingly, the UCC-1s filed by CCCB with the Rhode Island Secretary of State did not violate the LLC Agreement.

---

[43] See LLC Agreement Article XIII, Section 13.1 (“Transfers by Members. Except as otherwise set forth in this Article XIII, a Member may not sell, assign (by operation of Law or otherwise), transfer, pledge or **hypothecate** ("Transfer")…”) (emphasis supplied).

### 3. The Transfer of CCCB's 15% Interest in Prospect Chartercare to the Receiver Would Not Be a "Conversion" under the HCA

Without any argument, citation to case law or other authority, the Prospect Entities make the following claim:

> The proposed transfer under the Settlement Agreement by CCCB of its fifteen percent membership interest in Prospect Chartercare violates the hospital conversion decision relative to the Hospitals, which is incorporated into the Hospitals' current licensure. Furthermore, the transfer contemplated by the Settlement Agreement of CCCB's fifteen percent interest in Prospect Chartercare implicates Prospect Chartercare's voting authority under the LLC Agreement, and regulatory approval is required from the RIDOH to alter the voting authority of Prospect Chartercare.

Prospect Memo. at 25-26.

However, the Hospital Conversion Act refers to hospitals, and Prospect Chartercare is not itself a hospital. R.I. Gen. Laws § 23-17.14-4(6) refers to a "a change of ownership or control or possession of twenty percent (20%) or greater of the members or voting rights or interests of the hospital or of the assets of the hospital. . ." The term "hospital" is defined in the HCA as "a person or governmental entity licensed in accordance with chapter 17 of this title." R.I. Gen. Laws § 23-17.14-4(4). Prospect Chartercare is not and never has been licensed to operate a hospital.

To the contrary, the hospital licensees in the for-profit operation are Prospect Chartercare St. Joseph (Fatima Hospital) and Prospect Chartercare Roger Williams (Roger Williams Medical Center). Prospect Chartercare is the sole member in those entities, but the Proposed Settlement does not affect Prospect Chartercare's membership in those entities, which remains unchanged at 100%. What it affects is only CCCB's membership interest in Prospect Chartercare. In other words, the

Proposed Settlement has zero effect on "an ownership or membership interest or authority in a hospital, or the assets of a hospital," which is a *sine qua non* for a "conversion" under the HCA. R.I. Gen. Laws § 23-17.14-4(6).

Finally, even if the HCA definition of "hospital" included companies that have membership interests in a hospital (which it simply does not), the LLC Agreement for Prospect Chartercare expressly excludes from the prohibition on transfers any transfers of membership interest to an "Affiliate" of CCCB. Both the Plan and the Receiver are "Affiliates" of CCCB for the reasons discussed above.

**4. The Restrictions on Transfer in the LLC Agreement Are Void**

"It is well established that '[f]raud vitiates all contracts.' " West Davisville Realty Co., LLC v. Alpha Nutrition, Inc., 182 A.3d 46, 51 (R.I. 2018) (quoting Guzman v. Jan–Pro Cleaning Systems, Inc., 839 A.2d 504, 507 (R.I. 2003)). Plaintiffs' Complaint alleges as follows:

> d. Beginning in 2011, SJHSRI and other Defendants put into operation a scheme to transfer SJHSRI's operating assets, cash, and most of its expected future charitable income to entities controlled by SJHSRI's parent company, intending that such assets thereby would be out of reach of a suit by the Plan participants, and then terminate the Plan. This scheme had four key stages:
>
> i. First, in connection with the 2014 Asset Sale, SJHSRI and related entities engaged in the fraudulent transfer of SJHSRI's operating assets to the control of a for-profit limited liability company, leaving SJHSRI with the insolvent pension plan and no operating assets, in return for SJHSRI's parent company getting a 15% stake in the for-profit company that they thought would be safe from the claims of Plan participants, and made fraudulent misstatements and material omissions concerning the Plan to the state

> regulatory agencies whose approval was required for the transfer to go forward.

FAC ¶ 57(d)(i). The First Amended Complaint then extensively describes the fraud, as follows:

> 419. The consideration that Prospect East provided at the closing on or about June 20, 2014 included 15% of the shares of Prospect Chartercare.
>
> 420. The fair market value of that 15% at the time of the asset sale was at least $6,640,000 according to Prospect Chartercare's own audited financials.
>
> 421. The Asset Purchase Agreement had provided that CCCB would receive those shares, as follows:
>
> > Sellers have designated CCHP (the "Seller Member") to be the holder of the units representing the Company's limited liability company memberships on behalf of all Sellers to be issued as partial consideration in respect of the sale by Sellers of the Purchased Assets.
>
> 422. The consideration that the Prospect Entities provided in return for the assets included the undertaking to provide long term working capital of $50,000,000, which conferred a benefit on CCCB as 15% shareholder in the additional amount of $9,479,000, according to Prospect Chartercare's own audited financials.
>
> 423. Thus, notwithstanding that CCCB provided virtually none of the consideration for the transaction, the parties consummated the transaction so that CCCB obtained all of the 15% interest in Prospect Chartercare, totaling a fair market value of at least $15,919,000. SJHSRI and RWH received none of that interest, and, therefore, that valuable asset was not available to satisfy claims of Plan participants, the Plan, or any other creditors of SJHSRI.

FAC ¶¶ 418-423. Insofar as the Receiver prevails on these claims, any restrictions on transfer of CCCB's 15% interest that are set forth in the LLC Agreement would be void and unenforceable, both as the product of fraud, and because they themselves are part

of the fraud of keeping this 15% interest from the creditors of SJHSRI, including the Plan and the Plan participants. Indeed, the Prospect Entities' current effort to use the LLC Agreement to prevent CCCB from transferring its interests to the Receiver is an effort to protect fraud by contract. In other words, the LLC Agreement is a contract between culpable participants in a fraudulent transfer, and the specific terms upon which the Prospect Entities rely purport to prohibit one of the parties to the fraud from transferring rights to a third party, even though the third party is a lawful creditor who has been injured by the transfer.

We do not expect the Court to adjudicate these allegations of fraud in connection with the Joint Motion. Instead, we offer them as further justification for the Court adopting the Superior Court's conclusion that the Prospect Entities' objection is not ripe, and *not* inquiring into the merits concerning the validity of the provisions in the Settlement Agreement which Prospect East claims are either illegal or impair contract rights. See Campbell Investors v. TPSS Acquisition Corp., *supra*, 787 N.E.2d at 82 (refusing to prohibit the receiver from taking an assignment of claims, because "the subject of the assignment agreement, including the promissory note, is extensively intertwined with the allegedly fraudulent conveyances and conversion that the receiver has asserted" against the target of the assigned claims). To do so would turn these proceedings into a full-blown trial on the merits, and discourage settlements that in general are favored by the courts. The Prospect Entities will suffer no prejudice if those issues are left for another day, such as when, for example, the Receiver attempts to enforce these provisions, because until then they have not been injured, and at such time their arguments can be fully heard.

### H. The Statements in the Settlement Agreement to Which the Prospect Entities Object Are Not Collusive

#### 1. "Collusion" Refers to Tortious Or Other Wrongful Conduct, Not Lawful Combined Action

Both the Diocesan Defendants and the Prospect Entities improperly use the term "collusion" in their arguments against the Proposed Settlement being approved as a good faith settlement under the Settlement Act. Rather than twice burdening the Court with Plaintiffs' arguments as to the proper meaning of "collusion," we respectfully ask the Court to refer to Plaintiffs' Reply Memorandum to the Diocesan Defendants for those arguments, which explain why "collusion" refers only to tortious or other wrongful conduct, not lawful combined action.

#### 2. There Is Nothing Objectionable about the Settling Defendants' Agreeing to Undergo a Judicially Supervised Liquidation

The Prospect Entities contend—without any authority whatsoever—that it is inappropriate for the Settling Defendants to agree to undergo a judicially supervised liquidation in the event the Proposed Settlement is approved. See Prospect Memo. at 23 ("The Settling Defendants' apparent uncontested acquiescence to their relinquishment of control over all their assets evidences their collaboration with the Receiver and Special Counsel in negotiating the Settlement Agreement."). There is nothing "wrongful" or "tortious" about that. Plaintiffs hope to obtain additional recoveries in those judicial liquidations. Far from evincing bad faith, the fact that Plaintiffs have been able to require the Settling Defendants to submit to judicial liquidation is actually evidence of the strength of the legal claims the Plaintiffs have brought against them,

and the vigor with which Plaintiffs are attempting to maximize the value of the settlement for the settlement class.

### 3. There Is Nothing Objectionable about the Settling Defendants' Agreeing to Join the Receiver in Seeking Settlement Approval from this Court

Again without citing any authority, the Prospect Entities contend it was collusive for the Settling Defendants to have agreed to the request that this Court certify a settlement class pursuant to Fed. R. Civ. P. 23(b)(1)(B), and argue that "[a]s the Settling Defendants will ultimately be dismissed from the Federal Action if the Settlement Agreement is approved, such requested certification of the plaintiff class is solely to benefit the plaintiffs and prejudice the remaining defendants in this suit." Prospect Memo. at 23. Here the Prospect Entities take the absurd position that settlement provisions are collusive unless all provisions are mutually beneficial, and that any provision which exclusively benefits one of the settling parties is improper or "collusive." Of course, every settlement agreement contains some provisions that solely benefit one side or the other.

In any event, this provision is not solely to benefit Plaintiffs. Class certification pursuant to Fed. R. Civ. P. 23(b)(1)(B) is also very much in the Settling Defendants' interest, since it will ensure that there are no opt-outs, and that the Settling Defendants are released from the claims that all Plan participants might assert. The Settling Defendants would not be settling this lawsuit is they remained subject to the claims of Plan participants.

#### 4. There Is Nothing Objectionable about the Settling Defendants' Acknowledgment That the Plaintiffs' Damages Are Large and That Their Proportionate Fault Is Small

The Settlement Agreement includes the Settling Defendants' acknowledgment in the Settlement Agreement that they are liable at least for breach of contract, and that the Plaintiffs' damages are "at least $125,000,000." That provision is necessary to enable the Receiver to prove his creditor status in connection with asserting claims in the liquidation proceedings for CCCB, SJHSRI, and RWH.[44] Without it, the Receiver would have to independently establish the Settling Defendants' liability. Indeed, if the Settling Defendants had denied liability in the Settlement Agreement (as the Prospect Entities claim they should have), that would have permitted them to contest their liability in the liquidation proceedings and would have frustrated a material term of the Settlement Agreement.

Again without any citing any authority, the Prospect Entities contend that that provision is unfairly prejudicial to the non-settling Defendants. Prospect East's Memo. at 10. That contention proceeds on at least three false premises. First, they contend that "[v]ery few, if any, settlement agreements include an admission of liability and a statement of unproven damages." Prospect Memo. at 23. However, many settlements include confessions of judgment, which go well beyond a mere admission of liability and statement of damages. Second, the amount of the current shortfall, on a termination

---

[44] See Joint Motion Exhibit 1 (Settlement Agreement) ¶ 29 ("The Settling Defendants RWH and CCCB agree that they are liable along with SJHSRI, jointly and severally, for breach of contract to the Plaintiffs and, arguably, on at least some of the other claims Plaintiffs have asserted against the Settling Defendants in the Federal Court Action and the State Court Action, in the amount of damages of at least $125,000,000, and all of the Settling Defendants agree that **such sum less the Gross Settlement Amount Prior to Distribution in the Liquidation Proceedings shall be amount of the Plaintiffs' claims as creditors of the Settling Defendants in the Liquidation Proceedings**.") (emphasis added).

basis, is in fact over $125,000,000, and the Prospect Entities do not even suggest otherwise. Third, the Settling Defendants are entitled to make whatever admissions they wish. The non-settling Defendants are entitled, of course, to deny the amount of damages or, indeed, argue that there are no damages.

Again without citing any authority, the Prospect Entities contend that the provision in the Settlement Agreement, stating that "[t]he Settling Defendants contend" that their proportionate fault is small, is itself collusive:

> A statement by the Settling Defendants that their proportionate fault is "small compared to the proportionate fault of the other defendants" borders on the absurd, is factually incorrect, and is further evidence of collusion. Although this Court would not be bound by the gratuitous, self-serving statements set forth in the Settlement Agreement, in all likelihood the collusive "fault" provisions are intended to influence a future determination by the Court or by a jury of the relative fault of the defendants should such an inquiry be warranted.

See Prospect's Memo. at 23. However, the Settling Defendants have every reason to make that contention, since if, for whatever reason, the Settlement Statute is ultimately found not to limit their liability, the Settling Defendants may face contribution claims in which their proportionate fault will be key. Plaintiffs, on the other hand, are indifferent, since the Settling Defendants' proportionate fault is irrelevant if the Settlement Statute controls, and will have no effect on Plaintiffs' recovery if it does not. See Roberts-Robertson v. Lombardi, 598 A.2d 1380, 1381 (R.I. 1991) ("It is a well-settled doctrine that a plaintiff may recover 100 percent of his or her [share of] damages from a joint tortfeasor who has contributed to the injury in any degree.").

Moreover, the Prospect Entities apply a double standard, arguing that it is both improper for the Settling Defendants to admit liability, and contrary to the facts and

collusive for them to contend that their proportionate fault is small. Thus, it appears likely that if the Settling Defendants had denied liability, the Prospect Entities would be arguing that such denial would have also been collusive. In any event, the Settling Defendants are entitled to include in the Settlement Agreement whatever "contention" they want, but the Prospect Entities are not bound by such statements, as they themselves recognize. 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").

**5. There Is Nothing Objectionable about the Settling Defendants' Agreeing Not to Object to the Receiver's Claims in the *Cy Pres* Proceeding**

Finally, the Prospect Entities contend—without any legal support and through an incorrect misreading of the settlement documents—that the Settling Defendants' agreement *not to object* to the Receiver's claims in the *Cy Pres* proceeding is an agreement "to collude with the Receiver to influence the outcome of the pending *Cy Pres* Proceeding." Prospect Memo. at 25. Of course the Settling Defendants must drop their objections to the Receiver's claims in the 2015 *Cy Pres* proceeding as part of a complete settlement with the Receiver. They are thereby essentially agreeing to step out of the way of Plaintiffs' pursuit of $8,200,000 of their assets that were transferred in that proceeding.[45] Plaintiffs were entitled to demand that. The purpose of the Proposed Settlement is to end all litigation between the Receiver and the Settling Defendants, not

---

[45] Plaintiffs subsequently released their claim against these assets in return for $4,500,000, in a settlement which has already been approved by the state court and is pending approval by the Court.

to have the Plaintiffs litigating with the Settling Defendants in other forums, such as the 2015 *Cy Pres* Proceeding.

## IV. CONCLUSION

The Joint Motion should be granted.

Respectfully submitted,
Plaintiffs,
By their Attorney,

/s/ Max Wistow
Max Wistow, Esq. (#0330)
Stephen P. Sheehan, Esq. (#4030)
Benjamin Ledsham, Esq. (#7956)
WISTOW, SHEEHAN & LOVELEY, PC
61 Weybosset Street
Providence, RI 02903
401-831-2700 (tel.)
mwistow@wistbar.com
spsheehan@wistbar.com
bledsham@wistbar.com

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 Prospect 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:

Andrew R. Dennington, Esq.
Christopher K. Sweeney, Esq.
Russell V. Conn, Esq.
Conn Kavanaugh Rosenthal
Peisch and Ford, LLP
One Federal Street, 15th Floor
Boston, MA 02110
adennington@connkavanaugh.com
csweeney@connkavanaugh.com
rconn@connkavanaugh.com

David A. Wollin, Esq.
Hinckley Allen & Snyder LLP
100 Westminster Street, Suite 1500
Providence, RI 02903-2319
dwollin@hinckleyallen.com

Preston Halperin, Esq.
James G. Atchison, Esq.
Christopher J. Fragomeni, Esq.
Dean J. Wagner, Esq.
Shechtman Halperin Savage, LLP
1080 Main Street
Pawtucket, RI 02860
phalperin@shslawfirm.com
jatchison@shslawfirm.com
cfragomeni@shslawfirm.com
dwagner@shslawfirm.com

Howard Merten, Esq.
Paul M. Kessimian, Esq.
Christopher M. Wildenhain, Esq.
Eugene G. Bernardo, II, Esq.
Partridge Snow & Hahn LLP
40 Westminster Street, Suite 1100
Providence, RI 02903
hm@psh.com
pk@psh.com
cmw@psh.com
egb@psh.com

Steven J. Boyajian, Esq.
Daniel F. Sullivan, Esq.
Robinson & Cole LLP
One Financial Plaza, Suite 1430
Providence, RI 02903
sboyajian@rc.com
dsullivan@rc.com

Robert D. Fine, Esq.
Richard J. Land, Esq.
Chace Ruttenberg & Freedman, LLP
One Park Row, Suite 300
Providence, RI 02903
rfine@crfllp.com
rland@crfllp.com

Joseph V. Cavanagh, III, Esq.
Joseph V. Cavanagh, Jr., Esq.
Blish & Cavanagh LLP
30 Exchange Terrace
Providence, RI 02903
Jvc3@blishcavlaw.com
jvc@blishcavlaw.com
lbd@blishcavlaw.com

David R. Godofsky, Esq.
Emily S. Costin, Esq.
Alston & Bird LLP
950 F. Street NW
Washington, D.C. 20004-1404
david.godofsky@alston.com
emily.costin@alston.com

Ekwan R. Rhow, Esq.
Thomas V. Reichert, Esq.
Bird, Marella, Boxer, Wolpert, Nessim, Drooks,
Licenberg & Rhow, P.C.
1875 Century Park East, 23rd Floor
Los Angeles, CA 90067
erhow@birdmarella.com
treichert@birdmarella.com

W. Mark Russo, Esq.
Ferrucci Russo P.C.
55 Pine Street, 4th Floor
Providence, RI 02903
mrusso@frlawri.com

/s/ Max Wistow

# Exhibit 1

Case Number: PC-2017-3856
Filed in Providence/Bristol County Superior Court
Submitted: 1/2/2019 12:59 PM
Envelope: 1856933
Reviewer: Alexa G.


**HEARING: JANUARY 18, 2019; 9:30 A.M.**

STATE OF RHODE ISLAND SUPERIOR COURT
PROVIDENCE, S.C.

ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND, INC.

vs. C.A. No.: PC-2017-3856

ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND RETIREMENT PLAN, as amended.

**PROSPECT MEDICAL HOLDINGS, INC., PROSPECT EAST HOLDINGS, INC., AND PROSPECT CHARTERCARE, LLC'S MEMORANDUM IN SUPPORT OF THEIR NOTICE OF INTENT TO SUE CHARTERCARE COMMUNITY BOARD, OR IN THE ALTERNATIVE, MOTION FOR RELIEF FROM THE INJUNCTIVE PROVISIONS OF THE PERMANENT RECEIVERSHIP ORDER**

The Prospect Entities[1] bring this motion for two purposes:

1. To provide this Court with notice of their intention to sue Chartercare Community Board f/k/a Chartercare Health Partners ("CCCB")[2] for (i) CCCB's violation of the provisions of the Amended and Restated Limited Liability Company Agreement of Prospect Chartercare, LLC (the "LLC Agreement"), and (ii) contractual indemnity pursuant to the Asset Purchase Agreement ("APA"). While, as addressed below, such Lawsuits should not require leave from this Court before being filed, to the extent necessary, the Prospect Entities seek leave through this motion to file them; and

[1] Prospect Medical Holdings, Inc. ("Prospect Medical"), Prospect East Holdings, Inc. ("Prospect East") and Prospect Chartercare, LLC ("Prospect Chartercare").

[2] Prior to the 2014 Sale, CCHP was an entity with two hospital subsidiaries: Our Lady of Fatima Hospital ("Fatima Hospital") and Roger Williams Hospital ("RWH;" collectively, "the Hospitals"). After the 2014 Sale, CCHP changed its name to CCCB. The terms CCHP and CCCB will be used herein relative to the appropriate point in time (i.e. whether before or after the 2014 Sale).

2. The obtain relief from this Court from the injunctive provisions of the Permanent Receivership Order ("Order") to allow Prospect Chartercare to file—or instruct the Receiver to file—administrative petitions ("Administrative Petitions") with the Rhode Island Attorney General ("RIAG") and Rhode Island Department of Health ("RIDOH") regarding the contemplated change in ownership of Prospect Chartercare as a result of the Receiver's assumption of an interest in CCCB pursuant to the Settlement Agreement between CCCB, the Receiver, and others.

**BACKGROUND FACTS AND PROCEEDINGS**

Prior to 2014, St. Joseph Health Services, Inc. ("SJHSRI") owned and operated Fatima Hospital and, as a benefit to its employees, sponsored the St. Josephs Health Services of Rhode Island Retirement Plan ("the Retirement Plan"). However, over many years, SJHSRI sustained significant financial losses and, as a result, entered into an affiliation agreement ("Affiliation Agreement") to share operational expenses with RWH. As part of the Affiliation Agreement, RWH and SJHSRI organized into subsidiaries of CCHP.

Despite the Affiliation Agreement, CCHP continued to incur significant financial losses and ultimately solicited offers for outside capital from entities that invested in or operated hospitals. Prospect East responded to such solicitation, and in 2014, certain of CCHP's assets were sold ("2014 Sale") for (1) a cash payment of $45 million, (2) a commitment to capital project and network development, and (3) a grant to CCCB of a fifteen percent (15%) ownership interest in a newly-formed limited liability company, Prospect Chartercare, which in turn owned Prospect Chartercare SJHSRI, LLC ("Prospect SJHSRI") and Prospect Chartercare RWMC,

LLC ("Prospect RWMC").[3] The 2014 Sale was expressly conditioned upon any liability for the Retirement Plan remaining with SJHSRI. The RIAG and RIDOH reviewed, evaluated, and approved the 2014 Sale pursuant to the Hospital Conversion Act ("HCA") and the Health Care Facility Licensing Act of Rhode Island ("HLA").

*The Asset Purchase Agreement Excludes the Retirement Plan and Provides for Indemnification*

In connection with the 2014 Sale, SJHSRI, RWH, CCHP, and the Prospect Entities, among others, executed the APA.[4] The APA listed assets that were specifically excluded from the 2014 Sale. Among the "excluded assets" were "any Seller Plans (any and all assets associated therewith or set aside to fund liabilities related thereto), the Retirement Plan[5] and the Retirement Plan Assets[6]." *See* APA at § 2.2(d). The APA also provided that CCHP, RWH, and SJHSRI would indemnify Prospect Medical, Prospect East, and Prospect Chartercare from any liability relating to the Retirement Plan. Specifically, the APA states the following:

> Sellers[7], jointly and severally, shall indemnify, defend and hold harmless Prospect, the Prospect Member, the Company, the Company Subsidiaries and their respective Affiliates, officers, directors, trustees, employees, stockholders, partners, members, agents, representatives, successors and permitted assigns (collectively, the "Company/Prospect Indemnified Persons"), from and against any loss, Liability, claim, damage or expense (including costs of investigation and defense and reasonable attorneys' fees and expenses), whether or not involving a Third-

---

[3] CCCB's fifteen percent interest in Prospect Chartercare was subject to the LLC Agreement. Prospect SJHSRI and Prospect RWMC were entities that owned the Hospitals post-2014 Sale.

[4] The 2014 APA is a public document posted on the RIAG's website at http://www.riag.ri.gov/CivilDivision/OfficeoftheHealthCareAdvocate.php under "Recent HCA Reviews," "CharterCARE/Prospect" and "Public Exhibits" and included thereunder as Exhibit 18.

[5] The APA defines "Retirement Plan" as "the St. Joseph Health Services of Rhode Island Retirement Plan." APA at A-13.

[6] The APA defines "Retirement Plan Assets" as "the assets, cash and investments of the Retirement Plan." APA at A-13.

[7] The APA defines "Sellers" to include CCHP, RWH, and SJHSRI, among others.

> Party Claim (collectively, "Damages"), arising from or in connection with:
>
> [ . . . ]
>
> (c) the Excluded Assets and Excluded Liabilities; and
>
> (d) Sellers' operation of the Business[8] prior to the Closing Date to the extent not contained in the calculation of Final Net Working Capital, including . . . (ii) Liabilities for funding of, or tax or ERISA penalties or any other liabilities with respect to, the Retirement Plan . . . .

APA at § 14.2(d).

*The LLC Agreement Prohibits Transfers of a Member's Interest*

Prospect Chartercare was created as part of the 2014 Sale. Pursuant to the LLC Agreement, Prospect Chartercare has two members: Prospect East and CCCB. The LLC Agreement specifically prohibits a member's ability to transfer its interest in Prospect Chartercare as follows:

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

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

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

*Id.* at § 13.6.

---

[8] "Business" means "the business, operation or ownership of the Facilities and the Purchased Assets." *See* APA at A-2. The "Facilities" means the "Hospitals," which is defined as RWH and Fatima Hospital. *See id.* at A-5, A-7.

Case Number: PC-2017-3856
Filed in Providence/Bristol County Superior Court
Submitted: 1/2/2019 12:59 PM
Envelope: 1856933
Reviewer: Alexa G.


*The Retirement Plan is Placed Into Receivership*

After the 2014 Sale, SJHSRI filed a petition with this Court, requesting that the Court place the Retirement Plan into receivership due to the Retirement Plan's insolvent state ("Receivership Action"). *See St. Joseph Health Services of Rhode Island, Inc. v. St. Joseph Health Services of Rhode Island Retirement Plan,* PC-2017-3856 (R.I. Super. Ct. Aug. 18, 2017). The Court appointed a temporary receiver, and ultimately appointed Stephen Del Sesto as permanent receiver ("Receiver"). The order appointing the Receiver ("Order") provides, in pertinent part, the following:

> That the commencement, prosecution, or continuance of the prosecution, of any action, suit, arbitration proceeding, hearing, or any foreclosure, reclamation or repossession proceeding, both judicial and non-judicial, or any other proceeding, in law, or in equity or under any statute, or otherwise, *against the Respondent or any of its assets or property*, in any Court, agency, tribunal, or elsewhere, or before any arbitrator, or otherwise by any creditor, corporation, partnership or any other entity or person, or the levy of any attachment, execution or other process upon or against any asset or property of the Respondent, or the taking or attempting to take into possession any asset or property in the possession *of the Respondent* or of *which the Respondent has the right to possession*, or the cancellation at any time during the Receivership proceeding herein of any insurance policy, lease or other contract with the Respondent, by any of such parties as aforesaid, other than the Receiver designated as aforesaid, without obtaining prior approval thereof from this Honorable Court, in which connection said Receiver shall be entitled to prior notice and an opportunity to be heard, are hereby restrained and enjoined until further Order of this Court.

(Emphasis added).

*The Receiver Files the Federal Court Action Seeking To Hold the Prospect Entities Liable For the Underfunding of the Retirement Plan*

In June 2018, the Special Counsel that was engaged by the Receiver filed suit on behalf of the Retirement Plan and several of its participants (collectively, "Federal Action Plaintiffs")

against numerous entities, including the Prospect Entities and CCCB, in the United States District Court for the District of Rhode Island ("Federal Action"). *See Stephen Del Sesto v. Prospect Chartercare, LLC, et al*, 1:18-cv-00328-WES-LDA (D.R.I. Jun 18, 2018). Among other things, the Federal Action Plaintiffs allege that the Prospect Entities are liable for a purported underfunding of the Retirement Plan. *See e.g., id.*, ECF No. 60 at ¶ 461.

*The Receiver And CCCB Enter Into A Settlement Agreement That Violates The LLC Agreement*

In September 2018, the Receiver entered into a settlement agreement with CCCB and then filed a Petition for Settlement Instructions ("Settlement Petition") in the Receivership Action, requesting that the Court "approv[e] the Proposed Settlement as in the best interest of the Receivership Estate, the [Retirement] Plan, and the Plan participants," and "authoriz[e] and direct[] the Receiver to proceed with the Proposed Settlement." Attached to the Settlement Petition was the executed settlement agreement ("Settlement Agreement"), which was between the Receiver, the Federal Action Plaintiffs, CCCB, SJHSRI, and RWH.

The Settlement Agreement provides that CCCB will hold its interest in Prospect Chartercare "in trust for the Receiver," and the Receiver "will have the full beneficial interest therein." *See* Settlement Agreement at ¶ 17. It further provides that at the direction of the Receiver, CCCB will exercise the Put Option[9] in the LLC Agreement and remit to the Receiver the proceeds of the Put Option. *See id.* ¶ 18. Additionally, pursuant to the Settlement Agreement, (1) the Receiver has the right to sue in the name of CCCB to collect or otherwise obtain the value of the beneficial interest in Prospect Chartercare; (2) CCCB, upon the

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

Receiver's written demand, must file a petition for its judicial liquidation and follow the request of the Receiver to marshal its assets and oppose claims of creditors; and (3) CCCB will grant a security interest in essentially all its assets, which includes its membership interest in Prospect Chartercare. *See id.* at ¶¶ 19, 24, 29. On September 4, 2018, the Receiver filed a UCC-1, asserting a purported interest in essentially all of CCCB's assets.

*Prospect East Notifies CCCB of the Violation in Anticipation of Bringing Suit*

Because the Settlement Agreement provides for the hypothecation of CCCB's interest in Prospect Chartercare in direct contravention of the provisions of the LLC Agreement, Prospect East sent CCCB a Notice of Dispute letter pursuant to the detailed dispute resolution procedures in the LLC Agreement. The Notice of Dispute letter informed CCCB that the transfer of CCCB's interest in Prospect Chartercare as provided in the Settlement Agreement constituted an ineffective, invalid, and prohibited transfer under the LLC Agreement.

*Prospect Chartercare Files the Administrative Petitions With the Relevant State Regulators*

Prospect Chartercare also filed a Petition for Declaratory Order ("Petition") with the RIAG and RIDOH pursuant to R.I. Gen. Laws § 42-35-8. The Petition sought the following declarations: (1) that the proposed transfer of CCCB's interest in Prospect Chartercare pursuant to the Settlement Agreement violated the HCA, HLA, and is inconsistent with the Final Conversion Decisions and Change in Effective Control Decision (collectively, "Decisions") issued by the RIAG and RIDOH, respectively; (2) that the proposed transfer of CCCB's interest in Prospect Chartercare pursuant to the Settlement Agreement is a conversion under R.I. Gen. Laws § 23-17.14-4(6) of the HCA and is thus not permitted absent approval by the RIAG and RIDOH; (3) that any application filed by the Receiver for review and approval of the Settlement Agreement is barred by the doctrine of administrative finality; and (4) that the Decisions bar any

claim that Prospect Chartercare is liable for the Plan. In connection with the Petition, the Receiver filed a motion for contempt ("Contempt Motion"), requesting that the Court find Prospect Chartercare in contempt of court for violating the Order by initiating an action against the receivership estate.

*The Court Rules on the Receiver's Settlement Petition and Contempt Motion, Leading to This Motion*

After the Court held a hearing on the Settlement Petition, it issued a written decision ("Settlement Decision"), holding, among other things, that the Prospect Entities did not have standing to object to the Settlement Petition; and that the Settlement Agreement was in the best interest of the receivership estate. *See St. Joseph Health Servs. of R.I. v. St. Josephs Health Servs. of R.I. Ret. Plan*, 2018 R.I. Super. LEXIS 94, *25-26 (R.I. Super. Ct. Oct. 29, 2018). Subsequently, the Court issued a written decision on the Contempt Motion ("Contempt Decision"). *St. Joseph Health Servs. of R.I. v. St. Josephs Health Servs. of R.I. Ret. Plan*, 2018 R.I. Super. LEXIS 100, at *17 (R.I. Super. Ct. Nov. 14, 2018). In the Contempt Decision, the Court reserved its decision on contempt, and provided Prospect Chartercare ten days to withdraw the Petition, indicating that Prospect Chartercare should thereafter seek leave of Court to re-file the Petition after notice and hearing. *Id.* Prospect Chartercare thereafter withdrew the Petition, and this motion now follows.

## ARGUMENT

The Prospect Entities raise two separate matters by way of this motion. First, they provide notice to the Court that they intend to sue CCCB in Delaware for (1) its breach of the LLC Agreement by transferring its interest in Prospect Chartercare to the Receiver; and (2) contractual indemnification arising out of the APA, inasmuch as the Receiver has alleged that the Prospect Entities are liable for the Retirement Plan's liabilities. Both of these claims

Case Number: PC-2017-3856
Filed in Providence/Bristol County Superior Court
Submitted: 1/2/2019 12:59 PM
Envelope: 1856933
Reviewer: Alexa G.


(collectively, the "Lawsuits") are founded in contracts between the Prospect Entities and CCCB and should not be deemed subject to the Order. However, to the extent that the Court finds that such lawsuits fall within the scope of the Order, the Prospect Entities seek relief from the Order to bring such lawsuits pursuant to the terms of the underlying contracts. Relief is warranted so that the Prospect Entities may take necessary action to protect their legitimate, contractual interests, and preserve and assert claims that they have against business associates.

As to the Administrative Petitions, the Court should grant Prospect Chartercare relief from the Order to file the Administrative Petitions so that the appropriate regulatory agencies—the RIAG and RIDOH—can determine whether the provisions of the Settlement Agreement—in particular, the transfer of interest from CCCB to the Receiver—comply with the HCA, HLA, and conditions of the Decisions. Prospect Chartercare respectfully requests leave to refile the Administrative Petitions or, in the alternative, asks that the Court direct the Receiver to seek the necessary regulatory input or approval regarding CCCB's transfer of its interest in Prospect Chartercare to the Receiver.

**A. The Order Does Not Prevent the Prospect Entities from Suing CCCB, and the Court's Equitable Jurisdiction Does not Extend to Claims of Creditors of CCCB.**

The Prospect Entities respectfully provide notice to the Court of their intent to initiate the Lawsuits against CCCB. Relief from the Order is not necessary prior to the Prospect Entities filing the Lawsuits because the Order does not prevent the Prospect Entities from suing CCCB, and the Receiver has no standing to request that the Court equitably enjoin the Prospect Entities from suing CCCB. However, to the extent the Court disagrees, the Prospect Entities respectfully request leave to bring such actions, for the reasons addressed below.

*1. The Order does not enjoin suits against CCCB.*

For purposes of the proposed Lawsuits, CCCB's affiliation with the Receiver solely arises out of it holding its interest in Prospect Chartercare in trust for the Receiver. However, simply because CCCB holds an interest in trust for the Receiver does not make CCCB part of the receivership estate and preclude claims by third parties against CCCB.

This Court has held that actions against parties who contract with an entity in receivership do not violate a receivership order enjoining actions against the receivership estate. *See Dulgarian v. Sherman*, 1991 R.I. Super. LEXIS 1, at 4-5 (R.I. Super. Ct. Jan 7, 1991). For instance, in *Dulgarian*, a seller sold a parcel of property ("Property") to a buyer for $459,315, which the buyer financed through (1) a note and mortgage to Atrium Financial Service Corporation ("AFSC"); and (2) a note and mortgage to the seller, which mortgage was junior to AFSC's mortgage. *Id.* at 1. Subsequently, the buyer defaulted on the terms of the note that it gave to the seller, and the seller foreclosed on the property. *Id.* at 1-2. At the time of the foreclosure, AFSC was in receivership, and an order prohibited the commencement or prosecution of any action, suit, or foreclosure against AFSC or its property. *Id.* at 2. The seller filed a lawsuit against the buyer, and sought summary judgment as to the buyer's liability on the note that it gave to the seller. *Id.* In objecting to the seller's motion for summary judgment, the buyer argued that the seller's foreclosure of the Property violated the order enjoining any action against AFSC or its assets. *Id.* at 3. The Court rejected that argument, holding that, while the order staying action against AFSC or its assets "would certainly operate to preclude foreclosure actions by [AFSC's] creditors against property owned by [AFSC], it would not preclude a foreclosure action by [seller] against the property owned by [buyer]." *Id.* at 4. The court noted that "[t]he stay does not affect the creditors of [buyer] merely because [AFSC] holds a first mortgage on the property." *Id.* The Court held that the buyer's argument that the foreclosure

Case Number: PC-2017-3856
Filed in Providence/Bristol County Superior Court
Submitted: 1/2/2019 12:59 PM
Envelope: 1856933
Reviewer: Alexa G.


was invalid because AFSC was in receivership at the time "must fail" because "[t]he stay in the [AFSC] case operated to preclude creditor action against its property interests." *Id.* at 5. Additionally, the Court held that "[t]he foreclosure by [seller], a junior mortgagee of the property . . . had absolutely no effect on [AFSC's] rights or interest in the property" because after a junior mortgage holder forecloses, "the senior mortgage remains on the property and the purchaser takes the property subject to this mortgage." *Id.* at 5. As such, the Court concluded that "[s]ince the [] stay did not operate to preclude [seller's] right of foreclosure against [buyer], and foreclosure of the junior mortgage in no way affected [AFSC's] superior property interest, [buyer's] argument that the foreclosure sale is void must fail. *Id.*

Here, it is wholly undisputed that prior to execution of the Settlement Agreement, disputes between Prospect East and CCCB relating to Prospect Chartercare, the LLC Agreement, or APA would not be part of the receivership estate and would not be subject to the injunctive provisions of the Order. The Settlement Agreement does not change that conclusion. The Settlement Agreement provides that CCCB's interest in Prospect Chartercare is to be held by CCCB "in trust for the Receiver, and that the Receiver will have the beneficial interests therein." Settlement Agreement at ¶ 17. However, CCCB continues to hold the membership interest and thus, continues to carry the contractual and fiduciary obligations and responsibilities thereunder. Moreover, CCCB remains obligated under the APA to indemnify the Prospect Entities. The mere fact that the Receiver claims a beneficial interest in CCCB does not alter the contract rights and obligations of CCCB under the LLC Agreement or APA; CCCB is a legal entity distinct from the Receiver and is governed (1) by the LLC Agreement and the fiduciary obligations arising thereunder; and (2) the APA, which requires CCCB to indemnify the Prospect Entities.

Just as in *Dulgarian*, even though the Receiver has an arguable contingent interest in CCCB, the Prospect Entities suit against CCCB has no effect on the interest that the Receiver holds in CCCB and therefore does not violate the Order. The legal title to the membership in Prospect Chartercare remains with CCCB, and CCCB is thus subject to the terms of the LLC Agreement and the fiduciary obligations arising thereunder. Similarly, CCCB is still an independent entity and subject to the terms of the APA. Accordingly, a dispute between the Prospect Entities and CCCB with regard to the LLC Agreement and the fiduciary obligations arising thereunder, or under the APA, does not change the position of the Receiver. In other words, no matter the outcome of the Prospect Entities claims against CCCB, the Receiver's interest in CCCB will remain. The Receiver's claimed contingent, beneficial interest in CCCB cannot prevent the resolution of disputes between CCCB and third-parties (the Prospect Entities) who are outside of the receivership estate.

Indeed, any other conclusion would be exceedingly strange. The LLC Agreement and the APA place a series of obligations, restrictions and responsibilities on CCCB as a member of Prospect Chartercare. The fact that CCCB has entered into an agreement with the Receiver cannot be seen to void any of those obligations, restrictions or responsibilities. How can it be the case that the Settlement Agreement vitiates a series of contractual responsibilities and limitations? If CCCB begins simply flouting its contractual obligations, is there truly no legal remedy? The Receiver seems to contend exactly that. But, frankly, that is an unsupportable position. It would be an extraordinary exercise of power to hold that the Prospect Entities cannot seek to vindicate their contractual rights based on the actions of others.

Accordingly, the Order does not, and should not, preclude the Prospect Entities from seeking to effectuate their contractual rights pursuant to the LLC Agreement and APA.

Therefore, the Prospect Entities respectfully provide notice to this Court of its intention to initiate a lawsuit against CCCB (1) relative to its breaches of the LLC Agreement; and (2) for indemnification under the APA.

2. *Enjoining the Prospect Entities would constitute an extension of the Court's equitable jurisdiction beyond its limits.*

In the Settlement Decision, this Court ruled that the Prospect Entities lacked standing to challenge provisions of the Settlement Agreement that they found objectionable. However, in rejecting the Prospect Entities' arguments that the Settlement Agreement included provisions that violate the LLC Agreement, the Court acknowledged that the receivership proceeding was "not the appropriate proceeding to unwind the litany of objections the Prospect Entities lodge." *St. Joseph Health Servs. of R.I.*, 2018 R.I. Super. LEXIS 94, at *26. The Court further stated that the "dispute between CCCB and the Prospect Entities belongs in a different proceeding—one where a court can dedicate appropriate judicial resources to resolving that isolated dispute." *Id.* Finding that the Prospect Entities could not contest the objectionable terms of the Settlement Agreement in the receivership proceeding, the Court recognized that the Prospect Entities nevertheless had the right to challenge objectionable terms in another proceeding. *See id.* ("Because the Prospect Entities have no right to contest the terms they find objectionable in this proceeding, they do not waive the right to do so in another"). That other proceeding is exactly what the Prospect Entities seek to initiate following this motion.

And just as the Court ruled that the Prospect Entities have no standing to challenge a contract between the Receiver and CCCB, similarly, the Receiver would have no standing in an action for CCCB's breach of contracts that it had with third parties. The LLC Agreement and the APA are contracts among CCCB and the Prospect Entities, not the Retirement Plan or the Receiver. Just as the Prospect Entities were found to be strangers to the Settlement Agreement,

it is equally true that the Receiver is a stranger to the LLC Agreement and APA. The Receiver's claimed interest in CCCB is insufficient to confer standing on him to either participate in that litigation or to seek to enjoin it.

A party "generally must assert his own legal rights and interest, and cannot rest his claim to relief on the legal rights or interests of third parties." *Savage & Assocs., P.C. v. Mandl (In re Teligent, Inc.)*, 417 B.R. 197, 210 (Bankr. S.D.N.Y. 2009) (citing *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). In the Settlement Decision, this Court elaborated on that principal:

> . . . our Supreme Court has consistently held that "strangers to a contract lack standing to either assert rights under that contract or challenge its validity." *See*, *e.g*., *DePetrillo v. Belo Holdings, Inc.,* 45 A.3d 485, 492 (R.I. 2012) (prospective purchaser lacked standing to challenge purchaser's exercise of right of first refusal where prospective purchaser was a stranger to a contract between the vendor and purchaser providing for first refusal rights); *Sousa v. Town of Coventry*, 774 A.2d 812, 815 n.4 (R.I. 2001) (rejecting argument that "an individual who is not a party to a contract may assert the rights of one of the contracting parties in order to void a contract or have it declared unenforceable").

Accordingly, the Prospect Entities have the right to litigate their contract dispute with CCCB "in a different proceeding" and the Receiver has neither standing to assert rights under the LLC Agreement nor the right to impair the Prospect Entities' rights under the LLC Agreement by petitioning this Court for equitable relief.

Since the Receiver and CCCB are legally distinct, and the Receiver has no direct interest in the contract dispute between the Prospect Entities and CCCB relating to a breach of the LLC Agreement, this Court should not grant equitable relief to the Receiver by enjoining the Prospect Entities from pursuing their contract claims against CCCB. Equitable jurisdiction of the Superior Court "is not limitless" and is predicated on a litigant being entitled to some form of equitable relief. *See Ret. Bd. of the Emplees. Ret. Sys. of Providence v. Corrente*, 111 A.3d 301,

Case 1:18-cv-00328-WES-LDA Document 83-1 Filed 01/21/19 Page 16 of 25 PageID #: 4779

306 (2015) ("[A] litigant must seek or be entitled to some form of recognized equitable relief in order to invoke this jurisdiction"). At best, the Receiver has beneficial interest in the assets of CCCB. Such an interest should not be construed to insulate CCCB from claims by CCCB's creditors or contracting parties. The Receiver has no standing to seek equitable relief to prevent the Prospect Entities from pursuing their rights under the LLC Agreement. To hold otherwise would be to enjoin *all* actions of *all* third-parties against CCCB simply because the Receiver holds a contingent interest in CCCB; a conclusion that would stretch equity beyond its limits.

**B. Even if the Court Finds That the Order Enjoins Suits Against CCCB, it Should Nonetheless Grant the Prospect Entities Relief from the Order to File the Lawsuits.**

Even if the Court finds that the Order enjoins suits against CCCB and that the Lawsuits are within the equitable jurisdiction of the Court, it should nonetheless grant the Prospect Entities relief from the Order and allow them to pursue their claims against CCCB.

While this Court has yet to expressly identify factors that would warrant relief from a receivership stay, the Ninth Circuit, in *SEC v. Wencke*, 622 F.2d 1363, 1373-74 (9th Cir. 1980) ("*Wencke I*") and *SEC v. Wencke*, 742 F.2d 1230, 1231 (9th Cir. 1984) ("*Wencke II*"), addressed the standard to be employed by a federal court in determining whether to lift a receivership stay.[10] In *Wencke II*, the Ninth Circuit held that a district court should consider three factors to determine whether lifting a receivership stay is appropriate:

> (1) whether refusing to lift the stay genuinely preserves the *status quo* or whether the moving party will suffer substantial injury if not permitted to proceed; (2) the time in the course of the

---

[10] This Court has previously noted that "[i]n Rhode Island, the Court looks to the Bankruptcy Code for guidance in receivership matters." *Site, LLC v. Matthew Realty Corp.*, 2016 R.I. Super. LEXIS 149, at *3 (R.I. Super. Ct. Dec. 27, 2016) (citing *Reynolds v. E & C Assocs.*, 693 A.2d 278, 281 (R.I. 1997)). However, where, as here, both this Court and a federal court may sit in equity in receivership matters, the federal court's jurisprudence regarding relief from a receivership stay may be more applicable than looking to the Bankruptcy Code.

> receivership at which the motion for relief from the stay is made; and (3) the merit of the moving party's underlying claim.

742 F.2d at 1231.[11] The *Wencke II* test "simply requires the district court to balance the interest of the Receiver and the moving party . . . . [T]he interests of the Receiver are very broad and include not only protection of the receivership *res*, but also protection of defrauded investors and considerations of judicial economy." *United States v. Acorn Technology Fund, L.P.*, 429 F.3d 438, 443 (3rd Cir. 2005) (citing *SEC v. Universal Financial*, 760 F.2d 1034, 1038 (9th Cir. 1985)). The *Wencke II* standard has been widely accepted in application and has been adopted by courts in the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits.[12] In addressing a receivership stay and whether lifting a stay is appropriate, a court noted that

> the purpose of imposing a stay of litigation is clear. A receiver must be given a chance to do the important job of marshaling and untangling a company's assets without being forced into court by every investor or claimant. Nevertheless, an appropriate escape valve, which allows potential litigants to petition the court for permission to sue, is necessary *so that litigants are not denied a day in court during a lengthy stay*.

*Greentree Capital*, 2014 U.S. Dist. LEXIS 79277, at *11 (emphasis added).

**a. The status quo.**

When considering the status quo, the Court should "essentially balance[] the interests in preserving the receivership estate with the interests" of the Prospect Entities. *Stanford Int'l Bank*

[11] While these factors were specifically crafted to apply to SEC-related receiverships, the overall rationale set forth by the courts applies to the case at bar.

[12] *See SEC v. Stanford Int'l Bank Ltd.*, 465 Fed. App'x. 316, 320, (5th Cir. 2012); *Chizzali v. Gindi*, 642 F.3d 865, 872-73 (10th Cir. 2011); *United States v. Acorn Tech. Fund, L.P.*, 429 F.3d 438, 443 (3rd Cir. 2005); *SEC v. Universal Fin.*, 760 F.2d 1034, 1038 (9th Cir. 1985); *United States SEC v. N.D. Devs., LLC*, 2016 U.S. Dist. LEXIS 94016, *8 (D.N.D. Mar. 10, 2016); *United States v. JHW Greentree Capital, L.P.*, 2014 U.S. Dist. LEXIS 79277, *11 (D. Conn. June 11, 2014); *Belsome v. Rex Venture Group, LLC*, 2013 U.S. Dist. LEXIS 181160, *3, (W.D.N.C. Dec. 30, 2013); *SEC v. One Equity Corp.*, 2010 U.S. Dist. LEXIS 124013, *19 (S.D. Ohio Nov. 23, 2010); *FTC v. 3R Bancorp*, 2005 U.S. Dist. LEXIS 12503, *5 (N.D. Ill. Feb. 23, 2005)

Case 1:18-cv-00328-WES-LDA Document 83-1 Filed 01/21/19 Page 18 of 25 PageID #: 4781

*Ltd.*, 424 F. App'x at 341; *see also Schwartzman v. Rogue Int'l Talent Grp., Inc.*, 2013 U.S. Dist. LEXIS 16493 (E.D. Pa. Feb. 7, 2013) (first factor requires court "to balance the Receiver's interest in maintaining the status quo with any injury the moving party may suffer if the stay remains in place"); *U.S. v. ESIC Capital, Inc.*, 675 F. Supp. 1462, 1463 (D. Md. 1987) (court must assess "the competing interests of the injury to the moving party versus preserving the status quo").

Here, the status quo is that the Receiver has placed a number of issues into dispute in litigation instituted by the Receiver *after* the injunctive provisions of the Order allowed the Receiver to investigate unimpeded. The litigation commenced by the Receiver and the Receiver's proposed settlement with CCCB give rise to other disputes that must be resolved. Even the Special Counsel represented to the Court that all of these issues have to be resolved. Accordingly, it would do substantial injury to the Prospect Entities if the Receiver were able to continue to litigate these issues while the Prospect Entities were unfairly restricted by the injunctive provisions of the Order. In contrast, the status quo will be maintained because even if the Lawsuits proceed to judgment in favor of the Prospect Entities, the Receiver's interest in CCCB will remain unaffected.

**b. The time at which the motion for relief is made.**

The timing factor is fact-specific and "based on the number of entities, the complexity of the scheme, and any number of other factors." *Stanford Int'l Bank Ltd.*, 424 F. App'x at 341; *see also SEC v. Wing*, 599 F.3d 1189, 1197 (10th Cir. 2010) ("the timing factor is case-specific"). The Ninth Circuit, in *Wencke I*, explained that

> [w]here the motion for relief from the stay is made soon after the receiver has assumed control over the estate, the receiver's need to organize and understand the entities under his control may weigh more heavily than the merits of the party's claim. As the receivership progresses, however, it may become less plausible for

> the receiver to contend that he needs more time to explore the affairs of the entities. The merits of the moving party's claim may then loom larger in the balance.

*Wencke I*, 622 F.2d at 1373-74. Similarly, the Third Circuit has concluded that

> [f]ar into a receivership, if a litigant demonstrates that harm will result from not being able to pursue a colorably meritorious claim, we do not see why a receiver should continue to be protected from suit. On the other hand, very early in a receivership even the most meritorious claims might fail to justify lifting a stay given the possible disruption of the receiver's duties.

*Acorn Tech. Fund, L.P.*, 429 F.3d at 443-44.

Generally, courts are reluctant to lift litigation stays early in a receivership where lifting a stay would disrupt the receiver's duty to organize and understand its assets. *JHW Greentree Capital, L.P.*, 2014 U.S. Dist. LEXIS 79277, at *20. However, "a lift of the stay is more palatable later in a receivership's lifetime, after the receiver has had sufficient time to conduct its duties." *Id.*; *see S.E.C. v. Provident Royalties, L.L.C.*, 2011 U.S. Dist. LEXIS 74304 (N.D. Tex. July 7, 2011) (timing factor weighed heavily in favor of lifting stay where receivership was almost two years old, receiver had marshaled almost all receivership assets and had proposed a plan of distribution); *SEC v. Private Equity Mgmt. Grp., LLC*, 2010 U.S. Dist. LEXIS 126337, (C.D. Cal. Nov. 18, 2010) (second factor cut against receiver where receivership was well over one year old and receiver had progressed sufficiently in the effort to organize and understand the entities under his control, as evidenced by regular status reports to the court).

Here, this receivership is not at a stage where the Lawsuits should be enjoined. The Receiver has had ample time to collect and assume control over the estate, evidenced by the numerous subpoenas Special Counsel has issued; the Federal Court Action; a motion to intervene in a *cy pres* proceeding; the initiation of a state suit; the negotiated settlement with several parties, resulting in two settlement agreements, and over one year since the receivership was

initiated. In essence, the Receiver, after an exhaustive investigation, has brought action against all persons and/or entities that the Receiver thinks are liable to the Receivership Estate. The time and the course of the receivership is such that the Receiver has concluded a lengthy investigation and has instituted wide-ranging litigation that requires a number of issues to be addressed. In this instance, the Receiver has had over a year with complete subpoena powers to determine how to proceed. The Receiver has determined to proceed with the Federal Court Action and the contingent settlement thereof with CCCB. Indeed, it was only because the Receiver initiated litigation and then entered into the Settlement Agreement with CCCB that the claims that are the subject of the Lawsuits ripened. Accordingly, the Court should grant the Prospect Entities relief from the Order.

**c. The merits of the underlying claims.**

In considering the merits of the movant's claims, a "court need only determine whether the party has colorable claims to assert which justify lifting the receivership stay." *Acorn Tech.*, 429 F.3d at 449. The more meritorious a movant's underlying claim, the more heavily this factor will weigh in the movant's favor. *See Wencke I*, 622 F.2d at 1373 ("Where the claim is unlikely to succeed (and the receiver therefore likely to prevail), there may be less reason to require the receiver to defend the action now rather than defer its resolution").

The Rhode Island Supreme Court, in *Reynolds v. First NLC Fin. Servs., LLC*, has determined with reference to an automatic stay provision in the bankruptcy context that granting a relief from stay "is merely a summary proceeding of limited affect," which is "determination of whether the parties seeking relief has a colorable claim to the property of the estate," and a decision on a motion for relief from stay "is not a determination of the validity of those claims, but merely a grant of permission from the Court allowing the creditors to litigate its substantive claims elsewhere without violating the automatic stay." 81 A.3d 1111, 1117 (R.I. 2013).

Here, there are a number of "colorable" disputes that must be resolved in accordance with the dispute resolution provisions of the LLC Agreement, including the following:

1. The "purposes" of Prospect Chartercare are specifically related to a community healthcare mission. *See* LLC Agreement at § 3.1. CCCB, as a member of Prospect Chartercare and its designees to the Board of Directors of Prospect Chartercare, who exercise fifty percent voting control, have to exercise their duties and fiduciary obligations to advance those purposes, not the purposes of the Receiver in the Federal Court Action.
2. There is a dispute as to whether the contingent transfer of beneficial rights to the Receiver violates Article 13 of the LLC Agreement. Moreover, the Receiver has argued that the transfer meets the requirements of the LLC Agreement because it is to an "affiliate," which Prospect East disputes. However, even if one were to put that issue aside, the transfer still had to secure regulatory approval. *See* LLC Agreement at § 13.1(c).
3. Prospect Chartercare and Prospect East have more than a "colorable" claim to indemnity, under the LLC Agreement and the APA.

Accordingly, as the Prospect Entities have colorable claims against CCCB, the Court should grant the Prospect Entities relief from the Order to initiate the Lawsuits against CCCB.

**C. The Court Should Also Grant Prospect Chartercare Leave to File the Administrative Petitions Because the RIAG and RIDOH's Involvement is Necessary; or the Court Should Order that the Receiver Seek Appropriate Regulatory Input or Decisions Relative to CCCB Transferring its Interest to the Receiver.**

For the same equitable balancing arguments made above, Prospect Chartercare should be entitled to relief from the injunctive provisions of the Order to request that the regulatory

Case Number: PC-2017-3856
Filed in Providence/Bristol County Superior Court
Submitted: 1/2/2019 12:59 PM
Envelope: 1856933
Reviewer: Alexa G.


authorities determine the preclusive effect of the HCA and CEC decisions and whether the contingent, beneficial transfer agreed to by and between CCCB and the Receiver requires regulatory approval.

As to the first issue regarding preclusive effect, CCCB has repeatedly admitted that the "Acquiror" in the 2014 Sale (Prospect, Prospect East, Prospect Chartercare, and others) did not acquire the Retirement Plan or any Plan liability. In fact, CCCB advocated for such an approval. Thus, it is critical that a process be advanced to determine the preclusive effect of that regulatory process that was clearly quasi-judicial. *See Town of Richmond v. Wawaloam Reservation, Inc.*, 850 A.2d 924, 933-934 (R.I. 2004).

As to regulatory approvals, CCCB was bound to secure necessary regulatory approvals for any transfer of its interest. *See* LLC Agreement at §13.1(c). Moreover, a transfer of CCCB's rights to exercise fifty percent of the voting authority on Prospect Chartercare's Board of Directors as structured in this specific HCA and CEC decisions is a "conversion" as that term is defined under the HCA. *See* R.I. Gen. Laws § 23-17.14-4(6). At oral argument on the Contempt Motion, the Special Counsel noted Prospect Chartercare's argument that CCCB and/or the Receiver did not exhaust administrative requirements for the sought remedy. Thus, the Special Counsel argued that such a position could be an "affirmative defense" in the Federal Court Action. However, the Receiver cannot seek to abrogate regulatory authority in that fashion. The regulatory issues that have arisen as a result of the Receiver's actions must be resolved, and must be resolved by the appropriate state regulatory agencies, not by a federal court.

For these reasons, a balancing of the equities requires that Prospect Chartercare be granted such relief from the injunctive provisions of the Permanent Receivership Order.

## CONCLUSION

Because the Order does not preclude the Lawsuits against CCCB, the Prospect Entities respectfully provide notice to the Court that they intent to initiate the Lawsuits. However, to the extent that the Court finds that the Order enjoins the Lawsuits, the Court should nonetheless grant the Prospect Entities relief from the Order to file the Lawsuits. Further, the Court should provide the Prospect Entities relief from the Order to file the Administrative Petitions, or instruct the Receiver to seek the input or appropriate decisions from the RIDOH and RIAG in connection with it taking a beneficial interest in CCCB.

[Signature page to follow]

Case 1:18-cv-00328-WES-LDA Document 83-1 Filed 01/21/19 Page 24 of 25 PageID #: 4787

PROSPECT MEDICAL HOLDINGS, INC., AND
PROSPECT EAST HOLDINGS, INC.

/s/ *Preston W. Halperin*
/s/ *Dean J. Wagner*
/s/ *Christopher J. Fragomeni*
Preston W. Halperin (#5555)
Dean J. Wagner (#5426)
Christopher J. Fragomeni (#9476)
SHECHTMAN HALPERIN SAVAGE LLP
1080 Main Street
Pawtucket, RI 02860
Tel.: (401) 272-1400
Fax: (401) 272-1403
phalperin@shslawfirm.com
dwagner@shslawfirm.com
cfragomeni@shslawfirm.com

PROSPECT CHARTERCARE, LLC,

By its attorneys,

/s/ *Joseph Cavanagh, Jr.*
/s/ *Joseph Cavanagh, III*
Joseph V. Cavanagh, Jr. #1139
Joseph V. Cavanagh, III #6907
BLISH & CAVANAGH LLP
30 Exchange Terrace
Providence, RI 02903
Tel.: (401) 831-8900
Fax: (401) 751-7542
jvc@blishcavlaw.com
jvc3@blishcavlaw.com

/s/ *W. Mark Russo*
W. Mark Russo #3937
FERRUCCI RUSSO P.C.
55 Pine Street, 3rd Floor
Providence, RI 02903
Tel.: (401) 455-1000
mrusso@frlawri.com

**CERTIFICATE OF SERVICE**

I hereby certify that on this 2nd day of January, 2018, the within document was electronically filed through the Rhode Island Superior Court Case Management System by means of the EFS and is available for downloading by all counsel of record.

/s/ *Christopher J. Fragomeni, Esq.*

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. | : | |

**DECLARATION OF JEFFREY B. COHEN**

Jeffrey B. Cohen hereby declares and states as follows:

1. I am an attorney admitted to the bars of New York (since 1981), Virginia (since 1984), and the District of Columbia (since 1981).

2. I served as an attorney with the Pension Benefit Guaranty Corporation ("PBGC") from July 1989 to January 2007. From December 1991 through December 2004, I was Deputy General Counsel, and from January 2005 through January 2007, I was Chief Counsel. I am presently a partner in the law firm of Bailey & Ehrenberg, PLLC, where my practice focuses on the Employee Retirement Income Security Act of 1974 ("ERISA"), in particular Titles I and IV of ERISA.

3. I, along with other attorneys at my firm, have been advising Plaintiff Stephen Del Sesto and Plaintiffs' counsel (Max Wistow, Stephen Sheehan, and

Benjamin Ledsham) on ERISA-related matters since October 2017, with respect to the St. Joseph Health Services of Rhode Island Retirement Plan (the "Plan").

4. Together with attorneys Max Wistow, Stephen Sheehan, and Benjamin Ledsham, I met with members of the staff of PBGC's Office of General Counsel on January 11, 2018 (about five months prior to the filing of this action) at PBGC's offices in Washington, D.C. to discuss the Plan.

5. I—or an attorney under my direct supervision—have been sending copies of all filings in this action, as well as copies of all filings in the state court receivership proceeding *St. Joseph Health Services of Rhode Island, Inc. v. St. Joseph Health Services of Rhode Island Retirement Plan*, C.A. No. PC-2017-3856 (R.I. Super.), to PBGC, to the U.S. Department of Labor, and to the Internal Revenue Service.

6. When Defendants first argued to the Court (in their original motions to dismiss the Complaint, which Defendants filed on September 14 and 17, 2018) that PBGC was an indispensable party, PBGC had already long been aware of the Complaint and had already received a copy thereof. Defendants' motions to dismiss, which included these arguments about PBGC's absence, were sent to PBGC on September 28, 2018.

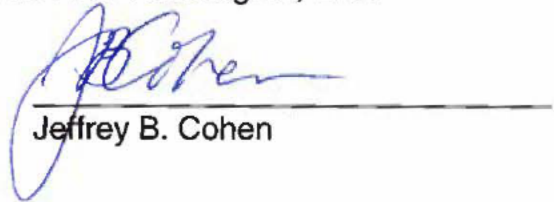
7. Defendants reiterated these arguments about PBGC's absence in their motions to dismiss the First Amended Complaint. These motions, which Defendants filed on December 4, 2018, were sent to PBGC on December 7, 2018.

8. More recently, on December 24, 2018, the Prospect-related Defendants filed a Joint Memorandum in objection to the first proposed class action settlement,

reiterating similar arguments about PBGC's absence. This Joint Memorandum was sent to PBGC on December 28, 2018.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 16th of January, 2019 in Washington, D.C.



Jeffrey B. Cohen