UNITED STATES 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.*

v. C.A. No. 1:18-CV-00328-S-LDA

PROSPECT CHARTERCARE, LLC, *et al.*

ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND, ROGER WILLIAMS HOSPITAL AND CHARTERCARE COMMUNITY BOARD'S REPLY TO DIOCESAN DEFENDANTS' POST-HEARING BRIEF (DOC. 115)

St. Joseph Health Services of Rhode Island, Roger Williams Hospital and CharterCare Community Board (collectively, "Settling Defendants") hereby respond to The Diocesan Defendants' Post-Hearing Brief Addressing Proposed Orders on Preliminary Settlement Approval and Question Regarding Federal Receivership (Doc. 115) (hereinafter the "Post-Hearing Memorandum") as follows:

The reverse adage, "*every solution has a problem*,"[1] best describes the Diocesan Defendants' misguided efforts to frustrate the settlement, despite the benefits to all parties the settlement provides.

I. INTRODUCTION

After more than two months of negotiations, the Settling Defendants entered into a comprehensive settlement agreement which not only benefits all the parties

[1] Andy Hargreaves (2001). "Changing Teachers, Changing Times: Teachers' Work and Culture in the Postmodern Age", p.138.

involved, but is intended for the Settling Defendants to avoid wasting resources on costly litigation.[2] The settlement undoubtedly benefits the Class, but also benefits the non-settling defendants who will have their potential exposure greatly reduced under R.I. Gen. Laws § 23-17.14-35. The Diocesan Defendants should welcome the reduced liability. They should also welcome the fact that the settlement is being made relatively early in this litigation, because the credit they will receive will be higher than they would obtain in the event of a later settlement (and even if the Settling Defendants are found liable at trial).[3] Instead, the Diocesan Defendants' Post-Hearing Memorandum further demonstrates the Diocesan Defendants' (1) reliance on false accusations and criticisms rather than evidence, and (2) attempt to distract this Court with non-existent problems.[4]

The Court should disregard the Diocesan Defendants' challenge because they have not presented any evidence of collusion (only suggestion and innuendo), and the alleged collusive conduct has no bearing on this Court's analysis of preliminary

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[2] One of the central factors leading the Settling Defendants to reach an agreement was the cost of litigation and its impact on the Settling Defendants' creditors, including the Class. Each dollar spent on litigation is a dollar not available to satisfy other claims, including those of the Class. The Settling Defendants' belief that litigation costs would be significant is well founded. There are 149 docket entries in this case before any defendant has even filed an answer. It is the time and expense of responding to pleadings such as the Post-Hearing Memorandum that the Settling Defendants are seeking to avoid for the benefit of the Class and the non-settling defendants.

[3] Moreover, if the Settling Defendants were to prevail at trial, the non-settling defendants would receive no credit at all.

[4] There is irony in the Diocesan Defendants' challenge to the settlement. The entity that created the pension plan, managed it for decades, and then abandoned it at a time when it was allegedly underfunded by tens of millions is now making every effort to prevent recovery by the plan.

settlement approval. It is regrettable, but the Settling Defendants must respond to the Post-Hearing Memorandum.

II. ARGUMENT

At the outset, the Settling Defendants need to correct certain inaccuracies and clarify certain issues set forth in the Diocesan Defendants' papers. First, the Diocesan Defendants in footnote 4 condemn Attorney Land for the board's lack of separate counsel. See Doc. 115, p. 6, fn. 4. The directors did in fact engage separate counsel, Edward Feldstein, Esq., for the purpose of evaluating the terms of the settlement agreement. The Diocesan Defendants should be more careful in casting aspersions against the Settling Defendants counsel, or better yet, they could have asked Attorney Land who would have corrected their misstatement before it was made. Second, the Post-Hearing Memorandum is laden with arguments wherein the Diocesan Defendants purport to argue on behalf of the class or Father Reilly. The Diocesan Defendants do not represent the class or Father Reilly and lack standing to make any arguments on their behalf.[5]

A. THE DIOCESAN DEFENDANTS (AND OTHER NON-SETTLING DEFENDANTS) ARE CAPABLE OF DEFENDING THE LITIGATION NOTWITHSTANDING A GOOD FAITH FINDING

In Section I of the Post-Hearing Memorandum, the Diocesan Defendants claim that they are harmed by a good faith finding because it will "leave the non-settling

[5] The fact that the Diocesan Defendants take issue with the impact of a fee award on the Class further supports the Settling Defendants' position explained in Sec. II.D.

defendants' contributions and judgment reduction rights unclear." Doc. 115, p. 2.[6] However, all settlements leave non-settling defendants' contribution and judgment reduction rights unclear, because those rights depend on future contingencies (many of which involve disputed issues of law and fact). The list of contingencies can be quite long. See e.g. Ernst & Young v. Depositors Econ. Prot. Corp., 45 F.3d 530, 538 (1st Cir. 1995)(setting out eight contingencies that would need to be satisfied before a non-settling defendant can be said to have any rights of contribution or indemnity under Rhode Island's DEPCO settlement statute). Accordingly, a good faith finding does nothing to alter the preexisting contingencies necessary for the Diocesan Defendants' to establish their contribution and judgment reduction rights.[7]

B. THE DIOCESAN DEFENDANTS COLLUSION ARGUMENTS ARE BASED ON THE FAULTY PREMISE THAT THERE IS SOME REQUIREMENT FOR PRE-SUIT NEGOTIATION

Many of the Diocesan Defendants' arguments relating to collusion are premised on the erroneous notion that Plaintiffs and the Settling Defendants were required to engage in pre-suit settlement negotiations. There is no requirement whatsoever that any potential litigant engage in pre-suit settlement negotiations. It

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[6] It is curious why the Diocesan Defendants are so concerned about contribution. If they are not liable, as they so vigorously maintain, they have no need or right to contribution. The Diocesan Defendants' position is clearly a hedge (i.e. we are not liable but if we are found liable we have contribution rights), and is precisely what they criticized Plaintiffs for doing. See Doc. 73, p. 16.

[7] The argument that the Diocesan Defendants cannot defend the litigation because they do not know the contribution and joint-tortfeasor regime is not supportable. Inherent in any settlement with fewer than all joint-tortfeasors, non-settling (potential) tortfeasors can both enjoy the benefits of others' payments and deal with possible consequences based on the determination of relative liability as against settling joint-tortfeasors at a later time.

is revealing that the Diocesan Defendants failed to identify any legal authority for this necessary predicate to the Court accepting their position.

The Diocesan Defendants fault the Settling Defendants for not engaging in pre-suit settlement negotiations. See Doc. 115, p. 4-5. To be clear, the Diocesan Defendants' position is that this Court cannot make a good faith finding if the counterparties in a subsequently filed lawsuit did not engage in pre-suit settlement negotiations.[8] Setting aside that there is no pre-suit negotiation requirement, the Settling Defendants and Plaintiffs were fundamentally at odds. As indicated in the Affidavit of Richard Land ("Affidavit"), "[w]hile the Heritage Hospitals had expressed a willingness to discuss settlement," the absence of such negotiations does not equate to the absence of good faith. Moreover, even if there were pre-suit negotiations, there is no basis for concluding that any settlement would have resulted therefrom. "[A]t the time the Complaint was filed, the Heritage Hospitals were only prepared to initiate judicial liquidation of the entities to provide a forum for the Receiver to prove its claim, without any admission of liability or transfer of assets." Affidavit, ¶ 2. A careful reading reveals that the Settling Defendants' pre-suit position is drastically different from the resulting settlement agreement. Moreover, pre-suit "the Heritage Hospitals were not certain of how much, if any, funds might be available for the Plan following completion of the wind down of the Heritage Hospitals." Affidavit, ¶ 5. Surely the Diocesan Defendants cannot be asserting that Plaintiffs were required to

[8] The Settling Defendants view the Diocesan Defendants' assertion that pre-suit negotiations were required to be a red-herring intended solely to misdirect the Court.

accept a pre-suit settlement with no assurances of when or if payments would be made, or the amount of such payments. Whether there were pre-complaint negotiations or not, negotiations were arms-length over a period of two months after filing and resulted in a settlement agreement acceptable to the Settling Defendants. The Diocesan Defendants must acknowledge that a party with a colorable claim enjoys the prerogative of choosing to file a complaint or not. In this instance, the Plaintiffs chose to file the Complaint, which was out of the Settling Defendants' control and certainly not with their consent or input. The fact that no settlement was reached prior to filing does not speak to (in favor or against) whether any particular post-filing settlement is made in good faith. It is irrelevant to the good faith inquiry.

Moreover, acceptance by this Court of the Diocesan Defendants' position would create an unnecessarily difficult litigation landscape and preclude a party with a colorable claim from ever obtaining settlement approval if they simply chose to file a complaint rather than expend time, efforts and expenses on pre-suit negotiations with a defendant whose proposed settlement terms were unacceptable to a plaintiff. Adopting the Diocesan Defendants' position is indistinguishable from creating a judicial rule requiring pre-suit negotiations in every case. The havoc and disruption such a rule would wreak needs no explanation.

C. THE TERMS OF THE SETTLEMENT AGREEMENT DO NOT EVIDENCE COLLUSION

The Diocesan Defendants focus predominately on settlement terms that they perceive as "unnecessary" or improper and leave the Court to conclude collusion is

afoot based on innuendo. See Doc. 115, p. 4-7.[9] Each of the settlement agreement terms complained of as collusive are easily addressed and insinuations of collusion dispelled.

Relying on general quotes gleaned from inapposite decisions, the Diocesan Defendants complain of the so-called admission of liability. See Doc 73, p. 15. However, like a litigant who enjoys discretion to settle or not, a litigant can chose to admit liability or not. Although denying liability in a settlement agreement is commonplace, and in some ways meaningless, the converse does not make a settlement agreement collusive. In this instance, the Settling Defendants agreed to a qualified admission of liability because Plaintiffs' required the provision. Certainly, the Settling Defendants would have preferred otherwise. Nonetheless, like the other terms discussed below, the Settling Defendants' qualified admission of liability is not binding on the Diocesan Defendants and does not cause the Diocesan Defendants or the non-settling parties any harm.

The Diocesan Defendants complain that a provision in the Settlement Agreement stating that the Settling Defendants' proportionate fault is small compared to others is "absurd and improperly aimed at gaining a tactical advantage in these proceedings." See Doc. 73, p. 16. They also contend that this provision "is clearly intended as a hedge in the event that the Court ultimately considers proportional fault and limits any liability to a non-settling defendant's responsibility

[9] The Affidavit sets out that the parties engaged in contested negotiations and demonstrates compromised positions resulting therefrom. See Affidavit ¶ 2.

to its proportionate share of liability to the plaintiff." Id. at 17. (citing In re Masters Mates & Pilots Pension Plan & IRAP Litigation, 957 F.2d 1020, 1032 (2d Cir. 1992) regarding consideration of relative fault before approving a contribution bar in ERISA class action).

The Settling Defendants' belief is not unreasonable, particularly in light of the Diocesan Defendants' control over the pension plan from its inception in 1965 to the 2009 transaction (almost 50 years), and the Diocese and Prospect entities' involvement in the 2014 transaction. In any event, the Settling Defendants' view (or to be more accurate, contention) of proportionate liability in the settlement agreement is simply not binding on the Diocesan Defendants. See Proposed Settlement Agreement, ¶ 30 ("Settling Defendants contend…"). Moreover, the law applied by District Courts in the First Circuit is that defendants have no contributions rights under ERISA. See Anthony v. JetDirect Aviation, Inc., 725 F. Supp. 2d 249, 255 (D. Mass. 2010)(no federal common-law right to contribution and indemnity under ERISA). Thus, the Diocesan Defendants' concern relative to the provision of the Settlement Agreement and proportionate fault is immaterial.

Third, and notwithstanding the Diocesan Defendants' continued improper attempt to argue on behalf of class members, the so-called clear-sailing provision does not evidence collusion. Instead, the clear-sailing provision is a term of the settlement agreement negotiated by the parties which the Plaintiffs required to remove future impediments by the Settling Defendants. Further, there were no clear seas to sail through. Certainly the Settling Defendants could give no assurance that the non-

settling defendants would refrain from challenging the Plaintiffs' attorney's fees. Indeed, the challenges from the non-settling defendants have already been filed. The Diocesan Defendants assert that because the Settling Defendants agreed not to challenge a pre-existing and court-approved fee order, the Settling Defendants and Plaintiffs somehow colluded. The logic of the Diocesan Defendants' contention is seriously flawed. The Settling Defendants did not negotiate or agree to the Plaintiffs' fee arrangement. Plaintiffs did not demand the fee arrangement from the Settling Defendants. The fee arrangement was imposed by court order. How is an agreement not to challenge a receivership court order collusive? If the Court accepts that agreeing not to challenge attorney's fees is evidence of collusion, that type of provision could never be included in future settlement agreements.

Lastly, that the Plaintiffs agreed to release certain parties, but not Father Reilly, does not demonstrate collusion. See Doc. 115, p. 5-6. There are two significant legal reasons why Father Reilly was not released; (1) Plaintiffs refused to release anyone associated with the Diocese,[10] and (2) Father Reilly, as a voluntary, uncompensated, director of a non-profit, is exempt from personal liability under R.I. Gen. Laws § 7-6-9. Thus, it is perfectly logical for the Plaintiffs and the directors of the Settling Defendants to carve-out Father Reilly from the release because he is exempt from personal liability. Neither the Plaintiffs nor the Settling Defendants wanted to leave open indemnification claims by the directors against the Settling

[10] Father Reilly recused himself from all discussions and decisions related to the lawsuit based on his role as Chancellor of the Diocese and secretary on the boards of the Diocesan Administration Corporation and the Diocesan Service Corporation.

Defendants which would reduce the assets of the Settling Defendants. Thus, the Diocesan Defendants accusing the Settling Defendants' directors of holding up any settlement is erroneous. See Doc. 115, p. 6. It is the Diocesan Defendants' position to the contrary which "borders on the ridiculous."

D. THE DIOCESAN DEFENDANTS' CHALLENGE ON COLLUSION GROUNDS IS REALLY A CLOAKED FEE DISPUTE

Although presented as a challenge to the good faith issue by virtue of purported collusion, the Diocesan Defendants' challenge is really a cloaked fee dispute. See Doc. 115, p. 5. There is nothing in the Diocesan Defendants' Post-Hearing Memorandum that concerns the conduct of the Settling Defendants vis-à-vis attorney's fees, nor could there be because the Settling Defendants were not involved in the fee arrangement.

Instead, relying on the advisory committee's note to the 2018 amendment of Fed. R. Civ. P. 23(e)(2), the Diocesan Defendants ask the Court to "focus on the treatment of any award of attorney's fees, with respect to both the manner of negotiating the fee award and its terms." Id. That comment, however, is inapplicable here. The Settling Defendants did not negotiate any attorney's fee provision. The Court should not fault the Settling Defendants for a fee arrangement with which they had no part.

More particularly, it appears in the Diocesan Defendants' view, the settlement agreement is collusive merely because there was a pre-existing, two-tiered, court-approved fee order. Would the Diocesan Defendants be challenging the settlement if there were no attorney's fees or would a higher or lower attorney's fee order make the

settlement more or less in good faith? Although rhetorical, this inquiry demonstrates that the Diocesan Defendants' concern is a fee dispute, not truly a challenge of the Settling Defendants' conduct. The Diocesan Defendants may at some point have their day in court for challenging Plaintiffs' attorney's fees, but masquerading their discontentment with Plaintiffs' attorney's fees as a collusion challenge is meritless.

III. CONCLUSION

Notwithstanding the Diocesan Defendants' boisterous complaints, there is nothing preventing this Court from preliminarily approving the Settlement Agreement. The Court should keep in focus the lack of evidence presented by the Diocesan Defendants, the goals of the Settlement Agreement, and the benefit of the Settlement Agreement to the interested parties.

For the reasons set forth herein, this Court should disregard and overrule the Diocesan Defendants' objections to preliminary approval of the Settlement Agreement.

ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND, ROGER WILLIAMS HOSPITAL and CHARTERCARE COMMUNITY BOARD

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CERTIFICATION

I hereby certify that the within document was electronically filed and served on March 26, 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.

/s/ Robert D. Fine