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.	)	
Plaintiffs,	)	
v.	)	C. A. No. 18-328 WES
PROSPECT CHARTERCARE, LLC, et al.	)	
Defendants.	)	

SPECIAL MASTER'S REPORT AND RECOMMENDATION ON AWARD OF ATTORNEYS' FEES

This Report and Recommendation is filed pursuant to the Order Appointing Special Master entered September 5, 2019, ECF No. 152. In the Order, p. 4, this Court stated:

> The role of the Special Master is limited. The Special Master's objective is to review the motions for attorneys' fees and make a recommendation as to those requests. The Special Master is directed to review the attorney fee motions, ECF Nos. 64 and 78, the objections, the declarations related thereto, and any other document the Special Master deems necessary to perform the scope of his duties.

In compliance with the Order, I have reviewed the Motions for Award of Attorneys' Fees filed by the plaintiffs' counsel, the Objections thereto filed by certain non-settling defendants, and the several related declarations, settlements, and other relevant documents. I also met with interested parties on September 26, 2019.

Background

This case arises out of a 2017 receivership proceeding in the Rhode Island Superior Court for the St. Joseph Health Services of Rhode Island Retirement Plan (the "Plan"), St. Joseph Health Services of Rhode Island, Inc. v. St. Joseph Health Services of Rhode Island Retirement Plan, C.A. No. PC-2017-3856. Declaration of Max Wistow in Support of Joint Motion for Class Certification, etc. (hereinafter "Wistow Declaration"), Ex. 1, ECF No. 65-1. According to the petition, the Plan was seriously underfunded[1] and insolvent at the time of the sale of assets of Roger Williams Hospital and Our Lady of Fatima Hospital in 2014. *Id.* ¶¶8-10; First Amended Complaint, ¶54. The Plan had more than 2700 participants, and, because of the underfunding, the petitioner sought a 40% reduction in retirement benefits. Petition ¶15, ECF No. 65-1; Wistow Declaration ¶3, ECF No. 65. The Plan, at least until some point prior to the receivership, was a "church plan" associated with the Catholic Diocese, Petition ¶6, ECF No. 65-1, but had not received contributions from St. Joseph Health Services since 2008 except for a $14 Million contribution in 2014 from the sale the hospital assets. Plaintiffs' Counsel's Final Approval Memorandum (Settlement A), p. 11, ECF No. 150; Wistow Declaration ¶37, Ex. 24, ECF Nos. 65, 65-24. The Receiver who was appointed by Judge Brian Stern of the Superior Court, Stephen Del Sesto, engaged the firm of Wistow Sheehan and Loveley, PC ("WSL") as special counsel to investigate the matter and commence litigation against potentially liable parties to recover monies for the Plan and its participants. To this end, the Receiver contracted with WSL as special counsel, and agreed to pay WSL based on $375/hour for the investigative work and on a contingency basis after litigation commenced. Wistow Declaration Exs. 3, 5, ECF Nos. 65-3, 65-5; Declaration of Stephen Del Sesto, Ex. 1, ECF No. 144. Specifically, the engagement letter

[1] The Plan was allegedly underfunded by some $91 Million as of April 30, 2013. First Amended Complaint, ¶253, ECF No. 60.

(hereinafter the "Fee Agreement") was approved by the Superior Court and provided for a fee of 23.3% of funds recovered for the Plan after commencement of litigation.[2] WSL also entered into similar fee agreements with the individual plaintiffs. Wistow Declaration, Exs. 12-18, ECF Nos. 65-12 to 65-18. The investigation involved the issuance of 12 *subpoenas duces tecum* by the Receiver, some of which were contested, and the obtaining and review of more than a million documents.[3] Plaintiffs' Counsel's Memorandum in Support of Motion for Award of Attorneys' Fees, pp. 3-4, ECF No. 64-1; Wistow Declaration ¶16, ECF No. 65. For this work, WSL was paid $552,281.25 (1472 hours @ $375/hour). Wistow Declaration ¶18, ECF No. 65.

On June 18, 2018, WSL filed in this Court a class action Complaint on behalf of the Receiver and seven Plan participants, as representatives of a class of participants, against fourteen corporate defendants[4] alleging a federal claim under ERISA and state claims of fraud and breach of fiduciary duty, among others.[5] Wistow Declaration, Ex. 7, ECF No. 65-7. The plaintiffs filed a First Amended Complaint on October 5, 2018. ECF No. 60. Thereafter, the action was approved as a class action, with the individual plaintiffs as class representatives, and WSL as class counsel. Memorandum of Decision, pp. 13-14, ECF No. 162; Memorandum and Order, pp. 18-19, ECF No. 164.

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[2] The Fee Agreement also provided for WSL to receive 10% of any recovery between the end of the investigation and commencement of litigation, but there was no recovery of funds during this period, so no fees are requested under this provision. Fee Agreement §II, ECF No. 144.

[3] Plaintiffs' counsel also received a substantial number of additional documents after the litigation commenced. Plaintiffs' Counsel's Memorandum, p. 6, ECF No. 64-1.

[4] The plaintiffs are seven participants in the Plan and the Receiver. The defendants are Prospect Chartercare, LLC; CharterCARE Community Board; St. Joseph Health Services of Rhode Island; Prospect Chartercare SJHSRI, LLC; Prospect Chartercare RWMC, LLC; Prospect East Holdings, Inc.; Prospect Medical Holdings, Inc.; Roger Williams Hospital; CharterCARE Foundation; the Rhode Island Community Foundation; Roman Catholic Bishop of Providence; Diocesan Administrative Corporation; Diocesan Service Corporation, and the Angell Pension Group, Inc.

[5] A companion complaint was filed in the Superior Court in the event that the ERISA claim was dismissed, thereby depriving this Court of jurisdiction.

In addition, WSL, on behalf of the Receiver and the individual plaintiffs, sought and was granted intervention in a *cy pres* proceeding in the Superior Court[6] that involved the alleged fraudulent transfer of some $8.2 Million of charitable assets by St. Joseph Health Services of Rhode Island and Roger Williams Hospital into a foundation, CharterCARE Foundation, LLC ("CCF"), to the detriment of the Plan and its participants. Plaintiffs' Counsel's Memorandum (Settlement A), pp, 10-11, ECF No. 64-1; Plaintiffs' Counsel's Final Approval Memorandum (Settlement B), p. 6, ECF No. 140; Wistow Declaration ¶21, ECF No. 65; Wistow Supplemental Declaration, Ex. 3, ECF No. 79-3. In the Superior Court there was also related litigation concerning settlement instructions the Receiver sought from the Court. Plaintiffs' Counsel's Memorandum (Settlement A), pp. 6-9, ECF No. 64-1.

Not long after the litigation commenced, WSL, consistent with the instructions of the Superior Court, Wistow Declaration ¶¶33-34, Ex. 21, ECF No. 65, Wistow Supplemental Declaration, Ex. 7, ECF No. 79-7, negotiated two settlement agreements with certain defendants, the first on August 31, 2018, Wistow Declaration, Ex. 25, ECF No. 64-1, and the second approved by the Rhode Island Superior Court on October 2, 2018. Wistow Supp. Declaration, Ex. 7, ECF No. 79-7. In the settlement agreements, the settling defendants agreed to WSL seeking attorneys' fees to be paid out of the settlement fund. Settlement Agreement (A), p. 21, ¶36, ECF No. 63-2; Settlement Agreement (B), p. 26, ¶9, ECF No. 77-2.

<u>The Settlements</u>

The two settlements, designated A and B, reached in this case are:

Settlement A: The settling defendants, namely CharterCARE Community Board ("CCCB") (the parent of the heritage St. Joseph and Roger Williams Hospitals), St. Joseph

[6] <u>In re: Chartercare Heath Partners Foundation, Roger Wiliams Hospital and St. Joseph health Services of Rhode Island</u>, C. A. No. KM-2015-0035.

Health Services of Rhode Island, and Roger Williams Hospital, have agreed to pay $11,150,000 to the Receiver (that will be paid into the Plan), and also agreed to the assignment of interests of CCCB's interest as a member of CharterCARE Foundation, LLC ("CCF") and CCCB's interest (about 15%) in Prospect Chartercare, the entity that currently directly or indirectly operates the Roger Williams Hospital and Fatima Hospital. The former assignment is of questionable value if the settlements are approved; the latter could be of significant value, but the value is not known at this time and the assignment is contested. Plaintiffs' Counsel's Memorandum (Settlement A), pp. 11-15, ECF No. 64-1.

Settlement B ("the CCF Settlement"): The principal settling defendant here is CCF, the recipient of certain assets of Roger Williams Hospital and St. Joseph Health Services of Rhode Island. The other settling defendants are CharterCARE Community Board, St. Joseph Health Services of Rhode Island, and Roger Williams Hospital, but they are not making any monetary contributions. Plaintiffs' Counsel's Memorandum (Settlement B), p. 1, fn 2, ECF No. 78-1. CCF has agreed to pay $4,500,000 to the Receiver, almost half of its charitable assets that were valued at approximately $9,108,334 as of April 30, 2018. Plaintiffs' Counsel's Memorandum (Settlement B), p. 6, ECF No. 78-1. The Superior Court approved this settlement as in the best interests of the Plan on December 27, 2018, Plaintiffs' Counsel's Memorandum (Settlement B), pp. 6-7, ECF No. 78-1, at which time the Court found the contingent fee of 23.3% of the recovery to be "fair, reasonable, and very much a benefit to the receivership estate." Wistow Supp. Declaration, Ex. 6, p. 16, ECF No. 79-6.

With respect to the non-settling defendants, the litigation against them will continue. The WSL may have to defend additional litigation relating to the dissolution and liquidation of the settling defendants for which no further compensation would be due. *Id.*, pp. 16-17.

This Court has approved both Settlements A and B. Memorandum and Order, ECF No. 164; Memorandum of Decision, ECF No. 162.

Fees Requested

The Receiver retained plaintiff's counsel pursuant to an Order of the Superior Court dated October 17, 2017, and the Superior Court approved the Engagement and Fee Agreement between the Receiver and WSL. ECF Nos. 65-3, 65-5. Under that Agreement, as noted, WSL was paid on an hourly basis of $375/hour[7] for investigation of the potential claims related to the transaction in question, and is to be paid 23.3% of monies recovered for the Plan after the commencement of litigation. *Id.* WSL was paid for 1472 hours of work at $375/hour, for a total of $552,281.25. Wistow Declaration ¶18, ECF No. 65.

WSL has stated that it was not prepared to take this case on a pure contingency basis because of the substantial investigation required in order to evaluate the litigation risk. As a result, WSL agreed to a hybrid arrangement with the Receiver that provided for discounted hourly compensation for the investigation and contingent compensation for the litigation. Wistow Second Supplemental Declaration ¶¶9-10, ECF No. 145. WSL seeks an award of fees consistent with the Fee Agreement, that is, fees based on a percentage of the funds recovered for the Plan.

The individual plaintiffs' retainer agreements with WSL that mirror the Agreement with the Receiver and provide for the payment of fees to plaintiffs' counsel essentially on the same basis as the agreement with the Receiver. Wistow Declaration, Exs. 12-18, ECF Nos. 65-12 to 65-19.

[7] WSL states that $375/hour is a discounted rate and that WSL's usual blended rate is $600 in non-contingent fee cases. Plaintiffs' Counsel's Final Approval Memorandum (Settlement B), p. 36, ECF No. 140; Wistow Second Supplemental Declaration ¶¶8-10, ECF No. 145; Declaration of Stephen P. Sheehan, ECF No. 161.

WSL does not break down the fees for the class as opposed to the Receiver. Since WSL was working toward a common goal for both the Receiver and the class members for the ultimate benefit of the Plan participants, it is difficult to distinguish hours spent for the class versus the Receiver. Plaintiffs' Counsel's Memorandum (Settlement A), p. 28, ECF No. 64-1. This is understandable and is reasonable.

With respect to Settlement A, the fee requested is 23.3% of $11,150,000, or $2,597,950, With respect to Settlement B, the fee requested is 23.3% of $4,500,000, or $1,048,500. In addition, WSL seeks 23.3% of additional sums recovered.

These fees total $3,646,450. While the Fee Agreement does not require this, WSL has agreed that the $552,281.25 that it received for the investigation should be deducted from the contingent fees awarded.[8] Plaintiffs' Counsel's Memorandum (Settlement A), p. 18, ECF 64-1; Plaintiffs' Counsel's Memorandum (Settlement B), p. 3, ECF No. 78-1. Thus, the net fees requested are **$3,094,168.75**. Declaration of Stephen P. Sheehan, ECF No. 161 (corrected for a minor mathematical error).

WSL advises that its costs have been reimbursed by the Receiver, hence, there is no request for costs in this case. Plaintiffs' Counsel's Final Approval Memorandum (Settlement A), p. 26, ECF No. 150.

<u>Hours Spent</u>

In considering the reasonableness of an award of attorneys' fees, it is instructive to review the hours spent by counsel in order to calculate a lodestar and to check on the reasonableness of an award based on a percentage of the fund. They are as follows:

[8] The Receiver commended WSL for this credit. Declaration of Stephen Del Sesto ¶17, ECF No. 144.

Hours spent during the investigative stage:	1472
Hours spent after the commencement of litigation to date	3022[9]
Total hours	**4494**

Declaration of Stephen P. Sheehan, Ex. 1, ECF No. 161.

Plaintiff's counsel has not submitted any backup to these hours – just the gross number – therefore it is not possible to examine the quality of the hours spent. However, there does not appear to be any dispute as to the number of hours that WSL has spent. In addition, given the complexities of this case, the number of parties, the issues presented and the reams of documents produced, it is not surprising that this litigation required a substantial number of hours.

Oppositions

As noted, Settlement Agreements A and B both provide that WSL may apply for attorneys' fees and the settling defendants will not object. The "Diocesan Defendants"[10] have filed Oppositions to both settlements and to the award of WSL's requested attorneys' fees. ECF Nos. 73, 75, 80 136, 146. The "Prospect Defendants"[11] have joined in the Objections. Joint Opposition of Prospect Defendants, ECF No. 75. The non-settling defendants do not object to the 23.3% contingency applied to any future recovery. Diocesan Defendants' Opposition (Settlement A), p. 11, ECF No. 146. These defendants raise a number of issues, most of which go to whether the Court should approve the settlements, although there is some overlap. I will

[9] This figure includes time spent on settlements (legal memoranda, hearings, etc.) as well as state court proceedings. Declaration of Stephen P. Sheehan, Ex. 1, ECF No. 161.

[10] Roman Catholic Bishop of Providence, Diocesan Administrative Corporation, and Diocesan Service Corporation.

[11] Prospect Medical Holdings, Inc.; Prospect East Holdings, Inc., Prospect Chartercare, LLC, Prospect Chartercare SJHSRI, LLC, and Prospect Chartercare RWMC, LLC.

not address the issues that relate to the settlements generally that are outside the scope of my charge.[12] They are generally addressed in this Court's Memoranda approving the settlements.

No other party or member of the class has filed an objection to the award of fees.[13] Plaintiffs' Counsel's Final Approval Memorandum (Settlement A), p. 4, ECF No. 150. In fact, attorneys for many of the participants have filed declarations or affidavits in support of the settlements and the attorneys' fees requested. Declaration of Stephen Del Sesto, ECF No. 144; Affidavit of Arlene Violet (representing 285 participants in the Plan), ECF No. 142; Declaration of Jeffrey W. Kasle (representing some 247 participants in the Plan), ECF No. 143; Declaration of Christopher Callaci (representing 400 participants in the Plan), ECF No. 141. Taken together, these declarations are filed on behalf of nearly 1000 out of the 2700 Plan participants.

The Receiver has stated that WSL's fees for both settlements are "fair and reasonable," and that awarding fees less than what has been agreed upon would be "detrimental" to the receivership estate and will not incentivize plaintiffs' counsel to pursue zealously the Receiver's claims in this complex litigation. Stephen F. Del Sesto Declaration ¶¶17, 18, ECF No. 144.

Standing

WSL has questioned the standing of the non-settling defendants to object to the fees requested citing, among other things, Rule 23(h)(2) that states that "a class member, or a party from whom payment is sought may object to the motion [for fees]" and the Advisory Committee's note to that section of the Rule that states that "nonsettling defendants may not object because they lack a sufficient interest in the amount the court awards." WSL argues that

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[12] These include whether the Plan was an ERISA plan, whether the Pension Benefit Guaranty Corporation should be joined as a party, whether there was collusion between the plaintiffs and the settling defendants in reaching the settlements to the detriment of the non-settling defendants, and certain constitutional claims relating to the joint tortfeasor statute, R.I Gen. Laws, §23-17.14-35.

[13] One class member objected to Settlement B. Plaintiffs' Counsel's Final Approval Memorandum, p. 8, ECF No. 140.

since the joint tortfeasor releases to be signed by the settling defendants provide that the non-settling defendants will receive full benefit from the amount of the settlements undiminished by attorneys' fees, they have insufficient interest to object. Plaintiffs' Counsel's Final Approval Memorandum (Settlement B), pp. 30-31, ECF No. 140. The non-settling defendants respond that one of the key claims for relief in the First Amended Complaint is to order these defendants to make the Plan whole, and that whatever amount that does not go into the Plan but goes for attorneys' fees will diminish the assets in the Plan below what they would otherwise be, and if held liable, these defendants will have to make the fund whole. First Amended Complaint, Prayer for Relief, Section D (that defendants "make the Plan whole for all contributions that should have been made pursuant to ERISA funding standards"). ECF No. 60; Diocesan Defendants' Opposition (Settlement A), p. 12, ECF No. 146. These defendants cite no authority to support their position. *Id.*

While I conclude that the position of the non-settling defendants is somewhat speculative given that it is not known how the Plan will perform in the future and the fact that liability has not been established against the non-settling defendants, nevertheless, in my judgment these defendants have sufficient interest to file an opposition to the fees requested. However, as explained *infra*, I find their objections to be without merit.

Legal Standard

This is a "common fund" case that, under Rule 23 and First Circuit law insofar as it pertains to class actions, and based on the settlements and Fee Agreement, entitles WSL to attorneys' fees. The U. S. Supreme Court has sanctioned reasonable fees awarded out of a common fund. See Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980). This Court has considerable discretion in the method for determining a "reasonable" fee and determination will

be made on a case-by-case basis. See In re Fidelity/Micron Securities Litigation, 167 F.3d 735, 737 (1st Cir. 1999). The First Circuit, in In re Thirteen Appeals Arising out of the San Juan DuPont Plaza Hotel Fire Litigation, 56 F.3d 295 (1994), has held that this Court may review fee requests where there is a common fund either through a lodestar approach or through a percentage of fund "POF") approach:

> We think that a more malleable approach is indicated. Thus, we hold that in a common fund case, the district court, in exercise of its informed discretion, may calculate counsel fees either on a percentage of the fund basis or by fashioning a lodestar. Our decision is driven both by a recognition that use of the POF method in common fund cases is the prevailing praxis and by the distinct advantages that the POF method can bring to bear in such cases.

56 F.3d at 307. In Heien v. Archstone, 837 F.3d 97 100 (1st Cir. 2016) (citing In re Thirteen Appeals with approval) the court stated:

> The Court recognized [in *In re* Thirteen Appeals, 56 F.3d at 307] that the percentage-of-fund method 'in common fund cases is the prevailing praxis' and acknowledged the 'distinct advantages that the POF method can bring to bear in such cases.' *Id*. However, the Court has also noted that the percentage-of-fund approach 'may result in the overcompensation of lawyers in situations where actions are resolved before counsel has invested significant time or resources. *Id*. If the fee is determined according to the lodestar approach, 'it is the court's prerogative (indeed, its duty) to winnow out excessive hours, time spent tilting at windmills, and the like. Gay Officers Action League v. Puerto Rico, 247 F.3d at 296 (internal cite omitted).'

837 F. 3d at 100-101.

In weighing a common fund request for fees, courts will also consider the so-called Goldberger factors: (1) the size of the fund and the number of persons benefitted; the skill, experience, and efficiency of the attorneys involved; (3) the complexity and duration of the litigation; (4) the risks of the litigation; (5) the amount of time devoted to the case by counsel; (6) awards in similar cases; and (7) public policy considerations.

See In re Neurontin Marketing & Sales Practices Litigation, 58 F. Supp. 3d. 167, 170 (D. Mass. 2014), citing Goldberger v. Integrated Resources, Inc., 209 F.3d 43, 50 (2nd Cir. 2000).

Discussion

As noted, WSL requests attorneys' fees based on the percentage-of-fund method, totaling $3,094,168.75, including the credit for fees paid. There are a number of factors to take into consideration in determining the reasonableness of the fees requested by WSL. It is not merely a matter of a mathematical calculation, tempting as that is.

This is a complex case, both factually and legally. It is not a pure class action; it is a partial class action along with an action by the Receiver. Uncertainty about federal jurisdiction led to the filing of a companion complaint in the Superior Court, although virtually all the actual litigation has been conducted in this Court. The two settlements will not end the case; the litigation will continue against the non-settling defendants, and there will likely be more time spent by WSL in consummating the settlements. There is a Fee Agreement that has been approved by the Superior Court and that is a hybrid in the sense of providing for hourly compensation initially and contingency compensation thereafter based on the success of the litigation. There is a state court *cy pres* proceeding that has great significance with respect to the recovery of funds for the Plan and, in particular, Settlement B. And there is a significant legal issue, yet unresolved, involving ERISA and the so-called "church plan" exemption.

I will review the Goldberger factors, consider the benchmark for fees in common fund cases, review the other factors unique to this case, perform a "lodestar check" on the reasonableness of the fees to be awarded, In re Thirteen Appeals, 56 F.3d at 307, and consider the objections to the award of fees.

The Goldberger factors. (1) *Size of fund/persons benefitted.* Assuming both settlements are approved and carried out, the Receiver will receive in $15,650,000 to add to the Fund (less attorneys' fees). While this will not make the Fund whole, it is a significant addition to the Fund. More than 2700 participants in the Plan, who were facing a 40% cut in benefits from the substantially underfunded Plan, will benefit. (2) *Skill/efficiency of attorneys.* Plaintiffs' counsel, led by Max Wistow, a senior and highly experienced member of the bar, are skilled at complex litigation such as this, as was attested to by the Receiver. Declaration of Stephen Del Sesto, ¶2, ECF No. 144. Without reviewing the hours, I cannot comment on the efficiency of the time spent, although I have no reason to believe that WSL was inefficient. Sifting through more than a million documents, determining appropriate claims, and achieving these two settlements requires legal skill. (3) *Complexity/duration of litigation.* As noted, this is a complex commercial case that required devoting significant resources of several attorneys, sorting out the numerous parties and their respective roles in this matter, and reviewing reams of documents generated by the several transactions in issue. Because of the significant investigation undertaken by WSL at the outset, which was effectively pre-trial discovery, the duration of this litigation was relatively short between the filing of the complaint and the negotiation of the settlements in issue. (4) *Risks of litigation.* At the outset, there was a significant risk undertaking this case, given the number of parties and the complexity of the facts and the uncertainty of recovery. This risk was partially mitigated by the Fee Agreement that provided for hourly compensation for the investigation of the matter for the Receiver, for which credit is given, but the risks of the litigation thereafter were significant and continue since the plaintiffs still face hurdles to further recovery. (5) *Amount of time.* The total hours spent to date are

approximately 4494 hours, a significant amount of time. In addition, there may be significant other litigation related to the settlements and relating to claims against the non-settling defendants that will require additional time by WSL.[14] Wistow Supplemental Declaration ¶12, ECF No. 79. (6) *Similar awards.* See benchmarks *infra*. (7) *Public policy.* As a matter of public policy, retirement plans should be properly funded for the benefit of the employees who participate in the plans. To recover from responsible parties monies for the underfunded Plan is consistent with public policy. Therefore, in reviewing the contributions of WSL against the Goldberger factors, WSL scores well.

The Fee Agreement. The Fee Agreement is a significant factor in support of WSL's request. The Fee Agreement between WSL and the Receiver was negotiated by the Receiver and approved by the Superior Court. Wistow Declaration, Ex. 5, ECF No. 65-5. Judge Stern of the Superior Court is, to my knowledge, a highly capable judge, sophisticated in complex litigation, and his approvals of both the Fee Agreement and the fees awarded in Settlement B are noteworthy. While his approvals are not necessarily binding on this Court, they are entitled to considerable deference. The plaintiffs and the settling defendants have agreed to the award of fees. No objection has been filed by any clearly interested party, including the Plan participants, only by the non-settling defendants. At least with respect to Settlement B, the Superior Court has found that the 23.3% contingent fee is fair and reasonable. Wistow Supp. Declaration, Ex. 6, p. 16, Ex.7, ECF No. 79-7. I see no reason why Superior Court would see things differently if it were to approves fees for Settlement A, since the fees would be based on the same Fee Agreement previously approved by the Court.

[14] I am advised that WSL has spent an additional 72.5 hours in this litigation since September 26, 2019. Letter of Stephen P. Sheehan to the Special Master, October 10, 2019.

The Receiver has a fiduciary responsibility to the Plan as well as obligations to the Court as an officer thereof. Therefore, it makes a difference that the Receiver negotiated the Fee Agreement, approved the award of fees for both Settlement A and B, and obtained the blessing of the Superior Court for both the Fee Agreement as well as for the award of fees pursuant to that Agreement. Declaration of Stephen Del Sesto ¶¶3-10; 17, ECF No. 144.

Benchmark. There is First Circuit authority for the proposition that the benchmark percentage for POF cases is 25% of the common fund. "Within the First Circuit, courts generally award fees 'in the range of 20-30%, with 25% as "the benchmark." ' " Bezdek v. Vibram USA Inc., 79 F. Supp. 3d 324, 349-350 (D. Mass. 2015) (quoting Latorraca v. Centennial Techs., Inc., 834 F. Supp. 2d 25, 27-28 (D. Mass. 2011), *aff'd,* 809 F. 3d 78, 85 (1st Cir. 2015).

Here, using a 25% benchmark implies a total fee of $3,912,500 ($15,650,000 x 25%). Subtracting the credit of $552,281.25, the result is $3,360,218.75. This is about $266,00 more than the fees sought.

The fees requested here, 23.3% of the common fund, or $3,646,450, falls below the benchmark. Giving credit to the fees already paid, the percentage drops to 19.78%. Unlike most other cases where fees are awarded, this case is not over and may well result in significant additional hours for which WSL may not be paid, including processing the settlements and pursuing other non-settling defendants. Plaintiffs' Counsel's Memorandum (Settlement A), p. 27, ECF No. 64-1. While the recovery of additional funds for the Plan against non-settling defendants would be subject to the contingency of 23.3%, the recovery of additional sums is by no means certain.

Lodestar. Because of the unique Fee Agreement, there are several ways to calculate the lodestar. The simplest way is this: As noted, WSL has stated that its usual blended hourly fee in non-contingent matters is $600/hour.[15] Using that rate times the total hours spent to date, 4494, the lodestar is $2,696,400.[16] Thus the fees requested are about $400,000 more than the lodestar ($3,094,168.75 – $2,696,400 = $397,768.75). Applying the credit of $552,281.25 results in a modified lodestar amount of $2,144,118. If one divides the total fees sought, $3,646,450 by the total hours to date, the result is $811/hour. This effectively amounts to a premium over WSL's usual rate of $600/hour, a premium that I find fair and reasonable in the circumstances of this case, a premium that is likely to diminish. If the investigative hours (1472) and the payment based on hours ($552,281.25) are backed out, then the result is $3,094,168.75/3022 or $1,023.88/hour. While this is a very high rate, I am not convinced that this is the way to view the lodestar here because of the Fee Agreement.

The Diocesan defendants have calculated a "creative" lodestar as follows: They would compensate WSL for the difference between the WSL's $600/hour rate and the discounted $375 rate for the 1472 hours expended during the investigative stage, or 1472 x $600/hour = $883,200 less the $552,281.25 paid or $330,918.75. Diocesan Defendants' Opposition (Settlement A), p. 11, ECF No. 146; see also Diocesan Defendants' Response (Settlement B), p. 29, EFC No. 73, using another approach that does not reflect the time spent on this case. These defendants would discount all other post-litigation time because it is not broken down as to time spent litigating with the defendants or reaching the settlements. Underpinning this approach is the contention that the settlements were collusive and that the litigation was unnecessary. Diocesan

[15] There is no affidavit from other Rhode Island counsel about the reasonableness of this rate, but no objection has been lodged, and I will take notice that this rate is in the range for experienced attorneys in Rhode Island.
[16] Using the so-called cross-check multiplier, the factor is 1.35; stated another way, the total fee requested, before the credit, is about 35% higher than the lodestar.

Defendants' Opposition (Settlement A), pp. 7-9, ECF No. 146. Given this Court's approval of the settlements, I find no merit to this approach, which I also think does not properly reflect the work performed by WSL or the result achieved.

The Fee Application is Unreasonable. The Diocesan Defendants contend that WSL did not pursue efforts to settle this case prior to commencement of litigation and that the settling defendants essentially laid down and died once the Complaint was filed. Diocesan Defendants' Opposition (Settlement A), pp. 4-7, ECF No. 146. This argument, which effectively amounts to a charge of collusion, was advanced in opposition to the settlements generally and has been rejected by this Court. Memorandum and Order, pp. 12-14, ECF No. 164. It is true that the settlements were achieved within months of the filing of the Complaint. However, this overlooks the fact that for the eight months prior to the filing of the Complaint, the Receiver issued numerous subpoenas duces tecum generating in excess of 1 million documents that were produced and used to commence an action based on fraud, breach of fiduciary duty and violation of ERISA, among other claims. In effect, this investigation was the discovery phase of this case, at least insofar as it pertained to the settling defendants. Further, the Settlement Agreements themselves recite that they were "the result of lengthy and intensive arms-length negotiations." Settlement Agreement B, p. 26, ¶10, ECF No. 73-1.

This Suit was Unnecessary. The non-settling defendants contend that the assets of the settling defendants would have poured into the Plan anyway and, therefore, this suit was unnecessary. Diocesan Defendants' Opposition to Final Approval, p. 3, ECF No. 146; Diocesan Defendants' Response, p. 26, ECF No. 73. This is pure speculation, especially given the facts that, among other things, (a) the Plan was dramatically underfunded in the first place due to a lack of contributions from St. Joseph Health Services, and St. Joseph Health Services actually

filed the receivership petition with the intention of reducing the benefits to the participants that could be supported by the existing assets; (b) allegations of wrongdoing by the settling defendants with respect to cutting loose the Plan as set forth in the First Amended Complaint; and (c) funds that should have been paid into the Plan were transferred to CCF, which was the reason the Receiver sought to intervene in the *cy pres* proceeding to have those assets redirected to the Plan. Plaintiffs' Counsel's Final Approval Memorandum (Settlement A), pp. 9-15, ECF No. 150. The Receiver has stated that ". . . I believed, and I continue to believe today, that there would have been no meaningful settlement discussions until after a suit had been brought." Declaration of Stephen Del Sesto ¶16, ECF No. 144. Furthermore, Richard J. Land, counsel to CCB and the so-called Heritage Hospitals, filed an affidavit that stated that "[t]he Settlement Agreement [B] resulted from contested and often-times heated negotiations between the Heritage Hospitals and the Receiver and his Special Counsel" and that absent the settlement 'the Heritage Hospitals will be compelled to litigate all claims, including denying liability…" Affidavit of Richard J. Land, Ex. 2 to Plaintiffs' and Defendants' Post-Hearing Memorandum, ¶¶2, 7, ECF 109-2.

The Nature of the Plan. Some consideration should be given to the fact that the Plan is non-profit retirement plan for the benefit of some 2700 hospital and other workers that was badly underfunded and, therefore, the fees should be reduced in some fashion. This notion is balanced by the fact that absent the efforts of the Receiver and WSL, and the risks undertaken, the Plan would likely have remained underfunded and the participants would have received a substantial cut in their benefits. Of note is the fact that the several representatives of the participants do not object to the settlements or the attorneys' fees requested.

Recommendation

Based on the applicable legal standard and on all the factors discussed, I recommend that WSL be awarded fees consistent with the Fee Agreement negotiated with the Receiver in 2017, that is, 23.3% of the common fund less the credit for work in the investigative stage, or $3,094,168.75, plus 23.3% of any additional funds recovered. In my judgment, all the factors – the Goldberger criteria, the pre-existing Fee Agreement, the approval of the Receiver and the settling defendants, the absence of objections from anyone other than the non-settling defendants, the time spent and to be spent by WSL, the risk undertaken in a highly complex case, and the fact that the award would be significantly below the First Circuit benchmark of 25% of the common fund – all justify this recommendation.

No costs should be awarded because they have been waived by WSL.

/s/ Deming E. Sherman

Special Master

October 14, 2019

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